VOL. XXXII—PART IX

No. 1480—High Court of Justice (King's Bench Division)—
24th and 25th October, 1949

Court of Appeal—20th, 21st and 22nd March and
1st and 10th May, 1950

House of Lords—17th, 18th, 19th, 23rd and 24th July and
25th October, 1951

(1) Tamplin and Son's Brewery (Brighton), Ltd. *v.* Nash (H.M. Inspector of Taxes)[1]

(2) Webbs (Aberbeeg), Ltd. *v.* Davies (H.M. Inspector of Taxes)
Davies (H.M. Inspector of Taxes) *v.* Webbs (Aberbeeg), Ltd.

Income Tax, Schedule D—Deductions—Brewery company letting tied houses.

(1) *The Appellant Company was lessee of a number of licensed houses which it sublet to tied tenants. In Income Tax assessments made upon the Company under Schedule D, deductions were allowed in respect of the difference between the rents payable by the Company and the rents receivable from the tied tenants. Some time after the passing of the Finance Act,* 1940, *the Inspector of Taxes took the view that the Company's lease was a "long lease" within Section* 17 *of that Act, and that after that Act no deduction in respect of the rent payable was admissible in computing the Company's liability to Income Tax under Schedule D. The Company did not contest this view.*

On appeal against additional assessments, the Company contended (a) *that the difference between the rents which it could have obtained by letting the houses free of ties and the rents which it actually received from the tied tenants was an expense wholly and exclusively laid out for the purpose of the trade, and therefore an admissible deduction, and* (b) *that in any event there had been no "discovery" within Section* 125 *of the Income Tax Act,* 1918, *to justify the making of additional assessments. The Special Commissioners held that the deduction claimed was not admissible; and that on the question of discovery they were bound by the decision in the King's Bench Division in the case of* Vestey's Executors and Vestey *v.* Commissioners of Inland Revenue, 31 T.C. 1. *They accordingly dismissed the appeal.*

(2) *The Appellant Company was the lessee of a number of licensed houses which it sublet to tied tenants. In every instance the Company's lease was a "long lease" within the meaning of Section* 17, *Finance Act,* 1940.

[1] Reported [1950] 2 All E.R. 93; [1951] 2 All E.R. 869; [1952] A.C. 231.

In the computation of its profits for the purposes of assessment under Schedule D, the Company claimed (i) *as regards one house, deduction of the difference between the rent which it could have received by letting the house free of ties (measured by the rent payable by the Company) and the rent received from the tied tenant, and* (ii) *as regards* 17 *other houses, deduction of the difference beween the gross Schedule A assessment on the house (which exceeded the rent payable by the Company) and the rent received from the tied tenant. On appeal the Special Commissioners rejected the first claim and admitted the second.*

Held, *that, nothwithstanding the passing of Section* 17 *of the Finance Act,* 1940, *deductions in accordance with the decision in* Usher's *case,* 6 T.C. 399, *for "rent forgone" remained admissible.*

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(1) *Tamplin and Son's Brewery (Brighton), Ltd.* v. *Nash*

CASE

Stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on 19th November, 1946 and 26th February, 1947, Tamplin & Son's Brewery (Brighton), Ltd. (hereinafter called "the Appellant Company") appealed against additional first assessments, for the year 1942-43 in the sum of £32,033, and for the year 1943-44 in the sum of £32,791, raised upon it under the provisions of Case I, Schedule D, and Section 125 of the Income Tax Act, 1918, in respect of its profits as brewers.

2. The points for our determination were, and for the opinion of the Court are;

(1) whether on the facts hereinafter stated and in view of Section 17 of the Finance Act, 1940, the Appellant Company was or was not entitled, in computing the profits of its trade as brewers as aforesaid, to a deduction of a sum equal to the difference between the rents received by the Appellant Company from certain leasehold tied houses and the rents which would have been received from the houses, had they been let separately, free of the burden of the tie;

(2) whether in any event there had been such discovery within the meaning of Section 125 of the Income Tax Act, 1918, as would justify the making of the additional assessments for the said years 1942-43 and 1943-44.

3. The following documents and statements were put in evidence before us and may be referred to as Exhibits (1):

I. Agreement for lease dated 1st June, 1938, between Tamplins Licensed Properties, Ltd., the Law Debenture Corporation, Ltd. and the Appellant Company.

II. Specimen tenancy agreement between the Appellant Company and its tied tenants.

(1) Not included in the present print.

III. Directors' report and statement of accounts of the Appellant Company for the year ended 30th April, 1941.

IV. Directors' report and statement of accounts of the Appellant Company for the year ended 30th April, 1942.

V. The Appellant Company's computation of its profits for the purposes of assessment to Income Tax, Schedule D, for the year 1942-43, based on the figures in the accounts (as adjusted) for the year ended 30th April, 1941.

VI. The Appellant Company's computation of its profits for the purposes of assessment to Income Tax, Schedule D, for the year 1943-44, based on the figures in the accounts (as adjusted) for the year ended 30th April, 1942.

VII. Statement showing the licensed and unlicensed properties comprised in the agreement for lease with Tamplin's Licensed Properties, Ltd. (Exhibit I), with rents receivable by the Appellant Company, for the year ended 30th April, 1941, and gross and net Schedule A assessments for the same period.

VIII. Letter of 1st February, 1947, from the Solicitor of Inland Revenue to Messrs. Godden Holme & Co., solicitors to the Appellant Company, setting out the facts, admitted on behalf of the Crown as material to the issue of "discovery", under Section 125 of the Income Tax Act 1918.

IX. Letter dated 10th February, 1947, from Messrs. Godden Holme & Co. to the Solicitor of Inland Revenue agreeing the facts contained in Exhibit VIII, and intimating that in view of the admission therein no evidence would be called on behalf of the Appellant Company on the "discovery" point.

X. Statements put in on behalf of the Crown illustrating, by the use of token figures, the computation of the Company's profits as brewers for Income Tax purposes (A) before the enactment of Section 17 of the Finance Act 1940: (B) after the enactment of the said Section 17, as contended on behalf of the Crown: (C) after the enactment of the said Section 17, as contended on behalf of the Appellant Company.

4. Evidence was given before us by Mr. A. F. Huggons, secretary of the Appellant Company, and the facts found by us on that evidence, or as agreed between the parties, are as stated in the following paragraphs, numbered 5 to 13 inclusive.

5. The licensed houses, which gave rise to the first issue in this appeal, were owned by a company called Tamplin's Licensed Properties, Ltd., hereinafter called "T.L.P." which is a wholly owned subsidiary company of the Appellant Company. T.L.P. was formed in the year 1926 to acquire and hold property, with a capital of £100,000, later increased to £200,000. The object of forming T.L.P. was entirely financial. The Appellant Company wanted to raise further debenture capital for the purpose of its business as brewers, as aforesaid, but its financial structure in the year 1926 was such that it could not readily do so on its own account. It therefore formed T.L.P. which took over from the Appellant Company properties of sufficient value to provide cover for the issue of £200,000 6 per cent. redeemable debenture stock. The said properties were mainly licensed

houses. The stock was secured by a trust deed providing for redemption in 35 years, with a provision for a cumulative sinking fund at one per cent. per annum. T.L.P., having acquired the said properties leased them to the Appellant Company, and the rent received by T.L.P. from the latter was sufficient to provide cover for the annual interest on the debenture stock, and for the sinking fund. In the year 1929, T.L.P. took over further properties from the Appellant Company, and the total block rent for all the said properties was increased to £40,000, which was the total lease rent paid by the Appellant Company to T.L.P. in the material years. At the same time the debenture stock issued was increased to £350,000. In the year 1933, T.L.P. redeemed the whole of the said debenture stock issue, and replaced it by a 4½ per cent. issue redeemable in 60 years, with a provision for an annual sinking fund contribution of one quarter of one per cent. In view of this alteration in the period fixed for the redemption of the debenture stock, a new lease was necessary, and the agreement for lease dated 1st June, 1938 (Exhibit 1) (1) was therefore executed. Under clause 4 of the said agreement, T.L.P. and the Law Debenture Corporation as trustees, bound themselves, when required by the Appellant Company, to execute a lease of the said properties in the form of lease scheduled to the said agreement. In the meantime however, all the said parties bound themselves under clause 5 of the said agreement by the covenants and provisions contained in the said form of lease in all respects "as if the same were "actually executed". The Appellant Company never has required the other said parties to execute a lease, but it is common ground between the parties in this appeal that nothing turns upon such omission.

6. By the said agreement for lease (Exhibit 1) T.L.P. agreed to grant a lease to the Appellant Company of the properties, set out in the schedule to the form of lease therein referred to. The said schedule sets out, in the first part thereof, particulars of freehold properties and in the second part thereof, particulars of leasehold properties comprised in the agreement for lease. The agreement was for a term of 61 years, computed from 1st October, 1933, as regards the freehold and certain of the leasehold properties, and as regards the remainder of the leasehold properties, for the residue of the terms for which such properties were held by T.L.P., less the last three days of each of such respective terms.

The said agreement for lease provided that the Appellant Company should pay a yearly rent of £40,000 (hereinafter called the block rent); there was no apportionment of the block rent between the several properties in the first and second parties of the said schedule, but it was common ground between the parts in this appeal that such parts of the block rent as were paid by the Appellant Company to T.L.P. for the properties set out in the first part of the said schedule, and for the properties (other than Nos. 3 and 4) set out in the second part of the said schedule, were rents under "long leases", within Section 17 (1) (*a*) of the Finance Act, 1940, and such parts of the block rent as were paid for properties Nos. 3 and 4 set out in the second part of the said schedule, were rents under "short leases".

The said properties comprised in the agreement for lease consisted in the main of licensed properties, which the Appellant Company in turn sublet to tied tenants in the manner described in paragraph 7 of this Case; the remainder consisted of unlicensed properties and licensed properties which the Appellant Company retained under its own management.

(1) Not included in the present print.

No question arose for our consideration or now arises on this Case in respect of the properties held on short lease from T.L.P., nor in respect of such of the properties held on long lease as were unlicensed, or were licensed properties retained by the Appellant Company under its own management, the position of the figures in relation to those properties in arriving at the profits or gains of the Appellant Company for the purpose of assessment under Case I of Schedule D having been agreed between the parties. The first issue referred to in paragraph 2 above for our determination related solely to the licensed properties held on long lease from T.L.P. which the Appellant Company sublet to tied tenants.

7. Such of the properties leased as aforesaid for a term of 61 years to the Appellant Company as were licensed properties, and were not retained under the management of the Appellant Company, were in turn sublet by the Appellant Company to various "tied" tenants under agreements of which a specimen, Exhibit II, is exhibited as part of this Case(1). Under clause P of the said agreement, the tenant and licensee of the public house entered into the usual undertaking to purchase solely and exclusively from the landlord, *viz.* the Appellant Company, all the ale, beer, stout and other malt liquor and all wines, spirits *etc.*, and mineral waters as should be required for sale in or out of the said premises. Under clause Q, the said tenant entered into an undertaking not to buy from any other source than the Appellant Company, and, under clause R, not to be engaged or concerned in any trade or business other than that of the licensee of the said premises, without obtaining the Appellant Company's consent as landlord.

It was common ground between the parties in this appeal that the said specimen agreement and the said restrictive terms mentioned above were those commonly to be found between brewers and their tied tenants, and that they were entered into by the Appellant Company to obtain a better market for its beer.

The Appellant Company's accounts for the year ended 30th April, 1941, (Exhibit III),(1) being the basis year for the year of assessment 1942-43, shows, in the profit and loss account, a debit for rent payable of £42,325. The said figure is analysed in appendix 4, attached to Exhibit V (1) giving the Appellant Company's computation of its liability to assessment for the said year 1942-43. From the said appendix, it appears that the said debit of £42,325 included the said block rent of £40,000 paid by the Appellant Company to T.L.P. under the agreement for lease as aforesaid. The remaining items which were in respect of other licensed and unlicensed properties, telephone rents *etc.* are not material to this Case.

On the credit side of the profit and loss account for the Appellant Company's year ended 30th April, 1941, as aforesaid (Exhibit III) is an item "Rents Receivable—£25,364". This item is analysed in appendix 3, attached to the said Exhibit V, from which it appears that it includes a sum of £5,355 being the aggregate of the rents received by the Appellant Company for the licensed properties, leased from T.L.P., and sublet on tied tenancies. Of this sum of £5,355, the sum of £5,329 represented rents received from properties held by the Appellant Company from T.L.P. on "long lease".

9. The Appellant Company, in computing the profits of its said business as brewers for the purposes of Income Tax for the year 1942-43, prepared a computation based on its accounts for the year ended 30th

(1) Not included in the present print.

April, 1941 (Exhibit V). In this computation the net profit of £19,887, as shown in the printed accounts was adjusted by the addition of the "Rents Payable £42,325", debited to revenue in the printed accounts, and by the deduction of the "Rents receivable . . . £25,364" credited to revenue in those accounts, the effect of these adjustments being to eliminate the whole of the rents payable and the rents receivable from the computation of the Appellant Company's profits for Income Tax purposes. The Appellant Company then deducted (among other items not material to this Case) an amount of £48,837 described as "Deficiency of Rents of Tied Licensed Houses". The manner in which this £48,837 was calculated is shown in appendix 5 of Exhibit V.

The last-named figure of £48,837 was the deduction to which the Appellant Company originally claimed to be entitled, under the decision of the House of Lords in the case of *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 6 T.C. 399. As appears from the said appendix 5 of Exhibit V it represented the difference between the rents paid by the Appellant Company for all leasehold properties, or the gross Schedule A assessments of all freehold properties owned by the Appellant Company on the one hand, and the rents received by the Appellant Company on the other hand.

Similarly, in computing the profits of its business as brewers for the purposes of Income Tax for the year 1943-44, the Appellant Company prepared a computation based on its accounts for the year ended 30th April, 1942 (Exhibit VI [1]). In this computation the net profit of £19,978 as shown in the printed accounts was adjusted by the addition of the "Rents Payable—£42,331" debited to revenue in the printed accounts, and by the deduction of the "Rents Receivable—£25,864," credited to revenue in those accounts, the effect of these adjustments again being to eliminate the whole of the rents payable and the rents receivable from the computation for tax purposes. The Appellant Company then deducted (among other items not material to this Case) an amount of £50,410 described as "Deficiency of Rents of Tied Licensed Houses", calculated as shown in appendix 5 to Exhibit VI. The last-named figure was the deduction to which the Appellant Company originally claimed to be entitled under *Usher's* case, above mentioned.

The figures in appendix 5 to Exhibit V and appendix 5 to Exhibit VI relate not only to the licensed properties, leased from T.L.P. as aforesaid, but also to all the licensed properties owned or leased by the Appellant Company and also to the unlicensed properties leased from T.L.P.

10. The computations of the Appellant Company for the years 1942-43 and 1943-44 referred to in the last preceding paragraph hereof were at first accepted by the Inspector of Taxes, and first assessments were made under Case I of Schedule D, Income Tax Act, 1918, in accordance with those figures. At that time the Inspector was aware of the contents of the agreement for lease (Exhibit I) but was mistaken as to its legal effect under the provisions of Part II of the Finance Act, 1940, in that he regarded the agreement as a "short lease", within the provisions of Section 15 of the said Finance Act.

Pursuant to his then opinion that the agreement was a short lease the Inspector considered that a deduction for rent paid under it was an admissible deduction in arriving at the profits for the purposes of assessment to Income Tax under Schedule D and that the said first assessments were made in the correct amounts.

[1] Not included in the present print.

11. Subsequently, the Inspector having come to the opinion, now admitted by both parties to this Case to be correct, that the said agreement for lease (Exhibit I) was a "long lease", within the provisions of Section 17 of the Finance Act, 1940, turned his attention to the deductions of £48,837 and £50,410 claimed for the said years 1942-43 and 1943-44.

Having now formed the opinion that the rent payable by the Appellant Company to T.L.P. as aforesaid, was a rent under a long lease, the Inspector came to the conclusion that under the provisions of Sub-section (2) of Section 17 of the Finance Act, 1940, it must be treated as if it were a royalty paid in respect of the user of a patent, from which tax is deductible by the payer under the provisions of Rule 19 (2) of the General Rules applicable to all Schedules of the Income Tax Act, 1918, and which, under the provisions of Rule 3 (*m*) of the Rules applicable to Cases I and II of Schedule D, may not be deducted in computing the amount of the profits to be charged.

When the matter came before us on this appeal the Appellant Company did not deny that the said rent for leasehold licensed houses did fall within the provisions of the said Section 17, and was accordingly disallowable in computing the profits of the Appellant Company for the said years 1942-43 and 1943-44. But the Appellant Company claimed that it was, nevertheless, entitled to an allowance under the said decision in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (1) in respect of the amount of "rent "forgone" by the Appellant Company for the purposes of its trade as brewers, and that the amount of such allowance had been correctly computed by reference to the difference between the rent paid to T.L.P. for leaseholds, as aforesaid, and the rents received by the Appellant Company from its tied tenants, such difference being included in the said figures of £48,837 and £50,410 mentioned above in paragraph 10.

12. The Inspector, declining to accept the Appellant Company's contention, asserted that he had discovered that the Appellant Company had been undercharged in the first assessments for the said years 1942-43 and 1943-44, to the extent that the deductions of £48,837 and £50,410, claimed and allowed in the first assessments raised on the Appellant Company, as aforesaid, included deductions computed as described in paragraph 9 above, in respect of the properties held on long lease by the Appellant Company from T.L.P.

Whereupon, as the said first assessments had already been signed and allowed, the Inspector certified particulars to the General Commissioners who signed and allowed additional first assessments for the said years 1942-43 and 1943-44, against which the Appellant Company appealed before us. The said additional assessments, as stated above in paragraph 2, were objected to by the Appellant Company, not only on the grounds that the deductions claimed under the said decision in the case of *Usher's Wiltshire Brewery* had not been allowed, but also the ground that, as contended by the Appellant Company, the Inspector had not made any discovery, within the meaning of the said Section 125.

13. On the hearing of the appeal the Appellant Company agreed that no "allowance" under the said decision in *Usher's* case could be claimed by it in respect of such properties comprised in the said agreement for lease (*a*) as unlicensed and (*b*) as were licensed, but retained by it under its own management.

The sole issue raised on the first question before us as set out in paragraph 2 hereof was whether the Appellant Company was entitled in arriv-

(1) 6 T.C. 399.

ing at its profits to a deduction in respect of those properties held by it on long lease from T.L.P. which were sublet by it on tied tenancies, the amount of the deduction claimed by the Appellant Company being a sum equal to the difference between the rents received by the Appellant Company for such properties and the rents which would have been received by it, had they been let separately free of the burden of the tie.

Statement X [1] shows, by the use of token figures, the difference between the method of calculating the Appellant Company's profits for Income Tax purposes. as contended for by the Crown (sub-statement (B)), and as contended for by the Appellant Company (sub-statement (C)).

14. It was contended on behalf of the Appellant Company that;

(1) the difference between the rents received by the Appellant Company in respect of its tied houses and the rents which would have been received for them if let separately free of the burden of the tie was "rent forgone" by the Appellant Company solely for the purposes of its trade as brewers;

(2) in accordance with the decision of the House of Lords in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce,* [1915] A.C. 433; 6 T.C. 399, the Appellant Company was entitled, in computing the profits of its said trade for the purposes of assessment to Income Tax under Case I of Schedule D, to deduct the amount of such "rent forgone";

(3) the subject matter of the deduction allowable pursuant to the decision in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* being "rent "forgone" and not rent paid—*vide Collyer* v. *Hoare & Co. Ltd.,* [1932] A.C. 407; 17 T.C. 169—the Appellant Company's right to the deduction was unaffected by the enactment of Section 17 of the Finance Act 1940;

(4) in any event the assessments under appeal being additional assessments for the years 1942-43 and 1943-44, were bad in law, because the Inspector had not, on the evidence, made any discovery within the meaning of Section 125 of the Income Tax Act, 1918, so as to justify the making of any additional assessments for the said years; and accordingly

(5) the additional assessments for 1942-43 and 1943-44 should be discharged.

15. It was contended on behalf of the Inspector of Taxes that;

(1) the allowance claimed by the Appellant Company in the case of the leasehold houses in question for the said years 1942-43 and 1943-44 was in reality a claim to a deduction of the lease rent paid by the Appellant Company to T.L.P. mitigated by the rent received from the tied houses;

(2) on a correct consideration of the case of *Usher's Wiltshire Brewery, Ltd.* v. *Bruce,* 6 T.C. 399, the allowance which it was decided a brewer was entitled to in respect of licensed houses which he holds on lease and lets subject to a tie is an allowance for the rent paid by the brewer for the houses, mitigated by the rent he receives from them, and this construction is confirmed by the case of *Lowry* v. *Consolidated African Selection Trust, Ltd.,* 23 T.C. 259;

[1] Not included in the present print.

(3) the said allowance in the case of the licensed houses held by the Appellant Company from T.L.P. on long lease, although previously allowable, was barred for the said years 1942-43 and 1943-44 by the provisions of Section 17 of the Finance Act, 1940, and Rule 3 (*m*) of the Rules applicable to Cases I and II of Schedule D, which read together provide that, in computing the amount of the profits to be charged, no sum shall be deducted in respect of rent paid under a long lease;

(4) the Appellant Company was not entitled to any allowance in respect of the rent which it might have obtained by letting the said licensed houses free of the tie, but if it was, the measure of the allowance was the difference between the rents received for the houses and the rents that would have been received for them in the relevant years, if let separately free of the burden of the tie, which latter was not correctly represented by the portion of the rents payable to T.L.P. for such houses;

(5) the said additional assessments were correctly made because the Inspector had, within the meaning of Section 125, discovered that the Appellant Company had been undercharged in the first assessments, for the said years 1942-43 and 1943-44, and reliance was placed (*inter alia*) on the case of *Lord Vestey's Executors and Vestey* v. *Commissioners of Inland Revenue* [1] (Tax Leaflet 1418);

(6) the assessments were right in principle.

16. We, the Commsisioners who heard this appeal, after taking time to consider the evidence and the arguments adduced before us gave our decision as follows.

In this appeal against additional assessments for the years 1942-43 and 1943-44, it is not disputed that the rent paid by the Appellant Company to Tamplin's Licensed Properties, Ltd. for the tied houses comprised in the agreement for a lease dated 1st June, 1938, is to be treated as a rent under a long lease within the meaning of Section 17 (1) (*a*) of the Finance Act, 1940, and as such, falls to be disallowed under Sub-section 2 of the said Section, in computing the profits of the Appellant Company for purposes of assessment under Case I, Schedule D for the relevant years.

It is however, contended by the Appellant Company that, as the tied houses in issue are leased by it wholly and exclusively for the purpose of its trade as brewers, it is entitled under the authority of *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, 6 T.C. 399, to a deduction of a "rent deficiency", measured by the difference between the aggregate rents received by the Appellant Company from the tied houses, and the aggregate which would have been received had they been let separately, free from the tie. This "rent deficiency", hereinafter called the *Usher* allowance, is said to be the amount of rent forgone by the Appellant Company for the purposes of its trade, and therefore not rent at all, within the meaning of Section 17 of the Finance Act, 1940, as aforesaid. The Appellant Company's contention is supported in particular by reference to portions of the speech of Lord Sumner in *Usher's* case at page 437, and to the comments on that speech delivered in the course of the judgment of the House of Lords in the case of *Collyer* v. *Hoare & Co. Ltd.* (No. 1), 17 T.C. 169.

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[1] 31 T.C. 1.

But for a passage in the speech of Lord Sumner in *Usher's* case (1) mentioned above, it would have seemed to us incontestable that the *Usher* allowance was a deduction of the rent or annual value which was either notionally in the case of tied houses owned by the brewer or actually in the case of tied houses leased by the brewer, considered to have been expended wholly and exclusively for the purposes of the brewer's trade. This view of the *Usher* allowance seems to us to be supported by the frequent references in the speeches in the House of Lords to the case of *Russell* v. *Aberdeen Town and County Bank,* 2 T.C. 321.

In our opinion the true construction of this portion of Lord Sumner's speech is, as the Crown contends, expounded in the speeches of the majority of the Court in the case of *Lowry* v. *Consolidated African Selection Trust, Ltd.,* 23 T.C. 259, and in particular in that of Lord Russell at page 293. We therefore hold that the Usher allowance claimed in the case of these leasehold houses must be regarded as a claim to a deduction of the lease rent payable by the Appellant Company mitigated by the rent received from the tied houses and that, although allowable under *Usher's* case, it is barred for the relevant years by the provisions of Section 17 of the Finance Act, 1940.

A second point taken by the Appellant Company at the hearing of this appeal was that, in any event, there had been no such discovery within the meaning of Section 125 of the Income Tax Act, 1918, as would justify the making of the additional assessments for the years 1942-43 and 1943-44. It was however conceded that we were bound by the decision of the High Court on 4th November, 1946, in the case of the *Lord Vestey's Executors and Vestey* v. *Commissioners of Inland Revenue* (2) to decide that point in favour of the Crown.

In the result therefore we hold that the appeal fails and that the additional assessments for the years 1942-43 and 1943-44 were rightly made, and we leave the figures following our decision in principle to be agreed between the parties.

17. Subsequently we were informed that the figures of the additional assessments had been agreed between the parties, in accordance with our decision in principle, and we accordingly increased the additional assessment for the year 1942-43 to £32,563, and increased the additional assessment for the year 1943-44 to £32,976.

18. If we should be held to be wrong in the opinion to which we came, as aforesaid, that the Company was not entitled to an *Usher* allowance in respect of the leaseholds in issue, but right in the opinion to which we came that the said additional assessments were not invalidated through lack of discovery, under the provisions of Section 125 of the Income Tax Act, 1918, it will be necessary that the case should be remitted to us to find the quantum of the *Usher* allowance for the said years 1942-43 and 1943-44, either in the sums to be agreed upon between the parties, or, failing such agreement, after hearing further evidence on behalf of the parties, in such sums as we may hereinafter determine on such evidence.

19. The Appellant Company immediately after the determination of the appeal declared to us its dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the

(1) 6 T.C. 399. (2) 31 T.C. 1.

opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

A. W. BALDWIN } Commissioners for the Special Purposes
R. A. FURTADO. } of the Income Tax Acts.

Turnstile House,
94-99, High Holborn,
London, W.C.1.
11th June, 1948.

The case came before Croom-Johnson, J., in the King's Bench Division on 24th October, 1949, when judgment was given in favour of the Crown, with costs.

Mr. Cyril King, K.C., Mr. F. Heyworth Talbot, K.C., and Mr. O. J. Shaw appeared as Counsel for the Company and Mr. Frederick Grant, K.C., and Mr. Reginald P. Hills for the Crown.

Croom-Johnson, J.—This case involves the consideration of what is I think a somewhat novel point. I have had the benefit of a very thorough argument from Mr. Cyril King. When tax is going to be assessed on profits and gains under Schedule D of the Income Tax Act, 1918, for the purpose of computing the amount of the profits accounts have to be prepared and Schedule D of the Income Tax Act does not say in terms what deductions may be made in the accounts. But in Rule 3 applicable to Cases I and II the Act sets out certain things which are not to be deducted or, to use the language of the Rule, " no sum shall be deducted in respect " of " certain things.

What is it that may be deducted so far as is permissible for the purposes of this present case? Broadly speaking they are disbursements or expenses. It is true that in the sub-divisions of the Rule those words do not appear in each of the sub-headings but I look at the very first one to see what it says: " (*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 ". That is what one might call the introductory and dominant rule which has to be applied. " Disbursements " are things disbursed and " expenses " are things in respect of which money has been expended, and that sub-rule at least deals with money actually paid.

When it became necessary some years ago to consider the application of that Rule, there arose the familiar case of a brewery company who conducted their business by granting tenancy agreements of licensed premises to tenants upon covenants by the tenants that they would trade exclusively with the brewery company and contrariwise would not deal with other people for certain commodities, including beer. Accordingly the question arose as to whether the brewery company for the purposes of their trade were or were not enabled to deduct the rent or annual value not of premises which they were occupying for the purposes of their trade or business but in respect of premises which they had acquired either by purchase or by taking leases and later subletting to the resident licence holder who was their tenant. The point arose under paragraph (*c*) of Rule 3 which said that no sum should be deducted in respect of " rent or annual value of any " dwelling-house or domestic offices or any part thereof, except such part " thereof as is used for the purposes of the trade or profession ". The rest

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of it is not material for me to consider. It was argued on behalf of the Revenue that inasmuch as the brewery company were not in occupation of the licensed houses which they had let for the purposes of their trade they could not deduct, and were not entitled to deduct, the rent or annual value of any of those houses. Accordingly the argument took a rather different turn. What was said about it was: "This expenditure in the way of rent"—I will deal with the simple case of rent which they paid because it is just the same whether it was their own property in respect of which they might otherwise have had the benefit by deduction of the annual value —"through the property being sublet by us for the purposes of our trade at a loss by reason of the fact that we have got a covenant for the benefit of our trade is something which is a permissible deduction in arriving at the brewery company's liability to tax under Schedule D." That was very strongly canvassed. Eventually it was held in a case the detail of which I need not give to-day, *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, 6 T.C. 399, upon a Case stated by the General Commissioners at Trowbridge in Wiltshire, that the difference between rents paid and rents received with other expenses which again are not material to-day was an admissible deduction as being money wholly and exclusively paid out or expended for the purposes of the trade of the brewery company.

Usher's case, the precise arguments to support which I do not think I need refer to, has been acted upon ever since subject to one thing which gives rise to this present case. I left on one side the question about the property owned by the brewery company and I said that it was in exactly the same position for the purpose of *Usher's* case as though the brewery company had taken a lease of the premises and were themselves responsible for the head rent, the only difference being that in a case where they owned the property the first item which would have to be taken into account would be the annual value less the deductions in respect of what they got from their tenants, whereas in cases where they themselves were tenants of the property the first item which would be claimed as the permissible deduction would be the rent which they had to pay to their landlords again subject to deduction in respect of the rents receivable from their tied tenants. The accounts of the Appellants in the present case were accordingly made out on that basis and they were allowed deductions arrived at by looking to see what rent they paid to their landlords, who happened to be a subsidiary company on the one hand and the amount of rent which they got from their tied tenants on the other hand.

In the year 1940 Parliament, by Section 17 of the Finance Act, 1940, decided that in respect of rents under long leases there should no longer be a permissible deduction of the annual value or the amount of the rents. Sub-section 2 of Section 17 says "Rules 1 and 4 of No. VIII of Schedule "A shall not apply to any payment to which this section applies, but any "such payment shall, so far as it does not fall under any other Case, be "charged with tax under Case VI of Schedule D and be treated for the "purposes of such of the provisions of the Income Tax Acts as apply to "royalties paid in respect of the user of a patent as if it were such a "royalty"; and going back again for a moment to Rule 3 of Cases I and II of Schedule D, one of the things which is not permitted to be deducted is "(*m*) any royalty or other sum paid in respect of the user of a patent." Accordingly it is agreed, and has been for some time agreed, that these Appellants were people who had premises in respect of which they paid rents under long leases, that the long leases were within the language and

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provisions of Section 17, and that they were not entitled therefore to have a deduction in respect of the rent which they were paying. All that is agreed. I am not going to spend a great deal of time therefore, or indeed any time, examining it, except to say this: if they were entitled to have deducted before the Finance Act, 1940, the rent which they paid they were entitled to have set against it, as I understand it, as a result of *Usher's* case (1), the rents which they were entitled to receive. It seems to me that directly Parliament enacts that the rent paid for a long lease is not to be a permissible deduction it is no longer necessary to put into the computations the countervailing amounts which in order to ascertain the figures accurately they would otherwise be entitled to have, as it were, as a credit. That is exactly what happened in this case although it did not happen directly. I will say a word or two about that later.

When the Finance Act, 1940, was passed these rents paid and the rents received ought to have been eliminated from the accounts in so far as, and only in so far as, they were tied up with the long leases which are the subject of Section 17, but for some time, I think for at least two years, it was not observed or fully appreciated that these were long leases at all. Accordingly in computing the profits of the Appellants' business as brewers for the years 1942-43 and 1943-44 what I will call a deficiency of rents, that is to say the difference between the block rent paid by the Appellants and what they got back from their tied tenants, was allowed in the Income Tax accounts of the Appellants—the details do not matter—and they were assessed accordingly with that credit having been allowed them. Some time later the Inspector of Taxes in looking into the case came to the opinion that what is called a long lease (which in this case really is an agreement for a lease) was a long lease within the meaning of Section 17. Accordingly, as the Case says in paragraph 11, he turned his attention to the deductions which had been claimed and allowed in respect of the two tax years 1942-43 and 1943-44. When he did pay his attention to it apparently everybody agreed that these were long leases and that Section 17 did apply.

The second point which emerges, with which I propose to deal now in order to get rid of it, is this: the Inspector, having found all this out, proceeded to make and get allowed by the General Commissioners additional first assessments for each of those two years on what he said was the correct view of the matter when it was observed that in view of the applicability of the Finance Act, 1940, Section 17, those particular deductions no longer were permissible. One of the points that was argued, this being an appeal, as I understand it, against those additional assessments, was that within the meaning of the provisions under which the Inspector purported to act under the Income Tax Acts he had not "discovered" anything. I need not say anything more about it than this: it is admitted that that point is not open as an effective point before me by reason of the fact that there is some authority which would bind me to decide in favour of the Crown; but the point has been argued and the point has been taken so that it may be open to the Appellants somewhere else. I need say no more about it.

Faced with this position the Appellants claimed that whereas the deductions which had been granted to them under the authority of *Usher's* case were no longer allowable to them they could put their case in a different way. If they can do it, so much the better for them. The way in

(1) 6 T.C. 399.

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which they sought to put it was in this way. It was submitted before the Special Commissioners who state the Case that notwithstanding and outside altogether of Section 17, they were entitled to have a deduction made, not in respect of the rent which they paid for the properties, which were tied properties, but in respect of something quite different, something which they had never in fact expended and something which they had never in fact, as a figure in accounts or books or anything of that sort, incurred—namely, the difference between the rent which their tied tenants paid to them and the notional rent which they might have had, and probably would have had, the right to get if there had been no tied covenants in the tenancy agreements at all. Whether they are proposing to do it as one lump sum or whether they are proposing to do it as a variety of lump sums as between the different properties I do not know, and perhaps it does not matter very much for the purposes of to-day; but it is said that they are entitled to put the case this way by reason of some observations by Lord Sumner in his speech in the House of Lords in *Usher's* case (1). It is said that the effect of those observations is that in any case in which it can be shown that brewers have let their premises to tied tenants at a low rent instead of to free tenants at a full rack rent in the open market it means that they have forborne to recover the money which they could have received, and having for reasons of their own in connection with their business so forborne, that difference is a deductible expense. Anything that falls from Lord Sumner I need not say is treated by me with the very greatest respect, but before I look to see what the learned Judges have said I must, I think, go back to the language of the Act which has to be administered. The language of the Act of Parliament does not seem to me to provide any place into which I can fit this sort of claim.

As I have already pointed out, primarily Rule 3 of the Rules applicable to Cases I and II is dealing with "disbursements or expenses, "not being money wholly and exclusively laid out or expended for the "purposes of the trade, profession, employment, or vocation". What leaps to the eye about this kind of case is that no money has been laid out at all. It is a notional figure arrived at by saying: "If we had not done our business in this way, if we had abandoned the tied covenant and never got our tenants to enter into it at all, we could have made a lot more money by way of rent." That is an argument which I think needs to be examined with great care and which needs to be reinforced to the full before I can give way to it in the face of what Rule 3 says. Paragraph (*b*) of Rule 3 prohibits certain other disbursements or expenses; paragraph (*c*) deals with the prohibition of allowing the rent or annual value of the property, except such part as is used for the purposes of the trade or profession; paragraph (*d*) deals with any sum expended for repairs of premises occupied; paragraph (*e*) deals with any loss not connected with or arising out of the trade. No loss has been incurred in this case. "Loss" there means, I think, a loss which is actually an accrued loss. Paragraph (*f*) deals with capital withdrawn; paragraph (*g*) deals with capital employed in improvements; paragraph (*h*) deals with interest; paragraph (*i*) deals with debts, except bad debts, and so on; paragraph (*j*) deals with any average loss beyond the actual amount of loss after adjustment; paragraph (*k*) deals with any sum recoverable under an insurance or contract of indemnity; paragraph (*l*) deals with any annual interest or any annuity or other annual

(1) 6 T.C. 399.

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payment payable out of the profits or gains; paragraph (*m*), to which I have already referred, deals with any royalty or other sum paid in respect of the user of a patent. Therefore I start off by looking to see under which of those different heads can this claim for this particular item be put. I do not myself find one which I think answers the description.

That being so I look to see with what it was precisely that Lord Sumner was dealing. He was dealing there with something which was an actual expenditure, an actual payment made by the brewery company in order to get either the property which had been taken on lease, or, notionally under Rule 3 (*c*), the annual value of the property which they were using solely for the purposes of trade or so much of it as was used for that trade; but in the course of expressing his reasons Lord Sumner said this (6 T.C., at p. 437): "A trader who utilises, for the purposes of his trade, "something belonging to him, be it chattel or real property, which he could "otherwise let for money, seems to me to put himself to an expense for "the purposes of his trade. He does so equally if he hires or rents for "that purpose property belonging to another. The amount of his expense "is *prima facie* what he could have got for it by letting it in the one "case, and what he pays for it when hiring it in the other. Where he "gets something back for it, while employing it in his trade, by receiving "rent or hire for it in connection with that trade, the true amount of his "expense can only be arrived at by giving credit for such receipt."

The difficulty I have in following that language is this: where in the Income Tax Acts, and particularly in the Rules applicable to Schedule D, is the authority for the proposition that a trader who utilises *a chattel* which he could otherwise let for money puts himself to an expense for the purposes of his trade which is an expense which is deductible in the computation of profits and gains? The power to deduct the annual value of property is express (Rule 3 (*c*). What Lord Sumner went on to say was, "In principle, therefore, I think that in the present case rent foregone, "either by letting houses, which the brewers own, to tied tenants at a low "rent instead of to free tenants at a full rack-rent in the open market, or "by letting houses in the same way, which they hire and then re-let at a "loss, is money expended within the first Rule applying to both of the "first two Cases of Schedule D, and that upon the findings of the Special "Case, which are conclusive, it is 'wholly and exclusively expended for the "'purposes of such trade'". It is to be observed that in that paragraph the noble and learned Lord was professedly dealing with money which had actually been expended on balance, not with a notional figure and a notional sum as I am asked to do and as the Special Commissioners were asked to do in this particular case.

I am not going through all the cases which have been cited very fully to me as to quite what the effect of the *Usher*[1] judgment was, but in a much later case, the case of *Lowry* v. *Consolidated African Selection Trust, Ltd.*, 23 T.C. 259, Lord Russell of Killowen in his speech dealt with the language used by Lord Sumner. At page 295 he says this: "It "is true that the language used by Lord Sumner, and quoted by the Master "of the Rolls"—that is in the case then under decision—"is far reaching, "and extends even to chattels; indeed, if taken literally it would lead to "some startling results. The other members of this House who took part "in the debate used no such wide language and I, for one, am not pre-

(1) 6 T.C. 399.

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" pared to extend the decision so as to cover the wholly different facts of " the present case. Both these decisions relate to the annual value of land, " to which peculiar considerations are applicable ". That no doubt is a reference to Rule 3 (*c*) and to the observations made by Lord Russell himself at page 294 as to the reason for the applicability of Rule 3 (*c*). Lord Russell goes on to say: " . . . and I am unable to see how the reasoning " in either of these two decisions of your Lordships' House can be applied " to a case like the present, in which the claim is to deduct a sum which " never came into existence because the Respondents, in order to achieve " a desired result, elected to issue some shares at their nominal value."

The answer made by Mr. King to the criticism made by Lord Russell of Lord Sumner's observations, which criticism I respectfully desire to follow, is that in the *Usher* case the Lord Chancellor, Lord Loreburn, at page 420 of the Report in 6 T.C., uses language which suggests that he was agreeing with Lord Sumner. I do not myself think he was, and his language is certainly not so wide as to cover chattels used for the purposes of trade. I had better read it. His Lordship says, " The next item which " the brewery company seeks to deduct is £2,134 14*s.* 6*d.*, which is the " difference between the annual value or the rent which they pay to the " freeholders of the tied houses on the one hand, and the rents which they " receive for the same houses from their tied tenants on the other hand. " This difference arises because the tied tenants are bound by covenant to " buy their liquor solely from the Brewery Company. In consideration of " this ' tie ' the tenants occupy at rents less than the annual value and less " than the rents which the Brewery Company itself has to pay for the " houses and the sum claimed to be deducted must be taken to represent " in each case the difference between the rents actually received from the " tied tenants and the proper annual value."—I interpolate in there " an actual expense "—" For no argument was offered to show that the rent " paid by the Brewery Company is other than the proper annual value. " And it is agreed that this letting at reduced rents is made solely to get " the trade, which the using of the tied houses affords, and so to swell the " profits of the brewery businesss. On ordinary principles of commercial " trading such loss arising from letting tied houses at reduced rents is " obviously a sound commercial outlay. Therefore, this item must be de- " ducted."

I do not think that the Lord Chancellor was for one moment saying there that sums of money which had been forborne, to use the expression which has been used in several of these cases, by letting at reduced rents when no loss had actually accrued in money to the company was something which was a permissible and deductible expense for the purposes of the Income Tax Acts. It is noteworthy that he is there referring simply and solely to the rent of property belonging to the brewery company and is dealing of course, as one must remember in dealing with any decided case, with the facts of the particular case in which an actual loss or an actual deficiency was found to exist between the rents payable or the annual value on the one hand and the rents receivable on the other. I do not myself think, notwithstanding some other observations in *Lowry* v. *Consolidated African Selection Trust, Ltd.*(1), that I am compelled, sitting here, by that language of Lord Sumner to hold that a sum of money which never came into existence, a sum of money which never has been paid, a loss which

(1) 23 T.C. 259.

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never has accrued in any accountancy sense, is something which I am obliged to hold as a deductible expense in the accounts for those two additional assessments on the Appellants. It seems to me that if I were to say that, I should be giving them something which it is not suggested is covered by any provision of the Income Tax Acts expressly or by any one of the Rules which are applicable to this particular Schedule, either Schedule D or the Rules applicable to that Schedule. It is admitted on behalf of the Appellants that there is no provision of the Income Tax Acts which can be referred to, and this interesting and in some ways attractive proposition rests, and rests entirely, upon Lord Sumner's observations. It is no part of the actual decision. The actual decision as I have already indicated covered sums of money which had been paid on the one hand, claimed to be deductible, less sums received on the other hand, and admitted in those circumstances right to be credited against that deduction. That was the case. No other member of the House of Lords said in those wide terms what Lord Sumner has said and I do not think that he was purporting to decide it. It seems to me that these observations are *obiter dicta*. I have examined them with care but in the light of Lord Russell of Killowen's observations and my own imperfect examination and reasoning I do not think that I am obliged to apply them to the facts of this Case, and I do not propose to follow them.

The Special Commissioners came to very much the same conclusion. They took the view, expressed in paragraph 16 of the Case, " But for a " passage in the speech of Lord Sumner in *Usher's* case[1] mentioned above, " it would have seemed to us incontestable that the *Usher* allowance was a " deduction of the rent or annual value which was either notionally in the " case of tied houses owned by the brewer "—that is a reference to Rule 3 (*c*)—" or actually in the case of tied houses leased by the brewer, considered " to have been expended wholly and exclusively for the purposes of the " brewer's trade. This view of the *Usher* allowance seems to us to be " supported by the frequent references in the speeches in the House of " Lords to the case of *Russell* v. *Aberdeen Town and County Bank*, 2 T.C. " 321. In our opinion the true construction of this portion of Lord Sumner's " speech is, as the Crown contends, expounded in the speeches of the " majority of the Court in the case of *Lowry* v. *Consolidated African Selec-* " *tion Trust, Ltd.*, 23 T.C. 259, and in particular in that of Lord Russell at " page 293. We therefore hold that the *Usher* allowance claimed in the " case of these leasehold houses must be regarded as a claim to a deduction " of the lease rent payable by the Appellant Company mitigated by the rent " received from the tied houses and that, although allowable under *Usher's* " case, it is barred for the relevant years by the provisions of Section 17 " of the Finance Act, 1940."

That being so I think the Commissioners have arrived at a right determination and conclusion, and that this appeal fails.

Mr. Grant.—Appeal dismissed with costs ?

Croom-Johnson, J.—Yes.

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(1) 6 T.C. 399.

(2) *Webbs (Aberbeeg), Ltd.* v. *Davies*
Davies v. *Webbs (Aberbeeg), Ltd.*

CASE

Stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 22nd June, 1948, Webbs (Aberbeeg), Ltd. (hereinafter called "the Company") appealed against an assessment of £44,323 less £3,205 wear and tear, raised upon it under the provisions of Case I of Schedule D, Income Tax Act, 1918, for the year 1946-47, in respect of its profits as brewer carried on at the Brewery, Aberbeeg, near Abertillery, Monmouthshire.

2. The points for our determination were, and for the opinion of the Court are:—

(1) In the case of the "Railway Inn," Abertillery—a leasehold licensed house let by the Company to a tied tenant—whether on the facts hereinafter stated and in view of Section 17 of the Finance Act, 1940, the Company was or was not entitled, in computing the profits of its trade as brewer as aforesaid, to a deduction of a sum equal to the difference between the rent received by the Company from its tied tenant and the rent which would have been received for the said house had it been let separately free from the burden of the tie (the measure of such difference in this particular case being the difference between the rent actually paid by the Company and the rent received from its tied tenant).

(2) In the case of 17 other leasehold licensed houses whether on the facts hereinafter stated and having regard to the relevant principles involved and in view of Section 17 of the Finance Act, 1940, the Company was or was not entitled, in computing the profits of its trade as brewer as aforesaid, to a deduction of a sum equal to the difference between the rents received by the Company from those houses and the gross Schedule A assessments on the said houses, being in all cases more than the lease rents payable to the lessors in respect of those houses.

3. The following documents and statements were put in evidence before us and are attached to and form part of this Case[1].

I. Specimen agreement between the Company and the tenants of its leasehold tied houses.

II. Lease, Railway Hotel, Abertillery, dated 6th May, 1943.

IIIA. Lease, land at Abertillery dated 4th October, 1852.

IIIB. Assignment, Globe Hotel, Abertillery, dated 12th February, 1918.

IV. Lease, White Lion Hotel, Blaina, dated 29th September, 1909.

V. Assignment, Queen Victoria Inn, Blaenavon, dated 17th April, 1940.

VI. Lease, Somerset Hotel, Abertillery, dated 6th May, 1943.

VII. Schedule of 18 leasehold tied houses.

VIII. Accounts of the Company for the year ended 30th September, 1945.

[1] Not included in the present print.

IX. Computation of adjusted profit of the Company for the year ended 30th September, 1945.

4. The facts as agreed between the parties, and as found by us, are as stated in this and the following paragraphs numbered 4 to 9 inclusive.

(I) The Company, in carrying on its business as brewer as aforesaid, leased 18 licensed houses, particulars of which are contained in the schedule, Exhibit VII.(1) The said schedule shows in the third column the lease rent payable in each case, by the Company to the lessor; in the fourth and fifth columns the amount of the gross and net Schedule A assessments; in the sixth column the gross rent actually received by the Company from each of its tied tenants; and in the seventh column the rent from such tenants actually specified in the tenancy agreement. In nearly every case the rent actually paid by the tenant as shown in column 6 differed from the rent specified in the tenancy agreement, as shown in column 7. The explanation of this difference is that the Company let its houses to its tied tenants on annual tenancies, most of which were entered into many years ago. Subsequently difficult days descended upon South Wales and it was found necessary by agreement to abate the rents. When this abatement was made, the Company informed its tied tenants that the abatement would be according to the business actually done in the house, and that if in subsequent years a greater volume of trade than what was regarded as the basic trade were done, the tenant would then be asked to pay a greater rent than that provided by the tenancy agreement. For this reason the rent received from the tied tenants in the case of five of the said 18 leasehold houses, as shown in column 6, is more than the rent specified in the tenancy agreement, as shown in column 7. On the other hand, in the case of 11 of the said 18 houses, the rent received from the tied tenants, as shown in column 6, is less than the rent specified in the tenancy agreement, as shown in column 7, and in the remaining two cases the figures are the same.

It was agreed between the parties that for the purposes of this Case the rents payable and paid by the tied tenants should be taken to be those set out in column 6 of Exhibit VII.

(II) In the case of one of the said licensed houses, the "Railway Hotel", Abertillery, the rent payable to the lessor, £125 as shown in column 3 is more than the gross Schedule A assessment on the house, £110 as shown in column 4. In each of the other cases (17 in all) the rent paid to the lessor, as shown in column 3, was less than the gross Schedule A assessment, as shown in column 4.

(III) A copy of the lease of the "Railway Hotel", dated 6th May, 1943, for a term of 99 years is exhibited (Exhibit II) (1) and the said lease, among other provisions not material to this case, contains the lessor's covenant as to repairs as follows:—"And the Lessors as to their respective "acts and deeds but not further or otherwise do hereby respectively cove- "nant with the Company in manner following, that is to say, that they "will at all times during the said term keep the main walls, roofs, external "drains, sewers and outside of the said premises (except only the glass in "the windows) in good and tenantable repair".

(IV) In the case of the "Globe Hotel", Abertillery, as appears from Exhibit IIIA (1), there was a lease for 870 years, dated 4th October, 1852, at one shilling per annum to Charles Edwards. The said lease was assigned on 12th February, 1918, (Exhibit IIIB) to the Company which, in considera-

(1) Not included in the present print.

tion of the payment of a sum of £14,900 became the assignee of the land comprised in the said lease (Exhibit IIIA) and of the licensed house called the "Globe Hotel", which had by that time been erected on the said land, and became liable to pay the annual rent of one shilling per annum for the remainder of the said term of 870 years.

(V) In the case of the "White Lion Hotel", Blaina, there was a lease to the Company dated 29th September, 1909, for a term of 99 years at a rental of £20 per annum from 29th September, 1911 (Exhibit IV).[1] The said lease was granted as aforesaid to the Company in consideration of the payment by the Company of a premium of £4,500 in addition to the rent of £20 per annum as from 29th September, 1911, as aforesaid.

(VI) In the case of the "Queen Victoria Inn", Prince Street, Blaenavon, the assignment to the Company dated 17th April, 1940, (Exhibit V) [1] recites an indenture of lease dated 31st December, 1839, of a piece of land "situated in the parish of Llanover Upper, Monmouthshire a little "below Blaenavon Church". The said land was demised to John Rees from 3rd April, 1839, for the term of 998 years at a yearly rental of £15 13*s.* 6*d.*, and under and subject to the covenants on the part of the lessee and conditions therein contained including a covenant by the said John Rees not without consent in writing to use the said premises as a shop, inn, public house, tavern, beer shop *etc.* By a further recital it appears that by endorsement dated 15th December, 1849, consent was given to James Gilbert and his under-tenants "to use the dwelling house "and buildings erected on part of the said piece of land as a public house "or inn during the term for which the same was demised". Subsequently the Company, on 17th April, 1940, as aforesaid, for the consideration of the sum of £600, became the assignee of part of the property comprised in the original lease above-mentioned, on which was erected the "Queen Victoria Inn", and became liable thereby to the payment of an apportioned rent of £5, as from 29th March, 1940, for the unexpired residue of the term of 998 years.

(VII) In the case of the "Somerset Hotel", Abertillery, there is a lease (Exhibit VI) [1] dated 6th May, 1943, for a term of 99 years from 2nd February, 1943, whereby the Company became lessees of the said licensed house at a yearly rental of £37 10*s.* No premium was paid for the grant of the lease nor was there any other consideration therefor.

(VIII) It was admitted and agreed between the parties in this appeal that the foregoing leases and assignments numbered II to VI,[1] as aforesaid, were fairly representative of all the leases and assignments in the case of the 18 leasehold houses included in the said Schedule VII.

5. Every one of the 18 licensed houses, referred to in paragraph 4 above, was sublet to a tenant under an agreement of which a specimen, Exhibit I, is exhibited as part of this Case [1]. Under Clause 13 of the said agreement the tenant covenanted "to purchase direct from the land-"lords or their nominees and from no other person all ale beer porter "stout cider male hops wines spirits cordials or spirituous liquor and "mineral or aerated waters which may be brought into or sold or offered "for sale on the demised premises or any premises occupied therewith "and not to brew manufacture sell or offer for sale on or bring into any "such premises any liquor of any of the above description other than such "as shall be bona fide purchased directly from the Landlords or their "nominees".

[1] Not included in the present print.

It was common ground between the parties in this appeal that the said specimen agreement and the said restrictive terms mentioned above were those commonly to be found between brewers and their tied tenants, and that they were entered into by the Company to obtain a better market for its beer.

6. The Company's accounts for the year ended 30th September, 1945, (Exhibit VIII) (1) being the basis year for the year of assessment 1946-47, show, in the profit and loss account a net profit for the said year of £88,710, which profit was arrived at after charging as an expense of the Company's trade the total rents payable for the 18 leasehold houses *viz.* £446 10s. as shown in column 3 of the Schedule (Exhibit VII),(1) and after crediting as a receipt of the Company's trade the total rents received from the tenants of the said 18 tied houses *viz.*, £612 15*s.* as shown in column 6 of the said schedule (Exhibit VII).

7. The Company, in computing the profits of its said business as brewer for the purposes of Income Tax for the year 1946-47, prepared a computation based on its accounts for the year ended 30th September, 1945 (Exhibit IX) (1). In this computation the net profit of £88,710, as shown in the printed accounts, was adjusted by the addition of the rent payable for tied houses £521, debited as aforesaid to revenue in the printed accounts (which includes the total of £446 10*s.* for leaseholds mentioned in paragraph 6 above); and by the deduction of the "Rents Receivable" £1,805, credited to revenue in those accounts (which includes the total of £612 15*s.* for leaseholds mentioned in paragraph 6 above). The effect of these adjustments was to eliminate the whole of the rents payable and the rents receivable from the computation of the Company's profits for Income Tax purposes. The Company then deducted (among other items not material to this Case) an amount of £784 described as "*Usher* allowance" in respect of the 18 leasehold houses, which deduction of £784 is the only matter in issue in this Case. The said sum of £784 is arrived at by deducting; (1) in the case of the "Railway Inn", Abertillery, the rent received from the tenant, *viz.*, £35 from the rent paid to the lessor £125, giving a figure of £90; (2) in the case of the remaining 17 leasehold tied houses, the total rents received from the tied tenants, *viz.*, £577 15*s.* from the total gross Schedule A assessments on those houses, *viz.*, £1,272, giving a figure to the nearest pound of £694, as shown in the schedule of leasehold houses (Exhibit VII).

8. (*i*) The said figure of £784 was the deduction to which the Company claimed to be entitled, under the decision of the House of Lords in the case of *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 6 T.C. 399, and on the basis of that claim, the assessable profits of the Company for the year 1946-47 were agreed to be £44,233, as shown in Exhibit IX.

(*ii*) The assessment of £44,323 as stated in paragraph 1 of this Case was made on the footing that the assessable profits of the Company for the said year should be in the sum of £44,323, on the basis of provisionally allowing the Company's claim to an *Usher* allowance of £694 in respect of the 17 leasehold houses on which the gross Schedule A assessments exceeded the rents payable by the Company to the lessors for those houses, but of refusing the Company's claim to an *Usher* allowance of £90 on the "Railway Inn", Abertillery, on which the lease rent payable by the Com-

(1) Not included in the present print.

pany, *viz.* £125, exceeded the gross Schedule A assessment on that house, *viz.* £110.

(*iii*) At the hearing before us however, it was contended on behalf of the Crown that the Company was not entitled to an *Usher* allowance in respect of any of the 18 leasehold houses, and that the assessment for the said year 1946-47 ought to be increased to a sum of £45,017, by adding to the figure of £44,323, as aforesaid, the *Usher* allowance previously deducted of £694.

9. It was common ground between the parties in this appeal that all the leases in the case of the 18 leasehold tied houses in question were long leases within the meaning of Section 17 of the Finance Act, 1940.

The issues raised before us, as set out in paragraph 2 hereof, were whether the Company was entitled in arriving at its profits to deduct the amounts following, that is to say:

(1) in the case of the "Railway Inn", Abertillery a sum equal to the difference between the rent received by the Company for that property and the rent paid to the lessor;

(2) in the case of each of the remaining 17 leasehold houses a sum equal to the difference between the rent received by the Company for the house and the amount of the gross Schedule A assessment thereon, the amount of the assessment being in each case greater than the amount of the lease rent payable by the Company.

10. It was contended on behalf of the Company that;

(1) the difference between the rents received by the Company in respect of its tied houses and the rents which would have been received for them if let separately free of the burden of the tie was "rent forgone" by the Company solely for the purpose of its trade as brewer;

(2) in accordance with the decision of the House of Lords in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce,* [1915] A.C. 433; 6 T.C. 399, the Company was entitled, in computing the profits of its said trade for the purposes of assessment to Income Tax under Case I of Schedule D, to deduct the amount of such "rent forgone";

(3) the subject matter of the deduction allowable pursuant to the decision in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* being "rent "forgone" and not rent paid—*vide Collyer* v. *Hoare & Co. Ltd.,* [1932] A.C. 407; 17 T.C. 169—the Company's right to the deduction was unaffected by the enactment of Section 17 of the Finance Act, 1940;

(4) in the alternative, under the authority of *Collyer* v. *Hoare & Co., Ltd.,* [1938] 1 K.B. 235; 21 T.C. 318, the Company was entitled, in respect of each of the 17 leasehold tied houses the gross Schedule A assessments on which exceeded the lease rents paid by the Company, to deduct in computing the taxation profits of its trade an amount equal to the excess of the gross Schedule A assessments over the rents received from the tied tenants;

(5) the Company's right to deduct the said excess of the gross Schedule A assessments over the rents received from those houses was unaffected by Section 17 of the Finance Act, 1940;

(6) the assessment should be reduced to £44,233, or, in the alternative, should be confirmed.

11. It was contended on behalf of the Inspector of Taxes that;

(1) the allowance claimed by the Company in the case of all the leasehold houses in question for the said year 1946-47, was in reality a claim to a deduction of the lease rent paid by the Company mitigated by the rent received from the tied house;

(2) on a correct consideration of the case of *Usher's Wiltshire Brewery, Ltd.*, v. *Bruce*, [1915] A.C. 433; 6 T.C. 399, the allowance which it was decided a brewer was entitled to in respect of licensed houses which he holds on lease and lets subject to a tie is an allowance for the rent paid by the brewer for the houses, mitigated by the rent he receives from them, and this construction is confirmed by the case of *Lowry* v. *Consolidated African Trust, Ltd.*, 23 T.C. 259;

(3) the said allowance in the case of the licensed houses held by the Company on long lease, even if in the past allowable, was barred for the said year 1946-47 by the provisions of Section 17 of the Finance Act, 1940, and Rule 3 (*m*) of the Rules applicable to Cases I and II of Schedule D, which read together provide that, in computing the amount of the profits to be charged, no sum shall be deducted in respect of rent paid under a long lease;

(4) the said allowance in the case of 17 of the 18 licensed houses held by the Company on long lease was not and never had been correctly measured by the difference between the gross Schedule A assessments on the said houses and the rents received from those houses, and the allowance of such difference in the case of *Collyer* v. *Hoare & Co., Ltd.*, [1938] 1 K.B. 235; 21 T.C. 318, was not made under the authority of that case, but as a concession for which there was no authority in law;

(5) in the alternative the said allowance in the case of the said 17 licensed houses held by the Company on long lease, even if, contrary to the foregoing contention, it fell to be measured by the difference between the gross Schedule A assessments on the said houses and the rents received from those houses, was still to be regarded as an allowance of the rent paid for those houses mitigated by the rent received from them, and as such was barred by the said provisions of Section 17 of the Finance Act, 1940;

(6) in the alternative if the Company was entitled to any allowance in respect of the said 17 licensed houses held on long lease by the Company, which was denied, the correct measurement of such allowance was the difference between the net Schedule A assessment on those houses and the rent received by the Company from those houses;

(7) the assessment should be increased to a sum of £45,017, or in the alternative to a sum of £44,758.

12. (*i*) We, the Commissioners who heard this appeal, decided that the Company was not entitled to deduct the excess of the rent paid for the "Railway Inn" over the rent received for such house from its tied tenant; but that the Company was entitled to deduct the excess of the gross Schedule A assessments on the remaining 17 houses over the rents received for the said houses.

(*ii*) Our reasons for coming to the above decision were as follows:

It was not disputed by the Company that the rent paid by the Company to the lessor of the "Railway Inn" was to be treated as a rent under a long lease within the meaning of Section 17 1 (*a*) of the Finance Act, 1940, and as such fell to be disallowed under Sub-section 2 of the said Section in computing the profits of the Company for purposes of assessment under Case I, Schedule D for the year 1946-47.

(*iii*) It was, however, contended by the Company that, as the "Railway Inn" was leased by it wholly and exclusively for the purposes of its trade as brewer, it was entitled under the authority of *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, 6 T.C. 399, to a deduction of a "rent deficiency", measured by the difference between the rent received by the Company from the said house and the rent which would have been received, had it been let separately, free from the tie. This rent deficiency, hereinafter called the "*Usher* allowance", was said to be the amount of "rent forgone" by the Company for the purposes of its trade and thereafter not rent at all, within the meaning of Section 17 of the Finance Act, 1940, as aforesaid. The Company's contention was supported, in particular, by reference to portions of the speech of Lord Sumner in *Usher's* case at page 437[1], and to the comments on that speech delivered in the course of the judgment of the House of Lords in the case of *Collyer* v. *Hoare* (*No.* 1), 17 T.C. 169.

(*iv*) But for a passage in the speech of Lord Sumner in *Usher's* case mentioned above, it would have seemed to us incontestable that the *Usher* allowance was a deduction of the rent or annual value which was, either notionally, in the case of tied houses owned by the brewers, or actually, in the case of tied houses leased by the brewer, considered to have been expended wholly and exclusively for the purposes of the brewer's trade. This view of the *Usher* allowance seemed to us to be supported by the frequent references in the speeches in the House of Lords to the case of *Russell* v. *Aberdeen Town and County Bank*, 2 T.C. 321.

(*v*) We were of opinion that the true construction of that portion of Lord Sumner's speech, was, as the Crown contended, expounded in the speeches of the majority of the Court in the case of *Lowry* v. *Consolidated African Selection Trust, Ltd.*, 23 T.C. 259, and in particular in that of Lord Russell at page 293. We therefore held that the *Usher* allowance, claimed in the case of the "Railway Inn", must be regarded as a claim to a deduction of the lease rent payable by the Company, mitigated by the rent received for that house, and that, although allowable under *Usher's* case, it was barred for the year 1946-47 by the provisions of Section 17 of the Finance Act, 1940.

(*vi*) In the case of the remaining 17 leasehold houses, it was likewise not disputed by the Company that the rents paid by the Company to the various lessors were rents under long

(1) 6 T.C.

leases, within the meaning of Section 17 (1) (*a*) of the Finance Act, 1940, and as such fell to be disallowed under Subsection (2) of the said Section, in computing the profits of the Company for the purposes of assessment under Case I, Schedule D for the year 1946-47.

(*vii*) It was however contended by the Company that, as the gross Schedule A assessments exceeded the rents paid for such houses, the Company was entitled under the authority of *Collyer* v. *Hoare* (No. 2), 21 T.C. 318, to an *Usher* allowance measured by the difference between the gross Schedule A assessments and the rents received for the said houses by the Company. It was argued that whether or not such difference was, as contended in the case of the "Railway Inn", to be regarded as "rent forgone" (*vide* sub-paragraph (*iii*) above) in any event it was not a "rent under a long lease", to which alone Section 17 of the Finance Act, 1940, applied.

(*viii*) It was contended for the Crown that the case of *Collyer* v. *Hoare* (No. 2) did not authorise the measurement of the *Usher* allowance, in the case of these leaseholds, by reference to the difference between the gross Schedule A assessments and the rents received for them by the Company. On the contrary, it was said that the basis of computing the *Usher* allowance in that case was a mere concession by the Crown with no authority in law. It was therefore argued that the correct *Usher* allowance in respect of these leaseholds was, as in the case of the "Railway Inn", to be regarded as a claim to a deduction of the lease rents payable by the Company, mitigated by the rent received for those houses, and as such, the allowance was equally barred by the provisions of Section 17 (2) of the Finance Act, 1940.

(*ix*) In the alternative, it was contended for the Crown that, even if the *Usher* allowance was rightly measured by reference to the gross Schedule A assessments, instead of by reference to the lease rents actually paid by the Company, this was only a measurement, in no way determining the nature of the allowances, which remained notional lease rents, mitigated by the rents received and, as such, were barred by the provisions of the said Section 17.

(*x*) We considered that we were bound by the case of *Collyer* v. *Hoare* (No. 2) to hold that the Company's contention, set out above in sub-paragraph (*vii*), was well founded. We were of opinion that where, as in this case, the gross Schedule A assessments exceeded the lease rents paid, the claim to an *Usher* allowance was analogous to that in the case of a freehold, in respect of which (as we have indicated above in sub-paragraph (*iv*) our view was that the Company was notionally considered to have expended an amount equal to the annual value of the houses, mitigated by the rents received for such houses. This view of the matter seemed to us confirmed by the facts adduced in evidence before us in relation to the said leasehold houses, as shown in the schedule (Exhibit VII), in particular the "Globe Hotel", Abertillery and the "Queen Victoria Inn", Blaenavon where the lease

rent paid by the Company was an insignificant proportion of the true annual value of those houses, if let separately free from the tie.

(*xi*) For these reasons, whether the Usher allowance claimed by the Company in the case of these 17 leasehold houses was properly to be regarded as a notional expense, or a notional lease rent, equal to the gross Schedule A assessments, mitigated by the rents received by the Company for those houses, in either case we were of opinion that such allowance was not barred by Section 17 of the Finance Act, 1940, which appeared to us to be concerned with actual rents under long leases, and not with notional expenses or notional lease rents.

(*xii*) Finally it was contended on behalf of the Crown that if, as was denied, the Company was entitled to an *Usher* allowance in respect of the 17 leasehold houses, measured by reference to the Schedule A assessments and not by reference to the lease rents paid, the correct measurement was the difference between the net Schedule A assessments and the rents received by the Company. This contention was supported by reference to the comments on *Usher's* case[1] made by the House of Lords in the case of *Lowry* v. *Consolidated African Selection Trust, Ltd.*, 23 T.C. 259, with particular reference to the provisions of Rule 5 (2), Cases I and II, Schedule D.

(*xiii*) We rejected this contention, considering ourselves bound by the decision of the House of Lords in *Usher's* case, to hold that, when the measurement of the *Usher* allowance is based on the Schedule A assessments, the gross and not the net Schedule A assessments are to be adopted.

13. Subsequently it was reported to us that the parties in this appeal had agreed the figures following our decision in principle. Accordingly we confirmed the assessment for the said year 1946-47 in the sum of £44,323 less wear and tear £3,205.

14. Immediately after the determination of the appeal the Company and the Inspector of Taxes declared to us their dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

A. W. BALDWIN, } Commissioners for the Special Purposes
R. A. FURTADO, } of the Income Tax Acts.

Turnstile House,
94-99, High Holborn,
London, W.C.1.
26th January, 1949.

The case came before Croom-Johnson, J., in the King's Bench Division on 24th and 25th October, 1949, and on the latter date, judgment was given in favour of the Crown, with costs.

Mr. Cyril King, K.C., Mr. F. Heyworth Talbot, K.C., and Mr. O. J. Shaw appeared as Counsel for the Company, and Mr. Frederick Grant, K.C., and Mr. Reginald P. Hills for the Crown.

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(1) 6 T.C. 399.

Croom-Johnson, J.—In this case the Special Commissioners have stated a Case for the opinion of the Court arising out of an appeal against an assessment of £44,323, less an allowance for wear and tear, under Case I of Schedule D for the year 1946-47. Two points arose for determination, one raised by the Appellant, the subject or taxpayer, and one raised by the Crown. The Special Commissioners decided against each of their respective contentions. I need not trouble about the first contention raised, because it is admitted on the part of the Appellants that if and so long as my judgment given yesterday in the case of *Tamplin & Son's Brewery (Brighton). Ltd.* v. *Nash* stands, it rules and governs this case.

The second point raised in the case is therefore the one on which I have now to give a judgment. That arises in this way: the Appellants had altogether taken on lease eighteen licensed houses for the purpose of their business as brewers. They had sublet all of the eighteen to tied tenants, an expression which I do not find it necessary this morning to define. Seventeen of those houses are agreed to be houses which were let under long leases to the Appellants so that they were unable to claim any credit in the accounts in respect of the rents which they paid under those long leases by reason of the provisions of Section 17 of the Finance Act, 1940. But the Appellants contended, and the Special Commissioners have found, that they were entitled to approach the matter in another way, the question of rent deficiency having in these circumstances disappeared; that they were entitled to say: "Well, there is a difference between the gross annual value of these seventeen houses"—whether taken singly or altogether does not seem to matter for the purposes of this case—"and the rents received from the tied tenants and that being so, as a measure of what we have suffered by way of expenditure or disbursement for the purpose of computing the amount of profits or gains to be charged, we claim that we are entitled to have something analogous to the *Usher* (1) allowance, as it is called, measured by the difference between the gross Schedule A assessments and the rents received for the said houses from the tied tenants by us, the Company."

The point as argued before me rests, and simply rests, upon the authority of *Collyer* v. *Hoare and Co., Ltd.* (No. 2), which is reported in 21 T.C. 318; no other argument in support of it has been advanced before me. It will be observed that this present case, like the *Usher* case, is not a case in which there could but for the legislation of 1940 have been any allowances in the assessment under Rule 3 (*c*) applicable to Cases I and II of Schedule D because, of course, the Appellants, the brewery company, are not in occupation of the premises at all; they are in the occupation of their tenants. Subject to the authority relied upon, the difficulty which seems to arise on the threshold is this: you have to show either that the Appellants had actually suffered a pecuniary loss by reason of the fact that they have paid sums of money and have not got them back in the necessary countervailing rents receivable under the tied tenancy agreements or else that the Company have in some way paid away and incurred a loss by reason of sums which they are entitled notionally to take into account in making or agreeing the computation which is to lead to the assessment in question. It is quite plain that they had achieved, as a matter of accountancy between their board of directors and the shareholders, a deficiency upon what I may call the "rent account" relating to these seventeen houses but of course that does not help them at all having regard to the legislation of 1940. Have

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

(Croom-Johnson, J.)

they achieved it in any other way than the notional way? It seems to me that to give them anything which is disallowed by the legislation of 1940 would be in effect to set aside the provisions of Section 17 which stands like a lion in the path. Therefore what has to be looked at is whether there is anything in the one case relied upon by Mr. King which binds me to come to a conclusion that in some way which is admittedly not expressed in the Rules, the Schedules or in any section of the Income Tax Acts which have been called to my attention the Appellants are entitled to have the allowance in question. It looks to me like perhaps a meritorious effort to get round the provisions of Section 17.

The argument which apparently ultimately found favour with the Special Commissioners was that the Company was entitled under the authority of the case to which I have referred to have this amount, and the Crown's point of view was that this was not correct. What the Special Commissioners decided was this: "We considered that we were bound by the case "of *Collyer* v. *Hoare* (No. 2)[1] to hold that the Company's contention . . . "was well founded. We were of opinion that where, as in this case, the "gross Schedule A assessments exceeded the lease rents paid, the claim to "an *Usher* allowance was analogous to that in the case of a freehold, "in respect of which . . . our view was that the Company was notionally "considered to have expended an amount equal to the annual value of the "houses, mitigated by the rents received for such houses." I know of no authority for the proposition that when you are assessing profits and gains you can notionally and by analogy say that a sum of money which has never been expended or which at any rate if it has been expended cannot be allowed, is entitled to be drawn into the accounts for the purpose of mitigating, minimising or reducing the liability of the subject to tax, but of course if the case referred to did decide what is suggested it not only bound the Special Commissioners but it binds me. That being so I think it is necessary that I should just look at the case to see what it decided.

Collyer (No. 2) was a case in which questions arose as to the correct determination of the amounts to be allowed as deductions to the respondent brewery company, Hoare and Company, in respect of a deficiency of rent under the *Usher* decision[2]. One of the questions was whether the separate houses were to be treated individually or whether a general account could be taken. Another question was whether any premiums paid by the tenant were to be drawn into the calculations. The company, that is to say the respondents in that case, contended that in computing the deficiency of rent in respect of leasehold tied houses the amount of the improvements and I think something else, which is not material for this purpose, should be drawn into the account. According to the headnote, it was "held that for the "purpose of computing the deficiency of rent the figure to be compared "with the rent paid by the tenant was the rent paid by the Company or "the gross Schedule A assessment of the premises, whichever was the "higher and that it was not correct to take into account sums falling under "any of the categories in question." I have searched to see whether the headnote on this point does reflect the actual decision of the Court. I have come to the conclusion that the point was neither raised nor decided, although the learned Judge, Finlay, J., expresses an opinion about it to which I naturally pay the very closest and most respectful attention. But

(1) 21 T.C. 318. (2) 6 T.C. 399.

(Croom-Johnson, J.)

it was not there to be decided or discussed, the reason being that in the Case as stated by the Special Commissioners this paragraph No. 4 appears: "It is admitted on behalf of the Appellant that"—I leave out the parenthesis—"the sum to be taken for comparison with the rent received by "the Company from a tied tenant for the purpose of computing the "deficiency of rent of the house is the rent paid by the Company"—that is obviously directed to the case in which the company is itself a tenant to somebody else; and then it goes on—"or the gross annual value of the "house as assessed for the purpose of Income Tax under Schedule A, "whichever is the greater sum."

I have had an interesting and impressive argument addressed to me to show that the gross annual value would not have been the right annual value to have taken for the purpose of implementing Rule 3 (*c*), having regard to the language of the Rule and to the language of Rule 5, and in particular to sub-paragraph (2) of that Rule 5. But I am not dealing with a case in which Rule 3 (*c*) has application. It follows that there was no discussion and no argument in the case cited and nothing in the judgment by the learned Judge whether gross or net was correct; somebody made an admission which, speaking for myself, I should want to have much more fully argued before I could come to the conclusion that it was a right admission. When the case had reached its conclusion and judgment had been given some discussion followed which is reported in the Tax Cases but which would not find any place in a report of the case in a normal law report; the learned Judge having dealt with the case, as he had to do, in the form in which it was stated had apparently used the expression that gross annual value ought to be taken. Inasmuch as the parties had agreed that it should, that no doubt was right so far. Counsel for the respondents, the brewery company, called his Lordship's attention to that: "Your Lordship says that if the gross annual value exceeds the rent it "ought to be taken?" Finlay, J.—"Yes." Then there is a discussion. Counsel says that if it had not been ascertained the case ought to go back to the Commissioners to ascertain it. The Attorney-General questioned whether that was right, and then Finlay, J., says: "I thought you had "agreed that gross annual value or rent, whichever was the higher, was to "be taken." Then the Attorney-General quotes from the paragraph to which I have referred and then, after an observation by learned Counsel, the learned Judge says: "I think you are entitled to the full benefit of "that. Even if it was only a concession—personally I think it was right—"I think you are entitled to have that. In fact, the basis of my decision "is that you are entitled to rent or gross annual value, whichever is the "better." Then the Attorney-General says: "Yes", and later on he says: "I was wondering why it was necessary to mention it because it "seems to me to be the agreed basis of the case"; and so it was.

Is that a considered judgment by the Court that the gross annual value is correct so that I am bound to say that it is, and so that I am bound to allow this present contention, bound to allow this notional sum of money to be brought into the accounts? I do not think it is. The language of the learned Judge is really parenthetical. It was only a concession; it is an admission made for the purposes of the case. It is no authority for the proposition that gross annual value is to be allowed, and especially in

(1) 6 T.C. 399.

(Croom-Johnson, J.)

a case in which but for Section 17 of the Act of 1940 the taxpayer, the brewery company, would have been entitled to have the *Usher*[1] concession. The learned Judge's language: "Personally I think it was right" indicates that he is only expressing a view but it is a view about something which had never been argued at the time. I do not think, with great respect, that I am obliged to follow it. I do not agree with it. In my judgment it is not right, as I have already said, and in those circumstances I think the Special Commissioners in this case were wrong when they said that they were bound to hold the Company's contention was well founded because of that case.

I confess I do not understand when you are dealing with matters which arise under legislation and under taxing statutes that an analogy has anything to do with it. Either this is something which the subject is entitled to recover under Rule 3 (*a*) as a sum of money disbursed or expended and exclusively laid out for the purposes of the trade or it is not. That really is the basis of *Usher*. As *Usher* has no application here by reason of the legislation of 1940, I do not think that this attempt to get on to a better course by a sub-wind, by a favouring breeze—whether you call it an analogy or whatever you call it—is one which is correct.

Perhaps I ought to add that I do not understand when this question arises, if at all, under Rule 3 (*a*), how anybody is entitled to say that the Company was notionally considered to have expended an amount equal to the annual value of the house. The gross annual value after all, as taken into the account, is only a step in the method of assessing the property which falls to be assessed under Schedule A. This property did not fall to be assessed directly under Schedule A for the Company, although no doubt when the tenants paid the tax on the net assessment they would be entitled to deduct from their next payment of rent as against the Company the amount of the tax which they had paid, subject to the statutory provision as to "not exceeding" and so on.

In those circumstances I have come to the conclusion that on this point the Special Commissioners misdirected themselves. They came to a wrong conclusion in law and the Crown's appeal on this point must be allowed. The result therefore is that the Company's appeal is dismissed and the Crown's cross-appeal, if that is the right way of putting it, on this point is correct and must be allowed. The Company must pay the costs of the argument on both points.

Mr. Grant.—Would your Lordship add that the case should be remitted to the Commissioners to adjust the assessment in accordance with your Lordship's judgment?

Croom-Johnson, J.—Yes.

Both Companies having appealed against the decisions in the High Court, the cases came before the Court of Appeal (Somervell and Singleton, L.JJ., and Roxburgh, J.) on 20th, 21st and 22nd March and 1st May, 1950, when judgment was reserved. On 10th May, 1950, judgment was given in both cases unanimously, against the Crown, with costs.

(1) 6 T.C. 399.

Mr. Cyril King, K.C., Mr. F. Heyworth Talbot, K.C., and Mr. O. J. Shaw appeared as Counsel for the Companies, and Mr. Frederick Grant, K.C., and Mr. Reginald P. Hills for the Crown.

Somervell, L.J.—Although the judgments in these three appeals are inter-related, we propose to deal first with *Tamplin's* case. We will therefore read our judgments in that case and then deal with *Webb's* case.

This is a taxpayer's appeal from a decision of Croom-Johnson, J., upholding a decision of the Commissioners. The appeal turns on the *ratio* of the decision in *Usher's Wiltshire Brewery, Ltd.*, v. *Bruce*, 6 T.C. 399 and [1915] A.C. 433. That case was concerned, as is this, with tied houses let by a brewer to a tenant. The tenant was of course carrying on his business in the tied house of which he was in occupation. The brewer however claimed, and claimed successfully, to treat tied houses let to a tenant as held and used by him, the brewer, in the course of his business, so that he could bring in expenses in respect of them under his Schedule D, Case I, computation. As Lord Atkinson put it, in 6 T.C. 427 and [1915] A.C. 433: "The publican's trade is the vending of the landlord's beer and "none other. The house is the market place for that beer and none other. ". . . The two trades are as dependent upon and as connected with each "other as they well can be".

The Crown contended that there were two distinct trades, the brewer's of making and selling beer to, *inter alios*, their tied tenants, and the tenant's of selling the beer which he bought to the public. The brewer, as I have said, succeeded. The first and simplest deduction claimed and allowed was in respect of money spent on repairs to the houses. The second deduction claimed and allowed, on which the present argument arises, was stated in this way in the case, on page 400 of 6 T.C.: "Difference between rents of "leasehold houses or Sch. A. Assessment of freehold houses on the one "hand, and rents received from tied tenants on the other hand". In the bargain made between the brewery and the tied tenant the tenant undertook, of course, to get all his beer from the brewer, he undertook to pay a somewhat higher price for the beer than that paid by other customers and he got the house at a rent less than it would have commanded if let as a free house—in other words at a rent less than its full annual value. As appears from the above, some of the houses let to tied tenants were freeholds and some leaseholds.

The present argument arises in this way. The Appellant taxpayer leased a number of licensed houses from a company called Tamplin's Licensed Properties, Ltd. The lessor company was a wholly owned subsidiary, but no point turned on this before us. A rent of £40,000 paid by the brewery to the lessor company covered the houses with which we are concerned and others with which we are not concerned. No difficulty arises as to this as, subject to the points of law, figures have, I understand, been agreed. It is also agreed that the proportion of the rent referable to these houses exceeded the annual value. The premises in question were sublet to tied tenants on terms similar to those I have stated. The brewery claim, in their Schedule D computation, to deduct a sum equal to the difference between the rents received by the brewery in respect of those houses and the rents which would have been received if the houses had been let free of the tie.

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The rent paid by the brewery to its lessor is, it is agreed, rent under a long lease within the meaning of Section 17 of the Finance Act, 1940, the material parts of which are as follows: " 17.—(1) This section applies " to the following payments, that is to say—(*a*) rents under long leases; . . . " (2) Rules 1 and 4 of No. VIII of Schedule A shall not apply to any " payment to which this section applies, but any such payment shall, so far " as it does not fall under any other Case, be charged with tax under " Case VI of Schedule D and be treated for the purposes of such of the " provisions of the Income Tax Acts as apply to royalties paid in respect " of the user of a patent as if it were such a royalty."

Rules 1 and 4 of No. VIII of Schedule A are the rules which provide for the deduction from rent or other annual payments charged on land of a proportionate amount of the Schedule A assessment paid by the occupier. The effect of treating rents paid under long leases as royalties is, by reason of the provisions of Rule 3 (*m*) of the Rules applicable to Schedule D, Cases I and II, to prohibit this deduction for the purpose of a Case I or II computation. Sums paid in respect of royalties fall under the General Rules 19 and 21. If therefore the rent under a long lease is paid out of profits and gains brought into charge the payer is entitled to deduct and retain the tax.

I consider the working of Section 17 (2) in more detail later, but the main line of the argument can now be stated. If the deduction allowed by *Usher's* case [1] is that of rent paid, giving credit for rent received, then Mr. Grant for the Crown submits that this is prohibited by Section 17 (2) and Rule 3 (*m*), at any rate in a case like the present, where the rent exceeds the annual value. If, on the other hand, what is allowed by *Usher's* case is a notional sum arrived at by taking the difference between what could have been got for the house as a free house and what is paid by the tied tenant, then Mr. King for the taxpayer submits that Section 17 (2) does not affect the right. The rent under the long lease does not come into the calculation.

Before considering *Usher's* case in more detail, I will consider the effect of Section 17 (2) in the case of an ordinary trader who holds under a long lease the premises which he occupies for the purpose of his trade. It is necessary to do this as Mr. Grant based an argument on the intention of the Section to be gathered from its application in such a case.

In the present case it was agreed that the rent under the long lease exceeded the Schedule A annual value, and I will make this assumption in the figures which I will use. A trader's profit before deducting rent is £1,000. The rent under a long lease of the trade premises is £200. The annual value, as assessed for Schedule A, is £100. Before the Act of 1940 it is agreed by Mr. Grant that the trader could have deducted the long lease rent as a disbursement, reducing his taxable profits to £800. The trader will also have paid Schedule A tax on the annual value, that is to say £100. He will recoup himself in respect of this by deducting it from the £200 paid to his landlord. The trader therefore bears tax on £800, his net profit. The landlord bears the Schedule A tax on the annual value, but prior to 1940 the excess rent over and above the annual value escaped taxation.

(1) 6 T.C. 399.

(Somervell, L.J.)

A trader who owns and occupies his business premises is entitled to deduct the annual value for the purpose of his Schedule D computation. I am considering the ordinary case in which the premises are in this country and the trader is assessed to Schedule A tax. If he leases the premises at a rent below the Schedule A annual value, it is agreed that he is entitled to deduct a sum equal to the annual value. There is a dispute which arose in the second appeal as to whether he is to be treated as deducting first the rent and then the difference between that rent and the annual value or whether one treats the deduction as one of annual value *simpliciter*. The result is that prior to 1940 a trader lessee of business premises could deduct the rent or the amount of the annual value, whichever was the higher.

On the figures which I have put, Mr. Grant on behalf of the Crown agrees that after 1940 the trader remains entitled to deduct the amount of the annual value. This reduces the £1,000 profit to £900. He pays tax on this sum under Schedule D. He also bears Schedule A tax on the annual value, £100. He has therefore paid tax so far on £1,000. But the provisions of Section 17 (2) entitle him to deduct and retain tax on the whole of £200 rent. He therefore bears tax, as before, on £800. His position is unaffected; but the landlord suffers tax by deduction on the whole of £200 instead of only on £100. The trader's position is unaffected. The Section has, however, taxed the excess rent which previously escaped.

In *Usher's* case [1] there was no suggestion that the amount of the rent paid by the brewer was other than the Schedule A annual value, nor was there any suggestion that that value was not the amount by which the house could have been let as a free house. As Earl Loreburn said, in 6 T.C. page 420, and [1915] A.C. page 446: "No argument was offered to show "that the rent paid by the Brewery Company is other than the proper "annual value."

I will now state the arguments more fully. Mr. Grant for the Crown submits that the basis of the *Usher* deduction in the case of the leasehold houses was the rent paid by the brewer to be deducted as a disbursement, diminished by the rent received from the tied tenant. As a long lease rent cannot now be deducted by reason of Section 17 (2) of the Finance Act of 1940, the basis of any *Usher* deduction has gone. Mr. Grant relied particularly on the exposition of *Usher's* case given by Lord Russell of Killowen in *Lowry* v. *Consolidated African Selection Trust, Ltd.*, 23 T.C. 259. At page 293 Lord Russell said this: "So far as concerns the leaseholds "the position seems to present no abnormal features; it is a plain case of "entering actual income and actual outgoings". The actual outgoing, says Mr. Grant, is the rent, which, if it is a long lease rent, cannot now be deducted as an outgoing. But Mr. King for the taxpayer submits that an examination of the speeches in *Usher's* case and of equally authoritative expositions of the decision shows that this was not the basis. He submits that the deduction allowed is not based on a rent paid, but is the difference between the proper annual value—the value in the market of the house let as a free house—and the rent received from the tied tenant. He relies on the description of the *Usher* [1] deduction as "rent forborne" in Lord War-

(1) 6 T.C. 399.

(Somervell, L.J.)

rington of Clyffe's speech in *Collyer* v. *Hoare & Co., Ltd.*, 17 T.C. 169, at page 212. In the same case, at page 215, the deduction is described by Lord Tomlin as "rent forgone."

In *Lowry's* case (2) Viscount Maugham, in commenting on some observations by Lord Sumner in *Usher's* case in which the expression "rent "forgone" occurred, said this at page 287: "The second sentence contains "the words 'rent forgone', but I think the words in their context mean "only rent which might have been but was not actually received."

In *Usher's* case Earl Loreburn said, in 6 T.C. 420, and [1915] A.C. 446: "In consideration of this 'tie' the tenants occupy at rents less than "the annual value"—that is in the case of the freehold houses—"and less "than the rents which the Brewery Company itself has to pay for the "houses and the sum claimed to be deducted must be taken to represent "*in each case* the difference between the rents actually received from the "tied tenants and the proper annual value." The words which I have italicised support Mr. King's argument. Lord Atkinson's speech also, I think, supports Mr. King's argument, as admittedly does Lord Sumner's, where the expression "rent forgone" is to be found. (6 T.C. 437, and [1915] A.C. 469.) Lord Parker describes the deduction in the case of leasehold houses as "the difference between the rent they"—the brewers—"pay and the rent they receive." This supports Mr. Grant's argument.

If I may say so with respect, as the case proceeded on the basis that the rent, the Schedule A annual value and the rent which could have been obtained if the house had been let as a free house were all the same figure, it is perhaps not surprising that the deduction is described in somewhat differing words.

The principle is best seen by considering the case where the brewer owns the freehold of the tied house. I assume the annual value is £100 and this is accepted as the figure at which the brewer could let the house as a free house. He gets £40 rent from his tied tenant, on which he suffers Schedule A tax by deduction. He is entitled under the decision in *Usher's* case to deduct £60 in his Schedule D computation. In other words, he is not treated as making any profit until he has got back in profits on the beer he sells the £60, being the difference between the rent he could get and what he charges the tied tenant. He has not, of course, paid any tax on this £60, as he would have done if he had himself occupied the premises through a manager.

In this case, as it seems to me, the deduction is accurately described by the words "rent forborne" or "forgone." If the rent he pays is equal to or higher than the sum at which the house could be let as a free house, I should have thought that the principle applicable must still be the same, namely rent forborne. Assuming however that Mr. Grant is right and that in such a case the brewer could deduct rent paid, as he would wish to if it was higher than the annual value, as an ordinary outgoing, giving credit for the rent he receives, I do not think that that would lead to the conclusion that Section 17 (2) prohibits the *Usher* deduction altogether.

The position of the brewer *qua* a tied house would, on this basis, be aptly described by the following formula. He is entitled to deduct the rent

(1) 6 T.C. 399. (2) 23 T.C. 259.

(Somervell, L.J.)

at which the house could be let free or the actual rent he pays, whichever is the higher, giving credit for the rent received. This is analogous to the position of a trader-occupier, who can deduct the annual value or the rent he pays, whichever is the higher. Mr. Grant agreed that in the case of an ordinary trader-occupier lessee, Section 17 (2), having prohibited the deduction of the rent, has not taken away the right to deduct the annual value. As the figures quoted earlier show, if this were not so Section 17 (2) would have put the ordinary trader-occupier in a worse position. On analogous reasoning the brewer can still, I think, deduct rent forgone.

I therefore come to the conclusion, subject to further arguments which I shall consider in a moment, that having regard to the principle of *Usher's* case, having regard to what was said in the majority of the speeches in the case, and the later speeches referred to, the basis of the *Usher* deduction is in all cases rent forgone, and is therefore unaffected by the provisions of Section 17 (2). If I am wrong to this extent, that, where the rent actually paid led to a larger deduction, this was allowable before the Act of 1940, I do not think that the prohibition by Section 17 (2) of that basis precludes the brewer relying on the alternative of rent forgone, as claimed in the present case.

Mr. Grant submitted figures, which Mr. King did not dispute, to show that if any *Usher* deduction was allowed in the case of a brewer paying rent under a long lease, the brewer paid less tax as a result of the application of Section 17 (2) than he did before. This, Mr. Grant submitted, was clearly not intended. I am inclined to agree, but I do not think this would justify us in giving the decision in *Usher's* case[1] a basis other than that which is in my opinion to be extracted from it, nor in making Section 17 (2) prohibit a deduction which it does not prohibit. The matter is admittedly a complicated one, and Parliament may well have overlooked the repercussions of Section 17 (2) on the facts of the present case.

Finally Mr. Grant submitted that since the decision in *Usher's* case amendments to what is now Rule 5 (1) of the rules to Cases I and II of Schedule D had destroyed the basis on which *Usher's* case was decided, and it was no longer applicable. Rule 5 (1) at present reads as follows: "The computation of tax shall be made exclusive of the annual value of "lands, tenements, hereditaments, or heritages occupied for the purpose of "the trade or profession *and separately assessed and charged under* "*Schedule A*". Those last eight words, the italicised words, have been added since *Usher's* case was decided.

Now there is, I think, a difficulty in that argument at the outset. There are observations in *Usher's* case, particularly in the speech of Lord Atkinson, comparing the position of a tied tenant with a manager and showing how similar the position is from the point of view of the brewer's trade. Nevertheless it was of course plain that the tied house was in the occupation of the tied tenant. It was not occupied by the brewer for the purpose of his trade. This is emphasised in the argument of the Attorney General in [1915] A.C., at page 441. I doubt myself whether Rule 5, or rather its predecessor, was the basis of the decision in *Usher's* case, for the above reason, and also from the analysis given above of what seems to me its principle.

(1) 6 T.C. 399.

(Somervell, L.J.)

At the date when *Usher's* (1) case was decided the predecessor of Rule 5 was the second rule applicable to Cases I and II of Schedule D in the Act of 1842 (Dowell's Income Tax Laws, 1913 Edition, page 294). The relevant words are: "The computation of the duty to be charged in respect of any "trade . . . shall be made exclusive of the profits or gains arising from "lands, tenements, or hereditaments occupied for the purpose of such . . . "trade". Section 9 of the Finance Act, 1898, also dealt with this subject, but does not seem to me to affect the issue. In 1917 it was decided that this Rule allowed the deduction of the annual value of premises abroad occupied for the purposes of the trade. (*Stevens* v. *Boustead,* 7 T.C. 107). The last words to be found in the present Rule 5, inserted since that date, would negative any such claim today, because the lands would not have been assessed and charged under Schedule A.

There are further answers to Mr. Grant's argument. If I am right, the House of Lords was not basing itself on the Rule allowing the deduction of annual value. It was in the very special relationship of brewer and tied tenant allowing a deduction of rent forborne. Secondly, these tied houses were separately assessed and charged under Schedule A. Mr. Grant, if he reaches this stage, has, as it seems to me, to add these words, "to the extent to which that charge is paid or borne by the person claiming the exclusion."

I therefore think that the appeal succeeds. The Commissioners and the learned Judge took the view that the *Usher* allowance was a claim to the deduction of the lease rent paid by the brewer, credit being given for the rent received, and was therefore prohibited by Section 17 (2) of the Finance Act of 1940. They relied on the observations of Lord Russell of Killowen in *Lowry's* case, 23 T.C. 259, which I agree support the Crown's argument. This subject is, at any rate to me, a complicated one, and I have given my reasons to the best of my ability for coming to a different conclusion.

Singleton, L.J.—The Appellant Company appealed against additional first assessments raised upon it in respect of its profits from carrying on the trade or business of a brewery. The question to be determined depends upon what effect, if any, Section 17 of the Finance Act, 1940, has upon the assessment of a brewery company in so far as its tied houses are concerned. The houses are owned by another company, Tamplin's Licensed Properties, Ltd., and they are held by the Appellant Company under an agreement for lease for a term of 61 years computed from 1st October, 1933, the Company paying a block rent of £40,000 a year to T.L.P. The Company let each of the houses to a tied tenant on terms which are commonly to be found as between brewers and their tied tenants. The object of the lettings was to enable the Company to obtain a better market for its beer and as one would expect, the rents paid by the tied tenants are much less than the Schedule A assessment of the houses and much less in the aggregate than the sum of £40,000 paid to the holding company.

For the purpose of making up its annual accounts for the year ended 30th April, 1941, the Company included as a debit item the block rent of £40,000 and as a credit item the sum of £5,329 received as rent from the tied tenants. It is now admitted that the agreement for lease under which the houses were held from T.L.P. was a long lease within the meaning of

(1) 6 T.C. 399.

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Section 17 of the Finance Act, 1940, and it is claimed by the Crown that under Sub-section (2) of that Section the rent payable by the Company must be treated as if it were a royalty paid in respect of the user of a patent which, under the provisions of Rule 3 (*m*) of the Rules applicable to Cases I and II of Schedule D, may not be deducted in computing the amount of the profits to be charged. This is not really in dispute, but the claim of the Company is that it is entitled, in arriving at its profits, to a deduction in respect of the properties which it let on tied tenancies, namely a sum equal to the difference between the rents it receives from the tied tenants and the rents which would have been received by it if the houses had been let separately free from the burden of the tie—the annual value.

The system of tied houses is of long standing, and it is common ground in the case that it was followed by the Company in order to obtain a better market for its beer, from which it is to be assumed that the profit from sales would be the greater. If the houses were not tied the Company would get higher rents but lower sales, or less profit from their sales, of beer. The Company is a commercial undertaking looking for profit. Tax in respect of each of the houses is of course charged on the annual value under Schedule A.

Tax upon the Company chargeable under Schedule D is to be computed on the full amount of the balance of the profits or gains arising from its trade. "Where a man owns premises, and uses them for business pur- "poses, he may be considered as paying the rent to himself which he would "otherwise pay to somebody else. The ownership of the premises may be "looked upon as something apart from the carrying on of the business, and "it may be that he is entitled to treat the matter as if he paid himself just "what anybody else would pay as the rent of the premises." Such was the argument of Sir Farrer Herschell, the Solicitor-General, in *Gillatt and Watts* v. *Colquhoun* (1884), 2 T.C. 76 at page 77, a case in which leasehold premises had been acquired and used for trade purposes. It was held that the deduction from the assessment on the trade profits in respect of such premises must be limited to the existing annual value thereof, whatever the premium originally paid might have been.

Smith, J., points out, on page 85: "'The premises in question are "'assessed under Schedule A of the Income Tax Acts at the sum of £1,000 "'which for the purposes of this case is to be taken as the "annual value" "'of the premises.' Now upon the statement of this case how much is to "be set off against the gross taking . . . ? It seems to me it should be "£1,000 and not £1,775."

From this it appears clear that the same principle applies in the case of leasehold property as in the case of freehold property. In computing the balance of the profits or gains the trader who makes use of his own freehold or leasehold property for the purposes of his business is entitled to a deduction in respect of the annual value of the property, namely the Schedule A assessment.

In *Russell* v. *Aberdeen Town and County Bank* (1888), 2 T.C. 321, it was not disputed that the annual value of the premises owned by the bank was the proper measure of the deduction if the premises were exclusively used for the purposes of the trade or business of banking. Lord FitzGerald, at page 331, after defining profits, said: "The annual value of them"—that

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is the premises—" forms a proper deduction in estimating the balance of " profits ".

The case of *Usher's Wiltshire Brewery, Ltd.* v. *Bruce,* 6 T.C. 399, was before the House of Lords in the year 1914, and the decision provides strong support for the submission made on behalf of the Appellant Company. Usher's Brewery Company were the owners or lessees of a number of licensed houses which they let to tied tenants. They claimed (*inter alia*) that in the computation of their profits they should be allowed as a deduction the differences between rents of leasehold houses or Schedule A assessments on the one hand and the rents received from tied tenants on the other hand; and they were successful. No particular point seems to have been made in the case of leasehold houses as between Schedule A assessments and the rents which the company were paying. (See page 403). Lord Loreburn, the Lord Chancellor, said at page 420: " In consideration of this 'tie' " the tenants occupy at rents less than the annual value and less than the " rents which the Brewery Company itself has to pay for the houses and " the sum claimed to be deducted must be taken to represent in each case " the difference between the rents actually received from the tied tenants " and the proper annual value. For no argument was offered to show that " the rent paid by the Brewery Company is other than the proper annual " value. And it is agreed that this letting at reduced rents is made solely . . . " to swell the profits of the brewery business. On ordinary principles of " commercial trading such loss arising from letting tied houses at reduced " rents is obviously a sound commercial outlay. Therefore, this item must " be deducted."

No good purpose would be served by further citations from the speeches in that case, except to notice the expression " money forgone " used by Lord Sumner at page 435. I shall refer to the effect of the decision later. I do not think that Croom-Johnson, J., was right in saying that the Appellant Company's case was dependent solely on the speech of Lord Sumner. It seems to me that support for it is to be found from the decision of the House and from most of the speeches.

In *Collyer* v. *Hoare & Co., Ltd.,* 17 T.C. 169, it was decided that in determining the amounts to be allowed as deductions in respect of deficiencies of rent each tied house must be considered separately, and that in computing the deduction to be made, account must be taken of premiums paid as well as of rent—from which it would appear that the matter was treated on the basis of the company's form of accounts. The case is of importance as showing the way in which the decision in *Usher's* case was regarded. In the Court of first instance Rowlatt, J., said, at page 180: " It " is said there is no distinction in the particular case of a tied house between " a manager and the tenant "; and in the House of Lords Lord Buckmaster said, at page 209: " So far as the tied houses are concerned, if in any case " rent paid by the tenant is less than the amount of the assessment under " Schedule A, it has been decided in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* " that the Appellants are entitled in preparing their accounts for assessment " under Schedule D to deduct as an expense the difference between the rent " received and the Schedule A assessment . . . They are in fact regarded " as business premises of the undertaking. The decision referred to places " that point beyond controversy." Lord Atkin said, at page 213: " Whether

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" the expense allowed in *Usher's* case is based upon a deduction of the " Schedule A valuation as on premises used in the brewers' business miti- " gated by the sum received from the tied tenant, or whether it is regarded " as a notional sum paid for the advantage of the tie, it is allowed as an " expense incident to the particular house in respect of which it is incurred." Then Lord Tomlin said, at page 215: " In *Usher's Wiltshire Brewery, Ltd.* " v. *Bruce* [1], where tied houses of a brewery company were held by the " tenants at rents below the Schedule A valuations, your Lordships' House " . . . treated the difference between the rent and the valuation in the case " of each house as rent forgone or money spent exclusively for the purpose " of earning profits and held that expense to be one which could be " deducted for the purpose of ascertaining profits and gains under Schedule " D."

The case of *Lowry* v. *Consolidated African Selection Trust, Ltd.*, 23 T.C. 259, which was cited to us, is not really in point, except for the criticism by Lord Russell of Killowen (at page 293) of part of the speech of Lord Sumner in *Usher's* case and on this criticism Croom-Johnson, J., may be said to have based his judgment in favour of the Respondent. Lord Maugham said, at page 287, that Lord Sumner in *Usher's* case, by the words " rent forgone ", meant only rent which might have been but was not actually received. He said that *Usher's* case had no application to the case which was then being considered by the House of Lords.

The position arising from the authorities to which I have referred may be summarised in this way: (1) A trader who owns the premises on and from which he carries on his business is entitled, in computing the balance of his trading profits or gains, to make a deduction of the annual value of the premises. (2) In this regard no distinction has been drawn between the case of the freeholder and that of the leaseholder. (See Lord Atkinson in *Usher's* case, 6 T.C. at page 425). (3) The decision in *Usher's* case placed the brewer who lets his houses on tied tenancies in an exceptional position. They are to be regarded as business premises of the undertaking. (4) The amount of the deduction allowable to the brewer is the rent forgone—words interpreted by Lord Maugham as meaning rent which might have been received but was not actually received. Hence the importance of the Schedule A assessment, or the rack-rent at which the premises are worth to be let by the year—" the potential rack-rent ", as Lord Russell of Killowen described it in *Lowry's* case (page 293).

A trader's accounts are made up of receipts on the one hand and payments on the other hand; and one type of payment is rent, be it under lease or under agreement. In *Usher's* case no distinction was drawn between leasehold rents and Schedule A assessments. In practice the amount of the payment out is the important factor to the trader, and his accounts are made out accordingly: in the ordinary case a deduction in respect of the user of his premises has been allowed to the trader on the basis of the rent he was paying. That was the commercial and the natural way of arriving at his profit. Rule 3 under Cases I and II of Schedule D recognises that when a deduction is permissible it may be calculated according to the rent or the annual value: it points to an alternative and it is reasonable to assume that

(1) 6 T.C. 399.

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the trader would choose the one which suited him the better, if and when he was allowed to do so.

Section 17 (2) of the Finance Act, 1940, has brought about an alteration in this; at least in relation to premises let on long leases. The question for consideration is how far, if at all, it has affected the principle of *Usher's* case(1). The question is stated in paragraph 13 of the Case in this way: "Whether the Appellant Company was entitled in arriving at its profits to a "deduction in respect of those properties held by it on long lease from "T.L.P. which were sublet by it on tied tenancies, the amount of the "deduction claimed by the Appellant Company being a sum equal to the "difference between the rents received by the Appellant Company for such "properties and the rents which would have been received by it, had they "been let separately free from the burden of the tie."

It is to be noticed that the sole question raised is as to rent forgone—as stated, the difference between tied rents and annual values. It was admitted that *Usher's* case governed the case of a freeholder, but it was said that a change had been made in the case of a leaseholder under a long lease who let the premises to a tied tenant. If the principle of rent forgone is right I fail to see any distinction between the case of the freehold house and of the leasehold house in the hands of a trader and used by him for the purposes of his trade.

Sub-section (2) of Section 17 of the Act of 1940 reads: "Rules 1 and "4 of No. VIII of Schedule A shall not apply to any payment to which this "section applies, but any such payment shall, so far as it does not fall under "any other Case, be charged with tax under Case VI of Schedule D and be "treated for the purposes of such of the provisions of the Income Tax Acts "as apply to royalties paid in respect of the user of a patent as if it were "such a royalty." The object of this is to make the landlord chargeable to tax on the rent he receives as distinct from the Schedule A assessment of the premises. It is agreed that the block rent of £40,000 is a payment to which the Sub-section applies. The payment is therefore to be treated as if it were a royalty paid in respect of the user of a patent.

This brings into play Rule 19 (2) of the General Rules, under which, when such a royalty is paid wholly out of profits brought into charge (as in this case) the person paying is entitled to deduct and retain the amount of the tax. Furthermore, Rule 3 (*m*) of the Rules applicable to Cases I and II of Schedule D forbids the deduction against profits of any royalty; and it was not disputed that the rent for leasehold houses did fall within Section 17 and was accordingly disallowable in computing the profits of the Appellant Company for the material years. The claim of the Company was based on the decision in *Usher's* case and, as I have said, was in respect of the amount of rent forgone.

The change made by Section 17 (2) can be seen more readily if one takes the case of the ordinary trader apart from any question of tied houses. Before the change the trader who owned the freehold of the premises from which his business was carried on was entitled to deduct the annual (or Schedule A) value from his profits. The trader who paid rent for the premises was normally allowed to deduct the rent if it was greater than the

(1) 6 T.C. 399.

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annual value, though naturally he deducted the annual value if it was higher than the rent. Section 17 (2) does not touch the position of the trader who owns the freehold, nor does it mention annual value as such; it deals with rents under long leases. The first result is that by reason of Rule 3 (*m*) the trader can no longer deduct the payment of rent in computing the balance of his profits or gains: the second result, arising from Rule 19 (2) of the General Rules, is that if he pays the rent wholly out of profits he is entitled, when paying his landlord, to deduct the amount of the tax and to retain it. At first sight his position appears to be the same as it was beforehand; but he has paid Schedule A tax, and the commencing words of Section 17 (2) take away from him the right which he otherwise would have had of deducting Schedule A tax when paying his rent. Indeed, it must be clear that he could not deduct both tax on the rent and Schedule A tax.

The position can be illustrated by taking the cases of four traders, each of whom occupies for the purposes of his trade premises of an annual value of £100 and each of whom makes a profit of £1,000 on a year's trading.

A owns the freehold. His position is not affected by Section 17 (2). He pays Schedule A tax on the land which he owns. He is entitled to set against his profits the annual value of the land (£100) so that he pays tax under Schedule D on £900.

B, C and D have each a long lease of their premises. I assume that each is charged to tax under No. VIII of the Rules applicable to Schedule A and pays Schedule A tax.

B pays £100 a year rent. Before the 1940 Act he would have been able to set the rent or the annual value (£100) against his profits, which at 9*s.* in the £ would have meant a saving of tax of £45. Under the 1940 Act, when he pays his landlord he is entitled to deduct and retain tax on the rent, £100—that is £45. He has however already paid £45 Schedule A tax.

C pays £200 a year rent. Before the 1940 Act he would have set the £200 against his profits, thus saving £90 in tax. He can no longer do that, but he is entitled to deduct tax on paying his landlord, and to retain it, of £90. He too has paid Schedule A tax, £45, which prior to 1940 he could have deducted from his rent.

D pays a nominal rent, £1. Before 1940 he would have set the annual value, £100, against his profits, thus saving £45 in tax. He can deduct 9*s.* on paying his rent. The position on Schedule A tax is virtually as before; he bears almost the whole of it.

Thus, unless there is some compensating advantage elsewhere, B, C and D are each the amount of the Schedule A tax worse off than they were before the 1940 Act. I know of no provision under which that can be recovered directly. I fail to see any reason for penalising the trader who has a long lease while the position of the trader who owns the freehold is unchanged; and this is especially noticeable in the case of D, who is practically in the position of a freeholder. Again, in the cases of B, C and D the Crown has collected at the expense of landlord and tenant tax on the total rent as well as on the Schedule A assessment of the premises.

The answer seems to me to be that when the trader tenant has paid his rent (and that rent is not taken into account in the computation of his profits) and when he has paid the Schedule A tax, he, as a trader, is in just

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the same position as if he were the owner of the freehold: he can then set the annual value of the premises against his profits as the freeholder does: there is nothing in Section 17 (2) to prevent this. The result is that the trader who has a long lease is in precisely the same position as to tax as he was before the 1940 Act, and the Crown in effect obtains tax on the rent. This, I believe, achieves the object of the Section, which was not devised to put an additional burden on traders but was meant to ensure that when premises were let on long lease at a rent higher than the annual value, the landlord should be charged to tax on the rent. It seems a long way round; but the Income Tax Acts form a complicated structure. If the rent is higher than the annual value the Crown collects additional tax at the expense of the landlord; if the rent is the same as, or less than, the annual value the position neither of the landlord nor of the tenant (the trader) is affected.

It is not necessary to consider this aspect of the matter further in view of the agreement of Counsel on the resumed argument that this is a correct statement of the position. None the less, it is useful to have before one the effect of Section 17 (2) in the case of the ordinary trader before coming to a conclusion as to how far it affects the decision of the House of Lords in *Usher's* case[1]. In that case Lord Parker of Waddington pointed out, at page 433 of 6 T.C., that the appellants claimed "the Schedule A assessment "value or the rent they pay as a deduction, giving credit on the other side "of the account for the rent paid by the tenants of the tied houses." That claim was upheld.

If a trader uses his own premises for the purposes of his trade he is entitled to set off the annual value of the premises against profits, otherwise he would be getting no return in respect of the premises on which he is assessed for the purposes of Schedule A. He could let the premises, but instead he uses them for the purposes of his trade. In a sense that is a case of rent forgone.

Now the tied houses of a brewery company are to be regarded as business premises of the undertaking. (Lord Buckmaster in *Collyer's* case, 17 T.C. at page 209). That is the basis of the decision in *Usher's* case. Each tied house is then theoretically worth its annual value to the company, and the company is entitled to a deduction in respect of that; but it receives a tied rent for which credit must be given: consequently the difference between the annual value and the tied rent is the amount of rent forgone, and the amount of the deduction to which *prima facie* the company is entitled. It is not surprising that complications arise when premises which are really in the possession of the tied tenants are to be regarded as business premises of the brewery company.

I do not see that Section 17 (2) of the Finance Act, 1940, has altered the principle of the decision of the House of Lords in *Usher's* case. It has deprived the trader of an option which he had in relation to rent, but it leaves untouched the right of the ordinary trader to set the annual value of the premises against his profits; and it is from this that the right to deduct rent forgone arises. If the brewery company received nothing from the tied tenants it would normally be allowed to set off the annual value against its profits: if it receives something by way of rent or otherwise that must be

(1) 6 T.C. 399.

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taken into account. In the ordinary case it may be sufficient to deduct the rent received from the annual value; in some cases it will be necessary to examine the tenancy agreements in order to arrive at the true position.

In my view the question raised by paragraph 13 of the Case should be answered in the affirmative, and the appeal should be allowed.

Roxburgh, J.—I agree, and I can state briefly the basis of my agreement.

Mr. Grant has not convinced me that *Usher* allowances have been abolished in the case of freehold premises let by brewers as tied houses. He suggested that they had been abolished because alterations had since been made in what is now Rule 5 of the Rules applicable to Cases I and II of Schedule D. But I agree with my Lords in rejecting that argument. If, then, a brewer with freehold tied houses is entitled to deduct the difference between their annual value and the rent he receives for them, what commercial or logical reason could there be for denying to a brewer who held the house on a long lease at perhaps a nominal rent the right to make a similar deduction? And, if the allowance is to be related to annual value, why should it not be so related when he pays a rent above the annual value? These difficulties disappear if the *Usher* allowance is related in every case, not to the rent paid by the brewer, but to the true annual value or potential rack-rent; and I agree with my Lords that it ought to be, for the reasons stated by them. I agree also that Section 17 (2) of the Finance Act, 1940, may have had an unexpected repercussion.

Somervell, L.J.—I will now deliver my judgment in the *Webb* case.

This is a taxpayer's appeal from a judgment of Croom-Johnson, J. The subject-matter is the same as in *Tamplin's* case, namely, claims by the taxpayer Company, which carries on business as a brewer, to the so-called *Usher* deduction in respect of eighteen premises held on long leases and let to tied tenants.

The appeal, in my opinion, succeeds, being covered by the decision that I have just given in *Tamplin's* case.

The case came before the same Commissioners and the view that they adopted in the two cases may be stated as follows. The Crown, in their opinion, succeeded in the contention that the right to an *Usher* deduction had been abolished by the Finance Act, 1940, in cases where the rent paid by the brewery under the long lease was greater than the annual value. This was so in *Tamplin's* case and in respect of one of the licensed premises here, the Railway Inn, at Abertillery. In cases where the rent under the long lease was below the annual value, they held that the deduction was not prohibited. The brewery in such cases was not, in their view, seeking to deduct rent, but annual value, and was covered by that part of the decision in *Usher's* case[1] which dealt with freehold houses and was clearly unaffected by Section 17 (2). This led to a decision in the taxpayer's favour on the remaining seventeen cases in the present case, the rents being less than the annual values.

On this point their decision was reversed by the learned Judge.

I fully appreciate, if I may say so, the distinction which the Commissioners drew. A decision in the Crown's favour where the rent is equal to

(1) 6 T.C. 399.

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or greater than the annual value would not necessarily involve a decision in the Crown's favour where the rent was below the annual value. On the other hand, if, as I have held, the taxpayer is entitled to the deduction where the rent is equal to or greater than the annual value, it seems to me impossible to suggest any reason why he should not be entitled to the deduction in cases where the rent is less than the annual value.

There are, however, one or two matters which arose on the Case and from the argument with which I will deal.

In the case of the Railway Inn at Abertillery the rent paid by the Company was in excess of the Schedule A assessment. The question, as set out in paragraph 2 (1) of the Case, is whether the Company was entitled to deduct a sum equal to the difference between the rent received by the Company from its tied tenant and the rent which would have been received for the said house had it been let as a free house. The paragraph goes on to state that this difference was (perhaps by the agreement of the Crown or it may have been the contention of the Company) measured by the difference between rent paid and rent received. In paragraph 9 (1) of the Case the claim of the Company is stated to be to deduct the difference between the rent paid and the rent received. The claim is however set out in paragraph 12 (*iii*) in the same way as in paragraph 2 (1). Paragraph 9 should therefore be treated as expressing the quantum of the claim and not its basis.

The Special Commissioners, as I have said, disallowed any deduction in respect of this house. This was affirmed by the learned Judge, following his own decision in *Tamplin's* case. For the reasons given in my judgment in *Tamplin's* case, the taxpayer's appeal with regard to this house succeeds.

The statement in paragraph 2 to which I have referred, that the rent forgone was measured by the difference between rent paid and rent received, illustrates a point which is, I think, worth emphasising. If the Schedule A valuation is up to date, it would be the amount to be taken, one would presume, in estimating the rent forgone. In principle however if relevant circumstances had changed since it was arrived at, the taxpayer could show, as he sought to do here, that a higher figure should be taken. The Crown might also seek to show that a lower figure should be taken. The basis of the *Usher* decision [1], in the view that I have expressed in *Tamplin's* case, is not based on the figure on which the occupying tenant is assessed for tax under Schedule A.

With regard to the other seventeen premises, where the long lease rent was below the Schedule A annual value, the question, as stated in paragraph 2 (2) of the Case, is whether the Company was entitled to a deduction of a sum equal to the difference between the rents received by the Company from those houses and the gross Schedule A assessments. On the other hand, the contention of the Company, as set out in paragraph 10 (1) of the Case, is to deduct the difference between the rents received and the rents which would have been received if the houses had been let free.

In the result it seems to me that the Company are claiming an *Usher* deduction on the correct basis, but are putting forward the gross Schedule A value as the measure of rent forgone, giving credit for rent received, in

(1) 6 T.C. 399.

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the absence of any evidence from either side that a higher or lower figure should be taken.

The Crown contended that if the Company was entitled to any deduction it should be based, not on the gross, but on the net Schedule A figure, that is, the figure collected, which is the gross figure subject to a conventional deduction for repairs.

It appears from Lord Parker's speech in *Usher's* case, 6 T.C., at page 433; [1915] A.C. at page 463, that in regard to the freehold houses a similar question was raised as to whether the deduction should be based on the gross or net Schedule A figure. It is only in Lord Parker's speech that this point is considered in detail. He says that in principle he would have taken the gross figure. He then considered whether Section 9 of the Finance Act, 1898, precluded him from doing this. That Section, which was repealed by the Income Tax Act of 1918, but re-enacted in substance in Rule 5 (2) of the Rules applicable to Schedule D, Cases I and II, provided *inter alia* that, where in estimating the profits or gains of any trade under Schedule D any sum is deducted on account of the annual value of the premises used for the purposes of such trade, the amount deducted shall be the net or reduced amount. Lord Parker held that though this applied to the tied tenant, it did not apply to the claim of the brewery which was being considered.

I agree, therefore, with the Commissioners, who held that on this point the House of Lords had decided in *Usher's* case in favour of the gross figure where this was put forward by the taxpayer as the proper measure for the rent forgone and there was no reason for not accepting it as such.

As I have said, on the basis of my decision in *Tamplin's* case, it seems to me impossible to argue that the Crown can succeed in these cases. I will however refer to an argument of Mr. Grant which would certainly have been relevant if our decision in *Tamplin's* case had been in favour of the Crown. The brewer here is claiming to deduct the rent at which the house could be let free. This figure is plainly not rent under a long lease, though it might be the same figure. In the cases under consideration one ought, Mr. Grant submitted, to regard the deduction as a composite one: the Company first claiming to deduct the rent under the long lease, which is prohibited, and then the difference between that and the rent which could be obtained for the house if let free, giving credit of course for the rent received. In the result, only the "difference" could be deducted, which in one or more of the cases under consideration was less than the rent paid by the tied tenant: so no deduction was in these cases admissible.

On the view that I have taken of the decision in *Usher's* case, I think that this argument fails *in limine*; but even if I had come to a different conclusion in cases where the rent paid equals or exceeds the annual value, I should have rejected the argument. Where the rent is less than the proper annual value, I think that the brewer is in the same position as if he were a freeholder and his tax position is unaffected by the provision of Section 17 (2). The brewer is not seeking to deduct the rent and then the difference between that and the true annual value. He is seeking to deduct the latter and the amount of rent is irrelevant.

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The learned Judge, as I have said, allowed the Crown's appeal in respect of these seventeen houses. He regarded the provisions of Section 17 of the Finance Act, 1940, as in effect making the whole decision in *Usher's* case (1) inapplicable. He rightly, if I may say so, rejected an argument based on the concession or admissions in *Collyer v. Hoare & Co., Ltd.* (1). I have given my reasons for differing from him in *Tamplin's* case and, if that decision is right, the taxpayer, I think, inevitably succeeds with regard to these seventeen houses.

In the result the appeal must be allowed.

Singleton, L.J.—I agree.

The same ruling applies in this case as in the appeal of *Tamplin's*. The right to deduct rent as against profits has gone, but the Company is entitled to make a deduction in respect of the annual value (normally the Schedule A assessment), less that which it receives from the tenant. This covers both the issues raised in paragraph 9 of the Case. The Company pays a rent of £125 a year for the Railway Hotel, Abertillery, under a 1943 lease, while the Schedule A assessment is £110. I am not sure as to the measure of agreement between the parties. From paragraph 2 (1) it would appear that it was agreed that the rent forgone was the difference between the rent actually paid by the Company and the rent received from the tied tenant. If that is so, the Company is entitled to succeed. Paragraph 9 (1) and the finding in paragraph 12 (*i*) seem to me to be differently worded. The principle to be applied is that which I have stated above. The amount of rent forgone is in each case a question of fact.

As to the other seventeen houses, the Company is entitled to a deduction as claimed and as allowed by the Special Commissioners.

This appeal, too, should be allowed.

Roxburgh, J.—I agree, and upon the basis which I have just stated in *Tamplin's* case.

Somervell, L.J.—Mr. Talbot, with regard to the Order, as in *Tamplin's* case the Commissioners found against you, has it to go back or are figures agreed?

Mr. Talbot.—I think that it is unnecessary for it to go back, although, if your Lordships make the usual Order, " appeal allowed ", it will go back as a matter of course if there is any adjustment to be made.

Mr. Peter Rowland (for Mr. Hills.)—In my submission, the Order should state that the assessment should be remitted to the Special Commissioners.

Mr. Talbot.—I have no objection to that.

Somervell, L.J.—Very well. Appeal allowed. Is it " the assessments remitted "? Is that the proper form?

Mr. Talbot.—Appeal allowed with costs here and below, and the cases to be remitted to the Special Commissioners to adjust in accordance with the judgment.

Mr. Rowland.—Yes; in accordance with the judgment.

(1) 6 T.C. 399. (2) 17 T.C. 169.

Somervell, L.J.—Yes. I suppose that the same Order will be made in *Webb's* case. In that case the Commissioners did reduce the assessments in respect of the seventeen houses.

Mr. Talbot.—It just leaves the one case open, I think: The Railway Hotel, Abertillery. I suppose that it should really go back on that.

Somervell, L.J.—Is that right?

Mr. Rowland.—I think that there should be the same Order in both cases.

Mr. Talbot.—I agree, my Lord.

Somervell, L.J.—There will be the same Order in both cases. Both appeals will be allowed with costs, the figures to be adjusted in accordance with our decision.

Mr. Talbot.—If your Lordship pleases.

Mr. Rowland.—I am instructed to ask your Lordships for leave to appeal to the House of Lords.

Somervell, L.J.—I should think that we might give leave.

Mr. Talbot.—I do not think that I can fairly offer any resistance. I do not know whether your Lordships would think that this is a proper case in which to consider putting the Crown on terms. I do not press the matter at all, but I am bound to raise the point.

Somervell, L.J.—It is a matter of interest to all brewers, I suppose. I suppose that you would have wanted to go to the House of Lords if you had lost?

Mr. Talbot.—Yes. I must confess that we should have certainly asked for leave to go to the House of Lords if your Lordships had been against us.

Somervell, L.J.—No; we think that this is not a case for terms.

Mr. Talbot.—If your Lordship pleases.

The Crown having appealed against the decisions of the Court of Appeal, the cases came before the House of Lords (Lords Morton of Henryton, Reid, Radcliffe, Tucker and Asquith of Bishopstone) on 17th, 18th, 19th, 23rd and 24th July, 1951, when judgment was reserved. On 25th October, 1951, judgment was given unanimously against the Crown, with costs.

Mr. Frederick Grant, K.C., and Mr. Reginald P. Hills appeared as Counsel for the Crown. Mr. Cyril King, K.C., Mr. F. Heyworth Talbot, K.C., and Mr. H. M. Allen appeared as Counsel for the Companies.

Tamplin and Son's Brewery (Brighton), Ltd. v. *Nash (H.M. Inspector of Taxes)*

Lord Morton of Henryton.—My Lords, this appeal arises out of additional first assessments made upon the Respondents for the year 1942-43 in the sum of £32,033 and for the year 1943-44 in the sum of £32,790 under Schedule D, Case I, and Section 125 of the Income Tax Act, 1918, in respect of their profits as brewers.

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The Respondents are the lessees of a number of licensed houses, the freeholder whereof is Tamplin's Licensed Properties, Ltd., a wholly-owned subsidiary company of the Respondents. These houses are held by the Respondents as lessees under an agreement for lease dated 1st June, 1938, for a term of 61 years computed from 1st October, 1933. Some of the houses were retained by the Respondents under their own management, but others were sublet by the Respondents to tied tenants under agreements whereof a specimen is exhibited to the Case Stated. By clause P of each of these agreements the tenant and licensee of the public house entered into the usual undertaking to purchase solely and exclusively from the Respondents all the ale, beer, stout and other malt liquor and all wines, spirits and mineral waters which should be required for sale in or out of the premises, and by clause Q he entered into an undertaking not to buy from any other source than the Respondents.

It is common ground between the parties to this appeal that the terms of the said specimen agreement are those commonly to be found in tenancy agreements between brewers and their tied tenants and that the Respondents entered into these tenancy agreements for the purpose of obtaining a better market for their beer. It is also common ground that if the Respondents had chosen to let the same houses under agreements which omitted the tie clauses but were in other respects the same as the specimen agreement, they could have obtained higher rents than those which they obtained from the tied tenants. Lastly, it is common ground that up to the date when the Finance Act, 1940, came into operation, the facts just stated entitled the Respondents to make a certain deduction in computing the amount of their profits under Case I of Schedule D of the Income Tax Act, 1918. The deduction is commonly called "the *Usher* deduction" or "the *Usher* allowance", as the right to make it was first established by the decision of this House in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 6 T.C. 399.

So far the parties are in agreement. I must now state the difference of opinion which has given rise to this appeal. The Crown contends that by reason of the decision in *Usher's* case the Respondents were entitled, in computing their profits under Case I of Schedule D of the Income Tax Act, 1918, to deduct the amount of the rent paid by them to the freeholders for each licensed house let to a tied tenant less the rent received by them from each tied tenant. The Crown further contends that the rents paid by the Respondents to the freeholders were "rents under long "leases" within Section 17 (1) of the Finance Act, 1940, and that by reason of Sub-section (2) of the same Section the Respondents ceased to be entitled to make the deduction just mentioned when the Act of 1940 came into force. The Respondents agree that the rents paid by them to the freeholders are "rents under long leases" within Section 17, Sub-section (1), of the Act of 1940, but they say that the deduction which they were entitled to make under the decision in *Usher's* case was not the difference between the rents paid by them to the freeholders and the rents received by them from the tied tenants but the difference between the rents which could have been obtained for the licensed houses in question if they had been let to tenants free from the tie imposed by clauses P and Q already quoted and the rents which they in fact obtained from the tied tenants. They further contend that Section 17 of the Act of 1940

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has no effect upon this right since they do not seek to deduct any "rents "under long leases"; what they were and are entitled to deduct in the case of each house is the notional rent which could have been obtained from a free tenant, less the rent paid by the tied tenant.

My Lords, it will be apparent that it is necessary to consider *Usher's* case(1) with some care, in order to ascertain what was in fact decided by your Lordships' House.

The rule which had to be considered by this House in *Usher's* case is to be found in Section 100 of the Income Tax Act, 1842, and is incorporated by reference in the Income Tax Act, 1853. It is Rule 1 of the Rules applying to Cases I and II of Schedule D, and there is no material difference between that Rule and the Rule which applies in the present case, Rule 3 (*a*) of the Rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918. Under both the old Rule and the present Rule it has to be decided whether the sum sought to be deducted is "money wholly and exclusively laid out or expended for the purposes of" the trade in question.

In *Usher's* case the facts were the same as in the present case, except that the brewers owned the freehold of some of the houses let to tied tenants and were leaseholders of others of these houses. They appealed against an assessment made on them in respect of the profits of their trade, and claimed to have the assessment reduced by (*inter alia*) a sum of £2,134 14*s.* 6*d.* described by them as the "difference between rents of "leasehold houses or Sch. A assessment of freehold houses on the one "hand, and rents received from tied tenants on the other hand". It is worthy of note, however, that in the brewers' contention (C), set out at page 437 of the report(2) it was pointed out that the tied tenants paid "a much less rent *than the full annual value of the premises*", and the following paragraph appears in a supplemental Statement of Facts agreed between the parties and signed in pursuance of an Order of Horridge, J.

> "B. In consideration of the 'tie' contained in the tenancy "agreement the appellants let the tied houses at considerably less "than their annual value or what they could get for them without such "a tie and in the case of houses rented by them also below what "they pay for the rent thereof themselves. Such letting is made by "them deliberately and solely in order to get the trade which the using "of such houses as tied houses affords and by means of so doing "they are enabled to make a profit on their total trading transactions by "reason of the increased sale of their beer and other goods. The "letting at less than the annual value or head rent is not due to a "change in the value of the premises. The figures in question repre-"sent the difference between the rents received by the appellants on "the one hand and
>
> "(i) in the case of their freehold houses, the net Schedule A "assessments;
>
> "(ii) in the case of their leasehold houses the rents paid by them.
>
> "If it should be held that in case (ii) the net Schedule A assess-"ment is the proper figure it can be ascertained."

(1) 6 T.C. 399. (2) [1915] A.C.; 6 T.C. at p. 401.

(Lord Morton of Henryton.)

This House unanimously allowed the deduction claimed, as being money "wholly and exclusively laid out or expended for the purposes of" the brewers' trade. But the opinions delivered must be studied with care, as two alternative views of these opinions have been put forward in argument. Counsel for the Respondents contend that what was allowed to be deducted, both in the case of the freeholds and in the case of the leaseholds, was the difference between the rents which were in fact obtained from the tied tenants and the notional rents which could have been obtained if the same premises had been let free from the tie. Counsel for the Crown, on the other hand, contend that the deduction allowed in *Usher's* case[1] in the case of the brewers' leasehold properties, was simply the rent paid to the freeholder less the rent received from the tied tenant. They deal with the deduction allowed in the case of the freehold properties by saying that it was simply the difference between the Schedule A assessment and the rent received from the tied tenant; that it was an "anomalous" decision; and that it has no application to the present case, because the Respondents are leaseholders of all the houses now in question.

I now turn to the speeches in *Usher's* case, in order to ascertain which of these contentions is entitled to succeed. Lord Loreburn said[2] ([1915] A.C., pages 445-6): "The next item which the brewery company seeks to "deduct is £2,134 14*s.* 6*d.*, which is the difference between the annual "value or the rents which they pay to the freeholders of the tied houses "on the one hand and the rents which they receive for the same houses "from their tied tenants on the other hand. This difference arises because "the tied tenants are bound by covenant to buy their liquor solely from "the brewery company. In consideration of this 'tie' the tenants occupy "at rents less than the annual value and less than the rents which the "brewery company itself has to pay for the houses, and the sum claimed "to be deducted must be taken to represent in each case the difference "between the rents actually received from the tied tenants and the proper "annual value. For no argument was offered to show that the rent paid "by the brewery company is other than the proper annual value. And it "is agreed that this letting at reduced rents is made solely to get the trade "which the using of the tied houses affords, and so to swell the profits of "the brewery business. On ordinary principles of commercial trading "such loss arising from letting tied houses at reduced rents is obviously a "sound commercial outlay. Therefore this item must be deducted."

It is to be observed that Lord Loreburn treats the freehold and leasehold premises as being on the same footing, and the vital words are: "the "sum claimed to be deducted must be taken to represent in each case the "difference between the rents actually received from the tied tenants and "the proper annual value. *For no argument was offered to show that the "rent paid by the brewery company is other than the proper annual value.*" This passage shows clearly to my mind that if the rent paid by the brewery company had been other than "proper annual value" it would not have been adopted as the figure from which the rent paid by the tied tenant was to be deducted, and I think that by "proper annual value" Lord Loreburn meant the rent which could have been obtained from a free tenant.

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(1) 6 T.C. 399. (2) *Ibid.*, at p. 420.

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Lord Atkinson said at page 457 (1): "As to the next item, it must be "conceded that if the appellants had put into occupation of a house a "manager, as distinguished from a tenant, who managed their trade in the "way I have described, they would, under the authority of *Russell* v. *Town* "*and County Bank*(2), have been entitled to deduct the full annual value "of the house as estimated under Sched. A, whether that house was a "freehold or leasehold. I do not think it can possibly make any real "difference in principle in respect to this right to deduct, if the salesman "put into the tied house, to live in it (as he must do to obtain a publican's "licence), happens to be a tenant and not a manager, though the brewer "no doubt occupies the house in the one case, because the occupation of "the manager is his occupation, and not in the other; but the balance of "the profits and gains of the brewer's trade would, according to the "methods of practical business men, be ascertained in the same way in "both cases, *i.e.*, by deducting from the receipts what it costs to earn them. "Part of the cost to the brewer is, in the manager's case, his salary, and "possibly a discount on profit. In the case of the tenant it is the difference "between the annual value of his, the brewer's, freehold house and the "rent he receives for it, and in his leasehold house the difference between "the rent he receives for it and the rent he pays for it, if that be equal to "the full annual value under Schedule A. For the purposes of striking "the balance of profits and gains the two cases are in principle undistin-"guishable."

Here, the vital words are "in his leasehold house the difference "between the rent he receives for it and the rent he pays for it, *if that be* "*equal to the full annual value under Sched. A*." The comments which I have just made as to Lord Loreburn's words apply equally to Lord Atkinson except that the latter speaks of "the full annual value under Schedule "A" instead of using the phrase "the proper annual value."

For the moment I pass over the opinion of Lord Parker of Waddington and turn to the opinion of Lord Sumner at page 469 (3), where he said: "Next as to the rent. A trader who utilises, for the purposes of his "trade, something belonging to him, be it chattel or real property, which "he could otherwise let for money, seems to me to put himself to an "expense for the purposes of his trade. Equally he does so if he hires "or rents for that purpose property belonging to another. The amount of "his expense is *prima facie* what he could have got for it by letting it in "the one case, and what he pays for it when hiring it in the other. "Where he gets something back for it, while employing it in his "trade, by receiving rent or hire for it in connection with that trade, "the true amount of his expense can only be arrived at by giving credit for "such receipt. In principle, therefore, I think that in the present case rent "forgone, either by letting houses, which the brewers own, to tied tenants "at a low rent instead of to free tenants at a full rack rent in the open "market, or by letting houses in the same way, which they hire and then "re-let at a loss, is money expended within the first rule applying to both "of the first two cases of Sched. D, and that upon the findings of the "special case, which are conclusive, it is 'wholly and exclusively expended "'for the purposes of such trade'."

(1) [1915] A.C.; 6 T.C. at p. 428. (2) 2 T.C. 321; 13 App. Cas. 418.
(3) [1915] A.C.; 6 T.C. at p. 437.

(Lord Morton of Henryton.)

Certain portions of this passage have been criticised as being too widely expressed; see, for instance, the observations of Viscount Maugham and Lord Russell of Killowen in *Lowry* v. *Consolidated African Selection Trust, Ltd.* (1), [1940] A.C. 648, at pages 663-4 and 674 *ad fin.* Mr. King does not seek to rely upon these portions as establishing a wide general rule. I think, however it is plain that in the particular case before him Lord Sumner thought that the proper deduction to be allowed was the difference between the rent received from the tied tenants and the rent which could have been obtained if the houses had been let "to free tenants "at a full rack rent in the open market". This difference he described as "rent forgone", and he regarded it as money "wholly and exclusively "expended for the purposes of such trade".

I now turn to the judgment of Lord Parker of Waddington. He dealt with the point at page 463 (2), saying: "My Lords, some of the licensed "houses which the appellants acquired for the purposes of their trade were "of freehold and some of leasehold tenure, but the rent reserved in all the "tenancy agreements on which they have been let is less, in the case of "freeholds, than the annual value according to the Sched. A assessment, "and, in the case of the leaseholds, than the rent which the appellants "themselves have to pay. The appellants claim to deduct, in the one "case, the difference between the Sched. A assessment and the rent they "receive, and in the other case the difference between the rent they pay "and the rent they receive. In other words, they claim the Sched. A assess-"ment value or the rent they pay as a deduction, giving credit on the "other side of the account for the rent paid by the tenants of the tied "houses. I am of opinion that they are also right in this contention. Unless "there is some express prohibition the case appears to be covered by "*Russell* v. *Town and County Bank*(3) . . . The right to make the deduc-"tion, however, must of course carry with it the obligations to give credit "for the rents received from the tenants of the tied houses."

Counsel for the Crown in the present case rely upon this passage as supporting their contention, but I incline to the view that if there had been evidence that the rents paid by the brewers to the freeholders had been greater than the rent which they could have obtained from a free tenant, Lord Parker would not have allowed the brewers to deduct the whole of the difference. It is to be noted that he expresses no dissent from the views which had already been expressed by Lords Loreburn and Atkinson. Lord Parmoor did not deal specifically with this particular claim by the brewers but he expressed no dissent from the views which had already been expressed by the other noble and learned Lords.

My Lords, I shall first consider the case of the leasehold houses dealt with in *Usher's* case (4). The deduction in fact allowed was the deduction claimed by the brewers, namely the difference between the rents paid to the freeholders and the rents received from the tied tenants; but in my view this deduction was allowed because, and only because, it represented the difference between the notional rent which could have been obtained from a free tenant and the rent obtained from the tied tenant, and if there had been evidence that the actual rent paid to the freeholder was higher or lower than this notional rent, the deduction would have been based on

(1) 23 T.C., pp. 286-7 and 295. (2) [1915] A.C.; 6 T.C. at pp. 432-3.
(3) 2 T.C. 321. (4) 6 T.C. 399.

(Lord Morton of Henryton.)

the notional rent and not on the actual rent. I think that this sufficiently appears from the passages which I have quoted from the speeches of Lords Loreburn, Atkinson and Sumner.

The point is not so clear in the case of the freehold properties, but as all the properties are leasehold in the present case it is not necessary to express a concluded opinion as to the view which this House would have taken in *Usher's* case (1), if there had been evidence that the Schedule A assessments were out of date, and that the rent which could be obtained from a free tenant was in fact higher or lower than the Schedule A assessment. I incline to the view that in this event the House would have discarded the Schedule A assessment as the basis. No one of the noble Lords appeared to think that there was any difference in principle between the freeholds and the leaseholds, and I believe that they adopted the Schedule A assessments merely because they assumed that these assessments accurately represented the rent which could be obtained from a free tenant. Lord Parker of Waddington discussed the question whether in the case of the freeholds the basis should be the gross or the net Schedule A figure, but I find it unnecessary to go into this matter as no other member of the House discussed it in *Usher's* case and your Lordships are not concerned with freeholds in the present case.

The result is that in my opinion the Respondents are right in their contention that the *Usher* deduction is a notional figure less the rent actually paid by the tied tenant; and if this be the true view it is plain that the right to make this deduction is not affected by the Finance Act, 1940. This appeal must therefore fail, and it becomes unnecessary to consider the second submission of Counsel for the Respondents, that the additional assessments are bad in law, because the Inspector made no "discovery" within the meaning of Section 125 of the Income Tax Act, 1918.

It was suggested by Counsel for the Crown that if *Usher's* case were to be heard today it would be decided differently, by reason of the difference in wording between Rule 5 of the Rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918, and the corresponding Rule in force when *Usher's* case was decided. I do not however find any foundation for this argument in the speeches of the noble Lords who decided *Usher's* case. I have based my opinion as to the effect of the decision in *Usher's* case simply upon the language used by those who decided it. I would add, however, that certain strange results would follow if the Crown's contention were accepted.

Assume that brewers hold a public house as lessees for a term of 870 years from 1852 at a rent of one shilling per annum. These are the facts in the case of the Globe Hotel, Abertillery, one of the houses in question in the next appeal before your Lordships' House. Assume further that the house is let to a tied tenant at £60 a year and that the rent which could be obtained from a free tenant and the net Schedule A assessment are both £100 a year. If the Crown's contention is right, the brewers could never deduct anything under the decision in *Usher's* case because the rent they pay is less than the rent they receive from the tied tenant; but if they had been freeholders, instead of being leaseholders for 870

(1) 6 T.C. 399.

(Lord Morton of Henryton)

years, they could have deducted £40 a year, both before and after the Act of 1940. This seems a strange and capricious result. If on the other hand the Respondents' contention is right the brewers could always have deducted £40 a year, as "rent forgone" for the purposes of their trade.

Another reason for rejecting the Crown's contention arises from the decision of this House in *Fry* v. *Salisbury House Estate, Ltd.* (1), [1930] A.C. 432. The Crown's contention is, in effect, that the right of the brewers under the decision in *Usher's* case(2) is to treat the rent paid to the free-holders as an outgoing of the business and the rent received from the tied tenants as a receipt of the business; but the latter part of this contention cannot in my view be reconciled with the *Salisbury House* case. Counsel for the Crown rely upon the explanation of *Usher's* case given by Lord Russell of Killowen in *Lowry* v. *Consolidated African Selection Trust, Ltd.*, [1940] A.C. at page 672 (3) when he said: "So far as concerns the lease-holds the position seems to present no abnormal features; it is a plain case of entering actual income and actual outgoings"; but with the utmost respect to that great Judge, I do not see how the receipts from the tied tenants can be computed as income from the brewing business for the purposes of Schedule D, in view of the decision in the *Salisbury House* case. Taxation in the case of each tied house would be imposed under Schedule A and under no other Schedule. I prefer the exposition of *Usher's* case which was given by Lord Warrington of Clyffe in the case of *Hoare & Co., Ltd.* v. *Collyer* (4), [1932] A.C. 407, at page 414, where he points out that the deduction in *Usher's* case was "rent forborne".

Counsel for the Crown submitted that a decision in favour of the Respondents might have far-reaching results in many different types of business. I do not think so. In *Usher's* case this House decided that in the very special case of a brewer's tied houses "rent forgone" was money wholly and exclusively "laid out or expended" for the purposes of the brewer's trade. I can find nothing in the facts of the present case to distinguish it from *Usher's* case, and nothing in any Act passed since *Usher's* case was decided which adversely affects that decision. It was in my view a decision upon a narrow point exactly covering the present case. If any of Lord Sumner's observations are to be construed as laying down a broad general rule, I cannot find that that rule was accepted by the other Members of the House or has been applied in any subsequent case.

For these reasons, which do not differ in substance from the reasons given by the Court of Appeal, I move that this appeal be dismissed with costs.

Davies v. *Webbs* (*Aberbeeg*), *Ltd.* (*two appeals*)

Lord Morton of Henryton.—My Lords, in my opinion the questions which arise on these two appeals are completely covered by the reasons which I have just given for rejecting the Crown's contentions in the case of *Nash* v. *Tamplin & Son's Brewery* (*Brighton*), *Ltd.*, and the appeals must fail.

I shall only add, to prevent any possible misunderstanding, that in the case of each of the licensed houses in question the Respondents were entitled, in computing their profits for the year in question for the purpose

(1) 15 T.C. 266. (2) 6 T.C. 399. (3) 23 T.C., at p. 293.
(4) 17 T.C. 169, at p. 212.

(Lord Morton of Henryton)

of Schedule D of the Income Tax Act, 1918, to deduct the difference between the rent which they received from their tied tenant and the rent which they would have received if the house had been let free from the tie. Neither the Respondents nor the Crown must necessarily accept either the gross or the net Schedule A assessment as accurately representing the latter figure; but it will of course save trouble and expense if they can agree a figure.

I move that these appeals be dismissed with costs.

Lord Reid.—My Lords, the Respondents in the first appeal hold a number of public houses on long leases from a subsidiary company and pay to that company a rent of £40,000. These public houses are let by the Respondents as tied houses for rents which amount in all to £5,329, and the assessments of these public houses, for the purpose of Schedule A, amount in all to about £12,000. The Respondents maintain that in the assessment of the profits of their brewery business for the purpose of Schedule D the decision of this House in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (1), [1915] A.C. 433, entitles them to a deduction of a sum equal to the difference between the amount of the tied rents received by them—£5,329—and either the amount of the rents which they could get if they let these public houses free of any tie (which I shall call the potential rents) or alternatively the amount of the Schedule A assessments. There is no finding as to what those potential rents would amount to but it is clear that they would greatly exceed the tied rents and they might considerably exceed the Schedule A assessments. It is common ground that the facts of this case are indistinguishable from the facts in *Usher's* case and there is no doubt that in *Usher's* case a deduction was allowed in respect of tied houses which were held by brewers under leases. But the Appellants maintain that the deduction then allowed in respect of leasehold premises was of a different character. They maintain that the only deduction then allowed was a sum equal to the difference between the tied rents received by the brewers and the rents which were actually paid by the brewers to their lessors. At first sight the difference between these two contentions might seem to be of a minor character, and so it would be but for Section 17 of the Finance Act, 1940.

Sections 13 to 17 of the Finance Act, 1940, appear to have been passed to deal with certain rents which had escaped taxation before that date. The reason for this immunity is to be found in *Fry* v. *Salisbury House Estate, Ltd.* (2), [1930] A.C. 432. In that case a company owned a block of buildings and let out rooms in it as unfurnished offices. The rents which the company received exceeded the total Schedule A assessment of the building and the Crown sought, unsuccessfully, to tax the amount of that excess as a profit of the company under Schedule D. The position then was that a tenant who paid rent which exceeded the amount of the Schedule A assessment of his premises paid to the Crown tax on the Schedule A assessment and no more; he was then entitled to deduct that tax from the rent which he paid to his landlord, but he could not deduct more than he was liable to pay, so he paid the excess of his rent over the Schedule A assessment without deduction of tax. The landlord could not be directly assessed; so the result was that no tax was payable by anyone on the excess rent. The effect of the Finance Act, 1940, was

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

(Lord Reid.)

to make such excess rents taxable. The Act dealt differently with rents under short leases and rents under long leases, and it is unnecessary in this case to refer to those provisions which deal with short leases. Long leases are dealt with by Section 17, and its effect is that a tenant can now deduct tax on the whole rent which he pays to his landlord. If the Section stopped there the landlord would pay tax on all that he received, but the tenant would gain because he would have deducted tax from the whole rent and still only be liable to pay tax on the Schedule A assessment. In the ordinary case any such gain to the tenant is prevented by further provisions in the Section. Before 1940 the tenant was entitled in determining his profits under Schedule D to deduct as an expense the whole rent which he paid, but Section 17 now prohibits him from making any deduction in respect of rent payable by him under a long lease. I need not enter further into an examination of the complicated provisions of this Section because it is agreed that in the ordinary case the ultimate result is that the landlord now pays tax on the full amount received by him, whereas the amount of tax payable by the tenant is on balance unaltered.

I must now deal with the effect of Section 17 on this case. Admittedly the brewers get the benefit of Section 17 in that they can now deduct and retain tax on the whole £40,000 which they pay as rent. The question is whether the countervailing prohibition also applies to them. The Section only prohibits the taxpayer from deducting in his Schedule D account any payment of rent under a long lease. So if the deduction allowed in *Usher's* case [1] was a deduction of the rent paid by the brewer, either in whole or in part, that deduction is now prohibited by Section 17. But if the deduction allowed in *Usher's* case was not based on rent paid by the brewer but was based on something else—potential rent or annual value—then Section 17 has no application to it and the deduction can still be claimed. It is for this reason that it is necessary to discover precisely what this House held to be the basis of the deduction allowed in *Usher's* case.

In *Usher's* case the brewers had let to tied tenants a number of public houses, some of which they held on lease and some of which were freehold, and they claimed a number of different deductions. The two most important claims were:

"(*a*) Repairs to tied houses—£1,004 0*s.* 10*d.*

"(*b*) Difference between rents of leasehold houses or Sch. A. "assessment of freehold houses on the one hand, and rents received from "tied tenants on the other hand . . .£2,134 14*s.* 6*d.*"

The Commissioners held: "3. In common with other brewery companies "the appellants have from time to time in order to increase their trade "purchased licensed houses which they let to tenants, one of the terms of "such lettings being that the tenants should buy from the appellants all the "ale, beer, wines and spirits sold in such tied houses. 4. The profits of "the appellants are made by brewing ale, beer and other articles and "purchasing spirits in bulk and selling these commodities partly to private "individuals, partly (to a limited degree) to free licensed houses, and as to "the greater part to the tenants of their tied houses. All these profits of "the appellants are included in the assessment. Such profits are materially

(1) 6 T.C. 399.

(Lord Reid.)

"increased owing to the possession by them of the tied houses in "question and in consequence of an increased sale of these commodities "to the tenants of those tied houses and to the fact that they are able to "obtain and do obtain for the same class of goods a higher price from "the tenants of their tied houses than they can obtain or are able to "obtain from their other customers . . . 7. The said premises have been "acquired by the appellants and are held by them solely in the course of "and for the purpose of their said business and as a necessary incident "to the more profitably carrying on of their said business. The possession "and employment of the said premises as aforesaid are necessary to enable "them to earn the profits upon which they pay income tax, and without "the said premises and their use as aforesaid, the appellants' profits if "there were any at all would be less in amount."

The main question in *Usher's* case was whether the brewers were entitled to any of these deductions at all. Lord Loreburn, L.C., said (1): "Accordingly the main question for decision is this. When the owners "of a brewery business, who are also landlords of tied houses which sell "their commodities by retail, come to be assessed for income tax under "Sched. D, can they, in estimating the balance of profits and gains on the "brewery business, bring into account expenses which they have "properly though voluntarily incurred in supporting their tenants so as to "enable them to sell the goods supplied by the brewery company?" This question was determined in favour of the brewers. It then became necessary to decide whether each of the separate claims was valid, and there was much argument about the first claim for the cost of repairs. This claim was held to be valid, but I need not consider the reason why, because the reasoning regarding this claim is not relevant in the present case.

What we are concerned with in this case is the second claim and the reasons for which it was allowed. That claim covered both freehold and leasehold properties. The form in which the claim in respect of leasehold properties was made and allowed is helpful to the Appellant in this case because it purports to be based on the rents actually paid by the brewers, whereas the claim in respect of freehold properties purports to be based on the amount of the Schedule A assessments. These are in their nature very different things: the rents paid were sums actually expended, whereas the Schedule A assessments did not represent anything paid out by the brewers. But this difference in character received little attention either in the arguments as reported or in the speeches in this House. It may well be that the reason for that was that it was assumed throughout that there was no difference in amount between the rents paid by the brewers, the Schedule A assessments, and what I have called the potential rents which the brewers could have got by letting without any tie. I think that the real problem in this case is to discover whether the claims in respect of freehold and leasehold properties were allowed for the same reasons or not.

I do not think that it is very difficult to discover the grounds of the decision on the freehold part of the claim. Lord Loreburn, L.C., states this claim as "the difference between the rents actually received from the "tied tenants and the proper annual value" (2), and he then says: "On "ordinary principles of commercial trading such loss arising from letting

(1) 5 T.C. at pp. 418-9. (2) *Ibid.*, at p. 420.

(Lord Reid.)

"tied houses at reduced rents is obviously a sound commercial outlay. "Therefore this item must be deducted." Lord Atkinson referred (1) to the decision in *Russell* v. *Town and County Bank* (2), 13 App. Cas. 418, "that a "trader who owns and occupies premises in which he carries on his trade "is entitled to deduct from his receipts the full annual value of those pre- "mises assessed under Sched. A", and then said: "This is obviously right "and just, because if he abstains from letting his premises and devotes "them to the purposes of his trade he must be taken to have dedicated "to that trade a sum equivalent to the annual sum which he might have "obtained in the shape of rent if he had let them to an untied tenant." Then he considered whether the fact that the brewer was not in occupation of the tied house made any difference and said (3): "I do not think "it can possibly make any real difference in principle in respect to this "right to deduct, if the salesman put into the tied house, to live in it (as "he must do to obtain a publican's licence), happens to be a tenant and "not a manager, though the brewer no doubt occupies the house in the "one case, because the occupation of the manager is his occupation, and "not in the other; but the balance of the profits and gains of the brewer's "trade would, according to the methods of practical business men, be "ascertained in the same way in both cases, *i.e.*, by deducting from the "receipts what it costs to earn them. Part of the cost to the brewer is, "in the manager's case, his salary, and possibly a discount on profits. "In the case of the tenant it is the difference between the annual value of "his, the brewer's, freehold house and the rent he receives for it, and in "his leasehold house the difference between the rent he receives for it "and the rent he pays for it, if that be equal to the full annual value "under Sched. A. For the purposes of striking the balance of profits and "gains the two cases are in principle undistinguishable."

Lord Parker of Waddington also based his opinion on the decision in *Russell v. Town and County Bank*. He said (4): "Thirdly, *Russell* v. "*Town and County Bank* decides, if not expressly at any rate by implica- "tion, that the first part of the rule which prohibits deductions for disburse- "ments and expenses, not being money wholly and exclusively expended "for the purposes of the trade, does not preclude a deduction for the "annual value of premises used wholly for the purposes of the trade, "though such annual value is not money expended in the ordinary sense "of the word." I will not quote from Lord Sumner's speech because I think that he goes too far in the passage which has so often been quoted. But at least he makes it clear that in his opinion "rent forgone" is the basis of the deduction. Lord Parmoor's speech is more difficult to inter- pret, but I think that he regarded the annual value of the freehold properties as an expense.

As I read the speeches, this House decided unanimously that as regards freehold properties the difference between annual value and the tied rent was to be regarded as "money wholly and exclusively laid out or expended "for the purposes of the trade" within the meaning of what was then Rule 1 and is now Rule 3 (*a*) of Cases I and II of Schedule D, and was therefore a good deduction. It was argued for the Appellant that this decision must be regarded as having been in some way superseded by

(1) 6 T.C. at p. 425. (2) 2 T.C. 321.
(3) 6 T.C., at pp. 428-9. (4) *Ibid.* ,at p. 431.

(Lord Reid.)

reason of changes in other Rules of Cases I and II since 1914: but the only Rule which has been materially altered is that which was Rule 2 and is now Rule 5. That Rule has never had any application except to a trader who was occupying the premises the annual value of which is to be deducted. So it could not be the basis of the deduction allowed in *Usher's* case(1), and in fact no one in that case ever suggested that it was the basis of the deduction allowed. I am therefore unable to understand how a change in that Rule can have any effect on the decision in *Usher's* case. I confess I do not find it easy to understand how the conclusion was reached that the difference between the annual value and the amount of the tied rent could be regarded as money expended; but I have no doubt that that was the decision of the House, and I cannot see that any later statutory enactment has in any way invalidated that decision.

It remains to determine what was meant in *Usher's* case by annual value. Was it annual value for the purpose of Schedule A assessment or was it the potential rent? In 1914 there was seldom any material difference between the two but now the difference is frequently material. Probably the point was not much considered in *Usher's* case, and therefore there appears to be some difference of opinion. Lord Parker seems the only one of the noble and learned Lords who was definitely of opinion that the Schedule A assessment should be taken. I cannot discover which view Lord Parmoor held but I think that Lord Loreburn, L.C., Lord Atkinson and Lord Sumner all held that potential rent was the true basis of the deduction. Lord Sumner was clearly of that opinion, and I think that Lord Loreburn's opinion is almost equally clear, because he refers to the "loss arising from letting tied houses at reduced rents" (2); that must I think mean the difference between those rents and something which the brewer could have received if he had acted differently; he could have received the potential rent but he could never have received the amount of the Schedule A assessment as such. Lord Atkinson in the passage I first quoted from his speech seems to regard the two as interchangeable, but in the end he states quite clearly that the trader must be regarded as having dedicated to his trade what he could have obtained as rent from an untied tenant. If their Lordships had intended that the deduction should be based on something other than the true annual value and that the Schedule A assessment should be taken instead I would have expected to find some reference to some reason for this. To base a deduction on the difference between what was received and what might have been received is intelligible once it is established that there is to be a deduction; but to base it on the difference between what was received and a figure which may have little relation to any present value would seem to require some justification, and I can find none. Accordingly, but not without some hesitation, I have come to be of opinion that it must be held that this House decided, at least by a majority, that the deduction permissible in the case of freehold properties was the difference between what the brewer might have got as rent from an untied tenant and what he in fact got from his tied tenant.

Was the decision of this House that the same deduction should be allowed in the case of leasehold properties or was the basis of the deduction in that case to be something different? At first sight it would seem

(1) 6 T.C. 399. (2) *Ibid.*, at p. 420.

(Lord Reid.)

that there was some difference because there are constant references to annual value in the case of freehold properties and rent in the case of leasehold properties, but these references seem merely to echo the wording of the brewers' claim, and in order to find the real ground of decision one has to look at the reasoning rather than at the words which were used.

My Lords, it is very unsatisfactory to have to grope for a decision in this way, but the need to do so arises from the fact that this House has debarred itself from ever reconsidering any of its own decisions. It matters not how difficult it is to find the *ratio decidendi* of a previous case, that *ratio* must be found. And it matters not how difficult it is to reconcile that *ratio* when found with statutory provisions or general principles: that *ratio* must be applied to any later case which is not reasonably distinguishable. It is not even suggested that this case can be distinguished from *Usher's* case (1). Subsequent events have given importance to differences which when *Usher's* case was decided in 1914 were of little moment and it is not surprising that these matters were not then elaborated. But there must have been a decision. There are three possible bases for the deduction which this House undoubtedly allowed in the case of leasehold properties: the basis must have been deduction of rents received from either rents paid, or Schedule A assessments (gross or net), or potential rents which the brewer might have got from untied tenants. It is true that in *Usher's* case whichever basis was held valid the practical result would have been the same because in that case rents paid, Schedule A assessments, and potential rents were all assumed to be equivalent in amount. But no deduction at all could have been allowed until a valid basis had been found for it, and the House must have chosen between the three possibilities, unless indeed it had held that all three were admissible—a result which would be fatal to the Appellants' case.

It does not appear from the reported arguments in this House that either side stressed any difference between the cases of freehold and leasehold properties. For the Crown it was contended that no part of the deduction claimed was allowable. For the brewers it was contended that the whole deduction was permissible under Rule 1 of Cases I and II of Schedule D, and very little distinction was drawn between the cases in the speeches in this House. But I think that the reasoning of at least Lord Loreburn, Lord Atkinson and Lord Sumner shows that they must have taken annual value as the basis of the deduction in this case as they did in the case of freehold properties. Lord Loreburn said, dealing with both parts of the second claim (2): "In consideration of this 'tie' the tenants occupy at "rents less than the annual value and less than the rents which the brewery "company itself has to pay for the houses, and the sum claimed to be "deducted must be taken to represent in each case the difference between "the rents actually received from the tied tenants and the proper annual "value. For no argument was offered to show that the rent paid by the "brewery company is other than the proper annual value." I think that it is clear that if the "proper annual value" had differed from the rent paid by the brewer Lord Loreburn would have held that the proper basis for the deduction was the annual value. If he had had to deal with the facts of the present case on the footing that the rent paid by the Respon-

(1) 6 T.C. 399. (2) *Ibid.*, at p. 420.

(Lord Reid.)

dents to their subsidiary company greatly exceeds the proper annual value I feel sure that he would not have allowed the full rent paid to be taken into account. And I think that it is equally clear that Lord Atkinson would not have accepted a rent which differed from the annual value: he said, dealing with the costs to the brewer which had to be brought into account (1): " it is the difference between the annual value of his, the " brewer's, freehold house and the rent he receives for it, and in his lease- " hold house the difference between the rent he receives for it and the rent " he pays for it, if that be equal to the full annual value under Sched. A." I have already noted that Lord Atkinson seems to regard annual value under Schedule A and potential rent as the same thing, and stated why I think that he and Lord Loreburn support potential rent rather than Schedule A value. Lord Parker refers to the rent paid by the brewers and makes no reference to annual value in the case of leasehold property. Lord Sumner refers to " rent forgone " by the brewers letting houses which they hire and then relet at a loss: he does not refer to annual value or potential rent, but this must I think be what he means because one can only forgo rent if one could have obtained that rent by acting otherwise. Lord Parmoor's view is less clear but at least he draws no distinction between the cases of freehold and leasehold properties

It is convenient at this point to notice the facts in the second appeal in which Webbs (Aberbeeg), Ltd., are Respondents. For all but one of the public houses with which that case is concerned the rents paid by the Respondents are less than the Schedule A values and also presumably less than the potential rents which they could get from untied tenants. An extreme instance is the Globe Hotel, Abertillery, which the Respondents hold on a lease for 870 years at a rent of one shilling, but to acquire this lease they paid £14,900. The tied rent is £60 and the gross Schedule A valuation £66. If the Appellants' contention is right, that *Usher's* case(2) decided that the only deduction allowable in respect of leasehold premises was the amount by which the tied rent fell short of the rent paid by the brewer, then the brewer could never have got any deduction in respect of this house however small the tied rent might have been. I find it impossible to reconcile such an unreasonable result with the reasoning in *Usher's* case, and I doubt whether even Lord Parker would have supported it. If the Globe Hotel had been freehold instead of being held on an 870 year lease, the deduction would undoubtedly have been based on the annual value (potential rent or Schedule A valuation). In *Collyer* v. *Hoare & Co.* (3), [1938] 1 K.B. 235, the Crown sought to avoid such a disparity by conceding that the deduction should be based on annual value where that exceeded the rent paid by the brewers but that concession is not made in this case and it is quite illogical. I can find no ground in *Usher's* case or elsewhere for the view that the brewer can claim the annual value as the basis of the deduction when the rent which he pays is small but cannot claim that basis when the rent is large. So I am fortified in my opinion that *Usher's* case decided that he can claim the annual value as the basis in every case.

I must now notice certain expressions of opinion which appear to be adverse to the conclusion at which I have arrived. In *Lowry* v. *Consolidated African Selection Trust, Ltd.* (4), [1940] A.C. 648, *Usher's* case was

(1) 6 T.C., at p. 428. (2) 6 T.C. 399. (3) 21 T.C. 318. (4) 23 T.C. 259.

(Lord Reid.)

distinguished. The company had issued shares to its employees at less than market value, and it was held that they were not entitled to deduct as an expense the additional sum which they could have obtained if they had sought the market price. To reach this result it was not necessary to determine precisely the nature of the deduction allowed in *Usher's* case[1] in respect of leasehold premises, but Lord Russell of Killowen dealt with that matter at some length. He said [2]: "The matters there in debate, "which are relevant to the present case were two, namely (1) the freehold "tied houses which the brewery let to tenants at rents lower than the "Sch. A assessment, and (2) the leasehold tied houses which the brewery "sublet to tenants at rents lower than the rents paid by the brewery to the "freeholders. It was held that the brewery could, in ascertaining its "profits, charge as an expense (in the first case) the difference between the "rents paid by the tenants, and the Sch. A assessment, and (in the second "case) the difference between the rents paid by the tenants and the rents "paid by the brewery. In other words, the receipts side of the account "included the smaller sums of rent received by the brewery while the "expenditure side included the larger sums representing (*a*) the annual "value of the freeholds, and (*b*) the rents paid by the brewery. Three "things may here be noted, namely (1) so far as concerns the leaseholds "the position seems to present no abnormal features; it is a plain case "of entering actual income and actual outgoings; (2) the great difficulty "arose as to the freeholds in regard to which no actual disbursement or "expense was made or incurred by the brewery, which could be described as "money laid out or expended for the purposes of the trade; and (3) it was "never suggested that anything beyond the Sch. A assessment (*e.g.*, the "amount of a potential rack rent) could be charged as an expense. It is in "regard to the decision concerning the annual value of the freeholds that "I propose to consider the case."

None of the other noble and learned Lords explained *Usher's* case in this way. Lord Caldecote, L.C., merely said [3]: "In the case of the lease-"holds, the rent paid, which as Lord Loreburn pointed out was not other "than the proper annual value, was an obvious item of expense." Lord Maugham did not deal separately with this point. Lord Wright, who dissented, said [4], apparently with reference to both freehold and leasehold properties: "The brewers were letting their houses at an undervalue in "order to promote their trade. They were held entitled to a deduction of "the true value, subject to allowance for the rent which they actually "received." Lord Romer, who also dissented, came nearest to agreeing with Lord Russell on this point. He said [5]: "Both the annual values in "the case of the freeholds and the rents paid in the case of the leaseholds "were treated as forming part of the cost of the brewery business and for "precisely the same reason, namely, that both the rents paid for the lease-"hold properties and the rents that would have been received for the free-"holds had they been let, instead of being used for the business, formed "part of the costs incurred in earning the receipts of the business, and "that the deduction of them was not prohibited by the Act."

If it were permissible to enter the rents received by the brewery in the receipts side of the account as Lord Russell suggests, then *Usher's* case

(1) 6 T.C. 399. (2) 23 T.C. at p. 293; [1940] A.C. at p. 672. (3) 23 T.C. at p. 280; [1940] A.C. at pp. 655-6. (4) 23 T.C. at p. 300; [1940] A.C. at p. 682. (5) 23 T.C. at p. 313; [1940] A.C. at p. 698.

(Lord Reid.)

might well be regarded as "a plain case of entering actual income and "actual outgoings". But Lord Russell must, I think, have omitted to notice that that is just what the *Salisbury House* case (1) prevents. It was rightly admitted for the Appellant in this case that that is so. So if this were the right way to look at the case and the rent paid should be entered as an actual outgoing nothing ought to be entered on the other side of the account and the brewer would get a much larger deduction than *Usher's* case(2) allowed him. The Crown seek to get round this difficulty by deducting the rent received from the rent paid before the latter is entered in the account and only entering the difference. It was argued that the *Salisbury House* case does not prevent this procedure. I think that the answer to that argument is to be found in *Hoare & Co.* v. *Collyer* (3), [1932] A.C. 407. In that case the brewers were entitled to deductions in respect of some public houses but they also held others where payments by the tied tenants exceeded the annual values. The Crown sought to diminish the deductions by setting off against them the excess rents received from tenants who paid more than the annual value, but it was held that this was not permissible. Lord Warrington of Clyffe said (4): "It seems to me to be now settled by the "authority of *Fry* v. *Salisbury House Estate, Ltd.* that the profits "and gains arising from the ownership of lands, whether used for the "purposes of a trade or not, are determined exclusively by reference to "annual value, and not by the result of an account of receipts on the one "hand and expenses on the other, and that accordingly the rents received "cannot be included in an account under Schedule D of the profits and "gains of the trade for the purposes of which the lands are used", and then later he said (5): "Items of receipt and expenditure respectively can-"not in my opinion be set off one against the other unless they are both "properly included in one account." Lord Warrington was not alone in this view. Lord Atkin said it made no difference whether you are seeking to establish a balance of profit or destroy an item of loss. Lord Tomlin said (6): "It does not seem to me to be any the less a bringing into "charge because the thing, or the part of the thing, brought in is brought "in for the purpose of wiping out deficits arising in cases where the rents "do not equal the Schedule A valuations." And Lord Macmillan said (7), "to use part of the rents in diminution of a deduction from the profits is "just to that extent to add the rents to the profits." It is true that the point in *Hoare's* case was not precisely the same as that in this case, but I think that the ground of decision in *Hoare's* case was general. If you cannot bring a rent in on one side of the account you cannot use it to diminish an entry on the other side.

If this answer to the Appellant's argument is not sufficient I think that it can also be met in another way. The contention is that a part of the rent paid, but only a part of it, is to be entered in the account as a deduction. That must mean that the part which is to enter the account was money wholly expended for the purposes of the trade but that the rest was not. The part which is not to enter the account was certainly expended, and it can only be excluded from the account if it was not

(1) 15 T.C. 266. (2) 6 T.C. 399. (3) 17 T.C. 169.
(4) [1932] A.C. at p. 414; 17 T.C. at p. 212. (5) [1932] A.C. at p. 415; 17 T.C. at p. 212. (6) [1932] A.C. at p. 420; 17 T.C. at p. 216.
(7) [1932] A.C. at p. 421; 17 T.C. at p. 217.

(Lord Reid.)

wholly expended for the purposes of the trade. For what purpose then was it expended? The brewer has to pay rent under a long lease and the tied rent which he receives may vary from time to time. I am at a loss to understand how rent which would otherwise be held to have been wholly expended for the purposes of the brewer's trade can cease in part to have been expended for those purposes because the brewer has received money from a sub-tenant. So, if the decision in *Usher's* case (1) had been that the rent paid is money expended within the meaning of Rule 3 (*a*) and that the rent received must be deducted from it, far from being a plain case it would be highly anomalous. I think that whichever way *Usher's* case is interpreted the decision is anomalous, and if it is relevant to have regard to such considerations, I prefer the interpretation which involves the same anomaly throughout rather than that which involves two separate anomalies, one for the freehold and another for the leasehold properties.

The Respondents submitted a further argument based on Section 125 of the Income Tax Act, 1918, but, as I am of opinion that they are entitled to succeed on other grounds, I do not find it necessary to consider this argument. I agree that these appeals should be dismissed.

Lord Radcliffe.—My Lords, the decision of this House in *Usher's* case has been often alluded to and sometimes explained. More than once it has been rather explained away than explained: for I think that it has come to be regarded as a special case, the principle of which it is difficult to discover and almost impossible to extend. But now, and perhaps for the first time, it is necessary for this House to decide exactly what that principle is.

There has never been room for doubt as to what *Usher's* case decided. It is the basis of the decision that is the matter for debate. First, it decided something in favour of a brewing concern and not against the concern. It decided that that concern had a right to the claims that it put forward. In our Courts a party gets what he asks for, if it is not more than that to which he is entitled: but he does not always ask for all that he is entitled to get. Secondly, it decided (and this was the real contest in that case) that the relation of a brewing concern to its tied houses was so special that it was entitled to charge against the receipts of its brewing business, when making up its taxable profits under Schedule D, sums expended by it, actually or notionally, in respect of those houses. And, lastly, it decided that those sums included the "difference between rents of leasehold houses "or Schedule A assessment of freehold houses on the one hand and "rents received from tied tenants on the other" (2).

Now the first question is, what is the basis of that decision with regard to leasehold houses? The argument has thrown up a variety of possible answers. What looks like the simplest is to say that it is a mere question of entering on one side of the account the sum disbursed to pay the head rent and on the other side the sum received from the tied tenant. That gives the difference. And so it would, if you make the very large assumption that in each case the head rent is larger than the tied rent. If it is not the principle goes astray, for the brewer, who may have paid a large premium to acquire his leasehold house at a low rent, forgoes annual

(1) 6 T.C. 399. (2) *Ibid.*, at p. 400.

(Lord Radcliffe.)

value in his tied rent just as much if he is himself paying a low rent as if he is paying a rack rent. But this explanation, if it were admissible, would support the Revenue's case in this appeal, for plainly the entry of rent paid under long leases would no longer be a permissible charge to profits under Schedule D now that Section 17 of the Finance Act, 1940, has been enacted.

In my opinion we are bound to reject this explanation of *Usher's* case(1). It can invoke two very great names at least in support of it. I cannot read what Lord Parker says at pages 432-433 of the report in 6 T.C. without concluding that he did treat the claim in respect of leasehold houses as being essentially one to deduct rent paid on terms of giving credit for rent received: nor do I doubt that in *Lowry's* case, 23 T.C. 259, at page 293. Lord Russell of Killowen accounted for *Usher's* case in the same way. Nor does that exhaust the list of authorities that might be prayed in aid of this view. But it seems to me quite impossible to reconcile such a reading with the decision of this House in *Salisbury House Estate, Ltd.* v. *Fry*, 15 T.C. 266. For if, as that case decides, the actual rents received from the tied tenants are not taxable receipts for the purposes of assessing the brewing concern's profits under Schedule D, how can they be treated as entered upon one side of the account for the purpose of "mitigating" the charge in respect of the actual amounts paid by way of head rent? Indeed if this were the true basis of *Usher's* case the full amounts paid by way of head rent would have been admissible as deductions but no counter entry could have been made in respect of receipts. And no one appears ever to have suggested that this is the result of *Usher's* case and the *Salisbury House Company's* case when taken together. The two decisions were in fact much canvassed before this House in *Collyer* v. *Hoare & Co.*, 17 T.C. 169, and I think it fairly obvious from the speeches of the noble and learned Lords who took part in that decision that they were well aware that an interpretation would have to be placed upon the decision in *Usher's* case that would not bring it into conflict with the general principle embodied in the other and later decision. But, if so, an interpretation which is based merely on setting receipts against expenditure must be abandoned.

To reject this explanation of *Usher's* case is, I think, to reject the real basis of the Revenue's appeal. But their argument as presented to your Lordships clung, no doubt wisely, to the indisputable fact that in the case of leaseholds *Usher's* case had accepted the difference between rents paid and rents received as the measure of the brewer's permitted charge. At least, it was said, "rents paid" involves a claim based on the actual disbursement in respect of rent, and it is just those disbursements, if made under "long leases", which are no longer admissible deductions. But *Usher's* case took as its measure a difference, not an actual disbursement. The distinction may mean much or little. If the test is not simply disbursement against receipt, the difference denotes either such part of the actual rent paid as exceeds the rent actually received or else some method of calculating a notional disbursement, which does not affect to express an actual disbursement at all. The former view would I think support the Revenue, for if the rent paid under a long lease cannot be charged against receipts in assessing profits, then the charge of even a part of it must

(1) 6 T.C. 399.

(Lord Radcliffe.)

similarly be prohibited. But if the latter view prevails then the principle of *Usher's* case (1) is untouched by the Finance Act, 1940.

My Lords, I have come to the conclusion that it is the latter view that must prevail. I cannot see any rational basis for the former. If the House had really meant to decide in *Usher's* case that rent paid by a brewing concern in respect of its tied house was itself expenditure made wholly and exclusively for the purposes of the trade it was very easy to say so. I do not think that any of their Lordships (with the possible exception of Lord Parker) did so decide or intended so to decide. Had they done so, then the right to treat the whole amount expended as a charge would have been established, whatever difficulties the *Salisbury House Co.* decision (2) might have involved. But the point is that either the whole of the rent or none of it must be regarded as such a disbursement. If it is the purpose of such expenditure that is in question I cannot think of any reason why one part of it should be treated as expended for the purposes of the trade and not another. Accordingly, to take the case of any individual tied house, I can find no reason why so much of the rent paid by the owner as exceeds the rent received by him should be regarded as a disbursement for the purposes of the trade, if the whole of the rent is not.

As I see it, the House in *Usher's* case did not conceive itself to be dealing with an actual disbursement at all; nor did it intend to approach the solution from that point of view. The "difference" between rents paid and rents received represented a way of calculating a "loss" which, to those who took part in the decision, was itself a proper charge in the trader's accounts. It was this "loss", not any sum actually paid, that was the expenditure or disbursement. Indeed, once the assessment of the trade profits is approached on this basis it necessarily follows that a trader cannot both charge the "loss" and the rent actually expended; and a decision that the allowable item of expenditure in these tied house cases is the "loss" excludes by inference the correctness of charging the rent paid as itself an item of admissible expenditure. I think that the speeches of Lord Loreburn, Lord Atkinson and Lord Sumner are only consistent with the hypothesis that it was a notional expenditure equivalent to the "loss" that they proposed to allow to the trader: and it is only an explanation on these lines that covers the fact that none of those who took part in the decision (with the possible exception of Lord Parker) appeared to think that any different principle governed the case of the leaseholds from that which governed the case of the freeholds. Yet in the case of the latter there was no question of any actual expenditure.

It is not easy to say exactly what the principle is that forms the basis of such a charge. It does not arise from any interpretation of Rule 5 of the Rules applicable to Cases I and II of Schedule D: for whatever the real meaning of Rule 5 (1) it applies only to land and buildings occupied for the purpose of the trade or profession and none of their Lordships treated the tied houses in *Usher's* case as being in the occupation of the brewer or thought that this particular Rule could support his decision. On the contrary the charge is supported "on ordinary principles of com-" mercial trading", as being "according to the methods of practical busi-" ness men", or as an illustration of the economic propositions that are

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

(Lord Radcliffe.)

set out in the well-known passage of Lord Sumner's speech. But the validity of these same propositions as a guide to the law of Income Tax has been virtually disowned by your Lordships' House in the later case of *Lowry* v. *Consolidated African Selection Trust* (1): and in *Hoare* v. *Collyer* (2) there was uncontradicted evidence from a chartered accountant called by the Revenue that in computing commercial profits no deduction could properly be made "in respect of annual value or rent forgone or "sacrificed" in respect of the brewer's freehold properties. I am bound to say that I should myself have so supposed, for I do not think that there is any general practice or principle by which a trader charges his profits with a sum in respect of the use either of his assets or of his capital. The consumption of his capital raises different considerations. But even if the conception upon which the *Usher* decision (3) rests is ambiguous in origin and exceptional in practice I think that it does both involve and establish the proposition that a trader who owns such assets as tied houses and uses them as tied houses are used may charge his trading profits with a sum equivalent to the part of the annual value of those assets that he has "forgone" by such use.

Now if that is the principle, as I think that analysis of the speeches in *Usher* shows that it is, the actual head rent paid in respect of leaseholds cannot be a real factor in determining what is forgone. It may be an adequate practical indication of the "loss", as it was treated as being in *Usher*. But the rent may be much less than the annual value, or more or less equivalent to it, or even much greater than it, as it is here in the case of the main Tamplin head-lease. Nor, if the rent paid were the conclusive test, would there be any purpose served by the insistence of both Lord Loreburn and Lord Atkinson that the brewer's claim to deduct the difference between rents paid and rents received is justified only if the rents paid are equal to the "proper annual value" or "the full annual "value under Schedule A". Such a qualification necessarily implies that it is the "full" or "proper" annual value that is the true factor in the deduction and not the actual rent.

With this much said, I will try to summarise what I believe to be involved in the *Usher* decision. It decided that a brewer's relation to his tied houses was a special one, since, though not occupied by him, they are used or utilised by him for the purpose of his trade. The house is the "market place" for his beer, to borrow Lord Atkinson's phrase. It decided that the brewer's trade profit in such circumstances ought to bear a charge equivalent to the amount of annual value "forgone" in respect of each house so utilised: the whole annual value, if he got no return from the house (though that I am afraid rather begs the question) or the difference between the annual value and the rent received in respect of the house, so far as he took rent. His right to charge this sum or this difference arises, it was held, from the ordinary principles of commercial accounting and, not being prohibited by anything to be found in the Income Tax statutes, ought to be allowed. Whether this principle is an application or an extension of what was decided in *Russell* v. *Aberdeen Town and County Bank*, 2 T.C. 321; whether it is in any way founded upon what is said or not said in Rules 1 to 5 of the Rules applicable to Cases I and II of Schedule D; and whether the structure of the Income

(1) 23 T.C. 259. (2) 17 T.C. 169. (3) 6 T.C. 399.

(Lord Radcliffe.)

Tax Act, with its different Schedules, may not have contributed, though without recognition, to the discovery of the principle: all these questions, are, "though puzzling, not beyond all conjecture". But the conjectures are I think of no ultimate importance once the principle had been laid down. Finally the principle is the same whether the brewer's tied house is freehold or leasehold.

For these reasons I think that these appeals must fail, since it is not suggested that if the *Usher* decision (1) proceeds upon the basis that I have stated the brewer's position has been altered by the Finance Act, 1940.

But, though I agree that these appeals must fail, I do not agree with the Respondent's claim that the "difference" ought to be ascertained by taking as a factor "the rents at which these houses could have been "severally let free from the restriction of the tie". I think that that is to introduce a novel and unwanted idea into the *Usher* computation. Moreover it seems to me that, in the case of freeholds, this House did explicitly decide that the correct measure was the net Schedule A assessment and nothing else. Paragraph (B) of the Supplemental Statement in the *Usher* case (6 T.C. at page 403) had stated that in the case of freeholds the net Schedule A assessment had been taken as the basis of the figures. If the gross assessment had been taken it would of course have given the brewer a larger disbursement to charge to his profits. If on the other hand the true standard was the rent of the house as let without the tie no one could say whether the result would have favoured the brewer or not, for among other things each letting would have had to be considered separately and the details of its various other terms ascertained. In this House Lord Parker alone went into the point, and he expressed a view in favour of taking the gross, not the net, Schedule A assessments. None of the other Lords, who could hardly have been unaware of what he proposed to say, said anything in support of this view. But on that state of facts how can we avoid the conclusion that the question was considered by the House and that its decision upheld the net Schedule A assessment as the correct standard in the case of freeholds?

I do not find that except for Lord Parker's preference for the gross assessment, a standard which still adheres to Schedule A, any member of the House said anything to suggest that, either in the case of freeholds or leaseholds, the right thing to do was to take each house each year, ascertain the terms of its letting, and then compute what its rent would have been in that year had it been let with those terms but without the tie. They speak of "annual value", "proper annual value" or "full annual value "under Schedule A", and two of them certainly base themselves on *Russell's* case (1) which turned on "annual value" and nothing else. But, whether Schedule A is explicitly referred to or not, "annual value" is itself the familiar phrase that we all know to be used in the Income Tax Act to describe the basis of the Schedule A assessment; and it denotes where lands are not let at rack rent, the "rack rent at which they are "worth to be let by the year". I cannot think that it is an appropriate phrase to describe a hypothetical computation of what rent could have been obtained under an actual letting if the tie had been removed.

I think, for these reasons, that the question is concluded by previous decision in the case of freeholds. And since I think that the essence of

(1) 2 T.C. 321.

(Lord Radcliffe.)

the *Usher* decision (1) is that freeholds and leaseholds were treated as coming under the same principle, it seems to me that the same measure ought to be adopted in the case of leaseholds. I am sure that it would be much more convenient to do so. I appreciate that if you are searching for a figure for rent forgone the net Schedule A assessment may not give you as "scientific" a measure as the test proposed by the Respondents. But it is a working measure; and if we are seeking to give effect to a principle of commercial accounting I think that the trader would be far more likely to be content to work by a known figure, such as the Schedule A assessment, than by a theoretical computation of the rent likely to be received from his tied house if it were untied.

This is not, so far as I can see, a matter of any important principle. I start from the same assumption as is, I believe, common to all your Lordships: that the notional disbursement allowed to the brewer is that amount of the annual value of his tied house which he fails to realise by virtue of taking the covenant for the tie. The annual value itself is necessarily a hypothetical figure in all such cases. The only point is, which is the best working hypothesis? You might proceed by employing a valuer to survey all your houses each year and compute for each a rack rent according to the values of that year. No doubt the Revenue must do the same and no doubt at some stage the appropriate figures would be settled. Or you might proceed by employing a valuer to survey all your houses each year and compute for each a rent, according to the values of that year, representing what it would have let for under the existing lease minus the covenant for the tie. Here again there must be controversy and possible counter-valuation and, no doubt, an ultimate conclusion. Or you might proceed by taking the existing Schedule A assessment which represents for Income Tax purposes the hypothetical rack rent of every property. If I think that the last form of procedure is the best, apart from being the one already finally decided upon, it is because I think that it is the one that every trader would prefer to accept once the logical austerities of legal argument are allowed to be forgotten.

Lord Tucker.—My Lords, the decision in the case of *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433, must be considered in the light of the law subsequently expounded by your Lordships' House in *Fry* v. *Salisbury House Estate*(2), [1930] A.C. 432. So considered it is I think impossible to accept the Crown's argument that the former case proceeded on the basis of allowing the brewer in the case of leasehold houses to deduct rent paid on giving credit for rent received. This would be contrary to the *Salisbury House* case, which decided that rents received cannot be included in an account under Schedule D of the profits and gains of the trade for the purposes of which the lands producing the rents are used. This was the explanation of that case given by Lord Warrington of Clyffe in *Hoare & Co.* v. *Collyer*(3), [1932] A.C. 407, and it shows that the interpretation of *Usher's* case given by Lord Russell of Killowen in *Lowry* v. *Consolidated African Selection Trust, Ltd.*(4), [1940] A.C. 648, in the passage which has already been referred to, cannot be reconciled with the *Salisbury House* decision.

This I think compels your Lordships to reject the contention of the Crown that under *Usher's* case the Respondents would have been entitled

(1) 6 T.C. 399. (2) 15 T.C. 266. (3) 17 T.C. 169. (4) 23 T.C. 259 (at p. 293.)

(Lord Tucker.)

in computing their profits under Case I of Schedule D to deduct the rents paid by them for tied houses less the rents received from the tied tenants, but that the rents paid by them being rents under long leases are no longer deductible by reason of the provisions of Section 17 (1) of the Finance Act, 1940.

If *Usher's* case (1) never allowed the deduction of these rents what did it decide? My Lords, I do not propose to set out again those passages from the speeches of Lords Loreburn, Atkinson and Sumner which have already been referred to. It is sufficient for me to say that in my opinion they show that at any rate the majority of your Lordships' House allowed the brewers' deduction in the case of both freeholds and leaseholds on the basis of rent "forgone", being the difference between rents received and the potential rents which could otherwise have been obtained from free tenants, *viz.*, the full annual values of the houses. It was never suggested that the rents paid in the case of the leaseholds or the Schedule A assessments in the case of the freeholds did not represent the full annual values in each case and I think the reasoning of the majority shows that they were so accepted. If their Lordships had been of opinion that the Schedule A assessment must always and for all purposes be accepted as representing the full annual value or potential rent it is difficult to understand why they did not substitute the Schedule A assessments for the rents paid in the case of the leaseholds. The truth is I think that in each case the figures put forward were accepted, but they were accepted as reflecting the full annual values, and I can find nothing in the decision to indicate that in either case it is not open to either side to call evidence to show what are the potential rents obtainable from free tenants for the purpose of quantifying the rent forgone. For these reasons, although it will no doubt often be found convenient in practice for the parties to agree to accept the Schedule A assessments as representing the potential rents, I think the Respondents are right in their contention that the rents forgone should be ascertained by deducting the rents received from the rents at which the tied houses could have been severally let free from the restriction of the tie.

I would dismiss the Crown's appeal in each case.

Lord Morton of Henryton.—My Lords, my noble and learned friend **Lord Asquith of Bishopstone,** who is unable to be present today, has asked me to say that he agrees with the opinion which I have already delivered.

Questions Put:

Nash (Inspector of Taxes)

v.

Tamplin and Son's Brewery (Brighton), Ltd.

That the order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and the Appeal dismissed with costs.

The Contents have it.

(1) 6 T.C. 399.

Davies (Inspector of Taxes)

v.

Webbs (Aberbeeg), Ltd.

That the order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and the Appeal dismissed with costs.

The Contents have it.

Davies (Inspector of Taxes)

v.

Webbs (Aberbeeg), Ltd. (Second Appeal).

That the order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and the Appeal dismissed with costs.

The Contents have it.

Mr. Allen.—My Lords, may I mention to your Lordships the question of interest on the tax overpaid here? I am instructed that, following the decision of Croom-Johnson, J., in the Court of first instance certain tax has been paid to the Revenue and that tax, or some part of it, as the result of your Lordships' decision today, will need to be repaid to my clients as provided for by the Statute. All I ask your Lordships to do, if you will be good enough to do so, is to indicate the rate of interest which your Lordships consider proper.

Lord Morton of Henryton.—Mr. Hills, what do you say about that?

Mr. Hills.—My Lords, there is no necessity to put anything of this sort in the Order, because it is a statutory duty to repay with interest, but it is necessary for the Court to state the rate of interest. The rate of interest always allowed in these cases, dealing with a matter which is in the nature of a Government security, is 3½ per cent.

Lord Morton of Henryton.—Have you anything to say against 3½ per cent?

Mr. Allen.—No, my Lord; I am content with 3½ per cent.

Lord Morton of Henryton.—Very well; 3½ per cent.

Mr. Allen.—If your Lordships please.

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

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