No. 838.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—4TH AND 5TH JULY, 1928.

COURT OF APPEAL.—2ND, 5TH AND 7TH NOVEMBER, 1928, AND 14TH AND 15TH OCTOBER, 1930.

HOUSE OF LORDS.—27TH AND 30TH NOVEMBER, 1931, AND 23RD FEBRUARY, 1932.

(1) COLLYER (H.M. INSPECTOR OF TAXES) *v.* HOARE AND CO., LTD.(1)

(2) MILLER (H.M. INSPECTOR OF TAXES) *v.* ELLERY AND CO., LTD.

Income Tax, Schedule D—Brewer—Beer, wine and spirit merchant—Deduction—"Deficiency of rent"—Method of computation.

The Respondents in the first case were brewers and the Respondents in the second case were beer, wine and spirit merchants. Both Companies were owners and lessees of a number of licensed houses which they let to tenants who were "tied" to purchase their liquors from the Companies. Leases were granted for periods of from 3½ to 21 years and in a number of cases the tenants paid a premium in addition to the annual rent.

The rent paid by the Company or the amount of the Schedule A assessment (where the Company was the freeholder) was in nearly every case greater than the rent paid by the tied tenant, but less than the rent paid by the tenant plus the sum arrived at by spreading over the term of the lease the premium paid by him.

The Crown contended that in determining whether the Companies had sustained a deficiency of rent in connection with their tied houses (which would admittedly be admissible as a deduction under the decision in Usher's Wiltshire Brewery, Ltd. *v.* Bruce(2)*) both rents and premiums received must be taken into account; and that the figures for all the tied houses must be aggregated for that purpose.*

Held, *that in determining the amounts to be allowed as deductions in respect of deficiencies of rent each tied house must be considered separately; and that in computing the appropriate deduction for a particular tied house account must be taken of any premium paid as well as of rent.*

(1) Reported (C.A.) [1931] 1 K.B. 123 and (H.L.) [1932] A.C. 407.
(2) 6 T.C. 399.

CASES.

(1) COLLYER (H.M. INSPECTOR OF TAXES) v. HOARE & CO., LTD.

CASE

Stated under the Taxes Management Act, 1880, Section 59, and 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 a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on the 14th May, 1924, for the purpose of hearing appeals, Hoare and Company, Limited, (hereinafter called the Company) appealed against the following assessments to Income Tax made upon the Company under the provisions of Schedule D of the Income Tax Acts in respect of the profits of its trade.

For the year ended the 5th April,		1918, in the sum of	£70,000
,,	,,	1919, ,,	£114,583
		(less £7,404, wear and tear).	
,,	,,	1920, in the sum of	£145,805
		(less £6,406, wear and tear).	
,,	,,	1921, in the sum of	£215,000
,,	,,	1922, ,,	£205,000
,,	,,	1923, ,,	£220,000
,,	,,	1924, ,,	£180,000

2. The Company carries on the business of brewers at the Red Lion Brewery, St. Katherine's Way, E. Following a common practice among brewers, the Company has, in order to increase its trade, purchased from time to time licensed houses, which it lets on yearly tenancies or for periods ranging from seven to twenty-one years, to tenants who are tied to the Company for all the beer, wine and spirits sold in the premises let. In very rare instances only are licensed houses let by the Company without such a tie. The Company has a few free tenants. At the date of the appeal, the Company had about 600 leasehold or freehold licensed houses let to tied tenants.

3. The tenants who are not tied to the Company are allowed a higher rate of discount for the goods purchased from the Company than is allowed to the tenants who are tied. On the other hand, a tenant who is not tied is charged a higher rent for the premises

than a tied tenant would be, the difference in the rent being calculated by taking a percentage (five per cent. in town and three per cent. in the country) of the cost price to the tenant of the normal quantity of beer sold annually in the house.

4. In a number of cases, which, however, form only a small proportion of the total number of licensed houses, the tenant was charged a substantial premium for the lease in addition to the annual rent. A statement marked " A " is annexed, giving particulars of all the leases—eleven in number—granted during the three years ended the 5th April, 1922, for which a premium was charged in addition to the rent and a statement marked " B " showing the value of the barrelage. Statement " A " also shows the rent which the Company would have expected to obtain had the houses been let to a tenant who was not tied on the footing that he also paid the premium shown in column 5 of the statement.

5. Under the decision in the case of *Usher's Wiltshire Brewery, Limited* v. *Bruce*, [1915] A.C. 433(1), the Company is entitled to a deduction in computing the profits of its trade for assessment under Schedule D of the difference between the rents paid by the Company for its leasehold houses, or the Schedule A assessments of its freehold houses, and the rents received by it from the tied tenants, and also to a deduction for the amounts expended on repairs to its tied houses.

6. The Company in making up its own accounts brought into its profit and loss account, as items of receipt or expenditure, all rents received and paid by it and also the premiums (spread over the periods of the leases in annual proportions) charged on granting the leases.

Nothing was debited in the Company's accounts in respect of the annual value or rent forgone or sacrificed in respect of the Company's own freehold properties, whether occupied by the Company or let to tied tenants, and evidence of a chartered accountant called by the Inspector of Taxes was given to the effect that no such deduction could properly be made in computing commercial profits, and the Company did not dispute this evidence.

7. It was contended on behalf of the Company :

(1) That the premiums received on the grant of leases of the licensed houses were not receipts arising from its trade as brewers.

(2) That notwithstanding the receipt of the premiums the whole of the difference between the rents paid for the licensed houses (or the Schedule A assessments thereon) and the

(1) 6 T.C. 399.

rents received by the Company was admissible as a deduction in computing the profits of the Company for assessment under Schedule D.

(3) That, on either view, the premiums should be wholly excluded from the Company's profits for the purpose of such assessment.

8. It was contended on behalf of the Crown (*inter alia*):

(1) That all receipts of the business on revenue account and all expenses of the business on revenue account must be included in the account made out to compute the profits made by the trader in his business.

(2) That the premiums as received or a part of the premiums as shown in the Respondent's own accounts, or as arrived at on an actuarial basis, and also all rents as received are therefore includable in computing the profits for the purpose of Case 1 of Schedule D.

(3) Alternatively, if such premiums or parts of premiums and rents are not so includable they should be taken into account in ascertaining whether there has been a deficiency of rent or rent forgone or otherwise.

(4) That the debit entry as to the annual value of property dedicated to the business in the case of freehold houses is the amount of the assessment under Schedule A as reduced for the purposes of collection under Rule 7 of No. V of Schedule A.

9. We held that the premiums received by the Company on the grant of leases were not receipts arising from its trade as brewers, and that no regard should be had to those premiums in arriving at the amount of the deficiency of rents to be allowed as a deduction in computing the Company's profits under the decision in the case of *Usher's Wiltshire Brewery Company, Limited* v. *Bruce*.

We also held that the excess of rents received by the Company over rents paid by it (or in the case of freehold premises, over the Schedule A assessments) should not be brought into the computation of the Company's liability.

We accordingly held that the premiums and any excess of rents should be altogether excluded in the computation of the Company's liability to assessment under Schedule D in respect of the profits of its trade.

10. We adjourned the appeal for the correct amounts of the said assessments to be ascertained, having regard to the principles decided by us. These amounts were subsequently agreed and, on the

17th February, 1926, we gave our final determination of the appeal, amending the said assessments to the following amounts :—

	£
For the year ended 5th April, 1918	31,622
,, ,, 1919	47,347
,, ,, 1920	100,806
,, ,, 1921	142,911
,, ,, 1922	185,346
,, ,, 1923	178,608
,, ,, 1924	194,587

11. The Appellant, immediately upon 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 Taxes Management Act, 1880, Section 59, and the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

J. JACOB,
MARK STURGIS,
N. ANDERSON,
} Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.
17th February, 1928.

STATEMENT "A".

re PREMIUMS RECEIVED.

Name and address of house.	H. & Co's holding.	Date of lease.	Period of lease.	Premium.	Assessment.	Tied rent.	Trade.	Rent if free with same premium.
				£	£	£		£
Falcon, South Street, Ponders End, N.	Freehold	24/4/1919	7 years from 25/3/1919.	1,300	1919 : 140 1922 : 150	100	360 Barrels	175
Off Licence, 24, Orford Road, Walthamstow.	Freehold	1/8/1919	7 years from 25/7/1919.	150	1919 : 50 1920 : 65	25	83 Barrels £750 Bottled Beer	80
Crown & Sceptre, Britannia St., City Road.	Freehold	8/3/1920	14 years from 25/12/1919.	1,000	1919 : 150 1920 : 195	100	421 Barrels	200
Junction Tavern, Raynes Park	Freehold	5/1/1920	14 years from 25/12/1919.	1,000	210	100	362 Barrels	220
Kings Head, Hogarth Place, Earls Court.	Freehold	20/11/1919	14 years from 25/12/1919.	6,000	1919 : 275 1920 : 375	200	468 Barrels	375
Greyhound, Richmond ...	Leasehold rent £500	3/12/1920	21 years from 11/11/1920.	2,000	400	400	517 Barrels	550
White Hart, Brasted	Freehold	29/7/1920	14 years from 31/7/1920.	1,394	80	100	112 Barrels	130
Six Bells, Handcroft Road, Croydon.	Freehold	17/3/1921	8 days and 14 years from 17/3/1921.	600	40	35	201 Barrels	70
Plough & Harrow, Epsom ...	Freehold	4/8/1920	14 years from 24/6/1920.	1,400	70	50	351 Barrels	100
Dewdrop, Maple Road, Penge	Freehold	25/11/1921	7 years and 2 months from 25/10/1921.	500	1919 : 30 1921 : 60	35	238 Barrels	75
Railway Hotel, Beckenham ...	Leasehold rent £210.	3/4/1922	7 years from 25/3/1922.	6,500	375	200	676 Barrels	435

STATEMENT "B".

Hoare & Co., Ltd. Tied Houses let on leases for which premiums charged.

Statement showing barrelage and computation of the rent which would have been charged to a free tenant paying the same premium.

House.	Trade.	Percentage taken.	Addition to tied rent to arrive at free rent.	Tied rent.	Total estimated rent if free with same premium.
	£		£	£	£
Falcon ...	1,533 = 360 Barrels Bottled Beer small	5	75	100	175
Off Licence, 24, Orford Road, Walthamstow	353 = 83 Barrels 750 Bottled 1,103	5	55	25	80
Crown & Sceptre	1,840 = 421 Barrels 200 Bottled Beer 2,040	5	100	100	200
Junction ...	1,796 = 362 Barrels 600 Bottled Beer 2,396	5	120	100	220
Kings Head ...	1,990 = 468 Barrels	7½	175	200	375
	450 Bottled Beer	5			
Greyhound ...	2,199 = 517 Barrels 1,000 Bottled Beer 3,199	5	150	400	550
White Hart ...	600 = 112 Barrels 300 Bottled Beer 900	3	30	100	130
Six Bells ...	1,080 = 202 Barrels 200 Bottled Beer 1,280	3	35	35	70
Plough & Harrow	—	—	—	—	—
Dewdrop ...	1,263 = 238 Barrels 200 Bottled Beer 1,463	3	40	35	75
Railway Hotel	3,823 = 676 Barrels 900 Bottled Beer 4,723	5	235	200	435

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.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 18th day of March, 1925, for the purpose of hearing appeals, Ellery and Company, Limited, (hereinafter called the Respondent Company, or the Company), appealed against an assessment to Income Tax in the sum of £2,805 for the year ending 5th April, 1925, made upon them under the provisions of the Income Tax Acts.

1. The Respondent Company are beer, wine and spirit merchants and retailers and are the owners of certain licensed houses hereinafter described as " tied houses " which, in order to increase their trade, the Respondent Company lets to tenants upon terms which include (*inter alia*) (1) the payment to the Company of a premium paid by the tenant at the commencement of his tenancy; (2) the payment by the tenant of an annual rent; (3) an undertaking that the tenant will not supply to the public any goods of a like nature to those in which the Company deals other than those goods supplied to him by the Company. All the said tied houses owned by the Company are let on these terms, the Company executing all necessary repairs.

2. The profits of the Respondent Company so far as they are made by purchasing ale, beer, spirits and other articles in bulk and selling these commodities to private individuals, to free licensed houses and to the tenants of their tied houses are included in the assessment. The tied houses in question are occupied by the tenants for the purpose of their trade as licensed victuallers and beer retailers. In some cases the houses are occupied partly as private dwellings of the tenants and their families.

3. Under the decision in the case of *Usher's Wiltshire Brewery, Limited* v. *Bruce*, [1915] A.C. 433(1), the Company is entitled to a deduction in computing the profits of its trade for assessment under Schedule D of the difference between the rents paid by the Company for its leasehold houses, or the Schedule A assessments of its freehold houses, on the one hand and the sums received by it from the tied tenants on the other and also to a deduction for the amounts expended on repairs to its tied houses.

(1) 6 T.C. 399.

4. The Company makes up its accounts to the 31st December in every year and the following table contains the relevant particulars in relation to the tied houses for the year 1923.

House.	Lease.	Premium.	Annual equivalent of premium.	Rent received.	Gross Schedule A or rent paid.
		Freeholds			
		£	£	£	£
Hobart Arms ...	10 years from 10/2/23.	525	50	116	116
Clarence Arms	14 years from 29/9/20.	650	46	96	150
Great Western Hotel, Modbury.	7 years from 12/9/22.	150	21	58	66
		Leaseholds			
Fowey Wine Stores.	12 years from 5/12/11.	400	33	125	150
Oporto Wine Stores.	3½ years from 13/12/22.	200	57	56	56
Royal Oak, Bigbury.	7 years from 29/9/19.	60	8	18	20
			£215	£469	£558

The tenants of the tied houses have been duly assessed to Income Tax under Schedule A as occupiers of the said tied houses.

5. The Company, in making up its own accounts, brings into its profit and loss account as items of receipt all rents received and also the premiums in the year in which they are received, and brings in as items of expenditure all rents paid for those tied houses of which the Company are leaseholders. Nothing is debited in respect of the annual value or rent forgone or sacrificed in respect of the Company's own freehold properties whether occupied by the Company or let to tied tenants.

6. The rent reserved by the leases granted by the Company of the tied houses in the case of freeholds is, in one case which arises, in the first two of the three years of average greater than the annual value at which the premises are assessed under Schedule A of the Income Tax Acts and in the other cases less, except one where it is equal, and in the case of leaseholds is in two cases less than, and in the remaining case equal to, the rent paid by the Company. If, however, there be added to the rent reserved by each lease a sum arrived at by spreading the premium over the term of the lease, such sum together with the rent reserved in the case of many of the tied houses would exceed the annual value as assessed under Schedule A of the Income Tax Acts in the case of freeholds, or the rent paid in the case of leaseholds.

7. In computing the profits of the Company for assessment under Case I of Schedule D, for the purpose of the assessment for the year ended 5th April, 1925, the Assessing Commissioners included as items of receipt in the Company's business the annual equivalent of the premiums and the rents received from the tied tenants. They debited the rents paid by the Company for its leasehold houses and the annual values of the Company's freehold houses.

8. On behalf of the Respondent Company it was contended :

(*a*) That the said premiums were capital payments made to them and were not taxable.

(*b*) That the tied houses having been assessed under Schedule A, these premiums were not taxable under Schedule D or any other Schedule of the Income Tax Acts.

(*c*) That the point was decided in their favour *in converse* in the case of *Watney and Company* v. *Musgrave*, 1 T.C. 272, in which it was laid down that a brewer paying a premium for the lease of a public house for the purpose of letting it to a tenant under covenant to buy beer from him alone, was not entitled to a deduction on account of the gradual exhaustion of the premium.

(*d*) That there was no evidence upon which any part of the premiums could be said to represent rent and that, in any case, the method of arbitrarily dividing the premium in each case by the term of the lease was incorrect.

(*e*) That the assessment was excessive and should be reduced by the sum of £190.

9. The Appellant contended (*inter alia*) :

(1) That all receipts of the business on revenue account and all expenses of the business on revenue account must be included in the account made out to compute the profits made by the trader in his business.

(2) That the premiums as received as shown in the Respondent's own accounts, or a part of the premiums or as arrived at on an actuarial basis, and also all rents as received should therefore be included in computing the profits for the purpose of Case I of Schedule D.

(3) Alternatively, if such premiums or parts of premiums and rents should not be so included, they should be taken into account in ascertaining whether there has been a deficiency of rent or rent forgone or otherwise.

We were of opinion that the said premiums, or the annual equivalent of them, should not be regarded as augmenting the rent or as capitalised rent and, on the basis of this our decision, we reduced the assessment to £2,615.

10. The Appellant, immediately upon 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.

MARK STURGIS, N. ANDERSON, } Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.
27th February, 1928.

The cases came before Rowlatt, *J.*, in the King's Bench Division on the 4th and 5th July, 1928, and on the latter date judgment was given against the Crown in both cases, with costs.

The Attorney-General (Sir T. W. Inskip, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, K.C., and Mr. C. L. King for both Companies.

JUDGMENT.

Rowlatt, J.—These two cases deal with the problem presented by tied houses in taking the Income Tax accounts under Schedule D, of brewers in one case, and wine and spirit merchants in the other. The Companies own houses and they rent houses, and they let them out to tied tenants at generally a lower rent and sometimes with a premium. They are entitled to deduct under *Usher's* case[1], speaking generally, the difference to their prejudice between the rent which they paid for their leasehold houses or the annual value under Schedule A, taken as the real annual value of the houses that they own, and the lesser rents which they get from their tenants. That is under *Usher's* case.

The questions in these cases are these. First of all, can they bring in the premiums, and I think also if the rents they received were greater than the rents or the annual value which they had to pay—can those be brought in as substantive receipts so as to increase their assessment treating them as in themselves going to profits ? If they cannot do that, can they bring them in, especially the premiums, to the extent of wiping out the deficiency

[1] Usher's Wiltshire Brewery, Limited *v.* Bruce, 6 T.C. 399.

(Rowlatt, J.)

of which under *Usher's* case they would be entitled to take advantage ? It has all turned really upon a discussion of *Usher's* case. My view of the decision in *Usher's* case is this. It followed the *Russell* case(1). The *Russell* case decided that in addition to the right to deduct the annual value or the cost in rent of the premises in which the company is doing its work—its clerks, if it keeps a counting house, its brewery staff and its book-keeping staff—the company can deduct the value or the rent of premises which are given to one of its staff really as part of his remuneration on the premises, because those, like the others, are premises used for the purpose of the trade.

Now it seems to me that the *Usher* case did nothing more than this. It said there is no distinction in the particular case of a tied house between a manager and the tenant. Lord Atkinson says so in terms. Just as, if you put a manager into the house you can deduct the value of the house as one of the expenses because it is a place which you are using to sell your beer and carry on your trade, so if you put in a tenant it is just the same thing; you can deduct the value of the house as an expense. But there is this difference. If you have a tenant and get some rent, that mitigates the amount of the expense which you can show and deduct. Lord Sumner puts that particularly clearly. It is put just on the same footing as if the bank manager in *Russell's* case had paid some small rent. They would have had to bring that in in diminution of the deduction to which they were entitled in respect of premises used for their business, and, in the case of a tied house, used for selling their beer. Therefore it seems to me that the receipts from the rent do not come in as incomings *per se*. They only come in as countervailing the disbursement. In fact if that is so, there is no question of bringing in the premiums as such where they overtop the rents paid or the annual value.

The Attorney-General's argument and Mr. Hill's argument—they both developed it with complete candour and without flinching—is that in these brewery cases you have simply to take rent paid or annual value consumed in providing yourself with premises on the one hand, and everything you get out of the premises on the other hand, and bring them into your trading account. In a word, the landlord's position and the trader's position are completely combined in these cases, and combined to the extent of sweeping in rents. Of course we know that in the *Lion Brewery* case(2) there was a talk there of combination, the landlord's position passing into the position of trader, and so on. But here it is said that the landlord's and the trader's positions are combined for the purpose of rents. I think it would have been extremely

(1) Russell *v.* Aberdeen Town and County Bank, 2 T.C. 321.
(2) Smith *v.* Lion Brewery Company, Limited, 5 T.C. 568.

(Rowlatt, J.)

easy for the House of Lords to have said that in two or three sentences if that had been intended. Of course the argument goes to this extent—Mr. Hills did not deny it—that the free houses, the houses without a tie, must be brought in because a brewery company does not buy a house for pleasure or merely as an investor, but buys it to buttress the trade directly or indirectly. Even free houses are to be brought in so that the rents paid for them and the rents received for them go on either side of the account. That is very startling, because I was always under the impression that all these cases had their genesis in the circumstance that they were tied houses.

But there is this other very great difficulty. Although in the case of houses leased by the brewers it is probable that what they can deduct—I think the Lords so treated it—is the rent they pay, yet it is quite clear that in the case of annual value it is only the annual value under Schedule A by Statute that they can deduct. Therefore you at once get an artificial limit brought in as to what they bring in on one side, and the taking of this general account seems to be very much hampered from that point of view too. It seems to me that it is extraordinarily difficult to contemplate working this system side by side with the special taxation of land and premises under Schedule A, and I think Mr. Hills frankly said if you do it, it does involve making allowances for taxes under Schedule A. In other words, it involves this. It involves taking all these houses out of Schedule A altogether and treating the thing as a trade, the houses merely being items of the trade; just as an insurance company may be required by the Crown to let its investments disappear from taxation under the deducting Schedules and be brought in as receipts in a mere trading account.

Now I am bound to say that I know of no sort of authority for that, and certainly *Usher's Brewery* case does not seem to me anywhere near an authority for that, and I cannot accept it. It is said that the *Rosyth* case(1) shows it, but the *Rosyth* case does not. The *Rosyth* case was a case where it was sought to get back some Income Tax charged under Schedule A, and the amount that could be recovered was limited to an amount by reference to the sum at which the company would have been assessed had they been assessed under Schedule D. Therefore, when you are dealing with that imaginary figure, of course you have to throw overboard the Schedule A taxation and bring in the rents and payments in order to get at the notional figure which you are seeking. But I cannot find any authority there for saying that a company of this kind can be so treated—which is really what the Crown have to contend for in this case. So I think on the broad question the Crown must certainly fail.

(1) The Rosyth Building and Estates Co., Ltd. *v.* Rogers, 8 T.C. 11.

(Rowlatt, J.)

But then there is this subsidiary question. It may be that some house shows a profit on rent account. More is received from the tenant than is paid for rent, or has to be allowed for as annual value. Can that surplus be transferred to other houses so as to reduce their showing of loss ? That depends upon whether we are to look at this problem treating the houses in the aggregate, or whether we are to look at them one by one. Now it seems to me that the reasonable thing requires they should be looked at one by one. It is a question, I think, under *Russell's* case, what the premises, Nos. 1, 2, 3, 4 and 5, are costing the owner as an expense of his trade. That, I think, is the principle of it. I think the other view involves a notion of sweeping it all into a trading account. But there is this practical consideration too. At any rate, where the houses are the property of the brewer, Schedule A is the measure against which you have to set the rent. Now there is not one Schedule A for all the houses. Schedule A is separate house by house. Therefore if one is going to proceed on logical lines one must take this calculation, I think, house by house.

That leaves this question. Although premiums cannot be brought in as I have said as a subject-matter of taxation, I have not hitherto considered them as different from rent. I have merely said that you cannot bring in receipts as receipts by themselves. But can anything be brought in except the rent of the house itself to the extent of wiping out the deficiency ? Can the premiums be brought in to the extent of wiping out the deficiency? Well now, I am bound to say I feel a good deal of difficulty there when one is confronted with the facts. Here is a brewer who says : " I have a house worth so much, and it stands me, in one way " or another either as leaseholder or freeholder, in a charge of " £100 a year, and I am only getting £50 for it, there is my loss " of £50." You say : " Besides getting £50, you are getting a " substantial premium ; do not talk about loss on this house." Of course that appeals to one very much. That is the difficulty which I respectfully think we have got into by this step which has been taken in extending the doctrine of the *Russell* case[1] to the case of the tenant, because although in the House of Lords they only spoke of tenants letting at a rent *simpliciter*, and landlords taking from a superior landlord at a rent *simpliciter*, there is the other circumstance which they never looked at, namely, where the tenant may have paid a premium and where the landlord himself, being a leaseholder, may also have paid a premium.

Now I have come to the conclusion that one cannot look at premiums. The Attorney-General had to agree that if we are to look at premiums received we must look at premiums paid. I

(1) Russell v. Aberdeen Town and County Bank, 2 T.C. 321.

(Rowlatt, J.)

cannot conceive on the authorities how I can look at premiums paid to swell the amount which is brought in as rent paid. I do not see how I can possibly do that. It can only be brought in if you are to look at these people as traders, not only in rents, but as traders in property—which is the point I have already expressed my opinion upon. Now if you cannot bring in the premiums on the one side, I cannot conceive how you can bring them in on the other. I think the Attorney-General admitted it, and I think really that disposes of the question. I do not think you can regard premiums at all. It is not a satisfactory position, but there it is. They have taken so much rent, and they have taken the premium, and in that position the figures must be dealt with, it not being workable to bring in premiums at all.

But another point—a very much more subtle and difficult point—is suggested to have arisen. It is said, without looking at the premiums as capable of being translated into annual sums to be added to the rent, they can be looked at in this way. When the landlord goes to his tenant and says: "Take this and pay me a "premium," he is not forgoing rent for the tie, he is forgoing rent for the premium. That is fastening upon Lord Sumner's happy phrase "rent forgone." Or, to put it in another way which I think for this purpose is better, it is said when you are dealing with premiums you are displacing the whole basis of the comparison; you only can compare when there is rent on the one side or annual value and rent on the other. When you begin to deal in premiums you displace the whole basis of comparison, and it is not open to you to institute that comparison any longer. Mr. Latter admitted that if there was such a case, he of course could not claim application of the doctrine at all. That is what I understood him to admit. But he says that in this particular case of Messrs. Hoare the matter does not arise upon the figures, because if you look at the figures in the only case stated—they were all leases which had premiums in the last three years, but of course there may be others of older date—you will see the deficiency is entirely accounted for by the tie. Now in the other case the Commissioners did not deal with it. In my view, no point has been stated for the Court upon this point at all. I do not think the Commissioners had it in mind. They were simply saying premiums as premiums cannot be taken into consideration because they are premiums, and they can no more be taken into consideration as countervailing than they can be taken into consideration as giving a substantive balance. I think that is all they decided.

For these reasons I think that the appeal of the Crown must be dismissed in these cases in every respect, with costs.

COLLYER (H.M. INSPECTOR OF TAXES) v. HOARE & CO., LTD.[1]

The Crown having appealed against the decision of the King's Bench Division the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Greer and Russell, *L.JJ.*) on the 2nd, 5th and 7th November, 1928, and on the last mentioned date it was remitted to the Commissioners to find further facts.

The Attorney General (Sir T. W. Inskip, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, K.C., and Mr. C. L. King for the Company.

JUDGMENT.

Lord Hanworth, M.R.—We think that this case must go back to the Commissioners. We are keeping the whole matter open, and I forbear to say much lest it should be in any way suggested or supposed I had formed a concluded opinion at all upon the case. I have not. We desire further materials to be found by the Commissioners.

Now there are three points, it has been said, on this question of how the premiums ought to be dealt with. The Attorney-General has conceded that the premiums when received are capital and not income. That leaves two points still which are open. Can the premiums or any part of them in any form be used to set against the rent forgone? I use Lord Sumner's phrase. It is said that there has been rent forgone in these cases, and looking at the table and taking the first item it appears that the actual tied rent received is £100 and no more, whereas the assessment upon that tied house is £140. It is said that if it were free, with the same premium, a rent of £175 could have been obtained. From those figures it would appear that in accepting the tied rent of £100 and no more the brewers were accepting £40 less than the assessment, and accepting £75 less than the rent if it were free, if that £175 is to be taken as the actual rent which could have been and ought to have been and might have been obtained in the open market. Paragraph 4 of the Case dealing with statement " A " says that it shows the rent the company would have expected to obtain. It may be that the item £175 under the column headed " Rent if " free with the same premium " is the rent which would actually have been received, but inasmuch as in paragraph 4 it is stated to have been the rent which the company would have expected to have obtained it is not clear whether that £175 is to be taken as the annual value if the house were free.

(1) An appeal was entered by the Crown in the case of *Miller* v. *Ellery and Co., Ltd.*, also; it was arranged that this appeal should stand over pending the decision in *Collyer* v. *Hoare and Co., Ltd.*

(Lord Hanworth, M.R.)

On the second point, quite apart from the figures given to us in table " A ", there remains this point. Even if you treat the premium as capital or as capitalised income, capitalised rent that could have been received, ought or ought not those premiums or any part of them in any form to have been taken into account and set against the rent which has been forgone? I am not expressing any opinion at all. It appears to me a matter of accountancy which must be dealt with by those who are expert in the matter. It may be that the admission that the premiums are capital and not income answers the point, but I do not know. Looking at *Usher's* case, [1915] A.C. 433(1), and calling attention to one or two passages in it, it appears to me that it has a very wide range of bearing upon the facts of this case. At page 451 Lord Atkinson says this(2) :— " The meaning of paragraph 8 taken together with this paragraph A " is, I think, simply this, that in the proper and reasonable conduct " by the appellants of their trade they are obliged to defray the " cost of these repairs, inasmuch as the same are necessary to " enable the houses to serve the very purposes for which the " appellants have solely and exclusively acquired and used them. " I may say for myself that I am wholly unable to follow the line " of reasoning which would lead one to the conclusion that where " premises have been acquired and used wholly and exclusively " for a particular purpose, the expenditure upon them necessary " to enable them to fulfil that purpose is not expenditure incurred " solely and exclusively for the very purpose for which they have " been acquired and used."

Bearing that observation in mind, is it right to say that this premium received, inasmuch as it is capital and not income, must be wholly excluded in considering what was the expenditure upon premises necessary to fulfil the purpose of the brewers. There is a passage at the bottom of page 452 in the same sense. Passing to page 455, again he says this(3) :—" The two trades are as " dependent upon and as connected with each other as they well " can be; they are almost, if not altogether, the same enterprise " seen from different sides, different standpoints, and I confess I " am unable to see upon what principle money designedly spent " by the brewer with the sole and exclusive object of maintaining " this market-place for his own goods, and promoting, through " the action of this salesman, the sale of those goods therein, ceases " to be an expenditure wholly and exclusively for his (the brewer's) " trade because incidentally it may benefit the salesman and " increase his remuneration in the shape of increased profits."

Then Lord Sumner at page 467 says this(4) :—" If a subject " engaged in trade were taxed simply upon ' the full amount of " ' the balance of the profits or gains of such trade,' there can be

(1) Usher's Wiltshire Brewery, Ltd. *v.* Bruce, 6 T.C. 399.
(2) *Ibid.* at p. 424. (3) *Ibid.* at p. 427. (4) *Ibid.* at p. 435.

(Lord Hanworth, M.R.)

" no doubt that, upon the facts found in this special case, he would " be entitled to deduct all the items which are now in debate before " arriving at the sum to be charged. To do otherwise would " neither be to arrive at a balance between two sets of figures, a " credit and a debit set, which balance is the profit of the trade, " nor to ascertain the profits of the trade, for trade incomings are " not profits of the trade till trade outgoings have been paid or " allowed for and deducted." And on page 469 he says(1) :—" In " principle, therefore, I think that in the present case rent forgone, " either by letting houses, which the brewers own, to tied tenants " at a low rent instead of to free tenants at a full rack rent in the " open market, or by letting houses in the same way, which they " hire and then re-let at a loss, is money expended within the first " rule applying to both of the first two cases of Schedule D, and " that upon the findings of the special case, which are conclusive, " it is ' wholly and exclusively expended for the purposes of such " ' trade '."

Applying those observations, but without in any way directing the Commissioners, it appears to me that we have here a large business in respect of which there are something like six hundred leasehold or freehold licensed houses let to tied tenants. It is true we are told, though the Case does not contain the statement, that these eleven houses are the only houses which have been dealt with on the basis of the premium in the particular three years stated. But the assessments that we are dealing with cover many more than three years. Now it may be that the business of providing the houses or the " market-places " ought to be brought in and treated as one with the brewer's business proper. So far as I understand it, that is stated to be so in paragraph 6, because for some reason or another—and I confess I do not understand how—the premiums charged on granting the leases are brought into its profit and loss account. If the two businesses of providing the houses, and making the beer and selling it in the houses so provided, are all one, it may be that the premiums which are received in respect of the tied houses are from one point of view capital but ought not to be neglected in considering what are the profits and gains of the business as a whole. It appears to me that *Usher's* case must be considered by the Commissioners and they must tell us the facts about this particular trade in the light of *Usher's* case.

Then there is a third point which is a very important point, and which Mr. Latter desires, and rightly desires, to keep open. That is the question, are the rents in excess of Schedule A liable to tax under Schedule D? Expanding that, it means this. You have a particular house, and you have a particular assessment upon it under Schedule A. It may be that the rents which are received in

(1) 6 T.C. at p. 437.

(Lord Hanworth, M.R.)

respect of that house are in excess of the assessment under Schedule A, so that the Company receives more than the amount for which the house is assessed. In that sense there is a profit arising from that house. Is that a profit which can be carried forward out of Schedule A and brought into Schedule D? I can see there is a strong argument to be presented in saying that although the Income Tax is one tax and assessed in respect of different property under different Schedules, yet there is no authority for saying that when you have received the taxation of one piece of property under Schedule A you can carry forward some balance or loss from that Schedule A and bring it into a different Schedule such as Schedule D, the taxation of the property falling to be estimated under Schedule A and under Schedule A alone.

I hope I have not mis-stated that point, because I am very anxious that Mr. Latter's point should be entirely safeguarded. I want to know what the Commissioners do hold on that point. Paragraph 9 of the Case stated by the Commissioners says :—" We held " that the premiums received by the Company on the grant of " leases were not receipts arising from its trade as brewers, and " that no regard should be had to those premiums in arriving at the " amount of the deficiency of rents to be allowed as a deduction in " computing the Company's profits." That may refer to this very point, but I am not sure. As I read the Case it seems to have thrown aside the premiums altogether. Whether that is right or not seems to me primarily to depend upon a question of what is the true way in which to estimate these accounts. I have stated the difficulties which I have felt not by way of giving directions, but for the purpose of indicating the sort of points that we want cleared up in a supplementary case, and keeping open the rights of both sides. The Case will therefore be sent back for a further statement to be made by the Commissioners. It will come back to this Court, and we will then deal with it, and we will reserve all costs until we proceed with the hearing of the case.

Greer, L.J.—I agree. I desire to add a word or two in order to make it quite clear what facts in my judgment are necessary for the Commissioners to find in order to enable us to deal with the second point arising in this case. They have stated their findings in paragraph 9 in these terms :—" We held that the premiums " received by the Company on the grant of leases were not receipts " arising from its trade as brewers, and that no regard should be " had to those premiums in arriving at the amount of the deficiency " of rents to be allowed as a deduction in computing the Company's " profits." As a statement of principle it is admitted by Mr. Latter that that is wrong, if it is a statement of principle that no regard is ever to be taken of the premiums in arriving at the amount of the deficiency of rents to be allowed. I think it was rightly conceded

(Greer, L.J.)

that that is so. "But," says Mr. Latter, "that is not really what "the Commissioners have decided. What they decided was that "on the facts of this particular case if you look at the rents that "could have been obtained from free tenants you find there that "a deficiency of rent due to the tie is proved to have taken place "in every one of these leases, and as it is proved that we have "lost more than we have claimed credit for, the credit certainly "ought to be allowed." I agree that if table "A" had been proved to the satisfaction of the Commissioners, and they had accepted the rents as stated in the final column as the rents that would have been obtained from free tenants in addition to the premiums, then the fact upon which Mr. Latter relies would have been demonstrated, namely, that they had lost as a deficiency in rents at any rate up to the amount that they made claim to have a credit given to them in the accounts for Income Tax. I am not satisfied that they ever considered that question at all. They may have done so. Mr. Latter says they did, and that there was only evidence one way and that was all they could find. I do not read paragraph 3 and paragraph 4 of the Case as a statement that those were rents which could necessarily have been obtained. Anyone knows how calculations of this sort are made over and over again in cases of valuation, particularly in rating cases, as to what rents could have been obtained, and how frequently a mere calculation of what rents could have been obtained has to be discounted and regarded with a certain amount of suspicion. But it may very well be that Mr. Latter is right, and that the Commissioners did think that the rents stated in the last column were rents which could have been obtained. If they think so they will state it before the Case comes back to this Court. But they may think that the rents were something less than that, and it seems to me very undesirable that they should confine their statement merely to saying whether they think those rents could have been obtained. If they are ready to accept those rents as the rents in the market, the rack-rents that could have been obtained with the payment of those premiums, they need not say anything further, but if they find that those are excessive they will have to substitute some other figure in order that we may see whether or not there has been a deficiency as to which the firm are entitled to credit.

So far as I am concerned, I think that would be sufficient to dispose of the matter, subject to the other matters mentioned by my Lord as to whether or not these are the only cases that have to be taken into consideration for the purpose of estimating the income during the years which were under consideration. It is not sufficiently stated in the Case that they are, and it may be that they are sufficient to enable the Commissioners to deal with every one of the years in question.

Russell, L.J.—I agree.

Mr. Latter.—Your Lordship mentioned the third point about the excess of rents going back. May I remind your Lordship that the Commissioners have found on that. Is it your Lordship's wish that it should go back? It is in the second paragraph of Paragraph 9. "We also held that the excess of rents received "by the Company over rents paid by it (or in the case of freehold "premises, over the Schedule A assessments) should not be brought "into the computation of the Company's liability." They found on that, my Lord.

Greer, L.J.—Personally, I do not think there is anything else to be found on that part of the Case. All that there is is the argument as to the result.

The Attorney-General.—I respectfully agree with my learned friend Mr. Latter that the finding is sufficiently stated on that to enable me to argue the point, and for your Lordships to express an opinion on it.

Lord Hanworth, M.R.—Very well. I am much obliged. I am afraid I had overlooked that. Then we need not send it back on that point. But otherwise, Mr. Latter, I think we have safeguarded your point, have we not?

Mr. Latter.—If your Lordship pleases.

Lord Hanworth, M.R.—We reserve all costs. The only thing that occurs to my mind we ought to do is this, on the question of time, as there is another case dependent upon it. The Commissioners are the Commissioners for Special Purposes at York House, Kingsway, so that they can deal with the Case, I suppose, and let us have it back by next term.

The Attorney-General.—I am afraid it is difficult for me to answer for other people. It may be it will take some little time for the Respondents here and for the Inland Revenue Department to have a proper valuation made of these houses upon the hypothetical basis that they are free houses. I do not know that I could answer for the Commissioners. It might be possible to obtain evidence ready to be laid before them, but I do not know at all what their engagements may be.

Lord Hanworth, M.R.—Very well, I will not say any more about that. I will only indicate that it is a case which we hope to receive back without undue delay.

The Attorney-General.—That intimation will be brought to the attention of the Commissioners. Subject to what they can do, I am sure they will do their best to comply with your Lordship's wishes.

ORDER OF THE COURT OF APPEAL.

On Appeal by the said Appellant from an Order of the King's Bench Division of the High Court of Justice dated the 5th day of July, 1928.

UPON READING the above mentioned Order and the Notice of Appeal herein AND UPON HEARING Sir Thomas Inskip, His Majesty's Attorney-General and Mr. R. P. Hills of Counsel for the Appellant and Mr. A. M. Latter, K.C., for the Respondents on the 2nd, 5th and 7th days of November last and on this day IT IS ORDERED by the Court that the Case stated herein mentioned in the said Order of the King's Bench Division be remitted to the Commissioners for the Special Purposes of the Income Tax Acts for them to state the following further facts—

(1) Whether the premiums mentioned in the first sentence of paragraph 4 of the said case, or any part of them in any form as a matter of accountancy should be taken into account for the purpose of ascertaining commercial profits over any given period.

(2) Whether the rents stated in the final column of Statement " A " annexed to the said case are such as could have been obtained in the open market from free tenants in addition to the premiums mentioned in the said statement, and, if not, what is the rent that could have been obtained from a free tenant in each case paying the same premium.

(3) Whether the said Statement " A " is a full list of the houses for which premiums were paid by the tenants for leases or tenancy agreements which were in force during the whole or any part of the nine years ended 18th April, 1922 (the date to which the Company makes up its accounts). If not what other such houses were there and what was the rent that could have been obtained for the same from a free tenant in each case paying the same premium.

(4) Whether in the light of the decision in the case of *Usher's Wiltshire Brewery, Limited* v. *Bruce*, [1915] A.C. 433, and of the facts in the present case a part of the business of the Respondents was the providing of licensed houses as a market place for the beer brewed.

The Court doth reserve the question of Costs of the 2nd, 5th and 7th days of November last. The Costs of the application of this day to be Costs in this Appeal.

G. A. BONNER,

King's Remembrancer.

FURTHER FINDING OF FACTS BY THE SPECIAL COMMISSIONERS.

In compliance with the Order, dated the 20th December, 1928, we have to state the following further facts :—

(1) The premiums should be taken into account in ascertaining the commercial profits of the Respondents' business. The premiums apportioned over the respective periods of the leases should preferably be treated as revenue receipts, or alternatively, should be included in the rent account for the purpose of ascertaining the balance of that account to be brought into the profit and loss account of the business.

(2) The rent which could have been obtained from a free tenant of the houses in statement "A" paying the same premium as that shown in the statement was as follows :—

	£
Falcon, Ponders End	Nil
24, Orford Road, Walthamstow	65
Crown & Sceptre, Britannia Street ...	180
Junction Tavern, Raynes Park	220
King's Head, Hogarth Place	−260
Greyhound, Richmond	450
White Hart, Brasted	Nil
Six Bells, Croydon...	50
Plough & Harrow, Epsom	100
Dewdrop, Penge	70
Railway Hotel, Beckenham	−500

Where the rent is stated to be a minus quantity a free tenant, having undertaken to pay the premium named, should be entitled to a refund of the figure shown from the owners.

(3) There were twenty-one houses in addition to those shown in statement "A" for which premiums were paid by the tenants for leases or tenancy agreements which were in force during the whole or any part of the nine years ended the 18th April, 1922.

A statement, marked " B ", of these twenty-one houses is annexed. The rent that could have been obtained for these houses from a free tenant paying the same premium in each case is shown in column 6 of the statement.

(4) The providing of licensed houses as a market-place for the beer brewed by the Respondents formed a part of their business.

J. JACOB,
MARK STURGIS,
N. ANDERSON,
} Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.
1st January, 1930.

STATEMENT "B."

1. Name and address of licensed houses.	2. Date of lease.	3. Period of lease.	4. Premium.	5. Tied rent.	6. Rent if free with same premium.	7. Assessments.	
			£	£	£		£
Anchor & Hope, Riverside, New Charlton	30.8.1900	50 years from 24.6.1900	5,000	100	−124	1913–16	116
						1918–21	90
						1921–22	130
Artesian Arms, 80, Richmond Rd., Bayswater	8.2.1892	40 years from 25.12.1891	2,500	200	+250	1914	319
						1916	180
						1922	250
Blacksmith's Arms, Upper Caterham (with yard and buildings)	9.10.1908	21 years from 29.9.1908	700	60	+ 70		87
Castle, Regent Street	1898	20 years from 24.6.1898	13,500	250	−383	1914	360
						1917	295
Cock & Bottle, 94 and 96, Cannon Street	30.8.1897	30 years from 24.6.1897	600	200	−490	1914	304
							reduced on appeal to 220
						1916	280
						1922–23	400
Duke of Wellington, Manchester Street, King's Cross	15.12.1896	55 years from 29.9.1896	18,500	250	−293		300
Falcon, South Street, Ponders End ...	7.2.1898	21 years from 25.12.1897	1,500	150	+150	1914	150
						1917	140
						1919	150
Fleet Tavern, 90, Park Hill Road, Hampstead	28.7.1896	45 years from 24.6.1896	7,850	100	nil	1914	148
						1917	195
						1922	298
Henley Arms, 268, Albert Road, North Woolwich	17.11.1897	40 years from 29.9.1897	300	100	+250	1914	186
						1917	210
							reduced on appeal to 180
						1922	300

Horse & Groom, 637, Holloway Road, N.	17.12.1903	55½ years from 29.9.1903	500	200	+300	1913	500
						1916	490
						1921	600
King's Head, 100, Clapham Park Road (including stabling and rooms in rear)	1.9.1902	30 years from 24.6.1902	700	200	nil	1914	270
						1917	210
						1922	290
King's Head, Hogarth Place, Earls Court Road	26.12.1887	32 years from 25.12.1887	2,400	120	+250	1914	300
						1917	275
						1921	375
Leaming Hotel, 1, Leamington Terrace, Willesden Lane, Acton	31.1.1908	35 years from 29.9.1907	600	100	+175	1910 onwards	375 reduced on appeal from 400
Marquis of Granby, 322, New Cross Road	30.12.1902	45 years from 24.6.1902	600	100	nil	1914	360
						1917	450
						1922	600
Prince of Denmark, 151, Junction Road, Holloway	16.4.1888	35 years from 25.3.1888	3,000	100	+300	1914	250
						1916	220
						1921	325
Railway Tavern, White Hart Lane, Tottenham (cottages, yard and out-buildings)	26.8.1896	55 years from 25.3.1895	450	112	−166		200
Red Deer, Brighton Road, Croydon ...	3.7.1902	60 years from 24.6.1902	10,000	100	−279	1911	200
						1923	350
Rising Sun, 88, Rushey Green, Catford	17.9.1897	40 years from 24.6.1897	16,000	200	+300	1914	600 reduced on appeal to 575
						1916	585
						1917	795
						1922	960
Salisbury, 86, High Street, Lewisham	27.11.1899	80 years from 24.6.1899	15,000	251	−475	1916	650
						1921	1,075
Walpole Arms, 407, New Cross Road ...	27.5.1897	42 years from 25.3.1897	14,000	140	−104	1906	650
						1913	503
						1916	450
						1921	695
White Hart, 307, High Street, Poplar	3.1.1900	59¾ years from 29.9.1899	2,000	130	− 56	1916	230
						1921	255

Further facts having been found by the Special Commissioners, the case came again before the Court of Appeal (Lord Hanworth, *M.R.*, and Slesser and Romer, *L.JJ.*) on the 14th and 15th October, 1930, when the Crown abandoned the contention (paragraphs 8 (1) and (2) of the Stated Case) that the premiums and rents received by the Company must be brought into the computation of profits for Schedule D purposes. Argument for the Crown was confined to the contention that both rents and premiums received must be taken into account in determining whether the Company had sustained a deficiency of rent in connection with its tied houses, and that the figures for all the tied houses must be aggregated for that purpose.

On the 15th October, 1930, judgment was given unanimously in favour of the Crown.

The Attorney-General (Sir W. A. Jowitt, K.C.), the Hon. R. Stafford Cripps, K.C., and Mr. R. P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, K.C., and Mr. C. L. King for the Company.

JUDGMENT.

Lord Hanworth, M.R.—This case involves a number of points of law of some difficulty, the difficulty arising from the question as to how the law is to be applied to the facts of the case.

The case has been before this Court before, and was sent back to the Commissioners for the Commissioners to make further findings for the information of this Court. I will recount the facts, therefore, with some care, for the sequence of events is important.

Messrs. Hoare and Company, Limited, are brewers carrying on a very considerable business. They have appealed against assessments to Income Tax made upon them under Schedule D in respect of their profits on their trade for seven years. The profits are large, and the profit in respect of which the assessment was made on them in 1921 was £215,000, and in subsequent years that average of about £200,000 was substantially maintained. They carry on their business as brewers at the Red Lion Brewery, St. Katherine's Way, E., and, following a common practice among brewers, the Company has, in order to increase its trade, purchased from time to time licensed houses which it lets on yearly tenancies, or for periods ranging from seven to twenty-one years, to tenants who are tied to the Company for all beer, wine and spirits sold on the premises let. There are some cases in which the premises are let without a tie, but the Company has very few such tenants, and at the date of this appeal the business was so large that the Company had about six hundred leasehold or freehold houses which were let to tied tenants. The Company make up the accounts of their trade as a whole. As one would naturally expect, they do

(Lord Hanworth, M.R.)

not make up their profits derived from any particular house and segregate those profits. They take the profits as a whole derived from their business, a large market for which is found in the premises which are afforded by these six hundred tenants who are occupying the tied premises, and, in addition, the sale which takes place through the free tenants.

Now, the Company claim to apply the decision in *Usher's Wiltshire Brewery, Limited* v. *Bruce*(1), a case of great importance, which was first decided before Mr. Justice Horridge in December, 1913. That case went to the Court of Appeal, and ultimately to the House of Lords, and I shall have to refer to it later. What was allowed by Mr. Justice Horridge, and his principle was adopted in the House of Lords, was this. It was laid down that under Rule 3, in computing the amount of profits, there is a restriction whereby no sum shall be deducted in respect of any disbursements or expenses not being money wholly or exclusively laid out or expended for the purposes of the trade, profession, employment or vocation. That has been re-written by Lord Sumner in his judgment in one of these cases in which he says it amounts to this, that in computing the profits a trader is entitled to deduct money which is wholly and exclusively laid out or expended for the purposes of the trade.

In *Usher's* case what was said was this. The Company, desirous of making a large market for the sale of their liquors, were compelled to adopt a practice which, we are told in this case, is a common practice among brewers, to provide premises which the tenant occupies, in which the sale could take place, and he is tied to the brewery in the sense that he can only sell at those premises the beers and liquors which are provided by the brewer. It was claimed in *Usher's* case that the expense which was involved in that system could not be deducted. Two items in particular were in question in *Usher's* case; there were other smaller ones, but I need not deal with them. The two items were: Repairs to tied houses, £1,004, and a difference between the rents of leasehold houses or Schedule A assessments of freehold houses on the one hand, and the rents received from tied tenants on the other, £2,134. It was said that, in respect of the repairs, there is a special Rule under the Income Tax Act whereby certain allowances are allowed for repairs, and no more, and it was said, with regard to the second item, the difference between the rents that were in fact charged to the tied tenants and those which would have been charged if the particular tie had not been insisted upon, that that margin or difference which represented a loss to the brewers could not be deducted as being an expense which had been wholly and exclusively expended for the purposes of the trade. The House of Lords, however, in *Usher's* case disagreed with that view, and

(1) 6 T.C. 399.

(Lord Hanworth, M.R.)

they allowed the sums which had been paid by the brewers in respect of repairs, and the losses which the brewers had suffered in consequence of maintaining this tied system. The House of Lords said that, although the brewers were not bound to effect these repairs, although they had done them *ex gratia* to oblige their tenants, yet they had done them as a part of a policy, finding that goodness to their tenants had inured to the advancement of the sale of their liquors, and equally that this loss incurred in the maintenance of the tie was one which was part of their policy of enhancing the sale of their liquors. In both cases, therefore, they held that the sum expended and the sum lost were sums which were wholly and exclusively laid out or expended for the purposes of the trade.

In the present case, the brewery company, Messrs. Hoare and Company, ask that there should be an allowance made to them in respect of losses which they have incurred by reason of the fact that they have not secured from the tied tenant the full rent that would have been available if there had been no tie insisted upon, and they set out a table, table " A ", which gives the facts about some eleven licensed premises, tells us of the periods of the leases, and shows that there would have been a larger rent payable or available if there had been no tie. There was an answer made to that on the part of the Crown. The Crown said this : If you will look at the individual cases where this lower rent is received by the brewery company from the tied tenant you will find that there has been paid by the tenant a premium, that the premium is a factor to be taken into account, and it is because of the premium paid down at once that the tenant has agreed to pay a smaller rent over the period and duration of his lease. The answer to that by the Respondents is : You must not take into account these premiums at all ; they are capital payments, and are not to be treated as revenue or profits taxable at all. Upon those arguments the Commissioners held that the premiums received by the Company on the grant of leases were not receipts arising from its trade as brewers, and that no regard should be had to those premiums in arriving at the amount of the deficiency of rents to be allowed as a deduction in computing the Company's profits under the decision in the case of *Usher's Wiltshire Brewery, Limited* v. *Bruce*. They then further held that the houses were to be looked at individually, that the excess of rents received by the Company over the rents paid by it, or the Schedule A assessments in the case of freehold premises, should not be brought into the computation of the Company's liability ; in other words, that the matter should be considered item by item, that examination should be made into the facts relating to the " Falcon," the " King's Head," the " Dewdrop," and so on, individually, and the ultimate decision of the Commissioners was that the premiums and any excess of rents should be altogether

(Lord Hanworth, M.R.)

excluded from the computation of the Company's liability to assessment—excess of rents, that is to say, where there were some licensed premises which showed an excess and not a loss in respect of the rent received. That decision was given in February of 1928.

The Crown appealed, and the case came before Mr. Justice Rowlatt who, on the 5th July, 1928, gave his judgment, and he supported the decision of the Commissioners. He was of opinion that *Usher's* case allowed a deduction to be made, even though you had a manager or a tied tenant in the house, that if that house had caused a burden upon the income of the brewer by reason of the maintenance of the tie, that could be charged as a debit against the profits when computing them for the purposes of Income Tax. From that decision of Mr. Justice Rowlatt an appeal was taken to this Court. It was heard on more than one day (I think on three days), and on the 7th November, 1928, this Court came to the conclusion that we had not the full material that was necessary for the decision of the case. We were not satisfied with the materials presented to us by the Commissioners, and in particular we were not satisfied as to how the last column in table " A " had been reached; that is the table which sets out rent if free with the same premium. It did not appear that that was based upon any evidence before the Commissioners, and we asked also for further information. In my judgment I was careful to leave open the decision of the points which had been raised before us. On page 5, I said this[1]: " Now it may be that the business of providing the houses " or the ' market-places ' ought to be brought in and treated as one " with the brewer's business proper. So far as I understand it, " that is stated to be so in paragraph 6; because for some reason " or another—and I confess I do not understand how—the " premiums charged on granting the leases are brought into its " profit and loss account. If the two businesses of providing the " houses, and making the beer and selling it in the houses so " provided, are all one, it may be that the premiums which are " received in respect of the tied houses are from one point of view " capital but ought not to be neglected in considering what are the " profits and gains of the business as a whole. It appears to me " that *Usher's* case must be considered by the Commissioners and " they must tell us the facts about this particular trade in the light " of *Usher's* case." Those observations were made in consequence of a passage, to which I must refer in a little greater length in a moment, in Lord Atkinson's judgment when he was criticising a decision of Lord Justice A. L. Smith in the case of *Brickwood* v. *Reynolds*[2].

The case then went back to the Commissioners, and we carefully drew up the questions that were to be submitted to them. After that judgment had been delivered a further application was made

(1) Page 186 *ante*. (2) 3 T.C. 600

(Lord Hanworth, M.R.)

in December to the Court to have the questions put into shape. Some little difficulty had occurred upon them, and the case was then sent back to the Commissioners for them to state the further facts: " (1) Whether the premiums mentioned in the first sentence " of paragraph 4 of the said Case, or any part of them in any form " as a matter of accountancy, should be taken into account for the " purpose of ascertaining commercial profits over any given period. " (2) Whether the rents stated in the final column of Statement " 'A' annexed to the said case are such as could have been " obtained in the open market from free tenants in addition to " the premiums mentioned in the said statement, and, if not, what " is the rent that could have been obtained from a free tenant in " each case paying the same premium. (3) Whether the said " Statement 'A' is a full list of the houses for which premiums were " paid by the tenants for leases or tenancy agreements which were in " force during the whole or any part of the nine years . . . . " —those are the taxation years—" If not what other such houses " were there and what was the rent that could have been obtained " for the same from a free tenant in each case paying the same " premium. (4) Whether in the light of the decision in the case of " *Usher's Wiltshire Brewery, Limited* v. *Bruce*, [1915] A.C. 433, " and of the facts in the present case a part of the business of the " Respondents was the providing of licensed houses as a market " place for the beer brewed." The answers to those questions are now embodied in a further case, and, in compliance with that Order, the Commissioners say this: " (1) The premiums should " be taken into account in ascertaining the commercial profits of " the Respondents' business. The premiums apportioned over the " respective periods of the leases should preferably be treated as " revenue receipts, or alternatively should be included in the rent " account for the purpose of ascertaining the balance of that " account to be brought into the profit and loss account of the " business."—and then they give particular figures for the last column of statement " A ", figures which are different from those given before, and they are based upon evidence heard. Then they say: " There were 21 houses in addition to those shown in state- " ment 'A' for which premiums were paid by the tenants for leases " or tenancy agreements which were in force during the whole or " any part of the 9 years ended the 18th April, 1922 . . . . (4) The " providing of licensed houses as a market-place for the beer " brewed by the Respondents formed a part of their business." I look, therefore, at the totality of the facts which the Case and its supplement present to the Court. It appears, therefore, that there are two sides to the activities of Messrs. Hoare and Company. They quite properly and quite naturally follow the common practice and do provide licensed houses as a market-place for the beer brewed by the Respondents as an integral part of their business, and the Commissioners find that in that department of their business they

(Lord Hanworth, M.R.)

ought to take into account the premiums, whether the number of houses is so large that upon an average you may treat the sums which are paid when renewals take place as an annual revenue, or whether you ought to distribute it over a period of years, but at any rate they have to be taken into account. The Commissioners also tell us that in carrying on that provision of the market-place for the beer, as business men, one or other of the alternatives they suggest should be followed, the premiums should be apportioned over respective periods of the lease and treated as revenue receipts, or, alternatively should be included in the rent account for the purpose of ascertaining the balance of that account. At any rate, it is clear from these facts and the findings of the Commissioners that this department of providing what Mr. Stafford Cripps has called the booths in the market-place for the sale of beer should be treated as one side of the business, and the individuality of the houses is not to be maintained separately in ascertaining whether or not there has been a profit or loss in the provision of those booths in the market-place. Therefore, it seems upon these facts that we are not to place any emphasis on the question of the premiums; we have got to regard this business, which has produced those profits of, roughly speaking, £200,000 a year, as having two sides to it, one, the sale of the beer, and the other the provision of the stalls at which the beer is sold. If there is a loss in respect of the provision of the stalls, that would go against the profits made just as the cost of the brewing of the beer and the conveyance of the beer, or anything else, would go as a debit item in the profit and loss account.

We have to apply the law which is laid down in a few cases. The recent case of *Salisbury House*(1) in the House of Lords has definitely decided that where a company or body of persons carry on a business which concerns the property in lands, tenements, hereditaments or heritages in the United Kingdom, that business falls to be taxed for Income Tax purposes under Schedule A. It is not a matter of choice on the part of the Crown or on the part of the subject. The estimation of the tax which is to be paid in respect of the annual value of those lands, tenements, hereditaments and heritages is to be computed in accordance with the Rules under Schedule A. Hence, in respect of the premises which are used for the purposes of the sale of the beer, Income Tax would be charged upon Messrs. Hoare after being estimated under Schedule A. Their profits would be subjected to Income Tax computed under Schedule D, which deals with the profits of a trade, and, following the decision in the *Salisbury House* case, it is not open to the Surveyor of Taxes to bring over any overplus of profit beyond what has been charged in Schedule A and claim that that overflow ought

(1) Salisbury House Estate, Ltd. v. Fry, 15 T.C. 266.

(Lord Hanworth, M.R.)

to be brought into account of profits under Schedule D. The annual value of the lands, tenements and hereditaments is to be taxed once and for all under Schedule A, and if there is any overplus which is not reached under the Rules of Schedule A it remains immune and is not to be brought into some further account to swell a taxation of profits under Schedule D. The question that then arises is: Is it possible for Messrs. Hoare and Company, who have paid taxes under Schedule A to say that *Usher's* case justifies their looking individually into the houses which were taxed under Schedule A and to say that they have suffered a loss in respect of the tie maintained in one or other of those houses? Mr. Latter does not claim that he can secure that immunity *pro tanto* except upon proof that there has been an actual cost to the Company in maintaining the tie. He takes an illustration from one or two cases which are found in table "A". He says upon the facts relating to the "Falcon", in South Street, Ponders End—that is item No. 1—his evidence is sufficient to show that there remains a burden upon the profits in the maintenance of the tie. He says otherwise in the case of the off-licence at Orford Road, Walthamstow, but he does seek to deal with the facts relating to these cases separately and individually by houses. Can that be done? Mr. Latter's argument in support of it is based upon *Usher's* case. He agrees that his argument leads to a development of *Usher's* case, for it is to be noted that *Usher's* case dealt with the total accounts. The figures in *Usher's* case were these: Against an assessment of £17,000, which was the total profit assessable of the brewery, it was sought to deduct the total repairs to the tied houses, namely, £1,004, and the total of the difference between the rents of the leasehold houses or freehold houses, £2,134. Exactly how those totals were reached we do not know, but it cannot be said that in *Usher's* case the individuality of each separate licensed premises was maintained and scrutinised, but Mr. Latter's argument is that it follows as a logical sequence. I do not agree with that view, and I do not agree after carefully examining the speeches of the noble Lords in *Usher's* case. It must be remembered that *Usher's* case was a development of a sequence of cases. In *Russell* v. *Town and County Bank*(1) the company or bank were allowed to deduct the cost of premises in which they had placed a manager, for, in seeking their profit, it was necessary to have a manager, and the cost of providing him with a house was a necessary outlay, integrally connected with the seeking of the profits.

Usher's case definitely overruled *Brickwood and Reynolds*. Now *Brickwood* v. *Reynolds*(2) ([1898] 1 Q.B.D.) was a case in which it was sought to deduct the repairs to the tied houses which had been

(1) Russell *v.* Aberdeen Town and County Bank, 2 T.C. 321.
(2) 3 T.C. 600.

(Lord Hanworth, M.R.)

paid for by the brewers, and the brewers claimed for the purpose of the Income Tax, in arriving at the balance of their profits and gains, to be entitled to a deduction in respect of that sum expended on those repairs. Lord Justice A. L. Smith said(1) this on page 102: "Now there are two things wholly distinct and apart "the one from the other, the trade of a brewer and the trade of a "publican, and the expense incurred in respect of the latter cannot "in my judgment be deducted when finding out the profit of the "former. When the brewer is making up his balance of profits "and gains, he would on the one side place to his credit the beer "and other articles sold and paid for, and on the other side he "would place to debit the necessary expenditure for earning those "receipts, and the difference between the two would, as Lord "Herschell pointed out in *Russell* v. *Town and County Bank*, be "the balance of the profits and gains of the trade on which the "brewer would have to pay income tax. But the contention of the "appellants comes to this—that inasmuch as by doing the repairs "to the tied houses they keep up and foster the trade of the "publican, which is a wholly independent trade, they are entitled "to deduct the cost of the repairs to the publicans' houses before "arriving at the balance of the profits and gains of their own trade "as brewers. I am of opinion that that contention cannot prevail, "and I agree with what Hawkins J. said in *Watney* v. *Musgrave*." The words that Mr. Justice Hawkins had used were these(2), at page 246 of 5 Ex.D.: "The house, it is true,"—that is the tied house—"is or may be a valuable adjunct to the brewery, by "increasing the number of consumers; but the house, whether it "yield a profit or loss to the brewer, is not in the least connected "with the trade profit of the brewery." Lord Justice A. L. Smith, in supporting that view of Mr. Justice Hawkins had clearly indicated that this business of keeping the tied houses was wholly independent of the brewer's trade. Lord Atkinson in his speech in *Usher's* case(3), in [1915] A.C., at page 455, says this "The "decision,"—that is in the case of *Brickwood* v. *Reynolds*—"it "would appear to me from the judgment of A. L. Smith, L.J., "pp. 102–103, is based upon two propositions. (1) That the trade "of a publican in a tied house is altogether independent of the "trade of the brewer, and therefore the entire of the expenditure "of money on the repairs of the houses could not be held to be "expenditure wholly and exclusively for the purposes of the "brewer's trade since it was, in addition, expended for the benefit "of the trade of the publican. With infinite respect for the Lord "Justice I think this proposition is based upon a fallacy. The "publican's trade is the vending of the landlord's beer and none

(1) 3 T.C. at pp. 607/8.
(2) Watney and Company v. Musgrave, 1 T.C. 272 at p. 279.
(3) 6 T.C. 399 at p. 427.

(Lord Hanworth, M.R.)

" other. The house is the market-place for that beer and none " other. The brewer takes the house, ties it to his brewery, and " puts the publican into it as tenant for the very purpose of having " his beer sold in that market through the efforts of this salesman, " the tied tenant. The two trades are as dependent upon and as " connected with each other as they well can be; they are almost, " if not altogether, the same enterprise seen from different sides, " different standpoints, and I confess I am unable to see upon what " principle money designedly spent by the brewer with the sole " and exclusive object of maintaining this market-place for his own " goods, and promoting, through the action of this salesman, the " sale of those goods therein, ceases to be an expenditure wholly " and exclusively for his (the brewer's) trade because incidentally " it may benefit the salesman." I have looked back at *Brickwood* v. *Reynolds* and *Watney* v. *Musgrave*, in order to mark the distinction which is drawn by Lord Atkinson in his judgment in which he agreed with the rest of the noble Lords, as showing that this business of providing the tied houses as a part, and an integral part, of the brewer's business. Under those circumstances in *Usher's* case they did allow the totality of the expense incurred in providing the tied houses and executing the repairs to be deducted from the totality of the profits made. So here, if there was found to be a loss in carrying on this provision of licensed houses which forms a part of the business, as the Commissioners tell us, I suppose that would be carried as a debit to the profit and loss account against the profits which are again considered and treated as a whole—£200,000 in each year; but it is quite a different matter to say that when the houses have been provided, and an expense has been incurred in respect of one, though a profit has been made in respect of another, the individual loss in the particular house can be brought and set against the profits which are earned, and which are treated in bulk, and that *Usher's* case justifies such an attempt. It appears to me that *Usher's* case—in which, be it observed, there were no premiums if and so far as that may be relevant matter for consideration—deals with the business as a whole, and treats the provision of the houses as a part of the business of the brewer. We have now, upon the materials before us, a clear indication that the business of Messrs. Hoare had these two limbs, and that in the case of the department which is concerned with the provision of the tied houses there ought to be an aggregation of the sums received, or sums expended in the matter of that department, with the result to be carried to the profit and loss account of the business as a whole; whereas the argument of Mr. Latter is that, quite apart from that account or department of the business, individual items can be looked at, and if there is a particular loss established at the " King's Head ", or the " Greyhound ", or the " White Hart ", or whatever else it may be, that particular loss may be put against the aggregation of the profits. I desire emphatically

(Lord Hanworth, M.R.)

to say that the assessment of the houses must be under Schedule A, and that it is quite right to assess these houses, and to take their assessment as being the value of the house. Nothing that I am saying impinges at all upon that, but I find no warrant in *Usher's* case for splitting up the totality of the expense of the tied houses, and then, in individual cases where there is a loss, asking that that particular loss should be deducted from the total profits which are treated as a whole, and are not treated as belonging to or to be separated out among the individual houses where the profits are obtained. It is really one and the same trade, the vending of the beer and providing the place to sell it. Those two sides are part of the same business, and I think not only Lord Atkinson says that, but, on page 467, Lord Sumner says(1) : " I think that the " judgment appealed against really finds facts, and does not, as it " was supposed to do, rule the law, when it declares that the rents " forgone are losses of annual value and not expenses of trade, that " the described expenses are moneys laid out partly for the " publican's trade, and, therefore, not ' wholly and exclusively ' " for the brewer's trade, and that such moneys enter into a com- " putation of the profits or gains of the brewer's trade because, in " the view of the Court, they also enhance the value of his " goodwill," clearly indicating that he was treating it entirely as a matter of the trade of the brewer.

Now, I will only add this. In the *Salisbury House* case two of the learned Lords indicate that *Usher's* case has no relevance to that, and certainly nothing that we are deciding to-day in any way alters or varies the principle laid down in the *Salisbury House* case ; but what we are unwilling to do is to say that the principle of *Usher's* case applies so as to enable some individual and particular loss on a house to be set against the totality of the profits of the business as a whole when the business of providing the premises for the sale of the beer is an integral part of the business, and that part of the premises ought to be dealt with as a department in respect of which there must be items both to be debited and credited in the account.

Under those circumstances, the appeal will be allowed, and the case will have to go back to the Commissioners for the purpose of ascertaining what the true sum is at which the assessment should be fixed ; but we can deal with the matter and with the costs after my learned brothers have delivered their judgments.

Slesser, L.J.—After the exhaustive judgment of my Lord in this case it is not necessary for me to say many words to explain why I find myself in agreement with him.

In my view, this case raises a problem which was not decided in the case of *Usher's Wiltshire Brewery, Limited* v. *Bruce*. The

(1) Usher's Wiltshire Brewery, Ltd. *v.* Bruce 6 T.C. 399 at p. 435.

(Slesser, L.J.)

problem is this. In *Usher's* case there was a difference between the value of the house to the world, and the rent which was given by a tied tenant, and there was therefore an expense to which the brewery company were put in obtaining a market for the sale of their beer. No question there arose that there was not actually an expenditure or a loss on the part of the brewers, and the question which had to be decided, and was decided, was whether that admitted expenditure which is set out in the Case, either in the case of repairs, or the difference between rent of leasehold houses and the Schedule A assessment, or fire insurance premiums and legal costs, and so forth, was or was not expenditure which fell within Rule 3 of Schedule D, as being disbursements wholly and exclusively laid out or expended for the purpose of the trade. In the present case, now that the matter has fully been considered by the Commissioners, it appears that as regards the whole of the properties in question, if they are to be treated as one market in the aggregate, there is, in fact, no expense to which the brewers are put in order to earn their profits by the provision of a market; and, if that is the right way of looking at the matter it must necessarily be an end of the case. If there be no expense at all, the problem whether the expense can properly be deducted, or whether it cannot, does not arise. What Mr. Latter argues, as I understand him, is this, that the subject matter which is here considered consists of a number of different houses; that at any rate in some of the cases there is an expense or difference between the rent which would have been obtained from a free tenant, and a tenant who is tied, that, at any rate, he can point, in four or five cases, to individual expenses or losses, and those expenses, he says, may properly be regarded as expenses under *Usher's* case, and so fall to be deducted under Rule 3 (a). It seems to me, stripped of certain complications—some of which have disappeared as the result of decisions in this Court and in the House of Lords in the *Salisbury House* case—and of extraneous matter, that the sole question which remains is whether one can or cannot so aggregate the expenses as to ascertain whether there is or is not in the result a loss. I have come to the conclusion that it is right and proper that these expenses should be aggregated; in other words, that one should look at the market as a whole, and not at individual parts of that market. Lord Atkinson in *Usher's* case at page 457 in [1915] A.C. said this(1): "but the balance of the profits and gains of the "brewer's trade would, according to the methods of practical "business men, be ascertained . . . . . by deducting from the "receipts what it costs to earn them." He is speaking there of the particular expense of having a tied tenant, applying the doctrine which was laid down in the case of *Russell* v. *Town and County Bank*(2) as to the installation of a manager. Reading that language,

(1) 6 T.C. at p. 428. (2) 2 T.C. 321.

(Slesser, L.J.)

and the language of the other learned Lords, I think it is clear that the House was looking to the market as a whole, and not looking to whether there might be some expense in some particular item, or some particular part of the market, but saying broadly: It being a necessary incident of a brewer's business that he shall have a market to vend his products, is there, or is there not, an expense incurred in the installation and maintenance of that market? I can see no authority at all for itemising the various expenses on the various public-houses in the way suggested by Mr. Latter. I agree with my Lord that the whole of the authorities point in the contrary direction. That view, in my opinion, concludes this case, if the matter is to be taken as a whole. So regarded, it is clear that this market, so far from costing the brewers anything, either costs them nothing, or is positively a source of profit to them. Whether that source of profit be taxed or not does not really here arise. It has been decided that it cannot be taxed under Schedule D; that is not the question we have now to consider. The sole question is whether you have to look at the market as a whole, or parts of the market individually. If this had been one market in which there were many booths, I fancy the question could scarcely have arisen. It is a geographical accident, in my view, that these various public-houses are not entirely in the same curtilage, or in the same neighbourhood. It is only the geographical fact that some are at Walthamstow, some at Epsom, and some at Beckenham, and in other parts of the Kingdom, that has made it appear possible that they might be regarded separately. I think there is one market, and on that market the brewers have failed to prove that they have been put to any expense for the purpose of their trade, and, therefore, I think they are not entitled to the deductions provided in Schedule D, Rule 3. Consequently this appeal must be allowed.

Romer, L.J.—I agree. The questions arising on this appeal, except in so far as they are covered by authority, as it seems to me fall within a very small compass. The principle to be applied is the principle that was established in the House of Lords in the case of *Smith* v. *the Lion Brewery Company*(1). That principle was described by Lord Atkinson in the later case of *Usher's Wiltshire Brewery, Limited* v. *Bruce* as follows(2); "Stated broadly, I "think that doctrine"—"that doctrine" is the doctrine of *Smith* v. *Lion Brewery Company*—"amounts to this, that where a "trader bona fide creates in himself, or acquires a particular estate "or interest in premises, wholly and exclusively for the purpose of "using that interest to secure a better market for the commodities "which in his trade he vends, the money devoted by him to "discharge a liability imposed by statute on that estate or interest,

(1) 5 T.C. 568. (2) 6 T.C. 399 at p. 422.

(Romer, L.J.)

" or upon him as the owner of it, should be taken to have been " expended by him wholly and exclusively for the purposes of his " trade;" and, following that principle which was held by the House of Lords in this case of *Usher's Wiltshire Brewery, Limited*, that where a brewery company, as a necessary incident of the profitable working of its brewery business, acquires and owns licensed houses which it lets to tied tenants who, in consideration of the tie, paid a rent less than the full annual value, the company in respect of that loss of rent was entitled to set off or to deduct that sum lost in rent from the profits of its business as brewers for the purposes of assessment to Income Tax on the ground that it was a sum exclusively allowed by the brewery company for the purposes of this business.

Now in that case one of the sums that was allowed to be deducted from the profits was a sum of £2,134, which was stated to be the difference between the rents on leasehold houses, or Schedule A assessments on freehold houses on the one hand, and rents received from the tied tenants of those houses, on the other hand. Lord Sumner in dealing with that claim said this (1) : " In " principle, therefore, I think that in the present case rent forgone, " either by letting houses, which the brewers own, to tied tenants " at a low rent instead of to free tenants at a full rack rent in the " open market, or by letting houses in the same way, which they " hire and then re-let at a loss, is money expended within the first " Rule applying to both of the first two Cases of Schedule D and " that upon the findings of the Special Case, which are conclusive, " it is ' wholly and exclusively expended for the purposes of such " trade.' " Now in that case the tied tenants had not paid any premiums in respect of their leases; in the present case they have; and it is obvious that it is impossible to ascertain what rent has been forgone in the case of tied tenants by comparing the rent actually paid by a tied tenant, who has paid a premium for his lease, with the assessment under Schedule A. It seems to me that either one of two courses must be adopted: You must either ascertain what rent the tied tenant would pay if he had not paid a premium—and ascertain that in the way indicated by Mr. Stafford Cripps, by spreading the premium over the term of the lease, and compare that sum with the figure under Schedule A —or you must ascertain what rent a free tenant would pay if he had paid the premium which the tied tenant had paid, and compare that rent with the rent paid by the tied tenant. As I understand the Crown would strongly object to the adoption of this second method of ascertaining the rent forgone, and they say, and they may well be right in saying, that for all purposes of Income Tax the assessment under Schedule A is to be taken as the annual value of the premises. It is quite unnecessary in the present case to

(1) 6 T.C. 399 at p. 437.

(Romer, L.J.)

decide, however, which of the two methods should be adopted, because, whether you adopt one, or whether you adopt the other, it appears that, though in some cases the tied tenants are paying less than the annual value, or what a free tenant would pay, and that in some cases they are paying more, yet, on the whole, the rents paid by the tied tenants are in excess of the total annual value, or the aggregate of the rents that would be paid by free tenants, as the case may be. Mr. Latter says that he is entitled to deduct the excess of the annual value, or what the free tenant would pay over the rent paid by the tied tenants where there is such excess, and that he is entitled to disregard altogether those cases where the tied tenant is paying more that the annual value fixed by Schedule A, or the amount that a free tenant would pay.

The only question left on this appeal, as it seems to me, is whether he is right in saying that. In my opinion, for the reasons that have been given by the Master of the Rolls and Lord Justice Slesser, it is not open to him to do that. For myself, I cannot understand how for the purpose of ascertaining the cost to the brewers of providing tied houses for the purposes of their trade, they are entitled to disregard the profits made, where profits have been made, by granting leases to tied tenants, and looking only at the cases where a loss has been made by granting such a lease. In my opinion, the thing must be looked at as a whole. I agree that this appeal accordingly should be allowed.

Lord Hanworth, M.R.—Mr. Cripps and Mr. Latter, is it necessary to send this case back to the Commissioners?

Mr. Stafford Cripps.—Yes, I think it will have to go back.

Mr. Latter.—It will have to go back, unless it is agreed. I should think there will be very little difficulty in agreeing.

Lord Hanworth, M.R.—It has to go back unless it is agreed.

Mr. Stafford Cripps.—If your Lordship pleases.

Lord Hanworth, M.R.—Mr. Cripps, our view about costs is this. We think Mr. Justice Rowlatt had not the advantage of having before him the full materials that we have had, and we have decided undoubtedly, in considerable measure, on the case as supplemented. Under those circumstances we think the right course should be that there should be no costs in this case up to yesterday, but that you are entitled to the costs of the hearing yesterday and to-day.

Mr. Stafford Cripps.—If your Lordship pleases.

Lord Hanworth, M.R.—There will be no costs previously.

Mr. Stafford Cripps.—If your Lordship pleases.

Lord Hanworth, M.R.—I reserved the costs specifically on November 2nd, 5th and 7th, I think.

Mr. Stafford Cripps.—Yes, my Lord. That cuts it all out prior to coming back here.

Lord Hanworth, M.R.—Yes.

Mr. Stafford Cripps.—The appeal will be allowed with the costs of this hearing in the Court of Appeal.

Lord Hanworth, M.R.—Yes, it will be costs for the hearing on the 14th and 15th of October.

Mr. Stafford Cripps.—My Lord, the Crown have actually paid the costs before Mr. Justice Rowlatt. I suppose that means that they will be returned?

Lord Hanworth, M.R.—Yes, that will be so; you need not have any anxiety.

Mr. Stafford Cripps.—Your Lordship intends that there shall be no costs on either side prior to the hearing yesterday and to-day?

Lord Hanworth, M.R.—Yes.

Mr. Stafford Cripps.—I wanted to get it clear that your Lordship did not mean that things should stay as they are, but that there should be no costs.

Lord Hanworth, M.R.—Yes.

Mr. Stafford Cripps.—If your Lordship pleases.

The Company having appealed against the decision in the Court of Appeal, the case came before the House of Lords (Lord Buckmaster, Lords Warrington of Clyffe, Atkin, Tomlin and Macmillan) on the 27th and 30th November, 1931, when judgment was reserved.

Judgment was delivered on the 23rd February, 1932, when it was held that in determining the amounts to be allowed as deductions in respect of deficiencies of rent (under the decision in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*[1]), each tied house must be considered separately; and that there was no authority for restricting the deductions in respect of deficiencies of rent by the amounts of the excess rents arising from tied houses let at rents exceeding the Schedule A assessments or rents paid.

It was held, further, that in computing the appropriate deduction for a particular tied house account must be taken of any premium paid as well as of rent. The Case was remitted to the Commissioners to determine, in the case of each tied house for which premiums were paid, what sum should be added to the rent in respect of the premiums.

Mr. A. M. Latter, K.C., and Mr. C. L. King appeared as Counsel for the Company and the Attorney-General (Sir W. A. Jowitt, K.C.), the Solicitor-General (Sir T. W. Inskip, K.C.) and Mr. R. P. Hills for the Crown.

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(1) 6 T.C. 399.

JUDGMENT.

Lord Buckmaster (read by Lord Macmillan).—My Lords, the Appellants are a limited company carrying on the business of brewers and owning a number of licensed houses, many of which are let to tenants who are compelled to acquire from or through the Appellants all beers, wines and spirits sold upon the premises so let. They also own a number of free houses, but the question in the present case does not apply to them. All these houses are assessed under Schedule A, at amounts fixed by determining the annual value for purposes of the Schedule, a value which may be less or more than the rent actually paid under the lease or agreement which creates the tenancy. So far as the tied houses are concerned, if in any case rent paid by the tenant is less than the amount of the assessment under Schedule A, it has been decided in the case of *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*(1) that the Appellants are entitled in preparing their accounts for assessment under Schedule D to deduct as an expense the difference between the rent received and the Schedule A assessment. The principle underlying this decision is that such houses were solely and exclusively acquired for the purpose of the Appellants' trade, and that by means of their exclusive use as a channel for the sale of the Appellants' goods, the profits upon which they are to be taxed under Schedule D are earned. They are in fact regarded as business premises of the undertaking. The decision referred to places that point beyond controversy. In the present case, while accepting that principle, the Commissioners for Inland Revenue have sought to treat all the tied houses as a single entity and, by bringing in the surplus rent which in certain cases the Appellants receive over and above the Schedule A assessment, they seek to reduce the amount of the allowances to which the Appellants are entitled in cases where the rent is below such assessment and by this means to modify the amounts they are allowed to charge as expenses in their profit and loss account by virtue of the decision in *Usher's* case.

The Commissioners for Special Purposes decided the dispute in favour of the Appellants and their opinion was confirmed by Mr. Justice Rowlatt but reversed by the Court of Appeal. The judgment of the Court of Appeal depends upon the view that the decision in *Usher's* case treats the business as a whole and regards the provision of all the houses treated as one entity as part of the business. I find it difficult to follow this reasoning from examination of the case, nor does it seem to me consistent with the effect of the case of *Fry* v. *Salisbury House Estate, Ltd.*(2), which decided that profits made from dealing with house property, subject to assessment under Schedule A, over and above the amount of such assessment were not subject to tax. From this decision it would follow that if in all the houses in the present case there had been excess rentals, that excess could not be taxed, but where, as here, the assessments

(1) 6 T.C. 399. (2) 15 T.C. 266.

(Lord Buckmaster.)

are in some cases above and in some cases below the rent, the fact of using the rent to reduce the allowances to which the Appellants were entitled, where the rents were deficient, would result in causing the Appellants to pay the tax upon the surplus rents, and that notwithstanding the decision in *Fry's* case, which distinctly holds that such surplus rents are immune.

The assessments under Schedule A are each of them separate assessments in respect of each separate house and, in respect of each such house in appropriate conditions, the principle of *Usher's* case applies and I find it difficult to see how the allowances the Appellants are thereby entitled to make can be reduced because in a totally distinct property different conditions apply. I can see no ground upon which all the houses can be made into one and, unless they are so unified, the Appellants are entitled to succeed.

I am not quite clear as to the extent to which the question of premiums received is still a matter of controversy, but it ought not to be difficult of determination. In all cases where rents are below the Schedule A assessment, the premiums received in respect of such houses must be brought into the account for the purpose of determining what is the actual expense to which the Appellants have been put in maintaining the house as part of their business. The actual method by which the premium is so to be dealt with is not before us, but it ought not to be difficult of calculation.

For these reasons, I think the Appellants are entitled to succeed, the judgment of the Court of Appeal should be set aside, and the judgment of Mr. Justice Rowlatt restored.

Lord Warrington of Clyffe.—My Lords, the Appellants, Hoare & Co., Ltd., are the well-known brewers of that name. They are the owners of a large number of " tied " houses, some freehold and some leasehold. They let these houses to publicans who are under an obligation to take their supply of beer exclusively from the Appellants. In the case of some of these houses they are let at rents less than the annual value under Schedule A, in the case of freeholds, and less than the head rent, in the case of leaseholds. The Appellants also, in some cases, bear the expense of repairs and other expenses usually falling on tenants. They accept these reduced rents and make these payments for the purpose of thereby increasing the quantity of beer taken by the tenants and thus enhancing the profits of their trade as brewers. It is not disputed by the Crown that under the decision of this House in *Usher's Wiltshire Brewery Company* v. *Bruce*, [1915] A.C. 433(1), the difference between the actual rent taken and the annual value or the rent payable to the head lessor, as the case may be, and the amount of the expenses so incurred may be treated as costs wholly incurred in earning the profits of their trade and therefore as a proper debit item in the

(1) 6 T.C. 399.

(Lord Warrington of Clyffe.)

account of profits and gains under Schedule D of the Income Tax Act. In some cases, however, the rents received by the Appellants exceed the annual value or the rent, as the case may be, and the Crown contend that the amount of such excess must be brought into the account under Schedule D, but so far only as is required to wipe out the debit above-mentioned, and that for this purpose the whole of the houses must be aggregated instead of treating each house as a separate item of assessment as it is under Schedule A.

This contention of the Crown, which is disputed by the Appellants, raises the whole question now in dispute between the parties.

The Commissioners and Mr. Justice Rowlatt decided this question in favour of the Appellants, but the Court of Appeal (Lord Hanworth, Master of the Rolls, and Lords Justices Slesser and Romer) took the opposite view. Hence this appeal.

A further point was raised in the Courts below. In some cases the Appellants charged and received a premium in addition to the rent and the Crown contended that such premium ought to be taken into account in calculating the amount of the difference between the rents paid by tenants and the annual value or the head rent, as the case may be, namely, in ascertaining whether in particular cases the receipts from the houses were in fact less than the annual value or the head rent. It is now conceded by the Appellants that the premiums should in some way be taken into account and therefore this question is not now in issue, and the sole question is that stated above.

The solution of this question depends, in my opinion, upon the true effect of *Usher's Brewery* case(1) *ubi supra* and of the more recent decision in this House of *Fry* v. *Salisbury House Estate, Ltd.*, [1930] A.C. 432(2).

Before coming to a consideration of these cases, however, it is well to remind oneself of the relevant provisions of the Income Tax Act. Tax under Schedule A is to be charged in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom for every twenty shillings of the annual value thereof. It is quite clear from the General Rule No. I for ascertaining this annual value that for this purpose each item separately let must be taken by itself. Under this Schedule, therefore, the aggregation contended for by the Crown has no place.

To turn now to Schedule D, Rule 5 relating to Cases I and II provides that the computation of tax shall be exclusive of profits or gains arising from lands, tenements, hereditaments or heritages occupied for the purpose of the trade. It is also provided by Rule 3 that no sum shall be deducted in respect of any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade.

(1) 6 T.C. 399. (2) 15 T.C. 266.

(Lord Warrington of Clyffe.)

It seems to me to be now settled by the authority of *Fry* v. *The Salisbury House Estate, Ltd., ubi supra*, that the profits and gains arising from the ownership of lands, whether used for the purposes of a trade or not, are determined exclusively by reference to annual value and not by the result of an account of receipts on the one hand and expenses on the other, and that accordingly the rents received cannot be included in an account under Schedule D of the profits and gains of the trade for the purposes of which the lands are used.

Usher's case is in no way inconsistent with this view. All that was decided in that case was that certain expenses incurred by the owners and certain items of rents forborne by them for the purpose of extending their trade might properly be treated as money wholly and exclusively laid out or expended for the purposes of such trade and therefore forming a proper item of debit in the account under Schedule D. The Crown do not contend, and could not in my opinion successfully contend, that this principle does not apply to the cases of the houses in the present case in which the rents have been forborne or expenses incurred as above-mentioned. What they say is that the excess of rents over annual value in the case of other houses should be set off against the deficiency, conceding that this should be done only so far as is necessary to wipe out the deficiency as a debit item in the account under Schedule D. The concession seems to me to make no difference; either the rents come into the account or they do not. If they do, then they must come in as a credit item, whether or not it is more than sufficient to wipe out the debit item. It reminds me of the concession, unsuccessfully offered in *Fry's* case, that the annual values should be allowed as a reduction from the rents there sought to be included in the account under Schedule D.

The fact is that the claim of the Crown really depends on the contention that houses should be treated as an aggregate mass, so that a loss or expenditure in respect of certain items making up that mass should be wiped out by a surplus of receipts in others. In my opinion, there is no authority for this view. It is true that in the record of *Usher's* case the totals of the sums representing rents forborne and expenses incurred are alone stated, but in my opinion that was only done as a matter of convenience to avoid setting out a large number of small items making up those total sums.

There is no suggestion in the case that the decision in any way turned upon the absence there of any such surplus as exists or is said to exist here. The question this House has to decide did not arise.

Items of receipt and expenditure respectively cannot, in my opinion, be set off one against the other unless they are both properly included in one account. In the present case, although the rents forborne and the expenses incurred in the case of certain houses

(Lord Warrington of Clyffe.)

form a proper item of debit in the account under Schedule D, the rents received in the case of other houses are excluded from that account under the authority of *Fry's* case.

For these reasons, I am of opinion the claim of the Crown fails and this appeal should be allowed with costs here and below and the decisions of Mr. Justice Rowlatt and the Commissioners should be restored.

The case, however, should be remitted to the Commissioners to determine what sum in each case in which a premium was charged should be added to the rent in respect of such premium.

Lord Atkin.—My Lords, the solution of the problems presented by this case does not appear difficult in view of decisions of your Lordships' House. The Appellants, who are brewers, own about 600 leasehold or freehold licensed houses let to tenants who are tied to the Appellants for all the beer, wine and spirits sold in the house. They also own a few free houses, with which this case is not concerned. The question arises in respect of the assessment of the Appellants to Income Tax under Schedule D. When the tied tenant pays a rent in the case of leasehold houses less than the rent payable by the Appellants, or in the case of freehold houses less than the Schedule A valuation, the Appellants have treated the difference as a trade expense following the decision in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433(1). The Crown raise no objection to this, but make two contentions. They say : (1) There ought to be brought into account the sums which other tied tenants pay in excess of the Schedule A valuation or of the rents paid by the Appellants so far as is necessary to compensate the alleged expense but no more. (2) In calculating the amount of the rent actually received from the tied tenant there should be brought into account any premiums paid by the tenant when his lease was granted. And this would apply both to determine the amount of the actual expenses charged in each case and also to ascertain the excess amounts which are relevant under contention (1).

My Lords, it appears to me plain that the first contention is ill-founded. Whether the expense allowed in *Usher's* case is based upon a deduction of the Schedule A valuation as on premises used in the brewers' business mitigated by the sum received from the tied tenant, or whether it is regarded as a notional sum paid for the advantage of the tie, it is allowed as an expense incident to the particular house in respect of which it is incurred. It in no way differs from expenses for repairs or compensation levy or insurance premiums on particular houses such as are also authorised by the same decision. They do not cease to be particular because the sum of them can be expressed in one total and is so brought into the account. When brought in, they rank as debit items in the general

(1) 6 T C. 399.

(Lord Atkin.)

account of profits for Schedule D purposes. The reason why the surplus rents cannot be set against them is that such rents find no place in a Schedule D account. The decision in *Fry* v. *Salisbury House Estate, Ltd.*, [1930] A.C. 432(1), makes this clear. Applying the words of Lord Dunedin at page 440(2): " ' You cannot bring " ' out that balance of profit without taking the rents I receive *in* " ' *computo*. Now, these rents are also part of my income or " ' property, and the statute says that any income which represents " ' the value of real property is to be assessed in the manner directed " ' under Schedule A.' " It makes no difference whether you are seeking to establish a balance of profit or destroy an item of loss. It is in the present case admitted by the Crown that they cannot bring the totality of rents paid and received into the Schedule D account. I see no justification in law or in business for taking a department of the trade, " a tied house rent department ", and investigating whether that showed a profit or a loss, rejecting the loss but not charging the profit. The fact is that if the Crown's contention were to prevail the whole of the rent accounts would have to be brought into account on both sides in order to show whether there was a general profit or a loss. And this is exactly what is prohibited by the *Salisbury House* case. If such a procedure as is contemplated here were permissible I cannot see any reason why it should not extend to other expenses such as repairs and insurance premiums, which has never yet been suggested. I think, therefore, on the first issue the Crown fails.

On the second contention, however, I think that they are clearly right, though the application in this case will be limited to the particular houses in respect of which deductions are claimed. The cases where premiums are concerned only appear to number about thirty. Counsel for the Appellants agreed that premiums should be taken into account for the purpose of ascertaining the true rent actually paid by the tied tenant. What was suggested was that where it could be shown that a premium of equivalent amount would also be paid with a higher rent without a tie, the diminution in rent should be treated as paid for the tie. The only question seems to me to be whether the tied rent, plus the premium, is in fact less than the Schedule A valuation or the rent paid by the Appellants on freehold or leasehold houses respectively. If it is not, there is no expense which can be brought into account. The case must go back to the Commissioners for them to assess the figures where premiums are concerned. The appeal must be allowed and the order of the Court of Appeal varied in accordance with your Lordships' decision.

Lord Tomlin (read by Lord Thankerton).—My Lords, there is one principle of Income Tax law which is now indisputable, namely, Schedule A and Schedule D are concerned with distinct subject matters of taxation, and hereditaments are necessarily taxed under

(1) 15 T.C. 266. (2) *Ibid.* at p.307.

(Lord Tomlin.)

Schedule A even though they belong to one whose business is the letting of them. Further, any hereditament, the rent of which exceeds the Schedule A valuation, being taxable under Schedule A and Schedule A alone, is immune from taxation under Schedule D in respect of such excess (*see Fry* v. *Salisbury House Estate, Ltd.*, [1930] A.C. 432(1)).

The subject carrying on a trade or business is entitled to treat as a deduction, in the account prepared for the purposes of Schedule D, any expenses exclusively incurred in earning his profits.

In *Russell* v. *Town and County Bank, Ltd.*, 13 A.C. 418(2), your Lordships' House was of opinion that where a manager was allowed living accommodation in part of the bank's business premises free of rent, the annual value of that part of the premises occupied by the manager could be treated by the bank as an expense incurred in earning the profits, because it was in effect an addition to his salary.

In *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433(3), where tied houses of a brewery company were held by the tenants at rents below the Schedule A valuations, your Lordships' House, as I understand the case, treated the difference between the rent and the valuation in the case of each house as rent foregone or money spent exclusively for the purpose of earning profits and held that expense to be one which could be deducted for the purpose of ascertaining profits and gains under Schedule D.

In the present case, the brewery company held many tied houses, in respect of some of which the rents received were in excess of the Schedule A valuations, and in respect of others of which the rents received were less than the Schedule A valuations.

The Crown, while admitting that the excess of rents over valuations cannot, in respect of any house, be taxed under Schedule D, maintain that the brewery company are not entitled to be allowed by way of deduction anything from the account for rent foregone in respect of any house the rent of which is less than the Schedule A valuation, but are only entitled to a deduction if on an account taken of the rents of all the tied houses it be shown that the total rents are less than the total of the Schedule A valuations.

Mr. Justice Rowlatt decided in favour of the Appellants, but the Court of Appeal have acceded to the arguments of the Crown and the brewery company appeals to your Lordships' House.

I cannot bring myself to think that the contention of the Crown is consistent with the decisions already given by your Lordships' House.

No such account as the Crown contend for was, as I read the case, referred to or contemplated by your Lordships in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*. It is true the items in respect

(1) 15 T.C. 266. (2) Russell *v.* Aberdeen Town and County Bank, Ltd., 2 T.C. 321. (3) 6 T.C. 399.

(Lord Tomlin.)

of several houses were in that case aggregated and referred to as one sum, but that was, I think, merely a matter of convenience and not because any account of rents had to be taken.

In effect, the Crown are seeking to bring into charge under Schedule D the thing, or part of the thing, which admittedly is not chargeable at all, *viz.*, in the case of every house where the rent exceeds the Schedule A valuation, the amount of the excess. It does not seem to me to be any the less a bringing into charge because the thing, or the part of the thing, brought in is brought in for the purpose of wiping out deficits arising in cases where the rents do not equal the Schedule A valuations.

In my opinion, therefore, the Crown's contention on this point ought not to prevail.

Upon the minor point whether, where the tenant has paid a premium, regard ought to be had to that premium in estimating the rent actually paid, the Crown are in my opinion right in contending that the premium must be taken into account. Indeed, the point was in effect conceded by the Appellants at the bar.

In my judgment, the appeal should be allowed, the case being remitted to the Commissioners to assess the figures in the cases where premiums have been paid.

Lord Macmillan.—My Lords, the assessed annual value of each of the tied licensed houses, of which the Appellants are the freehold or leasehold proprietors, is admittedly the subject of taxation under Schedule A. The annual value assessed in the prescribed statutory manner, on which the tax is levied, is in some cases less and in some cases more than the rents which the Appellants in fact receive from those to whom they let their houses. Where the rent received by the Appellants is less than the assessed annual value, the Appellants, in virtue of the decision of this House in *Usher's Wiltshire Brewery, Limited* v. *Bruce*, [1915] A.C. 433(1), are entitled, in computing the balance of the profits of their business for the purpose of assessment to Income Tax under Schedule D, to deduct the difference as an expense necessarily incurred in earning their profits. It is not suggested that, in the converse case, where the rent received by the Appellants is in excess of the assessed annual value, they should be required to carry the excess to the credit of their profits under Schedule D; but it is submitted that, before the total of the deficiencies to be deducted is ascertained, there should be set off against those deficiencies the excesses received, in diminution *pro tanto* of the deduction to be made. The deduction, it is admitted, cannot be converted into an addition by bringing the excesses into computation, but it is argued that they may be utilised up to the point of extinguishing the deductible deficiencies altogether.

(1) 6 T.C. 399.

(Lord Macmillan.)

I am of opinion that this is not permissible under the Income Tax Acts, however reasonable it may appear. It has been definitely settled by the decision of your Lordships' House in *Fry* v. *Salisbury House Estate, Ltd.*, [1930] A.C. 432(1), that rents received by the owners of property, the annual value of which is taxed under Schedule A, cannot be assessed to any effect under Schedule D, notwithstanding that the rents so received exceed the annual value on which the tax under Schedule A has been levied. The present contention of the Respondent is, in my opinion, clearly untenable in view of that decision, for his contention is that a part at least of the rents received shall be reckoned in the computation of the profits of the Appellants' business, namely, that part of the rents which is in excess of the assessed annual value. No doubt, he does not put it that way, but that is in effect what he asks, for to use part of the rents in diminution of a deduction from the profits is just to that extent to add the rents to the profits.

As regards the estimation of the rent where a premium has been paid by the Appellants' tenants, I am clearly of opinion that in such cases regard must be had to the premium paid.

The appeal should accordingly be allowed and the appropriate order pronounced.

Questions put:

That the Order appealed from be reversed.

The Contents have it.

That the Order of Mr. Justice Rowlatt be restored and the case be remitted to the Commissioners to determine, in each case in which premiums are charged, what sum shall be added to the rent in respect of such premiums, and that the Respondent do pay to the Appellants their costs here and below.

The Contents have it.

[Solicitors :—Solicitor of Inland Revenue; Godden, Holme & Ward.]

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(1) 15 T.C. 266.