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VOL. XVI.—PART V.

No. 804.—High Court of Justice (King's Bench Division).—
2nd June, 1930.

Court of Appeal.—20th and 21st October, 1930.

House of Lords.—23rd and 24th November, 1931.

The Union Cold Storage Co., Ltd. *v.* Adamson (H.M. Inspector of Taxes).(1)

Income Tax, Schedule D, Case I—*Deductions—Payments for occupation etc. of properties abroad dependent on amount of profits—Whether a deduction in computing profits.*

The Appellant Company leased lands and premises abroad under a deed reserving a rent of £960,000 *per annum. The deed provided that if at the end of any financial year it was found that after providing for this rent the result of the Company's operations was insufficient to pay both interest on its charges and debentures and dividends at fixed rates on its preference shares and also at least* 10 *per cent. on its ordinary shares, the rent for the year was to be abated to the extent of the deficiency, repayment of rent already paid being made if necessary.*

The Company claimed that in computing its profits for the years ended 31*st December*, 1922 *and* 1923, *there should be allowed as deductions the sums of* £630,000 *(an abated amount) and* £960,000 *paid as rent in the years* 1922 *and* 1923 *respectively.*

Held, *that the payments were not "payable out of the profits "or gains" and that they were allowable deductions.*

Case

Stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London pursuant to Section 149 of the Income Tax Act, 1918, for the opinion of the High Court of Justice.

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(1) Reported (K.B.D. and C.A.) 144 L.T. 140 and (H.L.) 146 L.T. 172.

1. At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the City of London held on the 18th and 19th of February, 1929, at Gresham College, Basinghall Street, in the City of London, the Union Cold Storage Company, Limited, an incorporated company whose registered office is at 13/16 West Smithfield in the City of London (hereinafter called " the Appellant " Company "), appealed against assessments to Income Tax for the years 1923–24 and 1924–25 under Schedule D of the Income Tax Acts in respect of the profits of the Appellant Company's trade as follows :—

1923–24 ... £800,000 less £450,000 wear and tear of plant and machinery.

1924–25 ... £800,000 less £350,000 wear and tear of plant and machinery.

2. The main ground of the Appellant Company's appeal, apart from a question of depreciation which it was agreed should stand over, was that in computing its profits for the years ended 31st December, 1922, and 31st December, 1923, respectively (two of the years of average upon which the said assessments were based), there should be included and allowed as deductions two sums of £630,000 and £960,000 paid in 1922 and 1923 respectively, in the circumstances hereinafter mentioned, under an indenture of lease dated the 29th of December, 1921, and made between Sir William Vestey (now Lord Vestey) and Sir Edmund Hoyle Vestey of the first part, the Appellant Company of the second part and Messrs. Charles Auguste Kennerley Hall, James Meeres Drabble and Kenneth Stirling, all of Paris, of the third part.

A copy of the said indenture marked " A " is annexed hereto and is to be deemed a part of this Case.

3. The Appellant Company was incorporated in the year 1897 and the persons concerned in the forming of it were the present Lord Vestey and Sir Edmund Hoyle Vestey. During the period between its formation and the year 1921 the Company carried on a profitable business principally consisting of the maintenance and operating of cold storages in this country and elsewhere, as stated in paragraph 7 hereof.

A copy of the memorandum and articles of association of the Appellant Company together with copies of certain resolutions passed from time to time is annexed hereto marked " B " and forms part of this Case[1].

4. The capital of the Appellant Company was originally £30,000. The capital was increased from time to time and in 1920 it was £4,780,000, made up as follows :—

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1,480,000	6 per cent. first cumulative preference shares.
2,000,000	7 per cent. second preference shares.
1,000,000	10 per cent. "A" preference shares.
300,000	ordinary shares.
4,780,000	

There was also outstanding at 31st December, 1920, $4\frac{1}{2}$ per cent. first mortgage debenture stock issued by the Appellant Company amounting to £1,079,667.

In 1923 there was a further issue of £3,300,000 first preference shares and 700,000 ordinary shares, bringing the total share capital up to £8,780,000 and in 1925 there was a further issue of £3,220,000 6 per cent. preference shares, bringing the total share capital up to £12,000,000.

The holders of the ordinary shares have one vote for each share and the holders of the 10 per cent. "A" preference shares have one vote for each share. The holders of the 6 per cent. and 7 per cent. preference shares have no voting rights unless (*inter alia*) the dividends are passed.

5. When Messrs. Vestey decided to form the Appellant Company in 1897 they approached Messrs. Sing, White & Co., stockbrokers, of Liverpool, and asked for their assistance. They desired to have an outside director on the board to look after the interests of the outside public who hold shares or debentures issued by the Company. Accordingly, Mr. James Sing, a member of the said firm, was appointed a director and was chairman of the board from 1897 until 1913, in which year he died, and his brother, Mr. Roger Percy Sing, succeeded him and has remained chairman of the board. Mr. R. P. Sing's main function as a director has always been, and is, to represent and watch over the interests of the members of the public who have invested their money in the Company, namely, the holders of preference shares and debenture stock. In 1920 and 1921 the other directors were Lord Vestey, Sir Edmund Hoyle Vestey, Mr. Horsfield, Mr. Bundey, Mr. Samuel Vestey and Mr. Percy Vestey, the two latter being managing directors.

6. Up to the year 1911 the whole of the ordinary shares (then £300,000) were held by Lord Vestey and Sir Edmund Hoyle Vestey. In 1911 these shares were converted into 10 per cent. "A" preference shares and a further £300,000 ordinary shares were issued. The whole of those ordinary shares were held by Lord Vestey and Sir Edmund Hoyle Vestey who held (in addition) a certain number of the preference shares.

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In 1918 the Vesteys transferred the whole of their ordinary shares, *viz.*, 300,000 shares of £1 each, to The Western United Investment Company, Limited (hereinafter called "the Western "Company"), which was incorporated on the 26th of August, 1918.

The Western Company holds by itself or its nominees (some of whom are employees of the Appellant Company) the whole of the £1,000,000 ordinary shares of the Appellant Company and some of the 10 per cent. "A" preference shares of that company.

A copy of the memorandum and articles of association of the Western Company is annexed hereto marked "C" and is to be deemed part of this Case(1).

There are four "management" shares of the Western Company which are held respectively by Lord Vestey, his son Mr. Samuel Vestey, Sir Edmund Hoyle Vestey and his son Mr. Ronald Vestey.

The ordinary shares of the Western Company were applied for and allotted direct to the Public Trustee, Mr. Samuel Vestey and Mr. William George Bundey, who paid cash for them, and all the shares in the Western Company, other than the four management shares hereinafter mentioned, stand in the name of the Public Trustee, Mr. Samuel Vestey and Mr. Ronald Arthur Vestey under a settlement dated 31st July, 1919, whereby Lord Vestey and Sir Edmund Vestey settled the same upon trust to pay annuities to employees of the Appellant Company, certain relatives of the settlors and other persons and, subject thereto, upon trust for the descendants of the settlors.

The four Vesteys, who hold the management shares, control the Western Company. Article 5 of the articles of association of that Company provides :—

"The said ordinary shares shall not confer on the holders for "the time being thereof the right to attend or vote either in person "or by proxy at any general meeting or to have notice of such "meeting or to have any voice in the management or control of "the Company or to appoint directors or to interfere in such "management or control or to inspect the account books and "documents of the Company (except as by law entitled) and such "holder shall be bound by the accounts from time to time furnished "by the directors."

Article 6 provides :—

"The said management shares shall confer on the holders for "the time being thereof the right to the management of the business "and the control of the Company, and such holders shall alone be "capable of being directors of the Company. The said management "shares shall not confer the right nor entitle the holders for the "time being to any dividend, interest or other payment of a like "nature out of the funds, profits or capital of the Company "nor the right in a winding-up of the Company to any "repayment of capital or other payment of a like nature

(1) Not included in the present print.

"in respect of such shares. The said management shares "shall not entitle the holders for the time being thereof nor shall "they be entitled to or be paid any remuneration or fees for their "services as such directors as aforesaid or in connection with their "management of the business or control of the Company."

7. The head office and seat of direction of the Appellant Company is and always has been in the United Kingdom and until the year 1915 it carried on either directly or through subsidiary companies a world-wide business. In particular, besides a very large trade in the United Kingdom, it carried on extensive trade in and with the Argentine, China and Russia. It owned cold stores and refrigerating and other plant and machinery in Russia at Riga, Petrograd and Moscow, and in China at Hankow, Singargee and Shanghai, and in the year 1915 it commenced the erection of large works at Zarate in the Argentine. The Appellant Company owned the whole of the works used for the purposes of the trade wherever situate and itself carried on the trade in the United Kingdom and in Russia, but the trade at Hankow was carried on by a subsidiary company known as the International Export Company, Limited (hereinafter referred to as "International"), the trade at Shanghai was carried on by a subsidiary company known as the Shanghai Ice and Cold Storage Company, Limited (hereinafter referred to as "Shanghai"), and it was intended that when the works at Zarate were completed, the trade there should be carried on by a third subsidiary company to be formed for that purpose under the name of the Anglo-South American Meat Company, Limited (hereinafter referred to as "Anglo"). The Appellant Company or its nominees owned all the shares in "International" and "Shanghai" and these companies were controlled in the United Kingdom and charged to Income Tax in respect of the whole of their profits under Case I of Schedule D, the greater part of those profits being paid over to the Appellant Company in the form of taxed dividends.

8. On the 14th December, 1915, the Appellant Company entered into an agreement with the National Cold Storage Company Incorporated of New York (hereinafter referred to as "National") and Sir William Vestey and Mr. E. H. Vestey.

A copy of this agreement is annexed hereto marked "D" and is to be deemed part of this Case[1] and by this agreement and a series of collateral agreements entered into then or subsequently between the same parties and "International", "Shanghai" and "Anglo", respectively, it was provided that the Appellant Company should place "National" in full undisturbed possession and control for its own individual benefit of all the businesses, business premises, goodwill, assets and undertaking of and controlled by the Appellant Company in all parts of the world outside the United Kingdom on the terms that "National", or, in default, Sir W. Vestey and Mr. E. H. Vestey, should pay annually to

[1] Not included in the present print.

"International", £30,000, to "Shanghai", £3,000, to "Anglo" (as from the date when the capital of £150,000 should have been provided by the Appellant Company), £10,500 and to the Appellant Company such sums as might be required to make up the profits of the Appellant Company to an amount (*viz.*, at that time £224,000) sufficient to provide for payment of the interest on its debenture stock and mortgages, the dividends on its 6 per cent. cumulative preference shares, the amount required to be carried to its depreciation fund, the dividends on its 10 per cent. "A" cumulative preference shares and dividends at the rate of 10 per cent. per annum on its ordinary shares. The ownership of the premises, plant and machinery in China, Russia and the Argentine was retained by the Appellant Company and it was part of the terms of their agreement with "National" that these premises should not be demised or leased to "National", but that the premises, plant and machinery should, during the continuance of the agreement, be at the sole disposal and under the sole control of "National" for the purpose of enabling "National" to carry on such of the business as "National" might think fit, "National" being bound to keep all buildings and premises in a proper state of repair and to keep all plant and machinery in proper working order and condition, save as regards all ordinary wear and tear, but being under no obligation to make provision for fire insurance or to write-off or provide for any depreciation in value of wasting assets which was intended to be covered by the sum carried to the depreciation fund of the Appellant Company. The term of the agreement was twenty-eight years from the 1st January, 1916, determinable by "National" on twelve months' notice at the end of seven, fourteen or twenty-one years.

9. The provisions of the agreements referred to in the preceding paragraph were duly carried out and from the 1st January, 1916, until the year 1921 the businesses theretofore carried on by the Appellant Company or its subsidiary companies outside the United Kingdom were carried on by "National" and were controlled abroad. The profits arising from these businesses consequently ceased to be chargeable to Income Tax under Case I of Schedule D but, on the other hand, the balance of the said payments of £30,000 a year to "International" and £3,000 a year to "Shanghai" remaining after charging the administration expenses of those companies was charged to Income Tax and paid over to the Appellant Company as taxed dividends.

10. In, and for some years prior to, the year 1921, Lord Vestey and Sir Edmund Hoyle Vestey (independently of the Appellant Company) were shareholders in companies which were engaged in businesses in connection with meat and other produce. The general nature of the businesses so carried on was to provide for the raising and bringing to this country the meat supplies which enabled the companies in question to compete with the Americans. Some of

these companies owned ranches, cattle breeding properties and freezing works in South America, Australia, New Zealand, China and other places. Lord Vestey and Sir Edmund H. Vestey owned personally the properties specified in the first schedule to the said indenture of lease and, through their nominees, the properties specified in the second schedule to the said lease(1). Other of the companies not owning properties carried on the businesses on the leased properties and/or in connection with the distribution of the produce thereof. Lord Vestey and Sir Edmund H. Vestey beneficially owned the whole of the shares in these " holding " " operating " and " distributing " companies.

11. It was stated in evidence that during the war the Appellant Company had to increase its cold storage accommodation very considerably and, in particular, at the suggestion or with the consent of the Government, the Appellant Company built very large stores in Liverpool and in Glasgow, the Government helping to finance the Company with the result that at the end of the war the cold storage accommodation throughout this country was very much in excess of requirements and that in 1920 and 1921 it became a serious matter whether the Appellant Company could earn sufficient money to pay its fixed charges, including its preferential dividends. Discussions took place as to the course to be adopted by the Appellant Company so as to broaden the basis of its business and the suggestion was made that the Appellant Company should take at a rental the properties mentioned in paragraph 10. Negotiations followed between the Vesteys and Mr. R. P. Sing (as representing the outside shareholders in the Appellant Company) and finally an arrangement was come to, as hereinafter described, the general nature of which was that the Appellant Company should take a lease of the ranches, freezing plants and other immovable property mentioned in paragraph 10 hereof for a term of 21 years (determinable, however, on six months' notice as hereinafter mentioned), at a rent of £960,000 per annum (subject to abatement as mentioned in clause 3 of the said indenture marked "A"), that the Appellant Company should purchase from the Vesteys the shares in the " operating " and " distributing " companies before-mentioned for the sum of £1,226,903, subject to the condition that, upon determination of the lease, the Appellant Company should re-sell the shares to the Vesteys at the same price and that the shares in the " holding " companies should also be acquired (without payment) by the Appellant Company and held by them during the period of the lease. In negotiating these arrangements, Mr. Sing's desire and intention were, as he stated to us, to establish the business of the Appellant Company upon a broader basis so that the Appellant Company could and would be certain of earning the dividend on its preference capital and the scheme evolved appeared to him one

(1) The Schedules to the Lease are not included in the present print.

which practically ensured the Company handling some quarter of a million tons of food products and getting the profits which would result from that and which would give them a fair certainty, in ordinary times, of earning enough to pay the preference and ordinary dividends. In short, as Mr. Sing stated, he entered into the arrangement as a business proposition in order to ensure his preference shareholders' position.

12. (*a*) Concurrently with the negotiation of the proposals above-mentioned the Appellant Company decided to resume possession and control of the foreign enterprise of the Appellant Company which had been placed in the possession and control of "National" by the before-mentioned agreement of 14th December, 1915, other than the Russian businesses which had already been relinquished by "National". Accordingly, arrangements were made with "National" for the cancellation of the said agreement of 14th December, 1915, as hereinafter mentioned. The properties relinquished by "National" included the said properties at Zarate (in the Argentine) and Hankow and Singargee (in China) mentioned in paragraph 7 above. It was arranged that the Appellant Company should resume control of these properties and sell them (together with the shares in the International Export Co., Ltd.) to Lord Vestey and Sir Edmund Vestey for the sum of £1,800,000 and that the said properties should be included in the lease of properties which the Appellant Company was to take referred to in the preceding paragraph.

(*b*) It was stated to us by Mr. R. P. Sing, in the course of the evidence given by him, that the business reason for selling these properties to the Vesteys and taking a lease from them were (as regards Zarate) that it was then in contemplation that Zarate might some day be sold to another company because developments were going on by which the Appellant Company should in course of time have other works out there. It was all part and parcel of the Appellant Company's scheme of development. Also the Appellant Company had to find money for the shares it was purchasing from the Vesteys, it wanted to obtain the money without a public issue and the Vesteys wanted back these properties with the possibility of re-sale later on and it was a mutually advantageous arrangement. As regards the Hankow property, a further reason was that the two Chinese businesses at Harbin and Nankin which were included in the lease belonged to companies in which the Vesteys held all the shares and had never been subject to the "National" agreement of 1915 or the cancellation thereof of 1921. The headquarters of all the Chinese businesses were at Nankin. Hankow was to a certain extent a subsidiary and it was thought wise that the three properties should be all in the one hand.

(*c*) It was also stated in evidence by Mr. Sing that at various periods and in various ways there were sales and counter-sales between various companies in which the Vesteys were interested

and the Appellant Company. The latter only bought properties when the working was proved to be a success and at sundry times and in various ways there had been sales from the Appellant Company to such companies as aforesaid and then sales back from such companies to the Appellant Company, as suited their arrangements.

13. The foregoing arrangements were sanctioned by the directors of the Appellant Company at meetings held on the 5th and 23rd December, 1921, when the resolutions set out in the extracts from the minute book contained in the document marked " E " and annexed hereto as part of this Case were passed.

14. In pursuance of the said resolutions an agreement was entered into on 23rd December, 1921, with the National Company, whereby the agreement of 1915 was terminated and the National Company relinquished the control of the said foreign businesses other than the said Russian businesses which had already been relinquished and the control was re-transferred to the Appellant Company. A copy of the said agreement is hereto annexed marked " F " and forms part of this Case(1). On the same day, for the purpose of giving effect to the resumption and control by the Appellant Company of the said foreign enterprises, three other similar agreements were entered into with the said three subsidiary companies of the Appellant Company, namely, " International ", " Shanghai " and " Anglo " respectively.

15.(*a*) Sir William Vestey and Sir Edmund Hoyle Vestey decided to execute a settlement of the said rent of £960,000 in manner hereinafter appearing and the trustees of that settlement were Messrs. Charles Auguste Hall, James Meeres Drabble and Kenneth Stirling, all of Paris, who were accordingly made parties to the lease which was executed pursuant to the arrangement mentioned in paragraph 11 hereof being annexure "A" to this Case. The lease was dated 29th December, 1921, and made between Sir William Vestey and Sir Edmund Hoyle Vestey (thereinafter called " the Lessors ") of the first part, the Appellant Company (thereinafter called " the Lessees ") of the second part and the said Charles Auguste Kennerley Hall, James Meeres Drabble and Kenneth Stirling of the third part, which is the said indenture referred to in paragraph 2 hereof, and for the sake of convenience is hereinafter referred to as " the lease ".

(*b*) The properties comprised in the lease were divided into three schedules. Those in the first schedule were properties owned by the Vesteys in their own names. Those in the second schedule were properties to which the Vesteys were beneficially entitled but were in the hands of nominees. Those in the third schedule were properties held by companies which the Vesteys controlled. For the purpose only of the claim for depreciation put forward by the

(1) Not included in the present print.

Appellant Company and for the purpose of the hearing it was agreed that the rent of £960,000 would be fairly apportioned between the three schedules as follows : namely, first schedule, £13,000, second schedule, £693,000, and third schedule, £254,000. The properties mentioned in these three schedules included the ranches, cattle breeding properties, freezing works and other properties owned either by the Vesteys or by the " holding " companies as described in paragraph 10 above and also included the said properties at Zarate (in the Argentine) and Hankow and Singargee (in China) mentioned in paragraphs 7 and 12 above.

(*c*) For the terms of the lease the Court is referred to the said exhibit marked "A".

16. In further pursuance of the arrangements mentioned in paragraph 11 hereof, the Vesteys sold to the Appellant Company, or its nominees, their shares in the " operating " and " distributing " companies (other than those in the next succeeding paragraph mentioned) for the sum of £1,226,903 and the Appellant Company executed an undertaking dated 29th December, 1921, addressed to the Vesteys, whereby, in consideration of that sale, the Appellant Company undertook, on the termination by any means of the lease, to re-sell and re-transfer, or cause to be transferred, to the Vesteys in equal shares, or as they might direct, the said shares in the said " operating " or " distributing " companies at the price then paid by the Appellant Company to the Vesteys for the same. In the event of any of the properties upon which the business of the said companies had been carried on being withdrawn from the lease, the Appellant Company undertook to re-sell and re-transfer as aforesaid the shares of the company which (prior to the granting of the lease) was carrying on the business at the particular property so withdrawn from the lease, at the prices then paid by the Appellant Company to the Vesteys for the same.

A copy of the said undertaking is hereto annexed marked " G " and forms part of this Case(1).

17. For the purpose of implementing and making effective the lease, so far as it included properties which were not in the legal ownership of the Vesteys but of the " holding " companies aforesaid, the shares in these " holding " companies were transferred by the Vesteys to the Appellant Company (without payment) and by a further undertaking, also dated 29th December, 1921, executed by the Appellant Company and addressed to Sir William Vestey and Sir Edmund Hoyle Vestey, the Appellant Company acknowledged that it held those shares for and on behalf of and as trustees for the Vesteys in equal shares and that it had no beneficial interest in the capital value of those shares but only in the profits earned by carrying on the business of the companies by which those shares were issued and in respect whereof dividends might be declared and income payable on them during the currency of the lease. The

(1) Not included in the present print.

same had been transferred to the Appellant Company to hold during the currency of the lease, not with the intention of creating any charge thereon in the Appellant Company's favour, but solely for the purpose of ensuring that the lease was given effect to by the respective companies. And the Appellant Company undertook that, on the termination by any means of the lease as regards all or any of the properties in question, it would re-transfer or cause to be re-transferred to the Vesteys, or as they might direct, all the aforesaid shares, or such of them as related to the properties the lease of which should have so terminated.

A copy of this undertaking is hereto annexed marked " H " and forms part of this Case(1).

18. By an indenture dated 30th December, 1921, and made between Sir William Vestey and Sir Edmund Hoyle Vestey (thereinafter called " the Settlors ") of the one part and the said Charles Auguste Kennerley Hall, James Meeres Drabble and Kenneth Stirling (thereinafter called " the Trustees ") of the other part, the Settlors settled all rent or sums of money payable to them in accordance with the terms and during the continuance of the lease and which the trustees might receive subject to any refund or rebate they might be liable to make thereon to the Appellant Company upon the trusts for the benefit of the respective descendants of the Settlors therein mentioned.

A copy of the said indenture is hereto annexed marked " I " and forms part of this Case(1).

19.(*a*) It was stated by Mr. Sing in evidence that in negotiating the lease Lord Vestey first proposed a larger rent than £960,000 per annum. The figure of £960,000 was ultimately agreed upon after negotiation, but Mr. Sing stipulated that there should be an abatement clause so that in the event of the Appellant Company's earnings not being sufficient to pay the rent, the rent should be *pro rata* abated and an abatement clause (namely the proviso to clause 3) was accordingly inserted in the lease. His sole object was to preserve the interests of the preference and other shareholders and, in particular, to safeguard them against the effect of American competition and to ensure as far as possible that the earning capacity of the Appellant Company should be sufficient to pay the preference and ordinary dividend as provided in the lease. He agreed that he could only secure the insertion of this clause if Lord Vestey and Sir Edmund Vestey and his co-directors agreed and, further, that if Lord Vestey and Sir Edmund Vestey took a decided view one way and he and his co-directors took a decided view the other way, the Vestey's view would ultimately prevail, in which event he should resign. In point of fact, however, he and the Vesteys have always agreed amicably.

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(1) Not included in the present print.

(*b*) It was also stated by Mr. Sing that, in negotiating the lease, he regarded it as necessary that it should be over a fairly long period. Continuity was desirable and it did not seem to be worth while to enter into an arrangement of this nature unless there was a fair chance of its continuing for his tenure of office as chairman of the Company. The Vesteys, however, wished to be able to terminate the lease at six months' notice and Mr. Sing agreed to the insertion of a mutual clause to this effect. Inasmuch as he had known the Vesteys for many years and had been on the board for ten years then, he considered that it was a reasonable arrangement and relied on the Vesteys not to let the Company down.

20. A number of retail shops have been opened by subsidiary companies in which the Appellant Company owns all the shares and since 1923 it has acquired all the shares in other companies owning similar shops. The issue of the £4,000,000 additional capital in 1923 (referred to in paragraph 4 hereof) was made for the purpose of acquiring the shares in some of these companies. The total number of retail shops now owned by the various companies above-mentioned is 2,600. It was stated in evidence by Mr. Sing that, since the lease, the business operations of the Appellant Company (so far as concerns the properties, etc., comprised in the lease) are as follows : it either rears on properties comprised in the lease or buys cattle out in far distant countries and takes them into the freezing works comprised in the lease and kills them and uses all the by-products. It has its own ships which bring the produce from the various freezing works to London or to the continent or to Liverpool and there it is distributed by the Appellant Company either wholesale or to the shops above-mentioned, where it is sold over the counter. The business of the Appellant Company in respect of the profits of which it is assessed to Income Tax is the entirety of its business whether raising from the properties comprised in the lease or not, and it was also stated by Mr. Sing in evidence that the ownership, as lessees of the properties mentioned in the lease, was an integral part of the whole business and ensured the Appellant Company getting at least 250,000 tons per annum; and that although without these properties the Appellant Company would be able to carry on business to a certain extent, it would not have the certainty that it now has.

21.(*a*) By three indentures dated respectively, 11th July, 1923, 22nd April, 1925, and 30th November, 1927, each made between Lord Vestey and Sir Edmund Hoyle Vestey of the first part, the Appellant Company of the second part and the said C. A. Kennerley Hall, J. M. Drabble and K. Stirling of the third part (which indentures are, for the sake of convenience, hereinafter referred to as the first, second and third supplemental leases, respectively) in pursuance of the proviso in that behalf hereinbefore referred to contained in the lease, various properties were

withdrawn from the lease and other properties substituted therefor as hereinafter mentioned.

Copies of the first, second and third supplemental leases are hereto annexed marked " J ", " K " and " L ", respectively, and form part of this Case(1).

(*b*) By the first supplemental lease, freezing works and land used in connection therewith at Port Darwin in Australia (included in the third schedule to the lease and owned by the North Australian Meat Co., Ltd.) were withdrawn from the lease and freezing works and other buildings at Campana in the Argentine Republic and known as the " Campana Works " were substituted therefor. For the purpose of a claim for depreciation made by the Appellant Company, the Port Darwin property was valued at £916,000 and the Campana Works at £553,000. But it was stated in evidence that, at the time when the substitution took place, the earning capacity of the Campana Works was greater than that of Port Darwin, which was functioning to a very small extent, if at all, owing to the labour position, which made it very costly to handle cattle. At that period, the Campana Works were a " live " business, whereas Port Darwin was in a poor way and to a certain extent lying dormant. No alteration was made in the rent payable under the lease on the occasion of the substitution. The explanation given to us as to why the rent was not increased, was that Port Darwin had been a disappointment and the Campana Works were substituted because they were considered better business which would enable the Company to earn the rent. In connection with, and as part of the arrangement for the substitution of these properties, by an agreement dated 28th June, 1923, and made between the Western United Investment Co., Ltd. of the one part and the Appellant Company of the other part, the Appellant Company purchased for the sum of £4,000,000 all the shares in the North Australian Meat Company (which owned Port Darwin) and in eight retail shop-owning companies mentioned in the schedule thereto.

A copy of the said agreement is hereto annexed marked " M " and forms part of this Case(1).

It was thought desirable that the Appellant Company should own Port Darwin with a view to future possibilities.

(*c*) By the second supplemental lease, the freezing works and lands used in connection therewith at Zarate in the Argentine Republic (hereinbefore referred to) were withdrawn from the lease and properties in Brazil, Uruguay, China and Poverty Bay, New Zealand, were substituted. No alteration was made in the rent payable under the lease. It was stated by Mr. Sing in evidence that one of the reasons for the withdrawal of the Zarate property was that, at the date of the second supplemental lease, negotiations were going on for the sale of this property and it was sold to the River Plate British and Continental Meat Company and, under the terms of that sale, the Appellant Company were to get contracts for

(1) Not included in the present print.

the storage, lighterage, cartage and sale on commission of the products of the River Plate British and Continental Meat Company (a company in which neither the Appellant Company nor the Vesteys held any interest) and therefore would earn a considerable amount on handling that business. The agreement was to last for twenty-one years with regard to storage, lighterage and cartage and ten years with regard to sale on commission. The arrangement made between the Appellant Company and the Vesteys was that the Appellant Company would release the Zarate property on the terms that the contract with the River Plate Company should be made with the Appellant Company, giving the Appellant Company the rights above-mentioned, and that the Vesteys should include in the lease the other properties above-mentioned in place of Zarate.

(*d*) By the third supplemental lease, the said Campana Works and certain other properties were withdrawn from the lease and property at Buenos Ayres known as " South Dock " was substituted. No alteration was made in the rent payable under the lease. For the purpose of the said depreciation claim, South Dock was valued at £2,361,000 and was more valuable than the properties withdrawn. It was stated by Mr. Sing in evidence that South Dock was a property which the Vesteys had just completed at that time and was the finest and most up to date freezing works in the world; that it was part of the arrangement that the Appellant Company should purchase the Campana Works and other properties withdrawn, and the Appellant Company purchased them for approximately £1,900,000; that the reason why it was made a term of the arrangement that the Company should purchase the withdrawn properties was that the Appellant Company did not wish to increase the rent payable under the lease, it wanted the benefit of the South Dock property, and it suited the Appellant Company to buy the withdrawn properties and continue working them on its own account. If the Vesteys should give six months notice to terminate the lease, it might be a very useful thing for the Appellant Company to have the withdrawn properties which it was working on its own account. The same applied to the purchase by the Appellant Company of Port Darwin. For ordinary purposes the construction of a freezing works takes eighteen months.

22. In the years 1923 and 1924, the said rent of £960,000 per annum was paid in full but, by reason of the operation of the abatement clause, in 1922 only £630,000 was paid and in 1925, 1926 and 1927 no rent was paid at all because the Appellant Company's receipts were not sufficient. The unpaid rent is not carried forward but simply abates.

Prints of the Appellant Company's accounts for the years 1922 and 1923 are hereto annexed marked " N " and " O " and form part of this Case[1].

23. For many years, including each of the years 1922 to 1927, both inclusive, mentioned in the preceding paragraph, the Appellant

[1] Not included in the present print.

Company has invariably paid both the fixed dividends on its preference shares and also uniform dividends of ten per cent. on its ordinary shares.

24. Whether any particular property is in the hands of a subsidiary company of the Appellant Company, or whether any particular operation is carried on by an operating company or not, the whole business is controlled by the Appellant Company, and the assessments to Income Tax are based upon the assumption that the business, whether in the hands of the subsidiary companies or the operating companies or the Appellant Company, is business taxed as carried on by the Appellant Company.

25. It was contended on behalf of the Appellant Company :—

(*a*) That the said sums of £630,000 and £960,000 paid by the Company under the lease were rent which the Company was under a legal obligation to pay and paid for the use and occupation of the leased properties and were wholly paid for the purpose of enabling the Company to earn its profits.

(*b*) That it is an established principle of Income Tax law that rent payable by a trader in respect of trade premises occupied and used for the purposes of the trade is a proper and admissible deduction.

(*c*) That the said sums were moneys wholly and exclusively laid out and expended for the purposes of the Company's trade.

(*d*) That the said sums were proper deductions in computing the Company's profits for assessment to Income Tax.

26. It was contended on behalf of the Respondent :—

(*a*) That the assessments appealed against should stand good unless the Appellant Company established by evidence satisfactory to the Commissioners that they were excessive.

(*b*) That regard must be had to the true nature and substance of the payments in respect of which deductions were claimed as appearing from the evidence before the Commissioners.

(*c*) That the yearly sum of £960,000 mentioned in Clause 3 of the said indenture of 29th December, 1921, and therein described as rent, was effectively payable by the Appellant Company for any year only if and so far as there remained a surplus of profit for that year after payment of (*inter alia*) the fixed dividends on the preference shares and a dividend of not less than ten per cent. on the ordinary shares and any effective payment made under that clause was a payment or application of a portion of the surplus profits of the Appellant Company.

(*d*) That the said yearly sum was not a true rent but merely a payment reserved under a contract.

(*e*) That there was no necessity to pay the said yearly sum or any part thereof as a condition precedent to earning profits. On the contrary, the earning of profits was a condition precedent to the paying of that sum.

(*f*) That the said sums of £630,000 and £960,000, in respect of which deductions were claimed, were not payments necessary for the purpose of earning profits, but were either annual payments payable out of the profits, or distributions of profits.

(*g*) That the said sums were not proper deductions in computing the Company's profits for assessment to Income Tax.

27. The following cases were referred to :—

Last *v.* London Assurance Corporation, 10 A.C. 438; 2 T.C. 100.

Russell *v.* Aberdeen Town & County Bank, 13 A.C. 418; 2 T.C. 321.

Gresham Life Assurance Society *v.* Styles, [1892] A.C. 309; 3 T.C. 185.

Usher's Wiltshire Brewery, Ltd. *v.* Bruce, [1915] A.C. 433; 6 T.C. 399.

Stevens *v.* Boustead & Co., [1918] 1 K.B. 382; 7 T.C. 107.

Union Cold Storage Co., Ltd. *v.* Jones, 8 T.C. 725.

T. Haythornthwaite & Sons, Ltd. *v.* Kelly, 11 T.C. 657.

Having considered the evidence and the contentions of the parties, we held that the said payments of £630,000 and £960,000 were not payments antecedent to, or necessary to, earn profits, but contingent payments dependent and payable only out of profits earned and were not allowable deductions from profits assessable to Income Tax.

The Appellant Company thereupon expressed dissatisfaction with the finding of the Commissioners as being erroneous in point of law and required them to state a case for the opinion of the High Court of Justice, which we have stated and do sign accordingly.

(*Signed*) H. S. KING,
,, JOHN PAKEMAN,
,, BALFOUR OF BURLEIGH,
,, W. HARDY KING,
,, A. S. SUTHERLAND-HARRIS,
,, S. W. WARD.

COPLEY D. HEWITT,
Clerk to the said Commissioners.
5th March, 1930.

APPENDIX.

"A."

INDENTURE of 29th December, 1921.

THIS INDENTURE made the 29th day of December 1921 BETWEEN SIR WILLIAM VESTEY Baronet of Kingswood Dulwich London England and SIR EDMUND HOYLE VESTEY Baronet Shirley Croydon London England (hereinafter called the Lessors) of the first part THE UNION COLD STORAGE COMPANY LIMITED whose registered office is situate at Market Buildings 13/16 West Smithfield in the City of London England (hereinafter called the Lessees) of the second part and CHARLES AUGUSTE KENNERLEY HALL of 4 Rue Ste-Anne Paris, France, Licentiate of Law of the Faculty of Paris JAMES MEERES DRABBLE of 3 Rue Amiral de Joinville Neuilley sur Seine Paris Merchant and KENNETH STIRLING of 4 Rue Ste-Anne Paris France Licentiate of Law of the Faculty of Paris of the third part WHEREAS the Lessors are now absolutely entitled for the entire and full interest according to the laws of the respective countries where the same are respectively situate to the hereditaments and premises particulars whereof are set forth in the First Schedule hereto(1) and are also entitled to the full beneficial interest and power of dealing with the hereditaments and premises particulars whereof are set forth in the Second Schedule hereto(1) the legal and absolute interest in which is vested in the persons and corporations set opposite each of the respective premises in the Second Column of the said Schedule and are also entitled for an absolute interest to all the shares in the companies whose names are set forth in the first column of the Third Schedule hereto(1) and which companies respectively own the hereditaments and premises particulars whereof are set forth in the second column of the Third Schedule hereto AND WHEREAS the Lessors are desirous of demising and leasing to the Lessees all the said premises respectively for the period upon the terms and conditions and subject to the rent to be paid to the said Kennerley Hall, Drabble and Stirling as hereinafter mentioned NOW THIS INDENTURE WITNESSETH

1. THE Lessors as beneficial owners hereby démise unto the Company all and singular the hereditaments and premises respectively referred to in the First Second and Third Schedules hereto TO HOLD the same unto the Company for the term of 21 years from the 10th day of April 1921 at the rent hereinafter reserved to the said Kennerley Hall, Drabble and Stirling and upon the terms and conditions hereinafter appearing and the Lessors hereby covenant that they will forthwith as and when requested and at the cost of the Company do and perform all acts and things which may be necessary to confirm and make binding in favour of the

(1) The Schedules are not included in the present print.

Company by all necessary parties including the respective companies and persons whose names are set forth in the Second and Third Schedules hereto according to the laws of the respective countries where the said hereditaments and premises are respectively situate a lease or leases or other effective documents according to the laws of the said countries for the purpose of confirming and establishing in favour of the lessees a lease or terminable interest or other like interest according to the laws of the said respective countries corresponding to a lease in English law of the said respective premises upon and subject to the terms and conditions herein contained.

2. THE lease and demise of the said hereditaments and premises herein contained shall include in each case respectively the buildings of all descriptions water and other privileges and appurtenances and all and singular the engines boilers shaftings gear and other plant machinery insulation and effects annexed to or within the said premises respectively.

3. THE Lessees shall pay therefor to the said Kennerley Hall, Drabble and Stirling (whose receipt only shall be a good discharge for the same) yearly during the said term hereby granted and so in proportion for any less time than a year the rent of £960,000 to be paid to the said Kennerley Hall, Drabble and Stirling by quarterly instalments on the 1st day of January the 1st day of April the 1st day of July and the 1st day of October in each year the first payment of such rent being a proportionate part of the rent as from the 10th day of April 1921 to the first of such quarterly days after the date hereof to be paid on the first quarterly day after the date hereof PROVIDED ALWAYS AND IT IS HEREBY AGREED that if on making up at the end of each financial year ending on the 31st December the accounts of the Lessees (as to which the certificate of the Auditors for the time being of the Lessees shall be final and binding) it is found that in respect of the then past financial year the result of the Lessees operations after providing for the rent hereinbefore reserved shall be insufficient to enable the Lessees to pay the aggregate of the following sums namely the interest on the debentures or debenture stock issued by the Lessees for the time being outstanding and the interest on the amount owing on all specific mortgages heretofore or hereafter created by the Lessees and for the time being outstanding the dividend at the fixed rate of interest on all the preference shares issued by the Lessees for the time being outstanding a dividend at the rate of 10 per cent. per annum at least on the ordinary shares issued by the Lessees for the time being outstanding then the rent aforesaid for such financial year shall be abated to the extent of the deficiency so ascertained and any rent already paid by the Lessees in respect of that particular year shall be repaid to them by the said Kennerley Hall, Drabble and Stirling to the extent of the rebate necessary.

4. THE Lessees for themselves and their assigns covenant with the Lessors (and as a separate covenant with the said Kennerley Hall, Drabble and Stirling as regards the covenant for payment of the said yearly rent next hereinafter contained) in manner following that is to say :—

THAT the Lessees will during the continuance of the term hereby granted pay to the said Kennerley Hall, Drabble and Stirling the said yearly rent hereby reserved and made payable at the times and in the manner in which the same is hereinbefore reserved and payable without any deduction save and except such deductions as may be found liable to be made on the making up of the accounts at the end of each financial year without prejudice to the obligation in the meantime to make the usual quarterly payments during each year And also will from time to time and at all times during the said term pay and discharge all rates taxes charges duties assessments impositions and outgoings whatever whether charged imposed or assessed by the Supreme Government or by any Parliamentary local or other body of any description of and in the respective countries where the said hereditaments are situate which are now or may be at any time hereafter assessed charged or imposed upon or payable in respect of the said demised premises or any of them or any part thereof or the owner or occupier in respect thereof and also will from time to time and at all times during the said term well and substantially repair cleanse maintain amend and keep the buildings and all new buildings which may at any time during the said term be erected on and all additions made to the said demised premises and the fixtures plant machinery and insulation for the time being therein whether affixed to the said premises or not and all walls fences vaults roads sewers drains and appurtenances thereof with all necessary reparations cleansings and amendments whatsoever and also when and so often as any fixtures plant machinery or insulation belonging to the said premises shall so require substitute other fixtures plant machinery or insulation of a similar description and value to the satisfaction of the Lessors and also will execute all such works as are or may under or in pursuance of any laws or regulations of the Supreme Government or any local or other authority having authority in the country where the said hereditaments and premises are respectively situate whether already or hereafter to be passed be directed or required to be executed at any time during the said term upon or in respect of the said demised premises or any of them or any part thereof whether by the Lessors or the Lessees and also will at all times during the said term bear and pay all costs and expenses payable either by the Lessors or the Lessees in respect of the premises hereby demised or any of them or any part thereof of making repairing maintaining rebuilding and cleansing of ways roads pavements sewers drains pipes water courses party walls party structures fences or other conveniences which shall belong to the hereditaments hereby demised or any additional

buildings which may be erected as aforesaid either alone or in common with other premises near or adjoining thereto any such sums paid by the Lessors to be paid by the Lessors on demand and will keep the Lessors indemnified against all such costs and expenses as aforesaid and the said demised premises so repaired cleansed maintained amended and kept as aforesaid will at the expiration or sooner determination of the said term quietly yield up and deliver over unto the Lessors together with all additions and improvements made thereto in the meantime and all fixtures plant machinery or insulation of every kind in or upon the said premises or which during the said term may be fixed or fastened to or upon the same and also it shall be lawful for the Lessors or their agents at all reasonable times during the said term with or without workmen or others to enter the said premises or any of them or any part thereof to view the state of repair and condition of the same and the fixtures plant machinery and insulation therein and of all defects and want of reparation then and there found to give or leave on the said premises notice in writing for the Lessees and that the Lessees will within the period of three calendar months after such notice or sooner if requisite repair and make good the same according to such notice in that behalf contained and also if the Lessees shall at any time make default in the performance of any of the covenants hereinbefore contained for or relating to the repair of the said premises fixtures plant machinery and insulation it shall be lawful for the Lessors but without prejudice to the right of re-entry under the clause hereinafter contained to enter upon the said premises and repair the same at the expense of the Lessees in accordance with the covenants and provisions of these presents and the expense of such repair shall be repaid by the Lessees to the Lessors on demand AND ALSO will permit the Lessors or their surveyor or agent at any time or times during the said term to enter the said premises or any of them or part thereof during seasonable hours in the day time and to take schedules or inventories of the fixtures plant machinery and insulation to be yielded up at the expiration of the said term

AND will during the said term keep the said buildings and premises hereby demised and the said fixtures plant machinery and insulation therein insured against fire to the satisfaction of the Lessors and whenever required produce to the Lessors the policy or policies and receipt or receipts for the last premium in respect of such insurance and that in case of the destruction or damage of the said premises by fire the moneys received in respect of such insurance shall at the option of the Lessors either be laid out in rebuilding or reinstating the same or paid to the Lessors in which latter case the rent payable hereunder shall be reduced as if such property had been withdrawn from the lease under the provisions hereinafter contained.

AND ALSO will not at any time during the said term without the license in writing of the Lessors first obtained make any alteration or addition whatsoever in or towards the said premises hereby demised or any buildings which may be erected on the said premises and that in case at any time during the said term there shall be occasion to rebuild the said buildings or any part thereof or any boundary wall whether by reason of destruction by fire or through decay or from any other cause the same shall be rebuilt according to the original plan and elevations thereof or according to such other plan as shall be previously approved of in writing by the Lessors and not otherwise.

AND ALSO will not assign transfer underlet or part with the possession of the said premises or any part thereof without the previous consent in writing of the Lessors.

PROVIDED ALWAYS and these presents are upon this condition that if the said yearly rent hereby reserved or any part thereof shall at any time be in arrear and unpaid for 3 calendar months after the same shall have become due (whether any formal or legal demand thereof shall have been made or not) or if the Lessees shall at any time fail or neglect to perform or observe any of the covenants conditions or agreements herein contained and on their part to be performed and observed or if the Lessees while the said demised premises or any part thereof shall remain vested in them shall go into liquidation (whether compulsory or voluntary) other than for the purpose of reconstruction then and in any such case it shall be lawful for the Lessors or any person or persons duly authorised by them in that behalf into or upon the said hereby demised premises or any part thereof in the name of the whole to re-enter and the said premises peaceably to hold and enjoy thenceforth as if these presents had not been made without prejudice to any right of action or remedy of the Lessors and/or the said Kennerley Hall, Drabble and Stirling in respect of any antecedent breach of any of the covenants by the Lessees hereinbefore contained PROVIDED ALSO AND IT IS HEREBY AGREED that either the Lessors or the Lessees may at any time during the term hereby granted determine this lease on giving to the other parties 6 calendar months previous notice in writing expiring on any of the aforesaid quarterly days for payment of the said rent and after the expiration of such notice this present demise and everything herein contained shall cease and be void but without prejudice to any claim by any party to these presents against the other party or parties in respect of any antecedent breach of any covenant or condition herein contained and without prejudice to the right of the Lessees on the making up of their accounts for the financial year ending next after the termination of this demise to reclaim all or any part of the said rent paid or payable in respect of that year under the provisions in that behalf hereinbefore contained PROVIDED FURTHER that the Lessors may at any time during the term hereby granted on giving to the Lessees six calendar

months previous notice in writing expiring on one of the aforesaid quarterly days withdraw any part or parts of the premises hereby demised from this demise in which case the rent hereinbefore reserved to the said Kennerley Hall, Drabble and Stirling shall as from the date of such withdrawal be reduced by such amount as shall be agreed upon between the Lessors and Lessees and as from the date of such withdrawal the provisions hereof shall cease to apply to the premises so withdrawn but as regards the remainder of the said demised premises shall continue in full force and effect subject to the reduction of the said rent as hereinbefore provided and the Lessors covenant as regards all the said premises that the Lessees paying the rent hereby reserved and performing and observing the several covenants conditions and agreements herein contained and on their part to be performed and observed shall and may peaceably and quietly hold and enjoy the premises hereby demised during the term hereby granted without any lawful interruption or disturbance from or by the Lessors their heirs or assigns or any person or persons claiming under or in trust for them

AND IT IS HEREBY AGREED that any and every dispute difference or question which shall at any time arise between the said parties hereto or the persons for the time being claiming under them or any of them touching the construction meaning or effect of these presents or any clause or thing herein contained or the rights and liabilities of the said parties respectively or the parties for the time being claiming under them under these presents or otherwise howsoever in relation to the premises or any other matter arising hereunder shall be referred to the arbitration of two persons one to be appointed by each party to the reference or their umpire and this shall be deemed to be a submission to such arbitration.

IN WITNESS whereof the parties to these presents have hereunto set their hands and seals at Brussels the day and year first before written

WILLIAM VESTEY,

E. H. VESTEY.

For Union Cold Storage Co., Ltd.,

H. T. CLEMENTS.

KENNETH STIRLING,

J. M. DRABBLE,

C. A. KENNERLEY HALL.

"E."

EXTRACT from MINUTES dated 5th December, 1921.

Present—

Roger P. Sing,
Sir William Vestey, Bt.,
Sir Edmund Hoyle Vestey, Bt.,
William George Bundey,
Samuel Vestey, } Managing
Percy C. Vestey, } Directors.
E. Hinchliff, Secretary.
Chas. H. Wright, Solicitor.

The Chairman referred to the arrangements made with Sir William and Sir E. H. Vestey as to the taking over by the Company of certain foreign businesses with which the Company were closely connected and stated that the draft documents to carry these arrangements into effect were now ready to be placed before the Board. These arrangements entered into in March last and referred to at the last General Meeting entailed the sale of certain of the Company's assets at a very substantial profit.

It was Resolved :—

1. That the Agreements with the National Cold Storage Co. Incorporated, The Anglo South American Meat Co. Ltd., The Shanghai Ice and Cold Storage Co. Ltd., and the International Export Co. Ltd. should be terminated as from the 10th April 1921, except that the Guarantees given by the National Cold Storage Co. Inc. and Sir William Vestey and Sir E. H. Vestey shall continue until the end of the first seven years mentioned in such Agreement, but shall then cease and that proper arrangements in accordance with the above mentioned Agreements are to be made for the return as of the 10th April 1921 to the Company of all assets to which the Company is entitled on the basis of those agreements.

2. That the Company sell as from the 10th April 1921 to Sir William Vestey and Sir Edmund Hoyle Vestey at the price of £1,800,000 all the properties owned by the Company at Zarate Argentina and at Hankow and Singargee in China also the Shares in the International Export Co. Ltd.

The Chairman mentioned that the cost to the Company of all the above assets was £1,301,165 9*s*. 5*d*. and it was noted that there has been carried to depreciation account in respect of the Zarate Hankow and Singargee properties considerable sums which would if the same had been applied specifically in depreciating such properties have reduced the book value of those properties.

It was Resolved :—

3. That a Lease be taken by the Company of various properties set out in the Schedules to a draft Lease submitted to the Board that the form of Lease be approved and the draft thereof initialled by the Chairman, and that Mr. Harry Manning of 18, Rue Chaveau Lagarde, Paris be hereby authorised to sign and execute such Lease in France for and on behalf of the Company.

4. That the Company purchase from Sir William Vestey and Sir Edmund Hoyle Vestey for the sum of £1,226,903 the shares in the Operating and Distributing Company set out in the Undertaking a draft of which was submitted to the Board and that the form of Undertaking be approved and the draft thereof initialled by the Chairman.

5. That for the purpose of ensuring the due carrying out of the terms of the Lease this Company take a transfer to itself or its nominees of the Shares in certain Companies holding some of the properties to be leased as set out in the draft acknowledgment submitted to the Board which draft was approved and initialled by the Chairman.

The Solicitor was requested to proceed with the preparation of the various documents necessary to carry these arrangements into effect.

Memorandum. Sir William Vestey and Sir Edmund Hoyle Vestey being interested did not vote in respect of any of the above mentioned resolutions.

(*Signed*) ROGER P. SING,
Chairman.

EXTRACT from MINUTES 23rd December, 1921.

Arising out of the discussions as regards the taking over by the Company of certain foreign businesses from Sir William and Sir Edmund Hoyle Vestey at the meeting on the 5th inst. the Secretary reported that the arrangements had now been practically completed and he produced engrossments of Agreements whereby the possession and control of the foreign enterprises of this Company (other than the Russian properties which had already been relinquished by the National Company) were relinquished by the National Cold Storage Co. Inc., and resumed by this Company as from the 10th April 1921.

The Secretary reported that a Notice has been received from the National Cold Storage Co. Inc. terminating the agreement of the 14th December 1915 and the agreements supplemental thereto on the 31st December 1922.

Resolved that the engrossments of the following Agreements, whereby the Company resumes the possession and control of its foreign enterprises produced and read to this Meeting, be and are

hereby approved and that the same be passed under the Common Seal of the Company :—

1. Agreement with the National Cold Storage Co. Inc., and Sir William and Sir Edmund Hoyle Vestey.
2. Agreements between the National Company Sir William and Sir Edmund Hoyle Vestey and the
    1. International Export Co. Ltd.
    2. The Shanghai Ice & Cold Storage Co. Ltd. and
    3. The Anglo South American Meat Co. Ltd.

Memo. The above mentioned agreements were thereupon sealed with the Common Seal of the Company in accordance with the Articles of Association.

Resolved that the authority given by the Board at the Meeting held on the 5th inst. to Mr. Harry Manning to execute the Lease, draft of which was produced at that Meeting, be cancelled.

Resolved that Mr. H. T. Clements of Brussels in Belgium be and is hereby authorised to execute on behalf of the Company in Brussels the Lease and two Undertakings drafts of which were submitted to and approved by the Meeting of Directors held on the 5th inst., and which drafts were initialled by the Chairman of that Meeting.

That S. Vestey who is the registered Proprietor of Hankow and Singargee properties as Trustee for the Company be requested forthwith to execute a Declaration of Trust of the same, in favour of the Purchasers of such properties Sir William and Sir Edmund Hoyle Vestey.

That the Company do declare itself a Trustee of the Zarate property for the purchasers pending completion of the Transfer and the Solicitor was to prepare such Declaration forthwith.

Memo. Sir William Vestey and Sir E. H. Vestey being interested did not vote upon any of the Resolutions.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 2nd June, 1930, when judgment was given against the Crown, with costs.

Mr. W. Greene, K.C., Mr. A. M. Bremner and Mr. J. H. Stamp appeared as Counsel for the Appellants and the Attorney-General (Sir W. A. Jowitt, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Rowlatt, J.—In this case the point is a short one, although the materials are complex. There is no finding by the Commissioners, nor is there any contention on the part of the Crown here that this document was not a real document and, therefore, the case has to be decided upon the tenor of the document as it stands. Undoubtedly the relations of this cloud of companies *inter se* were

(Rowlatt, J.)

very complicated; undoubtedly the interest of one family was dominant throughout, and there are very many peculiarities connected with this extensive business, but for the purposes of this case I have only to consider this: What is the nature, from the point of view of the Income Tax Acts, of this figure of £960,000. The Company is in possession of all these premises abroad; it does not own them, but it has obtained possession and the use of them under this arrangement and it has to make some recompense in respect of that possession and use. I have used that lengthy form of expression because both sides are so afraid that I should, somehow or other, be hypnotised by the word "rent". This is simply a sum, which the Company have entered into some liabilities about, by way of payment for their premises and, whatever you call it, a payment of that kind is, *prima facie*, most certainly an outgoing of the business which has to be provided for and allowed before you can see whether the incoming of the business exceeds the outgoing and so shows a profit. That is quite clearly the ordinary way in which an expense of this kind must be looked at. Now it is conceivable that although that is the natural place of an expense of this kind in the accounts of the Company, a special bargain might be made by which the person providing the premises, or whatever it is, would take an interest in profits. He might take an issue of shares, or he might take an interest in profits expressly made to be an interest in the profits, as in *Walker's* case(1), in respect of the second payment of £300, or whatever it was. He might do it.

The question is: What has he done here? I must look, as I said, at the tenor of this document, and the tenor is that this Company covenants to pay this rent; and then there is a proviso by which, if the profits, after charging this rent, are not sufficient to show payments to debenture holders, preference shareholders, and so on, and something on the ordinary shares, then there is to be a refund of some of this rent, to the necessary extent. Now the simple question is: Does that make it, within the meaning of the Income Tax Acts, payable out of the profits or gains? I do not think it does. It seems to me that this payment is not within the words "payable out of profits or gains," it being a payment which is covenanted to be made quarterly in every year, and then, when the accounts of the year come to be made up, there is a liability to have some of it repaid if the Company has not reached a certain standard of success. It seems to me that is a different thing. If the statute had said: "annual interest or annuity or any annual "payment payable out of the profits or gains or only retainable by "the recipient contingently upon the amount of the profits or "gains" then it would have been within it, but the words which I have imagined seem to me very different words from "payable

(1) A.W. Walker and Co. *v.* The Commissioners of Inland Revenue, 12 T.C. 297.

(Rowlatt, J.)

"out of the profits or gains." Therefore, I think the Commissioners' decision cannot be supported in this case, and the appeal must be allowed with costs.

Mr. Greene.—The appeal will be allowed with costs, my Lord?

Rowlatt, J.—Yes.

The Crown having appealed against this decision, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, Slesser and Romer, *L.JJ.*) on the 20th and 21st October, 1930, and on the latter date judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

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. W. Greene, K.C., Mr. A. M. Bremner and Mr. J. H. Stamp for the Company.

JUDGMENT.

Lord Hanworth, M.R.—We need not trouble you, Mr. Greene.

This is an appeal from a judgment of Mr. Justice Rowlatt which set aside a decision of the distinguished Commissioners for the City of London, and held that the Company were entitled to rely upon certain deductions in order to estimate what was the sum assessable to Income Tax in the years 1923–4 and 1924–5.

The point arises in this way. The Appellant Company had selected as the two years which were to be the basis of their assessment to Income Tax the years 1922 and 1923. In those two years there were two sums paid, namely, a sum of £630,000 paid in 1922 and a sum of £960,000 paid in 1923 under the terms of an indenture of lease, dated the 29th December, 1921. They claimed that the payment of those two sums might be relied upon by the Company as sums which should be deducted under the Rules which allowed deductions from the estimation of profits, the Rules which are set out in the Income Tax Act of 1918 applicable to Cases I and II and in particular the Rule which contains them is Rule 3. That Rule provides that: "In computing the amount of the profits or "gains to be charged, no sum shall be deducted in respect of— "(*a*) any disbursements or expenses, not being money wholly and "exclusively laid out or expended for the purposes of the trade, "profession, employment or vocation:" and then "(*l*) any annual "interest, or any annuity, or other annual payment payable out "of the profits or gains."

(**Lord Hanworth, M.R.**)

In, I think it is *Usher's Brewery* case, Lord Sumner calls attention(1) to the negative form in which those Rules are laid down, but says that for the purpose of their interpretation they may be turned into an affirmative form in this way, namely, that in computing the amount of the profits or gains, disbursements and expenses which have been wholly and exclusively laid out or expended for the purposes of the trade may be deducted in the ascertainment of the profits; and equally that an annual interest or annuity or other annual payment may be deducted. I make this observation: that inasmuch as the Rule has these Sub-rules against which the letters of the alphabet are placed set out *seriatim*, it may be that a particular item may be caught by the negation in one or other of the Rules; you are not allowed to deduct disbursements which are not wholly and exclusively laid out, and also you are not allowed to deduct an annual payment payable out of the profits or gains. One has to call attention to those two negations for it might be that the negation in (*a*) would leave some sum as a possible deduction, but it must pass the test in (*l*) as well before it can be relied upon.

Now the facts of this case are complex and they are set out in the Case stated by the Commissioners, but it is not, however, necessary to go through them at length. The point really turns upon the effect of the terms of an agreement which I have already referred to, an indenture of lease dated 29th December, 1921. The Company was in possession, under the terms of that lease, of a very large number of properties which were situate in different parts of the world and which are recorded in the Schedule to the document marked "A" attached to the Case, that is the lease, and in return for being allowed the occupation of those premises it is provided by the lease that a rent should be paid of £960,000. The persons to whom the rent is to be paid are three named persons who are resident in Paris. The indenture is clearly in the form of a strict lease, it provides that the rent of £960,000 shall be paid, and paid quarterly, and it makes the usual provisions in respect of repairing agreements, insurance and a covenant to yield up in proper repair and so on; it provides for the lessors having the opportunity of inspection and serving a notice in writing for any repairs to be done upon the premises; it provides that the lessees are not to make any alteration or addition to the premises without the leave of the lessors and it also provides for re-entry in case the rent reserved should be in arrear and unpaid for three calendar months, and so on; then there is also a power reserved to the lessors to determine the lease and also to withdraw by notice in writing a certain portion of the premises from the demise.

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(1) Usher's Wiltshire Brewery, Limited v. Bruce, 6 T.C. 399 at p. 436.

(Lord Hanworth, M.R.)

There is, however, another clause on which the argument for the Crown turns ; it is this : although it is made quite clear that the £960,000 is to be paid, there is this proviso : " Provided always " and it is hereby agreed that if on making up at the end of each " financial year ending on the 31st December the accounts of the " Lessees (as to which the certificate of the Auditors for the time " being of the Lessees shall be final and binding) it is found that in " respect of the then past financial year the result of the Lessees' " operations after providing for the rent hereinbefore reserved shall " be insufficient to enable the Lessees to pay the aggregate of the " following sums namely the interest on the debentures or debenture " stock issued by the Lessees for the time being outstanding and the " interest on the amount owing on all specific mortgages heretofore " or hereafter created by the Lessees and for the time being out-" standing the dividend at the fixed rate of interest on all the " preference shares issued by the Lessees for the time being out-" standing a dividend at the rate of 10 per cent. per annum at " least on the ordinary shares issued by the Lessees for the time " being outstanding then the rent aforesaid for such financial year " shall be abated to the extent of the deficiency so ascertained and " any rent already paid by the Lessees in respect of that particular " year shall be repaid to them by the " three persons who are named recipients of the rent.

We are told that the sums for which provision is made in priority to the keeping of the rent by the lessors amount to a total of about £400,000 a year, and it is said that inasmuch as there is a provision whereby in certain events the £960,000 need not be paid, this is not in truth a rent, it is not in truth a payment for the use of the premises, it is, upon a view of the whole of the facts set out in the Case stated, a payment to or for the account of Messrs. Vestey based upon the profits of each year. It is said that it is a misnomer to call it a rent, or to treat it as a rent ; it is otherwise, it is merely a sum contingent upon the profits of the year, and profits being able to provide a payment over and above the dividends on the shares which may be held, some by the Vesteys and some by others.

Now the Commissioners came to this conclusion : " Having " considered the evidence, and the contentions of the parties, we " held that the said payments of £630,000 and £960,000 were not " payments antecedent to, or necessary to, earn profits, but con-" tingent payments dependent and payable only out of profits " earned, and were not allowable deductions from profits assessable " to income tax."

Mr. Justice Rowlatt set that decision aside and held that looking at the tenor of the document this payment to be made was a proper deduction in the course of earning or seeking profits.

(**Lord Hanworth, M.R.**)

From that decision the Crown appealed, and the Crown, first of all, take the point that this is a question of fact and call attention to a number of cases which it is useful to look at upon that point. It appears to me, however, that the Commissioners themselves, in their Case stated, show that they have had to consider and to interpret the lease to which I have already referred, and to apply the facts to the interpretation of that document, and that they have not dealt with it as a pure question of fact. It seems to me, after very carefully considering the point and up to a certain point having had my doubt about it, that it is a mixed question of law and fact. We have to determine what is the meaning and effect of the lease and we have to consider that in its proper setting of the other facts which are recounted to us in the Case stated.

If it be, as I have come to the conclusion it is, a mixed question of fact and law, then the decision of the Commissioners is open to review by Mr. Justice Rowlatt and by this Court. I need only refer as an authority for that to an observation in the course of the speech of Lord Cave, who was then Lord Chancellor, in the case of the *Gas Lighting Improvement Company, Limited* v. *Commissioners of Inland Revenue*, which is reported in [1923] A.C. in which, at page 728, he says this(1): "My Lords, I feel no doubt that the point "is appealable. If the finding of the Commissioners for General "Purposes were indeed one of pure fact, then it could not be reviewed "except on the ground that there was no evidence upon which they "could as reasonable men have come to their conclusion. But the "finding involves not only a conclusion of fact, but the construction "of the statute. It is a finding of mixed fact and law, and, as such, "is open to review by the Courts."

So here it appears to me that the present case does not depend upon a conclusion of fact alone, but also upon the construction to be placed upon the lease of the 29th December, 1921, and it is thus at least a mixed question of fact and law, and so open to review by the Courts.

Having disposed of that point I come then to the main question, and here it is important to bear in mind that it is not alleged by the Crown that this indenture of lease is not a valid and effective document, a specious device or strategy to cloak the true facts; it is accepted as a good agreement, and that carries one a very long way; it is no use to say the lease must be accepted as a lease, but must be looked at with the eye of suspicion; you have got to take its terms, and I think Mr. Justice Rowlatt is right in saying that once the Crown have admitted that it is a real document, then the case has to be decided upon the tenor of the document as it stands, without an ingenious effort to get round it because one may hold that it has the effect of withdrawing some profits from tax.

(1) 12 T.C. 503 at p. 533.

(Lord Hanworth, M.R.)

Now that lease was made at the end of December, 1921. It is right and fair that I should call attention to the facts of the next two years, because it appears that in the following year there was a sum of £630,000, in fact, paid under the terms of the rent clause, and in 1923 the full rent of £960,000 was paid. We are told in the Case stated that this sum of £960,000 was arrived at after discussion between a director who was said to represent outside interests, and the member of the Vestey family who was arguing the point with him. It is quite true that the Vestey family have large, it may be said to be over-riding, interests in all these properties, but in spite of that there is no reason to discredit this figure of £960,000 inserted in the lease, arrived at, as it was, after discussion between persons who were representative of different and it may be opposing interests before it was determined.

Now the sum is to be paid and it is true that if there are no means of paying it, or no means sufficient after the rights of debenture holders, mortgagees and shareholders have been made good, then, there is a deduction to be made; but for my part I cannot in one breath accept the lease as binding, valid and good, and at the same time refuse to attach credit and import to the terms which provide for the payment of this £960,000. It does not seem to me an impossible thing that, in the interests of the Company and in the interests of Messrs. Vestey, it should have been wise to have made a provision whereby Messrs. Vestey were not to exact the full rent unless and until a certain measure of prosperity as well as the payment of indebtedness to creditors was ensured to the members of the Company.

Now that is all that the lease provides for and I cannot look at it with a sinister eye as an attempt to defeat or to put a different colour upon a claim intended to defeat the Revenue. Mr. Justice Rowlatt has said this(1): "This is simply a sum, which the "Company have entered into some liabilities about, by way of "payment for their premises and, whatever you call it, a payment "of that kind is, *prima facie*, most certainly an outgoing of the "business which has to be provided for and allowed before you "can see whether the incoming of the business exceeds the out-"going, and so shows a profit." These words seem to be quite accurate and justified; the Company did get possession of these premises. It is quite true that the Vesteys could have withdrawn one of those premises; it is true, in fact, that they withdrew one of them, but they got the premises at which the profits were sought to be earned and they agreed to pay for them. It seems to me that that burden was undertaken by them, a burden to pay certain disbursements or expenses, and that those expenses and disbursements were exclusively laid out and expended for the purposes of

(1) Page 318 *ante*.

(**Lord Hanworth, M.R.**)
the trade ; in other words, this was a real rent, but it was agreed that there should be a reduction if the facts did not justify its full payment.

It is important, I think, to bear in mind that the prognosis formed as to the payment of it was realised as to two-thirds of it in the first year, 1922, and fully realised in the year 1923. It does not seem, therefore, as if there was any ground in the light of the immediately subsequent events for discrediting the intention to pay the rent as a rent in return for the services which the Company enjoyed.

Now I have only one more observation to make, and that is this. Our attention has been called to the case of *Strong* v. *Woodifield*(1) [1906] A.C. at page 448, and to the speech that Lord Davey made in that case. He had to consider what deductions could be made in connection with the appellants' trade, and he says this at page 453(2) : "These words are used in other rules, and appear to me "to mean for the purpose of enabling a person to carry on and earn "profits in the trade, &c. I think the disbursements permitted "are such as are made for that purpose. It is not enough that the "disbursement is made in the course of, or arises out of, or is "connected with, the trade, or is made out of the profits of the "trade. It must be made for the purpose of earning the profits." To say that those words are not fulfilled in the present case is in effect to discredit and decline to accept the indenture of lease as being effective ; to say that the words of Lord Davey have not been complied with is really to treat the lease and the whole of the facts relating to this payment of £960,000 as a strategy designed to effect a release from Income Tax, and not as stating the true position as between the parties.

I have already said that the Crown do not attack the lease ; they only attack the effect of it. When one comes to measure the true effect of it in the light of the surrounding facts, it appears to me that Mr. Justice Rowlatt was quite right in holding that this payment was, according to the tenor of the document, a sum payable for the purpose of seeking profits, and thus a proper deduction made under Rule 3 (*a*) in the Rules attached to Cases I and II of Schedule D of the Income Tax Act, 1918.

For these reasons it appears to me that the appeal fails and must be dismissed with costs.

Slesser, L.J.—I agree that this appeal must be dismissed. Although the case presents considerable aspects of complication from the point of view of history, when we consider all the arrangements which have been made between Lord Vestey and the other members of the Vestey family and the Union Cold Storage Company,

(1) 5 T.C. 215. (2) *Ibid.* at p. 220.

(Slesser, L.J.)

the subsidiary companies and all the other companies interested, the actual matter which we have to consider in this case appears to me comparatively simple. We have, as my Lord has said, an agreement drawn up between the Respondent Company and certain trustees and owners of properties, whereby the Respondent Company in consideration of paying a certain rent are put in possession of certain properties. Now it is not seriously contested by the Crown, that, apart from some specific provision as to the abatement of rent, of which I will speak in a moment, this agreement does provide in the simplest form for the payment of certain annual sums of money for the occupation of certain premises, which are necessary for the Respondent Company to earn its profits, and that if the particular provision dealing with abatement was absent from this agreement, there really would have been no argument here at all ; it would have been clear beyond doubt that the moneys paid, the £960,000 and the £630,000, were paid under this agreement for the possession of certain properties whereby the Respondent Company were enabled to earn their profits. In that way the Respondent Company would fall in the first place within the negative provisions of Rule 3 (*a*), that is, they would show that the money was wholly and exclusively laid out and expended for the purpose of their trade, and they would be able to show that this payment was not an annuity or annual payment payable out of the profits or gains.

Now it is quite clear, whatever effect the provision as to abatement may have on the interpretation of the lease and the transactions, that the two sums which are here sought to be deducted, namely, the £960,000 on the one hand and the £630,000 on the other, were in fact paid as rent or consideration for the occupation of the premises under this agreement. That really is not in dispute. It is not suggested that they were paid for any other purpose ; indeed, as my Lord has pointed out, in the case of the second payment, actually the whole of the sum provided to be paid was paid. But then it is said, as I understand it, that this agreement is of such a character that notwithstanding the fact that these payments were actually so made, the provisions of the agreement as to the abatement of rent in certain circumstances are such as to show that this was not, taking the agreement as a whole, an expenditure purely made for the purpose of earning the profit, but was a payment out of the profit itself.

The paragraph which is relied on is to this effect. After setting out that the lessees shall pay yearly the sum of £960,000 to the trustees, it provides : " And it is hereby agreed that if on " making up at the end of each financial year ending on the 31st " December the accounts of the Lessees . . . it is found that in " respect of the then past financial year the result of the Lessees' " operations after providing for the rent hereinbefore reserved

(Slesser, L.J.)

" shall be insufficient to enable the Lessees to pay " certain dividends and interest, then the rent shall be abated to the extent of the deficiency and any rent already paid shall be repaid. The last reference is explained by the next paragraph of the lease, which provides that the lessees shall during the year in which the rent is payable make the usual quarterly payments in any event—I am slightly paraphrasing the provision—and then if it is found at the end of the year that the dividends and the like cannot be paid then, as I have said, there is a provision for repayment. In all other respects, as my Lord has said, the agreement contains the usual provisions for repairs, for re-entry, for inspection and the like.

Now I am quite unable to see why, because there is a provision whereby in certain contingencies the rent may be reduced, or even may in a particular year be reduced to nothing, the rent which has in fact actually been paid under that agreement for the possession of certain properties during the year is not rent which has been paid in order to earn the profits. It will be observed that the obligation to pay rent obtains in any case. We are told that in the later years the Company had paid no rent, but the actual transaction as contemplated by the agreement is that the Company, in any event, whatever their dividends may ultimately be ascertained to be, will pay the rent by quarterly instalments and then, as the agreement provides, they shall be repaid by the lessors the rent, if that rent is covered in fact by the right to have an abatement.

In the two years in question, however, the rent was paid, in one case the whole of the rent and in another case part of the rent, and I think what the Crown have sought to do here is really to attack, if I may use the phrase, the *bona fides* of the lease itself and suggested that the purport of the lease is something other than what was actually sought to be achieved.

In the case of *Frost* v. *Caslon*, which is reported in [1929] 2 K.B. at page 138, a somewhat similar argument was addressed to the Court, with regard to the right to a franchise claimed by a director of a company, who produced an agreement from the company giving him the right to the tenancy of a room in the company's premises, whereby it was said he became entitled to a vote. Lord Justice Greer, at page 149, says this : " There may be many cases, " I agree, in which it would be right for the tribunal of fact to say " that the agreement of tenancy put forward is not a real agreement, " and by that I do not mean that the tribunal of fact can " dispose of the agreement by saying that the motive of its " execution was to get the right to vote."—that was the question there in issue—" If the tribunal were satisfied that the agreement " was a mere sham, the registration officer would be entitled to " say : ' This is not a real agreement, and it is a mere pretence to

(Slesser, L.J.)

" 'say that the director is the tenant.' The registration officer " has not said so in this case and, indeed, when the case was argued " before the county court judge it was conceded that the tenancy " granted to Caslon was a genuine tenancy and we must therefore " decide the case on that basis." Now here, also, it is not suggested that this is not a genuine tenancy. If it was a genuine tenancy, we must assume that these were genuine payments made under the lease for the consideration of the occupation of the premises; and if that be so, it seems, to my mind, to conclude this case in favour of the Respondents; because whatever argument might be based on the fact of the history of the transactions between Lord Vestey and the Vestey family and these companies, once it is conceded that this is a genuine tenancy agreement, then I am unable to see how the mere provision for abatement of rent in certain contingencies can make the tenancy agreement any the less real.

I would only say this in conclusion, because a certain atmosphere of suspicion has perhaps collected round this case, that according to the findings of the Commissioners themselves, the suggestion to place this abatement into the agreement did not come from the Vestey family at all, but was suggested by Mr. Sing, who represents the independent shareholders. It appears from the Case that, so far as Lord Vestey and the Vestey family were concerned, they were content to have an actual and simple agreement for a tenancy without provision for abatement; the suggestion for abatement, according to the finding of the Commissioners, did not come from them at all, but from Mr. Sing. But however that may be, once it is conceded, as it is conceded, that this agreement is a genuine agreement, I think that decides the case which we have to consider, and that we must regard these as expenses properly falling within the exception to Rule 3 to Schedule D and, therefore, a proper deduction to be made from the sums chargeable to tax.

Romer, L.J.—I agree, for the reasons that have been given by the Master of the Rolls, that the question decided by the Commissioners in this case is a mixed question of law and fact, and is therefore open to review by the Courts. That being so, the first question that we have to determine is whether the two payments that have been made and which are in question were payments wholly and exclusively laid out or expended for purposes of the Company's trade. As was pointed out by the Master of the Rolls, Lord Davey has told us what those words mean, and he says that they mean, for the purpose of enabling a person to carry on and earn profits in the trade. Now it seems to me impossible to come to the conclusion that these sums were not paid by the Company for the purpose of enabling them to carry on and earn profits in that trade. The sums were paid for the acquisition and possession of what were essential for the Company in order to enable it to earn part of the profits which the Crown were now seeking to tax.

(Romer, L.J.)

I agree that the question does not rest there, because although those payments may have been, and in my opinion clearly were, made for the purpose of enabling the Company to carry on and earn profits in the trade, the sums so paid may nevertheless have been paid out of the profits of the Company, within the meaning of Sub-section (*l*) of Rule 3 to Schedule D of the Act of 1918. Approaching that question, it appears to me that inasmuch as the Crown do not attack the *bona fides* of the document of 1921, the document which has been called, and I think is, a lease or agreement for a lease, they do not regard it as a mere cloak or sham, in order to succeed in their contention that the payments were really payments of profits, they must establish the following proposition: That where a company, for the purpose of enabling it to carry on its trade and earn profits in its trade, places itself under an obligation to make money payments, the amount of which is dependent upon the profits earned, or the payment of which is contingent upon certain profits being earned, payments made in discharge of that obligation are payments made out of the profits or gains of the Company, within the meaning of Rule 3 (*l*). In my opinion, for that proposition there is no foundation at all in principle or on authority.

I agree that this appeal should be dismissed.

The Crown having appealed against this decision, the case came before the House of Lords (Lord Buckmaster, Lords Warrington of Clyffe, Atkin, Tomlin and Macmillan) on the 23rd and 24th November, 1931, and on the latter date judgment was given unanimously against the Crown with costs, confirming the decision of the Court below.

The Attorney-General (Sir W. A. Jowitt, K.C.), the Solicitor-General (Sir T. H. Inskip, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown and Mr. W. Greene, K.C., Mr. A. M. Bremner and Mr. J. H. Stamp for the Company.

JUDGMENT.

Lord Buckmaster.—My Lords, on the 29th December, 1921, the Respondents took a lease of a very large quantity of property specified in the three schedules, arranged according to the different interests in the property. Examination of the facts and circumstances connected with the granting of the lease is quite unnecessary. The lease itself, though it dealt largely with foreign rights and foreign properties, took the form of a common English lease in which the lessors, as beneficial owners, demised unto the

(Lord Buckmaster.)

Respondents all the property that was mentioned for twenty-one years. The lease contained the common covenant for payment of rent, fixed at £960,000 a year, and provided that the lessees should pay that rent in the usual way by quarterly instalments, on the 1st January, April, July and October. Following that covenant, there was a proviso to this effect: If at the end of each financial year ending on the 31st December, when the accounts of the Company were made up, it was found that there had not been sufficient profits earned to enable the payment of certain interests and dividends that are specified in the lease, then to the extent of the deficiency the rent should be abated, and any rent that had been paid in excess should be repaid.

The Inland Revenue authorities have assessed the Respondents for two years, which are now under consideration, upon the basis that the Respondents are not at liberty to introduce any payment of rent made under that lease as a liability in ascertaining the balance of their profit and loss, and they base their claim for this assertion, which, on the face of it, seems rather unusual, upon the ground that this payment under this lease is not, in fact, a payment of rent at all, but is something in the nature of a distribution of profits which can only be made after the balance has been struck under the statute, that the landlords are really sharers in the profits of the Company on a similar footing with the preference shareholders and others, and consequently this money is not deductible for the purpose of ascertaining whether profit has been earned.

My Lords, the first thing, and, to my mind, the only thing, to be considered is this: Is this or is this not rent payable under this lease? No attack whatever has been made upon the document itself. It was said that there had been an arrangement of property to try to avoid payment of Income Tax, of which, it may be, this document is one of the instruments; but nobody has challenged the *bona fides* of the document itself; nobody has said that the £960,000 is a fictitious or an artificial sum. It is admitted that this case has to be determined on the hypothesis that this is a perfectly sound business document, and it is upon that ground that the payment has been attacked.

When the matter is so considered, in spite of the efforts of the Law Officers, I find myself quite unable to understand what is the argument upon which this assessment is supported. The rent is covenanted to be paid as rent. There is no provision whatever in the lease that the condition precedent to the payment of that rent is the earning of profits. It is not disputed that at any time, up to the 31st December, action could be taken at law for payment of the quarterly sums. The only thing that is provided is that if at the end of the year, when the balance sheet is made up, certain payments cannot be made if the full rent is charged, instead of

(Lord Buckmaster.)

the full rent being charged a smaller sum shall be charged, and if anything has been overpaid it shall be returned. But whether the whole sum or part of it is paid, the payment is the rent of business premises and nothing but rent.

For these reasons I am very clearly of opinion that this appeal should fail, and though I wish to make no remarks which would imply responsibility, the nature of which I cannot possibly measure or ascertain, it does appear to me, without further information, unfortunate that, when Mr. Justice Rowlatt had given judgment in the clearest terms and the Court of Appeal also to the same effect without any hesitation, the matter should have proceeded here. There is, of course, the fact that the Commissioners thought otherwise, but I cannot help thinking that the Commissioners may have been misled by the introduction of a large mass of irrelevant matter antecedent altogether to the date of this lease. I have only to add that the decision of the Commissioners was not a decision on a pure question of fact but certainly involved the construction of the lease, and was in my opinion more nearly a pure question of law than a question of fact.

Lord Warrington of Clyffe.—My Lords, I agree. Once it is admitted that the deed, the so-called lease, represents a genuine transaction, the case for the Crown appears to me to be at an end. The deed is called a lease, and, if the immoveables comprised in it were situate in this country, I think it would be a lease in the technical sense, but whether or not it is right to call it a lease, having regard to the fact that the immoveables are situate in foreign countries, this at any rate is clear, that the annual sum to be paid under the document is the consideration for the use and occupation by the Respondent Company of lands, the use and occupation of which is essential to the earning by the Company of their trading profits. Now, that being so, we start with this, that the annual payment would clearly be a sum which would be properly debited against any account of profits and gains for the purpose of Income Tax. The deed imposed upon the Company an absolute obligation, by express covenant, to pay this annual sum or rent by equal quarterly payments, but, those payments having been made, it was realised—and no doubt the lessors were interested themselves in the prosperity of the Company—that, in order to secure the payment of debenture interest and dividends on shares, it might be necessary to allow some abatement of the rent so paid, and accordingly it was provided that if " it is found that in respect " of the then past financial year the result of the lessees' opera- " tions after providing for the rent hereinbefore reserved "—that is, the total sum of £960,000—" shall be insufficient to " enable the lessees to pay " the debenture interest and the dividends mentioned in the document, " then the rent aforesaid

(Lord Warrington of Clyffe.)

" for such financial year shall be abated to the extent of the " deficiency so ascertained and any rent already paid " shall be repaid. It seems to me that the mere fact that the amount of the rebate of the rent is measured by the question whether or not the net profits are sufficient to pay such interest and dividends is a mere detail which has no effect upon the real substance of the transaction. The real substance of the transaction is that in the events specified there shall be a rebate of the rent; whatever is the rent, after the application of that rebate, is still to be paid, and it seems to me it still remains an expense necessarily incurred in earning the trading profits of the Company.

My Lords, for these reasons I agree that the appeal ought to be dismissed.

Lord Atkin.—My Lords, I agree the appeal should be dismissed. This seems to me to be a particularly clear case, and I find it unnecessary to say anything in addition to what has been already said by the noble Lords who have preceded me.

Lord Tomlin.—My Lords, I concur.

Lord Macmillan.—My Lords, I also agree, but as reference has been made to the case of the *Pondicherry Railway Company, Limited* v. *Income Tax Commissioner*, [1931] 58 I.A. 239, an Indian appeal before the Privy Council in which I took part, I should like to point out that the circumstances there under consideration differed entirely from those which the House has been considering in the present appeal. We were reminded very properly by the Solicitor-General that these cases all turn upon their particular circumstances, and in that case the convention under which the payments were made provided as follows: " The " Company undertakes on its part to make over to the Colonial " Government during the whole duration of the concession one- " half of the net profits which shall be arrived at " in a manner which is then set out in detail, provision being made for the deduction of all outgoings, such as rates and taxes, and so on. In that case, therefore, the ascertainment of profits preceded the coming into operation of the obligation to pay, and when the profits had been ascertained the obligation was to make over one-half thereof to the French Colonial Government. The obligation was conceived in language entirely different from the language which your Lordships have been considering in the present appeal, where there is a common form obligation in a lease to pay rent. When, therefore, in the passage referred to by the Attorney-General in the *Pondicherry* case I said that " a payment out of profits and " conditional on profits being earned cannot accurately be described " as a payment made to earn profits ", I was dealing with a case in

(Lord Macmillan.)

which the obligation was, first of all, to ascertain the profits in a prescribed manner, after providing for all outlays incurred in earning them, and then to divide them. Here the question is whether or not a deduction for rent has to be made in ascertaining the profits, and the question is not one of the distribution of profits at all.

I should like to add, also, that the other authorities to which the notice of the House has been directed, when their circumstances are examined, differ so entirely from the present case as to be no assistance in its determination. To refer to one only, which the learned Solicitor-General seemed to regard as his sheet anchor, namely, the case of *Last* v. *London Assurance Corporation*[1], (1885) 10 A.C. 438, when you examine that case you find that you are in an entirely different region of the law and are dealing with transactions of an entirely different nature. The expression "participating policies" denotes by its very terminology that they are policies which participate in profits, and when insurance companies talk of a quinquennial distribution of bonuses they plainly refer to a distribution of profits. A case dealing with such distributions appears to me to be removed, *toto cœlo*, from the type of case with which your Lordships have to deal here. I have, therefore, no difficulty in concurring in the motion that this appeal be dismissed.

Questions put:—

That the Judgment appealed from be reversed.

The Not Contents have it.

That this Appeal be dismissed with costs.

The Contents have it.

[Solicitors:—Charles H. Wright & Tracey; Solicitor of Inland Revenue.]

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(1) 2 T.C. 100.