MARSTON'S DOLPHIN BREWERY, LTD. (IN LIQUIDATION) *v.* LOUGHNAN (H.M. INSPECTOR OF TAXES)

No. 1002—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—14TH AND 15TH MARCH, 1934

COURT OF APPEAL—25TH AND 26TH JUNE, 1934

HOUSE OF LORDS—31ST JANUARY, 3RD AND 4TH FEBRUARY AND 9TH MARCH, 1936

(1) ALFRED LENEY & CO., LTD. *v.* WHELAN (H.M. INSPECTOR OF TAXES)(1)

(2) MARSTON'S DOLPHIN BREWERY, LTD. (IN LIQUIDATION) *v.* LOUGHNAN (H.M. INSPECTOR OF TAXES)(2)

Income Tax, Schedule D—Brewers—Lease of tied houses together with right to supply beer—Rents under the lease exceeding aggregate Schedule A assessments—Whether excess a subject of assessment under Schedule D.

In the first case the Appellant Company, a brewery company which held a number of freehold and leasehold licensed premises let to tied tenants, agreed to grant to another brewery company a lease of its properties, including plant and fixtures, for a term of years at a rent equivalent to the Appellant Company's average net profits over a period of three years. By leases subsequently granted the premises were demised, subject to and with the benefit of the existing tenancies and the covenants by which the tenants were tied to the landlords as regards the purchase of beer, etc.

In the second case the Appellant Company, a brewery company, leased to another brewery company for a term of years at a fixed rent all its tied houses, together with the brewery, the goodwill of the business carried on thereon, the benefit of the tying covenants imposed on the tenants of the licensed houses and the right to use the trade marks, trade labels and advertisements of the Appellant Company.

In both cases the rent reserved under the leases considerably exceeded the aggregate Schedule A assessments on the premises, which were arrived at by a valuation on a basis which took into account the profit which a free tenant might make in the houses, but ignored the profit which a brewer could make by supplying goods to the houses under the tying covenants. The Appellant Company in each case was assessed to Income Tax under Schedule D in respect of profits arising from the rent received by it under the leases.

(1) Reported (C.A.) [1934] 2 K.B. 511; (H.L.) [1936] A.C. 393.
(2) Reported (H.L.) [1936] A.C. 393.

Held, *that the rent was paid wholly in respect of the property in land (except in so far as, in the second case, it represented payment for goodwill, and the user of trade marks, trade labels and advertisements), and that the Company's liability to Income Tax in respect of the rent received in respect of the property in land was exhausted by the Schedule A assessments and there remained no subject for assessment under Schedule D.*

Salisbury House Estate, Ltd. *v.* Fry, 15 T.C. 266, *applied.*

CASES

(1) *Alfred Leney & Co., Ltd.* v. *Whelan (H.M. Inspector of Taxes)*

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 a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 2nd May, 1933, for the purpose of hearing appeals, Alfred Leney & Company, Limited, hereinafter called " the Appellant Company ", appealed against a series of estimated assessments to Income Tax for the years 1926–27 to 1932–33 inclusive, made upon the Appellant Company under the provisions of Schedule D of the Income Tax Acts in respect of profits arising from payments received by it from Fremlin Brothers, Limited, and Fremlins, Limited.

2. The Appellant Company had for many years carried on the business of brewers, with a brewery at Dover. In the course of and for the purpose of this business it held a number of freehold and leasehold properties, the majority of which were licensed and were let to tied tenants.

3. On 18th October, 1926, the Appellant Company entered into an informal agreement with Fremlin Brothers, Limited, a copy of which, marked "A", is attached hereto and forms part of this Case(1), to grant a lease to Fremlin Brothers, Limited, of all its freehold and leasehold properties, including plant and fixtures, except the mineral water and cordial factories and buildings used or held therewith, for a term of 36 years from 1st October, 1926, at a rent equivalent to the average net profits of the Appellant Company for the three years ending 30th September, 1926, subject to modifications and to a provision that in the case of leaseholds which expired during the term of the new lease and were not renewed the rent should be reduced thereafter by £1 per barrel sold in the house comprised in the expired lease on the average of the three years prior to the expiration of the lease, with further provisions as to what was to be done in the case of leases renewed or properties sold.

(1) Not included in the present print.

There was a further provision that :—

" The rent is to be reduced by the Schedule A tax paid by " (or deducted from the rent paid to) Fremlins on the properties " included in the new lease. It is also to be reduced if necessary " by the following amount. Fremlins will, in paying the rent " under the new lease, deduct only the Schedule A tax on " the houses included therein (the total assessments being less " than the new rent). They will seek to deduct in their own " Income Tax return the whole rent payable by them to " Leneys. If after due efforts they fail to get this allowance " from the Inland Revenue, then the amount of Income Tax " which they lose by such failure is to be deducted from the " rent ".

4. Immediately after the signature of the said agreement, Fremlin Brothers, Limited, began to supply beer to the Appellant Company's tied tenants, and the Appellant Company's brewery was closed down in December, 1926.

5. On 21st June, 1928, the Appellant Company entered into four formal agreements, of which copies, marked respectively " B ", " C ", " D " and " E ", are attached hereto and form part of this Case(1), to grant leases of its properties to Fremlin Brothers, Limited. " B " related to unencumbered properties held by the Appellant Company on leases for terms of which less than 36 years remained to run, " C " to unencumbered freeholds and long leaseholds, " D " to freeholds and long leaseholds charged under the Appellant Company's debenture trust deed, and " E " to short leaseholds similarly charged. The trustees for the Appellant Company's debenture holders were made parties to the agreements " D " and "E ".

6. By the agreement " B " the Appellant Company agreed to grant to Fremlin Brothers, Limited, a lease in the form set forth in the schedule thereto of the leasehold premises therein described, commencing as from 1st October, 1926, for respective residues of the terms therein to which the Appellant Company was entitled except the last three days thereof at a rent of £938 14*s*. 8*d*. for the first year and for subsequent years of the said sum as adjusted as provided by the above mentioned agreement of 18th October, 1926, to be further adjusted from time to time as provided in the said form of lease. The form of lease provided for the demise to Fremlin Brothers, Limited, their successors and assigns, of the lands and premises specified in the schedule thereto subject to and with the benefit of the existing tenancies thereof and subject to the rights exceptions reservations stipulations covenants conditions and liabilities therein mentioned or otherwise then affecting the same (other than head rents). Provision was made for adjustment of the

(1) Not included in the present print.

rent on the expiration or renewal of the lease of any of the premises demised. The name of the Appellant Company was during the respective terms of the lease to continue to be conspicuously exhibited on the licensed premises demised. The agreements " C ", " D " and " E " were *mutatis mutandis* similar to the agreement " B ", the rents reserved for the first year being £2,433 13*s*. 5*d*. for the freeholds and long leaseholds unencumbered, £17,078 2*s*. 10*d*. for the freeholds and long leaseholds charged under the debenture trust deed, and £1,066 12*s*. 9*d*. for the short leaseholds similarly charged. The term of the leases of the freeholds and long leaseholds was 36 years from 1st October, 1926. The leases contemplated by these four agreements were never in fact executed.

It is not in dispute that the agreements referred to in this paragraph, together with the agreements referred to in paragraph 3 above, governed the position as from 18th October, 1926.

7. Between 1928 and 1930 the business of Fremlin Brothers, Limited, was transferred to another company called Fremlins, Limited. On 20th May and 10th December, 1930, the Appellant Company executed four leases to Fremlins, Limited, of which copies, marked respectively " F ", " G ", " H " and " J ", are attached hereto and form part of this Case(1). By these leases the Appellant Company (and the trustees for its debenture holders in the case of the properties charged to them) demised respectively its short leaseholds not encumbered, its freehold and long leasehold properties not encumbered, its freehold properties charged under the debenture trust deed, and its leasehold properties charged by the trust deed. The term of the lease was 34 years from 1st October, 1928, in the case of the freeholds and long leaseholds and the respective residues of the terms for which the short leaseholds were held by the Appellant Company less the last three days thereof, and the commencing rents were modified in accordance with the previous agreements. In all other material respects the leases followed the forms set forth in the corresponding agreements " B ", " C ", " D " and " E ".

8. A schedule, marked " K ", of the properties held by the Appellant Company on 1st October, 1926, is attached hereto and forms part of this Case(1). The rents shown in the last column of the schedule are the rents payable by the tenants of the properties to the Appellant Company up to 1st October, 1926, and thereafter to Fremlin Brothers, Limited. The properties marked with the letter " L " in red were licensed houses, and all these licensed houses were let to tied tenants. Specimen copies, marked " L ", " M " and " N ", of the tenancy agreements entered into by the Appellant

(1) Not included in the present print.

Company, Fremlin Brothers, Limited, and Fremlins, Limited, with the tied tenants are attached hereto and form part of this Case(1). These agreements contained an undertaking by the tenant—

> " To purchase from the Landlords or their nominee or " nominees and from no other company or companies person or " persons all ale beer stout porter and other malt liquors and " wines and spirits whether in cask or bottle and mineral waters " which may be received vended or consumed upon or out of the " said premises during the tenancy at the prices set out in the " Schedule hereto so far as the same are so set out and if and " where not set out then at the Landlords' usual list prices for " tied houses for the time being and not during the said " tenancy either directly or indirectly to buy receive sell or " dispose of in upon out of or about the said house and premises " or any part thereof or suffer to be brought thereon any ale " beer stout porter or other malt liquor or wines and spirits " either in cask or bottle or any mineral water except such as " shall have been so purchased of the Landlords or their " nominee or nominees ".

The specimen form of agreement entered into by the Appellant Company was the form in existence at the time when the Appellant Company first entered into an agreement for lease with Fremlin Brothers, Limited, and agreements in that form are still running in all cases in which there has not been any change of tenancy of the licensed houses.

It is not disputed on behalf of the Respondent that the benefit of the tie imposed upon the several tenants of the licensed houses ran with the land and was enforceable by Fremlin Brothers, Limited, and by Fremlins, Limited, during the periods in which they respectively were entitled to the reversion expectant on the determination of the terms granted to the tenants.

9. The tenants of the houses are assessed to Income Tax under Schedule A on the annual value thereof as occupiers, and when paying their rents to Fremlin Brothers, Limited, or Fremlins, Limited, they have deducted therefrom so much of the tax so assessed and paid by them as is permissible under the Income Tax Act, 1918, Schedule A, No. VIII, Rule 1. On paying to the Appellant Company the rents reserved by the leases to them, Fremlin Brothers, Limited, and Fremlins, Limited, have deducted therefrom the tax thus suffered by them on payment by the tenants. The last mentioned Companies have not made any further deduction on account of Income Tax in excess of the amounts assessed under Schedule A.

10. A statement, marked "O", is attached hereto and forms part of this Case(1), showing the amounts of the rents received by the Appellant Company from Fremlin Brothers, Limited, or Fremlins, Limited, under the leases or agreements for lease for each of the

(1) Not included in the present print.

years ending 30th September, 1927, to 30th September, 1932, inclusive. It will be observed that the amounts of these rents ranged from £21,684 6*s*. 8*d*. to £19,361 0*s*. 10*d*. For the purposes of this Case it is agreed that the aggregate Schedule A assessments on the whole of the properties comprised in the leases or agreements for lease may be taken as ranging over the same period from £8,008 gross or £6,079 net to £7,264 gross or £4,965 net, or in other words that while the average of the rents received was about £20,000 a year the average of the net Schedule A assessments on which tax was paid was about £5,500.

11. The Appellant Company relied on the documents put in, and did not call any evidence. Evidence was given on behalf of the Respondent by Mr. A. E. Killick, F.S.I., a Superintending Valuer in the Inland Revenue Department, who is in charge of the work done by that Department in connection with the valuation of licensed premises for the purpose of assessment of such premises to Income Tax under Schedule A, and who has had considerable experience of the licensed trade. He stated that the figures to be submitted to the local Commissioners of Taxes as representing the annual values of the licensed premises held by the Appellant Company were discussed and agreed between a member of his staff and a representative of the Appellant Company before the assessments under Schedule A were made for the year 1922–23. The figures were again discussed and agreed for the purposes of the assessments under Schedule A for the year 1931–32 between his department and a representative of Fremlins, Limited, to whom the premises had then been leased. Taking the figures as a whole, there had not been any very substantial alterations in the valuations between the two periods. The basis of the valuations was the amount which a hypothetical free tenant (*i.e.*, a tenant not tied to buy from a particular brewer) would be willing to pay by the year, the landlord doing repairs and paying for insurance. Regard was had to the retail trade to be carried on in the houses, but no account was taken of the wholesale profits which a brewer could make by reason of his having the right, under tying covenants, of supplying the licensed premises with the commodities consumed or sold thereon. To secure this right and the consequent profits a brewer would be prepared to pay a higher rent than a free tenant would give. In the present case Fremlin Brothers, Limited, could make a greater profit than the Appellant Company, as they would save a large proportion of the overhead charges, and the rent which they agreed to pay, which was based upon the average profits of the Appellant Company, bore no relation to the value of the houses as estimated for the purposes of the Schedule A assessments, but was influenced by considerations of the brewer's profits, which were ignored in arriving at the Schedule A assessments. This evidence was not challenged by the Appellant Company, who submitted that it was irrelevant.

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

(*a*) That the payments received by the Appellant Company under the leases or agreements for lease were true rents issuing out of corporeal hereditaments;

(*b*) That the subjects demised were the corporeal hereditaments and nothing else;

(*c*) That there was no authority for analysing these payments : there was nothing to analyse;

(*d*) That the tying covenants in the agreements with the tenants of which the lessees obtained the benefit were restrictive and ran with the land, and any advantages that might be derived from them flowed from the corporeal hereditaments demised;

(*e*) That the Appellant Company's liability to Income Tax in respect of the rents reserved was limited to the amount of the tax assessed on the properties under Schedule A and deducted from the rents;

(*f*) Alternatively, if any part of the payments received by the Appellant Company was chargeable under Schedule D, Rule 19 of the General Rules applicable to All Schedules precluded any assessment on the Appellant Company.

13. It was contended on behalf of the Crown :—

(*a*) That the liability of the Appellant Company to Income Tax in respect of the payments in question was not exhausted by the payments by deduction of the tax assessed on the properties under Schedule A;

(*b*) That the effect of the transaction was to transfer to the lessees the goodwill of the Appellant Company's trade with the tied tenants;

(*c*) That under the terms of the leases or agreements for lease the properties were demised subject to and with the benefit of the existing tenancies and subject, *inter alia*, to the covenants by which the tenants were tied as regards the purchase of beer and other commodities;

(*d*) That the benefit of the tying covenants was severable from the ownership of the properties, and might, if it had been so desired, have been reserved by the Appellant Company or transferred to another brewer independently of any demise of the properties;

(*e*) That the assessments on the properties under Schedule A were necessarily restricted to their bare annual value, without taking into account the brewer's profits or the enhanced rents which a brewer would be prepared to give to secure such profits by the use of the properties as tied houses;

(*f*) That the Commissioners were entitled to enquire into what the rents in fact were paid for;

(*g*) That the rents were in fact paid partly for premises assessable under Schedule A and partly for other matters;

(*h*) That the payments received by the Appellant Company were not payable wholly out of profits or gains brought into charge to Income Tax and Rule 19 of the General Rules applicable to All Schedules did not apply;

(*i*) That such part of the rents as was not paid for premises assessable under Schedule A was a receipt of the Company to be taken into consideration in arriving at its liability under Schedule D of the Income Tax Acts;

(*j*) That such last mentioned part (i) was the difference between the total rents paid to the Appellant Company and the total of the Schedule A assessments on the various properties, or, alternatively, (ii) was that part of the total rents paid which was found as a fact to be paid for matters outside the purview of Schedule A.

14. Reference was made to the following cases :—
Campbell v. *Inland Revenue*, 1 T.C. 234.
Salisbury House Estate, Ltd. v. *Fry*, 15 T.C. 266.
James Shipstone & Sons, Ltd. v. *Morris*, 14 T.C. 413.
Windsor Playhouse, Ltd. v. *Heyhoe*, 17 T.C. 481.
Assessment Committee of Bradford-on-Avon v. *White*, [1898] 2 Q.B. 630.

15. We, the Commissioners who heard the appeal, gave our decision in the following terms :—

" By the deeds or agreements entered into by the Appellant " Company the premises were demised or agreed to be demised " subject to and with the benefit of the existing tenancies " thereof and subject to the covenants therein mentioned or " otherwise affecting the same. Among the covenants affecting " the tenancies of the tied houses were the covenants by which " all the tenants were tied to purchase from the landlords or " their nominees and from no other company or person all " beer and other malt liquors, cider, wines, spirits and mineral " waters vended or consumed on or out of the premises. The " benefit of these tying covenants was thus transferred to the " lessees, and the transfer to the lessees of the trading con- " nection which the Appellant Company previously had with " the tenants of the tied houses was evidently the primary " object of the arrangement. It does not seem to us to be of " primary importance whether this trading connection be " described as goodwill or not. The arrangements originated " in the agreement of 18th October, 1926, under which the rent " payable was fixed as the equivalent of the average net profits " of the Appellant Company for the three years ending " 30th September, 1926, with modifications. In arriving at " the amounts of the Schedule A assessments, the profits which " a brewer could make by the use of the premises as tied " houses, or the enhanced rents which he would be willing to

" pay to secure those profits, were ignored, and upon the " authorities were rightly ignored. The payments received by " the Appellant Company therefore included an element which " was not, and could not be, taken into account in estimating " the annual value of the hereditaments for the purpose of " assessment to tax under Schedule A. In our opinion this " element which is excluded from consideration for the purposes " of taxation under Schedule A is a profit chargeable to Income " Tax under Schedule D, and the grounds for attributing the " whole of the excess of the payments over the aggregate of " the Schedule A assessments to this element are stronger in " this case than they were in that of the *Windsor Playhouse*, " *Ltd.* v. *Heyhoe*[1].

" We accordingly hold that the assessments under " Schedule D should be confirmed in the amounts of the excess " of the payments received by the Appellant Company over " the aggregate amounts of the Schedule A assessments on " the premises demised ".

We subsequently reduced the assessments to figures which have been agreed between the parties to be correct on the basis of this decision on the question of principle.

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

P. WILLIAMSON,
N. ANDERSON, } Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.

1st December, 1933.

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(1) 17 T.C. 481.

(2) *Marston's Dolphin Brewery, Ltd. (in liquidation)* v. *Loughnan (H.M. Inspector of Taxes)*

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 a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on the 22nd January, 1931, Marston's Dolphin Brewery, Limited (in liquidation), hereinafter called " the " Appellant Company ", appealed against assessments made upon it under the provisions of Schedule D of the Income Tax Act, 1918, for the five years ended the 5th April, 1930, in the circumstances set out below.

2. The Appellant Company was formed in the year 1897 to take over an old-established brewery which carried on a local brewers' business in Hampshire and Dorsetshire. In connection therewith it carried on a wine and spirit merchants' business. In addition it carried on a mineral water factory in Poole, which had a large trade in the surrounding district.

In accordance with the ordinary practice of brewers, the Appellant Company owned a freehold brewery and the freehold of a number of licensed houses and also held four licensed houses on lease. All the licensed houses were let on annual tenancies to tenants who were tied to the Appellant Company or their nominees or nominee for all malt liquors, wines and spirits and mineral waters. A specimen copy of one of these tenancy agreements is annexed hereto, marked " A ", and forms part of this Case(1).

The Appellant Company also owned a certain number of unlicensed premises, and had a certain amount of trade in beer and mineral waters with free customers.

3. In the year 1926 the Appellant Company agreed to lease for a term of 35 years to Strong & Company, Limited, hereinafter referred to as " Strongs ", who were carrying on a brewers' business in the same district, all the premises (including the brewery) belonging to them and the goodwill of the business carried on thereon.

A lease was accordingly executed on the 15th November, 1926, between the Appellant Company and Strongs. The material portions of this lease are as follows :—

" This Lease is made the 15th day of November 1926
" Between Marston's Dolphin Brewery Limited whose regis-
" tered office is at the Brewery Horsefair Romsey in the

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(1) Not included in the present print.

" County of Hants (hereinafter called ' the Company ' which " expression shall include its assigns where the context so " admits) of the one part and Strong & Co. of Romsey Limited " whose registered office is situate at Romsey in the County of " Southampton (hereinafter called ' the Lessee ' which expres- " sion shall include its assigns where the context so admits) " of the other part Witnesseth as follows :—

" 1. In consideration of the rent and covenants on the part " of the Lessee and conditions hereinafter reserved and con- " tained the Company as to the hereditaments described in the " Schedule hereto hereby demises and as to the other hereinafter " described premises the Company hereby grants assigns and " demises unto the Lessee all and singular the lands buildings " and hereditaments respectively described and specified in the " Schedule hereto together with the goodwill of the businesses " carried on thereon respectively and the licenses connected " therewith and the benefit of all covenants in restraint of trade " trading and other covenants to the benefit of which the " Company is entitled in connection with all or any of the said " premises And together with the right to sign the name of the " Company in requiring the tenants of the premises to deal " exclusively with the Lessee as the nominee (as it is hereby " appointed) of the Company for all ale beer porter stout and " malt liquors cider perry wines spirits mineral waters and " other goods in accordance with the terms of the holdings " of the said tenants as tenants of the Company's premises " Together also with the right to use in connection therewith " all trade marks trade labels and advertisements used by the " Company in connection with the said businesses Except " all fixed and loose plant and machinery in or upon any of " the brewery premises (including the mineral water factory) " and maltings specified in the Schedule hereto which fixed " and loose plant and machinery have already been purchased " by and belong to the Lessee to hold the same unto the Lessee " subject as hereinafter mentioned for the term of 35 years " computed from the 1st day of January 1926 subject as to " all the premises to all reservations covenants (other than " covenants as to rents and other payments and also covenants " to repair so far as the same are not consistent with the terms " of these presents) conditions and agreements respectively " affecting the same (whether contained in the several instru- " ments by or under which the same premises are respectively " held by the Company or otherwise) and subject also to and " with the benefit of the respective tenancies of the said " lands hereditaments and premises under which the present " tenants of the Company now hold yielding and paying " therefor during the said term and so in proportion for any

" less term than a year the rent of £20,000 without any " deduction (except for land tax tithe tithe rentcharge and " landlord's property tax and such deductions as the Lessee " may be entitled to make in respect of charges imposed upon " the Company as the lessor or owner under the provisions of " the Licensing (Consolidation) Act 1910 or any statutory " modification thereof) by equal half-yearly payments on the " 1st days of January and July in every year the first payment " having become due on the 1st day of July 1926 and having " been made on the signing hereof . . . .

" 3. (2) If the said yearly rent hereby reserved or any part " thereof shall be in arrear for 21 days after the same shall " become due (whether demanded or not) or in case the Lessee " shall go into liquidation whether voluntary or compulsory " otherwise than for the purposes of reconstruction or amal- " gamation or in the event of any breach of any of the " covenants and agreements on the part of the lessee herein " contained (but subject to the proviso next hereinafter con- " tained) the Company may re-enter upon the demised premises " or any part thereof in the name of the whole and hold and " enjoy the same thenceforth as if these presents had not been " made without prejudice to any right of action or remedy " of the Company in respect of any antecedent breach of any of " the covenants of the Lessee hereinbefore contained Provided " nevertheless that the power lastly hereinbefore reserved shall " not extend to or be capable of enforcement in respect of any " breach of the covenant hereinbefore contained on the part of " the Lessee not knowingly to do permit or suffer to be done " anything in or upon the said licensed premises whereby " the licenses thereof or any of them may be or become liable " to be forfeited except in respect of the particular premises in " regard to which such breach shall be committed And all " necessary adjustments shall be made with regard to the " reduction of the rent hereby reserved for and in respect of " the particular premises possession whereof shall have been " resumed under the power of re-entry contained in this " clause . . . .

" (4) If the license of any house is objected to on the ground " of redundancy or as being structurally unfit but is eventually " renewed the legal and other costs of the Company and the " Lessee relating to the objection or application to renew or " otherwise in connection with the matter shall be borne in " equal shares and proportions by the Company and the Lessee " but in cases where the licenses are refused and compensation " money received the legal and other costs as aforesaid shall be " borne by the Company solely . . . .

" 4. (2) In the case of those properties which are leasehold " the demise hereby created shall be deemed to be for the terms " of the leases or tenancy agreements under which they are " respectively held (less the last three days of such respective " terms) where the same are held for a less period than " 35 years and in the case of properties where the consent of " the superior lessor is required to this demise until the con- " sents of the respective superior lessors shall have been " obtained by the Company the same shall be deemed not to be " included in the demise hereby created but shall be held by the " Company until such consent is obtained upon trust for the " Lessee. The Lessee shall not underlet or part with the posses- " sion of the same until the consent of the superior lessors shall " have been obtained thereto if such consent shall be necessary " Provided that if during the subsistence of the term hereby " created the leases or tenancies of any of the demised " properties shall expire or determine and the Lessee is called " upon to and does yield up possession the Lessee shall be " allowed out of the rent of £20,000 hereby reserved such " reasonable part thereof representing the rental value of the " said demised premises so yielded up as aforesaid as shall be " mutually agreed upon between the Company and the Lessee " but otherwise the same shall be decided by arbitration under " Clause 3 Sub-clause (3) hereof.

" 5. Whereas it is possible that some of the licensed " houses hereby demised may be referred for compensation or " that the renewal of the licenses thereof may be refused Now " it is hereby mutually agreed that notwithstanding that certain " licensed houses hereby demised may in the future be so " referred or that the renewal of the licenses thereof may be " refused the said rent of £20,000 shall continue to be paid by " the Lessee and the amount of the compensation moneys pay- " able in respect of such licensed houses as are or shall hereafter " be referred for compensation or as to which the renewal of " the licenses is refused shall be paid forthwith to the Company " and the Company shall during the unexpired residue of the " said term pay to the Lessee a sum equal to £6 per centum " per annum on the net amount of the compensation moneys " so received by the Company as aforesaid the Lessee surrender- " ing and the Company (if then entitled so to do) " re-entering into possession of the premises so compensated " or of which the renewal of the licenses shall be refused and " receiving the future rents thereof the Company further pay- " ing to the Lessee during the unexpired residue of the said " term a sum equal to £6 per centum per annum on the " capital of the delicensed premises And such capital value " shall be taken to be the sale price of the delicensed premises " (if the same shall be sold within six months from the date

" when the license shall be taken away) or such other sum " as shall be mutually agreed upon between the Company and " the Lessee but otherwise the same shall be decided by " arbitration under Clause 3 (3) hereof ".

A copy, marked " B ", of this lease is annexed hereto and forms part of this Case(1).

4. The assessments under appeal were made on the basis that a portion of the sum of £20,000 was not attributable to the corporeal hereditaments demised by the lease, and was therefore a proper subject of assessment upon the Appellant Company under Schedule D.

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

(1) That the sum of £20,000 was reserved as rent and was distrainable as rent;

(2) That the sum of £20,000 was attributable to and issued out of the corporeal hereditaments and could not be apportioned between the corporeal hereditaments and the other subjects demised by the lease;

(3) That the whole of the £20,000 was covered by the Schedule A assessments on the corporeal hereditaments; and

(4) That the assessments under appeal should be discharged.

The cases of :—

Farewell v. *Dickenson*, (1827) 6 B. & C. 251;
Munster & Leinster Bank v. *Hollinshead*, (1930) I.R. 187;
Cox v. *Harper*, [1910] 1 Ch. 480,

were relied on.

6. It was contended on behalf of H.M. Inspector of Taxes :—

(1) That in addition to the corporeal hereditaments the lease of the 15th November, 1926, included other matters, *viz.*, the goodwill of the business, etc.;

(2) That some portion of the sum of £20,000 must be deemed to have been paid for these other matters;

(3) That this sum should be apportioned between the corporeal and the other matters; and

(4) That the assessments were correct in principle.

The cases of :—

Campbell v. *Inland Revenue*, 1 T.C. 234;
Wylie v. *Eccott*, 6 T.C. 128;
Rotunda Hospital v. *Coman*, 7 T.C. 517;
Salisbury House Estate, Limited v. *Fry*, 15 T.C. 266,

were relied on.

(1) Not included in the present print.

7. We held that on the authority of *Campbell* v. *Inland Revenue*(1) the Schedule A assessments must be based only on the portion of the sum of £20,000 applicable to the corporeal hereditaments, and that it followed that the balance of the rent could not be covered by those assessments. It followed therefore that the balance of the sum of £20,000 formed, or might form, a proper subject for separate assessment otherwise than under Schedule A.

We accordingly held that the sum of £20,000 was apportionable between the corporeal hereditaments and the other subject matters of the lease.

We left the determination of the figures to be settled, if possible, by agreement between the parties.

8. The parties, after protracted negotiations, being unable to arrive at any agreement, we held a further meeting on the 6th July, 1932, to determine the points in dispute.

9. (*a*) On the basis of our decision, the parties had agreed that the annual value of the free trade of the brewery and of the goodwill of the mineral water business was £100 in each case. It was claimed on behalf of the Appellant Company that the whole of the balance of the sum of £20,000, *viz.*, £19,800, was rent for or was attributable to the corporeal hereditaments, while it was claimed on behalf of the Crown that a substantial portion of this sum was attributable to the other subject matters of the lease of which the " tie " of the licensed houses to the Appellant Company formed an important part.

(*b*) The trading accounts of the Appellant Company for the year 1925 were put in evidence before us, together with an extract of its accounts for the five years 1921 to 1925 both inclusive. Copies of the said accounts for the year 1925 and of the said extract, marked " C " and " D " respectively, are hereto annexed and form part of this Case(2).

10. The following facts were admitted or proved in evidence before us :—

(*a*) The Dolphin Brewery (numbered 1 in the schedule to the said lease) had been closed down by Strongs upon the granting of that lease and had at no time been used by them as a brewery.

(*b*) The Schedule A assessments on the licensed premises included in the lease amounted to £5,116 gross and £4,118 net, and on the unlicensed premises £1,478 gross and £1,158 net.

(*c*) The Schedule A values, which were arrived at as though the licensed premises were free houses, were not challenged.

(*d*) The main object of the lease was to obtain the trade with the licensed houses.

(1) 1 T.C. 234. (2) Not included in the present print.

(*e*) The Appellant Company showed in its balance sheet for the year 1913 the sum paid by it for goodwill when it acquired the business of its predecessors referred to in paragraph 2 of this Case. The figure at which this item then stood was £16,367. This sum had been written down to the sum of £8,000 in 1925.

With regard to the figure of £16,367, it was usual for a brewer to put goodwill in his balance sheet at a figure which represented the difference between the price paid for the houses (or other assets) acquired and their true value. As values of licensed properties had increased, brewers had revalued their properties and the item of goodwill had disappeared or had been reduced in amount. In the course of the liquidation of the Appellant Company the whole of the assets of the business including the goodwill were sold to Strongs, the figure at which the goodwill was sold being the written down value of £8,000.

(*f*) It would be possible (and there had been such cases) for the landlord of a licensed house, who was not himself a brewer, to insert in the tenancy agreement of that house a tie to a particular brewer, so that he could obtain from the brewer a royalty dependent on the amount of the trade. A brewer wishing to obtain the benefit of the trade done in the licensed premises would stipulate for a long lease and proper control and would have to have a settled trade.

(*g*) If the Appellant Company had given Strongs the right to supply the liquor required in the licensed premises without assigning to them such premises, they could have obtained at least £16,842 per annum from Strongs.

(*h*) In arriving at the Schedule A assessment on a licensed house the profits of the brewer are not included.

(*i*) The net profit of the Appellant Company (as brewers) might be estimated as at December, 1925, at 20*s*. 0*d*. per barrel at least. If the houses had been let " free " instead of " tied " the profit to the Appellant Company owing to the lower prices charged to free tenants would have been 17*s*. 0*d*. to 18*s*. 0*d*. per barrel and the " free " tenants would thus receive 3*s*. 0*d*. to 2*s*. 0*d*. greater profit per barrel than the tied tenants. As the Schedule A assessments had to be arrived at on the basis of the rent that would be paid by a " free " tenant a portion of the 20*s*. 0*d*. profit per barrel amounting to 3*s*. 0*d*. to 2*s*. 0*d*. had been taken into consideration in arriving at such Schedule A

assessments. This sum of 3*s*. 0*d*. to 2*s*. 0*d*. represents the publican's profit which in the case of a tied tenant is secured by the brewer.

11. There was a conflict of opinion between the expert valuers who gave evidence before us. Mr. Sidney Herbert Motion, Fellow of the Surveyors Institution, Senior Partner in the firm of Sidney H. & D. Graham Motion, Rating Surveyors and Valuers, and Mr. I. A. Peiser, Senior Partner in the firm of Fuller Peiser & Co., Surveyors and Valuers, both having extensive experience in the valuation of licensed property of every description for every purpose, both stated that in their opinion :—

(*a*) Apart from licensed premises themselves and apart from the goodwill represented by the two sums of £100 referred to in paragraph 9 (*a*) hereof there was no goodwill acquired by Strongs by virtue of the use of the word in the lease.

(*b*) There was no value attributable to the right to use the trade marks, trade labels or advertisements or to the tying covenants referred to in the lease. All licensed premises are valued as if they were free and once the premises are acquired the value of the tying covenants goes with them. Any value arising to the Appellant Company from the sales by the Appellant Company to its tied tenants would have been taken into account in arriving at the Schedule A value of the licensed houses.

(*c*) With the exception of the said two sums of £100, the whole of the £20,000 is attributable to the licensed houses.

(*d*) A company in the position of the Appellant Company would be willing to give a sum in the neighbourhood of £20,000 per annum for the premises mentioned in the schedule to the lease *en bloc*, although the Schedule A values were £5,300 only, because once a brewery company had its brewery and a large number of tied houses, the expense of supplying the additional houses would be small, and consequently the sums received from the additional houses would be nearly all net profits.

(*e*) The rent of £20,000 was a fair and proper rent for the whole of the premises included in the schedule to the lease, and was a net rent in the sense that there was further consideration in the fact that Strongs (the lessees) covenanted to do the repairs. Repairs would be taken into account in arriving at the Schedule A net annual values.

(*f*) The effect of mentioning goodwill in the lease did not make the slightest difference. Strongs would have obtained just the same benefits under the lease if goodwill had not been mentioned.

12. Evidence was also given by Mr. A. E. Fleck, Fellow of the Auctioneers and Estate Agents Institute, Principal Valuer in the Valuation Office of the Inland Revenue, to the following effect :—

(1) That he had had fifty years' experience exclusively in the valuation of licensed property of every description and for every purpose, of which twenty-seven years' experience had been obtained outside the Valuation Office before he went into the service of the Inland Revenue.

(2) The difference between the sum of £20,000 and the aggregate amount of the Schedule A annual values of the licensed houses represents the additional sum which a brewer would give for the right of supplying the tied houses over and above the rents free tenants would give for the houses.

(3) He estimated the value to Strongs of the " tie " of the licensed premises at the annual sum of £16,642. A statement, marked " E ", showing how this was computed, is annexed hereto, and forms part of this Case[1]. He agreed, however, that of this sum £1,515 represented the " burden of the tie " (*i.e.*, that portion of the £16,642 which (if the houses were free houses) would be profit of the publican and not of the brewer) and that accordingly this £1,515 had been taken into account in the Schedule A assessments on the licensed houses.

(4) If licensed premises were sold in a block, the sum received would not necessarily be more, and might be less than if they were offered for sale separately.

(5) The value to the brewer of the tie was not in his opinion included in the Schedule A values of the licensed houses (save to the extent of the £1,515 above mentioned).

(6) In fact he had not arrived at the figure of £16,642 shown in the said statement by a process of valuation : he had not been instructed to do so. He had accepted the £20,000 which was admittedly a fair and reasonable rent, had deducted therefrom the net rents and the two sums of £100 referred to in paragraph 9 (*a*) of this Case, and had filled in the £16,642 as a balancing figure. If he had valued the annual value to the brewer of the tie in the tenancy agreements by reference to the volume of the trade, he would probably have arrived at a higher figure than £16,642.

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[1] Not included in the present print.

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

(1) That apart from the agreed sum of £200, the whole of the sum of £20,000 was a profit arising from the ownership of land.

(2) That the tie was a covenant running with the land and not a separate source of income.

(3) That the amount of the Schedule A assessments was irrelevant to any question as to the quality of the said sum of £20,000 and as to whether it was a profit arising from the ownership of land.

(4) That upon the evidence the whole of the £20,000 (other than the £200 aforesaid) arose from the licensed houses and from no other source.

(5) That the assessments should be discharged or be reduced to the said sum of £200.

14. It was contended on behalf of H.M. Inspector of Taxes :—

(1) That both in substance and in form the lease of 15th November, 1926, was a lease of the Appellant Company's trading concern as a whole, which included not only the licensed premises at which the liquor was sold but also (*inter alia*) the " tie " or exclusive right to supply liquor to those premises, and the goodwill and profits of the trading concern generally.

(2) That the consideration for various subject matters demised by the lease was in part a sum of £20,000 per annum and in part the covenant by the lessees to execute all repairs.

(3) That the goodwill of the brewer's (the Appellant Company's) trade with the tied houses (as distinct from the publicans', *i.e.*, the tenants' trade) did not fall to be included and was not in fact included in the computation of the Schedule A assessments on the licensed houses.

(4) That of the rent of £20,000 reserved by the lease a sum of at least £15,327 (*i.e.*, the above figure of £16,842 less £1,515) was attributable solely to the incorporeal subject matters of the lease, was not assessable or assessed under Schedule A, and was properly included in an assessment under Schedule D.

In support of these contentions the following cases (*inter alia*) were referred to :—

Bradford-on-Avon Assessment Committee v. *White*, [1898] 2 Q.B. 630.

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

15. Having considered the arguments, we gave the following further decision :—

" The question which we have now to decide comes to this : " Did Strong & Company, Limited, obtain by the lease of the " 15th November, 1926, anything beyond the various corporeal " hereditaments, the goodwill of the mineral water business " and the free brewing trade?

" By the terms of the lease, Strong & Company, Limited, " obtained the goodwill of the whole brewing business of the " Appellant Company and they also, in fact, obtained the " trading connection which the Appellant Company previously " had with the tenants of the tied houses. The acquisition " of this trading connection, which was a very valuable right, " was indeed the primary object of the arrangement between " the two Companies.

" In other words Strong & Company, Limited, in fact as " well as in law obtained the goodwill of the Appellant Com- " pany's trade with the tied houses.

" It was argued that this goodwill was included in the " Schedule A value of the tied houses and that consequently " anything paid for this goodwill was covered by the Schedule A " assessments. It seems, however, from the decision in the " case of *The Assessment Committee of the Bradford-on-Avon* " *Union* v. *White*, that any goodwill of the brewer's trade " with these houses (as distinct from the publican's trade) " would be ignored in arriving at the Schedule A value, and " even though this decision may have been the subject of " criticism, it was treated as being the existing law in the " case of *Truman, Hanbury Buxton & Co., Limited* v. *Commis-* " *sioners of Inland Revenue*, [1912] 3 K.B. 377, and it has " no doubt been acted upon generally and has been acted on " in this case.

" We therefore decide the question before us in favour of " the Crown and, on the figures being agreed, will give our " final decision ".

16. The parties being still unable to arrive at an agreement, we held a further meeting on the 6th December, 1932, at which we fixed the portion of the payment of £20,000 attributable to the subject matters of the lease, other than the corporeal hereditaments, at £15,000, and we adjusted the assessments under appeal accordingly in figures agreed by the parties.

17. Counsel for the Appellant Company immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course the Appellant Company 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.

18. The questions for the opinion of the Court are :—

(1) Whether the payment of £20,000 reserved under the lease is apportionable between the corporeal hereditaments and the other subject matters of the lease, and

(2) If so, whether the value of the goodwill of the Appellant Company's trade with the tied houses (as distinct from the publicans' trade) should be regarded as having been included in the annual values of those houses as determined for the purpose of assessment to Income Tax (Schedule A).

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

York House,
23, Kingsway,
London, W.C.2.
8th June, 1933.

The cases came before Finlay, *J.*, in the King's Bench Division on the 14th and 15th March, 1934, and on the latter date judgment was given in favour of the Crown in both cases, with costs.

Mr. A. M. Latter, K.C., and Mr. Cyril L. King appeared as Counsel for the two Companies and the Solicitor-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Finlay, J.—In these two cases, notwithstanding the argument of Mr. Latter, I cannot bring myself to doubt that the decisions arrived at by the Special Commissioners are correct.

There are two cases. It is necessary to some extent to look at them separately, although, in substance, the point that was decided by the Special Commissioners and the point that now comes up for decision by me is the same in each case. It is probably convenient to follow the order in which Mr. Latter dealt with the matter and to take first the case of Alfred Leney & Company, Limited, which, I think, is the second case in the list. I shall, after shortly referring to the facts in that case, call attention to the other case, merely to point out some distinctions which exist between the two cases and some points, perhaps points of complication, not really affecting the main issue, which exist in the other case, that of Marston's Dolphin Brewery, Limited.

Taking Leney's case, it was an appeal against a series of estimated assessments for a series of years from 1926–27 down to 1932–33, which were made upon the Appellant Company under the provisions of Schedule D of the Income Tax Acts, and which are expressed in paragraph 1 of the Stated Case to have been made " in respect of profits arising from payments received by it from " Fremlin Brothers, Limited, and Fremlins, Limited ".

(Finlay, J.)

It is perhaps convenient, having regard to something that was said in the argument, that I should say here at once that I do not propose to deal with any question as to what Case of Schedule D is applicable. I am not concerned to discuss, because I have heard no argument really upon the matter, whether Case I, Case III, or Case VI is the applicable Case, if there is taxation leviable within Schedule D. What I do conceive that I have to consider is not the particular Case under Schedule D, but whether there is taxation in respect of the matters in question leviable under Schedule D at all, for the substance of the argument which was urged with such great force upon me by Mr. Latter was that this was a case of Schedule A, that it was a case in which landowners were being taxed and, therefore, it was said, when the appropriate taxation under Schedule A has been levied, there is no room for any further taxation, and Schedule D is completely out of the case. That, as a mere statement of it will show to anybody at all familiar with these matters, was to a great extent based upon the *Salisbury House* case, 15 T.C. 266, and, indeed, Mr. Latter's main contention—he has naturally elaborated it a great deal—was really that, when the *Salisbury House* case was understood and when the facts of this case were understood, this case was governed by the *Salisbury House* case. I, therefore, regard myself as examining that proposition and not as dealing with any question—whether any question arises, or could arise, I have not the slightest idea—but I am not going to deal now with any question as to which is the appropriate Case under Schedule D for levying this taxation.

Paragraph 2 and the following paragraphs of the Case set out the facts. The Appellant Company had for many years carried on the business of brewers, with a brewery at Dover. They held a number of freehold and leasehold properties, the majority of those properties being licensed and let to tied tenants. On the 18th October, 1926—this is paragraph 3—the Appellant Company entered into an informal agreement with Fremlin Brothers, Limited, a copy of which is attached to the Case. That agreement was to grant a lease to Fremlin Brothers, Limited, of all its freehold and leasehold properties, including plant and fixtures, except the mineral water and cordial factories and buildings used or held therewith, for a term of thirty-six years from 1st October, 1926, at a rent equivalent to the average net profits of the Appellant Company for the three years ending 30th September, 1926, subject to certain modifications which it is not necessary to deal with in detail. That was the inception of the whole thing and it is found that, immediately after the signature of that, Fremlin Brothers, Limited, began to supply beer to the Appellant Company's tied tenants and the Appellant Company's brewery was closed down in December, 1926.

(Finlay, J.)

One at once thinks, going no further, that the case bears a considerable resemblance to a case which was a good deal pressed upon me by the learned Solicitor-General—*Shipstone* v. *Morris*, 14 T.C. 413. One does not want to put the case any higher than it will bear, but there, in circumstances very like those of the present case, it was held by Rowlatt, J., that it was at least open to Commissioners to find that there was a succession; that is to say, that the business of the one company had been transferred to the other company. It seems to me that, looking at the thing as far as we have got, when you find this transfer and when you find that the rent is equivalent to the average net profits of the Appellant Company for three years, it would be flying in the face of facts to say that that was a mere ordinary landowning transaction. The answer is, I think, that it is not. When one gets to paragraph 4, which says that, immediately after the signature of the agreement, Fremlin Brothers, Limited, began to supply beer to the Appellant Company's tied tenants, one gets at once what was, I think, the reality of the transaction: this was a sale by the one, and a purchase by the other, of a business, or a large part of the business, namely, the supplying of these tied houses. That was the most valuable part of what was bought and what was sold.

That was followed by four formal agreements. Copies of them are set out in the Case and I do not think that it is necessary that I should refer to them in detail. They relate to different sorts of properties which were possessed by the vendors. A form of these is attached and it provides for a demise to Fremlins of lands and premises specified in the schedule, subject to and with the benefit of the existing tenancies, and subject to the rights, exceptions, reservations, stipulations, covenants, conditions and liabilities therein mentioned or otherwise then affecting the same. Paragraph 7 relates to an unimportant matter from the point of view from which I have to consider it, the fact that the business of the company, Fremlin Brothers, Limited, was transferred to another company, obviously the same in substance, though, of course, technically a different entity, called Fremlins, Limited. The four leases to Fremlins, Limited, which are exhibited to the Case, were executed on the 20th May and on the 10th December, 1930. The leases can be referred to for their terms. Nothing in particular appears to me to turn upon them. There is attached to the Case a schedule of the properties held by the Appellant Company and the rents are there shown, and those are rents payable by the tenants of the properties to the Appellant Company up to the 1st October, 1926, and thereafter to Fremlins. Some details are set out with regard to that, the majority of the properties transferred being licensed houses and those licensed houses were let to tied tenants.

It is found in the Case, and I shall have a word to say about it later, that it was not disputed on behalf of the Respondent that the benefit of the tie imposed upon the several tenants of the licensed houses ran with the land and was enforceable by Fremlins. The tenants of the houses are, of course, in accordance with the machinery which we all understand, assessed to Schedule A on the annual value of the houses, as occupiers. They, of course, pay their rents and pay them, since this transfer, to Fremlins and, in paying the rents, they, of course, deduct the appropriate amount of tax, so much of the tax as they can deduct under the Act. Fremlins, paying to the Appellants the rent reserved to them, have deducted therefrom the tax thus suffered by them on payment by the tenants and they have not made any further deduction. Details with regard to the rents are set out in paragraph 10 and the exhibits to it. In substance, the thing can be concisely stated by saying that it is agreed that the aggregate Schedule A assessments on the whole of the properties may be be taken as ranging from £8,000 gross to £7,000 gross, or, if you like to put it net, £6,000 odd to £5,000 odd. The result, of course, is that the average of the rents received was about £20,000 a year, but the average of the net Schedule A assessments was about £5,500.

Paragraph 11 relates to some evidence which was given by Mr. Killick, a superintending valuer in the Inland Revenue Department. That evidence, as evidence, was accepted and not challenged. It was said by the Appellant Company that the evidence was irrelevant. There is one matter, and only one, to which I will refer in the evidence, and it is this. Mr. Killick says that, in arriving at the assessments, regard was had to the retail trade to be carried on in the houses, but no account was taken of the wholesale profits which a brewer could make by reason of his having the right, under tying covenants, of supplying the licensed premises with the commodities consumed or sold thereon. I quote that sentence because it seems to me to be crucial and to deal with what, as I conceive, is the real point in the case.

The contentions I do not need to set out, because they were all embodied in the very full arguments which I heard.

Several cases were referred to. I have already referred to the *Shipstone* case[1]. I shall quite briefly in a minute or two refer to the other cases cited, *Campbell* v. *Inland Revenue*[2], *Windsor Playhouse, Limited* v. *Heyhoe*[3] and *The Assessment Committee of Bradford-on-Avon* v. *White*[4]. I shall also, of course, refer, and refer with some care, to the *Salisbury House* case[5], because, as I have already indicated, Counsel for the Appellants really base their case upon that.

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(1) 14 T.C. 413. (2) 1 T.C. 234. (3) 17 T.C. 481.
(4) [1898] 2 Q.B. 630. (5) 15 T.C. 266.

(Finlay, J.)

The Commissioners who heard this case gave a judgment in writing. What they said in substance was this, that the premises were demised, or agreed to be demised, subject to and with the benefit of the existing tenancies thereof and subject to the covenants therein mentioned. Among the covenants were the covenants by which all the tenants were tied to purchase from the landlords, or their nominees, and from no other company. " ' The benefit of these tying covenants ' "—the Commissioners go on to say—" ' was thus transferred to the lessees, " ' and the transfer to the lessees of the trading connection which " ' the Appellant Company previously had with the tenants of the " ' tied houses was evidently the primary object of the arrange- " ' ment.' " That, of course, is a finding of fact, and it is a finding which seems to me to be well warranted by the evidence and to represent the common sense of the thing. " ' It does not seem to " ' us ' "—they say—" ' to be of primary importance whether this " ' trading connection be described as goodwill or not.' " That probably has reference to a case to which, I doubt not, their attention had been called, of Marston's Dolphin Brewery, Limited, the other case which is now before me, where there is a specific reference to goodwill. It was contended by Mr. Latter that it did not matter, and I agree with him, exactly what words were used; one had to look at, and to appreciate, the substance of the transaction. They then point out, and, again, I agree with them, that the arrangement originated in the agreement of the 18th October, 1926, and they call attention to the fact that the rent payable was fixed as the equivalent of the average net profits of the Appellant Company for the three years. Then they say this: " ' The payments received by the Appellant Company there- " ' fore included an element which was not, and could not be, taken " ' into account in estimating the annual value of the hereditaments " ' for the purpose of assessment to tax under Schedule A. In our " ' opinion this element which is excluded from consideration for " ' the purposes of taxation under Schedule A is a profit chargeable " ' to Income Tax under Schedule D, and the grounds for attributing " ' the whole of the excess of the payments over the aggregate of " ' the Schedule A assessments to this element are stronger in this " ' case than they were in that of the *Windsor Playhouse, Ltd.* v. " ' *Heyhoe*(1)' ". The figures were adjusted, and they reduced the assessments to figures which were agreed on the basis of this decision.

I think it may be convenient to say a word with regard to *Windsor Playhouse, Limited* v. *Heyhoe*, which was a decision of my own. I do not think that it has any very great bearing on the present case, though reliance was placed upon it by the Commissioners and, as far as it has a bearing, it appears to favour the

(1) 17 T.C. 481.

view which they took. In that case, what I decided was that there was no ground on which it could be said that the Commissioners had, in law, made any error in refusing to split up profits. It was a case of a cinema, and the decision of the Commissioners had been that an assessment under Schedule D could properly be supported. I held that there was no ground in law for interfering with that. I have reconsidered the matter and as far as I can see there is no particular reason to suppose that I was wrong in that and, no doubt, as the Commissioners say, the case has a bearing upon the present case, although it is much less important than some of the other cases decided by higher authorities.

That deals with the case of Alfred Leney & Company, Limited.

Before I endeavour to express the view that I have formed or, rather, to express it in a little more detail and with reference to the authorities, because I have already indicated what I think, it may be convenient that I should take, though quite shortly, the somewhat more confused case of Marston's Dolphin Brewery, Limited—somewhat more confused, although, when the case is understood, I think it does not really differ in essentials from the other case. I think the cases are really the same. There there was a company which had been formed in 1897 to take over an old-established brewery, with a local connection in Hampshire and Dorsetshire, and it carried on a wine and spirit merchant's business and also a mineral water factory at Poole. It had a number of licensed houses and these licensed houses were let on annual tenancies to tied tenants, tenants tied to the Appellant Company, or their nominees, for all malt liquors, and so forth.

In 1926, the Appellant Company, Marston's Dolphin Brewery, Limited, agreed to lease for a term of thirty-five years to Strong & Company, Limited, people carrying on a brewers' business in the same locality, all the premises, including the brewery, belonging to them, and the goodwill of the business carried on thereon. A lease was executed on the 15th November, 1926, between the Appellant Company and Strongs. It is not necessary to read the whole of it, but it shows that " In consideration of the rent and " covenants on the part of the Lessee and conditions hereinafter " reserved and contained . . . . the Company . . . . grants assigns " and demises unto the Lessee all and singular the lands buildings " and hereditaments respectively described . . . . Together with " the goodwill of the businesses carried on thereon respectively and " the licenses connected therewith and the benefit of all covenants " in restraint of trade trading and other covenants to the benefit " of which the Company is entitled in connection with all or any " of the said premises ". It further assigned " the right to use " in connection therewith all trade marks trade labels and adver- " tisements used by the Company in connection with the said

(Finlay, J.)

" businesses ". That is a thing as to which evidence was called by the Appellants to show that they possessed no value, and there is no finding by the Commissioners that they did. Though they might well have been valuable, it is quite possible that, in the present case, they did not, in fact, possess any value and I do not think anything turns upon that. The rent reserved is a rent of £20,000.

That is the substance of the lease in that case. It is fully set out in the Case, and other provisions may be looked at, although they do not appear to me to be very important.

Paragraph 4 shows that the assessments had been made, and made on the basis that a portion of the sum of £20,000 was not attributable to the corporeal hereditaments demised by the lease and was, therefore, a proper subject of assessment upon the Appellant Company under Schedule D. The Commissioners held, on the authority of the case to which I shall refer briefly in a few moments, *Campbell* v. *Inland Revenue*, 1 T.C. 234, that the Schedule A assessments must be based only on the apportionment of the sum of £20,000 applicable to the corporeal hereditaments, and that it followed that that balance of the rent could not be covered by those assessments. It followed, therefore, they say, that the balance of the sum of £20,000 formed, or might form, a proper subject for separate assessment otherwise than under Schedule A. They then said that, in their opinion, there must be an apportionment. On that there appear to have been long negotiations, and the result of the negotiations was an agreement that the annual value of the free trade of the brewery and of the goodwill of the mineral water business was £100 in each case. That reduced the amount. It took £200 a year out of the rent, and the contention of the Appellants then, before the Commissioners, was that £19,800 fell to be treated as rent, £200 only being taken out. Of course, the claim of the Crown remained as it had been throughout, that a substantial portion of the sum was attributable to other matters, of which the tie formed an important part.

Paragraph 10 contains a series of matters which were admitted or proved in evidence before the Commissioners. It is not necessary to go in detail through them. (*d*) is perhaps important. It is there proved or admitted that the main object of the lease was to obtain the trade with the licensed houses. That, I say, is important, because it is important to have that found expressly by the Commissioners, though I do not think that, in the absence of such a finding, anybody could doubt for a moment, looking at the agreement and looking at the facts and looking at the position, that that was the object of the agreement; it clearly was. Then there is another finding which is perhaps a little important. It is: " (*f*) It would be possible (and there had been such cases) for

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" the landlord of a licensed house, who was not himself a brewer, " to insert in the tenancy agreement of that house a tie to a " particular brewer, so that he could obtain from the brewer " a royalty dependent on the amount of the trade. A brewer " wishing to obtain the benefit of the trade done in the licensed " premises would stipulate for a long lease and proper control and " would have to have a settled trade. (*g*) If the Appellant Com- " pany had given Strongs the right to supply the liquor required " in the licensed premises without assigning to them such premises, " they could have obtained at least £16,842 per annum from " Strongs ". Then there is a considerable amount of evidence which was presented to the Commissioners and which, of course, from any point of view of the facts, was evidence which the Commissioners had to consider.

The Commissioners, doubtless, did consider the evidence and all the other material which was tendered to them, and then they gave their decision. The Commissioners in this case were different. They gave their decision in this way: " ' The " ' question which we have now to decide comes to this: " ' Did Strong & Company, Limited, obtain by the lease of the " ' 15th November, 1926, anything beyond the various corporeal " ' hereditaments, the goodwill of the mineral water business and " ' the free brewing trade? By the terms of the lease, Strong & " ' Company, Limited, obtained the goodwill of the whole brewing " ' business of the Appellant Company and they also, in fact, obtained " ' the trading connection which the Appellant Company previously " ' had with the tenants of the tied houses. The acquisition of " ' this trading connection, which was a very valuable right, was " ' indeed the primary object of the arrangement between the two " ' Companies.' " Then they say: " ' It was argued that this good- " ' will was included in the Schedule A value of the tied houses " ' and that consequently anything paid for this goodwill was " ' covered by the Schedule A assessments. It seems, however, " ' from the decision in the case of *The Assessment Committee of* " ' *the Bradford-on-Avon Union* v. *White*, that any goodwill of " ' the brewer's trade with these houses (as distinct from the " ' publican's trade) would be ignored in arriving at the Schedule A " ' value, and even though this decision may have been the subject " ' of criticism, it was treated as being the existing law in the case " ' of *Truman, Hanbury Buxton & Co., Limited* v. *Commissioners* " ' *of Inland Revenue*, [1912] 3 K.B. 377, and it has no doubt " ' been acted upon generally and has been acted on in this case. " ' We therefore decide the question before us in favour of the " ' Crown and, on the figures being agreed, will give our final " ' decision '. The parties being still unable to arrive at an agree- " ment, we held a further meeting on the 6th December, 1932,

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" at which we fixed the portion of the payment of £20,000 " attributable to the subject matters of the lease, other than the " corporeal hereditaments, at £15,000, and we adjusted the " assessments under appeal accordingly in figures agreed by " the parties ". I mention that because I understand it to mean this, that the Commissioners, realising that the apportionment of £20,000 was in issue, fixed £15,000 of that as being in respect of matters other than corporeal hereditaments, with the result that they took the other £5,000 as being in respect of that, and they said that they adjusted the assessments under appeal accordingly in figures agreed by the parties. Of course it would be quite impossible for me here to go into any question of figures; I merely took note of the circumstance that the Solicitor-General mentioned that, if any adjustment were necessary to ensure that tax was not exacted on more than the sum received, that adjustment would be made; so that, if any adjustment is necessary, I doubt not that that will be attended to.

That deals, I think, sufficiently fully with the two cases which are before me, and it is proper that I should quite shortly express, with reference to the two or three authorities, the view which I have formed. I think that the whole of this difficulty—and it is a difficulty which has given rise to a great amount of argument, and I think very admirable argument—is largely disposed of by attending to what is perhaps a very elementary consideration. There are really two quite distinct trades to be considered. There is the trade of the publican, the retail trade which the publican does in the house; and there is quite a different trade, the trade not in the house, but the trade with the house. That is the trade which the brewer does. He makes profits by supplying beer and other such commodities to the house, and that wholesale trade is a wholly distinct thing from the retail trade done by the publican. I think that distinction is fundamental and important, and it is reflected in a very important way in the Schedule A assessment, for it seems to me that, in fixing the Schedule A assessment, you do have regard to the licence and to the retail trade of the publican. That is an element for consideration in fixing the annual value, but, in fixing that annual value, you do not have regard to the wholesale trade of the brewer. That is a different thing altogether. It is a thing altogether outside the house. It has nothing to do with the retail trade there being carried on, and it seems to me that the authorities, and particularly a case which was referred to a good deal before me, *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q.B. 630, show that, while, in arriving at annual value, one takes into account the retail trade, the wholesale trade done, not in the house but with the house, is excluded. If that is right, I think it really solves the difficulty in this case. I think the truth of the matter is that two quite distinct things were here

sold. The houses were sold, or the leases of them, the reversions in them, and, quite a different thing, the right to supply liquor to the houses, the tie, so to speak; and I think that the argument is illustrated by the circumstance to which the Solicitor-General, basing himself on a paragraph in both Cases, drew my attention, that these things might be separately sold. One might sell the house and one might sell—it matters not whether it was done by the machinery of nomination, or something of that sort—the right to supply the house with liquor; and it would be an extremely startling thing, if you suppose these two things separately done, if no assessment could be made in respect of annual sums paid for a very valuable right, namely, the right to supply the houses with liquor. That, I think, when the case is properly understood, is just what has been done here, and the complication, which is no doubt introduced by the circumstance that the sale is all one, is not really the essence of the case. I do not think it matters—and I agree here with Mr. Latter—whether or not you say: " We are " selling the house together with the goodwill, and so forth ". That does not matter. It is perhaps a little useful, as illustrating what is really sold, but I do not think the precise words are of the essence of the case. What is of the essence of the case is to ascertain what has really been done, and what has really been done by the selling brewers is this: they have sold a number of houses and, more valuable than the houses, they have sold the right to supply those houses with drink.

A good deal was said to me on one side and the other about the covenant running with the land, and I should accept the view that this covenant is one which touches the land and would, therefore, run with it. As I understand, that is a matter which relates to the quality of the particular covenant, and falls to be decided with reference to that. I should in no way dissent from the view which Mr. Latter urged, that this tie was a covenant which would run with the land, but it does not seem to me to result that, where you get a covenant running with the land, that covenant not being taken into account in arriving at the Schedule A value, you are bound to treat that covenant as being part of the land. I think that is what it comes to. It is not dealt with in Schedule A. It is not reflected in the Schedule A value. What Mr. Latter said about that was this. He said, and I think it is true to say, there are two distinct things; there is the ambit of the tax and there is the measure to be applied. He said: " These things " have to be kept distinct, and the mere circumstance that you get " an imperfect measure does not really carry you any further ". I agree that, if it does not fall within the ambit of the tax, you cannot tax, but it is vital to consider what is the ambit of the tax, and the ambit of the tax in Schedule A is, beyond any question—it was not questioned, and could not be questioned—what is expressed in the Schedule; a tax in respect of the property

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in all lands, tenements and hereditaments. I cannot see why one is to say that income derived from the turning to account of a valuable covenant is necessarily to be taxed in respect of property in land, merely because the covenant is one which runs, as I think it does run, with the land.

Several cases, apart from those to which I have referred, were cited. Considerable reliance was placed by the Crown upon an old decision in *Campbell* v. *Inland Revenue*, 1 T.C. 234. It is not necessary to refer to that case in detail. It was a case where there was a lease of a mill, I think at Oban, and some horses, harness and various other matters were included, and the whole was expressed to be in respect of a rent. The Inner House and the Court of Session there said that, though it was called rent, you must split it up, and you must see how much of it was paid in respect of the land.

I have already referred to *Windsor Playhouse, Limited* v. *Heyhoe*(1) and *Assessment Committee of Bradford-on-Avon* v. *White*(2), and also to *Shipstone's* case(3).

I come now to the case upon which Mr. Latter placed his main reliance, and I hope it is not necessary that I should say that, if I thought that the *Salisbury House* case(4) governed this case, I should, without hesitation, follow it, although I might think that the result of applying it was, in the facts of this particular case, rather surprising. But it is necessary to examine the *Salisbury House* case. I need not do it in detail, but I can do it shortly, so as to indicate the view I take. It is necessary shortly to examine that case to see what it really decides. The decision in *Salisbury House Estate, Limited* v. *Fry* really went to this, that Schedule A is exhaustive as a tax in respect of the ownership of property. Where you are taxed as landlord—and this is expressed by several of the Lords—you are taxed under Schedule A, and you cannot be taxed under anything else; when that tax is imposed, there is no room for some further taxation under Schedule D. Of course, that does not mean that there may not be further taxation under other Schedules in respect of the use of land. That is expressly indicated by all their Lordships, and the case, often cited, of *Rotunda Hospital*, 7 T.C. 517, is an admirable illustration of that; there are dicta by Lord Birkenhead, by Lord Finlay and Lord Atkinson; I think those are the three who may be cited as showing that that is correct. You may, of course, perfectly well have a Schedule A assessment and a Schedule D assessment, but the Schedule D assessment must not be in respect, so to speak, of landowning; it must be in respect of some trade carried on. In the very case of *Salisbury House Estate, Limited* v. *Fry* there was a very minor trade, heating, lighting,

(1) 17 T.C. 481. (2) [1898] 2 Q.B. 630. (3) 14 T.C. 413.
(4) 15 T.C. 266.

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attendance, and so on, carried on, and in respect of that an assessment could be, and indeed was, levied. That I take to be the essential decision in the *Salisbury House* case(1), and, if that is right, I think that the cases at once become distinguishable, because there you got landlords and you got an assessment sought to be made upon them, as it was held, really *qua* landlords, and all that there could be said was this, that, by reason of a peculiarity of assessment, there was some escape from taxation which apparently might properly be levied.

Here the matter appears to me, when one looks at it, to be entirely different. Here there is the Schedule A, but here there is an annual sum received in respect of valuable property which falls entirely outside the ambit of the Schedule A assessment. There would be the clearest possible escape from taxation if the Appellants here succeeded. That is in no way conclusive, although I suppose it is perhaps true to say that if Income Tax is a tax on income, there is a certain presumption that it is intended to be a tax on all income, and that, while nothing but income should ever be taxed, no income ought, one would suppose, to escape. That is not decisive, because it is the business of Parliament to impose taxation as it thinks fit and, if it fails to impose the appropriate taxation, then the particular income escapes. When the *Salisbury House* case is understood, and when one considers the various observations which were made by the Lords in deciding that case—I am not going through them; they were canvassed very fully, but not in the least too fully, by Counsel on each side—I think the *Salisbury House* case, so far from being an authority against the Crown, is rather an authority in favour of the Crown. I think this is not a matter within Schedule A. It is not in their capacity as landlords that these people receive this income; they receive something as landlords, but this is paid in respect of valuable property of another sort. I do not forget for a moment that it is a covenant running with the land, but it is valuable property of another sort.

As I think, the substance of this case is—and it distinguishes it at once, if I am right, from the *Salisbury House* case—that this was really a trade receipt of the brewers as brewers. That is properly assessable and, in my opinion, it results that both these appeals fail and must be dismissed.

The Solicitor-General.—Dismissed with costs, my Lord?

Finlay, J.—Yes, both dismissed with costs.

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(1) 15 T.C. 266.

Appeals having been entered against the decisions in the King's Bench Division, the first case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Slesser and Romer, *L.JJ.*) on the 25th and 26th June, 1934, and the second case on the 26th June, 1934. On the latter date judgment was given in both cases unanimously against the Crown, with costs, reversing the decision of the Court below, and the second case was remitted to the Special Commissioners for reconsideration of their decision in the light of the Court's judgment in the first case.

Mr. A. M. Latter, K.C., and Mr. Cyril L. King appeared as Counsel for the two Companies and the Solicitor-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENTS

(1) *Alfred Leney & Co., Ltd.* v. *Whelan* (*H.M. Inspector of Taxes*)

Lord Hanworth, M.R.—This case raises a point which has quite recently been a good many times before the Courts. It really is this: whether, when taxation to Income Tax has been imposed under Schedule A, that concludes the whole liability to tax, or whether it is possible, by means of further assessments under Schedule D, to cover something which stands apart from and outside the area which is taxed under Schedule A.

The facts must be shortly stated; they are contained in full in the Case Stated. The Appellant Company, Alfred Leney & Company, Limited, were brewers who had a considerable business, and they had, in the course of carrying on their business, a number of freehold and leasehold properties the majority of which were licensed and were let to tied tenants. On the 18th October, 1926, the Appellant Company entered into an informal agreement with Fremlin Brothers, Limited, under which they undertook to grant a lease to Fremlin Brothers, Limited, of all their freehold and leasehold properties, including plant and fixtures used in connection with the brewery, for a term of 36 years from the 1st October, 1926, at a rent which was quantified at a sum based upon the average net profits of the Appellant Company for the previous three years ended on the 30th September, 1926. That rent was subject to modification and the lease contains a provision applicable to leaseholds the term of which expired during the term of the new lease. That agreement was carried out. The leases were granted and from and after that time the brewery business and the supply of beer to those houses were carried on and provided by Fremlin Brothers, Limited. After that date the Appellant Company's brewery was absolutely closed

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down in December, 1926, and from and after that time they have not carried on the business of brewers. They have received the rents which were specified in the several leases, and that is all that they have got from the activities which they carried on before October, 1926.

The premises which have been handed over under leases to Messrs. Fremlin have been taxed under Schedule A and the sums at which their annual value has been estimated have taken into account, as it is right they should do, that these houses which fall within Schedule A were tied houses.

The way in which to estimate the value under Schedule A has been laid down in a number of cases ; perhaps the best statement of it that I can adduce is this. I am reading from Ryde on Rating, 6th Edition, at page 601. Farwell, L.J., says (1) : " the question " is not what rent will a particular individual give, but what " will the hypothetical tenant give : it is on this ground that " the ' tie ' is disregarded in valuing tied houses ; the hypothesis " deals with the ordinary individual, not with a man bound by " special covenants ". But, as has been pointed out in a number of cases, it is right that the fact that it is a tied house should be taken into account in this sense, that there are persons who may be ready to give an enhanced value for the house, namely, brewers. Channell, J., said this in the case of *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q.B., at page 639 : " I do " not think, therefore, that it is right to say that the competition of " brewers should be wholly excluded from consideration, but the " special prices which they may give, owing to personal considera- " tions, and not on account of the value of the premises, should be " excluded except so far as the possibility of such special prices " being obtained raises the market value generally". That means that the question should be considered whether the competition of brewers had raised the market value of the public houses in the district. That is the right way in which this question of tie should be used.

We are told in the Case that " the basis of the valuations was the " amount which a hypothetical free tenant . . . . would be " willing to pay by the year, the landlord doing repairs and paying " for insurance. Regard was had to the retail trade to be carried " on in the houses, but no account was taken of the wholesale profits " which a brewer could make by reason of his having the right, " under tying covenants, of supplying the licensed premises with " the commodities consumed or sold thereon". That seems to indicate that those annual values were estimated upon a right and proper basis in accordance with the passages of authority which I have already cited.

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(1) Rex *v.* Shoreditch Assessment Committee, [1910] 2 K.B. 859, at p. 883.

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When those Schedule A values come to be added together, it is found that " the average of the net Schedule A assessments on " which tax was paid was about £5,500 " in respect of these houses. On the other hand, it is found that, by reason of the advantageous contract and leases which were made by Messrs. Alfred Leney & Company, Limited, under the agreement of the 18th October, 1926, they produced a much larger sum, round about a sum of £20,000 a year. Assessments have been served upon the Appellant Company in respect of what are called the profits arising from these payments received by it from Fremlin Brothers, Limited, and Fremlins, Limited—that was the successor of the first company—in other words, upon the margin, roughly speaking, between the assessments under Schedule A and the moneys received as the total rent of these premises. The Commissioners said this : " It does not seem to us " to be of primary importance whether this trading connection "—that is, under the tie—" be described as goodwill or not. The " arrangements originated in the agreement of 18th October, 1926, " under which the rent payable was fixed as the equivalent of the " average net profits of the Appellant Company for the three years " ending 30th September, 1926, with modifications. In arriving at " the amounts of the Schedule A assessments, the profits which " a brewer could make by the use of the premises as tied houses, or " the enhanced rents which he would be willing to pay to secure those " profits, were ignored, and upon the authorities were rightly " ignored. The payments received by the Appellant Company " therefore included an element which was not, and could not be, " taken into account in estimating the annual value of the heredita- " ments for the purpose of assessment to tax under Schedule A. " In our opinion this element which is excluded from consideration " for the purposes of taxation under Schedule A is a profit chargeable " to Income Tax under Schedule D, and the grounds for attributing " the whole of the excess of the payments over the aggregate of the " Schedule A assessments to this element are stronger in this case " than they were in that of the *Windsor Playhouse, Ltd.* v. *Heyhoe*(1). " We accordingly hold that the assessments under Schedule D " should be confirmed in the amounts of the excess of the payments " received by the Appellant Company over the aggregate amounts " of the Schedule A assessments on the premises demised ".

Finlay, J., has upheld that view and he holds that there must be some different trade which apparently is carried on by the Appellant Company and he is upholding the decision of the Commissioners and saying that (2) " it would be an extremely startling " thing, if you suppose these two things separately done, if no " assessment could be made in respect of annual sums paid for " a very valuable right, namely, the right to supply the houses " with liquor".

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(1) 17 T.C. 481. (2) *See* page 350 *ante*.

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But, although it may be a matter for the Legislature, we have to determine whether, under the present system of the Income Tax law, embodied as it is in the Income Tax Act of 1918 and other subsequent Acts, this margin between the Schedule A assessments and what has been received by the Appellant Company can be made the subject matter of a separate assessment under Schedule D.

It is not easy to see what trade the Appellant Company carry on in respect of these houses from which they receive the rent, quantified as it is under the leases, but I agree with the Solicitor-General that that does not conclude the matter, because, under Schedule D, it is possible to tax " the annual profits or gains arising or " accruing . . . . to any person residing in the United Kingdom from "any kind of property whatever", but that tax has to be charged under the Cases which are enumerated in Paragraph 2 of Schedule D. The Case that would be appropriate to such property would be Case VI, which enables a tax under Schedule D to be charged " in respect of any " annual profits or gains not falling under any of the foregoing Cases " and not charged by virtue of any other Schedule". If, therefore, the tax has already been imposed upon these annual profits or gains under Schedule A, it is excluded from the cognizance of Schedule D.

I think a mistake often arises from treating Schedule A as dealing solely with the annual value which enures to a landlord in respect of the real property which he holds. It has been pointed out by Lord Macnaghten, in the case of *Attorney-General* v. *London County Council*, [1901] A.C. 26, at page 36(1), that what is taxed, whether under Schedule A or Schedule D, are profits or gains. He says on that page : " It is a tax on 'profits or gains' in the case of duties " chargeable under Schedule A and everything coming under that " Schedule—the annual value of lands capable of actual occupation " as well as the earnings of railway companies and other concerns " connected with land—just as much as it is in the case of the other " Schedules of charge. And it is to be observed that the expression " ' profits or gains ' which occurs so often in the Income Tax Acts is " constantly applied without distinction to the subjects of charge " under all the Schedules". That passage still holds the field, for Lord Dunedin definitely referred to it and repeated some other portions of it in the *Salisbury House* case, 15 T.C. 266, at page 308. Commenting on the judgment of the Court of Appeal, says Lord Dunedin, Lord Macnaghten quotes from it : " ' The tax under Schedule D is a " ' tax upon " profits and gains ", an entirely different tax from " ' the tax under Schedule A', on which he says, ' With all defer- " ' ence, I do not think that that is a sound view of the Income Tax " ' Acts ' ". In other words, differing from the Court of Appeal, he held that whether you are taxing under Schedule A or Schedule D, you are taxing profits or gains, but under Schedule A you are taxing profits or gains arising from land.

(1) 4 T.C. 265, at p. 294.

(Lord Hanworth, M.R.)

What is embraced in that? We are told, first of all, to go back to the Income Tax Act, 1918. "Tax under Schedule A shall be "charged in respect of the property in all lands", and so on, and when we come to the first Rule, we are told under the General Rule for estimating the annual value of lands: "In the case of all "lands, tenements, hereditaments or heritages capable of actual "occupation, of whatever nature, and for whatever purpose occupied "or enjoyed, and of whatever value . . . the annual value shall "be understood to be:—(1) The amount of the rent by the year at "which they are let, if they are let at rackrent . . .; or (2) If "they are not let at a rackrent so fixed, then the rackrent at which "they are worth to be let by the year". That is the standard which is applicable to lands which are capable of occupation and for whatever purpose they are occupied or enjoyed.

In the course of the argument by the Solicitor-General, Slesser, L.J., called attention to No. III of Schedule A, which has now been altered by the Finance Act of 1926, but, as it stood, it embraced a number of profits arising otherwise than merely as rent; and I called attention also to Rule 5 of No. II, which embraces this—whether it has been altered or not I care not: "In the case of "manors and other royalties, including all dues and other services "or other casual profits . . . the annual value shall be under-"stood to be" so and so. In other words, Schedule A is intended to cover what are the profits and gains which are derived, and are enjoyed for whatever purpose, from the land, and the amount at which that assessment is to be quantified is the amount which they are worth to be let at by the year.

In the present case we have the fact that there is a large margin between the assessments properly imposed under Schedule A and the actual sum received by the Appellant Company. That that does not give any particular guide or justify the imposition of a further assessment is illustrated by the case of *Rossdale* v. *Fryer*(1), in which it was pointed out that the assessment that had been made under Schedule A governs the amount, whatever may be the vicissitudes of that same property in successive hands. Scrutton, L.J., in giving judgment, says this, at page 313: "If I am right in the "view that I expressed at the commencement of the judgment that "the tax on land is not according to the actual receipts but the "assessment, then £750, the actual rent, is not a sum on which the "landlord can be taxed".

In the case of *The Mersey Docks & Harbour Board* v. *The Assessment Committee of the Birkenhead Union*, [1901] A.C. 175, Lord Halsbury points out that you are not to rate the tenant's trade. He says, at page 180: "The trade is excluded "from valuation by the terms of the statute. You are to

(1) [1922] 2 K.B. 303.

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"rate the premises according to their value; therefore it would "be very wrong indeed to rate the trade, or to treat it as you would "if you were dealing with the question for the income tax. You "are not rating the income—you are rating the premises". This case is of value as showing what is the right measure on which you are to base your annual value: all the circumstances of the particular occupation, the mode in which the trade has been carried on, and all the circumstances are legitimately subjects of inquiry.

I have pointed out already that no objection can be taken to what has been done in estimating the annual value. When that has been done, the *Rotunda* case(1) seems to put an end to the possibility of a further assessment. In that case there was a separate independent activity which was derived from the letting of the hall, but, at page 588, Lord Atkinson says: "It has frequently been decided "that, for the purpose of this valuation, not only is the site of the "house or building, and its quality and condition to be taken into "account, but that, if some lucrative trade or business has been "carried on in it, then its inherent capacity (not personal to the "occupier carrying on this trade or business) to make a profit should "be taken into consideration". Then lower down he says: "The "case of licensed premises forms no exception to this rule, for the "licence to carry on the trade of a publican is not a licence purely "personal to the publican". Then he goes on to point out that, unless you have something independent of Schedule A, it is covered by Schedule A.

Then we come to the *Salisbury House* case(2). In the *Salisbury House* case, the Commissioners and Rowlatt, J., had come to the conclusion that there was a trade carried on—the totality of the trade—of letting the premises, which included an enhanced value of the flats which were let, and that, in respect of that, an assessment under Schedule D would lie. There was no question but that an assessment under Schedule D would lie in respect of the profits derived from the services rendered to the tenants, but when Lord Dunedin is considering whether that further assessment can be made, he says this, after having put his colloquy between the taxpayers and the tax gatherer, at the top of page 308: "The "rents, having been assessed under Schedule A, are, so to speak, "exhausted as a source of income, and the so-called concession "made by the Appellant that there should not be double taxation, "and that therefore he would be willing to allow deduction of the "sum paid under Schedule A, is a concession which is beside the "mark. It is a concession to avoid double taxation, but the con-"cession cannot come into being where double taxation does not "exist, and here it does not exist because it being imperative to deal "with the rents under Schedule A there is no possibility of subse-

(1) Governors of the Rotunda Hospital, Dublin *v.* Coman, 7 T.C. 517.
(2) 15 T.C. 266.

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" quently dealing with them under Schedule D". Lord Atkin said this at page 319—he is dealing with the various Schedules : " My " Lords, nothing could be clearer to indicate that the Schedules are " mutually exclusive ; that the specific income must be assessed " under the specific Schedule ; and that D is a residual Schedule " so drawn that its various Cases may carry out the object so far " as possible of sweeping in profits not otherwise taxed. For this " reason no doubt the actual Schedule was drawn in the widest " terms ".

If that be so, if the Schedules are mutually exclusive, there has been an assessment under Schedule A that catches at its own proper and appropriate measure the profits and gains that arise from the land. It has its own measure and that measure is not defeated, nor is it enhanced, by matters which take place outside and are not appropriate to the proper measure belonging to Schedule A. The fact, therefore, that there is this much larger sum received by way of rent by the Appellant Company is really irrelevant. They pay the sum which they are assessed to pay under the Rules appropriate to Schedule A and, although it may be tempting to say that there exists here a profit that ought to be taxed that is not taxed, that invites taxation, one has to see whether or not it can be charged under the present system of the Income Tax Acts. In my opinion, it cannot. If it is to be taxed, it must be done by some charge imposed upon it by the Legislature. We cannot make for ourselves some assessment which seems suitable in the circumstances. We have to apply the existing Rules, and under these existing Rules, payment having been made under Schedule A, there is no more that can be imposed upon the Appellant Company in respect of this enhanced profit, for they do not carry on a trade, nor have they an interest in property apart from what has already been assessed under Schedule A. Schedule D, therefore, to my mind, is inappropriate and cannot be applied.

For these reasons, the appeal must be allowed, with costs here and below.

Slesser, L.J.—In December, 1926, the Appellant Company, who were brewers, closed down their brewery and since that time, at all material times, the whole of their income has been derived from payments made to them by two companies, at first, Fremlin Brothers, Limited, from 1928 to 1930, and after 1930, Fremlins, Limited, in respect of leases granted by Alfred Leney & Company, Limited, the Appellant Company, to Fremlin Brothers, Limited, or Fremlins, Limited. Those leases, which form part of the Case and which we have considered, demised to the tenants for nearly the whole period which can be demised a large number of public houses, and it is in respect of the rents paid under those leases that an assessment has been made under Schedule A of the Income Tax Act, 1918, the tax

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being charged in respect of the property in the land. So far, there can be no question but that that was in every way an appropriate and proper assessment. But it is said here by the Crown that, by reason of the fact that in the leases of those public houses so assigned there are contained, as between Messrs. Leney & Company, Limited, and the publicans, certain covenants, which I will refer to, restraining the publicans' right to buy beer and other commodities where he will, that fact takes the property which has been demised from Leney, to Fremlins, Limited, out of the ambit of Schedule A in so far as it is concerned with that part of the leases which is concerned with what is called the tie or restriction with regard to the sale of beer and the monopoly created. That is really the point.

As I see this case, bearing in mind fully what Mr. Hills says, which I accept, that the mere use of the word " rent " is by no means conclusive of the matter, nevertheless, this is, in substance, no more and no less than an agreement between landlord and tenant, and I am unable to see that, because what has been here demised includes the tenancies which have restraining covenants in them, this makes the transaction any more or any less a transaction as between landlord and tenant or makes this income received anything but an income arising out of the land.

What is the position as regards these premises ? Originally these agreements by Messrs. Leney and Fremlins were of an informal kind, but after the formation of Fremlins, Limited, they were reduced to formal leases. In those leases there is a schedule containing the names of all these properties, these public houses, the terms and the rents and the dates and the parties to the lease, and so on. When we come to look at the tenancies between Messrs. Leney and the publicans, some of which have been exhibited, we find that it is there provided that the expression " landlord " shall, wherever the context admits, include the successors in title. So that the effect is that after these demises Fremlin Brothers and Fremlins, Limited, became the successors in title of Messrs. Leney and so became the landlords of these publicans, and Messrs. Leney ceased to be the landlords within the meaning of those tenancy agreements.

A typical tenancy agreement, exhibit " L ", is one that first of all deals with letting the public house, in that case the Wellington Hotel, for a certain sum per annum. Then in clause 2 come the agreements (*a*) to pay the rent, (*b*) to pay all rates, (*c*)—and this is the important one for the purpose of this case—" to purchase from the landlords or " their nominee or nominees and from no other company or com- " panies . . . all ale beer stout porter". Of course, after the transaction between Leneys and Fremlins, Fremlins become the landlords ; the nominees would be the nominees of Fremlins and no longer the nominees of Leneys, who have dropped out of the matter, because, in my view, Fremlins have become, by the operation of

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the clause to which I have referred, the landlords. It goes on to provide similar obligations with regard to paying for mineral waters—or rather, not similar ones, there is no tie as regards mineral waters—but it then provides that the tenancy may be determined by either party—that would be the publican now, or Messrs. Fremlin—giving to the other three calendar months' notice in writing to expire, but no such notice is to be given by the tenant at a date earlier than one year from the commencement of the tenancy. Then there is power to the landlord, when a tenant has been convicted of any offence against the law, to give one week's notice.

All these matters seem to me incident to the general agreement of landlord and tenant and although it may be, as the Commissioners have found and as Finlay, J., accepts, that the major motive for entering into these agreements was the remunerative value of the monopoly conferred by that covenant(1), I think it would be altogether wrong, and I can find no justification in the authorities or in logic for saying, that, because the motive or object of these parties in entering into this was rather the acquisition of a monopoly than the acquisition of the right to be a landlord of a public house, therefore this is to be dissected, as Finlay, J., said, into two businesses (2). I can only see here—and, I suppose, the matter is only one of impression—one relation between Messrs. Leney and Messrs. Fremlin, and that is the relation of landlord and tenant. The mere fact that such a relation produced a profit, which is to be found expressed in a higher rental than might otherwise be the case, does not seem to me to meet the matter. In other words, bearing in mind what Mr. Hills said, I do think that it is, in truth, a rent and not merely a rental to cover two or three different matters, but, in reality, a rent for a property to which certain covenants are attached, those covenants dealing, it may be, with matters which do not necessarily become incident to the land, as such, but are included here as a part of the general agreement between the parties.

In that view I must confess to myself that I find all the authorities of very little assistance, because the matter does seem to me to come back to this: whether, apart from the form of this agreement, there is here, first, an ordinary tenancy agreement and, secondly, the assignment of the business. I can find no assignment of the business; I can only find a tenancy agreement to which are attached certain covenants dealing with certain matters which are carried on in that place. It does quite often happen that, in a tenancy agreement, there are covenants not profitable but protective: agreements not to carry on a certain trade, not obligations to purchase in certain ways or to carry on, but agreements not to carry on, agreements not to trade at all, in cases of residential property and the like. All these are incidents of the relation of landlord and tenant, and the

(1) *See* page 345 *ante*. (2) *See* pages 349/50 *ante*.

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mere fact that in this case this particular covenant may or may not prove profitable does not seem to me to alter the matter. It may be profitable to have a negative covenant restraining a person in a residential area from carrying on a certain trade. That may have an effect which increases the rental, that the person knows that he will not be menaced by unsatisfactory occupations existing round about him. That is no reason for taking the agreement out of the general ambit of a landlord and tenancy agreement. So here, as it seems to me, the obligation that if a man buys beer he is to buy in a certain place—and be it noted there is no obligation on the tenant to purchase beer in any given quantities; it is only, as I read the tenancy agreement, that if he does buy it he is to buy it from a certain source—does seem to me merely incidental to the general position of landlord and tenant.

Therefore, to this extent, I think Mr. Hills is right in saying that the *Salisbury House* case(1) has no very great bearing on this case, nor, may I add, has the *Rotunda* case(2). The whole question is one of what the parties have agreed to do. That, it seems to me, is a matter of law depending on the proper construction of the agreement into which they have entered. Therefore the finding of fact of the Commissioners that the primary object of the agreement was having what the Commissioners call a trading connection does not seem to me to be material. We are not concerned here, as I see it, with motives but with the actual transaction which is being carried out.

For these reasons I find myself, with regret, in disagreement with the learned Judge, who seems to have based his judgment on the consideration of motive rather than on the consideration of the actual legal transaction entered into.

Romer, L.J.—The question that arises upon this appeal is quite clearly defined in the respective contentions of the parties set out in the special Case. I am reading from paragraph 12 of the Case so far as it is material for the purpose. "It was contended on behalf of "the Appellant Company :—(*a*) That the payments received by the "Appellant Company under the leases or agreements for lease were "true rents issuing out of corporeal hereditaments; (*b*) That the "subjects demised were the corporeal hereditaments and nothing "else; (*c*) That there was no authority for analysing these pay-"ments : there was nothing to analyse ; (*d*) That the tying covenants "in the agreements with the tenants of which the lessees obtained "the benefit were restrictive and ran with the land, and any advan-"tages that might be derived from them flowed from the corporeal "hereditaments demised". The contentions on behalf of the Crown are set out in paragraph 13, and again, so far as material for the present purposes, are as follows : "(*g*) That the rents were, in fact,

(1) 15 T.C. 266. (2) 7 T.C. 517.

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" paid partly for premises assessable under Schedule A and partly " for other matters ". I read that first because the other matters are evidently those to be referred to in sub-paragraphs (*b*) and (*d*), which are as follows : " (*b*) That the effect of the transaction was to " transfer to the lessees the goodwill of the Appellant Company's " trade with the tied tenants ". Then : " (*d*) That the benefit of " the tying covenants was severable from the ownership of the " properties ".

In other words, the Appellants are saying that the rent which they receive under the leases from Fremlins is a true rent paid for the corporeal hereditaments, and nothing else. It is said on behalf of the Crown that only part of that rent is payable for the hereditaments and the rest of it is paid for goodwill or, which may be the same thing, for the acquisition of the tie covenant. If the Appellants are right as to what the rent is paid for, they are, in my opinion, entitled to succeed on this appeal. If the Crown are right in saying that part of this rent is paid, not for the hereditaments at all, but for something else, then, so far as the rent is paid for something else, they are right on this appeal and the Appellants would be properly assessable under Schedule D in respect of that part of the rent.

Before considering which of those two contentions ought to prevail, I would like to get rid of one argument that is stated in paragraph 13 (*e*) of the Case. Under that sub-paragraph the Crown contend : " That the assessments on the properties under Schedule " A were necessarily restricted to their bare annual value, without " taking into account the brewer's profits or the enhanced rents which " a brewer would be prepared to give to secure such profits by the use " of the properties as tied houses ". That is an argument which found favour apparently with the learned Commissioners, who found as follows : " In arriving at the amounts of the Schedule A assessments, " the profits which a brewer could make by the use of the premises as " tied houses, or the enhanced rents which he would be willing to pay " to secure those profits, were ignored, and upon the authorities " were rightly ignored. The payments received by the Appellant " Company therefore included an element which was not, and could " not be, taken into account in estimating the annual value of the " hereditaments for the purpose of assessment to tax under Schedule " A. In our opinion this element which is excluded from considera- " tion for the purposes of taxation under Schedule A is a profit " chargeable to Income Tax under Schedule D ". That clearly means that, inasmuch as it is excluded from consideration for the purposes of ascertaining the annual value under Schedule A, therefore it falls under Schedule D. It is perfectly true that the fact that the brewer is willing to give a very much higher rent for a public house because of his anticipation, if he becomes lessee, of making very large profits from the supply of beer to the house, ought not

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to be taken into consideration in ascertaining the annual value for the purposes of Schedule A, but it by no means follows from that that the large rent which, in the end, he pays for the premises, because of his anticipation of profits, is not a rent in the true sense of the term. The two things have no connection whatsoever.

I will now turn to the other two contentions of the Crown to which I have already referred. They say, in the first place, that the rent paid by Fremlins is not a true rent because it includes the goodwill or a portion of the goodwill of Leneys, the Appellants. So far as any goodwill is passed by the leases to Fremlins, it is merely and solely goodwill attaching to the premises. Everybody knows that premises to which a goodwill is attached will fetch larger rents in the market than premises to which no goodwill is attached. I am not, of course, referring now to the personal goodwill of the tenant, but what I may call the goodwill of the house. The fact that a man pays a larger rent for a house to which a goodwill is attached is no indication whatsoever that the rent which he pays is not a rent paid for the hereditament and nothing else. It is quite untrue to say that part of his rent is paid for the goodwill attached to the house and part of the rent is paid for the corporeal hereditament itself.

It is then said by the Crown—and, I think, this really comes to the same and is really in effect the same contention—that part of this rent is paid for the benefit of the tie covenant. The benefit of the tie covenant passes, however, to Fremlins because, and merely because, they are assignees for a term of years of the reversion on the lease that contains the tie covenant. No doubt Fremlins are willing to pay a larger rent for these houses because of the tie covenant. I have no doubt indeed that it is the fact of the existence of those tie covenants that is responsible for the whole transaction, but it by no means follows from that, and it is quite untrue to deduce from that, that the rent which Fremlins are paying is a rent paid partly for the corporeal hereditaments and partly for the benefit of the tie covenant. The rent is paid wholly and entirely for the corporeal hereditaments. You might just as well say that, in the case of a house whose lights are protected under the Prescription Act or by a grant, where the house is let, that part of the rent is paid by the tenant for the house and part of the rent is paid for the benefit of the negative easement. Slesser, L.J., referred to negative easements, that is to say, restrictive covenants. It frequently happens, as one knows, in what are called cases of building estates, where a big estate is laid out in a number of plots, all of which are to be governed by one set of covenants, that that set of covenants provides that a particular trade shall not be carried on upon any of the plots except one. Having regard to the doctrine in *Renals* v. *Cowlishaw*(1) and *Tulk* v. *Moxhay*(2), the tenant of that one particular house will get the

(1) (1879) 11 Ch.D. 866. (2) (1848) 18 L.J.Ch. 83.

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benefit of the restrictive covenant relating to trade affecting the other houses and, in consequence of that, he will pay a higher rent if he wants to carry on that particular business, because that particular business cannot be carried on by anybody in any of the adjoining houses. The fact that he gives a higher rent for the house, in consequence of that protection, is no ground whatever for saying that part of the rent is paid for the benefit of the covenant and part for the hereditament. The whole rent is paid for the hereditament and for nothing else. So in this case, in my opinion, Messrs. Fremlin are paying this rent for the hereditaments and for nothing else, although, as I say, it is clear they are paying a higher rent for the premises than they otherwise would do—a rent very much higher than the annual value ascertained for the purposes of Schedule A, because, as lessees, they get the benefit of these covenants.

In the *Salisbury House* case(1) the Salisbury House company were assessed, and were held to be rightly assessable, under Schedule D in respect of the profits they made by providing, I think it was, lighting and that kind of thing—for services rendered. In my opinion, if the Salisbury House company were desirous of retiring from business and were offering their premises in the market to tenants, a tenant who gave a larger rent than the Schedule A assessment, because he foresaw the possibility of making the profits that the Salisbury House company did, which were assessable under Schedule D, would be paying a rent for the hereditament only, and it would be impossible to split up the rent which he agreed to pay the Salisbury House company in the way in which it is suggested that the rent should be split up in the present case.

To take another example from cases which have been cited to us, in the *Rotunda* case(2), if the charitable corporation there had granted a lease of the Rotunda and a tenant, in calculating the rent or, say, the annual sum he was prepared to pay for the lease of the Rotunda, had taken into consideration the possibility of deriving profits from letting out the rooms in the way the charitable corporation did, it would be impossible to say that the rent he paid was not a rent paid for the corporeal hereditament, and to split it up.

For these reasons, it appears to me, with great respect to Finlay, J., that he arrived at a wrong conclusion in the case and that the appeal ought to be allowed.

Lord Hanworth, M.R.—The appeal will be allowed with costs here and below.

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(1) 15 T.C. 266. (2) 7 T.C. 517.

Lord Hanworth, M.R.—What we will do in this case is this. We will send this case back to the Commissioners for them to reconsider their decision in the light of our previous decision, in *Alfred Leney & Co., Ltd.* v. *Whelan*, and for them to decide whether there was any, and what part, of the £20,000 attributable to the subjects included in the lease other than corporeal hereditaments and, in particular, to ascertain, on the footing of the decision in *Alfred Leney & Co., Ltd.* v. *Whelan* what part of the £20,000 could be considered as attributable to personal goodwill and to the user of the trade-marks and trade labels and advertisements ; and we direct them to deal with the case accordingly.

Romer, L.J.—That involves a discharge of the assessments that have been made—at least, I suppose it does ?

Mr. Latter.—Yes. Your Lordship will allow the appeal and remit the case ?

Lord Hanworth, M.R.—I think so.

Romer, L.J.—That is the Order which Mr. Hills will appeal against to the House of Lords.

Mr. Latter.—Yes.

Lord Hanworth, M.R.—We had better allow the appeal. The difficulty on this basis is about the costs. You are entitled to have your costs in this Court anyhow. I think we will allow the appeal with costs here and below, setting aside the assessments and send the case back to the Commissioners to reconsider in the terms I have already read.

Mr. Latter.—If your Lordship pleases. Do your Lordships set aside the assessments ? Is that necessary ? One sets aside the Order.

Lord Hanworth, M.R.—Yes, that is right—we set aside the Order.

Mr. Latter.—I understand the duty has been paid in both cases. Will your Lordship make the usual Order for repayment with interest ?

Lord Hanworth, M.R.—Yes. Is it with interest ?

Mr. Latter.—Yes. I think it is four per cent. that is given now. It is under a statute.

Lord Hanworth, M.R.—That is customary ?

Mr. Latter.—Yes, it is customary and statutory.

Lord Hanworth, M.R.—Is that right about the interest, Mr. Hills ?

Mr. Hills.—Yes, my Lord.

MARSTON'S DOLPHIN BREWERY, LTD. (IN LIQUIDATION) *v.* LOUGHNAN (H.M. INSPECTOR OF TAXES)

The Crown having appealed against the decisions in the Court of Appeal, the cases came before the House of Lords (Lord Hailsham, *L.C.*, and Lords Blanesburgh, Russell of Killowen, Macmillan and Roche) on the 31st January and the 3rd and 4th February, 1936, when judgment was reserved. On the 9th March, 1936, judgment was given unanimously in both cases against the Crown, with costs, confirming the decision of the Court below.

The Solicitor-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, K.C., and Mr. Cyril L. King for the two Companies.

JUDGMENT

Lord Russell of Killowen.—My Lords, it will be convenient to deal first with the appeal which relates to the assessment of Alfred Leney & Company, Limited, to whom I will refer as Leneys. The matter for decision is whether Leneys are assessable to Income Tax under Schedule D of the Income Tax Act, 1918, in respect of the amounts by which the aggregate rents payable to them under leases of premises demised by them exceed the amounts of the aggregate annual values of the same premises as assessed to tax under Schedule A. The Commissioners having assessed Leneys under Schedule D, their assessment was confirmed by the Special Commissioners, whose determination was affirmed by Finlay, J. An appeal from his Order was allowed, and the determination of the Special Commissioners was reversed by the Court of Appeal. Hence the appeal to your Lordships' House.

I need not recapitulate the facts in any great detail. Leneys were brewers with a brewery at Dover. They owned a number of freehold and leasehold properties, the majority of which were licensed houses, let to tied tenants. I will refer later to the nature of these tied tenancies. In the year 1926 they were minded to retire, at any rate for a time, from the business of brewing, and on the 18th October, 1926, they entered into an informal agreement with a company called Fremlin Brothers, Limited, who also were brewers, under which Fremlin Brothers, Limited, were to take a lease of all Leneys' freehold and leasehold properties including plant and fixtures (except their mineral water and cordial factories and buildings) for a term of thirty-six years from the 1st October, 1926, at a rent equivalent to the average net profits of Leneys for the three years ending 30th September, 1926, subject, however, to modification and to reductions as therein mentioned. It is unnecessary to consider this agreement in further detail. It was superseded by four formal agreements for leases each dated the 21st June,

1928, one covering the unencumbered freeholds and long leaseholds, a second covering the encumbered freeholds and long leaseholds, a third covering the unencumbered short leaseholds, and a fourth covering the encumbered short leaseholds. These agreements, it will be noticed, are some twenty months later in date; but ever since the execution of the informal agreement Fremlin Brothers, Limited, had supplied beer to the tied tenants, Leneys' brewery having been closed down in December, 1926.

The rents had been calculated and ascertained in respect of each of the four blocks of properties respectively comprised in the four formal agreements, and the appropriate sum for rent so ascertained was inserted in the form of lease which was scheduled to each of those agreements.

The leases which were in fact granted in pursuance of those agreements were not granted to Fremlin Brothers, Limited, but to assignees of their assets and business, *viz.*, another limited company called Fremlins, Limited. Nothing however turns upon that, or upon the fact that the properties were divided into four blocks. The total aggregate of the rents received under the four leases over a period of five years averaged approximately £20,000. The aggregate of the annual values of the properties comprised in the four leases (arrived at by adding together all the individual Schedule A assessments) averaged over the same period about £5,500.

Assessments to Income Tax were made upon Leneys under Schedule D in respect of the amount by which the payments received by them under the leases exceeded the aggregate annual values as appearing in the Schedule A assessments. On appeal to the Special Commissioners, they held that the assessments should be confirmed on the grounds (stated shortly) that the benefit of the tying covenants had been transferred to the lessees, that the transfer of this trading connection with the tied tenants was the primary object of the arrangement, that the profits which a brewer could make by the use of the premises as tied houses, and the enhanced rent he would be prepared to give to secure those profits, were not and could not be reflected in Schedule A assessments, that therefore the payments received by Leneys under the leases included an element not included for the purposes of taxation under Schedule A, and that therefore that element was a profit chargeable to tax under Schedule D.

On request they stated a Case which came on for hearing before Finlay, J., who affirmed their decision.

The learned Judge said[1] that two distinct things were sold, *viz.*, (1) the reversions and (2) the right to supply liquor to the tied houses; that the second was property outside the ambit of the

[1] *See* pages 349/50 *ante*.

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Schedule A assessments; that, while Leneys received something as landlords, they received also what was really a trade receipt as brewers. The learned Judge did not in terms say how much was received in each capacity, but since he affirmed the determination of the Special Commissioners it must be presumed that the receipt as landlords was so much of the rent reserved by a lease as was equivalent to the aggregate of the individual Schedule A assessments of the properties thereby demised.

An appeal to the Court of Appeal resulted in a reversal of the determination of the Special Commissioners and an order for repayment of the tax paid, with interest. In the opinion of the Court of Appeal the rents payable were payable for the hereditaments demised and for nothing else and consequently no assessment to tax under Schedule D was permissible.

My Lords, I entertain no doubt that the decision of the Court of Appeal was correct.

The Crown's case is that the rent is not paid for the land alone, but is paid partly for the ties affecting the licensed houses as matters which could be separated from the property in the land, *i.e.*, from the ownership of the reversion expectant on the determination of the tenants' interest. This portion of the rent is, they say, a profit or gain which does not arise from property in land assessable under Schedule A but is a profit or gain assessable under Schedule D.

In my opinion this contention is wrong from start to finish. Let me call attention (taking it merely as a sample) to the lease of Leneys' unencumbered short leaseholds, and to the sample tenancy agreement which was put in evidence. The lease is a sub-lease for the terms held by Leneys less three days, at a yearly rent of £938 14*s*. 8*d*., the parcels, so far as relevant to this appeal, being thus described: "All the land and premises specified in the Schedule "hereto and the appurtenances thereof and the fixtures thereon "subject to and with the benefit of the existing tenancies thereof". The description might have stopped with the word "hereto"; all that follows above merely described consequences necessarily involved in the demise of the land. The lease contains a clause providing that if a house is sold or ceases to be licensed the proceeds of sale or compensation money shall if possible be applied in purchasing other licensed property which is to be deemed included in the schedule and is to be demised without alteration of the rent.

Now consider the sample tenancy agreement subject to which the lessees, under this lease, will hold the land thereby demised. Its duration is "until the tenancy shall be determined in any manner "hereinafter mentioned", and clause 4 enables either party to determine it on three calendar months' notice in writing to expire on any day, except that the tenant cannot determine before one year

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from the commencement of the tenancy. The covenant tying the tenant so far as material runs thus : " To purchase from the Land- " lords or their nominee or nominees and from no other company or " companies person or persons all ale beer stout porter and other " malt liquors cider whether in cask or bottle wines spirits cordials " and mineral waters which may be received vended or consumed " upon or out of the said premises during the tenancy at the prices " set out in the Schedule hereto so far as the same are so set out " and if and where not set out then at the Landlords' usual list " prices for tied houses for the time being and not during the said " tenancy either directly or indirectly to buy receive sell or dispose " of in upon out of or about the said house and premises or any " part thereof or suffer to be brought thereon any ale beer stout " porter or other malt liquor cider either in cask or bottle or any " wines spirits cordials and mineral waters except such as shall " have been so purchased of the Landlords or their nominee or " nominees ".

The word " landlords " includes the successors in title of the landlords and the word " tenant " includes the executors or administrators of the tenant. It would seem reasonably clear that the benefit of the tie and the reversion could not be disposed of separately. The landlord owning the reversion might name a nominee, and as long as he remained landlord he could enforce the covenant for the nominee's benefit; the nominee could not. But the moment the landlord sold the reversion the nominee would cease to be the landlord's nominee, and a refusal by the tenant to take liquor from a person who was neither the new landlord nor the new landlord's nominee would be no breach of the covenant. There is accordingly in my opinion nothing here which can be separated from the ownership of the land.

Now consider the value to the lessees of that tie for which the Crown contend that Fremlins are paying large sums as a matter apart from the land demised to them. It is worth nothing. It is at most a three months' tie, for the tenant can determine the tenancy on three months' notice. A new tie would have to be imposed on the new tenant. In these circumstances it seems to me impossible to say that anything is paid for the tie. The rent is paid for the land, the ownership of which carries with it the power to impose a tie if the existing tenancy determines and (by abstaining from determining the tenancy) to retain a tie if the sitting tenant is willing to remain. The lessees pay a rent in excess of the aggregate annual values assessed under Schedule A because of the profitable use which they the lessees (in the light, if you will, of Leneys' experience) hope to make of the land; and that rent is received by Leneys in respect of their property in land, and in respect of nothing else.

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If that be so, then the case is concluded by the decision of this House in *Fry* v. *Salisbury House Estate, Ltd.*, [1930] A.C. 432(1). When once profits and gains arising from property in land have been charged to Income Tax under Schedule A, no further Income Tax can be charged in respect of those profits and gains. If, however, the owner of the land carries on upon the land some activities, which result in profits and gains arising, not from property in the land, but from the owner's user thereof, those profits and gains may be chargeable to Income Tax. Instances of such user and chargeability will be found in the *Salisbury House* case, and in the *Rotunda* case, [1921] 1 A.C. 1(2). In the present case, however, Leneys carry on no activities on the land; they are not in possession; they do nothing but receive the rents as owners of the reversions expectant on the determination of the four leases to Fremlins.

I am of opinion that the appeal in the case of Leneys fails, and should be dismissed with costs.

In the case of Marston's Dolphin Brewery, Limited, the facts are a little different, but the result must be the same.

In that case there was only one lease, for thirty-five years, at a single rent of £20,000. The parcels demised ran thus: " All and " singular the lands buildings and hereditaments respectively " described and specified in the Schedule hereto Together with the " goodwill of the businesses carried on thereon respectively and the " licenses connected therewith and the benefit of all covenants in " restraint of trade trading and other covenants to the benefit of " which the Company is entitled in connection with all or any of " the said premises And together with the right to sign the name " of the Company in requiring the tenants of the premises to deal " exclusively with the Lessee as the nominee (as it is hereby " appointed) of the Company for all ale beer porter stout and malt " liquors cider perry wines spirits mineral waters and other goods in " accordance with the terms of the holdings of the said tenants as " tenants of the Company's premises Together also with the right " to use in connection therewith all trade marks trade labels and " advertisements used by the Company in connection with the said " businesses ".

From this it is apparent that the rent was reserved in respect of some matters other than the land. The Commissioners apportioned out of the rent of £20,000, £100 to the free trade of the brewery and £100 to the goodwill of the mineral water business. Where a single rent is reserved in respect of several subject matters, some of which do not represent property in land, such apportionment is right and proper (*Campbell* v. *Inland Revenue*, 1 T.C. 234).

(1) 15 T.C. 266.
(2) Governors of the Rotunda Hospital, Dublin *v.* Coman, 7 T.C. 517.

(Lord Russell of Killowen.)

Ultimately the Commissioners fixed the sum of £15,000 as being the portion " attributable to the subject matters of the lease, other than " the corporeal hereditaments ". The Court of Appeal by their Order reversed this decision, and remitted the case to the Commissioners for them to reconsider their decision in the light of the decision of the Court of Appeal in Leneys' case, and to decide whether there was any and what part of the £20,000 attributable to subjects included in the lease other than corporeal hereditaments, with a particular reference to personal goodwill, and the user of trade marks, trade labels and advertisements. It was intimated to us that the parties would probably be able to come to an agreement without any reconsideration by the Commissioners; but in any event the Order of the Court of Appeal must stand, and the appeal therefrom should be dismissed with costs.

My Lords, I am authorised by my noble and learned friends, the **Lord Chancellor** and **Lord Blanesburgh**, to state that they concur in the opinion which I have just delivered.

Lord Macmillan.—My Lords, I concur.

Lord Roche.—My Lords, I also concur.

Questions put:

In the case of Loughnan v. *Marston's Dolphin Brewery, Limited (in liquidation).*

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and that this appeal be dismissed with costs.

The Contents have it.

In the case of Whelan v. *Alfred Leney and Company, Limited.*

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and that this appeal be dismissed with costs.

The Contents have it.

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