HOUSE OF LORDS.

Friday, December 4, 1914.

(Before Earl Loreburn, Lords Atkinson, Parker, Sumner, and Parmoor.)

USHER'S WILTSHIRE BREWERY, LIMITED *v.* BRUCE (SURVEYOR OF TAXES).

(On Appeal from the Court of Appeal in England.)

Inland Revenue — Income — Deductions — Assessment of Profits — Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Sched. D—Income Tax Act* 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2.

In the ordinary course of business as a brewery the appellants owned and let to tenants licensed premises, against the rents of which they claimed to set as a deduction in reckoning the profits expenditure incurred in respect of (*a*) repairs, (*b*) the difference between the actual and assessed rentals, (*c*) insurance premiums, and (*d*) legal costs in connection with the licences.

Held that all the deductions claimed ought to be allowed.

Smith v. *Lion Brewery Company*, [1911] A.C. 150, *followed; Brickwood & Company* v. *Reynolds*, [1898] 1 Q.B. 95, *disapproved.* Decision of the Court of Appeal, [1914] 2 K.B. 891, *reversed.*

Appeal from a judgment of the Court of Appeal (Lord Cozens-Hardy, M.R., Sir S. Evans, P., and Joyce, J.) disallowing the appeal of the appellants, and allowing the cross-appeal of the respondents from a judgment of Horridge, J., in the King's Bench Division on a case stated under section 59 of the Taxes Management Act 1880 (43 and 44 Vict. cap. 19) by the Commissioners for General Purposes of the Income Tax Acts of the Trowbridge Tax Division in the county of Wilts.

The *facts* are detailed in their Lordships' opinions, particularly that of Lord Atkinson.

The following written opinions were delivered:—

Earl Loreburn—This case relates to a claim for deductions on an assessment for income tax under Schedule D.

The respondents, a brewery company, were assessed on upwards of £17,000, profits of their trade. Their business consisted of brewing and selling beer and other articles, and purchasing spirits in bulk and selling it, principally to the tenants of their tied houses, but also to other people. They claimed to have the assessment reduced by several sums, all of them expended in respect of the tied houses. It is found with some redundancy of expression that all these sums of money were properly expended for the purpose of keeping the tied houses in a condition to earn a profit by selling the goods which the Brewery Company supplied to them, and that the possession of these tied houses is a necessary incident of the carrying on by that company of the brewery business so as to earn the profits upon which it is charged with income tax.

Accordingly the main question for decision is this—When the owners of a brewery business, who are also landlords of tied houses which sell their commodities by retail, come to be assessed for income tax under Schedule D, can they, in estimating the balance of profits and gains on the brewery business, bring into account expenses which they have properly though voluntarily incurred in supporting their tenants so as to enable them to sell the goods supplied by the brewery company? In all instances the sums here sought to be brought into account are voluntarily given to or paid for the tenants simply in order that the tied houses may be able to sell more of their landlord's liquor. If their leases alone were considered the tenants are bound to pay some of these moneys themselves.

In my opinion this point was practically decided by the case of *Smith* v. *Lion Brewery Company*, [1911] A.C. 150. I did not myself agree with that decision, and your Lordships' House was equally divided, but it is none the less binding, and our duty is loyally to carry it into effect. The brewers were there allowed, in estimating their balance of profit and loss under rule 1, to enter upon the debit side an allowance which they had to make for their share of the compensation charge in respect of their tied houses. That compensation levy became payable by them because they were landlords of the tied houses, and because it was necessary for the levy to be paid in order to save the licences which were in the names of their tenants. It was held to be a proper debit in estimating the balance of profits of the brewery business, because it was paid to keep going another business the success of which was essential to their own. That was the principle of the decision, and not the narrow point that the compensation was payable by statute. Whether the necessity to pay arises by statute or from business considerations seems to me immaterial in view of that decision.

The reasons given were that profits and gains must be estimated on ordinary principles of commercial trading by setting against the income earned the cost of earning it, subject to the limitations prescribed by the Act. One of these limitations is found in rule 1 of "rules applying to both the preceding cases." It says that in estimating the balance of the profits or gains "no sum shall be set against or deducted from or allowed to be set against or deducted from such profits or gains for any disbursements or expenses whatever not being money wholly and exclusively laid out or expended for the purposes of such trade." Now it was argued in the *Lion Brewery* case that the landlord's share of the compensation charge was at all events partially expended for the purposes of the tied house trade, which belonged to the tenant, not to the landlord. But the decision was against this view. It is therefore settled, in my opinion, that when the money is paid by the landlord, being a brewer, or allowed by him to the tenant of a tied house as a

necessary incident of the profitable working of the brewery business, the landlord is not prevented from deducting that money in his estimate of the balance of his own profits by reason of the fact that it enures also to the benefit of the tenant's separate trade in the tied house. I am always averse to reasoning by analogy from the facts of one case to the facts of another case; but I cannot see that the decision in the *Lion Brewery* case rests upon anything short of what I have stated. Upon the facts as found it is impossible to distinguish the rule laid down there. If it is to be changed the Legislature must change it—we cannot.

Now to apply that to the particular deductions claimed on this appeal.

There is a claim for £1004, 0s. 10d. for repairs to tied houses. These repairs ought under the leases to have been executed by the tenants of the tied houses. In fact they were executed by the landlord, because it is found that it is in the interests of the landlord commercially to pay for these repairs rather than enforce the legal obligation. The cost is incurred not as a matter of charity but of commercial expediency, and is necessary in order to avoid the loss of tenants, and consequent transfers, to which the licensing justices object. In rule 3 of the first case there is a statutory direction—"In estimating the balance of profits and gains chargeable under Schedule D" no deduction is to be allowed "for repairs of premises occupied for the purposes of such trade . . . beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made." This means, I think, that when a man occupies premises for the purpose of his trade he is not to make any deduction beyond the three years' average for repairs of the premises he so occupies. He is estimating the balance of profits of his own trade and deducting the repairs of premises which he occupies for the purpose of that trade. In this case he does not occupy the tied houses at all and he is not estimating the balance of profits of the tied-house trade. Therefore the rule cited does not apply, and the repairs in question do not fall within the rule. The cost of them can be deducted by the Brewery Company as part of the cost of earning their own profits, being admittedly reasonable in amount.

The next item which the Brewery Company seeks to deduct is £2134, 14s. 6d., which is the difference between the annual value or the rent which they pay to the freeholders of the tied houses on the one hand and the rents which they receive for the same houses from their tied tenants on the other hand. This difference arises because the tied tenants are bound by covenant to buy their liquor solely from the Brewery Company. In consideration of this "tie" the tenants occupy at rents less than the annual value and less than the rents which the Brewery Company itself has to pay for the houses, and the sum claimed to be deducted must be taken to represent in each case the difference between the rents actually received from the tied tenants and the proper annual value. For no argument was offered to show that the rent paid by the Brewery Company is other than the proper annual value. And it is agreed that this letting at reduced rents is made solely to get the trade which the using of the tied houses affords, and so to swell the profits of the brewery business. On ordinary principles of commercial trading such loss arising from letting tied houses at reduced rents is obviously a sound commercial outlay. Therefore this item must be deducted.

Very little was said in argument about the remaining items which the appellants seek to deduct, and nothing was said as to the correctness of the figure if on principle such deductions could be made. I think all of them can be supported upon the same grounds as repairs and loss of rental except one which was given up. I am not blind to the fact, upon which the Attorney-General dwelt, that the view I am obliged to take of this case may cut deep into the revenue, not merely from brewery profits but also from other trades which have ancillary trades connected with or supported by them. I do not propose to offer illustrations. That, however, cannot influence your Lordships in giving effect to the earlier decision of this House.

I think, therefore, that this appeal succeeds.

LORD ATKINSON—This is an appeal from a judgment of the Court of Appeal dated the 3rd April 1913, disallowing the appeal of the appellants and allowing the appeal of the respondents from a judgment dated the 12th December 1913 of Horridge, J., pronounced on a case stated under section 59 of the Taxes Management Act 1880, by the Commissioners for General Purposes of the Income Tax Acts of the Tax Division of Trowbridge in the county of Wilts.

Horridge, J., on the hearing before him, considered that the case as stated did not set forth with sufficient fulness information on certain points, and accordingly ordered that unless the parties before a certain date agreed to a supplemental statement of the facts the case should go back to the Commissioners for a further statement. The parties did, before the date named, agree to a supplemental statement, which was for all purposes treated as part of the case stated.

The question for decision on this appeal is whether the appellants, who are brewers, are, for the purpose of arriving at the balance of the profits and gains of their trade, assessable to income tax under Schedule D, case 1, of the Income Tax Acts, entitled to deduct the four sums following, or any and which of them, in respect of the several matters set forth:—

(*a*) Repairs to tied houses .	£1004	0	10
(*b*) Difference between rents of leasehold houses or Schedule A assessment of freehold houses on the one hand, and rents received from tied tenants on the other hand	2134	14	6
(*c*) Fire and licence insurance premiums . . .	90	7	0
(*f*) Legal and other costs .	56	7	6

The Commissioners were of opinion that the appellants were not entitled to deduct any of these sums. Horridge, J., concurred in opinion with the Commissioners as to the sum claimed for repairs, considering himself bound by the decision of the Court of Appeal in *Brickwood & Company* v. *Reynolds*, [1898] 1 Q.B. 95, but held that the other sums claimed should, on the authority of *Smith* v. *Lion Brewery Company*, [1911] A.C. 150, be allowed.

The Court of Appeal concurred in opinion with Horridge, J., as to the item for repairs, held that he was in error in supposing that the *Lion Brewery* case applied to any of the items, and decided that all the deductions were inadmissible.

Before proceeding further it might be well, as there was in this latter case an equal division of opinion in your Lordships' House, to point out that it was laid down by Lord Campbell in the case of *Beamish* v. *Beamish*, 9 H.L.C. 274, that the decision of this House occasioned by the Lords being equally divided is as binding on the House and on all inferior courts as if it had been pronounced *nemine dissentiente*. Again, in the *Attorney-General* v. *The Dean of Windsor*, 8 H.L.C. 369, Lord Campbell said—"But the doctrine on which the judgment of the House is founded must be unreservedly taken for law, and can only be altered by Act of Parliament. So it is even when the House gives judgment in conformity to its rule of procedure that where there is an equality of votes *semper præsumitur pro negante*." He then proceeds to enforce this point by reference to the case of *Reg.* v. *Mills*, 10 C. & T. 534.

One must look, therefore, for the *ratio decidendi*—the doctrine on which the judgment of the House was founded—to the judgments of those members of the House who voted in the negative on the question put to the House "that the judgment appealed from be reversed." Stated broadly, I think that that doctrine amounts to this, that where a trader *bona fide* creates in himself or acquires a particular estate or interest in premises wholly and exclusively for the purposes of using that interest to secure a better market for the commodities which it is part of his trade to vend, the money devoted by him to discharge a liability imposed by statute on that estate or interest or upon him as the owner of it should be taken to have been expended by him wholly and exclusively for the purposes of his trade.

I use the word "creates" advisedly in order to meet the case of a trader who lets premises he has, for instance, inherited to a tenant who covenants to vend his goods in them, and buy from him and none other the goods vended.

The trader in such a case by the letting creates in himself the estate or interest of a lessor wholly and entirely for the purposes of his trade, namely, to provide a better market for his goods. No doubt in the case above mentioned the liability imposed on the landlord, or his interest, was imposed by statute, but, speaking for myself, I am bound to say that I cannot see any difference in principle between a liability imposed on such a lessor by statute and a liability imposed upon him by the reasonable requirements of his trade. I think the money devoted to discharge the liability should in each case be held to be money expended wholly and exclusively for the purposes of the landlord's trade, these being the very purposes for which the interest was created. I take this opportunity of pointing out that at p. 163, line 22, of the report of the *Lion Brewery* case in the Law Reports, the words "unconnected with the brewer's trade" should, in order to make my meaning clearer, be inserted after the word "tenants."

It has been contended on the part of the Crown that the findings of fact in this case do not amount to a finding that the sums claimed to be deducted were laid out or expended wholly and exclusively for the purposes of the appellants' trade in respect of the profits and gains of which they are assessed.

It is quite true that the Commissioners have not framed any of their findings in the precise words of rule 1, Schedule D, applying both to professions and trades. They do not specifically in so many words find that the several sums which the appellants claim to deduct were disbursements wholly and exclusively expended for the purposes of the appellants' trade. That fact, however, by no means disposes of the question. In paragraphs 4, 5, 7, and 8 of the case stated, and also in the supplementary statement, the facts which they have found are set forth.

It is for a court of law to construe these several paragraphs as written documents, just as the courts of law often have to construe the answers (in writing) of juries to questions put to them by the judge presiding at a trial, or as such courts have to construe a correspondence between parties litigant to determine whether their letters in the aggregate contain a concluded contract in writing.

In doing this the tribunal of law does not usurp the exclusive jurisdiction of the tribunal of fact, and from facts found by the latter draw a further inference of fact. It merely discharges its proper and exclusive function of construing written documents. What, then, do those paragraphs disclose?

Paragraph 4 sets forth that the appellants obtain higher prices for their beer and increased the profits of their trade by the ownership and letting of their tied houses.

Paragraph 5, that such repairs of those tied houses as are claimed for are necessary, and are effected at the appellants' "expense." It is not suggested that the sum claimed, £1004, 0s. 10d., is excessive having regard to the requirements of the licensing authorities.

Paragraph 7, that these houses are not acquired by the appellants as investments, that if any house lost its licence the appellants would get rid of it, that except for the purpose of employing these houses in their business the appellants would not possess them at all, that they have acquired and hold them solely in the course of and for

the purposes of that business, and as a necessary incident to the carrying it on, and that the possession and employment of them in the manner described is necessary to enable the appellants to earn the profits which it is sought to tax, and further, that without these houses used in the manner described, the profits, if any, of the appellants' trade would be much less in amount.

The meaning of all these written statements when condensed appears to me to be simply this, that the appellants acquired and let these houses in the manner described for the purposes of their trade and for no other purpose whatever, which is precisely the same as saying they acquired and let them solely and exclusively for the purposes of their trade, that they are necessary for those purposes, and that by means of their acquisition and use in the manner indicated, the profits on which the appellants are to be taxed are earned.

Then paragraph 8 sets forth that the repairs claimed for are solely repairs which the appellants are bound (*i.e.*, obliged) to make in order to maintain the premises in a condition fit for their use as licensed premises.

Now the supplemental statement of the facts in paragraph A sets forth that though the tenants are under their agreements bound to make the necessary repairs, the appellants in fact execute them at their own expense, because it is found to be to their interest commercially so to do rather than to enforce the obligations of their tenants. That the cost of the repairs is incurred not as a matter of charity, but of commercial expediency, in order to avoid the loss of tenants, and the consequent transfers, to which the licensing justices object. The meaning of paragraph 8 taken together with this paragraph A is, I think, simply this, that in the proper and reasonable conduct by the appellants of their trade they are obliged to defray the costs of these repairs, inasmuch as the same are necessary to enable the houses to serve the very purposes for which the appellants have solely and exclusively acquired and used them.

I may say for myself that I am wholly unable to follow the line of reasoning which would lead one to the conclusion that where premises have been acquired and used wholly and exclusively for a particular purpose, the expenditure upon them necessary to enable them to fulfil that purpose is not expenditure incurred solely and exclusively for the very purpose for which they have been acquired and used.

I therefore think that the condensed meaning of these paragraphs when properly construed is simply this, that the expenditure for repairs is incurred solely and exclusively for the purposes of the appellants' trade.

Item B is then dealt with in paragraph B of the supplemental statement. It is therein set forth that the appellants let their tied houses at considerably less than their annual value, or what they could get for them without a tie. And that in those cases where they themselves rent the houses they let them at rents considerably less than those they pay for them; that this low letting is not due to a change in the value of the premises, but is made deliberately and solely in order to get the market for their goods the tied houses supply. That the appellants by means of this dealing with their houses are enabled to make a profit upon their total trading transactions through the increased sale of their beer and other goods.

This is only another way of saying that the appellants let their tied houses at low rent solely and exclusively for the purpose of promoting their trade and enhancing the profits of it. It further sets forth that the figures represent the difference between the rents received by the appellants and those paid by them, and, in the case of their freehold houses, that between the net Schedule A assessment and the rents received.

As to paragraph C, the purposes for which the insurances upon the premises are effected are set out. They are found to be usual and proper trade outgoings, and are made as such by the appellants. They are designed to cover the loss of the fabric by fire and the loss sustained if the licences were not renewed. *Smith* v. *Lion Brewery Company* applies, I think, to the latter disbursement, and the remarks I have already made apply to the former as to the remaining items (*d*).

Now in the case of a trade the duty chargeable under section 100 of the Act of 1842, Schedule D, case 1, rule 1, is to be computed on the balance of the profits and gains on the fair average of the three years in the rule mentioned. It is well established that this balance is, *prima facie*, to be ascertained by deducting from the receipts of the trade the expenditure necessary to earn them. Until that has been done it is impossible to determine whether there has been any balance of profits at all —*Gresham Life Assurance Company* v. *Styles*, 1892 A.C. 309; *Ashton Gas Company* v. *Attorney-General*, 1906 A.C. 10.

This rule, however, proceeds to enact that only those deductions which are thereinafter allowed are to be made. Deductions which on ordinary business practice and principles might be deducted are thus restricted.

Now, despite this exclusion, it has been decided by this House that a trader who owns and occupies premises in which he carries on his trade is entitled to deduct from his receipts the full annual value of those premises assessed under Schedule A—*Russell* v. *Town and County Bank*, 13 A.C. 418. This is obviously right and just, because if he abstains from letting the premises and devotes them to the purposes of his trade, he must be taken to have dedicated to that trade a sum equivalent to the annual sum which he might obtain in the shape of rent if he had let them to an untied tenant.

It is not disputed by the Crown in this case, and could not, I think, be successfully disputed, that if the trader held such premises on lease he would be entitled to deduct the rent he paid up to this annual

value. The question how he acquired the premises is irrelevant. It was urged strongly by the Crown, however, that owing to this restrictive clause, coupled with the provisions of rule 3 and of rule 1, applying to the cases of both traders and members of professions, &c., and also to the provisions of rule 1, Schedule A, section 35, of the Finance Act of 1894, a deduction in respect of repairs could only be made where the trader himself was the occupier of the premises in which his trade was carried on, and that consequently the appellants, not being in occupation of these tied houses, could not claim to deduct anything in respect of repairs, nor when they sublet the houses to publicans at a lower rent than they themselves paid for them could they deduct from their receipts, as they claimed to do, the difference between the rents paid and the rents received by them.

Much of the argument turned upon the nature and extent of those prohibited deductions.

Rule 3 deals with the prohibition of deductions in respect of repairs. On the construction of it contended for by the appellants, though in fact the landlord of a tied house should make all the repairs at his own expense, and the tenant, the occupier, in fact, expend nothing for repairs, no deduction whatever is to be made in respect of them from the receipts of the landlord's trade.

Sir Robert Finlay, for the appellants, on the other hand, contended that this is not the true construction of the rule; that it merely fixes a maximum sum for the deductions which can be made in respect of repairs in the particular instance specifically dealt with, namely, the case where the occupier makes the repairs, but does not exclude the operation in the landlord's favour of rule 1, applying both to cases of trades, professions, &c., and entitles the brewer to deduct the sum spent upon repairs provided he can show that it was expended wholly and exclusively for the purpose of his own trade.

Schedule A provides that for the purposes of assessment under that schedule the annual value of lands, tenements, and charges shall be the rack-rent at which they are or can be let. Section 35 of the Statute of 1894, sub-section (*b*) (i), provides that where the owner is occupier or assessable as landlord, or where a tenant is occupier and the landlord undertakes to bear the cost of repairs, the assessment shall be reduced by one-sixth of its amount, and (*b*) (ii) that where the tenant is occupier and undertakes to bear the cost of repairs, the assessment is to be reduced by such a sum not exceeding one-sixth part thereof as may be necessary to reduce it to the amount of the rent payable by him.

It was contended for the respondent that these provisions show that the necessary expenditure on repairs is taken, on an average, to be about one-sixth of the full value, *i.e.*, of the rack-rent, that the landlord is relieved from paying income tax on this amount, and that to allow him to deduct the expenditure on repairs from the receipts of a trade carried on by him in the premises would in reality amount to enabling him to withdraw from liability to the tax the same sum twice over, at least to the amount of one-sixth of the assessment, and that the statute was obviously intended to limit the landlord's relief from taxation in respect of repairs to this fractional reduction of the assessment.

I own I am entirely unconvinced by this reasoning. I think the plain object of the statute was to limit the assessment to the benefit enjoyed. If the landlord was bound to repair, a deduction from the rack-rent, actual or assumed, should be made to get at the real benefit enjoyed by him, which would be the rent received less the cost of repairs; and if the tenant was bound to repair, as he would most probably pay a lesser rent by reason of that obligation, the aim was to reduce the assessment to the amount of the rent he actually paid the landlord. No doubt one-sixth of the assessment is fixed in this instance as the maximum limit.

This particular case does not on the facts strictly come within either of these provisions, as the landlord bears the cost of the repairs as a necessary outlay for the purposes of his trade, though the tenant is legally bound to make them.

I am, however, quite unable to see that there is any necessary connection between assessments under Schedule A and those under Schedule D in this regard, or to discover upon what principle, if an owner is relieved from taxation under Schedule A which would be excessive or unjust, the balance of his profits and gains is for the purposes of Schedule D to be inflated to a sum it never in fact reached, and he is to be assessed upon profits he never in fact made. For it is to be remembered that the Crown contended that no matter how much the actual expenditure on repairs exceeded one-sixth of the assessment, the landlord was not permitted to deduct even the overplus.

I now turn to the case of *Brickwood* v. *Reynolds*, [1898] 1 Q.B. 95. The decision, it would appear from the judgment of A. L. Smith, L.J., pp. 102-103, is based upon two propositions—

(1) That the trade of a publican in a tied house is altogether independent of the trade of the brewer, and therefore the entire amount of the expenditure of money on the repairs of the houses could not be held to be expenditure wholly and exclusively for the purposes of the brewer's trade, since it was, in addition, expended for the benefit of the trade of the publican.

With infinite respect for the Lord Justice, I think this proposition is based upon a fallacy. The publican's trade is the vending of the landlord's beer and none other. The house is the market place for that beer and none other. The brewer takes the house, ties it to his brewery, and puts the publican into it as tenant for the very purpose of having his beer sold in that market through the efforts of this salesman, the tied tenant.

The two trades are as dependent upon and as connected with each other as they well can be; they are almost, if not altogether,

the same enterprise seen from different sides, different standpoints, and I confess I am unable to see upon what principle money designedly spent by the brewer with the sole and exclusive object of maintaining this market place for his own goods, and promoting through the action of the salesman the sale of those goods therein, ceases to be an expenditure wholly and exclusively for his (the brewer's) trade because incidentally it may benefit the salesman and increases his remuneration in the shape of increased profits.

I am equally unable to see how the fact that this salesman, the tied tenant, has the secured position of a tenant, as distinguished from the possibly more precarious position of a manager, makes a profit, and has to bear the loss on the re-sale of the brewer's beer, differentiates on this point the outlay on repairs in his case from a similar outlay on repairs where the salesman is merely a manager.

The second proposition is that this case 1, rule 1, coupled with section 159 of the Statute of 1842, prohibits anyone other than the person in possession from making a deduction in respect of repairs. At p. 103, A. L. Smith, L.J., says—"Pausing there, what is the meaning of the word 'occupied'? To my mind the plain meaning is 'occupied' by the person assessed."

He rejects the construction apparently put forward by counsel for the appellant at p. 99 of the report, that the words "occupied for the purpose of trade" contain a mere description of the premises, and holds that the rule should be construed as if it ran, "On account of any sum expended for repairs of premises occupied by the person assessed for the purposes of such trade." It may well be that this is what the word "occupied" here means, and that the rule puts a limit on the amount of the deduction to be made by the occupant. Where I fail to follow the learned Lord Justice is in holding that this rule together with section 159 prohibit a deduction in respect of expenditure for repairs made by a person other than the occupier if made wholly and exclusively for the benefit of the trade of that other carried on in the premises repaired.

A deduction of this latter kind is one of those enumerated in the rules. There are others in Schedules A and B, sections 63-7. It may well be that rules 1 and 3 above mentioned overlap each other to some extent, but when section 159 enacts that no deductions are to be made other than those enumerated in the Act it does not appear to me that by these words a deduction expressly allowed by rule 1, section 100, applicable to both cases, is prohibited. On the contrary, I think it is impliedly authorised, and the rights given under the two rules may in my view co-exist.

For these reasons I am of opinion that the case of *Brickwood* v. *Reynolds* was wrongly decided, and that, on the findings of the Commissioners, amounting to what I think they do, the appellants were entitled to make the deductions for repairs which they claim.

As to the next item, it must be conceded that if the appellants had put into occupation of a house a manager, as distinguished from a tenant, who managed their trade in the way I have described, they would, under the authority of *Russell* v. *Town and County Bank*, 13 A.C. 418, have been entitled to deduct the full annual value of the house as estimated under Schedule A, whether that house was a freehold or leasehold. I do not think it can possibly make any real difference in principle in respect to this right to deduct if the salesman put into the tied house, to live in it (as he must do to obtain a publican's licence), happens to be a tenant and not a manager, though the brewer no doubt occupies the house in the one case, because the occupation of the manager is his occupation, and not in the other; but the balance of the profits and gains of the brewer's trade would, according to the methods of practical business men, be ascertained in the same way in both cases, *i.e.*, by deducting from the receipts what it cost to earn them. Part of the cost to the brewer is in the manager's case his salary, and possibly a discount on profits. In the case of the tenant's it is the difference between the annual value of his, the brewer's, freehold house and the rent he receives for it, and in his leasehold house the difference between the rent he receives for it and the rent he pays for it, if that be equal to the full annual value under Schedule A. For, for the purposes of striking the balance of profits and gains, the two cases are in principle undistinguishable.

The small items were not much contested in arguments. I concur, however, with Horridge, J., in thinking they ought to be allowed. For these reasons I am of opinion that the judgment appealed from was erroneous and should be reversed, and this appeal be allowed with costs.

LORD PARKER—The provisions of the Income Tax Acts relating to the ascertainment of the amount of the profits and gains of a trade on which income tax is to be levied have often given rise to difficulty. According to the first rule, case 1, section 100, of the Act of 1842, the duty to be charged is to be "computed on a sum not less than the full amount of the balance of the profits and gains of such trade, upon a fair and just average of three years." The expression "balance of profits and gains" implies, as has often been pointed out, something in the nature of a credit and debit account in which the receipts appear on one side and the costs and expenditure necessary for earning these receipts appear on the other side. Indeed, without such account it would be impossible to ascertain whether there were really any profits on which the tax could be assessed. But the rule proceeds to provide that "the duty shall be assessed, charged, and paid without other deductions than is hereinafter allowed." Grammatically this would seem to apply to deductions from the sum assessed and charged by way of income tax, and this construction would appear to be borne out by section 159, the first part of which might well apply to

deductions from the duty, and the remaining part to deductions in ascertaining the profits and gains upon which the duty is to be assessed; but it has been sometimes thought that both the words in question and the first part of section 159 really apply to the latter class of deductions. The difficulty is that nowhere in the Act is there any express allowance or enumeration of deductions, the scheme of the Act being to prohibit certain deductions with certain exceptions. It has been suggested that the difficulty may be overcome by treating the exceptions from the prohibitions as impliedly allowed deductions. The better view, however, appears to be that where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains, it ought to be allowed, notwithstanding anything in the first rule or in section 159, provided there is no prohibition against such an allowance in any of the subsequent rules applicable to the case, and the decision of your Lordships' House in *Russell* v. *Town and County Bank*, 13 A.C. 418, and the speech of Lord Halsbury in *Gresham Life Assurance Society* v. *Styles*, 1892, A.C. 316, clearly proceeded on this footing.

I will now proceed to consider the other rules cited as having an important bearing on the points which arise for decision in this case.

The third rule under case 1 provides that in estimating the balance of profits and gains, no deduction is to be made on account of any sum expended for repairs of premises occupied for the purposes of the trade, or for the supply or repairs or alterations of any implements employed for the purposes of the trade, beyond the sum usually expended for such purposes on a three years' average. This is a prohibition which in my opinion goes to the quantum only. It assumes that money spent in repairs or for the other purposes mentioned would be a proper item of deduction, but provides that where the property on which the money is expended is occupied or employed for the purposes of the trade, the amount allowed is to be calculated on an average, leaving the question as to what may properly be allowed where the property is not so occupied or employed entirely untouched.

The Court of Appeal in *Brickwood & Co.* v. *Reynolds*, [1898] 1 Q.B. 95, appears to have read the rule as containing, not only an express prohibition with regard to quantum in certain specified cases, but also an implied prohibition against allowing anything at all in cases not so specified. I am unable to adopt this construction of the rule, which seems in conflict with the view adopted in *Russell* v. *Town and County Bank*. If, for example, part of the trade consisted in letting houses or implements to be occupied or used otherwise than for the purposes of the trade, and if it were necessary for the purposes of the trade to keep such houses or implements in repair, a deduction in respect of the money spent in repairs would be both proper and necessary in order to ascertain a balance of profits and gains, and such deduction not being expressly prohibited ought therefore to be allowed.

I refrain from dealing with the subsequent parts of the third rule as having no relevance on the present occasion, and proceed to the first rule applicable to cases 1 and 2.

This rule provides that in estimating the balance of profits and gains no sum is to be deducted for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade. The rule also prohibits any deduction for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade, not exceeding the proportion of the rent or value thereinafter mentioned. The last words apparently refer to section 101, which provides that nothing is to restrain a person renting a dwelling-house, part whereof shall be used for the purposes of his trade, from deducting from the profits of such trade such sum not exceeding two-third parts of the rent *bonâ fide* paid for such dwelling-house as the Commissioners shall allow. I can, however, find no similar provision in the case of annual value.

The case of *Russell* v. *Town and County Bank* decides three points on the construction of this rule.

First, it decides that the annual value or rent of premises used wholly for the purposes of the trade is a proper deduction in ascertaining the balance of profits and gains.

Secondly, it decides that the rule refers only to a dwelling-house or domestic offices, or part of a dwelling-house or domestic offices, occupied by the person to be assessed; so that the fact that a bank manager resides in part of the bank premises does not bring that part of the premises within the prohibition or prevent the whole premises from being considered as used for the purposes of the trade. In other words, the effect of the prohibition cannot be extended by implication to cover a deduction for rent or annual value which would otherwise be a proper deduction in ascertaining the balance of profits and gains.

Thirdly, it decides, if not expressly at any rate by implication, that the first part of the rule which prohibits deductions for disbursements and expenses, not being money wholly and exclusively expended for the purposes of the trade, does not preclude a deduction for the annual value of premises used wholly for the purposes of the trade, though such annual value is not money expended in the ordinary sense of the word.

I will now proceed to consider the facts of this case. The appellants are a brewery company, and, like other brewery companies, have from time to time purchased licensed houses, which they let to tenants, who contract to buy from them all ale, beer, wines, and spirits sold in the licensed houses, which are thus tied to the brewery. The tie enables the appellants to obtain from their tenants a higher price for the ale and beer which they brew, and the wines and spirits which they purchase elsewhere, than

they can obtain from their other customers. Their profits are thus materially increased by the purchase and lease of the licensed houses in question, and it is solely with a view to such increase that these houses have been acquired and are let. Obviously the increased profits are assessable to income tax under Schedule D, and therefore all necessary cost and expenditure entailed by their possession must necessarily be brought into account in ascertaining the balance of profits and gains of the trade. The tenants of the tied houses occupy and use the premises let to them respectively, partly for the purposes of their trade as licensed victuallers and partly as dwelling-houses for themselves and their families. Though each tenancy agreement contains a repairing covenant on the part of the tenant, the tenant in fact does no repairs. The brewery company have found by experience that as a matter of commercial expediency it is better to do the repairs themselves rather than by insisting on performance of the covenants to run the risk of loss of tenants and consequent transfers to which the licensing justices object.

The appellants claim that the amount so spent in repairs ought to be deducted in ascertaining the balance of profits and gains of their trade, such repairs having, as found in the case, been solely repairs which the appellants were bound to do in order to maintain the licensed houses in a condition fit to use as licensed houses, and the sum expended not being an excessive sum to be expended in such repairs.

I am of opinion that the appellants are right in this contention. It is clear that not only were the tied houses acquired and let solely for the purposes of the trade, but that the repairs were necessary to maintain the houses in such a condition that they could be used for the purposes for which they were acquired and let.

There being, as I have before shown, no prohibition against making a deduction in respect of repairs in such a case, and the expenditure being wholly and exclusively for the purposes of the trade, it seems to follow from *Russell* v. *Town and County Bank* that the deduction ought to be allowed. It is true that *Brickwood & Company* v. *Reynolds* is contrary to this view, but it should be noticed that in *Brickwood & Company* v. *Reynolds* there was no finding of fact which would take the case out of the prohibition against deductions in respect of moneys not exclusively expended for the purposes of the trade, and I have already dealt with this case so far as it is an authority for extending by implication the express prohibition contained in case 1, rule 3.

In this connection I must refer, however, to an argument put forward by the Attorney-General. The annual value to be ascertained under Schedule A is calculated on the footing of the rent which a tenant might be expected to pay if the landlord did the repairs. This appears to have been thought a hardship on the party assessed, and accordingly by section 35 of the Finance Act 1894 the amount of the assessment is for the purposes of collecting the tax to be reduced by one-sixth. The Attorney-General argued that inasmuch as there is only one income tax, under whatever schedule it be assessed, and inasmuch as a deduction for repairs is allowed under Schedule A, no similar deduction ought to be allowed under Schedule D, for if it were there would be a double deduction for the same thing.

I cannot accept this argument. The fact that the owner of land receives a partial exemption from the tax which would otherwise be payable under Schedule A can have in my opinion no possible relevance in ascertaining what as a matter of fact is the balance of his profits and gains for the purposes of Schedule D. It should be noticed too that in the present case the exemption from part of the tax under Schedule A cannot, or at any rate may not, necessarily benefit the appellants. It may enure solely for the benefit of the tenants of the tied houses, the amount which they are entitled to deduct from the rent payable to their landlord remaining the same.

Some of the licensed houses which the appellants acquired for the purposes of their trade were of freehold and some of leasehold tenure, but the rent reserved in all the tenancy agreements on which they have been let is less than in the case of freeholds the annual value according to the Schedule A assessment, and in the case of the leaseholds than the rent which the appellants themselves have to pay.

The appellants claim to deduct in the one case the difference between the Schedule A assessment and the rent they receive, and in the other case the difference between the rent they pay and the rent they receive. In other words they claim the Schedule A assessment value or the rent they pay as a deduction, giving credit on the other side of the account for the rent paid by the tenants of the tied houses.

I am of opinion that they are also right in this contention. Unless there is some express prohibition, the case appears to be covered by *Russell* v. *Town and County Bank*, and I have already given my reasons for thinking that the express prohibition in the first rule, applicable to cases 1 and 2, cannot be enlarged by implication so as to preclude a deduction necessary to ascertain the balance of profits and gains in any true sense of that expression. The right to make the deduction, however, must of course carry with it the obligations to give credit for the rents received from the tenants of the tied houses.

The only remaining point on this part of the case is the amount to be deducted in respect of annual value. Is it the full Schedule A assessment, or is it such assessment less the one-sixth referred to in section 35 of the Act of 1894? In default of any statutory provision to the contrary, it would clearly be the full amount of the assessment. But the 9th section of the Finance Act 1898 provides that where in estimating the amount of annual profits or gains for the purpose of Schedule D any

sum is deducted on account of the annual value of the premises used for the purposes of such trade, the sum so deducted is not to exceed the amount of the Schedule A assessment as reduced for the purpose of collection under section 35 of the Finance Act 1894. Can these tied houses be said to be used for the purposes of the brewery business within the meaning of this section? They cannot be said to be so used in the ordinary sense of the word. Premises used for the purposes of trade are *prima facie* in the possession of the person carrying on the trade, and the person carrying on the trade will be assessable to income tax under Schedule A in respect of them. In the present case the section would clearly apply in assessing the trade profits of the tenants of the licensed houses, but I have come to the conclusion that such application will exhaust its effect and that it cannot also apply in assessing the trade profits of the appellants.

I have hitherto considered the questions which arise without reference to the case of *Smith* v. *Lion Brewery Company, Limited*, but the *ratio decidendi* of that case in my opinion strongly supports the conclusion at which I have arrived. There the licensed houses had been acquired and let by the brewery company under precisely the same circumstances as in the present case, and it was held that the compensation levy imposed on the company as landlords by the Licensing Act 1904, section 3, was a proper deduction in ascertaining the balance of the profits and gains of the brewery business. Indeed my noble and learned friend Lord Atkinson, in his exhaustive judgment in that case, instances the rent of premises acquired for the purposes of the trade as a deduction which ought to be allowed.

There is only one criticism which I shall desire to make on this judgment. The noble lord, after quoting a passage from the judgment of A. L. Smith, L.J., in *Brickwood* v. *Reynolds*, appears to have expressed the opinion that the concluding words of rule 1 of the rules applicable to cases 1 and 2 would prevent a deduction for repairs of those parts of the tied houses used by the tenants for domestic purposes. This does not seem to me to be in accordance with *Russell* v. *Town and County Bank*, in which it was held that the prohibition contained in the words in question applied only where the person using part of the house for domestic purposes was the party assessable under Schedule D. *Russell* v. *Town and County Bank* does not, however, appear to have been cited in *Smith* v. *Lion Brewery Company, Limited*.

The appellants claim deductions under three heads—(1) Fire and licence insurance premiums; (2) rates and taxes; and (3) legal and other costs. The Attorney-General did not object to these deductions being allowed, and, indeed, having regard to what I have already said and to the facts admitted in the supplementary statement, it would be difficult to contend that they were not proper and necessary deductions in ascertaining the balance of profits and gains of the appellants' trade, or that they are within any of the prohibitions contained in the rules.

I am therefore of opinion that the appeal should be allowed.

LORD SUMNER—The question which arises at the outset of this case is—What facts have the Commissioners found? The jurisdiction of the High Court, and on appeals from it, is by sec. 59 (2) (*b*) of the Taxes Management Act 1880 "to hear and determine the question or questions of law arising on a case transmitted under this Act." This involves the construction of the language of the case stated. It must be interpreted in the light of common knowledge and by the common sense of the language used, but the findings of fact as such when ascertained are final.

There is some dispute here as to the precise meaning of some of the statements in the case. The difficulty arises because Horridge, J., ordered that the case should go back to the Commissioners for further statement, unless the parties agreed a supplemental statement of the facts, and the parties in agreeing upon an additional paragraph to be stated in the case have used different language in respect of almost every item in question.

The paragraph states that payments for repairs to tied houses and rates and taxes chargeable in respect of them have been made by the appellants, not because of a legal liability to do so but because it is "necessary in order to avoid the loss of tenants and consequent transfers to which the licensing justices object; that tied houses are let at an under-value solely in order to get the trade which the using of such tied houses as tied houses afford;" that the payment of premiums of insurance is "a usual and proper trade outgoing, and is made by the appellants as such;" and that "lawyer's charges" in respect of the said tied houses "have been paid by the appellants as such." It would have been simpler if the parties had agreed their additional statement in the phraseology of the Act, but no doubt it was the result of negotiation, with some give-and-take on both sides. All questions that could be raised on the whole case (and they were many) were intended to be left open. I think that in the context in which these expressions are used, all alike mean that the disbursements and expenses in question, money foregone being properly within these words, were "money wholly and exclusively laid out or expended for the purposes of such trade"—that is to say, the brewer's trade.

In the judgment appealed from it is said, "I can see no such finding of fact in this case." This is so in terms, but in substance it is otherwise. Furthermore, the judgment seems to say that the question whether a given disbursement is "wholly or exclusively laid out for the purposes of the trade or concern" is a question of law and not of fact. With this I am not able to agree. Though the answer to the question may itself be an inference from a wide area of facts, it is an answer of fact. There is

no suggestion here that the Commissioners found the facts under any mistake in law, including in that term the view, conscious or unconscious, that a fact may be found which there is no relevant evidence to support. As to the paragraph agreed by the parties, I doubt if such a suggestion would be competent—at any rate it is not made. Findings that the brewers' motive was "commercial expediency," or their mental processes were "deliberately" gone through, can be severed from the findings above mentioned.

The questions of law raised are, and are only, whether, on the construction of the Act, the deductions in debate, though "disbursements or expenses, being money wholly and exclusively laid out or expended for the purposes of the trade" (that is, the brewer's trade), are nevertheless forbidden. I think that the judgment appealed against really finds facts, and does not, as it was supposed to do, rule the law, when it declares that the rents foregone are losses of annual value and not expenses of trade, that the described expenses are moneys laid out partly for the publican's trade, and therefore not "wholly and exclusively" for the brewer's trade, and that such moneys enter into a computation of the profits or gains of the brewer's trade because in the view of the Court they also enhance the value of his goodwill.

If a subject engaged in trade were taxed simply upon "the full amount of the balance of the profits or gains of such trade," there can be no doubt that, upon the facts found in the special case, he would be entitled to deduct all the items which are now in debate before arriving at the sum to be charged. To do otherwise would neither be to arrive at a balance between two sets of figures, a credit and a debit set, which balance is the profit of the trade, nor to ascertain the profits of the trade, for trade incomings are not profits of the trade till trade outgoings have been paid and deducted.

Rule 1 of the first case of Schedule D does not, however, leave matters to the taking of a commercial account *simpliciter;* it provides that the duty shall be "assessed, charged, and paid without other deduction than is hereinafter allowed," and this must mean, though it is not strictly expressed, "without other deductions in the computation of the sum on which the duty is charged." Section 159 states it thus—"In the computation of the duty to be made under this Act in any of the cases before mentioned it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act," and here "therefrom" is not from the duty, but from the sum, whatever it be, that has to be ascertained before duty can be charged on it. Virtually both provisions mean that, in computing the sum which, when ascertained, is to be charged with duty, only the enumerated deductions shall be lawfully allowable.

The paradox of it is that there are no allowable deductions expressly enumerated at all, and there is in words no deduction allowed at all, unless indirectly by the words in rule 3 of the first case, viz., repairs "beyond the sum usually expended for such purposes according to an average of three years," loss "not connected with or arising out of such trade," debts, "except bad debts proved," and average loss "beyond the actual amount of loss after adjustment," and by the words in rule 1, applicable to both the first two cases, viz., expenses "not being money wholly and exclusively laid out or expended for the purposes of such trade;" and rent "except such part thereof, *i.e.*, of the premises, as may be used for the purposes of such trade."

The effect of this structure, I think, is this, that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances and to certain prohibitions of deductions, but that a deduction, if there be such, which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area, is one to be made or not to be made according as it is or is not on the facts of the case a proper debit item to be charged against incomings of the trade when computing the balance of profits of it.

I may now deal with the specific matters in respect of which the brewers sought to make deductions in this case. There is no expressed prohibition of the deductions for repairs at all, but it is said that they are the subject of a limited allowance, so that whether they would or would not be properly debited in the brewery profit and loss account they cannot be lawfully deducted here unless they come within the words "repairs of premises occupied for the purposes of such trade"—that is, of the brewery trade. This may or may not be so, but it does not advance the argument. The question is, "occupied" by whom? If by the person who actually occupies the clause does not apply here, for this case is not one of a brewer seeking to deduct the cost of repairing premises which he himself occupies. If the meaning is occupied in fact for the purpose of the brewer's trade by someone, be he who he may, the clause would apply in favour of the appellants. Personally I incline to the latter view, thinking that there is no warrant for interpolating "by the taxpayer" after "occupied," and so limiting by implication a provision which is expressed in favour of the subject, but the result is the same either way. The deduction for these repairs is not prohibited by this clause, and it is allowable either under the words "balance of the profits or gains" or under the words "money . . . exclusively laid out . . . for the purposes of such trade."

Next as to the rent. A trader who utilises for the purposes of his trade something belonging to him, be it chattel or real property, which he could otherwise let for money, seems to me to put himself to an expense for the purposes of his trade. He does so equally if he hires or rents for that purpose property belonging to another. The amount of his expense is *prima facie* what he could have got for it by letting it in the one case, and what he pays for it when

hiring it in the other. When he gets something back for it while employing it in his trade, by receiving rent or hire for it in connection with that trade, the true amount of his expense can only be arrived at by giving credit for such receipt.

In principle, therefore, I think that in the present case rent foregone, either by letting houses which the brewers own to tied tenants at a low rent instead of to free tenants at a full rack-rent in the open market, or by letting houses in the same way which they hire and then re-let at a loss, is money expended within the first rule applying to both of the first two cases of Schedule D, and that upon the findings of the Special Case, which are conclusive, it is "wholly and exclusively expended for the purposes of such trade."

It is said that such expenditure is not "wholly and exclusively expended." In so far as any questions of law arise here—and it is not clear that there are any—I think that the decision in *Smith* v. *Lion Brewery Company*, 1911 A.C. 15, disposes of them. Where the whole and exclusive purpose of the expenditure is the purposes of the expender's trade, and the object which the expenditure serves is the same, the mere fact that to some extent the expenditure enures to a third party's benefit, say that of the publican, or that the brewer incidentally obtains some advantage, say in his character of landlord, cannot in law defeat the effect of the finding as to the whole and exclusive purpose.

A similar answer may be made to the contention that this deduction is expressly prohibited by the words "nor for the rent . . . of any dwelling-house . . . except such parts thereof as may be used for the purposes of such trade." On the findings here the brewer is a brewer first and a landlord only afterwards. His *rôle* as landlord is subsidiary, an incident of his trade as brewer. If the "dwelling-house" here is the taxpayer's own dwelling-house, *cadit quæstio*. It is not this case. If the deduction is a proper one in arriving at the "balance of profits or gains," as it clearly is, and is not prohibited by any construction of the words "expenses, not being money wholly and exclusively laid out . . . for the purposes of such trade," as I think it equally clearly is not, there is nothing to prohibit it in the words in question. The prohibition does not say "used by the taxpayer who claims the deduction," and I do not see why this restriction should be implied. Further, the fact that the publican sleeps over the bar does not in itself preclude the possibility that his bedroom when so used is used for the brewer's trade if, as here, the brewer in order to get the outlet for his beer which a tied house gives must find a tenant who sleeps as well as sells on the premises. On the findings of fact here, even if the words "by the brewer" be implied after the word "used," as I think they should not be, it is impossible to say that the case is not sufficiently brought within the allowance so read. There is no "wholly or exclusively" in this sub-clause.

The respondent's argument, based on the fact that rent as rent is chargeable to income tax under Schedule A, and that repairs as such form the subject of a conventional deduction under that schedule, is one which I find difficult to answer only because I find it difficult to understand.

As an argument "the scheme of the Act" is all very well, but I think it is pressed too far. The notion seems to be that if a trader chances to be a landlord his liabilities and his rights in connection with income tax so far as his houses are concerned are to be exclusively dealt with under Schedule A as though Schedule D did not exist. The effect is that having paid duty under A in respect of the houses, he has also to pay duty under D on profits which really he has not earned. If he has, in fact, repaired premises for the purpose and with the result of earning profits, and the expense ought, as a matter of business, to be debited to profit and loss, then in this argument he is made to pay under D, on what he has not earned, since the debit of the repairs would have taken that much off the profits, and is reminded that he has been excused something under A, which may or may not be the cost of the repairs, but is said to be deducted for repairs. The two things, repairs for allowance under A and expenses for the purposes of trade as an item in finding out what profits there are to be taxed under D, though they chance to be for repairs, are not *in pari materia*. It is all very well for the taxgatherer to reap where he has not strawed. It is too much (unless the Legislature says so) that he should tax not only the harvest but also the seed.

The remaining items, rates and taxes, premiums and costs, call for no special observation. In my view the case means to find them all to be disbursements and money "wholly and exclusively expended for the purposes of the trade," and that being so in fact I think there is no reason why they may not be so in law. They are accordingly covered by the decision on the rent and the repairs.

I think that the questions raised by the case stated should have been wholly answered in favour of the now appellants, and that the judgments of the Court of Appeal and, *pro tanto*, of Horridge, J., were wrong and should be reversed, and that this appeal should be allowed.

LORD PARMOOR—The appellants are a brewery company who own or lease a number of tied houses. These houses are in the occupation of tenants of the appellants. The appellants claim to make certain deductions in respect of expenditure or disbursements laid out or expended on these houses from the assessment of income tax on their trade profits under Schedule D of the Income Tax Act 1842. These deductions are ranged under five heads:—

(*a*) Repairs to tied houses	£1004 0 10
(*b*) Difference between rents of leasehold houses or Schedule A assessment of freehold houses on the one hand, and rents received from tied tenants on the other hand	2134 14 6

(*c*) Fire and licence insurance premiums . . .	90	7	6
(*d*) Rates and taxes . .	38	7	6
(*f*) Legal and other costs .	56	7	0

The Commissioners disallowed all the claims. Horridge, J., disallowed claim (*a*), but allowed claims (*b*), (*c*), (*d*), (*f*). The Court of Appeal disallowed all the claims, and against this decision the appellants appeal.

Before considering the rules and sections of the Income Tax Acts on which the questions raised in the appeal depend it is essential to have a clear determination of the relevant facts.

The Commissioners have found that the profits derived from the sales to the tied houses are included in the assessment; that these houses have been acquired by the appellants, and are held by them, solely for the purpose of their trade; that the possession and employment of these houses are necessary to enable the appellants to earn the profits on which they pay income tax; that except for the purpose of and for employment in their trade the appellants would not possess these houses. There are further special findings in reference to particular heads of claim. There is no suggestion that there was not relevant evidence on which the findings of the Commissioners might be based, and it is not said that the amounts expended are either excessive or extravagant.

The result of the findings of the Commissioners is that all the expenditure claimed as a deduction has been incurred on or in connection with premises solely acquired for the purpose of the trade of the appellants, and of which the possession and employment are necessary to enable them to earn the profits on which they pay income tax. These findings of the Commissioners must be accepted, and the courts are precluded from questioning them except so far as it is necessary to see whether there is relevant evidence.

In *De Beers Consolidated Mines* v. *Howe*, 1906 A.C. 455, Lord Loreburn, L.C., referring to a finding of fact by the Commissioners, says—"These conclusions of fact cannot be impugned." In *Smith* v. *Lion Brewery Company*, 1911 A.C. 150, Lord Halsbury says—"The facts are ascertained for us. There is no doubt that in ascertaining from time to time what is a taxable amount it might be an extremely difficult problem, but these facts have been ascertained for us, and I do not think it is competent for us to go out of what has already been determined by the tribunal which the Legislature has considered sufficient to determine the form in which such a question if it arises should be determined." It would be unnecessary to emphasise this matter but for the opinion expressed by the President of the Probate, Divorce, and Admiralty Division in delivering the judgment of the Court of Appeal that the question whether the disbursements or expenses were wholly and exclusively laid out for the purposes of the business from which the profits are taxed is a question of law. With great respect to the President this proposition appears to me to contravene a well-established principle, and one which is of great importance to maintain in cases which arise under the Income Tax Acts.

The first rule of the first case of the Income Tax Act 1842 directs that the duty to be charged in respect of any trade shall be computed at a sum not less than the full amount of the balance of the profits or gains of such trade upon an average of three years. The balance of the profits or gains of a trade is struck by setting against the receipts all expenditure incidental to the trade which is necessary to earn them, and by applying in the computation the ordinary principles of commercial trading.

In the present case the Commissioners have found that the possession and employment of the tied houses are necessary to enable the appellants to earn the profits on which they pay income tax.

I think it follows that reasonable expenditure recently incurred on or in connection with such houses is an expenditure incidental to the trade and necessary to earn the profits taxed, and would be set against the receipts of the trade in an ordinary commercial balance-sheet. No auditor could properly pass a balance-sheet unless such a deduction had been made.

I agree therefore with the first proposition put forward by Sir Robert Finlay, that unless there are subsequent statutory limitations disallowing the deductions, or any of them, the deductions must be included in the balance-sheet and set against the receipts of the trade, and that unless this is done the balance of profits or gains cannot be accurately computed.

The same rule further directs that the duty shall be assessed, charged, and paid without other deduction than is hereinafter allowed. It is not necessary to attempt to give an exhaustive meaning to these words, but a deduction is thereinafter allowed under the first rule of cases 1 and 2 for disbursements or expenses, being money wholly or exclusively laid out or expended for the purpose of the trade on which the income tax is paid. The question which arises is whether the statement of costs brings the various heads of expenditure for which a deduction is claimed within this condition. In my opinion it does. It is found that the expenditure under head (*a*) was incurred on repairs which the appellants were bound to do in order to maintain the tied houses in a condition fit for licensed premises, and that as to head (*b*) the sole inducement of the appellants to let tied houses at less than their proper rent was to obtain a larger profit from their business of brewers.

As to the expenditure under the heads (*c*), (*d*), and (*f*), I agree with Horridge, J., that they are all items of expenditure essential to the earning of the profits on which income tax is payable, and further, that they come within the principle of the decision of this House in *Smith* v. *Lion Brewery Company*.

The third rule of the first case provides that in estimating the balance of profits or gains chargeable under Schedule D, or for the purpose of assessing duty thereon, no

sum shall be set against or deducted from such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade beyond the sum usually expended for such purpose according to an average of three years preceding the year in which such assessment shall be made. Apart from the form in which it is expressed, the meaning of this provision is tolerably clear. In calculating any balance of trade on usual business principles, the cost of repairs of the premises occupied for the purpose of such trade would be deducted and set against the receipts. The rule provides that the sum to be allowed shall not exceed the sum usually expended on an average of three years preceding the year in which the assessment is made. The prohibition is not against any deduction in respect of the repairs of the premises occupied, but against the deduction of a larger sum than ascertained in a three years' average. A similar principle of obtaining the proper rate of deduction under the head of repairs is usual in compensation cases, in which a three or five years' average is not uncommonly taken. The question arises whether this rule operates to prohibit any deduction under head (*a*) of the claim. In my opinion it has no application. The tied houses are not occupied by the appellants, and both the prohibition and permission in the rule are limited to the same subject-matter, viz., premises so occupied.

In the court of first instance Horridge, J., held that the decision of the Court of Appeal in the case of *Brickwood & Company* v. *Reynolds*, 1898, 1 Q.B. 95, was binding upon him and negatived the claim to a deduction under head (*a*). The President of the Probate, Divorce, and Admiralty Division, in giving the decision of the Court of Appeal, took the same view, and further expressed the opinion that the decision rested on sound principles, and was not inconsistent with the decision of this House in *Smith* v. *Lion Brewery Company*.

With great respect for the Lords Justices who concurred in the judgment in the case of *Brickwood & Company* v. *Reynolds*, I cannot agree that the third rule of the first case excludes any claim for repairs to tied houses. The contention made in that case is stated to have been—"That inasmuch as by doing repairs to the tied houses they keep up and foster the trade of a publican, which is wholly independent of the trade of a brewer, they are entitled to deduct the cost of repairs to the publican's house before arriving at the balance of the profits and gains of their own trade as brewers."

No such contention was raised by the appellants in the present case. On the contrary, their contention is founded on the statement of fact that the tied houses were held by the appellants solely for the purpose of their business as brewers, and that the repairs to such houses were solely repairs which the appellants were bound to do in order to maintain such houses in a condition fit to use as licensed premises.

It is not very clear on what statement of fact the Court of Appeal founded their decision in the *Brickwood* case, but for the purposes of the decision it was held that the deduction claimed was not an expense wholly or exclusively laid out or expended for the purpose of the trade to be taxed. Any expense not so laid out or expended would be expressly excluded under the first rule of the first and second cases. Apart from the contentions raised and from the statement of facts in the case, A. L. Smith, L.J., expressed the opinion that expenditure on the repair of premises not occupied by the person assessed is not merely not allowed as a deduction, but expressly disallowed by this part of the Act. I cannot assent to this proposition. In my opinion the rule has no application whatever to expenditure on the repair of premises not occupied by the brewer assessed.

I further agree with Horridge, J., that apart from head (*a*) the deductions cannot be disallowed without disregarding the authority of the decision of this House in the *Lion Brewery* case. The statement of facts in that case was in all material particulars similar to the statement of facts in the present case. No doubt the special deduction sanctioned was the charge payable in respect of the compensation levy imposed by the Licensing Act of 1904, but I can see no principle on which, if such a deduction is allowed, the deductions claimed by the appellants should be disallowed. It can make no difference that the charge is a statutory one, so long as it is made for the sole purpose of earning the profit on which the income tax is paid.

A suggestion was made that if the deduction under head (*b*) is allowed the amount of £2134 or a portion thereof might escape the income tax altogether, since the tenant's profits under Schedule D would be calculated, not on the rents paid to the appellants, but on actual annual values. I think that there are two answers to the suggested difficulty. In the first place, whatever may be the effect of Schedule A on the deductions to be made for the purpose of computing tenant's profits under Schedule D, this is not a relevant consideration, and cannot affect the proper deductions to which the appellants are entitled in order to arrive at the balance of profits on a different trade. There would be no place for such an item in a commercial balance-sheet limited to the appellants' trade. In the second place, it is a confusion of language to say that the sum of £2134 escapes taxation. It is a sum expended to earn the profits on which income tax is charged, and whenever the consequent receipts are larger than the expenditure incurred to earn them there is an increase and not a diminution in the balance of profits or gain on which income tax is chargeable.

I have not overlooked section 159 of the Income Tax Act 1842, but deductions made under the rules to which reference has been made come within the words "deductions enumerated in the Act."

In my opinion the appellants are entitled to claim all the deductions ranged under

the five heads, and the appeal should be allowed, with the order as to costs which has been proposed.

Their Lordships allowed the appeal.

Counsel for the Appellants—Sir R. Finlay, K.C.—W. Ryde, K.C.—A. M. Latter. Agents—Godden, Holme, & Ward, Solicitors.

Counsel for the Respondent—Sir J. Simon (A.-G.) — Sir S. Buckmaster (S.-G.) — W. Finlay, K.C. Agent—H. Bertram Cox, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Tuesday, December 15, 1914.

(Before the Lord Chancellor (Viscount Haldane), Lords Dunedin, Atkinson, Parker, and Parmoor.)

JUREIDINI *v.* NATIONAL BRITISH AND IRISH MILLERS' INSURANCE COMPANY, LIMITED.

Contract — Insurance — Fire Policy — Repudiation of Liability — Arbitration Clause—Approbate and Reprobate.

An insurance company repudiating liability under a contract of insurance on the ground of fraud cannot claim that action is barred by the non-fulfilment of a condition-precedent to the contract.

Decision of Court of Appeal *reversed*. *Scott* v. *Avery* (1856, 5 H.L. Cas. 811) *considered* and *distinguished*.

Appeal from a decision of the Court of Appeal setting aside a judgment of DARLING, J., and the verdict of a special jury by which judgment was entered for the appellants for the sum of £543, 2s. upon two policies of assurance issued by the respondent company.

The appellant and his partner Mitri Mahli, his co-plaintiff in the action (since deceased), carried on the business of merchants and wholesale dealers in textiles, hardware, and other merchandise at premises situate at Lot 2, Manzana, 29 Second Street, Port Limon, in the Republic of Costa Rica, under the style of "N. & N. Jureidini & Company." The defendants were the Insurance Company, whose head office is at No. 59 Mark Lane, London, E.C.

The appellant firm had insured their stock-in-trade upon the premises at Port Limon against loss or damage by fire under two policies issued by the respondent company. The insurances were effected, together with seven other polices in all, for a total amount of £5800, on the same stock by Nasil Jureidini of Manchester through J. Horkeimer, a broker of Manchester. This broker instructed Price, Forbes, & Company, the agents of the respondents, to whom all premiums due upon the policies were paid. The policies were all in force at the time of the fire hereinafter referred to, and all were substantially in the same form. There was also another policy for £1000 on adjoining premises occupied by C. S. Lazarus, but no claim was made by the appellant firm under that policy to which the present proceedings had reference.

The policies contained, *inter alia*, the following conditions:—"(10) On the happening of any loss or damage the insured must forthwith give notice in writing thereof to the company, and must within fifteen days after the loss or damage or such further time as the company may in writing allow in that behalf dispatch to the company a claim in writing for the loss and damage, containing as particular an account as is reasonably practicable of all the articles or items of property damaged or destroyed, and of the amount of loss or damage thereto respectively, and of any other insurances, and must at all times, at his own expense, produce and give to the company all such books, vouchers, and other evidence as may be reasonably required by or on behalf of the company, together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith, and if the insurance is subject to average the insured must within the aforesaid fifteen days, or such further time as the company may in writing allow in that behalf, dispatch to the company an account of all the property insured with the estimated value thereof at the breaking out of the fire. No amount shall be payable under this policy unless the terms of this condition have been complied with. (12) If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy, or if the loss or damage be occasioned by the wilful act or with the connivance of the insured, or if the insured or anyone acting on his behalf shall hinder or obstruct the company in doing any of the acts referred to in condition 11; or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of condition 17 of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited. (17) If any difference arises as to the amount of any loss or damage, such difference shall independently of all other questions be referred to the decision of an arbitrator to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required to do so in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator; and in case of disagreement between the arbitrators the difference shall be referred to the decision of an umpire who shall have been appointed by them in writ-