upon the ground the day before, and it may have been seeing it there that made the creditor think it would be worth his while to apply for a warrant of poinding. But he has no right of attachment before he has poinded it. Then in virtue of that antecedent right he applies for a warrant for poinding. I should have thought that the date of the application was the date of the attachment, and that the right of the poinding creditor to the moveables did not draw back to the date of the bond. But we do not need to consider that here. Take any date you like for the poinding—and it was on a question of date that the Lord President was speaking—it is a poinding of goods in the house subject to the preferable right of the tax collector for rates. I have thought it right to say this as, however clear the case may appear to us, when a learned Sheriff has given his judgment in another view, I think it only right that we should state where we differ from him.

LORD RUTHERFURD CLARK—I concur.

LORD CRAIGHILL was absent from illness.

The Court pronounced the following interlocutor:—

"Recal the judgment of the Sheriff appealed against: Affirm the judgment of the Sheriff-Substitute: Of new recal the interdict granted *ad interim* and dismiss the petition: Find the defender entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Appellant—Guthrie Smith—C. S. Dickson. Agents—Smith & Mason, S.S.C.

Counsel for the Respondents — Moncreiff — Guthrie. Agents—Welsh & Forbes, S.S.C.

---

*Thursday, July* 12.

## FIRST DIVISION.

### SMILES (SURVEYOR OF TAXES) *v.* THE AUSTRALASIAN MORTGAGE AND AGENCY COMPANY, LIMITED.

*Revenue—Property and Income-Tax Act,* 1842 (*5 and 6 Vict. cap.* 35), *sec.* 100, *Schedule D, First and Fourth Cases—Trade Profits.*

A Scottish company, carrying on principally a wool broking business in connection with Australia, were in the habit of making advances or loans on securities upon the properties of their customers, which were in part secured by second mortgages over real property in the colony, and in part by liens or charges upon stock, wool, and other produce. These advances were, with trifling exceptions, not of fixed amount, but were of the nature of banker's advances, fluctuating from time to time according as produce was realised or other payments were made.

*Held* that this was the case of a company making profits by the use of its capital in mercantile transactions, and not the case of a company having a fund laid aside for the purpose of investment in foreign securities, and that its profits, including the interest received from its investments in colonial securities, were therefore liable to assessment for income-tax under the *First* case of Schedule D of the Income-Tax Act, 1842.

The Australasian Mortgage and Agency Company, Limited, incorporated under the Companies Acts, was formed in 1880, and had its head office in Edinburgh. There was also a board of directors in Melbourne.

The objects for which the company was formed, as set forth in their memorandum of association, were, *inter alia*, as follows:—"2. To carry on the business of wool brokers and stock and station agents, and to sell wool, sheepskins, tallow, horns, hides, bark, grain, and other produce on commission, or make shipments of the same respectively for sale on commission. . . . 6. To lend money, or to give the guarantee or acceptances or promissory-notes of the company upon the security of any description of property, real or personal, including stock and stations, and liens on wool, or on bonds or other obligations, or any other kind of personal security." The company carried on business as specified in the said objects.

The company was assessed by the Surveyor of Taxes for the sum of £669, 6s. 8d.—an "additional first assessment" for the year 1885-86—being duty on the sum of £20,080 arrived at in the manner stated below, under the rule contained in the *Fourth* case, Schedule D, of 5 and 6 Vict. c. 35.

The *Fourth* case, Schedule D, sec. 100, of 5 and 6 Vict. cap. 35, is—"The duty to be charged in respect of interest arising from securities in the British plantations in America, or in any other of Her Majesty's dominions out of the United Kingdom, and foreign securities, except such annuities, dividends, and shares as are directed to be charged under Schedule C of this Act. *Rule.*—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in the United Kingdom in the current year, without any deduction or abatement."

The *First* case, Schedule D, is—"Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act. *Rule First.*—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the fifth day of April preceding the year of assessment, and shall be assessed, charged, and paid without other deduction than is hereinafter allowed."

The company appealed, and the Commissioners sustained the appeal, being of opinion that the profits of the business carried on by the company were chargeable with income-tax under the rule applicable to the *First* case of Schedule D.

At the request of the Surveyor of Taxes a case was stated by the Commissioners, which set forth the following facts:—"7. The company has carried on its business since its

formation in 1880, and since then it has in each year, including the year 1885–86, returned its profits and gains, and has been assessed and has paid duty thereon in terms of the *First* case of Schedule D of the Act 5 and 6 Vict. cap. 35, sec. 100.

"8. The said additional assessment of £669, 6s. 8d., which was not demanded from the company until August 4, 1886, was stated by the Surveyor to be the tax calculated upon the sum of £20,080, being the difference between the sum on which the company was assessed for the year 1885-86, in terms of the *First* case, and the amount of interest on the company's colonial securities for the year of assessment under the *Fourth* case of Schedule D, and of the company's profits and gains from transactions in the nature of trade chargeable under the *First* case of Schedule D. The amount of the latter is not separately distinguished in the accounts of the company, and is estimated from the company's accounts for the year ending 30th September 1885, subject to increase or abatement as respects this description of profit on the three years preceding the year of assessment, on production of the figures.

"9. The advances or loans made by the company are on securities (almost without exception postponed to fixed loans by third parties) upon the properties of their customers, and are in part secured by their second mortgages over real property in the colony, and in part by liens or charges upon stock, wool, and other produce. Another part of the company's funds is lent on the security of shipments of wool and other produce, some of which may be in warehouse in Australia, some in course of transit to this country, and some in warehouse in London. The advances, with one or two trifling exceptions, are not of fixed amount, but are of the nature of banker's advances or loans, the amounts of which fluctuate from time to time, according as produce is realised or other payments are made. The "advances secured upon mortgages, stock, and liens over wool and other produce" are stated in the balance-sheet of the company for the year ending 30th September 1885 to amount to the sum of £874,181, 12s., and the "advances on shipments of wool and other produce and sundry open accounts outstanding," to amount to the sum of £483,209, 5s.—total, £1,357,390, 17s."

Before the Commissioners it was maintained on behalf of the company that "the amount of profit appearing in the balance-sheet for the year ending 30th September 1885 includes interest on real and personal securities in the colony of the description mentioned under head 9, on advances on wool and other produce in course of transit to this country, profits on guarantees granted by the company, commission on sales, warehouse rents, interest on moneys in bank in this country, interests on consols, and trade profits generally. Many of these items are incapable of exact segregation, the company's lending business being almost wholly regarded as a feeder to their commission business, making it impossible to say how much of the profit is derived from interest on advances, and how much from commission upon the produce dealt with, and that the nature of the securities fluctuates from day to day and from hour to hour. The company was different in its constitution from either the Scottish Mortgage and Land Investment Company of New Mexico, Limited, or the Northern Investment Company of New Zealand, Limited, inasmuch as it is not merely an investment company, but a material part of its business is the warehousing and the purchase and sale on commission of wool and other produce and property, both in this country and in Australia, which is entirely in the nature of trade."

"The Surveyor, on the other hand, maintained on behalf of the Crown that the interest accruing to the company on their mortgage loans and advances in the colony was profit of the nature described or comprised in the third paragraph, Schedule D, section 2, of the Act 16 and 17 Vict. cap. 34; viz., "for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act," and that the company was liable to be assessed on the total amount of the interest which had been or would be received in the United Kingdom in the year of assessment, according to the rule contained in the *Fourth* case of Schedule D, section 100, of 5 and 6 Vict. cap. 35.

"In support of his contention the Surveyor referred to the cases of the *Scottish Mortgage and Land Investment Company of New Mexico, Limited*, November 19, 1886, 14 R. 98, and the *Northern Investment Company of New Zealand, Limited*, May 31, 1887, 14 R. 734."

The questions of law for the opinion of the Court were:—"(1) Whether the company ought to be assessed to income-tax only in respect of its whole profits and gains, including the interest received from its investments in foreign and colonial securities, according to the rule contained in the *First* case of Schedule D, section 100, 5 and 6 Vict. cap. 35, or whether the company is chargeable for its income arising from interest on its foreign and colonial securities under the rule contained in the *Fourth* case of Schedule D, and for its profits and gains from transactions in the nature of trade under the *First* case of Schedule D of the said Act? . . . (3) Whether, in the event of its being held that the assessment is legally chargeable under either the *First* or *Fourth* case, or both cases, and considering that the general Commissioners have made the assessment under the *First* case, any question of law arises for the determination of the Court on the case now stated? (4) In the event of both rules of assessment being applied, whether advances on the security of stock on stations, wool, and other moveable or personal property, are to be treated as falling under the *Fourth* case of Schedule D, and that whether such wool or other personal property be *de facto* in the colony, in course of transit, or in London?"

Argued for the Surveyor of Taxes—This was a Scottish company with a board of directors in Melbourne. The parties borrowing from the company were resident in the colony, and the securities were colonial securities. There was nothing contrary to the Act in what was now proposed to be done, viz., to distinguish the company's trade profits from the money received as interest, and to assess them separately, and there was no practical difficulty in doing this. The company did not carry on a wool broking business with an ancillary money lending business. Money lending was their principal busi-

ness; it was the chief source of the company's profits — *Scottish Mortgage Company of New Mexico* v. *Commissioners of Inland Revenue*, November 19, 1886, 14 R. 98; *Surveyor of Taxes* v. *Northern Investment Company of New Zealand*, May 31, 1887, 14 R. 734.

Argued for the company—The business of the company should be dealt with as a whole. It was a mercantile trading company, whose chief business was wool broking, and its earnings fell to be dealt with as trade profits. It was practically impossible to draw a distinction between interest derived from the company's colonial securities and its trade profits. The cases cited by the other side were distinguishable, as there the sole business of the companies was the investment of their funds in foreign securities.

At advising—

LORD PRESIDENT—The company called the Australasian Mortgage and Agency Company carries on a very extensive business in connection with the Australian colonies, and that business is of a somewhat miscellaneous character. They are wool-brokers to begin with, and they both buy and sell wool, and of course, like all other produce brokers, they advance money on the security of the goods in which they deal, and they receive a commission for their agency. It appears to me that the sort of trade in which they are engaged is partly the trade of a broker and partly the trade of a banker. They do not call themselves bankers, but the description which is given in the case before us makes it pretty plain, I think, that they are at least as much bankers as brokers in so far as the nature of their business is concerned.

Now, the proposal on the part of the Surveyor of Income-Tax is to charge the profits of a part of their business under the *Fourth* case of Schedule D—that is to say, he proposes to deal with that part of the profits of the business as being interest arising from securities in the colony, so far as that interest is received in this country. And the Surveyor seeks to justify that proposal by a reference to the two cases which we formerly decided upon that *Fourth* case of Schedule D. But it appears to me that the present case is very clearly distinguishable from the former cases, and distinguishable in all its essential particulars. No doubt in the two former cases the companies were trading companies, but in the first of the cases the trade consisted of one thing only, and in the later case it was really assumed that there also the trade was of one description only, although it appears that there were some trifling additional profits arising in some other way. But the trade in both cases consisted of this—the company employed their capital, so far as paid up, and money borrowed in this country, to make investments in colonial securities. In the case of the borrowed money they were enabled to borrow it in this country at a lower rate of interest considerably than they got for it on their colonial investments; and therefore their profits consisted in the first place in getting a larger return per cent upon their paid-up capital, and a very considerable difference between the interest which they paid upon their debentures here and that which they received upon the colonial investments. We held that although this was a trading company, and might have been assessed under the *First* case of Schedule D upon profits of trade, it was equally within the meaning of the *Fourth* case, because their profits consisted distinctly of interest upon colonial securities received in this country.

Now, in the present case, the business carried on by the company is of a very different description, and in my opinion it is quite unnecessary to go further than the 9th article of this case to show what is in the admitted state of the facts the real business carried on. "The advance or loans made by the company" (that article states) "are on securities (almost without exception postponed to fixed loans by third parties) upon the properties of their customers, and are in part secured by their second mortgages over real property in the colony, and in part by liens or charges upon stock, wool, and other produce. Another part of the company's funds is lent on the security of shipments of wool and other produce, some of which may be in warehouse in Australia, some in course of transit to this country, and some in warehouse in London." Now, as regards the second part or branch of the business, it is not said that it can be charged under the *Fourth* case, and it is proposed to charge that under the *First* case. But we are chiefly concerned with what is stated in the first sentence of this article, that the advances or loans are made partly upon real property, and are partly secured "by liens or charges upon stock, wool, and other produce." But the statement does not stop there. "The advances"—this embraces the whole advances—"the advances, with one or two trifling exceptions, are not of fixed amount, but are of the nature of banker's advances or loans, the amounts of which fluctuate from time to time according as produce is realised or other payments are made."

Now, it will be observed that that statement is not confined to the advances upon shipments only, but applies to the whole advances, whether made upon real securities or by liens or charges upon stock, wool, and other produce. In short, it appears to me that the account betweeen the company and its customers is just of the nature of a current account as between banker and customer. The advances are made according to the amount of security held for the time. That may also be described as the nature of a commission agent's account, but it is the one or the other; and it seems to me to be not at all of the nature of investments of money. On the contrary, the advances are of the most irregular and fluctuating description—just such advances as a commission agent makes upon the security of the goods in his hands in this country, or that a banker makes according to the state of the securities which he holds for the time.

Now, the question is whether that is a case within the meaning of the *Fourth* case in the Act, and I think it is not. I think this is proper trading and nothing else, and not investment of money upon securities. The result of holding it to be otherwise would be, I think, most unjust, and to such a company as this utterly disastrous. Supposing that they had a very large amount of advances upon such fluctuating securities as those, and that they are held to have received interest upon these in this country within

the meaning of the *Fourth* case, and that upon the other branch of their business they have sustained very heavy losses—losses which they require all the returns from these advances to compensate and wipe off, the result would be that instead of setting one part of the business against the other—the profit upon these advances against the losses upon other transactions, —they would be compelled to pay income-tax upon that part which consists of advances upon securities of wool, and discount of bills, and everything of that kind, instead of being allowed to take the profit on the one part of their business and set it against the loss upon the other part.

It is not, to be sure, of much consequence how cruel may be the effect of a Revenue statute; that is a sort of thing that we are not entitled to take into account if the statute is perfectly clear. But it certainly helps one very much to the conclusion at which I have arrived to see what an unjust and anomalous result might flow from sustaining this proposal upon the part of the Surveyor of Income-Tax. I think the whole of this tax must be levied according to the *First* case of Schedule D, and that it is impossible to distinguish one part of the business from another, and to hold that one part falls under the *Fourth* case and the other part under the *First*.

The other queries of course we do not require to answer at all.

Lord Mure—I agree with your Lordship that this case is quite distinct from that of the *New Mexico Company*, which we had to deal with some time ago. It is plain from the articles that are quoted in the statement of the case that the objects of this company embraced every kind of trade almost that a company can carry on. The 5th article of the case mentions the different kinds of business which the company was established to carry on as a trading company, and they embrace almost every description of business; and it is stated at the end of the article that "the company carries on all the branches specified in the said objects." Now, that being its position, and reading statement 9 as to what actually takes place in regard to the particular matter here in question, and especially that passage of it which your Lordship has referred to, that the advances, with one or two trifling exceptions, are not of fixed amount, but are of the nature of banker's advances or loans, and the rest of that article, I can come to no other conclusion than that this is essentially a case that ought to be dealt with under the *First* case of Schedule D, and not under the *Fourth* case.

Lord Shand—I am of the same opinion, namely, that, as I understand it, the judgment of the Commissioners, which is practically here appealed against, should be affirmed. It appears to me after a full argument on the effect of the previous cases, and on the provisions of the statute, that the *Fourth* case in the statute is meant to cover the case in which money is invested upon securities in the British plantations in America, or in any other of Her Majesty's dominions out of the United Kingdom. I say invested, meaning by that something quite distinct from the use of money in the ordinary trading transactions of a company. It appears to me that if we are dealing with a company making profits by the use of its capital in mercantile transactions that should fall under the *First* case, but if a company which has a large rest or fund laid aside for the purpose of investment makes investments in foreign stock or other foreign securities, including securities over moveable property in the colonies, that is a case in which the charge is to be made under the *Fourth* case. And in so holding I do not think that we run counter in the least degree to anything that occurred either in the case of the *Scottish Mortgage Company of New Mexico*, or in the case of the *Northern Investment Company of New Zealand*. In both of these cases the Court went upon the view that as matter of fact the companies carried on as their sole business the business of investing their funds in foreign securities. They obtained their capital partly by subscription and partly by persons lending them large sums of money to increase the working capital. Having thus got the capital, the avowed business of these companies was to invest the money abroad for a return larger than can be got in this country, upon securities which were not of a fluctuating character, such as occur in a banker's business, but which were permanent, and intended to produce interest periodically and regularly, securities which were to have a currency usually of a number of years. That was just the case of a company doing as matter of business what an individual investor might do with his own funds; and the view which the Court there sustained was that it made no difference whether it was an indivdual who was investing his money abroad or a company who were investing their capital abroad. The course followed was the same, viz., the investment of funds, and in such a case the *Fourth* case of the statute applied.

But in the present case I think we are in a totally different category. This company are really themselves wool brokers. They purchased a wool broking business and took it up. They undertook a large agency business in connection with the purchase and sale of wool. In connection with their commission business they find it necessary to make large advances, taking for these advances certain securities. Part of such securities appear to be mortgages, but the larger part consists of moveable property, such as wool, hides, and other articles of that kind. The interest which they receive is, as your Lordship has observed, practically the same as is drawn by a banker upon a current account. They advance so much money, and as the proceeds of goods received in security come in they credit the sums received. They charge interest for the use of the money until it is repaid, just as an ordinary commission-agent or a banker who has made advances does. It is quite unlike a case of investment. The interest fluctuates; it is for no fixed period, the transaction may be closed at any time; in short, it is the case of a wool broker combining with his business that of a banker. Now, I should say it is very clear that if this had been the case of a banking company carrying on the business of a bank here, with a branch in one of the colonies, and thus receiving abroad interests and discounts as profits of their business in the ordinary way in which banking business is trans-

acted, that would not be a case which would fall under the *Fourth* case, which appears to me to be the case applying to investments. If such a banking company or insurance company made investments of their realised funds in stocks in the colonies which were paying them interest periodically, that would, so far as these investments were concerned, be a very different matter. But just as it appears to me that you could not under the *Fourth* case include a banking company carrying on the ordinary business of bankers, so as little do I think you could include under the *Fourth* case this wool broking company, which makes advances as part of its wool broking business and ancillary to it, and gets interest on current accounts as part of its profits in the same way as commission received. It appears to me plainly to fall under the *First* case, and that under that case alone can this charge be made.

Lord Adam—In my opinion the money here, which is said to yield interest so as to bring it under case *Four* of Schedule D, is simply neither more nor less than money used by the company in the ordinary carrying on of its business and trade. That being so, I think the return from such money is neither more nor less than trade profit, and being so, that it falls under the *First* case in Schedule D and not under the *Fourth* case. I am therefore of opinion that the decision of the Commissioners ought to be affirmed.

The Court answered the first alternative of query 1 in the affirmative, and the second alternative in the negative, and found it unnecessary to answer the other questions.

Counsel for the Surveyor of Taxes—Darling—Young. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for the Company—D.-F. Mackintosh—Lorimer. Agents—Menzies, Coventry, & Black, W.S.

---

*Thursday, July* 12.

## SECOND DIVISION.

[Lord M'Laren, Ordinary.

## HENRY THOMSON & COMPANY *v.* ROBERTSON.

*Trade Name—Sale—Interdict.*

In an action of declarator and interdict at the instance of a firm of whisky blenders against a spirit merchant, in which the pursuers alleged that the defender had sold whisky as blended or manufactured by them, which in point of fact had not been so blended or manufactured, evidence was led to show that on several occasions persons who had asked for the pursuers' whisky had been supplied with a different blend. *Held*, on the evidence, that it was not proved that the defender had fraudulently or wrongfully represented that he was a seller of the pursuers' whisky, and was therefore entitled to be assoilzied.

This was an action at the instance of Henry Thomson & Company, wholesale Old Irish Whisky merchants, Newry, Ireland, and the individual partners of the firm, against James Robertson, spirit merchant, 157 Seagate, Dundee. The conclusions of the summons were for declarator that the defender was not entitled to sell, by himself or others acting for him, as whisky manufactured or blended by the pursuers whisky not really so manufactured or blended, and for interdict.

The pursuers averred that they had carried on the business of blenders of whisky at Newry for more than twenty-five years, and that their whisky had acquired a great reputation in Great Britain. They further averred —"The pursuers have recently become aware that the defender James Robertson has been in the habit of wilfully and fraudulently in his said shop selling as the pursuers' whisky, in reply to orders or requests for that whisky, whisky or other liquor not manufactured or blended by them, and known by the defender not to be manufactured or blended by or for the pursuers, on the false pretence, made by the defender or by his shopmen and servants, that such whisky or other liquor was whisky manufactured or blended by the pursuers. . . . In particular, the defender has habitually offered for sale and sold whisky under the said false pretence during 1886 and 1887, and particularly during the months of July, August, September, and October 1887. Among other such sales so made by the defender and his shopmen at his said shop were the following—On several occasions in or about the months of July and August 1887, to Annie M'Connon Fee and Janet Jaffrey Ross, both residing at 22 Queen Street, Dundee;" and upon thirteen occasions between the 31st August and the 15th October 1887 to a man M'Gregor, who went into the shop with different companions, on the part of the pursuers.

The defender denied these averments and explained "that the defender has never to his knowledge had in his premises or sold any of the pursuers' whisky, and that he has never made any representation to this effect. He exhibits in his premises placards containing the names of several manufacturers of whisky and other liquors, but has never used or exhibited any placard or label of Thomson's whisky. He has specially instructed his assistants that if any special manufacture of whisky other than those sold in his premises is asked for, at once to intimate that they do not sell whisky of the manufacture asked. This practice has been adhered to regularly, both by the defender and his said assistants. . . . The defender is willing and ready to put up an intimation or placard in his premises publicly announcing that Henry Thomson & Company's Old Irish Whisky is not sold in his premises."

The pursuers pleaded—"(1) The defender having wilfully and fraudulently offered for sale and sold as whisky manufactured or blended by the pursuers whisky which was not so manufactured or blended, the pursuers are entitled to decree of declarator and to interdict as craved."

The defender pleaded—"(2) The defender not having sold whisky on the representations averred by the pursuers, and not having done or proposed to do anything in infringement of the pursuers' legal rights, the action is unnecessary, and should be dismissed."