

No. 354.—IN THE HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—29th July, 1913, and 4th, 5th and 12th December, 1913.

COURT OF APPEAL.—5th and 6th February and 3rd April, 1914.

HOUSE OF LORDS.—27th, 29th and 30th October and 4th December, 1914.

USHER'S WILTSHIRE BREWERY, LIMITED v. BRUCE (Surveyor of Taxes).⁽¹⁾

Income Tax (Schedule D).—Deductions—Brewer—Tied Houses.

A Brewery Company are the owners or lessees of a number of licensed premises which they have acquired solely in the course of and for the purpose of their business as brewers and as a necessary incident to the more profitably carrying on of their said business. The licensed premises are let to tenants who are "tied" to purchase their beers, &c., from the Company. The Company claimed that in the computation of their profits for assessment under Schedule D, the following expenses incurred in connection with these tied houses should be allowed:—

(A) repairs to tied houses; (B) differences between rents of leasehold houses or Schedule A assessment of freehold houses on the one hand and the rents received from the tied tenants on the other hand; (C) fire and licence insurance premiums; (D) rates and taxes; (E) legal and other costs.

Held, that all the expenses claimed were admissible as being money wholly and exclusively laid out or expended for the purpose of the trade of the Brewery Company.

CASE stated under 43 and 44 Vic. Cap. 19, Sec. 59, for the opinion of the King's Bench Division of the High Court.

1. At a meeting of the Commissioners for General Purposes of the Income Tax Acts for the Tax Division of Trowbridge in the County of Wilts held on the 31st day of May 1912 for the

⁽¹⁾ Reported K.B.D. [1914] 1 K.B. 357; C.A. [1914] 2 K.B. 891; and H.L. in [1915] A.C. 433.

purpose of hearing and disposing of Appeals under the Income Tax Acts for the year ending the 5th day of April 1912, Usher's Wiltshire Brewery Limited, a Company registered under the Companies Acts, carrying on business as brewers and maltsters and sellers of beer, wine and spirits at Trowbridge aforesaid and elsewhere appealed against an assessment of £17,383 (less £401 allowance for wear and tear of plant) made on them under 16 and 17 Vic. Cap. 34 Sec. 2 Sch. D in respect of the profits of their trade. The Appellants claimed to have this Assessment reduced by the following amounts :—

	£	s.	d.
(A) Repairs to tied houses	1,004	0	10
(B) Difference between rents of leasehold houses or Sch. A. Assessment of freehold houses on the one hand, and rents received from tied tenants on the other hand	2,134	14	6
(C) Fire and licence insurance premiums	90	7	6
(D) Rates and taxes	38	7	6
(E) Gas and water	4	2	6
(F) Legal and other costs... ..	66	2	8

2. The Appellants were represented by their Secretary, Edgar Lofts.

3. In common with other Brewery Companies the Appellants have from time to time in order to increase their trade purchased licensed houses which they let to tenants, one of the terms of such lettings being that the tenants should buy from the Appellants all the ale, beer, wines and spirits sold in such tied houses.

4. The profits of the Appellants are made by brewing ale, beer and other articles and purchasing spirits in bulk and selling these commodities partly to private individuals, partly (to a limited degree) to free licensed houses, and as to the greater part to the tenants of their tied houses. All these profits of the Appellants are included in the Assessment. Such profits are materially increased owing to the possession by them of the tied houses in question and in consequence of an increased sale of these commodities to the tenants of those tied houses and to the fact that they are able to obtain and do obtain for the same class of goods a higher price from the tenants of their tied houses than they can obtain or are able to obtain from their other customers.

5. The tenants of the Appellants' tied houses do not, as a matter of fact, spend any money on repairs to the tied houses let to them. Such repairs as from time to time become necessary to these tied houses are executed by the Appellants and it is not disputed that the sum of £1,004 0s. 10d. is not an excessive sum to be expended in such repairs, including compliance with the requirements of the Licensing Authorities.

6. The tied houses in question are occupied by the tenants partly for the purposes of their trade as licensed victuallers and beer retailers, and partly as the private dwellings of themselves and their families. Repairs are executed indifferently to the trade and private dwelling parts of these houses.

7. The said premises have been acquired by the Appellants and are held by them solely in the course of and for the purpose of their said business and as a necessary incident to the more profitably carrying on their said business. The possession and employment of the said premises as aforesaid are necessary to enable them to earn the profits upon which they pay income tax, and without the said premises and their use as aforesaid, the Appellants' profits if there were any at all would be less in amount.

Except for the purposes of and employment in their said business, the Appellants would not possess the said premises.

The said premises were not acquired and are not held by the Appellants as investments and if any house loses its licence the Appellants as soon as possible get rid of it.

8. The repairs to the said premises (in respect of which a deduction was claimed by the Appellants) were solely repairs which the Appellants were bound to do in order to maintain the said premises in a condition fit to use as licensed premises.

9. In addition to their tied houses, the Appellants own other licensed houses which they have during the year occupied by their managers or servants, and in respect of these, and of the brewery and other premises occupied by the Appellants for the purpose of their trade, they have been allowed for repairs before the Assessment was made the allowance to which they are entitled under 5 and 6 Vic. Cap. 35, Sec. 100, First Class, Rule 3.

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

(a) That having regard to the decision in *Smith v. Lion Brewery Company* (1911) A.C. 150⁽¹⁾ the deductions claimed ought to be allowed.

(b) That the licensed premises of which they are the owners and lessees have been acquired by them and were held by them in the course of and for the purpose of their said business and as a necessary incident to the more profitably carrying on of such business and that the purchase and letting of licensed houses was an essential part of their business as brewers.

(c) That in consideration of the tenants of their tied houses covenanting to buy all ales, beer, wines and spirits from the Appellants only, those tenants pay a much less rent than the full annual value of the premises.

(d) That by these means and the possession and use of the said premises which are employed by the Appellants as substantially necessary to carry on their business profitably the Appellants are enabled to earn and do earn profits upon which they pay income tax and which without the said premises and their user for the purposes aforesaid would be less in amount. That the Appellants had not acquired the premises as investments or for the purposes of investment.

(e) That the repairs in question were a necessary outlay without which such profits could not have been earned and that these form a legitimate deduction in arriving at the total gains in respect of which they are assessed under Schedule D.

⁽¹⁾ 5 T.C. 568.

(f) That they are properly entitled to a deduction from their profits by their assessment under Schedule D in respect of the difference between the rents of leasehold houses or Schedule A Assessment of freehold houses on the one hand and rents received from their tenants of tied houses on the other hand.

(g) That they are entitled to the above named deductions for fire and licence insurance premiums, for rates and taxes, for gas and water and for legal and other costs as necessary expenses in the conduct of their business, without which their profits as assessed under Schedule D could not be earned.

11. The Surveyor of Taxes on the other hand contended:—

(a) That the trade of the brewery is quite distinct from the trade of the public house and that the expenses incurred in respect to the public house cannot be deducted from the profits of the brewery and that so far as the deduction for repairs was concerned, the Commissioners were bound by the judicial decision contained in the case of *Brickwood & Co. v. Reynolds* (Surveyor of Taxes) decided in the Court of Appeal on the 17th day of November 1887.⁽¹⁾

(b) That there was no authority for the deductions (B), (C), (D), (E), and (F) claimed by the Appellants as set forth above, on the ground that the decision as to repairs to tied houses covers these deductions by analogy.

(c) That in estimating the balance of the profits and gains these sums should not be set against or deducted from such profits and gains, being money wholly and exclusively laid out or expended for the purpose of such trade and that with regard to the deductions sought under these heads also, it is necessary to differentiate between the trade of the brewery and the trade of the public house, and finally that these deductions are not authorised by the Third Rule of the First Case, Sec. 100, Income Tax Act, 1842.

12. At the conclusion of the arguments we announced our determination that in our opinion upon the authorities stated the Appellants were not entitled to the deductions claimed.

13. The Appellants expressed their dissatisfaction with our determination as being erroneous in point of law, and required us to state and sign a case for the High Court of Justice which we have stated and do now sign accordingly.

The question for the Opinion of the Court is whether the Commissioners were right.

Given under our hands this 6th day of February, 1913.

ERLYSMAN PINCKNEY

(Chairman),

WILLIAM MACKAY,
FRED. R. WILLIS,
J. POYNTON HADEN,
E. C. PINCKNEY,
W. H. CAVERTON,

Commissioners for General
Purposes,
Trowbridge Division,
County of Wilts.

(1) 3 T.C. 600.

SUPPLEMENTAL STATEMENT OF FACTS, DATED 29th October, 1913.

Agreed by the parties in pursuance of Order, dated 29th July, 1913.

The following paragraph 8a should be added.

8a. The following further facts are to the said expenses and losses A—F are agreed.

A. A form of the tenancy agreement of the said tied houses is exhibited and forms part of the Case. This tenancy agreement is used in the case of all the tied houses which are in question. In respect of the houses for which these claims arise the Appellants have in fact borne the cost of the repairs themselves. They have done so because although the legal obligation to repair is on the tenants, it is found that it is in the interests of the Appellants commercially to pay for these repairs rather than to enforce the legal obligation resting on the tenants. 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. Some of these repairs are to the exterior of the premises. Clause 8 of the Case applies to all these repairs.

B. In consideration of the "tie" contained in the tenancy agreement the Appellants let the tied houses at considerably less than their annual value of what they could get for them without such a tie and in the case of houses rented by them also below what they pay for the rent thereof themselves. Such letting is made by them deliberately and solely in order to get the trade which the using of such houses as tied houses affords and by means of so doing they are enabled to make a profit on their total trading transactions by reason of the increased sale of their beer and other goods. The letting at less than the annual value or head rent is not due to a change in the value of the premises. The figures in question represent the difference between the rents received by the Appellants on the one hand and

- (i) in the case of their freehold houses, the net Schedule A Assessment;
- (ii) in the case of their leasehold houses, the rents paid by them.

If it should be held that in case (ii) the net Schedule A Assessment is the proper figure, it can be ascertained.

C. These are annual expenses incurred by the Appellants on the said tied houses in the one case to insure against destruction of or injury to the premises, *i.e.*, the fabric, by fire, in the other to insure against loss of the publican's or beer house licence (as the case may be) in cases where no compensation is payable out of the Compensation Fund. The payment of premiums for the insurance of trade premises is a usual and proper trade outgoing and is made by the Appellants as such.

D. These expenses were paid by the Appellants in respect of some of the said tied houses. In respect of the houses for which this claim arises the Appellants did not for the reasons stated

under A (*supra*) enforce the tenants' covenant to pay and consequently paid the rates and taxes themselves.

E. This claim is waived for the purpose of this case.

7. These are lawyers' charges in respect of the said tied houses which have been paid by the Appellants as such. Particulars are as follows:—

These amount to £56 7s. and not to £66 2s. 8d. and consist solely of solicitors costs and disbursements in connection with the following matters, all relating to the Company's tied houses.

		£	s.	d.	
(1) Renewal of Publican's licences.	} New Inn, Lavington	13	7	0	
(2) Surrenders, terminations and assignments of leases or tenancy agreements thereof.		Stockwell Green ...	1	1	0
	} Victory Tavern ...	1	1	0	
		Woolpack ...	1	1	0
(3) Charges in connection with the assessments of tied houses for Poor Rate including attendances before Assessment Committees and obtaining reduction.	} Royal Exchange ...	1	1	0	
(4) General charges in connection with tied houses relating to complaints against tenants, obtaining surrenders of leases, preparing agreements &c., and—advising the Brewery as to thefts of beer, &c.		British Lion ...	17	14	8
	" " ...	1	11	6	
(5) Charges relating to Brewers' position and as to getting a full licence and as to proposal to give up claim to compensation on getting a full licence.	} Crown Inn, Hilperton.	£ 32	s. 7	d. 11	
		Less costs for full licence.	12	18	1
			19	9	10
		£56 7 0			

GODDEN, HOLME & WARD,
Solicitors for the Appellants

H. BERTRAM COX,
Solicitors of Inland Revenue for
the Respondent.

AN AGREEMENT made this _____ day of _____ 191
 between USHER'S WILTSHIRE BREWERY LIMITED, whose
 registered Office is at Trowbridge, in the County of Wilts
 (hereinafter called "the landlords"), of the one part
 and
 of

(hereinafter called "the tenant") of the other part, whereby
 it is agreed as follows:—

1.—The landlords hereby agree to let, and the tenant hereby **Premises.**
 agrees to take, all that messuage or tenement known as

situate

with the appurtenances for one year from the _____ day of
 191 _____ and so on from year to year unless
 and until the tenancy hereby created shall be determined in
 manner hereinafter provided at the yearly rent of £ _____ and **Rent.**
 so in proportion for any fractional part of a year, to be paid by
 equal quarterly payments on the usual quarter-days, the first
 payment to be made on the _____ day of _____ next.

2.—The tenant hereby agrees with the landlords as follows: **Tenant agrees.**
 (1) To pay the said rent at the times and in manner aforesaid, **(1) To pay rent.**
 and all rates, taxes and outgoings whatsoever in respect of the said
 premises, land tax, property tax, and ground rent (if any)
 excepted. (2) To keep the interior of the said premises and all **(2) To keep**
 drains and privies clean and well and sufficiently repaired and **interior in**
 upheld (damage by fire only excepted), and at the end of the **repair.**
 tenancy so to give up the said premises to the landlords. (3) To **(3) To keep**
 keep the said premises open as a **open as a**
 during such hours as shall be allowed by law for the sale of Beer, **licensed house**
 Ales, Stouts, Wines and Spirits, and to conduct the said house in **and conduct**
 such orderly manner that the necessary licenses and certificates **properly.**
 may not be taken away or refused to be renewed. (4) Not to carry **(4) To use only**
 on or permit to be carried on upon the said premises any other **as a licensed**
 business than that of a public house or beerhouse keeper. (5) To **house,**
 apply for and use his best endeavours to obtain a renewal of all **(5) To renew**
 necessary licenses and certificates for keeping open the said pre- **licenses.**
 mises as a Tavern or Public House and to pay the Excise duties **(6) To hand**
 for the same. (6) At the end of the tenancy to assign, transfer, **over licenses**
 and hand over the residue of all licenses, both Magisterial and **at end of**
 Excise held by him to the landlords or their nominee or to the **tenancy.**
 incoming tenant as the case may be upon being paid for the pro-
 portionate part of the unexpired term of the said licenses, which
 licenses, if not so assigned, transferred and handed over shall be
 considered as lost or wilfully withheld by the holder thereof, so
 that the Magistrates may receive a copy thereof under sec. 41 of
 the Licensing Act, 1872. (7) To attend when required so to do by **(7) To do all**
 the landlords before the Justices and sign all necessary notices, **acts necessary**
 and do all other acts and things which may be requisite at the end **for transfer,**
 of the tenancy to transfer the said licenses to the landlords or their
 nominee, or to the incoming tenant as the case may be. (8) Not **(8) Not to give**
 to give during the tenancy any Bill of Sale or preferential security **Bill of Sale.**

(9) Not to assign or underlet.

(10) To purchase malt liquors and wines and spirits only of landlords

(11) To permit agents of landlords to enter and inspect.

(12) not to brew.

Tenancy determinable by three months' notice.

Power to landlords to re-enter if rent in arrear.
House not kept open.

House not properly conducted.
Offence against Licensing Acts.

Bill of Sale, &c. given.

House assigned or underlet.

Failure to purchase liquors of landlords.

Tenant become bankrupt or liquidates.
Or suffers an execution or is committed to prison or leaves the country.
Or fails to observe foregoing agreements.

of his goods or effects to any person or persons. (9) Not to assign, underlet, or part with the possession of the said premises or any part thereof without the consent in writing of the landlords first obtained. (10) To purchase from the landlords or their nominee or nominees, and from no other person or persons, all the beer, ale, and porter and all other malt liquors and wines and spirits sold or consumed upon the said premises, or which shall be brought thereon to be sold or consumed. (11) To permit any person or persons, appointed in that behalf by the landlords to enter upon the said premises and the cellars and vaults thereof at all reasonable times to view the condition and state of repair thereof, and to inspect the stock of beer, ale, porter, and other malt liquors and wines and spirits in or upon the same. (12) Not to brew, or permit, or suffer to be brewed upon or about the said premises, any beer, ale, porter, or other malt liquors.

3.—Either party shall be at liberty to determine the tenancy hereby created in the first or any subsequent year of the tenancy by giving to the other of them three calendar months' previous notice in writing of their or his intention so to do, expiring at any time.

4.—If any rent payable hereunder, and whether payment has been demanded or not, be 21 days in arrear, or if the tenant shall cease or omit to use and keep open the said house and premises as according to the general practice of the trade, or shall fail to conduct the said house in such orderly manner as aforesaid, or shall do, or permit, or suffer to be done, any act whereby he shall or may be convicted of any offence against any law now or hereafter to be in force as to licensed houses whether such conviction is endorsed on the license or not, or shall omit to apply for a renewal of the necessary licenses and certificates, or shall give any Bill of Sale or preferential security of his goods and effects (without such consent as aforesaid), or shall assign, underlet or otherwise part with or give up possession of the said house and premises to any person or person (without such consent as aforesaid), or shall not take and purchase of the landlords or their nominee or nominees, all the beer, ale, porter, or other malt liquors and wines and spirits which shall be sold or consumed on the said premises or which shall be brought thereon to be sold or consumed, or shall become bankrupt or commit any act of bankruptcy or arrange or compound with his Creditors, or suffer his goods or any of them to be taken in execution, or if he shall be committed to prison upon any criminal or civil process or depart out of the country, or shall in any respect fail in the performance or observance of the agreements herein on his part contained then and in any such case and thereupon at any time thereafter it shall and may be lawful for the landlords or any person or persons duly authorised by them in that behalf into or upon the said premises or any part thereof in the name of the whole to re-enter and the said premises peaceably to hold and enjoy thenceforth as if this letting or agreement had not taken place or been made but without prejudice to any right of action or remedy of the landlords for any arrears of rent

or in respect of any antecedent breach of any of the agreements by the tenant herein contained.

5.—In case the tenant shall refuse or neglect to renew the said licenses, whether Magisterial or Excise, at the usual and proper times or to assign or transfer the same as aforesaid it shall be lawful for the landlords or their agent duly authorised in that behalf, and they or he are or is hereby irrevocably empowered by the tenant to do all things necessary or proper to effect such renewal, assignment, or transfer, and to execute or sign in the name or otherwise on behalf of the tenant all such instruments, documents or writings as may be requisite or proper for such purpose.

Power to landlords to renew or transfer licenses in case of tenant's default.

6.—Irrespective of and without prejudice to all or any of the powers or remedies herein contained or given to the landlords on the breach by the tenant of the agreement on the part herein contained to purchase from the landlords or their nominee or nominees and from no other person or persons, all the beer, ale, porter, and all other malt liquors and wines and spirits sold or consumed on the said premises or brought thereon to be sold or consumed, the tenant shall on each and every breach of such last mentioned agreement, pay to the landlords as liquidated damages the sum of £5, every such sum to be paid forthwith on every such breach.

Penalty on breach of agreement to buy malt liquors and wines and spirits of landlords.

7.—On the tenant giving up possession of the said premises, the landlords may at their option take to and pay for at a fair valuation to be made in the usual way by two valuers, one to be elected by each party, or by their umpire in the event of their not agreeing, all the tenant's fixtures and fittings which may have been taken to and paid for by the tenant, or which may have been added by him during the tenancy, provided that any sum or sums of money which may then be due or owing from the tenant to the landlords on any account whatsoever shall be retained out of the amount payable by the landlords under such valuation.

Landlords may take fixtures at valuation on the expiration of tenancy.

8.—The landlords hereby agree with the tenant, that the tenant paying the said rent and observing the agreements and stipulations herein contained shall and may quietly enjoy the said premises during the tenancy hereby created without interruption by the landlords and that the landlords will during the said tenancy supply the tenant with such beer, ale, porter and other malt liquors and wines and spirits as he may require; but this agreement shall not compel the landlords to deliver any goods after the tenant shall have become indebted to the landlords for goods delivered or arrears of rent or on any other account, to the amount of £10, until such debt shall be fully paid and satisfied.

Landlords' agreement for quiet enjoyment by tenant and to supply malt liquors and wines and spirits.

9.—The tenant further agrees on leaving the aforesaid premises not to ask, accept, or demand any premium for the goodwill of the business.

Tenant on leaving not to ask premium for goodwill.

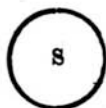
10.—The term "landlords" as herein used shall, whenever the context admits, include the Successors and Assigns of the said

Interpretations of terms "landlords" and "tenant".

Company, and the term "tenant" as herein used shall, whenever the context admits, include the Executors, Administrators, and Assigns of the tenant.

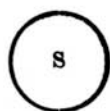
In Witness whereof the landlords have caused the Common Seal of the said Company to be hereunto affixed, and the tenant has hereunto set h hand and seal the day and year first above written.

Signed Sealed and Delivered by }
the tenant in the presence of }



The Common Seal of Usher's Wiltshire Brewery Ltd.,
was hereunto affixed in the presence of :—

}
Directors.



Secretary.

The Case was argued before the Court on the 29th July, 1913, when Mr. Ryde, K.C. and Mr. Latter appeared as Counsel for the Appellant Company and the Attorney-General (Sir Rufus Isaacs, K.C., M.P.) and Mr. W. Finlay appeared as Counsel for the Crown. Mr. Justice Horridge ordered the Case to be sent back to the Commissioners to state the facts as to the items (A) to (F) claimed by the Company as deductions, unless the parties agree before the 1st November to a statement of facts. The foregoing Supplemental Statement of Facts having been agreed by the parties in pursuance of this Order, the case again came on for hearing on the 4th and 5th December, 1914, when the same Counsel appeared as before, with the exception that Sir Rufus Isaacs, K.C., M.P., had been succeeded as Attorney-General by Sir John Simon, K.C., M.P., who appeared accordingly for the Crown. Judgment was given on the 12th December, 1914, when the Appeal of the Company was allowed as to the items other than the item for repairs and dismissed as regards the item for repairs.

JUDGMENT.

Horridge, J.—This is an appeal from the Commissioners for General Purposes of the Income Tax Acts for the Tax Division of Trowbridge in the County of Wilts whereby they found that the Appellants, a Brewery Company, were not entitled to make any of the deductions set out in paragraph 1 of the Case from the profits earned by them and upon which they were assessed under Schedule D. The first and third Rules to the First Case under Schedule D are the Rules under which the questions as to these

deductions arise. To deal first with the deduction claimed to be made in respect of repairs to tied houses, in the case of *Brickwood and Company v. Reynolds*, 1898, 1 Q.B., page 95,⁽¹⁾ the Court of Appeal decided that the provision of section 100, Case I., Rule 3, of 5 and 6 Victoria, Chapter 35, which authorises deduction in estimating the balance of profits and gains in a trade in respect of the expenditure on repairs of premises occupied for the purpose of such trade, applies only to premises occupied by the person assessed, and that Rule 3 contained both a permission and a prohibition, and that in case of repairs which do not come within the permission which only applies to the case of occupation by the person assessed, they necessarily fall within the prohibition, and cannot be deducted. I am therefore bound by this decision to hold that the Commissioners were right in holding that no deduction would be made in respect of repairs. The next deduction asked for was the difference between the 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. The facts with regard to this claim are set out in paragraphs 3, 4, and 7, of the Case, and also in paragraph B of the Supplemental Statement of Facts. They may be shortly summarised by saying that the sole inducement to the Brewery Company to let tied houses at less than their proper rents is to obtain a larger profit from their business as Brewers and that they would not own such premises except for their business advantage. The test of what is the balance of profits and gains upon which duty is to be assessed is in the language of Lord Herschell in *Gresham Life Assurance Society v. Styles*, 1892, Appeal Cases, at p. 323 "the balance arrived at by setting against the receipts the expenditure necessary to earn them."⁽²⁾ The Master of the Rolls, Lord Collins in *Strong & Co., v. Woodfield*, 1905, 2 K.B., p. 350, says "It seems to me that all expenses necessary for the purpose of earning profits may properly be deducted but expenses to come out of the profits after they have been earned cannot be deducted."⁽³⁾ These two definitions are quoted by Cozens-Hardy, Master of the Rolls, in *Smith v. The Lion Brewery Company*, 1909, 2 K.B., at page 919.⁽⁴⁾ In the report of *Smith v. The Lion Brewery Company* before Mr. Justice Channell, 1904, 1 K.B., at page 715, Mr. Justice Channell puts the very case of the loss of rents which I am now dealing with. He says "If a Brewery Company receives less rent than it pays for a public house, of which it is a tenant and which it underlets because the undertenant is bound to buy all his beer from the Company, is not the difference in rent an expense of the trade of the brewery in the sale of the beer, and can it not be deducted as such in estimating the profits and gains of that trade?"⁽⁵⁾ The findings with regard to this matter are in effect, I think, the same findings as those in *Smith v. The Lion Brewery Company* and which are set out in the Judgment of Lord Justice Farwell at page 920,⁽⁶⁾ and this loss in rent was an expenditure which

⁽¹⁾ 3 T.C. 600.⁽⁴⁾ 5 T.C. at p. 576.⁽²⁾ 3 T.C. at p. 195.⁽⁵⁾ 5 T.C. at p. 571.⁽³⁾ 5 T.C. at p. 215.⁽⁶⁾ 5 T.C. at p. 577.

within the words of the Master of the Rolls at page 920⁽¹⁾ was essential to the earning of the profits and not a deduction from the balance of profits, and I am of opinion on the authority of *Smith v. The Lion Brewery Company*, 1911, 2 K.B., 912 affirmed 1911, Appeal Cases at page 150,⁽²⁾ that the Appellants are entitled to the deductions under this head. I think on the facts found the Fire and Licence Insurance Premiums, the Rates and Taxes and the Gas and Water were all expenditure essential to the earning of the profits, and I think they also are governed by *Smith v. The Lion Brewery Company*⁽²⁾ and are proper deductions.

I would also as regards the Insurance premiums draw attention to the language of Lord Atkinson in *Smith v. The Lion Brewery Company*, 1911, Appeal Cases, at page 162, where he says, "If a publican insures the licensed premises against destruction by fire, his paramount purpose is to insure against the loss of his trade and business though incidentally he insures against the destruction of the fabric, in which; apart from the licence, he may have little or no interest. Yet it is not, as I understood, contended that the payment of the premium in such a case should not be deducted from his receipts as an expenditure made wholly and exclusively for the purposes of his trade."⁽³⁾

The only remaining deduction is "Legal and other costs." As to these it was agreed between Counsel that I must treat these legal expenses as not being incurred for any extension of the business so as to make them capital expenditure. If, therefore, they are regarded as average annual payments in respect of the various matters mentioned in the Supplemental Statement, I think they would be expenses essential to the earning of the profits and therefore come within the principle of *Smith v. The Lion Brewery*.⁽²⁾

With regard to the question of the deduction of the difference in rentals the Attorney-General contended that the effect of *Gillatt and Watts v. Colquhoun*, 2 Taxes Cases, page 76, and the language of Lord Herschell at page 45 of *Russell v. Town and County Bank*, 13 Appeal Cases,⁽⁴⁾ was that the tied tenants of these houses would be assessed under Schedule A for property tax upon the full value of the houses and that from these tenants' profits would be deducted for the purpose of Schedule D, not merely the rents they paid to the Appellants but the actual annual value. In this way, he said, the tenant gets the benefit in his assessment to Income Tax under Schedule D. of the full value of the premises and necessarily of all the difference in rent which the Appellants are now asking to be allowed in their account for income tax under Schedule D. I think this probably as regards the tenant is correct, but I cannot see why one should inquire into a separate and distinct income tax assessment for the purpose of depriving the Appellants of an allowance in respect of an expenditure which in their business it was necessary to incur, to earn the profits on which they are to be assessed.

) 5 T.O. at p. 575. (2) 5 T.C. at p. 568. (3) 5 T.C. at pages 595 and 596. (4) 2 T.C. at pages 328 and 329.

The Appeal must be allowed as to the items other than the items for repairs, and dismissed as regards the items for repairs.

Having regard to the result of the Appeal I do not think there ought to be any costs on either side.

The Company having given Notice of Appeal and the Crown having given Notice of Cross-Appeal, the Case was heard in the Court of Appeal on the 5th and 6th February, 1914, by the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division and Mr. Justice Joyce. The same Counsel appeared as in the High Court with the addition of the Solicitor-General (Sir S. Buckmaster, K.C., M.P.) for the Crown. Judgment was given on the 3rd April, 1914, when the Appeal of the Company was dismissed with costs and the Cross-Appeal of the Crown allowed with costs.

JUDGMENT.

Cozens-Hardy, M.R.—The President will read the Judgment of the Court.

The President.—In this case the questions which arise on the appeal and cross-appeal relate to deductions which the Brewery Company claim to be entitled to make from the profits or gains of their trade or business of brewers and malsters, and sellers of beer, wine and spirits, for the purpose of assessment to the Income Tax under Schedule D.

The facts are set out in the Case stated by Commissioners for General Purposes of the Income Tax Acts for the Tax Division of Trowbridge, under 43 and 44 Victoria, Cap. 19, section 59, for the opinion of the King's Bench Division of High Court, as amplified by a Supplemental Statement of Facts agreed by the parties in pursuance of an Order dated the 29th July, 1913. These two documents therefore constitute the case stated, and are hereinafter so referred to.

The deductions claimed are ranged under five heads in the Case stated, and designated by the letters, A., B., C., D., and F.

The deductions all relate to licensed premises which are known as "tied houses" owned by the Brewery Company, some of them being their freehold property, and others leasehold property; and all the tied houses are let to and are in the occupation of persons who are tenants of the Brewery Company. A Form in blank of the tenancy agreement is exhibited to and forms part of the case. It is stated in the case that the tied houses are occupied by the tenants partly for the purposes of their trade as licensed victuallers and beer retailers, and partly as the private dwellings of themselves and their families. It is also stated that "the houses have been acquired by the Brewery Company, and are held by them solely in the course of and for the purpose of their business, and as a necessary incident to the more profitably carrying on of their business; the possession and enjoyment of the said premises are necessary to enable them to earn the profits upon which they pay Income Tax, and without the said premises and their use the Company's profits, if there were any at all, would be less in amount; and, except for the purposes of and employment in their said business, the Company would

“ not possess the said premises; and the said premises were not
 “ acquired and are not held by the Company as investments; and
 “ if any house loses its licence, the Company as soon as possible
 “ get rid of it.”

The common ground upon which the Company claim to be entitled to have the various deductions made from their gains and profits is that they are disbursements or expenses in money wholly and exclusive laid out or expended for the purposes of their trade or concern; and are, therefore, not prohibited or disallowed by the 1st or 3rd Rule of the First Case, of the 1st Rule applicable to the 1st and 2nd Cases under Section 100, or the 159th Section of the Income Tax Act, 1842. The principles and tests to be applied in order to determine the legality of the various deductions claimed are the same; but it will be convenient to deal with each head separately.

It was contended with reference to all the heads that it was found and stated as a fact in the Case, that they were disbursements or expenses wholly and exclusively laid out or expended for the purposes of the Company's trade or concern in respect of the profits or gains of which they were assessed. I can see no such finding or statement in the Case. But even if there were such a statement, that would by no means settle the question to be determined. When the various circumstances and facts upon which the question depends are established and found the proper inference to be drawn in order to determine whether the disbursements or expenses were wholly and exclusively laid out for the purposes of the trade or concern within the meaning of the provisions referred to is a question of law. An analogous example of such a question, and one very familiar with this Court, is that which constantly arises under the Workmen's Compensation Act, where an Arbitrator or County Court Judge has found all the material facts relating to an accident to a workman, and this Court has on appeal to determine as a matter of law, whether in those facts the accident arose “ out of or in the course of the “ employment.” This point was recently dealt with by the Master of the Rolls (Sir H. Cozens-Hardy) in *Gane v. Norton Hill Colliery Company*, 1909, 2 K.B., 539. My Lord said at page 542:—“ I hope that I shall never depart from the fundamental rule that the learned County Court Judge is the tribunal “ to find the facts; but when, as in the present case, the facts are “ all found or admitted, then the only question which came before “ the County Court Judge was this, what is the true inference to “ be drawn from these known facts? I am clearly “ of opinion that it is open to us in a case like this, where the “ facts are not in dispute, where they have all been found by the “ tribunal dealing with the facts, to say that the inference which “ the Judge drew from those facts and the conclusion at which he “ arrived on those facts are wrong in point of law. We some- “ times say the Judge has misdirected himself, but if the learned “ Judge draws from the admitted facts a wrong conclusion in “ point of law, I care not whether you call it misdirection or not “ —that is a question which is open to review in this Court.”

I now proceed to deal with the facts and contentions pertinent to the present appeal.

The first head of deductions claimed is :—" A, Repairs to tied houses, £1,004 Os. 10d."

These repairs were " executed indifferently to the trade and " private dwelling parts of these houses." They are also described in the Case as " solely repairs which the Company were " bound to do in order to maintain the said premises in a condition fit to use as licensed premises,"

By their agreements the tenants covenanted to do these repairs themselves, but the cost of repairs was in fact borne by the Company " because although the legal obligation to repair was " on the tenants, it was found that it was in the interests of the " Company commercially to pay for these repairs rather than to " enforce the legal obligation resting on the tenants. The cost " was incurred not as a matter of charity, but of commercial " expediency and was necessary in order to avoid the loss of " tenants and consequent transfers to which the Licensing " Justices object."

Upon this point Mr. Justice Horridge decided against the Company holding that he was bound by the decision of this Court in *Brickwood and Company v. Reynolds* ([1898] 1 Q.B. 95).⁽¹⁾ It was contended before us that that case was inconsistent with the case of *Smith v. The Lion Brewery Company* ([1909] 2 K.B. 912)⁽²⁾ and ought to be regarded as of no authority. It is clear, however, that the former case was neither overruled nor disapproved of in the latter. On the contrary, it was treated as being a subsisting authority on the point which it decided. It is, therefore, binding upon this Court also. If I may be permitted respectfully to express an opinion upon it, I think the decision rested on sound principles. The case now before us is not distinguished upon the deductions claimed under head A. from *Brickwood and Company v. Reynolds*⁽¹⁾ (ubi sub); indeed the present is an *a fortiori* case. The deduction claimed in respect of the repairs accordingly is not allowable, and the Appeal of the Company upon this head must be dismissed.

The next head of deductions claimed is :—" 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, £2,134 14s. 6d."

The learned Judge in the Court below decided in favour of the Brewery Company that these deductions (and also those under C., D., and F.) should be allowed, mainly on the authority of *Smith v. The Lion Brewery Company*⁽²⁾ and against this part of the Judgment the Crown bring their Cross Appeal. The case of *Smith v. The Lion Brewery Company*⁽²⁾ in its progress through the Courts disclosed a remarkable divergence of judicial opinion. Mr. Justice Channell, Lord Justice Kennedy, Lord Loreburn (the Lord Chancellor), and Lord Shaw took one view. Sir H. Cozens-Hardy (Master of the Rolls), Lord Justice Farwell, Lord Halsbury and Lord Atkinson held the other; and the latter view prevailed. It is necessary to point out what was the actual decision. Whatever assistance may be desired from the various judgments and opinions expressed, the point decided was a

(1) 3 T.C. 600.

(2) 5 T.C. 568.

definite and narrow one. It was that a Brewery Company are entitled before arriving at their assessable profit to deduct the portion of the compensation levy paid by them on the ground that it is a statutory imposition upon them in respect of their interest in the licensed premises, and made payable by legal enactment as a condition of the use of the premises for the sale of intoxicating liquors. One of the learned Law Lords likened this compensation levy to the license duty paid by a publican or a pawnbroker or an auctioneer to entitle him to carry on his trade or business (Lord Atkinson 1911, A. C. at page 161).⁽¹⁾ In this illustration the learned Law Lord followed the line of reasoning which was initiated by the Master of the Rolls (Sir H. Cozens-Hardy) in the Court of Appeal in the same case ([1909] 2 K.B., 917) where first of all with reference to a tenant he says, at page 918. "His position is identical with that of an auctioneer, or pawnbroker, or a solicitor, each of whom has to make an annual payment to Government before he can earn, and as a condition of earning the profits in respect of which he is chargeable under Schedule D. It is a matter of no importance to consider how the amount thus paid is applied."⁽²⁾ And this is made applicable to the case of the Brewery Company in this passage at page 919: "It seems to me that every argument which goes to show that the retail seller of beer can deduct what he pays in respect of the compensation levy applies with equal force in favour of the wholesale seller of beer in respect of what he pays as his proportion of the Compensation Levy."⁽³⁾ The decision in *Smith v. The Lion Brewery Company*,⁽⁴⁾ therefore does not determine the questions which remain to be considered in the present case.

The Income Tax Acts disallow all deductions under the Schedule D assessments other than those expressly "enumerated" in the Act. The "enumeration" (implied rather than expressed) in the first Rule applicable to Cases 1 and 2 already referred to comprises "Disbursements or expenses being money wholly and exclusively laid out or expended for the purposes of the trade or concern."

Are the sums (amounting to the total of £2,134 14s. 6d.) representing the difference between rents of leasehold houses, or Schedule A Assessment of freehold houses on the one hand, and rents received from the tied tenants on the other hand such disbursements or expenses?

They appear to me to be more accurately described as losses of rents or annual values or allowances out of rents or annual values of freehold and leasehold properties than as such disbursements or expenses as aforesaid.

The rents or Schedule A assessments of these properties do not come into or form part of the trade profits of the Brewery Company at all; how therefore can sums by which the rents are reduced, or allowances made out of such rents, or any sums representing the difference between rents received and Schedule A assessments, be properly brought in as debits against such trade profits?

(1) 5 T.C. at p. 594.

(2) 5 T.C. at p. 575.

(3) 5 T.C. at p. 576.

(4) 5 T.C. 568.

The motives and objects of the Company in acquiring the tied houses are described in the Special Case, and have been referred to.

The Case further states that in consideration of the "tie" contained in the tenancy agreements, the Company let the tied houses at considerably less than their annual value, or what they could get for them without such a tie, and in the case of houses rented by themselves below what they pay for the rent thereof themselves, and proceeds; "such letting is made by them deliberately and solely in order to get the trade which the using of such houses as tied houses affords, and by means of so doing they are enabled to make a profit on their total trading transactions by reason of the increased sale of their beer and other goods. The letting at less than the annual value or head rent is not due to a change in the value of the premises. The figures in question represent the difference between the rents received by the Company on the one hand, and (1) in the case of their freehold houses, the net Schedule A assessments (2), in the case of their leasehold houses, the rents paid by them."

The claim of the Company assumes that they are entitled when they have become the owners of these properties, to a sort of insurance that they will never receive from their tenants less than what is placed as the annual value in the Schedule A assessments of such of the properties as they own as freeholders or than the head rents paid by them for such of the properties as they own as leaseholders.

They may for various reasons be content to take a smaller percentage upon the capital invested in the acquisition of the properties; for example, for the sake of keeping good and contented tenants, or for the sake of increasing the goodwill of the licensed premises and thus enhancing their capital value as well as for increasing their sale of liquors. I have said that these deductions in rent do not appear to me to come properly within the description of such disbursements or expenses. But assuming (contrary to my view) that agreements to accept these lower rents answer the description of disbursements or expenses, in my opinion they are not laid out or expended wholly or exclusively for the purpose or the trade or business of the Company. They are laid out or expended in part to increase the profits of the tenants' trade, because presumably the greater the "barrelage" (as the sale and consumption of liquor in the house is described) the larger the profits of the licence holder; unquestionably they are laid out in part also to maintain or increase the value of the goodwill of the business, and the greater the value of the goodwill the greater also will be the capital value of the licensed premises owned by the Company. Suppose that by the increase of the trade, the rents received exceeded the Schedule A assessments or head rents, the excess would not be brought in to swell the profits of the trade, as the rents do not come into the trade accounts at all.

It might very well happen that in order to increase the attraction and business and value of a licensed house, the Company

might let it at a peppercorn or merely nominal rent to a particular tenant, for example, a well known entertainer or a friend of crowds of athletes or their admirers, or a person of great influence amongst Friendly Societies, or Associations of various kinds. This might be done either by means of a "tie" or without any "tie" or agreement to sell and buy at higher prices than the ordinary, but merely in the hope or expectation that the tenant would buy largely from the Company, and thus not only help their profits, but create a valuable goodwill. It is difficult to conceive that it would be legitimate in such a case to deduct the whole annual value or Schedule A assessment of the premises from the profits of the Company, on the ground that it was such a disbursement or expense as has been described.

It is significant that by clause 9 of the tenancy agreement, the tenants "agree on leaving the premises not to ask, accept, or demand any premium for the goodwill of the business."

The truth is that whatever the object or motives of business proprietors like the Company in this case may be in acquiring properties like these houses which they do not themselves occupy, and whatever losses or gains they may sustain or enjoy either in capital or in income in respect of such properties (which are properly assessable under Schedule A), they cannot and ought not to be brought into the account of their trade profits or losses for the purposes of Schedule D.

A curious practical result, which could never have been intended, would seem to follow the making of these deductions. The policy of the Income Tax Acts is that all these properties must bear their proper Income Tax as lands, tenements, or hereditaments according to their annual values in accordance with Schedule A. If a house is of the annual value of £60 and is let at that rent, Income Tax is levied on that sum, and is payable in the first instance by the tenant. He is then entitled to deduct it from the next rent payable to the Company. If the house is let at a reduced rent of £30 on account of the "tie," the tenant can only deduct Income Tax on £30, and he therefore pays on £30 and the Company on £30 only. If the tenant is assessed under Schedule D he is entitled to deduct the full £60. So far as the occupier is concerned, therefore, the whole tax disappears. The Company as landlords in the case supposed have borne the tax on £30. If they in turn can also deduct £30 from their profits, the Income Tax on the property again disappears. In this way, if the Company's claim for deductions is allowed, property of the value of £2,134 would seem to escape the tax altogether and produce nothing.

I am of opinion that the deductions amounting to £2,134 14s. 6d. are not deductions which the Act allows and the Appeal of the Crown upon this head succeeds.

The next head is "C., Fire and licence insurance premiums, £90 7s. 6d."

The fire insurance premiums are paid to insure against destruction of or injury to the fabric of the premises. Fire insurance premiums can properly be deducted by occupiers or landlords under Schedule A. These are no doubt in one sense

disbursements or expenses. The question is whether they are wholly or exclusively laid out or expended for the purposes of the Company's trade or business, so that they are legitimate deductions under Schedule D. I am of opinion that they are not. They are paid to insure "the fabrics," to protect the landlords from loss by destruction of their property. Thus, indirectly, the rent or income derivable from the property may also be insured against loss. The fire policies are not effected for the purpose of insuring against the loss of the trade enjoyed by the Company in connection with the premises, certainly not exclusively for that purpose. And it is only very indirectly that the payment of fire insurance premiums can possibly be said to affect or protect the trade carried on, on the premises. What is insured against is the destruction by fire of the houses. In most cases no doubt, houses which are licensed are of greater value with the licence attached than without a licence but cases have been known where compensation was claimed under the Licensing Act, 1904, in which it was established that the premises were worth more as private properties without a licence (see *Lassells and Sharman, Limited, in re the Freemason's Arms*, 72 Justice of the Peace, page 323).

The passage from Lord Atkinson's Judgment, which was cited by Mr. Justice Horridge, referred to insurances effected by the publican himself, to protect his business, and not to protect "the fabric in which he may have little or no interest." In any case that passage is no more than a dictum, and was no part of the decision. As to the licence insurance premiums, these are paid "to insure against loss of the licence in cases where no compensation is payable out of the Compensation Fund." They are again payable in the main, if not wholly, to protect the Company as owners of the property from any diminution of the value of the houses in the event of the licences being taken away without any right to compensation. Where such a case arises, the trade in such a house has disappeared, and the Brewery Company are converted into the owners of private property, now assumed to be of a diminished value, with a capital sum of money which they have received under the policy. This sum recompenses them for the diminution of the value of the property. It is not brought in to swell the profits of the Company as traders under Schedule D, although it represents in the business of insurance, the capital value of annual payments of premiums which the Company claim to deduct as expenses.

I am of opinion that neither the fire insurance premiums nor the licence insurance premiums are deductions which can legally be made.

Under this head, accordingly, the Appeal of the Crown also succeeds.

The next head is "D., Rates and Taxes, £38 7s. 6d." These are sums which the tenants were under a legal obligation to pay pursuant to their covenant in the tenancy agreement. The Company, however, did not, for the reasons stated under A in the Case enforce the tenants' covenants to pay, and consequently paid the rates and taxes themselves. These reasons have been stated and appear in the Case, and need not be repeated; in brief, they

are commercial interest and expediency, and avoidance of inconvenience.

I am of opinion that these rates and taxes so paid are in no sense deductions which are allowable from the Company's profits.

Under this head, therefore, the Appeal of the Crown succeeds also.

The last head is "F., Legal and other costs, £56 7s. 0d." It is not easy to understand all these items. Clearly as to some of them, that is (2) and (3), they are not disbursements made wholly and exclusively for the purposes of the Company's trade. And I do not see how items (4) and (5) can be such disbursements. Item No. (1) is not explained.

These items are in some way connected with the licensed premises owned by the Company or with their tenants' conduct or position, and are thus incidentally connected with the trade of the Company; but I do not think it has been shewn that any of them are wholly or exclusively incurred for the purpose of the trade of the brewers, and they cannot, therefore, be deducted.

Upon this head the Appeal of the Crown also succeeds.

In the result the Appeal of the Company is dismissed with costs here and below; and the Cross-Appeal of the Crown is allowed, with costs here and below.

The Case was taken by the Company, on appeal, to the House of Lords and was argued before their Lordships on the 27th, 29th, and 30th October, 1914. Sir Robert Finlay, K.C., M.P., Mr. Walter Ryde, K.C., and Mr. Lyster appeared as Counsel for the Company and the Attorney-General (Sir John Simon, K.C., M.P.), the Solicitor-General (Sir Stanley Buckmaster, K.C., M.P.), and Mr. William Finlay, K.C., appeared as Counsel for the Crown. Judgment was given on the 4th December, 1914, in favour of the Company, with costs.

JUDGMENT.

Earl Loreburn.—My Lords, 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 their 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 *Lion Brewery Company Case*.⁽¹⁾ 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 name 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*⁽¹⁾ 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*⁽¹⁾ rests upon anything

(1) 5 T.C. 568.

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 £1,004 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 purpose 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 £2,134 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 figures 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.

My Lords, 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 earlier decisions of this House.

I think, therefore, that this Appeal succeeds.

Lord Atkinson.—My Lords, this is an Appeal from a Judgment of the Court of Appeal, dated 3rd April, 1914, disallowing the Appeal of the Appellants and allowing the Appeal of the Respondents from a Judgment, dated 12th December, 1913, of Mr. Justice Horridge pronounced on a Case stated under the fifty-ninth section 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.

Mr. Justice Horridge, 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 :—

	£	s.	d.
(A) Repairs to tied houses	1,004	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	2,134	14	6
(C) Fire and licence insurance premiums ...	90	7	6
(F) Legal and other costs	56	7	0

The Commissioners were of opinion that the Appellants were not entitled to deduct any of these sums. Mr. Justice Horridge 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 and Company v. Reynolds* (1898), 1 Q.B., 95⁽¹⁾; but held that the other sums claimed should,

(1) 3 T.C. 600.

on the authority of *Smith v. The Lion Brewery Company* (1911), A.C. 150,⁽¹⁾ be allowed. The Court of Appeal concurred in opinion with Mr. Justice Horridge as to the item for repairs, but held that he was in error in supposing that the Case of *Smith v. The Lion Brewery Company*⁽¹⁾ 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. 274-338) 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., 369-91), 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 *Regina v. Mills* (10 C. and 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 *bond 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 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

(1) 5 T.C. 568.

page 163, line 22, of the report on that Case, 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 increase 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 Appellant's "expense." It is not suggested that the sum claimed, £1,004 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 cost 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. The Lion Brewery Co.*⁽¹⁾ applies, I think, to the latter disbursement, and the remarks I have already made apply to the former as to the remaining items D and F.

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 or profits at all, *Gresham Life Assurance Company v. Styles* (1892), A.C. 309, 323, 324⁽²⁾; *Ashton Gas Company v. Attorney-General* (1906), A.C. 10, 12.⁽³⁾ This Rule, however, proceeds to enact that only those deductions which are thereafter 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. The Town and County Bank*, 13 A.C. 418.⁽⁴⁾ 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 was 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 provision 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 sub-let the houses to publicans at a lower rent than they themselves paid for them, could they deduct from their receipt, 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 these prohibited deductions. Rule 3 deals with the prohibition

(1) 5 T.C. 668.

(2) 3 T.C. 185.

(3) 75 L.J. Ch. 1; 93 L. T. 676.

(4) 2 T.C. 321.

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 heritages shall be the rack-rent at which they are or can be let. Section 35 of the Statute of 1894, sub-section (b) (1), 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.

The present 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 & Co. v. Reynolds*.⁽¹⁾ The decision, it would appear to me from the Judgment of Lord Justice A. L. Smith, pages 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 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 brewers' 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 his 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 his market-place for his own goods, and promoting, through the action of this 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 increase 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 the 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 page 103, Lord Justice A. L. Smith says: "Pausing there, what is the meaning of the word occupied? To my mind the plain meaning is occupied by the person assessed."⁽²⁾ He rejects the construction, apparently put forward by Counsel for

(1) 3 T.O. 600.

(2) 3 T.C. 608.

the Appellant, at page 99 of the report, that the words "occupied for the purpose of trade" contains 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 & Co. v. Reynolds*⁽¹⁾ 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. The Town and County Bank* (13 A.C. 418),⁽²⁾ 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 don't 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 profit. In the case of the tenants, it is the difference between the annual value of his, the brewer's, freehold house and the rent he receives for it, and in his leasehold house the difference between the rent he receives for it and the rent he pays for it, if that be equal to the full annual value under Schedule A. For the purposes of

(1) 3 T.C. 600.

(2) 2 T.C. 321.

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 Mr. Justice Horridge 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 of Waddington (read by Lord Parmoor).—My Lords, 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 the 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. The Town and County Bank* (13 A.C., page 418)⁽¹⁾ and that speech of Lord Halsbury in *Gresham Life Assurance Society v. Styles* (1892, A.C., page 316)⁽²⁾ clearly proceeded on this footing.

My Lords, 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 I. provides that, in estimating the balance of profits and gains, no deduction

(1) 2 T.C. 321.

(2) 3 T.C. 185.

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 and 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 and Company v. Reynolds* (1898, 1 Q.B., page 95)⁽¹⁾ 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. The Town and County Bank*.⁽²⁾ 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 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.

My Lords, 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 I. and II. 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 hereinafter 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. The Town and County Bank*⁽²⁾ 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

(1) 3 T.C. 600.

(2) 2 T.C. 321.

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, *Russell v. The Town and County Bank*⁽¹⁾ 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

(1) 2 T.C. 321.

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. The Town and County Bank*⁽¹⁾ that the deduction ought to be allowed. It is true that *Brickwood and Company v. Reynolds*⁽²⁾ is contrary to this view, but it should be noticed that in *Brickwood and Company v. Reynolds*⁽²⁾ 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 reduction 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.

My Lords, some of the licensed houses which the Appellants acquired for the purposes of their trade were of freehold and some of leasehold tenure, but the rent reserved in all the tenancy agreements on which they have been let is less 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

(¹) 2 T.C. 321.

(²) 3 T.C. 600.

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. The Town and County Bank*,⁽¹⁾ and I have already given my reasons for thinking that the express prohibition in the First Rule, applicable to Cases I. and II., 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 provisions to the contrary, it would clearly be the full amount of the assessment. But the ninth 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.

My Lords, I have hitherto considered the questions which arise without reference to the case of *Smith v. The Lion Brewery Company, Limited* (1911, A.C. 150)⁽²⁾, 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.

(1) 2 T.O. 321.

(2) 5 T.C. 568.

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 Lord Justice A. L. Smith in *Brickwood & Co. v. Reynolds*,⁽¹⁾ appears to have expressed the opinion that the concluding words of Rule I. of the Rules applicable to Cases I. and II. 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. The Town and County Bank*,⁽²⁾ 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. The Town and County Bank*⁽²⁾ does not, however, appear to have been cited in *Smith v. The Lion Brewery Company, Limited*.⁽³⁾

My Lords, the Appellants claim deductions under three other 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, p. 7, of the Appendix, 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.—My Lords, 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 section 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 Mr. Justice Horridge 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, "affords"; that the payment of premiums of insurance is "a "usual and proper trade outgoing, and is made by the Appellants

(1) 3 T.C. 600.

(2) 2 T.C. 321.

(3) 5 T.C. 568.

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 brewer's 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 this 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 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 directly 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 incomes of the trade when computing the balance of profits of it.

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

In principle, therefore, I think that in the present case rent 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. The Lion Brewery Company* (1911 Appeal Cases, 150)(¹) 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 role as landlord is subsidiary, an incident of his trade as brewer. If the "dwelling-house" here is the taxpayer's own dwelling-house, *cadit quaestio*. 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

(¹) 5 T.C. 568.

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.

My Lords, 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 it 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 tax-gatherer to reap where he has not sowed; 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 Mr. Justice Horridge were wrong and should be reversed, and that this Appeal should be allowed.

Lord Parmoor.—My Lords, 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 :—

	£	s.	d.
(A) Repairs to tied houses	1,004	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	2,134	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. Mr. Justice Horridge disallowed claim (A) but allowed claims (B), (C), (D) and (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, Appeal Cases, 455) Lord Loreburn (Lord Chancellor) referring to a finding of fact by the Commissioners, says: "These conclusions of fact cannot be impugned."⁽¹⁾ In *Smith v. The Lion Brewery Company*

(1) 5 T.C. at p. 214.

(1911 Appeal Cases, 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."⁽¹⁾ 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 trade of 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 it 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 expenditure reasonably 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 Facts brings the various heads of expenditure for which a deduction

(1) 5 T.C. at p. 591.

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 Mr. Justice Horridge 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. The Lion Brewery Company*.⁽¹⁾

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 Mr. Justice Horridge held that the decision of the Court of Appeal in the Case of *Brickwood and Company v. Reynolds* (1898, 1 Q.B., page 95)⁽²⁾ 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. The Lion Brewery Company*.⁽¹⁾

With great respect for the Lord Justices who concurred in the Judgment in the Case of *Brickwood and Company v. Reynolds*,⁽²⁾ I cannot agree that the third Rule of the First Case excludes

(1) 5 T.C. 568.

(2) 3 T.C. 600.

any claim for repairs to tied houses. The contention made in that Case is stated to have been : " That in as much 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*,⁽¹⁾ 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, Lord Justice A. L. Smith 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. My Lords, 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 Mr. Justice Horridge that apart from head (A) the deductions cannot be disallowed without disregarding the authority of the decision of this House in *Smith v. The Lion Brewery Company* (1911 A.C. 150).⁽²⁾ 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 £2,134, or a portion thereof, might escape the Income Tax altogether, since the tenants' 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 tenants' profits under Schedule D, this is not a relevant consideration and cannot affect

(1) 3 T.C. 600.

(2) 5 T.C. 568.

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 £2,134 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 gains 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."

My Lords, 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.

Sir Robert Finlay, K.C.—My Lord, there is one matter on which a direction from your Lordships may be necessary. The money has been paid in accordance with the provision of the Taxes Management Act that a Case on Appeal should not stay payment. Then the Act goes on to direct that in the event of an Appeal succeeding the money shall be repaid with such interest, if any, as the High Court may allow. The amount of money which has been paid will, of course, be agreed, but I ask a direction from your Lordships as to the rate of interest.

Lord Sumner.—What jurisdiction have we? You have just said it is the High Court. Have we any jurisdiction to fix the rate of interest? Can we do anything but remit?

Sir Robert Finlay, K.C.—On appeal from the High Court I should have thought your Lordships could.

Lord Sumner.—There is no decision appealed from on that point.

Earl Loreburn.—We are the High Court of Parliament, not the High Court of Justice.

Sir Robert Finlay, K.C.—If your Lordships take that view an application will be necessary to the High Court.

Earl Loreburn.—Unless you agree.

Sir Robert Finlay, K.C.—Possibly, but if the parties do not agree an application will be necessary.

Earl Loreburn.—If you do not agree as to the rate of interest, what is the difference? Is it 4 or 5 per cent?

Sir Robert Finlay, K.C.—We are perfectly content that your Lordships should say what it should be, to avoid expense.

W. Finlay, K.C.—I should like to say something about that, my Lord.

Sir Robert Finlay, K.C.—I only wanted to say a word or two. In one case in 1903, three per cent. was allowed in your Lordships' House. Then there are three cases, one case that came up to your Lordships' House where 4 per cent. was allowed in the Court of Session, and your Lordships allowed that to

stand; and in two other cases in the Court of Session 4 per cent. was given. Then there is a case in 1912 which came before Mr. Justice Hamilton, where I see from the report in the *Brewing Trade Journal* his Lordship said "Suppose we say 3½," and Mr. Finlay, for the Crown, said "I am quite content." That is how it stands.

Earl Loreburn.—When Mr. Justice Hamilton suggests 3½, that is the sort of thing that came in my mind.

Sir Robert Finlay, K.C.—I submit, my Lord, that it ought to have regard to the current rate of interest, and at present I should submit that we ought not to have less than 5 per cent.

Earl Loreburn.—What is it; 3 or 4 or 5 per cent. on what? What is the amount, and for what period?

Sir Robert Finlay, K.C.—It is since the 31st May, 1912.

Lord Sumner.—Then most of it is *ante bellum*; you must have peace interest.

Sir Robert Finlay, K.C.—I have got the Bank rate for the whole period.

Earl Loreburn.—What is the sum of money for it to be reckoned on? It is hardly a matter for argument, surely.

Sir Robert Finlay, K.C.—We will agree it very easily, my Lord. It comes, I am told, to a considerable sum taxed on £3,000 or £4,000.

Earl Loreburn.—It cannot be very large. Suppose we suggested 3½ per cent?

W. Finlay, K.C.—I should be content with 3½. I am perfectly content with that.

Earl Loreburn.—Are you going to be obdurate, Sir Robert, on the difference between 3½ and 5?

Sir Robert Finlay, K.C.—I should like 5 per cent. I leave it to your Lordships to decide.

Earl Loreburn.—Suppose we put it at 3½ per cent. It is merely our suggestion. If you leave it to us, we suggest 3½ per cent.

W. Finlay, K.C.—We should certainly carry out that suggestion, my Lord.

Earl Loreburn.—Might I suggest this to you, Sir Robert? I am not quite sure as to the form of the Order. You have heard the opinions. It means that the Order appealed from be reversed, I suppose, but there is something else, because there is one item that is agreed, and as to the rest.

Sir Robert Finlay, K.C.—That was dealt with, my Lord, in the Court of Appeal; it was treated as struck out.

Lord Parmoor.—You want costs in the Court of Appeal and before Mr. Justice Horridge?

Lord Atkinson.—The question in the case stated is that the Commissioners were right. We think the Commissioners were wrong.

Earl Loreburn.—Is that what we are to say?

Sir Robert Finlay, K.C.—Yes, my Lord, I submit it is.

Earl Loreburn.—I do not know what the form of the Order is. I want to put it in the proper form according to the practice of the House.

Sir Robert Finlay, K.C.—I suggest that the Order be that the Judgment of the Court of Appeal be reversed, and Judgment entered for the Appellants on all the points, that is, all the points now in issue.

Lord Parmoor.—There were five heads left.

Sir Robert Finlay, K.C.—Yes, my Lord, I think there are five. One was dropped.

Lord Sumner.—Would not the form be this: That the Appeal be allowed, that the Judgment of the Court of Appeal be reversed and that the Judgment of Mr. Justice Horridge be varied, in so far as he said that the Commissioners were right on any point, by declaring that the Commissioners are wrong on every point.

Sir Robert Finlay, K.C.—Yes, My Lords, that exactly meets it.

Lord Atkinson.—He only held that they were right on repairs.

Sir Robert Finlay, K.C.—Yes, at first.

Earl Loreburn.—It is simply, that the Order be reversed with costs.

Sir Robert Finlay, K.C.—Yes, my Lord, costs here and below, of course.

Earl Loreburn.—Yes, then you will be able to say anything if the form of the Order is not in accordance with regulations.

Sir Robert Finlay, K.C.—There will be no difficulty about it, my Lord.

Questions put.

That the Order Appealed from be reversed.

The Contents have it.

That Judgment be entered for the Appellants with costs here and below.

The Contents have it.
