NO. 1133—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—
4TH, 7TH AND 8TH NOVEMBER, 1938

COURT OF APPEAL—3RD, 6TH, 7TH AND 16TH MARCH, 1939

HOUSE OF LORDS—13TH AND 14TH FEBRUARY AND
12TH MARCH, 1940

B. G. UTTING & CO., LTD. v. HUGHES (H.M. INSPECTOR OF TAXES) (1)

Income Tax, Schedule D—Profits of trade—Builders—Houses disposed of by way of lease, subject to payment of premium and yearly ground rent—Whether premiums and ground rents to be included in trading receipts and, in the case of the ground rents, whether at cost or realizable value.

The Appellant Company carried on the business of speculative builders. In a number of cases it disposed of houses by granting, in consideration of a premium, a lease for 99 years subject to the payment of a yearly ground rent. Since its formation the Company had not sold any ground rent so created.

On appeal against assessments to Income Tax under Case I of Schedule D the Company contended that in computing its trading profits for Income Tax purposes nothing fell to be included in respect of the premiums or the right to the ground rents, and, alternatively as regards the ground rents, that no profit arose in respect of the value of its reversionary interest in the lands or of the ground rents until the sale thereof. The Special Commissioners decided that both the amount of the premiums and the realizable value of the ground rents at the date of sale of the houses must be brought in as receipts of the Company's trade.

Held, *that the Special Commissioners' decision was correct in regard to the treatment of the premiums, but that the unrealized freehold reversions (the " ground rents ") must be brought into the trading account at cost or market value, whichever was the less.*

John Emery & Sons v. Commissioners of Inland Revenue, 20 T.C. 213, *distinguished.*

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(1) Reported (K.B.) [1939] 1 K.B. 256; (C.A.) [1939] 2 K.B. 231; (H.L.) [1940] A.C. 463.

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 6th January, 1938, B. G. Utting & Co., Ltd. (hereinafter called " the Company "), appealed against assessments to Income Tax for the years ending 5th April, 1936 and 1937, made under Case I of Schedule D of the Income Tax Act, 1918.

2. The Company, which was incorporated under the Companies Act, 1929, on 11th March, 1935, carries on the business of builders, contractors and developers of building estates.

A copy of the Memorandum and Articles of Association of the Company is attached hereto (marked " A ") and forms part of this Case(1).

3. The Company owns two estates, one at Norbury and one at Hither Green. In the course of its trade the Company has developed these estates by making roads and laying down sewers and drains, and on the said lands has erected houses.

4. In a number of cases the Company sells land with the houses thereon freehold for cash, and in these cases the purchase price received by the Company is brought into the Company's accounts as a trading receipt, while the cost of the land and buildings is set against it as a trading expense.

In other cases the Company disposes of houses by way of 99 years' leases in consideration of a cash payment and subject to a yearly ground rent of either £9 15*s.* 0*d.* or £10 10*s.* 0*d.* In these cases the said cash payment is brought into the Company's accounts as a trading receipt and the ground rent is brought into those accounts at a figure assumed to represent the cost thereof as stated in paragraph 6 hereof, and the cost of the land and buildings is debited as a trading expense.

Whichever method is adopted the transaction is a transaction in the ordinary course of the Company's trading.

During the period 1st July, 1935, to 31st December, 1936, the Company disposed of properties by way of freehold sales in about twenty cases and granted leases for 99 years, subject to ground rents, in respect of nine houses.

The Company has not since its formation sold any ground rents, but has always retained its reversionary estate in those houses in respect of which the ground rents are payable.

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(1) Not included in the present print.

5. The method adopted by the Company for the disposal of houses by way of 99 years' leases subject to ground rents is as follows :—

> An agreement is entered into by the Company with the purchaser whereby the Company agrees to sell and the purchaser agrees to purchase by way of lease, for a named sum, a specified plot of land with the house erected or to be erected thereon. On payment of the purchase money a lease for 99 years, subject to a ground rent of £—, is granted by the Company to the purchaser.

Specimen copies of the agreement for sale and the lease for 99 years are attached hereto (marked " B ", and " C ") and form part of this Case(1).

The lease, though actually executed by B. G. Utting personally, was executed by him as nominee of the Company, who were throughout the beneficial owners of the two estates and the rents arising under the leases thereof(2).

The said agreements and leases are in similar form for both the Hither Green and Norbury estates.

6. A copy of the Company's Balance Sheet as at 31st December, 1936, and Trading and Profit and Loss Account for the period 1st July, 1935, to 31st December, 1936, is attached hereto (marked " D ") and forms part of this Case(1).

Among the assets in the Balance Sheet appears an entry :—

Materials on site, premises in course of erection, completed and unsold, undeveloped land and ground rents created and unsold	£46,882 2*s*. 8*d*.

The said sum of £46,882 2*s*. 8*d*. is made up as follows :—

	£	*s*.	*d*.
Ground rents created and in hand at cost	1,374	0	0
Undeveloped land	36,035	2	8
Materials on site	9,473	0	0
	£46,882	2	8

The said sum of £1,374 was arrived at by taking a proportionate part of the cost of the land and of the expenditure on roads and sewers. No part of the expenditure upon the building was taken into consideration.

In the Trading and Profit and Loss Account the entry, sales of premises £25,005 11*s*. 8*d*. includes sums received for sales of freeholds and the cash payments made prior to the grant of the leases for 99 years.

(1) Not included in the present print.

(2) Added by consent at the hearing before Macnaghten, J., on 4th November, 1938.

7. Mr. Ernest William Watts, a member of the firm of Messrs. Bourner, Bullock, Andrew & Co., Chartered Accountants and Auditors to the Company, gave evidence before us and stated (*inter alia*) as follows :—

(*a*) During the period 1st July, 1935, to 31st December, 1936, the Company had sold about twenty houses freehold and granted 99 years' leases, subject to ground rents, in respect of nine.

(*b*) The sums received by the Company from the freehold sales and the premiums received on the grant of 99 years' leases were included in the Company's trading account as receipts from sales of premises.

(*c*) He regarded ground rents as stock in hand, and as such they were correctly entered in the accounts at cost price.

(*d*) The Company had not sold any ground rents and he was of opinion that until they did sell the ground rent no profit was realized in respect thereof, and it would not be correct to bring the value into account at a sum in excess of the cost.

(*e*) The Company had not sold any land without a house erected upon it.

(*f*) Ground rents were readily saleable and their realizable value could be readily ascertained.

8. Mr. Francis Laurence Cooke, a member of the firm of Messrs. Slater Chapman & Co., Incorporated Accountants, consulting Accountants to the House Builders' Association of Great Britain, also gave evidence. He said that in his opinion it would not be correct to take credit in the Company's accounts for any profit in respect of the creation of the ground rents until the sale of the reversionary estate, when the transaction initiated by the original purchase of the land would be completed.

9. In computing the profits of the Company under Case I of Schedule D a sum of £2,139 has been included by the Revenue as a trading receipt in respect of the realizable value of the said ground rents.

The sum of £2,139 was computed as follows :—

Ground rents £93 at 23 years' purchase—£2,139.

The Company did not agree that this valuation was correct and no evidence on the matter was called before us, it being agreed that, if necessary, the case should be brought before us at a later date to take evidence on the question.

10. It was contended on behalf of the Company :—

(*a*) That both the premiums received on the granting of the leases and the ground rents reserved are profits arising to the Company from the ownership of the land in respect of which the Company was taxable only under Schedule A. In support of this contention the cases of *Salisbury House Estate, Ltd.* v. *Fry*, [1930] A.C. 432, 15 T.C. 266, and *Birch* v. *Delaney*, [1936] I.R. 517, were referred to.

(*b*) That the case of *John Emery & Sons* v. *Commissioners of Inland Revenue*, [1937] A.C. 91, 20 T.C. 213, is distinguishable on the ground that in that case the builders had disposed of their entire interest in the land for money's worth.

(*c*) That the right to the ground rents is inseparable from the Company's reversionary estate in the lands subject to the leases, and in computing the Company's profits for assessment to Income Tax under Schedule D no addition falls to be made in respect of such right.

(*d*) Alternatively, that if the value of the reversionary estate retained by the Company or of the right to receive the ground rents falls to be included in the computation of the profits of the Company's trade for the purposes of Schedule D no profit arises to the Company in respect of the value of such reversion or ground rents until the sale thereof, and that until the reversion is realized such value falls to be brought into account only at cost or at market value if that is less than cost.

11. It was contended on behalf of the Inspector of Taxes (*inter alia*) that :—

(*a*) The Company in the course of its trading had sold houses and land on 99 years' leases in each case for a cash payment and money's worth, *i.e.*, the right to receive a ground rent.

(*b*) The said cash payments were trading receipts of the Company and as such fell to be included in the computation of the Company's profits for the purposes of assessment under Case I of Schedule D.

(*c*) The right to receive ground rents was a part of the consideration for which the Company had disposed of land and houses and was a right which could readily be turned into money, and was a trading receipt equally with the cash payments.

(*d*) (1) The realizable value of the said ground rents ought to be added to the amount of the Company's trading receipts credited in the Company's accounts in order to ascertain the trading profits for the purposes of assessment under Case I of Schedule D.

(2) Alternatively, if the cost price or market value (whichever is the lower) had to be taken, the method contended for by the Appellant Company was wrong.

(*e*) The case of *Birch* v. *Delaney*, [1936] I.R. 517, was wrongly decided.

(*f*) Upon the facts proved this case was in principle indistinguishable from the case of *John Emery & Sons* v. *Commissioners of Inland Revenue*, 20 T.C. 213.

12. Having considered the evidence and arguments adduced before us, we decided as follows :—

" The Company, which was incorporated on 11th March, " 1935, carried on business as speculative builders.

" In the course of its trade the Company buys land, " develops it and builds houses thereon, and the houses when " completed are disposed of by the Company by way of sale.

" In some cases houses and land are disposed of freehold. " In other cases leases for 99 years are disposed of at premiums " and ground rents of either £9 15*s.* 0*d.* or £10 10*s.* 0*d.* per " annum.

" Whichever method of disposal is adopted the transaction " is a transaction in the course of the Company's trading.

" No question arises on this appeal as regards those cases " where the Company has sold freeholds, but in the cases " where houses have been disposed of by way of sub-demise " for a term of years subject to ground rents, it is argued " that the Company is not liable to be assessed under " Schedule D in respect of the amount of the premiums " received or of the capitalised value of the ground rents. In " support of this contention the Company relies on the case of " *Birch* v. *Delaney*, [1936] I.R. 517.

" We have considered the judgment of the Supreme Court " of Southern Ireland (delivered by FitzGibbon, J.). In our " opinion the decision is not in accordance with the principles " laid down by the House of Lords in *John Emery & Sons* v. " *Commissioners of Inland Revenue*, 20 T.C. 213.

" We think that the law was correctly stated in the judg- " ments of Hanna, J., and O'Byrne, J., in the High Court, " [1936] I.R., at pages 525 and 527.

" Upon the documents and facts before us we hold that " where houses have been disposed of by way of 99 years' " leases at ground rents, completed sales in the course of " the Company's trade have been effected, and in our opinion " the proceeds of those sales must be brought into the Com- " pany's trading accounts.

" We hold that the correct method of dealing with these " transactions in the Company's accounts is to bring in as " receipts from sales the amount of the premiums plus the " realizable value of the ground rents at the date of the " transactions.

" We heard no evidence as to the realizable value of the " ground rents and failing agreement between the parties on " this point, the case will have to be set down for further " hearing ".

13. 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.

14. If the opinion of the King's Bench Division of the High Court of Justice is that our determination is correct the case will have to be remitted to us to determine the realizable value of the ground rents. If, however, such opinion is that our determination is wrong and that the ground rents have to be valued at cost price or market value (whichever is the lower) the case will have to be remitted to us to determine the basis upon which the said cost price should be calculated.

N. ANDERSON,
MARK GRANT-STURGIS,
R. COKE,
Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94/99, High Holborn,
London, W.C.1.

30th May, 1938.

The case came before Macnaghten, J., in the King's Bench Division on the 4th and 7th November, 1938, when judgment was reserved. On the 8th November, 1938, judgment was given in favour of the Crown, with costs.

Mr. A. M. Latter, K.C., and Mr. J. S. Scrimgeour appeared as Counsel for the Appellant Company, and the Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Macnaghten, J.—This is a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts to obtain the opinion of the Court as to the correct method of arriving at the assessment to Income Tax of the Appellant Company, B. G. Utting & Co., Ltd., under Case I of Schedule D of the Income Tax Act, 1918, for the years ended the 5th April, 1936, and 5th April, 1937.

The Company was incorporated on the 11th March, 1935, under the Companies Act, 1929, for the purpose, *inter alia*, of carrying on the business of speculative builders, and since its incorporation it has in fact carried on that business and no other. It has acquired two building estates, one at Norbury and another at Hither Green,

(Macnaghten, J.)

and in the course of its business has developed these estates by making roads, laying down sewers and drains, and building houses thereon.

Sometimes the Company sells the houses it has built for cash. In those cases the price received by the Company for the house is brought into the Company's accounts as a trading receipt, and the cost of the house is set against that as a trading expense. No difficulty or question arises with regard to those cases.

But in other cases the Appellant Company disposes of the houses it has built by granting, in consideration of a premium, a lease for 99 years, subject to the payment of an annual ground rent. In some cases the ground rent is £9 15*s.* 0*d.*; in others it is £10 10*s.* 0*d.* The lease imposes upon the lessee the covenants which are usual in such instruments, including, of course, a covenant to pay the ground rent. The question which falls to be decided in this case is how the matter ought to be treated in the assessment to Income Tax when the Company has disposed of a house in that way.

Before the Special Commissioners, the contention was put forward on behalf of the Appellant Company that, in these cases, the premium received on the granting of the lease and the ground rent reserved thereby were profits arising to the Company from the ownership of land in respect of which the Company was taxable only under Schedule A, and should be excluded entirely from any assessment under Schedule D. This contention was based upon a decision of the Supreme Court of the Irish Free State (as it then was) in a case entitled *Birch* v. *Delaney*, [1936] I.R. 517. That decision appears to me to justify the contention put forward before the Special Commissioners.

The facts in that case were that a builder, Mr. Delaney, took on lease a plot of ground for a term of years, subject to a ground rent. On this plot he built several houses, which he sold. The sale of the houses was effected by way of sub-demise for a term of years subject to a ground rent in each case. He also received a sum of money in each case by way of a fine or premium.

The Supreme Court, reversing the judgment of the High Court (Hanna and O'Byrne, JJ.), decided that Mr. Delaney was not liable to be assessed under Schedule D either in respect of the premiums or of a capitalised value of the ground rents. The judgment of the Supreme Court was delivered by FitzGibbon, J.

I have carefully considered the judgments delivered in that case and have come to the same conclusion as that at which the Special Commissioners arrived, namely, that the judgments of Hanna and O'Byrne, JJ., in the High Court are to be preferred to the

(**Macnaghten, J.**)

judgment of FitzGibbon, J., in the Supreme Court. As it seems to me, if I may say so with respect, FitzGibbon, J., misapprehended the effect of the decision of the House of Lords in the case of *Salisbury House Estate, Ltd.* v. *Fry*, [1930] A.C. 432(1).

However that may be, it is sufficient for the purposes of this case to say that no such contention as was put before the Special Commissioners was put before this Court. Mr. Latter, on behalf of the Appellant Company, conceded that in a case where a speculative builder disposes of a house by means of a long lease, the premium received in consideration of the granting of that lease must be brought, as a trading receipt, into his trading account for the purposes of assessment to Income Tax. He also conceded that the ground rents must in some form or other be brought into the trading account as a trading receipt.

For the Crown it is contended that the ground rent, or as I should prefer to call it, and, I think, more correctly, the reversion expectant on the determination of the lease, should appear in the trading account at its market value, whereas for the Company it is said that the reversion ought to appear not at its market value but at its cost. The question on which the Commissioners desire the opinion of the Court is: which of those contentions is right? Ought the freehold reversion to appear in the trading account at its realizable value or at cost?

In the case of a company which is carrying on the business of a speculative builder, the land it buys, the roads it makes and the houses it builds—things which would be "capital" in other kinds of business—are its "stock-in-trade" and appear at cost in its trading account until the houses are sold. The argument for the Appellant Company in this case is—as I understand it—that before the grant of the long lease of a house the Company was the absolute owner of the house and the house would then appear in the trading account at cost. By granting the lease, the Company has divided that ownership into two things—the lease and the reversion. The reversion, says Mr. Latter, remains part of its stock-in-trade, and in accordance with the general rule must be put at cost in the trading account.

The first criticism which occurs to one on that argument is that the ownership of a freehold reversion does not seem to be any part of the business of a speculative builder. If that be the correct view, then the argument that there should be entered into the trading account a receipt representing the cost of the freehold reversion falls to the ground.

Secondly, in cases where stock-in-trade is taken in a trading account at cost, the actual cost of the stock can be ascertained

(1) 15 T.C. 266.

(Macnaghten, J.)

by investigating the accounts of the company. But the Appellant Company did not buy any freehold reversion, and there is nothing in their books which would enable anyone to say what was the "cost" of any such reversion in the ordinary sense of that word, though I was told that the Company's accountant had suggested several ways in which an estimate of the supposed "cost" of a freehold reversion could be made.

Whether those arguments are sound or unsound, so far as I am concerned it appears to me that this case is concluded by the decision of the House of Lords in *John Emery & Sons* v. *Commissioners of Inland Revenue*, 20 T.C. 213. That was a Scottish case. A firm of builders had acquired certain land upon which they erected dwelling-houses. In a number of cases they created ground annuals over the houses and the ground attached to them, and thereafter sold the houses and ground for a cash payment, subject to the ground annuals, which they retained in their possession. It appears that what is called in Scotland a "ground annual" corresponds to what is called in our law a rent-charge. When the builders sold the houses subject to the ground annuals, they parted with all their interest in the houses and land attached thereto.

The question arose in that case as to whether, when a house was sold subject to a ground annual, something should appear in the assessment to Income Tax as a trading receipt in respect of the ground annual. The House of Lords held that the realizable value of the ground annuals created and retained by the builders should be added to the amount of the trading receipts for the purpose of ascertaining the amount of their trading profits chargeable to Income Tax. It seems to me that that case covers the present one. It is quite true that there is a distinction between the cases, in that in the Scottish case the speculative builders, when they sold a house subject to the ground annual, parted with all their interest in it, whereas in this case the speculative builder has parted with his right to possess the land for no more than ninety-nine years, and at the end of ninety-nine years will, pursuant to the terms of the lease, be entitled to re-possess the property. But I do not think, after reading the judgments delivered in the House of Lords, that that is a distinction which affects the matter I have to determine here. The basis of the decision of the House of Lords was that the ground annuals were readily saleable—there was an open market for property of that description—and that for the purpose of ascertaining the profits made by the speculative builder in the year in question they must be included in the account at their market value. An assessment to Income Tax under Schedule D is for the purpose of ascertaining the profit which a trader has made in the particular year for which the assessment is made. In this

(Macnaghten, J.)

case before me, as in the case of the ground annuals, the ground rents, as they are called in the Case, or the reversions expectant on the determination of the leases, as I prefer to call them, are readily saleable, and their realizable value can be ascertained without any difficulty at all.

The Special Commissioners decided that the correct method of dealing with these transactions in the Company's accounts was to bring in as receipts from sales the amount of the premiums plus the realizable value of the ground rents at the date of the transactions. In my view the decision of the Special Commissioners was right, and the Case must, therefore, go back to them to ascertain that value.

It was said by Mr. Latter that, although it is true that the value of the reversion at the date when the lease was granted can be readily ascertained, yet it is a hardship that the speculative builder should be treated as having received that value, when in fact he has not sold the reversion, and may not sell it for years to come, and then perhaps he may find that the market value has gone down, owing to a change in the value of money. That is a hardship which he can, of course, avoid by selling the reversion at once. If he is not minded to do that, and chooses to keep the reversion in his own hands, he is really speculating not in houses but in reversions, a different class of business altogether.

It seems to me, as I have already said, that a speculative builder who, in consideration of a premium, grants a long lease at a ground rent and retains the reversion in his own hands is left with a form of property which cannot be described as part of his "stock-in-"trade". Therefore, in my opinion, this appeal fails.

Mr. Hills.—The appeal will be dismissed with costs?

Macnaghten, J.—I think so.

An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Scott, Clauson and du Parcq, L.JJ.) on the 3rd, 6th and 7th March, 1939, when judgment was reserved. On the 16th March, 1939, judgment was given unanimously in favour of the Crown in regard to the premiums, confirming in that respect the decision of the Court below, but unanimously against the Crown in regard to the unrealized freehold reversions, thereby reversing that part of the decision of the Court below.

Mr. A. M. Latter, K.C., and Mr. J. S. Scrimgeour appeared as Counsel for the Appellant Company, and the Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Scott, L.J.—Clauson, L.J., will read the judgment of the Court.

Clauson, L.J.—This is the judgment of Scott and du Parcq, L.JJ., and myself.

This case raises two points, both of importance, to those concerned in the developing of building estates. The particular facts are set out fully in the Stated Case, and also in the judgment of Macnaghten, J., under appeal, and need not be recapitulated.

The first point arises thus. During the period of assessment the taxpayer has expended money in purchasing freehold land, buying building materials and paying for cartage, and paying wages; by means of this expenditure he has completed some houses and partially completed others; some houses he has sold out and out, receiving cash; some houses are still unsold; some houses he has demised on 99 years' leases, receiving in each case a premium, and retaining unsold the freehold reversion, burdened, of course, by the 99 years' lease. In making out a trading account to lead to the ascertainment of the profit for the period of assessment he debits the account with the whole of the above expenditure which has resulted in the production (*a*) of the completed houses which he has sold out and out, (*b*) of the completed houses which he has leased, reserving the freehold reversion, and (*c*) the uncompleted houses and the houses which have neither been sold nor let. He credits the account with the sale moneys received for the houses sold out and out and with the premiums received on the grant of the leases on the houses demised on 99 years' leases. In order to ascertain the profit of the period of assessment he must credit the account with an item to represent the assets completed or partially completed but unsold. The normal method of dealing with this item would be to make it up by calculating cost or market value, whichever is the lower, of the various assets represented. The one thing which it would obviously be wrong to do would be to make up the item by putting on the assets the market value if it exceeds cost; that would result in swelling the gross profit (the balancing item on the other side) by bringing in as part of the gross profit an unrealized profit, *i.e.*, it would put into the profit of the period of assessment the profit expected to be realized in the future.

The claim of the Crown is that the freehold reversions should be brought into the account not at their cost or market value, whichever is lower, but at their market value which can, it is said, be easily ascertained. The claim is supported on the ground that the freehold reversions of the leased plots ought not to be treated as unrealized assets of the business. It is said, and quite truly, that an asset may be realized either by sale for cash or by sale or exchange for something other than cash. It is pointed out that the House of Lords held, in *Commissioners of Inland Revenue* v.

(Clauson, L.J.)

John Emery & Sons, 20 T.C. 213, that the sale of a completed house with the ground on which it stood for a rent-charge (or the Scottish equivalent of a rent-charge) charged on the land sold was held to be a realization of the house and ground, though not a realization for cash, with the result that in the trading account of the firm then in question the rent-charge was to be brought in at market value (which, it was said, was easily ascertainable) as the proceeds of a realization of the house and ground in question.

The answer of the subject to this claim is that in the present case the house and the ground on which it stands have not been realized. What has been realized (it is said) is a portion of the unencumbered freehold, namely, a term of 99 years at a ground rent, carved out of the freehold estates; and the proceeds of that partial realization, namely, the premium, have been brought in as proceeds of realization and appear (not perhaps quite accurately) in the item in the trading account representing proceeds of sale. What is called the " ground " rent ", *i.e.*, the freehold interest burdened by the 99 years' lease, is, it is said, an unrealized asset, and properly to be brought into the account at cost or market value, whichever is the less. When it is sold in due course, the profit on the complete realization of the plot will be ascertained, and that profit, so far as not already accounted for in this year's trading account, will come into the trading account of the period covering the date of realization.

In our judgment the contention put forward by the subject is correct. In truth and in fact the freehold plot has not been realized. It has been retained unsold, subject, of course, to the alienation of the 99 years' term. There is the crucial difference from *Emery's* case that in that case the subject had ceased to be the owner of the house and ground and became the owner of a rent-charge; in the present case, the subject continues owner of the house and ground, though a partial interest in the house has been realized, and his ownership is therefore subject to the lease created by way of alienation of, and realization of, the partial interest.

It was suggested that in truth and in fact the business of the Company, as regards those plots which it ultimately determined to lease on 99 year leases, was not the business of developing land and selling the developed land at a profit, but a business of developing and leasing it and retaining the freehold reversion resulting from the leasing as an investment, and carrying on therewith the business of a mere investment or land-owning company. It was, however, pointed out that the Case contained no finding on which such a contention could be based. It is to be observed, further, that in this particular case the business is clearly not confined to that of developing by leasing or, as it has sometimes been called, by " creating ground rents ", a circumstance which of itself may be enough to account for the absence of the finding required to give even a preliminary basis for the suggested argument.

(Clauson, L.J.)

The second point which arises is quite separate and distinct. The premiums which, as already explained, have been received in the period of assessment, on the grant of 99 year leases have in fact been brought by the subject into the trading account as proceeds of sale. It is, however, suggested on behalf of the subject that although these premiums are obviously profits arising from the subject's trade of land development, they are not properly taxable as such. The steps in the argument put forward in support of this contention which, notwithstanding that the point must have been available in the case of a vast number of similar assessments, appears admittedly to be novel, are as follows.

First, it is pointed out that under Schedule A, No. II, Rule 6, the receiver of a fine in consideration of a demise of lands is to be assessed and charged to tax on the amount of the profits received in respect of the fine in the year preceding the year of assessment, with a proviso for allowance in case of the profits being applied as productive capital. Next, it is pointed out that it is impossible to draw any distinction between the word "fine" and the word "premium" for the present purpose; each is nothing more nor less than a money payment in consideration of a demise. Next, it is pointed out that it is settled by the decision in *Salisbury House Estate, Ltd.* v. *Fry*, [1930] A.C. 432([1]), that if an item of receipt is taxable under Schedule A, it cannot form an item in the computation of liability to tax under Schedule D. The conclusion suggested is that had the present case arisen before certain changes in the law effected by the Finance Act of 1926, the operation of which will be dealt with later, it would have been necessary to hold that the premiums in question were taxable under Schedule A, with the result that they would have to be eliminated from the trading account as adopted for the purposes of taxation under Schedule D.

The provision in Schedule A, No. II, Rule 6, is to be traced back to legislation as early as 1805 : and it was argued for the Crown that the purview of the Rule is very narrow and must be limited to fines on renewal of renewable leases, whether renewable under covenant or by custom. It may very likely be the case that fines of this character were very familiar in 1805 and that at that date such premiums as the present were either unknown or at least unusual. It does seem to be the fact that it has never been the practice to construe the word "fine" in the Rule as covering such premiums as the present. The fact however remains that in its language the Rule is not confined to demise by way of renewal of a former lease, and that no sound ground seems to exist for distinguishing between a fine on a demise and a premium on a demise. It would be attractive in such a case, but scarcely legitimate, to fall back upon the maxim *communis error facit legem*.

([1]) 15 T.C. 266.

(Clauson, L.J.)

For reasons which will appear below it is not necessary to form a final view upon the question, and the case may safely be dealt with on the assumption, without deciding the point, that the subject's contentions are so far correct and that apart from the effect of the Finance Act, 1926, the subject's claim to eliminate these premiums from the Schedule D account on the footing that they are taxable under Schedule A is a sound claim.

A drastic change was, however, made by Section 28 of the Finance Act, 1926. By that Section, read with the Third Schedule to the Act, the subject-matter of the Income Tax Act, 1918, Schedule A, No. II, including fines (the subject-matter of Rule 6 of No. II) ceased to be chargeable under Schedule A, and became chargeable under Case III of Schedule D, the proviso to Rule 6 being incorporated among the Rules of Schedule D, Case III. The result without question is that the decision in *Salisbury House Estate, Ltd.* v. *Fry*, [1930] A.C. 432(1), no longer operates to exclude the premiums from assessment under Schedule D. The question however still remains whether the express provisions of Section 28 of the Finance Act, 1926, coupled with the Third Schedule of that Act, make it essential that the premiums should be dealt with under Case III of Schedule D, and under no other case. If they are to be dealt with under Case III, the subject will have the benefit of the proviso in Rule 6 making an allowance to him in case the premiums are applied as productive capital. It is suggested, however, for the Crown, that the effect of the 1926 Act and its Schedule is merely to expand Case III of Schedule D so as to cover this special subject of taxation, and that there is nothing expressed in or to be implied from the wording of the 1926 legislation which repeals, in regard to those particular items, the well-recognized right of the Crown, where a subject-matter of taxation under Schedule D falls within more than one case, to choose the case under which it is to be assessed, and thus to choose the case rules applicable. It is plain that the profits from the premiums fall within Case I of Schedule D as profits from a trade, and that, until the 1926 Act, it was only the assumed operation of Schedule A, No. II, Rule 6, which taxed them under Schedule A, and thus (on the principle of *Salisbury House Estate, Ltd.* v. *Fry*) excluded them from taxation under Schedule D. The transfer from Schedule A to Schedule D effected by the 1926 legislation leaves them taxable under Case I of Schedule D, though at the same time they are, by virtue of the 1926 legislation, taxable under Case III of Schedule D. When once the conclusion is reached (and in our view it is a correct conclusion) that nothing in the 1926 legislation places the profits in question in any different position to any other item taxable under Schedule D, Case III, it seems

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(1) 15 T.C. 266.

(Clauson, L.J.)

necessarily to follow that the Crown can exercise its option to tax them under Case I, with the result that the proviso to Schedule A, No. II, Rule 6, though now operating as a rule under Case III, ceases to have application to them.

The result is that assuming the premiums in question to be " fines " within the meaning of Schedule A, No. II, Rule 6, they, being in this particular case profits of a trade, are properly brought into the trading account as proceeds of realization and are thus taxable under Schedule D, Case I.

It was common ground between Counsel that if the freehold reversions (otherwise referred to as the ground rents) are not to be brought in at realizable value, the matter must be remitted to the Commissioners to determine the basis at which cost price should be calculated, and accordingly the appeal will be allowed and the Case will be remitted to the Commissioners accordingly. The determination of the Commissioners that the premiums are to be reckoned under the heading of receipts from sales is correct and will of course remain unaffected.

As the Crown has succeeded in regard to the premiums, while the subject has succeeded as regards the matter of the freehold reversions or ground rents, there will be no costs on either side of this appeal or of the hearing before the learned Judge.

There will be leave to either side to appeal to the House of Lords.

Mr. Honeyman.—Might I, on behalf of the Appellants, raise the question of costs in the course of the proceedings in the House of Lords? There is a principle that when it is an important principle for the Revenue and the amount involved from the point of view of the taxpayer is small, terms have in the past been imposed on the Revenue as a condition of leave to appeal. On behalf of the Appellants, I ask your Lordships to say something on that subject as to whether the terms should be imposed.

(The Court conferred.)

Scott, L.J.—The Court does not think the principle under which those special arrangements have been made or suggested by the Court applies to the present appeal.

The Crown having appealed against the decision in the Court of Appeal in regard to the unrealized freehold reversions, the case came before the House of Lords (Viscount Caldecote, L.C., Viscount Maugham, Lords Russell of Killowen, Wright and Romer) on the 13th and 14th February, 1940, when judgment was reserved. On the 12th March, 1940, judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. Raymond Needham, K.C., and Mr. J. S. Scrimgeour for the Company.

JUDGMENT

Viscount Caldecote, L.C. (read by Viscount Maugham).—My Lords, the Respondent Company carried on the business of developers of building estates or, as the Special Commissioners have found, of speculative builders. In the course of its trade the Company dealt with some of the houses which it had built by granting a lease for 99 years. A ground rent of £9 or £10 was reserved by the Company and a premium was paid to the Company by the lessee. The Company retained the reversionary estate, and sought to bring into the computation of the profits and gains of the Company for the year of assessment in respect of the houses their cost only (or market value if less than cost) until the sale of the reversion. No question now arises as to the premium. The Respondent Company has accepted the decision of the Court of Appeal that this must be brought in as a trading receipt, and I do not doubt the correctness of the view taken by the Court of Appeal on the facts of this case. The position might be different if the consideration for the lease was represented by a premium and only a peppercorn rent was reserved. On such a case I express no opinion. The Crown's appeal concerns the capitalised or realizable value of the ground rent. It is claimed that this must also be brought into the Company's profit and loss account as a trading receipt.

The argument for the Crown may be shortly stated. The Respondent Company is said to have disposed of the houses in question by granting a 99 years' lease in return for (1) a premium and (2) a ground rent, or at any rate to have realized its whole interest for the term of 99 years. The ground rent must be regarded as money's worth, and is no different in principle from the premium. Money or money's worth alike must be brought into the account as a trading receipt and the realizable value of the ground rents must be ascertained for the purpose of the account of profits and gains. The Respondent Company, on the other hand, denies that it has parted with the whole of its interest in the houses, even for the term of 99 years. As long as the reversionary estate is retained, the Respondent Company claims to be entitled to treat the houses as part of the stock-in-trade of its business.

My Lords, the key to the solution of this question seems to me to be found by keeping in view the real transaction. The Attorney-General laid emphasis on the word used by the Special Commissioners to describe what was done. He said the Respondent

(Viscount Caldecote, L.C.)

Company disposed of its houses. What the Respondent Company disposed of was not the houses, but a leasehold interest, retaining the reversionary estate. The Respondent Company has not yet disposed of its property so far as the houses in question are concerned. It may do so at any time and, the Company being speculative builders, this is likely to take place sooner rather than later. When it sells the ground rent, it will sell the reversion, and the whole of the Respondent Company's estate will be converted into an asset which admittedly comes into the trading account. Until that happens the Company, which was the freeholder before the ground rent was created and remained the freeholder after it was created, has only partially realized its property.

The decision in *John Emery & Sons* v. *Commissioners of Inland Revenue*,[1937] A.C. 91 [1], which was much relied on by the Crown, rested on the basis that the builders disposed of their entire interest in the land and in the houses built upon it, in return for cash and certain ground annuals. In the words of my noble and learned friend Lord Maugham, in giving his opinion in that case[2], the right of ownership had by the transaction in question been converted into a different type of property—namely, ground annuals. In those circumstances the ground annuals were required to be valued for the purpose of including the proceeds of the realization of the property in the trading account, so as to compute the company's profits and gains. In the case before your Lordships the builder, that is the Respondent Company, has retained, as it has a perfect right to do, an interest in the houses of a real and substantial character. This is in the ordinary exercise of the trade or business of a speculative builder who may have reasons for retaining the reversionary estate of any house or houses, until he can realise them all together, or possibly under better market conditions. I see no reason or principle which compels him to pay tax on the capitalised value of the rents which he has reserved.

My Lords, I find myself in complete agreement with the judgment of the Court of Appeal delivered by Clauson, L.J., and I think this appeal should be dismissed with costs.

Viscount Maugham.—My Lords, the question in this case may be very briefly stated. The Respondents carry on the business of builders, contractors and developers of building estates. They have developed two estates by making roads, laying down sewers and drains, and building houses. In some cases they have sold land with the houses for cash. In other cases they have granted leases for 99 years in consideration of premiums and yearly ground rents of £10 per house or thereabouts. The Respondents have not sold

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[1] 20 T.C. 213. [2] *Ibid.*, at p. 228.

(Viscount Maugham.)

any of the reversions in respect of which these ground rents are payable. Where the land and houses are sold outright the amounts paid on them are brought into the Respondents' accounts as trading receipts while on the other side of the accounts the cost of the land and buildings sold is brought in as trading expenses. This is plainly on the footing that it is part of the Respondents' business to build and sell houses. The premiums received where leases have been granted for 99 years have also been treated as trading receipts, and no question has been raised before this House as to that being correct. The question is whether the ground rents should not be valued at so many years' purchase and whether the amounts should not like the premiums be taken into account as trade receipts in the year in which the leases are granted.

My Lords, it is not in dispute that the Respondents are a trading company, that part of their business consists of selling these lands and houses, and that the surplus realised by them on a sale of their assets at enhanced prices is a surplus which is taxable as profit under Schedule D. Nor is it in dispute that, if their land and buildings should be sold for Consols or other investments, or for annuities, or for any other realizable property, the value of the property so obtained on the realization of the assets in question must be ascertained and that the profit on the transaction will be assessable under Schedule D (*Californian Copper Syndicate* v. *Harris*, 5 T.C. 159; *Commissioner of Taxes* v. *Melbourne Trust, Ltd.*, [1914] A.C. 1001, at page 1010).

It is, I think, clear that it is profit obtained on a realization that is taxable in such a case. We have therefore to decide whether the reversions retained by the Respondents in the lands and houses in respect of which the 99-year leases have been granted ought to be treated as part of the proceeds of realization of those properties, or whether on the contrary those reversions are part of the unrealized assets of the Respondents, with the result that unless and until they are sold the Crown cannot insist on their market value being brought into the profit and loss account of the Respondents.

My Lords, I think we cannot shut our eyes to the fact that the reversions in question are in truth the freehold lands of the Respondents which have been parted with by them only in so far as long leases have been granted of the lands in consideration of premiums and annual rents. I am unable to see any essential difference between this case and a case where lands have been retained subject to a 21-year lease which had been granted in consideration of a premium and a rent, or indeed a case where a lease has been granted at a rack-rent. In any of these instances the freehold interest is retained, and when that interest is realized the proceeds will be brought into account and the profit, so far as not already accounted for, will come into the trading account.

(Viscount Maugham.)

We were urged to say that the freehold interests retained were in substance wholly new interests, and that, again " in substance ", the Respondents had parted with their rights in the lands for 99 years. This of course wholly neglects the legal aspect of the case and, as I think, disregards also the popular and practical view of the position. The landlord in such a case has a good deal more than his right to the rent. The restrictive and repairing covenants which are entered into by the tenant are often of vital interest to the landlord, to the tenant, and even to the neighbourhood. The landlord may obtain in cases of breach of covenant an immediate right to re-enter. If the house is burnt down, his rights are sometimes of paramount importance. The Income Tax Acts have always proceeded on the basis that the owner of the reversion, even if leases at ground rents for long terms have been granted, is to be charged under Schedule A " in respect of " his " property in " all lands, tenements, hereditaments, and heritages " according to the annual value thereof.

My Lords, I do not think there is any real foundation for the argument that the Respondents, in retaining their reversions, ought to be treated as having retained nothing but annuities for 99 years. In the case of *Commissioners of Inland Revenue* v. *Emery*, 20 T.C. 213, that was, with unimportant differences, what the taxpayers had retained in the form of Scottish " ground annuals " payable in perpetuity; and it was precisely because they had parted in substance with all right of ownership in the houses and land attached thereto that this House, affirming the Court of Session, held that the ground annuals must be included at their market value in the trading accounts for the purpose of ascertaining the profits made by the taxpayers in the year in question. It may be mentioned that ground annuals are very similar to rent-charges in England and that Lord Dundas in the case of *Church of Scotland Endowment Committee* v. *Provident Association of London*, 1914 S.C. 165, observed(1), " . . . . ' ground-annual ' is not a *vox* " *signata*; I think it simply means a perpetual rentcharge secured " in some effectual fashion as a real burden on land ". There is, I think, no difficulty in distinguishing the *Emery* case from the one now before your Lordships.

My Lords, I agree with the conclusion arrived at by the Court of Appeal and with the reasons given for it. I am therefore of opinion that this appeal should be dismissed with costs.

Lord Russell of Killowen (read by Lord Romer).—My Lords, I would dismiss this appeal. I cannot help thinking that some confusion may have been introduced into the case by the wording of the documents used by the Respondents, when instead of

(1) 1914 S.C. 165, at p. 172.

(Lord Russell of Killowen.)

realizing a plot at once and in a single transaction by parting with the fee simple, they demise it for a term of years and keep unsold, at all events for the time being, the reversion expectant on the determination of the term. In the documents which they use on those occasions, the transaction is incorrectly described as a sale and purchase, which it most certainly is not. This, it appears to me, may have been the foundation of the statement by the Commissioners that the Company's houses when completed " are " disposed of by the Company by way of sale ", and may have led the Commissioners to regard the granting of a lease as a complete and final realization by the Company of its profit on that particular plot of land.

My Lords, I cannot take this view. The value of the reversion, though no doubt directly related to the rent reserved by the lease, may vary from time to time; and the Company has full power under its memorandum of association to retain the reversion unsold and to collect the rent. Until it sells the reversion (and the Commissioners find that the Company has not yet sold any reversions) the Company has not ceased to be interested in the plot, and its profit on the realization of the plot has not been finally ascertained.

This is not a case like *Emery's* case, [1937] A.C. 91(1), in which the builders no longer retained any interest in the land. They had sold it out and out for a ground annual, the capital value of which at the date of the sale had of necessity to be brought into account for the purpose of ascertaining the amount of the profit made on the out and out sale. The vendors' whole interest had been converted from land into another type of property. In the present case until the interest in the land which the lessor has retained is sold, his whole interest has not been converted into another type of property, and his profit on the realization of the plot cannot be said to have been ascertained. There is no present necessity, as in *Emery's* case, for bringing into account the capital value of the annual sum. That will, in effect, be brought into account at the proper time, namely, when the reversion is sold, and the proceeds of that sale are credited to the trading and profit and loss account for the year in which the sale is effected.

Lord Wright.—My Lords, I agree with your Lordships that the appeal should be dismissed. I think that the reasoning of the judgment of the Court of Appeal delivered by Clauson, L.J., is correct. The claim of the Crown is admittedly novel. It is based on certain propositions which, as I understand them, may be briefly stated to be as follows. The Respondent, it is said on the Appellant's behalf, is being taxed as a trader under Schedule D.

(1) 20 T.C. 213.

(Lord Wright.)

His trade is to dispose of completed houses and his profits come from the difference between the cost of the production and the proceeds of realization. If he sells the freehold outright, the position is clear. If he disposes of the house by a 99 or a 999 years' lease, it is equally clear that he is selling the house for a composite but still single consideration, which consists of the premium and the ground rent. Both these elements, it is said, are on a parity, the premium is money and the ground rents, which are immediately marketable, are money's worth which should be expressed in terms of a sum in cash, and this sum should be added to the premium so as to give a single sum which will then correspond to the price when the freehold is completely realized. In the case of the long lease, it is said, the entire interest of the builder is, in fact, realized. The house goes out of his balance sheet, because in a business sense or in substance he has no further interest in it. The cash premium and the realized or realizable value of the ground rents take the place of the house. The freehold reversion is thus of no practical or business value. Such are the propositions advanced by the Crown.

I think this way of putting the case is not sound either in law or in a practical or business sense. The speculative builder creates by his expenditure certain assets, including completed houses. So long as the houses are not sold or otherwise disposed of, they go into his accounts at cost or market value, whichever is lower. When the freehold is completely disposed of, the sums realized take the place of the house and show a profit or loss as the case may be. But when, instead of the house being sold, it is let on a long-term lease at a ground rent, there is not a complete but a partial realization. An interest is carved out of the freehold. The residue of the complete freehold estate is not disposed of but is retained by the builder. That interest is the freehold reversion, which normally includes the right to the ground rent, the right to enforce the restrictive covenants in the lease, the right of re-entry for breach of covenants and the right to resume possession at the end of the term. That is an estate which, in the case envisaged, is not traded away by the speculative builder. It is not correctly described as a new asset, but is a residue of the original asset. The house must now be represented in the accounts by the premiums and the freehold reversion, in practice often described as " the ground rents ", and entered at cost or market value whichever is lower. The speculative builder may find this method of disposing of the houses is in certain cases more convenient or profitable to him. He may keep the " ground rents " in hand until he decides to dispose of them. Until he does dispose of them, he cannot in my opinion be taxed on a profit on the footing that it has been realized in the year of charge when it has never been realized and may never be realized at all. He cannot in such a case be taxed on a notional profit. When

(**Lord Wright.**)

he does " sell the ground rents ", the proceeds will then be brought into charge in the appropriate year. According to the evidence of the accounts, set out in the Case, this is the practice commonly adopted. I think it is correct.

The Crown have argued that the issue is here determined by the findings of fact by the Commissioners. It seems to be said that the business of the Respondents is only to realize the houses, not to hold them on rental or to use them for income as would be the case if they let them on a rack-rent for a period, and therefore they must be somehow treated as if they had realized them outright in a case like that now in question. But it is clear that to grant a 99 years' lease is not *ultra vires* of the Respondent Company, and the facts stated in the Case show that in the case of a substantial number of the houses they are leased for 99 years and not sold outright and that the method of dealing is not infrequently adopted by the Respondents. There is no evidence to justify a finding that the business of the Respondents is in fact limited to selling houses outright.

I do not regard *Emery* v. *Commissioners of Inland Revenue*, [1937] A.C. 91(1), as laying down any general principle, except perhaps that in the particular circumstances of that case a presently realizable value might be treated as if it had been turned into cash. That case turned partly on the particular character of ground annuals in Scots law and partly on the circumstances, in particular that the property was completely disposed of, not leased for 99 years or some other period. I cannot treat it as governing this appeal.

Lord Romer.—My Lords, if the gentleman who attends to the conveyancing side of the Respondents' business had been a little more familiar with the terms usually employed by the practitioners in that art, it is, I think, at least possible that your Lordships would never have been troubled with this case. It is, indeed, one that furnishes a remarkable illustration of the confusion that may result from the use of inaccurate language. Such language in the present case is to be found in the form of agreement that the Respondents employ when they adopt the course of granting a lease of one of their houses instead of disposing of it by way of sale.

By such agreement, in which the proposed lessee is described as " the purchaser ", the Company purports to agree " to sell " and the lessee purports to agree to " purchase by way of lease " for the sum therein specified the particular land and house in question. It then fixes the date for completion and provides that upon completion a lease of the property will be granted to the "purchaser" for a term of 99 years, at the ground rent therein specified. But the expression " a sale by way of lease " is a contradiction in terms. A sale is the antithesis of a lease. The owner of a freehold house may sell it,

(1) 20 T.C. 213.

(Lord Romer.)

or he may retain it. In the former case he will receive in money or (as in *Emery's* case, [1937] A.C. 91[1])) money's worth the value of the house based upon its income-producing potentialities. In the latter case, assuming that he does not occupy it himself, he will retain it as an income-producing investment, and will obtain the income by means of letting it upon lease. It would be wholly inaccurate in that case to say that he is " selling " the house by way of lease. He is doing nothing of the kind, whether the lease be short or long, and whether he exacts a premium which is merely an anticipation of future income, or relies solely upon an annual or monthly or weekly rent.

The inaccurate language used in the agreements for a lease in the present case would, however, have been quite harmless had it not misled the Inspector of Taxes. Treating the agreements for a lease and the leases granted in pursuance of those agreements as being in truth what the agreements falsely described them as being, sales of the houses in question, he not unnaturally asked himself what consideration had been received by the Respondents on such sales. For without doubt the net proceeds of all sales effected by the Respondents must be brought into account as trading receipts. To the question so put to himself by the Inspector of Taxes there could be only one answer, assuming that the leases were really sales. The consideration in each case consisted of the premium and the value of the rent reserved. When the matter was brought on appeal before the Commissioners for the Special Purposes of the Income Tax Acts they were equally misled. What they said was this : " In the course of its trade the Company buys land, develops " it and builds houses thereon, and the houses when completed " are disposed of by the Company by way of sale. In some cases " houses and land are disposed of freehold. In other cases leases " for 99 years are disposed of at premiums and ground rents of " either £9 15*s*. 0*d*. or £10 10*s*. 0*d*. per annum. Whichever " method of disposal is adopted the transaction is a transaction in " the course of the Company's trading ". And later on : " Upon " the documents and facts before us we hold that where houses " have been disposed of by way of 99 years' leases at ground rents, " completed sales in the course of the Company's trade have been " effected, and in our opinion the proceeds of those sales must be " brought into the Company's trading accounts ".

If these were findings of fact there would be no more to be said. But they are erroneous conclusions of law of which the origin is to be traced back to the inaccurate language employed by the gentleman to whom reference has been made in the first line of this judgment.

What the Commissioners should have concluded from the documents and facts before them was that the Company in the course

(1) 20 T.C. 213.

(Lord Romer.)

of its trade sometimes effected sales of its houses, but sometimes retained the houses and granted leases of them for 99 years in consideration of a premium and a rent. In the former case the purchase consideration in money or money's worth must be brought into account as a trading receipt. In the latter case the premium must also be brought into account under Case I of Schedule D as a trading receipt if the Crown elects so to do; but the rent will represent a profit arising to the Company in respect of which it is only taxable under Schedule A.

That the premiums can be treated as a trading receipt under Case I of Schedule D was decided by the Court of Appeal, and the correctness of such decision is not now challenged by the Respondents. Their contention before that Court had been that the premiums were "fines" within the meaning of Schedule A, No. II, Rule 6. The Court of Appeal did not find it necessary to decide that point in view of the fact that if they were "fines" they became chargeable under Case III of Schedule D by virtue of the transfer of such receipts from Schedule A to Schedule D effected by the Finance Act, 1926. But the premiums were certainly trading receipts of the Respondents, and as such could, since the transfer, be taxed under Case I of Schedule D if the Crown should elect so to do, even if they were fines and could as such also be taxed under Case III of that Schedule.

The Court did not, however, treat the premiums as being the consideration received on a sale. It is no doubt true that if a lease for 99 years or any other long term were to be granted by the Respondents at a peppercorn rent in consideration of a premium, the premium would almost certainly be equivalent to the purchase money that could be obtained upon a sale of the freehold, and the reversion would have no appreciable value. The reversion would nevertheless exist as an asset of the Respondents, and the transaction, though differing in no way from a sale in its material results, could not even then be accurately described as one.

For these reasons I am of the opinion that the appeal should be dismissed with costs.

Questions put:

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 :—Royds, Rawstorne & Co.; Solicitor of Inland Revenue.]