SMITH v. LION BREWERY CO., LTD.

No. 315.—IN THE HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—18th and 19th February, 1909.

COURT OF APPEAL.—22nd and 23rd June, 1909.

HOUSE OF LORDS.—7th and 8th November, 1910.

SMITH (Surveyor of Taxes) *v.* LION BREWERY COMPANY, LIMITED.(1)

Income Tax (Schedule D). — Deduction. — Brewer. — Tied Houses.—Compensation Fund Charge.—The Respondents, a Brewery Company, are the owners or lessees of a number of licensed premises which (it is found in the case) they have acquired as part of their business as brewers and as a necessary incident of its profitable exploitation. The licensed premises are let to tenants, who are "tied" to purchase their beers from the Respondents. Under the Licensing Act, 1904, Compensation Fund Charges are levied in respect of the Excise "on" licences held by the tenants who pay the Charges and recoup themselves (within the limits assigned by the Act) by deduction from the rents which they pay to the Respondents. It is claimed by the Respondents that in computing their profits for assessment to Income Tax they should be allowed to deduct the sum of the amounts ultimately borne by them in respect of the Compensation Fund Charges.

Held, *in the Court of King's Bench that the deduction claimed was inadmissible. This decision was reversed in the Court of Appeal* (Kennedy, *L.J., dissenting*), *and opinions in the House of Lords being equally divided the judgment of the Court of Appeal was sustained.*

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1. At a Meeting of the Commissioners for the General Purposes of the Income Tax Acts (Second East Brixton Division) held at the Session House, Newington Causeway, in the County of Surrey, on the 13th day of November, 1906, the Lion Brewery Company, Limited, appealed against an Assessment of £44,652 (after allowance of the deduction allowed for diminished value by reason of wear and tear during the year of machinery and plant pursuant to 41 Vic. cap. 15, sec. 12) made upon them for the year ending 5th April, 1907, under Schedule "D" of the Income Tax Acts in respect of the profits arising from the business of brewers and sellers of beer carried on by them.

2. The facts stated in paragraphs 3 to 8 inclusive of this Case were established as such to our satisfaction.

(1) Reported (in K.B.D.), 1909, 1 K.B. p. 711, (in C.A.), 1909, 2 K.B. p. 912, and (in H. L.), 1911, A.C. p. 150.

3. The Lion Brewery Company, Limited (hereinafter called the Respondents), are as part of their business and as a necessary incident of the profitable exploitation of such business the owners of certain freehold licensed premises and also lessees of other licensed premises, all of which premises have been acquired by the Respondents and are held by them in the course of and solely for the purposes of their said business. The said premises are let by the Respondents to tenants who covenant to deal only with the Respondents in the way of their business, and in consideration thereof and the purchase of beers from the Respondents they pay a much less rent than the annual value of the premises would warrant. By these means and the possession and use of the said premises which are employed by the Respondents as substantially part of their plant or outfit necessary to carry on the business profitably the Respondents are enabled to earn and do earn profits upon which they pay the income tax and which without the said premises and their use in and for carrying on their business would be much less in amount.

4. The profits of the Respondents have always been greatly increased by reason of the employment and use of such premises in and for the purposes of the Respondents' business, and to enable the Respondents to earn the profits upon which they are assessed to the Income Tax the possession and employment as aforesaid of such premises are essentially necessary, and except for the purposes of and employment in their business of such premises the Respondents would not possess them. They do not possess them as investments or for the purposes of investments. If any house loses its licence the Respondents as soon as possible get rid of it.

5. Under and by virtue of the Licensing Act, 1904 (4 Edw. 7, cap. 23, sec. 3), the Respondents have been compelled to allow and have allowed to their tenants such deductions from rent as are provided for by the said Statute.

6. The Respondents have in their turn when paying rent in respect of such of the said premises as are rented by them deducted from such rent such deductions as are authorised and directed by the said Act.

7. The net result produced by such deductions as are above mentioned in paragraphs 5 and 6 was that the Respondents were compelled to pay and did pay in respect of the year ending December 31st, 1905, in respect of charges imposed by the said Act an amount of £3,600, no part of which was returned or made up or allowed to them, and was borne and paid by the Respondents out of their own moneys.

8. None of the premises in respect of which the deductions resulting in the said sum of £3,600 were made were in the occupation of the Respondents.

9. The Respondents contended that having regard to the facts in arriving at their assessable profits of their said business for the year ending December 31st, 1905 (being the last of the three years in respect of which the said assessment for the year ending 5th April, 1907, made upon the Respondents was based), they were entitled to take into consideration and to have pursuant to the

Income Tax Acts a deduction allowed to them in arriving at the assessable amount of their profits in respect of the said sum of £3,600.

10. For the Crown it was contended *inter alia* that the Respondents had to bear and pay the said sum of £3,600 as landlords or owners of licensed premises and not as Brewers or Traders, and that the deduction claimed was not one which could be allowed under 5 & 6 Vict., cap. 35, sec. 100, Case 1, Rule 1 and Rule 3 and Rule 1 of the "Rules applying to both the preceding Cases 1 and 2 of Section 100 of the said Acts" or otherwise, and that the deductions were deductions in respect of capital.

11. The following cases were referred to before us:—*Watney* v. *Musgrave*, 5 Ex. Div. 241;(1) *Brickwood* v. *Reynolds* (1898), 1 Q.B. 95; (2) *Hancock & Co.* v. *Gillard* (1907), 1 K.B. 47.

12. We were of opinion on a consideration of the facts stated in paragraphs 3 to 8 (inclusive) that the contention of the Respondents was correct, and we decided that the assessment made upon them ought to be reduced, and we reduced the same by the sum of £1,200, viz., one-third of the said sum of £3,600 accordingly.

13. Thereupon the Surveyor of Taxes expressed his dissatisfaction with our decision as being erroneous in point of law, and required us to state and sign a case for the opinion of the King's Bench Division of the High Court of Justice which we do state and sign accordingly.

Jno. Wilson,

Herbert Oakey,

Commissioners of Taxes for the Division of Second East Brixton.

April 29th, 1908.

The case was argued on the 18th and 19th February, 1909, before Mr. Justice Channell, and judgment was given on the second day in favour of the Crown.

Sir S. T. Evans, K.C., A.G. (*W. Finlay* with him), for the Crown.—The Compensation Fund Charge is not an allowable deduction under the Third Rule of the First Case of Schedule D, nor under the First of the Rules applying to the First and Second Cases. Moreover, the trade in a tied house is that of the publican, which is a perfectly distinct trade from that of the brewer, *cf. Brickwood* v. *Reynolds* and *Watney* v. *Musgrave* both of which cases are against the allowance of the deduction.

The Licensing Act of 1904 does not affect the Income Tax Act of 1842. This is clear from the case of *Hancock* v. *Gillard*. The Compensation Fund Charge therefore does not enter into the Income Tax account.

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(1) 1 T.C., 272. (2) 3 T.C., 600.

If a person other than a brewer were the landlord, he would have to bear as landlord his part of the compensation levy and would be unable to deduct it for Income Tax purposes. Why then should a brewer be allowed to deduct it? If the licence were lost the landlord and the publican would suffer; the brewer would not be affected unless *quâ* landlord.

Danckwerts, K.C. (*Leslie Scott* with him), for the Respondents. —A brewer does not make his profits by brewing beer but by selling it. This fact was overlooked in the judgment in *Watney* v. *Musgrave*.(1) A brewer to sell his beer must adopt methods such as acquiring tied houses, and the Compensation Fund Charge is an expense necessarily incurred in order to earn his profits as a brewer, just as much as he must pay for feeding his horses or for fire insurance. The Compensation Fund Charge is in the nature of an insurance against loss of part of the capital invested for the purpose of the brewing trade.

In the case of *Strong & Co.* v. *Woodifield*(2) Lord Davey said that disbursements which are made for the purpose of earning the profits were deductible, and the finding of the Commissioners in this case was that the Compensation Fund Charge is such a disbursement.

The case of *Hancock* v. *Gillard* has no bearing on the question.

It was held in the case of *Reid's Brewery Co.* v. *Male*(3) that a loss incurred by the brewer through lending money to a tenant in order to induce the tenant to deal with the firm was deductible. The principle of that decision applies here.

There is no distinction between a brewer's paying commission to a traveller and his paying the Compensation Levy on a tied house, so far as concerns the question of these payments being necessarily incurred for the purposes of the brewer's profits.

JUDGMENT.

Channell, J.—In this Case there are some points which to my mind are really very clear. They may be slightly obscured by observations which I think have not been approved, and which certainly will not bear investigation, in the Case of *Watney* v. *Musgrave*.(1)

Now a brewer's business is not merely to brew beer but to sell beer, and it is mainly to sell beer so far as its profits are concerned. It is not much use, as Mr. Danckwerts said, to brew beer if you are going to drink it all yourself; your profits are made out of selling it. The expenses necessary to sell it and exclusviely for the purpose of selling it are undoubtedly deductible. If a brewer sets up a depôt at a distance from his main brewery for the purpose of increasing his sales, the annual expense of that depôt is to my mind clearly an expense deductible as exclusively incurred for the purpose of his business of selling beer. The cost of purchasing, if he does purchase such a depôt, would not

(1) 1 T.C., 272. (2) 5 T.C., 215. (3) 3 T.C., 279.

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be deductible, not because it is not exclusively for the purposes of the business but because it is a capital expenditure and not an annual expenditure or an expenditure in respect of income. Then if, in order to sell his beer, he has to employ an agent and pay the agent, the payment of that agent is an expense of selling the beer so far as it is exclusive. If he employed the agent for two or three purposes he might possibly get into difficulties, but so far as he employs him, as in the case I am dealing with, exclusively for the purpose of selling his beer and pays him for that, then that is an expense of selling the beer which may be deducted.

If a brewer sells his beer by the now familiar process of having tied houses, I think that whatever is the annual expense to the brewer of having those tied houses is an expense incurred for the purpose of the sale of his beer, exactly as the expense of a depôt or the expense of an agent for selling the beer is an expense of his business. It is an expense of selling the beer which has to be deducted before you arrive at the profits. I see no reason to doubt that if you can get at what is the annual expense of having a tied house, or a number of tied houses, that might be, and upon the facts of this case I must say is, exclusively for the purpose of selling his beer. Now all that part of it I have really no doubt about. I do not think there is any case that in any way contradicts it. The case of *Watney* v. *Musgrave* has expression in it which may be contradictory to that, but expressions which it can hardly be pretended, and it is not pretended, would bear critical examination. They are only casual expressions and ought always to be interpreted with regard to the facts of the case that are before the Judges, and it is unfair to the Judges to lay too much stress upon things of that sort. The decision was beyond all question right, because there the question was with regard to something which was quite clearly a capital expenditure and therefore the point I am considering does not arise.

The next Case was *Brickwood* v. *Reynolds*.(1) That case, as Mr. Finlay has now pointed out, has two grounds in it. One ground I will deal with presently when I come to the real question in this case, namely, the effect of this Compensation levy; but another point is quite consistent with what I am now saying. There the question arose as to repairs of these tied houses. Repairs are a matter which come into the Income Tax account of the landlord as well as the tenant. In the Schedule A charge there is an allowance in respect of repairs brought into the account. In that particular case there were payments in excess of that allowance, but what the Court said was "There is a statutory "allowance in reference to this; we cannot entertain anything "in excess of the statutory allowance; this subject-matter that "you are claiming to have a deduction in respect of has already "been brought into an Income Tax account between you and the "Crown; not merely between the tenant and the Crown but "between you and the Crown it has been brought into an Income "Tax account and it cannot be brought in again." That is absolutely sound. There are other points that also come into the

(1) 3 T.C., 600.

Income Tax account as to rent and sub-rent and different things which I do not want to deal with, but there are lots of things that one sees would come into the Income Tax account and could not be brought in again. But whatever is the real annual expense of selling the beer by this means seems to me quite clearly to be within the principle of the Income Tax and to be deductible. I do not know whether my view about that is important or whether it is not, but I can quite imagine that it may be important in reference to certain cases which may arise, and I do not know whether they have ever arisen or have been considered before.

Having arrived at that, we come now to a different question, namely, whether this Compensation levy can be considered as an annual expense incurred by the brewer to sell his beer in that public house. He sells, we will say, 100 barrels of beer—I really do not know how much is consumed in a public house of this character, but we will call it in round figures 100 barrels of beer in the public house. He sells those 100 barrels of beer at a wholesale price. His object is to secure that customer and to sell that 100 barrels of beer, and; as I have already said, so far as he incurs annual expense in order to sell that 100 barrels of beer I think he is entitled to deduct it. The tenant is there, and the tenant who buys the 100 barrels of beer at wholesale prices sells them at retail prices. In all probability he sells other things besides the beer; he may sell spirits and other things. His trade is a different trade. It is selling over again what he buys from the brewer, and selling other things besides. The larger his trade is, the larger will be the amount that he will buy from the brewer, so that the one depends upon the other; but they are not the same. Now the payment of the Compensation levy is a payment to provide a fund which is to pay compensation in respect of the houses where the licences are taken away. The houses which retain their licences are to pay a contribution to that fund, and the contribution no doubt is in the nature of an insurance, but it is a statutory obligation to pay; it is a statuory obligation imposed, in my opinion, both upon the tenant and upon the landlord. The landlord's share of it is collectible through the tenant, but it is imposed upon both. I think Mr. Justice Bigham decided that in the case that was before him, and which has been referred to here, in the case of *Hancock* v. *Gillard* in 1907. I think the reasoning of that case shows quite clearly that it is not part of the rent. The landlord's share of it is a charge upon the landlord, payable by him but chargeable and collectible for the Crown through the tenant, and the tenant is given a convenient machinery for paying himself that sum which the landlord owes him by reason of the landlord having this statutory obligation which the tenant is bound to discharge in the first instance. The tenant is given a convenient machinery for repaying himself by the process of deducting it from the rent. That is a matter of account between them. It is a statutory right of set off but it has not anything to do with the amount of the rent, and it is not a charge upon the rent. It is a statutory charge upon the landlord, or a proportion of it is, and it is charged by the statute upon him as landlord, but as landlord of a licensed house,

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and it is in respect of his interest in the licensed house and of his probable loss, because if that licence is taken away the value of his premises will go down and both tenant and landlord are considered to have an interest in it, the proportion of the interest of the one and the other depending upon the length of the tenant's term. That is perfectly intelligible but it is an insurance (if an insurance) of the trade that is carried on in the house, which is the publican's trade and not the landlord's trade—one being a matter upon which the amount of the other to a certain extent depends, but it is different.

Under those circumstances, applying the clauses in the Income Tax Act the difficulty is that, although this charge upon the landlord—in this case he is a brewer—undoubtedly comes upon him by reason of his having assumed, for the purposes of his trade, the position of the landlord of a licensed house, and therefore it looks as if it was a charge, an expense, in reference to the carrying on of his trade—because, as I have already said, in my judgment the annual expenses which the brewer incurs by becoming the owner of a licensed house for the purpose of selling his beer there under circumstances when he would not be able to sell his beer, or that quantity of beer, without doing so—although that annual expense is an expense of the brewer's trade, yet in this case the real thing that it is paid for is a payment to secure the different trade in which the landlord is interested. In any case he is interested in it because it increases the value of his house; he is of course clearly interested in it when he is a brewer because it increases the amount which comes to him, but the difficulty is as to whether or not it can be said to be exclusively for the purposes of the trade when it really is a sum paid to secure the retail trade and not the wholesale trade. Looking at one of the grounds which is put forward in *Brickwood's* Case as the ground for that decision—although it may not have been necessary for the decision because the other ground may have been sufficient, still it is a ground, and to that extent I think *Brickwood's* Case is an authority upon this—the things that are done for the purpose of the retail trade (although by securing and improving the retail trade they do improve and increase the wholesale trade, yet it is only indirectly and not directly that they do so) cannot be said to be exclusively for the purpose of the brewer's trade.

On these grounds I have come to a conclsuion, though not without considerable doubt, and doubt occasioned, if I may say so with the greatest possible respect and admiration, by the arguments both of the Solicitor-General and Mr. Finlay who followed him, because I think they may be somewhat afraid of the consequences of admitting the proposition which seems to me so very clear—not for the purpose of this case but for the purposes of other cases. It may be that they felt bound to argue propositions which in my judgment were not really tenable, and in consequence of their so arguing it seemed to me for a considerable time that their argument necessarily depended upon it. I do not think it does necessarily depend upon it because I have come to the conclusion that although the annual expense in having

these tied houses would be allowable as a deduction, yet this particular charge cannot be considered as a charge which would be allowable by way of deduction, not because in no sense is it incurred for the purposes of the trade, but because though it goes towards the purposes of the trade in increasing their sales, yet it does so indirectly and not directly and cannot be said to be exclusively for the purposes of the trade.

On these grounds I think the judgment must be for the Crown.

The Solicitor-General.—The Appeal will be allowed with costs, and the original Assessment will stand.

Channell, J.—I daresay that is so.

The Solicitor-General.—It is in paragraph 1.

Notice of Appeal having been given, the case came before the Court of Appeal on the 22nd and 23rd June, 1909, when Sir R. Finlay, K.C., Mr. Danckwerts, K.C., and Mr. Leslie Scott, K.C., appeared as Counsel for the Appellants and the Solicitor-General (Sir S. T. Evans, K.C., M.P.) and Mr. W. Finlay as Counsel for the Respondents. Judgment was given on the 17th July, 1909, when the decision of Mr. Justice Channell was reversed, Cozens-Hardy, M.R., and Farwell, L.J., being in favour of the Appeal, and Kennedy, L.J., dissenting.

Cozens Hardy

JUDGMENT.

The Master of the Rolls.—The question in this Appeal is whether the owners of certain tied houses can, in ascertaining their profits under Schedule D, deduct the amount of the charge payable by them in respect of what is called the Compensation levy imposed by the Licensing Act, 1904. Now the levy is imposed in the tenant and is made payable by the tenant with and as part of the excise licence, but the tenant is authorised to deduct from his rent a proportion of the sum paid, varying according to the length of the tenant's interest in the house. The landlord must pay income tax under Schedule A on the full rent, the proportionate charge being, not a reduction of the rent, but a deduction from the rent. It is necessary to consider the position, first of the occupying tenant, and secondly of the landlord with reference to the Compensation levy.

First, as to the tenant. It seems to me not to admit of serious doubt that the actual occupier of the licensed house is entitled under Schedule D to deduct from his gross profits not only the ordinary excise licence but also such part of the Compensation levy as he is not able throw upon his landlord. Both these payments are alike necessary to enable him to carry on the business of a retailer of beer. His position is identical with that of an auctioneer or a 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

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to consider how the amount thus paid is applied. It may go in aid of the local rates. It may go towards the cost of the Army and Navy. It may go to provide compensation for licences withdrawn. It is sufficient to say that it is a payment which must be made if the profits of a retailer of beer are to be earned.

The position of the landlord is by no means so clear. It must vary according to the circumstances. If he is an ordinary non-trading landlord he must bear his proportion of the Compensation levy, and he cannot in any way bring it into account against the Crown. He must pay income tax under Schedule A, and for the reasons above stated he cannot treat it as a reduction of the rent payable by the tenant. He does not account under Schedule D at all, and the question which has now to be decided in this case does not and cannot arise. If, however, he is a trading landlord, a wholesale dealer in beer, it is necessary to ascertain precisely what are the facts. Now in the present case it is stated by the Commissioners that the Lion Brewery Company are "as "part of their business and as a necessary incident of the profitable "exploitation of such business," the owners of the tied houses which have been acquired by them and are held by them "in the "course of and solely for the purpose of their said business," These tied houses are employed by them as "substantially part of "their plant or outfit necessary to carry on the business profitably," and they are thereby "enabled to earn and do earn "profits upon which they pay income tax and which without "the said premises and their use in and for carrying on their "business would be much less in amount." And, further, that to enabled them to earn the profits upon which they are assessed to the income tax "the possession and employment as aforesaid of "such premises are essentially necessary, and except for the "purposes of and employment in their business of such premises "the Respondents would not possess them. They do not possess "them as investments or for the purposes of investments. If any "house loses its licence the Respondents as soon as possible get "rid of it." Accepting these facts, 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.

Thus far I have approached the question without regard to authorities. But I think the authorities are in no way opposed to this view. In the language of Lord Herschell in *Gresham Life Assurance Society* v. *Styles*, 1892, A.C., p. 323,(1) the "balance "of profits and gains" upon which duty is to be assessed is "the "balance arrived at by setting against the receipts the expenditure necessary to earn them." An the Master of the Rolls (Lord Collings) in *Strong* v. *Woodifield*, 1905, 2, K.B., p. 356,(2) said: "It seems to me that all expenses necessary for the purpose "of earning the profits may properly be deducted, but that "expenses to come out of the profits after they have been earned "cannot be deducted." And there are other authorities to the

(1) 3 T.C., at p. 194. (2) 5 T.C. 215.

like effect. Mr. Justice Channell held, and in my opinion quite correctly, that the landlord's share of the Compensation levy is a charge upon the landlord, payable by him but chargeable and collectible for the Crown through the tenant. But he held that it could not be said to be exclusively for the purposes of the brewers' trade when it was really a sum paid to secure the retail trade and not the wholesale trade. Mr. Justice Channell said that he came to that conclusion with considerable doubt and hesitation. With the utmost respect for that learned Judge I am unable to agree with his view. I regard this sum as payment essential to the earning of the profits and not as a deduction from the "balance " of profits " within the meaning of Rule I. applicable to the First and Second Cases. I think the Commissioners arrived at a right conclusion and that this appeal might be allowed.

Farwell, L.J.—I am unable to agree with Mr. Justice Channell in this case.

The Crown is entitled to income tax on the profits or gains of the business carried on by the Company. Their business is stated in the Case to be that of brewers and sellers of beer. In order to enable them to sell their beer in larger quantities and to greater advantage the Company have acquired a number of tied houses. The Case finds in paragraph 3 that this was done " as " part of their business and was a necessary incident of the profit- " able exploitation of such business," and that thereby " the " Respondents were enabled to earn, and did earn, profits on which " they paid income tax and which, without the said premises and " their use in and for the carrying on of the said business, would " be much less in amount." And paragraph 4 runs thus: " The " profits of the Respondents have always been greatly increased " by reason of the employment and use of such premises in and " for the purpose of the Respondent's business, and to enable the " Respondents to earn the profits on which they are assessed " to the income tax, the possession and employment as aforesaid " of such premises are essentially necessary, and except for the " purposes of and employment in their business of such premises " the Respondents would not possess them. They do not possess " them as investments for the purposes of investments. If " any house loses its licence the Respondents as soon as possible " get rid of it." This finding shows that the money was " wholly " and exclusively laid out or expended for the purpose of the " trade," and Mr. Justice Channell says that he thinks that " the " annual expense of having tied houses might be allowable as a " deduction." The Income Tax Acts expressly forbids certain deductions which might be thought allowable from the true profits of a trade could be ascertained, but with this exception " profits of a trade " bears its ordinary signification as used by business men in business. Several definitions of profits by eminent Judges are set out in Dowell's Income Tax Acts, Sixth Edition, page 185. Lord Herschell's in 2 T.C., p. 327, may be cited as an illustration :—"The profits of a trade or business is the surplus " by which the receipts from the trade or business exceed the " expenditure necessary for the purpose of earning those receipts." The Compensation levy under the Licensing Act, a portion of

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which it is sought to deduct, is imposed and made payable as part of the excise. It is paid in the first instance by the tenant, but the landlord is bound to allow the reduction of a proportionate part, according to the length of the term, from the rent. It is, therefore, in effect a statutory imposition on landlord and tenant in proportions varying according to their respective interests and necessarily payable as a term of the use of licensed premises.

Now, it cannot, I think, be doubted that the tenant is entitled to deduct the proportion borne by him in estimating his profits. It is a payment necessary for the purpose of enabling him to carry on and to earn profits in his trade. His trade is the sale of beer by retail, and the brewers' business is the sale of beer wholesale. These sales may be made to persons under no obligation to buy from him exclusively, or to persons under such obligation, or partly to one set and partly to the other. It is plain, and the Commissioners find, that the total sales are largely increased by the ownership of tied houses, but the brewers cannot own and use such houses without paying to their tenant the due proportion of the levy. If they had not these means of increasing their sales, their profits would be less. To put a concrete case: brewers sell x barrels without tied houses and make £1,000 yearly profit; they sell x plus y barrels with tied houses and make £1,500 profit; the payment of the levy in respect of these tied houses was necessarily made for the purpose of enabling them to sell the y barrels, and the Crown, claiming tax on the £500 resulting as the profit therefrom, or, in other words, claiming a share of the profits (for the tax is a part of the profits) is bound to allow a deduction for compulsory payment without which these particular profits could never have been earned at all. The Solicitor-General ignored the brewers' trade as wholesale sellers and urged that they were merely owners and that land or house owning is not a trade, and he put the case of an owner who was not a brewer and argued that, as he could claim no deduction, neither could the owner who was a brewer. But the non-brewer owner makes no profits from a trade of wholesale beer-selling, and there is, therefore, nothing from which to claim a deduction. The brewer does make such a profit and it is because the crown claims a share of such profit that he claims to be allowed to make this deduction. I fail to see the force of the argument that because A does not trade and therefore makes no profits, therefore B who does trade and makes profits should not be allowed to make a deduction merely because A who makes a compulsory payment submits without attempting to recoup himself by putting the privilege in respect of which it is made to profitable use; it is just because B does put it to profitable use that the question arises at all; if he did not, the Crown would get nothing because there would be no profits of which the Crown could claim a share. This shows the distinction between *Brickwood & Co.* v. *Reynolds* (1898, 1 Q.B., p. 95) (1) and the present case. The owner of a house whether tied or not is the owner of property which falls under Schedule A; he may or may not according to the circumstances of the case also earn profits which are taxable

(1) 3 T.C., 600.

under Schedule D. On the findings of fact in that case (which were very different from the present) it was held that the brewers did the repairs in question in that case as owners, and if the levy could not be deducted under Schedule A it could not be deducted under Schedule D because it was an outgoing that did not properly come into the trading account under Schedule D. But in the present case the profits of the wholesale trade are the matter in question, and these could not have been made without the tied houses on the owner of which this statutory payment is imposed. The matter is entirely different, and the facts proved in the case render a judgment against the Crown, in my opinion, inevitable. I cannot agree with Mr. Justice Channell's statement that the payment is made for the purpose of insuring against the loss of the tenant's trade in which the brewery company is only indirectly interested. The payment is made because the legislature has compelled it as a term of the ownership of a licensed house, and it is worth the while of the company to acquire houses and pay it in order to increase their own sales of beer in which they have a direct interest, and out of which the Crown claims a share. The tenant makes his own profit by his retail trade, the brewer makes his by his wholesale trade; the levy must be paid by each in his due proportion to enable those profits to be made, and out of each set of profits the Crown claims a share, and must allow proper deductions accordingly.

I am therefore of opinion that this appeal ought to be allowed with costs here and below.

Kennedy, L.J.—In my opinion the conclusion at which Mr. Justice Channell arrived was right. As I have the misfortune, taking this view, of differing from the Master of the Rolls and Lord Justice Farwell, and the difference is upon a matter of importance to the Revenue of the country and to a large trading interest, it becomes my duty to try and make clear the reasons which have guided my judgment.

The Appellants here are a large brewery company. As their title denotes, the business of the concern consists in the manufacture of beer and the sale of the product. According to paragraphs 3 and 4 of the Case, which, of course, we must entirely accept so far as they state substantial facts—such expression as a "necessary "incident of the exploitation of such a business" and "premises "which are employed . . . . as substantially part of their "plant or outfit," are rather vague and metaphorical phrases than statements of fact—such a brewery company cannot be worked in the most profitable way unless, by the acquisition of the freehold or leasehold interest, it acquires and maintains the ownership of licensed houses whose tenants can be bound by covenant with the company, which is their landlord, to buy solely from that company all the beer which is required by the tenant for sale by retail in the licensed houses. It is to be taken for the purposes of our judgment—this is the pith and substance of paragraphs 2 and 3 of the Case—that the possession of such "tied" houses is essential for the earning by the Appellants of the profits upon which they are assessed to the Income Tax. They seek to become and remain

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the landlords of licensed premises only as a market-producing and not as a rent-producing investment. If the premises happen to lose their licence the Appellants get rid of their ownership as soon as they can.

The question for decision on this appeal arises in the following way :—

By the Licensing Act, 1904 (14 Edw. VII., cap. 23), Section 3 (1), Quarter Sessions are enabled, and, except they can certify that it is unnecessary, are bound yearly to impose in respect of all existing " on " licences within their area charges at certain graduated and proportional rates.

By Section 3, sub-section (2), charges payable by licence holders under this section in respect of any licence must be levied and paid by the licence holder together with, and as part of, the duties on the corresponding excise licence.

By Section 3, sub-section (3), the licence holder who pays a charge under this section may " make such deductions from rent " as are set out in the second schedule to the Act, and, if the landlord is himself a lessee, such landlord may in his turn make a deduction from the rent payable to his lessor.

By Section 3, sub-section (4), the sums so paid to Quarter Sessions are to constitute the Compensation Fund of the district for the benefit of the persons interested in licensed premises in respect of which an " on " licence is not renewed under Section 1 and Section 2 of the Act.

The scheme of this legislation from the economic standpoint may be summed up as the creation of a compulsory mutual insurance on the part of those who are interested either as landlords or as tenants of licensed premises within the district against loss to their respective interests resulting from the non-renewal of the tenant's licence. The annual levy or charge under Section 3 of the Act paid immediately by the tenant, who is entitled partly to recoup himself by a deduction from the rent, represents the premium to which both contribute in respect of each licence, and when any licence within the district is not renewed under the provisions of Sections 1 and 2 of the Act, the landlord and the tenant affected get, in the form of compensation under the Act, the benefit of the insurance fund which has been created by the aggregation of the premiums paid by all landlords and tenants of licensed houses within the district in the form of the compensation charge levied upon the tenant under Section 3 and paid by him with and as part of the excise duties. The Appellants as owners of licensed houses in various districts are annually compelled, as appears from paragraph 5 of the Case, to allow, and they have allowed, to their tenants such deductions from rent as are provided for by Section 3. And they have, in their turn, when paying rent in respect of such of the said premises as are rented by them, deducted from such rent such amounts as are authorised by the Licensing Act. After allowing for such recoupments, the Appellants remain, as landlords, greatly out of pocket in respect of deductions from rent made by the tenants of their " tied " houses under the Act, and the question raised by the Case is whether they are or are not, in the

calculation of the balance of profits in respect of their trade of brewers chargeable to Income Tax under Schedule (D), entitled to make a deduction on account of so much of these deductions from rent under the Licensing Act, 1904, Section 3, as they have had themselves to bear without recoupment. Mr. Justice Channell, for reasons which he has expressed in very careful judgment, has held that they are not entitled to make such a deduction, and the present appeal is an appeal against that decision.

The argument on their behalf may, I think, fairly be stated thus: "The Case states as a fact that it is a proper and necessary "part of the conduct of such a brewery business to own tied "houses in order to make a profit; unless we had owned the 'tied' "houses whose tenants have, by virtue of the Licensing Act, 1904, "Section 3, made the deductions from the rents payable to us as "landlords, we could not have made the profits assessable to In-"come Tax under Schedule D. As the ownership of these 'tied' "houses is essential in order to earn our profits, and it is under "the Licensing Act, 1904, a necessary incident of such owner-"ship that we should have to allow these deductions from the "tenants' rent, it is right and in accordance with the Income Tax "Act, 1842, that in estimating the balance of profits assessable "to Income Tax we should deduct the amount of so much of these "deductions from tenants' rents as we have been obliged ourselves "to bear. Our case comes within the statement of the law made "by Lord Herschell: 'The profit of a trade or business is the "surplus by which the receipts from the trade or business exceed "the expenditure necessary for the purpose of earning those. "receipts.'" (2 T.C., p. 327.)

This argument appears, I agree, on the first blush, attractive. Its reasoning seems, by a single stroke as it were, to cut the Gordian knot of the difficult question we have to consider. Nevertheless, although with diffidence, for the argument has approved itself to the Master of the Rolls and Lord Justice Farwell, I am not satisfied of its soundness. It is clear that it is not every expenditure which is made by a trader for the promotion of his trade, and which, in fact, contributes to the earning of profits, which is a permissible deduction from the estimate of profits for Income Tax purposes. One may usefully refer to the judgments in *Watney* v. *Musgrave*, L.R., 5 Exch., p. 241,(1) (though some of the language of Chief Baron Kelly in this Case may be open to criticism), the judgment of Mr. Justice Charles in *Dillon* v. *Corporation of Haverfordwest* (1891), 1 Q.B., at p. 584,(2) and especially to the judgments of Lord Justice A. L. Smith and Lord Justice Rigby in *Brickwood and Company* v. *Reynolds*,(3) for illustratation and authority upon this point. It is not permissible to depart from the express terms of Schedule D, 1st and 2nd Cases, Rule 1. That Rule prescribes that in estimating the balance of profits and gains assessable to Income Tax in respect of any trade no sum shall be set against or deducted from such profits or gains for any disbursements or expenses whatever not being money wholly laid out or expended for the purposes of that trade. "It is not enough," said Lord Davey, in *Strong and Company Limited*, v. *Woodifield* (1906,

(1) 1 T.C., 272. (2) 3 T.C., 31. (3) 3 T.C., 600.

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A.C., at p. 453),(1) " that the disbursement is made in the course of " or connected with the trade or is made out of the profits of the " trade; it must be made for the purpose of earning the profits." By the expression " for the purpose " Lord Davey clearly intended —for the Rule which I have just quoted so says—" for the sole " and exclusive " purpose. In the same case at page 452 of the Report,(2) Lord Loreburn, the Lord Chancellor, pointed out that " it does not follow that if a loss is in any sense connected with " the trade, it must always be allowed as a deduction, for it may " be only remotely connected with the trade, or it may be con- " nected with something else quite as much as or even more than " with the trade."

It appears to me, in the first place, assuming that the deductions from the income which in the form of rent the Appellants draw from the tenants of their " tied houses " can properly be held to constitute " disbursements " or " expenses " within the meaning of the Rule, that this diminution of rent is too remotely connected with the earning of the Appellants' trade profits to be properly allowable as a deduction from these trade profits. The rents of the " tied " houses do not form part of the trade profits; and it is the rent receipts which are diminished by the tenants' deductions under the Licensing Act, 1904, Section 3. It must be taken, upon the facts stated in the Case, that the Appellants' ownership of tied houses is an essential element in the profitable working of their brewery business. because a secure market for their beer is thus acquired, but it is an equally undeniable fact that it is the revenue of the Appellants as rent receivers, and not either the volume or the profitableness of their trade with the tenants, that is affected by the tenants making the statutory deductions from rent.

In the second place, again assuming that the diminution of the Appellants' Income as landlords under the Licensing Act, 1904, Section 3, comes within the category of " disbursements " or " ex- " penses," I have to ask myself the question: Is it money " wholly laid out or expended for the purposes of " the Appel- lants' trade? It seems to me, as it had seemed to Mr. Justice Channell, that it does not satisfy this requirement of the Income Tax Rule. This point is put clearly and forcibly in the con- cluding portion of my brother Channell's judgment, but in a few sentences I will state it in the form in which it presents itself to me.

The compensation charge, in respect of which the publican tenant makes the deduction from the rent payable to his landlord, whether brewer or not, as I have already said, is in truth a pre- mium for the insurance of the continuance of his right to carry on the licensed retail trade on the premises which his landlord has let to him; it goes with similar premiums paid by other licence- holding publicans within the same licensing district to form the fund out of which compensation is paid to landlord and to tenant if the licence is not renewed under Sections 1 and 2 of the Licensing Act, 1904 The purpose of paying the premium is, no doubt, primarily, to maintain the licence which enables the publican tenant to carry on his licensed business. Indirectly the landlord,

(1) 5 T.C. at p. 220. (2) 5 T.C. at p. 219.

whether he be a landlord simply or a landlord who sells beer to the tenant for sale on the premises, is interested also in the maintenance of this trade on the premises and his interest in the latter case is much greater, and he is further interested, though in this case simply as a landlord in the creation of the district compensation fund which is formed out of these premiums.

But in these circumstances I feel myself unable to say that the share of the compensation levy which is borne by the Appellants as landlords is a sum of money wholly laid out or expended for the purpose of their trade as brewers. It is primarily and partially a payment for the maintenance of the publican's licensed business.

For these reasons, although after hearing the arguments so forcibly put by the learned Counsel for the Appellants, and knowing that they have satisfied my colleagues in this Court, I cannot say with Mr. Justice Channell that this Case is fairly clear—on the contrary, I feel that it is a difficult Case—I am, upon the whole, of opinion that the Appeal should be dismissed, but, as the majority of the Court think otherwise, the Appeal will be allowed.

Sir Robert Finlay.—With costs here and below?

The Master of the Rolls.—Yes.

The Crown having appealed, the case was argued before the House of Lords on the 7th and 8th November, 1910, when the Counsel appearing for the Appellants were the Attorney-General (Sir Rufus Isaacs, K.C., M.P.), Mr. S. A. Rowlatt and Mr. W. Finlay, and the Counsel for the Respondents were Sir Robert Finlay, K.C., M.P., and Mr. A. N. Bodkin.

I.—CASE OF THE APPELLANT.

1. This is an appeal from an order of His Majesty's Court of Appeal (Cozens-Hardy, *M.R.*, and Farwell, *L.J.*, Kennedy, *L.J.*, dissenting), dated the 17th July, 1909, reversing a judgment or order of the King's Bench Division (Channell, *J.*). The judgment or order so reversed was in favour of the now Appellant on a Case stated by the Commissioners for the General Purposes of the Income Tax Acts for the Second East Brixton Division.

2. The question by this appeal is whether the Respondents, who are brewers, are entitled, in arriving at the profit of their brewing trade for assessment under Schedule D of the Income Tax Acts, to bring into account certain deductions from the rent received by them from their tenants as owners of tied houses. The deduction from rent were under the provisions of the Licensing Act, 1904 (4 Edw. 7, c. 23).

3. The provisions of the Act which are most material for the present case are Section 3, sub-sections (1), (2), (3) and (4). For convenience of reference these sub-sections are here set out.

4.—Section 3 (1). Quarter Sessions shall, in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purposes of this Act, impose in respect of all existing on-licences renewed in respect of premises within

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their area, charges at rates not exceeding, and graduated in the same proportion as, the rates shown in the scale of maximum charges set out in the First Schedule to this Act.

(2.) Charges payable under this Section in respect of any licence shall be levied and paid together with and as part of the duties on the corresponding excise licence, but a separate account shall be kept by the Commissioners of Inland Revenue of the amount produced by those charges in the area of any Quarter Sessions, and that amount shall in each year be paid over to that Quarter Sessions in accordance with Rules made by the Treasury for the purpose.

(3.) Such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence holder who pays a charge under this Section, and also by any person from whose rent a deduction is made in respect of the payment of such a charge.

(4.) Any sums paid under this Act to Quarter Sessions in respect of the charges under this Section, or received by Quarter Sessions from any other source for the payment of compensation under this Act, shall be paid by them to a separate account under their management, and the moneys standing to the credit of that account shall constitute the compensation fund.

5. By Section 2, Schedule D, of the Income Tax Act, 1853 (16 and 17 Vic., c. 34), duties are to be charged :—

" . . . For and in respect of the annual profits or gains " arising or accruing to any person residing in the United " Kingdom from any profession, trade, employment or " vocation, whether the same shall be respectively carried " on in the United Kingdom or elsewhere . . . "

By Section 5, the duties are to be levied under the provisions of the Act of 1842 (5 and 6 Vic., c. 35).

6. The parts of the Act of 1842 (5 and 6 Vic., c. 35) which are most material for the present case, are Section 100, Schedule D, First Case, Rule 3, and Section 100, Schedule D, First and Second Cases, Rule 1. . . .

* * * * * * *

Section 159 expressly forbids the making of any deductions other than those enumerated in the Act.

7. The facts, as they were found by the Commissioners, are stated in the Case [for the opinion of the King's Bench Division].* They may be shortly stated as follows :—

The Respondents own a certain number of public-houses. They do not occupy them but they let them to tenants. The tenants are, by agreements, compelled to purchase the intoxicating liquor supplied in the houses from the Respondents. The houses are thus what are generally known as " tied houses."

The Respondents acquired the houses for the purpose of making them " tied houses "—so as to increase the sale or output of their beer. The business carried on by the tenants in the " tied houses " does increase the output of the Respondent's beer, and accordingly increases the profits of the Respondent's business.

* *Vide* p. 568.

8. The Respondents have allowed to their tenants the deductions from rent provided by the Licensing Act, 1904, and have in turn made the deductions authorised by the said Act in the case of houses leased to them. The result was that the total charges imposed upon the Respondents under the said Act, amounted in respect of the year ended 31st December, 1905, to £3,600.

9. The Commissioners were of opinion that the Respondents were entitled, in computing their profits on the three years' average, to bring the said sum of £3,600 into account, and they therefore allowed a deduction of £1,200 being one-third of the sum of £3,600.

10. The case having been stated for the opinion of the King s Bench Division, came on for argument before Channell, *J.*, and that learned Judge on the 19th February, 1909, gave judgment in favour of the now Appellant. He decided that the sum of £3,600 was not laid out by the Respondents wholly and exclusively for the purpose of their trade as brewers, and following the decision of the Court of Appeal in *Brickwood* v. *Reynolds* [1898], 1 Q.B. 95, he disallowed the deduction claimed.

11. From this decision, the Respondents appealed to the Court of Appeal. The Master of the Rolls and Farwell, *L.J.*, decided that the sum of £3,600 was to be taken into account, and reversed the decision of Channell, *J.* Kennedy, *L.J.*, dissented; he was of opinion that the deductions only affected the Respondents as rent-receivers and not as brewers, and that the sum of £3,600 could not be considered to be " wholly and exclusively laid out " for the purpose of the Respondents' trade within the meaning of the Income Tax Acts.

12. The Appellant humbly submits that the judgment of the majority of the Court of Appeal was erroneous, and that the judgment of Channell, *J.*, was correct, and that the Appeal should be allowed for the following (amongst other)

REASONS.

1. Because the sum claimed as a deduction was not a loss " connected with or arising out of " the trade of brewers carried on by the Respondents, within the meaning of Section 100, Schedule D, First Case, Third Rule, of the Act of 1842.

2. Because the said sum was not money " wholly and exclu- " sively laid out or expended " by the Respondents " for the " purposes of such trade," within the meaning of Section 100, Schedule D, First and Second Cases, Rule 1.

3. Because the deduction from rent which the Respondents suffered, was not an expenditure in their business as brewers.

4. Because the deduction from rent falls upon the Respondents as owners of the houses.

5. Because the rent received in respect of the house, is not, and cannot be brought into account under Schedule D, and a deduction from that rent is in the same position.

6. Because the deduction claimed could not be claimed by any owner of the same houses who was not a brewer, and brewers who own the houses are not in a position different from other owners.

7. Because the ownership of licensed premises is not a part of the trade of brewers, and is not a trade at all.

8. Because the deduction claimed is not authorised by any provision of the Income Tax Acts.

9. Because the reasons given in the judgment of Channell, *J.*, and of Kennedy, *L.J.*, were well founded and their conclusions correct.

10. Because the judgments of the majority of the Court of Appeal were erroneous.

W. S. ROBSON.

WILLIAM FINLAY

II.—CASE FOR THE RESPONDENTS.

* * * * * * *

2. The Respondents carry on business as brewers and sellers of beer and have as necessarily incidental to their said business acquired and held either as owners or lessees certain premises licensed for the retail sale of beer and other intoxicating liquors for consumption on the premises. All such licensed premises have been acquired and are held by the Respondents solely to secure a market for their beer and increase the profits earned by them in their trade as brewers. The Respondents do not themselves occupy any of the said premises but in each case the said premises are let to a tenant who is bound under covenant to purchase the beer sold by him from the Respondents and who in consideration of such obligation pays a lower rent to the Respondents than the annual value of his premises would otherwise command.

3. By reason of the said licensed premises owned or held by the Respondents as aforesaid the Respondents obtain for their beer a wider market than they would otherwise have, and are enabled to earn and do earn profits in their said business which without the said premises would not be earned by them upon which profits income tax is paid by the Respondents.

4. The said licensed premises are owned or held by the Respondents solely for the purpose of increasing the trade done and profits earned by them and not by way of investment, and when any of the said premises cease to be licensed premises the Respondents as soon as possible dispose of them or of their interest therein.

5. The licenses current in respect of the said premises are all "existing on licenses" within the meaning of the Licensing Act, 1904 (4 Ed. VII., c. 23).

* * * * * * *

8. Pursuant to the powers vested in them in that behalf by the Licensing Act, 1904, Quarter Sessions in the year 1905 imposed compensation charges in respect of the "existing on licenses" renewed in respect of the Respondents' said licensed premises and such charges were paid by the tenants of the said premises with the duties on the corresponding excise licenses.

9. The Respondents have been compelled to allow to the tenants of such premises such deductions from rent in respect of the said charges as are authorised by the Licensing Act, 1904, and have themselves in like manner in respect of such of the said licensed premises as are held by them on lease made the allowed deductions in resepct of the said charges from the rents paid by them to their lessors.

10. After allowing for all deductions which the Respondents were so entitled to make from rent paid by them to their lessors the aggregate proportions of the said charges which the Respondents have had to bear and have in fact borne and paid out of their own moneys for the year ending 31st December, 1905, amount to the sum of £3,600.

11. The Respondents in respect of the profits and gains of their said trade were assessed to income tax under Schedule D of the Income Tax Acts for the year ending 5th April, 1907, at the sum of £44,652, but in arriving at the said sum upon a fair average of the three years preceding the year of assessment no deduction was made in respect of the sum of £3,600 so borne and paid by them as aforesaid.

12. The Respondents being dissatisfied with the said assessment appealed therefrom to the Commissioners for General Purposes under the Income Tax Acts. The said appeal was heard on the 13th day of November, 1906, when the said Commissioners after hearing the Respondents and the Appellant found as matter of fact that the said sum of £3,600 was an expense necessarily and solely incurred by the Respondents in order to earn the profits of their trade as brewers and sellers of beer and that without such expenditure the Respondents' profits would have been much less in amount. The Commissioners accordingly reduced the Respondents' assessment by allowing a deduction of £1,200 therefrom in respect of the said sum of £3,600, but at the request of the Appellant stated a case for the opinion of the Court.

13. The decision of the Commissioners allowing the said deduction was reversed by the Hon. Mr. Justice Channell, but restored by the order of the Court of Appeal. The sole question on this Appeal is whether the said Commissioners were wrong in law in allowing such deduction.

14. The enactments governing the assessment of the Respondents to Income Tax are to be found in the Income Tax Act, 1842 (5 & 6 Vict., c. 35), Section 100, Schedule D, Case 1, relating to trades, manufactures, adventures, or concerns in the nature of trade. The following are the provisions of the Rules applicable to that case so far as material to the present Appeal :—

Case 1. Rule 1.

"The duty to be charged . . . shall be computed on "a sum not less than the full amount of the balance of "the profits or gains of such trade, manufacture, adventure, "or concern upon a fair and just average of three years, "ending on such day of the year immediately preceding "the year of assessment on which the accounts of the said "trade, manufacture, adventure, or concern, shall have "been usually made up, or on the 5th day of April pre-"ceding the year of assessment, and shall be assessed, "charged and paid without other deduction than is herein-"after allowed . . . ."

Rules applying to both Cases 1 and 2.

Rule 1.

"In estimating the balance of the profits or gains to be "charged according to either of the first or second Cases "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 or exclusively laid out or expended for the "purposes of such trade, manufacture, adventure, or con-"cern . . . ."

The Respondents submit that the Order of the Court of Appeal was right and ought to be affirmed for the following among other

Reasons.

1. Because the said charges constitute a disbursement or expenditure wholly and exclusively laid out and expended for the purposes of the Respondents' trade.

2. Because the said charges were expenses which the Respondents were compelled to incur in order to earn the profits of their trade as brewers and sellers of beer, and were solely incurred for that purpose.

3. Because without the expenditure of the said sum of £3,600 the profits upon which the Respondents have been assessed to Income Tax could not have been earned by the Respondents.

4. Because the said charges were payments essential to the earning of such part of the Respondents' profits as was derived from the trade in beer carried on at the said licensed premises and not disbursements out of the balance of profits when earned.

5. Because the Respondents' interest in the said licensed premises was part of the plant and outfit of their business and the compensation charges borne by them in respect of such premises were so borne by them in their capacity as traders and not as owners or landlords of licensed premises.

6. Because in the case stated by the Commissioners for General Purposes it is found as a fact that the licensed premises in respect of which the said charges were borne or incurred by the Respondents were part and necessarily incidental to the

maintenance and development of the Respondents' business as a profit-earning trade and were owned or held by the Respondents solely for the purposes of their said business.

7. Because the balance of the profit of the Respondents' trade is not arrived at unless the said charges are deducted from the gross profit.

8. Because the findings of fact in the case stated are conclusive in favour of the Respondents.

9. Because the decision of the Commissioners and the Judgments of the Court of Appeal were correct

R. B. FINLAY.
A. H. BODKIN.

JUDGMENT.

The Lord Chancellor.—My Lords, I consider that this Order ought to be reversed. The point arising for decision is short. The Lion Brewery Company have for income tax purposes to ascertain the balance of the gains and profits of their trade. In so doing they claim to deduct the amount which they are obliged to pay as owners of tied houses in respect of the Compensation levy authorised by the Licensing Act of 1904. May they make this deduction or not? That is the sole point.

Now the Income Tax Act, 1842, Section 100, tells us under what circumstances a deduction of this kind can be made. It can be made if the money was "wholly and exclusively laid out or "expended for the purpose of such" (that is the Brewery Com- "pany's) "trade, manufacture, adventure or concern."

The Lion Brewery Company's trade is that of manufacturing and selling beer wholesale. The Brewery Company owned a number of tied houses and owning such houses is found to be a necessary incident of their trade and increases their profits, and this was the only reason for which they acquired or retained these tied houses. It must be taken that the motive of the Brewery Company in owning tied houses was simply and solely to obtain a reliable market for their beer, and this is the utmost which can be conveyed in the somewhat redundant findings of the Special Case. The Company owned the tied houses for that reason and it was essential to their trade to own them.

The Act of 1904 compels a licence holder to pay a levy. That levy is to form a fund out of which compensation is to be made to those whose licences are discontinued by no fault of their own but in order to carry out the statutory policy of reducing the number of licensed houses and also to those who own the houses themselves. They are entitled to share in the compensation and are also bound to contribute to the fund. The licence holder can deduct a part of it from the rent he pays and his landlord may in turn deduct from the rent he has to pay, and so on, in order that each person interested in the house may contribute to the fund in proportion to the extent of his interest, in accordance with the tables set forth in Schedules 1 and 2.

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When a public house is deprived of its licence under the Act of 1904 a trade is destroyed. It is the retail trade which is destroyed, comprising the sale of wines and spirits as well as the sale of beer. That is the loss which is to be compensated and the owner of the house shares in the compensation, because a house with a licence is more valuable than a house without a licence. He is compensated simply for the diminution in the value of the house itself by reason of the discontinuance of the licence to sell beer, spirits and wine therein.

Suppose that the owner of the house is not a brewer but a man who has no trade at all. He will have to bear his share of the levy, as he would receive his share of the compensation. It was not argued that he can make a deduction from income tax under Schedule A, and as to Schedule D he can make no deduction because he carries on no trade and he is not therefore accountable at all under that Schedule.

But it is said that the owner of the house, if he is also a brewer, is accountable under Schedule D in respect of his trade and can therefore make the deduction from the profits of his brewery trade under that Schedule. In my opinion he cannot, and for two reasons.

In the first place the trade from the profits of which he seeks to make the deduction is the wholesale trade of manufacturing and selling beer alone. The levy, so far as it is laid out or expended for the purpose of any trade, is laid out or expended for the purpose of insuring against loss by destruction of the retail trade authorised by the licence, which is that of selling wine and spirits and not beer alone. I confess that I cannot see how the levy can be said to be "wholly and exclusively laid out or "expended for the purpose of the trade" of the Lion Brewery Company which has nothing to do with wine and spirits. It is proportioned to the annual value of the licensed premises, is paid out of the profits of the retail licensed trade or out of the rent of the licensed premises, and provides a fund to compensate those interested in licensed premises for their loss by reason of the retail trade being destroyed.

In the second place it is only in the character of owners of a house that the Lion Brewery Company can be called upon to pay this levy at all. The share of the levy which they have to pay is proportioned to the interest they have in the house, and has no relation to their wholesale trade of manufacturing and selling beer. They pay income tax for the house under Schedule A, not under Schedule D, and I cannot perceive how they can claim a deduction in the terms of Schedule D in respect of a property which is assessed under a wholly different Schedule. You cannot by saying that a man carries on the business of owning house property shift the method of assessing that property for income tax from Schedule A to Schedule D and still less, in my opinion, can you claim to take credit, by way of deduction from an assessment upon a trade, for moneys paid in respect of ownership of landed property which is assessable under a different Schedule altogether.

I agree with Lord Justice Kennedy that the levy is in substance a premium, which those interested in a licence, whether as landlords or as owners of the licence and tenants, pay to secure themselves against the loss which they might suffer by the retail trade under the licence being destroyed under the Act. "The "rents of the tied houses do not form part of the trade profits "of the Lion Brewery Company, and it is the rent receipts which "are diminished by the tenants' deductions under the Licensing "Act, 1904, Section 3."

I do not think the dicta cited by members of the Court of Appeal are really relevant in this case. They are to be understood *secundum subjectam materiam*. We are here only concerned with the construction of an Act of Parliament.

Earl Halsbury.—My Lords, I regret I am unable to agree with the Lord Chancellor, and therefore what I say I must say with a certain amount of hesitation from the respect which I hold for his opinions.

I think the Judgment about to be delivered by my noble and learned friend beside me (Lord Atkinson) is that with which I should agree if for reasons I am about to give we were at liberty to inquire into the actual formation of the profit out of which the tax is to be evolved. If, indeed, a determination of the particular case in hand were the only question which was demanded, I should say no more than content myself with Lord Atkinson's opinion, but I am of opinion that there is something more, and indeed more important, involved in the question, namely, whether or not we are able or entitled to go outside what has already been found. The facts are ascertained for us. There is no doubt that from time to time in ascertaining what is the taxable amount under these circumstances it might be an extremely difficult problem; but as I say, these facts have been ascertained for us, and these facts are so ascertained that 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.

The Master of the Rolls and Lord Justice Farwell quote, as I think they are entitled to do, the language of the case upon which we are now called to decide as decisive of the question, and there it is found that "the Lion Brewery Company are as part of their "business and as a necessary incident of the profitable exploita-"tion" (I shall have a word of protest to say presently against the use of a French word though it is very intelligible what is here meant) "of such business the owners of" these premises which "have been acquired" by them "in the course of and "solely for the purposes of their said business." My Lords, I only have to observe upon that that the persons who had to find these facts have, as a matter of fact, almost used the words of the Act of Parliament to show what is or what is not the subject of taxation. It is true that Lord Justice Kennedy, while he refers to paragraphs 3 and 4 of the case, which, he adds, of course we are bound to accept, goes on to say that such expressions as are there used are metaphorical. But to my mind the language of the Lord Justice

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himself is open to criticism. I can find no metaphor at all but a plain business statement of fact that there are in the words of the Act of Parliament those things which are necessary to earn that which is being taxed.

I do not think that one gets much further if one looks at the Rule which is also relied upon as prohibiting any further deduction. The Rule is this, Rule 1: "In estimating the balance of "the profits or gains to be charged according to either of the "First or Second Cases, no sum shall be set against or deducted "from, or allowed to be set against or deducted from such profits "or gains" (now let it be observed what sort of things are prohibited as deductions) "for any disbursements or expenses "whatever not being money wholly and exclusively laid out or "expended for the purposes of such trade" (I pause there for a moment to point out that in the case stated to us the subject matter is found to have been "acquired and held" "solely for the "purposes of their said business"), "manufacture, adventure "or concern, or of such profession, employment, or vocation; nor "for any disbursements or expenses of maintenance of the parties "their families or establishments; nor 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 or concern not "exceeding the proportion of the said rent or value hereinafter "mentioned; nor for any sum expended in any other domestic "or private purposes, distinct from the purposes of such trade, "manufacture adventure or concern, or of such profession employ-"ment or vocation."

One other observation I have to make, namely, as to the purpose for which the Government have enacted this tax. Whatever that purpose may be it is utterly immaterial. I note (and it is curious enough that it is observed by the Lord Justice who objects to metaphors) that it is said to be like an insurance. I am not aware if it were, that that would be a close analogy, because this is a tax which must be paid whether the owner of the licence likes it or not. I can imagine a person saying "Well, I will take my chance, I "do not want to join this insurance; it is a question for me, I "will do what I will with what is mine own." That might be. But the Government will not treat that as something at his option. He must if he carries on that business or that trade pay this tax; it is the act of the Legislature which makes him pay it and it is not a thing that is open to his own will or option.

Under these circumstances it appears to me that it would land us in a very serious difficulty if in any question like this we were called upon ourselves to do that which is the action of a business man, to find out what exactly he may or may not treat as part of the adventure, part of that which is necessary to be carried on. As to that matter (we being by the Act of Parliament confined to expressing our view whether by law such and such a deduction could possibly be made), I am of opinion that that is beyond us and it has been decided for us by a competent tribunal. I decline, therefore, to enter into that question.

Lord Atkinson.—My Lords, I share the regret expressed by Lord Halsbury that I am unable to concur in the judgment of the Lord Chancellor and have of course by reason of that circumstance all the less confidence in my own opinion.

The sole question for decision in this Appeal is, whether the Brewery Company, who are owners or lessees of certain premises licensed for the sale of intoxicating liquors and let by them to certain publicans who are bound by covenaht to buy and sell upon the premises demised the beer manufactured by the Respondents and none other, are entitled, under the circumstances of the case, in ascertaining the balance of the gains and profits of their brewery trade assessable under the Income Tax Acts, to deduct, under Section 100 Schedule D, First and Second Cases, Rule 1, the amount of the charge payable by them in respect of the compensation levy imposed by the Licensing Act of 1904. And this again turns upon the point whether the money disbursed in payment of this charge is, or is not, money in the words of Rule 1 "wholly or exclusively laid out or expended for the purpose of "their" (the Respondents') "trade manufacture or concern." I used the words "under the circumstances of this case" advisedly, for, in my view, the findings of fact set out in the case stated are matters vital for consideration, if not conclusive, on the question raised for decisions. Those findings so far as material are in effect as follows:—(1) The system of selling the Respondents' beer through the instrumentality of licensed houses tied to their brewery by covenant, in the manner described, is found to be a necessary incident to the profitable conduct by them of their trade as brewers, that is, of their trade as manufacturers and vendors of beer. (2) That the Respondents by means of the system of trading so adopted by them realise profits much in excess of what they would realise if they did not adopt it. (3) That the possession and employment of these licensed premises as tied houses are essentially necessary for the realisation of the enhanced profits on which the Company pay Income Tax. (4) That the Respondents acquired the possession and enjoyment of these licensed premises solely for the purpose of employing them as tied houses in the manner described. (5) That the Company would not have acquired them as an investment, and would not acquire or possess them at all, if they could not have used them as tied houses or, in other words, they acquired and let these licensed premises solely for the purpose of securing by and through the tied-house system an exclusive market for their beer.

Under these circumstances it would appear to me impossible to contend, at least successfully, that these licensed premises were not acquired and let under the terms of these leases solely, wholly, and exclusively for the purposes of the trade of the Respondents as manufacturers and vendors of beer. They acquired the houses in order that they might let them to persons who must needs buy beer and they bind those persons to buy from them the beer needed.

Now what is the nature of the levy for compensation under the Licensing Act of 1904? First it is a compulsory levy

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Though paid in the first instance in full by the publican in possession, it is, in the ultimate result, paid in part by him and in part by every person having an interest in the premises. No doubt it is paid by those persons interested, simply because they have the particular interest, irrespective of who or what they are, or what their position or avocation in life may be; but a portion of the contribution levy is by the Legislature imposed and charged upon every interest in the premises, which portion the owner of that interest must pay. And it certainly would appear to me that where a trader deliberately acquires any particular interest in the licensed premises, wholly and exclusively for the purpose of using that interest to secure a market for the commodities he manufactures, the money he must expend to satisfy the charge thus imposed is necessarily disbursed wholly and exclusively for the purposes of this his trade.

In the present case the Respondents cannot set up the system of trading through tied houses, unless they first acquire these premises as owners in fee or lessees, and secondly, unless the houses are licensed; but the moment these two conditions are fulfilled the liability to pay the compensation levy attaches. The impost must, therefore, necessarily be paid in order to set up the system which it is found to be vital to their trade prospects to set up. And if the substance of the transaction be looked at, this impost differs, in my view, but little, if at all, from the licence or tax which a man is obliged to pay in order to carry on a particular trade or business, such as that of an auctioneer, or a pawnbroker, or a publican.

It is an expenditure which must be incurred in order to earn the receipts which after the due deductions have been made, form the balance of the gains and profits assessable to the Income Tax, and may, therefore, according to the decision of your Lordships' House, be properly deducted from those receipts.

Now it is objected in the first place that the landlord's share of the contribution is deducted from his rent by the tenant, who, in the first instance, pays the entire contribution. That is obviously mere machinery, a mere set off of debts. The tenant pays himself out of his rent that portion of the contribution which must be ultimately borne by the landlord It is therefore quite obvious that this arrangement cannot affect the question.

Again, it is urged that the landlord pays his contribution as landlord and because of his proprietary interest in the premises, and not as trader, since he would be equally liable to it whether he traded or not. That, no doubt, is so, but in the present case the Company have become landlords and thus liable to pay the charge, for the purpose solely and exclusively of setting up the tied-house system of trading. If the Company took under lease a plot of land to enlarge their brewery or took similarly premises in which to establish a depôt to sell their beer through an agent, the same criticism might be applied with equal force to the payment of the rent reserved by the lease. They would pay it as lessees, not as brewers. They would pay it whether they continued to brew or not. Yet under the provisions of the very rule relied upon in

this case, they would be entitled to deduct the rent from the profits earned, and that, too, utterly irrespective of whether the receiver of the rent used it to pay for his support or for his pleasure, or even to set up a rival brewery.

Indeed, even in a contract made for the purchase of material such as hops or malt, the Company would have to pay for the commodity supplied, not because they are brewers, but because they were contracting parties, utterly irrespective of whether they carried on their trade or had abandoned it. Yet it can hardly be suggested that the price paid for the hops or malt under the contract should not be deducted from the receipts. There is therefore, in my opinion, nothing in this objection.

Next it was argued that regard must be had to the purpose to which the contribution was devoted. I think Sir Robert Finlay's contention that this is an altogether irrevelant matter is well founded. Were it not, it should be held that the licence duty paid by a publican or a pawnbroker or an auctioneer to entitle him to carry on his trade or business is paid not wholly or exclusively, or indeed at all, for the purposes of the trade or business carried on by him who paid it, but for the purpose to which it is appropriated by the Legislature, if it be specifically appropriated, or, if not specifically appropriated, then paid in part to each and every one of the special services to which the general taxation of the country is applied, such as the support of the Army, Navy, Civil Service or education. Yet such duties as these can, as I understood, admittedly be properly deducted from the gains and profits earned in the authorised trades by the persons who pay them. But even if it were otherwise and the purpose for which the Legislature had appropriated the compensation contributions under the Licensing Act of 1904 were a legitimate matter for consideration in the decision of the question raised in this case, it does not, in my view, sustain, in any degree, the contention of the Appellants. The contributions are appropriated to form a fund, out of which the publican and the other persons interested in the licensed premises are to be compensated for the loss of the licence by non-renewal. The contribution is, therefore, in truth and fact, a payment by way of insurance premium against the loss of the licence, which means in all cases, as regards the publican an insurance against the loss of his trade or business, and as regards the landlord in such a case as the present primarily and mainly an insurance against the loss of a market for the sale of his beer, seeing that the purpose for which the licensed premises have been acquired was to secure a market. Incidently, no doubt, it may also insure the Company in the present case against the depreciation in the value of their premises caused by the loss of the licence. And if the Respondents had acquired licensed premises as an investment that might be the only loss insured against; but if, as is found, they have acquired them solely and exclusively for the purpose of securing an exclusive market, the paramount purpose of the payment must be to insure against the loss of that market. If a publican insure the licensed premises against destruction by fire his permanent purpose is to insure against the loss of his trade and business,

though incidentally he insures against the destruction of the fabrics 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 duducted from his receipts as an expenditure made wholly and exclusively for the purposes of his trade.

Lastly, it was objected that the licence, which draws after it the liability to pay the compensation contribution, auhorises trading in several articles in addition to beer, and that the payment of the compensation or any part of it could not be held to be made wholly and exclusively for or in the interest of the trade in beer alone, and no doubt as far as the publican is concerned that possibly may be so, but as far as the Respondents are concerned they deliberately set up, wholly and exclusively for the purposes of their trade in beer, a system which necessarily subjects them to a liability for the share of the compensation contribution they claim to deduct. It matters not to them in respect to what trading, in addition to the trading in beer, the liability for the entire contribution is incurred. They deliberately assume the liability for the landlord's share of it solely to get a market for their beer, and therefore the payment of it is a disbursement made wholly and exclusively for the purposes of their trade as vendors of beer.

Much reliance was placed by the Appellants on the case of *Brickwood* v. *Reynolds* (1 K.B. (1898) 95).(1) When the case is carefully examined it does not appear to me to be such a conclusive authority on the question for decision in this case as was suggested in argument. In that case repairs were executed by the lessors on the entire fabric of tied houses, part of which were used as dwellings by the tenants, the publicans, and it was sought to deduct from the receipts from the landlord's business the entire cost of these repairs. The first point raised was that the houses were not occupied by the landlords (the Brewery Company) for the purposes of their trade, but were occupied by the tenants (the publicans) for the purpose of their trade; and that the expenditure could not therefore be deducted under the provisions of Rule 3, Case I., Section 100, Schedule D.

At page 103 of the Report, Lord Justice A. L. Smith is reported to have referred to Rule 1 applying to Cases 1 and 2 and to have expressed himself thus: "In my opinion that provision" (*i.e.*, the provision as to money wholly and exclusively expended for the purposes of the trade) "covers this case. It is impossible "to say, upon the facts stated in the case, that the whole of "the money expended in the repairs of those tied houses was "exclusively expended for the purposes of the Appellants' trade "as brewers. It was expended for many other things, one being "for the purposes of the trade of the publicans who occupied "those houses." Well it is clear, from the provisions at the end of Rule 1, that the money expended for the repairs of the portions of the fabrics used as dwelling houses by the tenants could not be deducted by either landlord or tenants. And this

(1) 3 T.C., 600.

may have been, and probably was, one of the many things to which the learned Lord Justice alluded. And Lord Justice Rigby at page 105 of the report, in dealing with the same point, says: "In my opinion, this money which was expended in the "repairs of these tied houses was not expended wholly and "exclusively for the purposes of the trade. Even if it were "conceded that the money was expended partly for the purposes "of the trade—I am not at all certain that even that can legiti- "mately be conceded—it certainly was not wholly and exclu- "sively so expended." It is clear, therefore, in my view that it was not expressly decided in this case that the money expended on the repairs executed on the portions of the houses used for trade purposes could not be deducted. Moreover, the Brewery Company in that case were not expressly bound to repair, nor did it appear that the repairs were necessary for the proper carrying on of the publican's business And in any case the expenditure is not analogous to that incurred in the present case in the obligatory discharge of an incumbrance imposed upon that interest in the premises which the Company acquired for the sole and exclusive purpose of increasing the volume of their sales and securing for their goods a higher price than they could otherwise obtain. That case is not a binding authority on your Lordships, but even if it were, it is, I think, distinguishable from the present case.

I am therefore of opinion that the decision of the Court of Appeal was right and should be affirmed and that this Appeal should be dismissed with costs.

Lord Shaw of Dunfermline.—My Lords, the opinions which your Lordships have just delivered show such a radical and complete difference of opinion that my own position is one of great difficulty. My two learned brethren who have preceded me have expressed diffidence in differing from the Lord Chancellor. My Lords, I express diffidence in differing from any one of your Lordships and in expressing an opinion either on the one side or on the other. With these cross currents of feeling, my Lords, and having appreciated the difference that was to arise I have made to the best of my power an independent investigation of the whole topic and I think it best to proceed to read that judgment.

My Lords, the decision of your Lordships' House must proceed—and in this I am most happy to agree with the Earl of Halsbury—upon the facts as set forth in the stated case. The Respondents are brewers and sell beer to what is known as tied houses. What is their situation in relation to these houses? The case states it thus: "The Lion Brewery Company Limited "(hereinafter called the Respondents) are as part of their busi- "ness and as a necessary incident of the profitable exploitation "of such business the owners of certain freehold licensed "premises and also lessees of other licensed premises, all of "which premises have been acquired by the Respondents and "are held by them in the course of, and solely for the purposes "of, their said business. The said premises are let by the "Respondents to tenants who covenant to deal only with the

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"Respondents in the way of their business, and in considera-
"tion thereof and the purchase of beers from the Respondents
"they pay a much less rent than the annual value of the
"premises would warrant. By these means and the possession
"and use of the said premises, which are employed by the
"Respondents as substantially part of their plant or out-
"fit necessary to carry on the business profitably, the Respon-
"dents are enabled to earn, and do earn, profits upon which
"they pay the income tax and which without the said premises
"and their use in and for carrying on their business would be
"much less in amount."

"The profits of the Respondents have always been greatly
"increased by reason of the employment and use of such
"premises in and for the purposes of the Respondents' business,
"and to enable the Respondents to earn the profits upon which
"they are assessed to the Income Tax the possession and em-
"ployment as aforesaid of such premises are essentially neces-
"sary, and except for the purposes of and employment in their
"business of such premises, the Respondents would not possess
"them. They do not possess them as investments or for the
"purposes of investments. If any house loses its licence the
"Respondents as soon as possible get rid of it."

To this narrative it falls to be added that, as stated in the Respondents' case in this Appeal, "the licences current in "respect of the said premises are all existing on licences within "the meaning of the Licensing Act, 1904." By the definition clause of that Act the expression "on licence" means "a "licence for the sale of any intoxicating liquor (other than "wine alone or sweets alone) for consumption on the premises." In the argument it was taken that these licences were on licences in the full sense, that is to say, there were retailed for consumption on the premises, spirits, wine and beer, and that the licensees were bound to the Respondents in a contract of exclusive dealing only in respect of beer. The Respondents are not themselves occupants of any of the licensed premises.

The Respondents own some of these houses, having the licensees as their tenants; they have others, having the licensees as their sub-tenants. For the purpose of your Lordships' decision, the point to be settled appears to me to be the same in either case; and I accordingly may, for the sake of greater simplicity of treatment, speak of the one case of ownership alone.

The relation in which the Respondents stand to the licensed premises, which are their tied houses, being as above described, there falls upon the licensees of these houses, in terms of the Licensing Act, 1904, a liability to pay "together with and as "part of the duties on the corresponding excise licence" charges at rates not exceeding those shown in the maximum scale of the first schedule to that Act. Such payments being made by the licensees, the Act, Section (3), sub-section (3), provides that "such deductions from rent as are set out in the second schedule "to this Act may notwithstanding any agreement to the con-"trary, be made by any licence holder who pays a charge under "this Section." In the present case these deductions from rent

have been made, and the claim of the Respondents is that they shall, in a question with the Inland Revenue, be treated as deductions from the profits of their wholesale business of brewers.

Before considering whether such a deduction from rent can be treated as a deduction from the wholesale business profits, it is necessary to make clear what is the purpose for which the whole charges including the deductions have been levied. That purpose is to make up a fund, known as the Compensation fund, and treated in the Act as a fund out of which those interested in houses dispossessed of their licences on public grounds, such as the need for a reduction in the number of licences, are to be compensated in respect of such loss of licence. So far as the particular premises are concerned, what is to be paid in respect of loss of licence is " a sum equal to the difference between the " value of the licensed premises . . . and the value which " those premises would bear if they were not licensed premises."

The primary interest in the on licence is of course with the proprietor of the retail business for the supply of liquor for consumption on the premises. But the owner of the house is also interested, because if the business, as a licensed one, disappear, the value of his property in the market will suffer depreciation. So far as the owner of the premises accordingly is concerned, he, by making this payment, insures his own proprietary interest, that is to say, he pays a premium against the depreciation of the premises in the property market. Whether a payment of that kind, fixed by the statute to be made as a deduction from the rent paid by the tenant, is a deduction falling under Schedule A applicable to the relation of owner and tenant is not a question in this case and has not been argued. The consideration of that question would depend solely upon the construction of the Acts relative to what are permissible deductions from or reductions of rent under Schedule A.

But the present case is pleaded as one falling under Schedule D. It is argued that the very owning of the property is a part of the means employed in the business without which the brewery profits " would be much less in amount " and that, therefore, the deduction from rent must be treated as a deduction from brewery profits. This question so stated might be of very great difficulty, and difficulties of that kind might confront the Revenue authorities on all similar occasions on which expenditure had been made, which was, so to speak, consequential upon the form in which the mechanism of the business had been built up, or, as the stated case has put it, incidental to its " exploitation." And, in my opinion, it is just for the sake of avoiding such difficulties that the statute itself has prescribed what, and what alone, are the deductions from profits which are permissible under the Act. One is accordingly driven to Rule 1 of the first and second cases under Schedule D of the Act of 1842 (5 & 6 Vict., c. 35). This provides that " in esti- " mating the balance of the profits or gains . . . no sum " shall be set against or deducted from . . . such profits

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" or gains for any disbursements or expenses whatever not being " money wholly and exclusively laid out or expended for the " purposes of such trade." Section 159 of the statute further expressly forbids the making of any deductions other than those enumerated in the Act. The true question accordingly in this case is, in my judgment, that which has been put by my noble and learned friend, the Lord Chancellor, namely, is this sum wholly and exclusively laid out or expended for the purposes of the wholesale brewing trade carried on by the Respondents?

In my opinion the words "purposes of such trade" do not mean the motives animating the minds of the traders, but do mean the purposes to and for which the money is applied and expended.

In regard to this Case these moneys in the sense of the compensation charges or levies were expended as a whole for the purpose of securing that the premises should be continued on the list of premises licensed for the retail trade in liquor. Stated negatively, they were expended to secure the retail trader against the discontinuance of a licence for his retail business, and, secondly, to secure the owner of the house against the discontinuance of the premises as premises in which a retail licensed trade could be carried on.

As a whole, therefore, if the word " exclusively " were applicable at all, it would be applicable, not to the wholesale business of a brewer, but to the retail business of the sale of intoxicating liquor for consumption on the premises.

Strictly, however, to confine the question to the case of the contribution made by the Respondents, in the shape of a deduction from the rents received by them, that case is an owner's case; and with regard to these premises the payment falls upon the owner, whatever be the trade he is engaged in, and the purpose of the payment is to keep up the value of the premises as licensed premises, whoever owns them. I respectfully agree with the opinion of the Master of the Rolls when he says of the owner: " if he is " an ordinary non-trading landlord, he must bear his proportion " of the compensation levied, and he cannot in any way bring " it into account against the Crown." Neither the payment of the charge nor the scale of it can be avoided or altered by any reference to the owner's business relations with the licensee. The payment would be exigible, although there were no such relations, and the scale is fixed by statute in proportion to the rental and period of occupancy and to nothing else.

My Lords, this appears to me to demonstrate that a payment made by an owner, irrespective of whether he is in trade or is dealing as a trader with the premises, is a payment for the purpose of preserving the owner's rights as such, and cannot be said to be exclusively devoted to the purpose of some business in which the owner happens to be engaged. In short, it seems to be difficult logically to affirm—and were it not for the opinion of some of your Lordships and some of their Lordships in the Court below, I should deem it impossible to affirm—that a payment is exclusively devoted to the purpose of the wholesale brewing trade carried on by the owners of premises when

the same payment to the same amount, and in respect of the same premises, would fall upon the owners, although they stopped the brewing business to-morrow or although they had never at any time been engaged in any business transaction with the licensee. I have, as I say, difficulty in seeing how an owner's payment can be said to be exclusively for the purpose of a brewer's trade when the payment would fall upon the owner, whether he was a brewer or not.

While the payment is not, in my opinion, " exclusively " for the brewing trade purpose, it appears also to be equally clear to me that it is not " wholly " for such a purpose. I may point out that even if it were maintained that the payment was to secure the continuing value of a brewery asset, still that asset was a value in a licence which was for wine, beer, and spirits. The payment undoubtedly was for the continuance of that licence as a whole, although the trading interest of the Appellants with the premises had no reference to anything but beer. It is not difficult to figure cases in which, if an on licence in the full sense were reduced to a beer house licence, the value of the premises would be greatly reduced, while the trade in beer therein with the wholesale brewer might not be reduced, but increased. It is, to my mind, fairly plain, therefore, that the payment by the owner, who happens to be a brewer, is a payment not exclusively devoted to the purposes of his brewing trade, but devoted to the purposes of a trade in wine and spirits as well as beer, and the deduction under the statute cannot accordingly apply.

In the argument I put the case of an on licence under which the profit of the trade in wine, in beer, and in spirits was fairly equal, one-third profit attaching to the retail sale of each of the articles. It hardly appears to me to be possible that a payment made even on the assumption that it was for the purpose of keeping up the brewer's beer connection with the premises, can be said to have been wholly applied to and expended upon that, seeing that this formed only one-third of the business, and the other two-thirds of the interests covered by the payment had reference to a trade in other articles. Under the statute, however, a deduction, to be legitimate, must be both exclusively and wholly for the purposes of the Appellants' brewing trade; whereas, even on the facts in the present case, it must be conceded that the payment was, in any view, partially for keeping up a trade in articles not supplied by the brewer.

I desire to repeat, however, that while this result is reached by a consideration of the limited nature of the owner's trade with fully licensed premises, I think the same result is reached by a consideration that it is not *quâ* trader, but simply *quâ* owner, apart from being a trader at all, that the owner makes the payment, and that in such circumstances it cannot be soundly established that the payment so made is a deduction from trading profits under Schedule D.

I think, accordingly, that the judgment of the Court of Appeal should be reversed. In my opinion, Mr. Justice Channell and Lord Justice Kennedy came to a sound conclusion.

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The Lord Chancellor.—My Lords, as there is an equal division of opinion in this House, as indeed there was an equal division of opinion among the learned Judges who heard the case in the Courts below, the rule *Semper præsumitur pro negante* applies, and the Appeal will not prevail; but the practice of your Lordships is in such cases that there be no costs of the Appeal to this House. I shall, therefore, move your Lordships accordingly.

Questions put.

That the order appealed from be reversed.

The Not Contents have it.

That there be no costs of this appeal on either side.

The Contents have it.