VOL. XII.—PART XII.

No. 61*.—High Court of Justice (King's Bench Division).—15th and 16th December, 1925.

Court of Appeal.—13th, 14th, 17th and 18th May, and 9th June, 1926.

House of Lords.—6th, 9th and 10th May, 1927.

The Commissioners of Inland Revenue *v.* Newcastle Breweries, Ltd.(1)

Excess Profits Duty—Trade or business—Profits—Date of arising—Goods requisitioned by Government in 1918 *under Defence of the Realm Regulations—Payment received in* 1922 *of compensation awarded by War Compensation Court less sum already received on account in* 1918—*Finance (No.* 2) *Act*, 1915 (5 & 6 *Geo.* V, *c.* 89), *Section* 38.

The Respondent Company carried on the business of brewers and wine and spirit merchants, and in the course of this business kept large stocks of rum which had to be reduced and blended before sale. The blended product was sold either wholesale or retail in relatively small quantities.

In January, 1918, *the Admiralty, acting under the Defence of the Realm Regulations, took over about one-third of the stocks in question then owned by the Respondent Company. Payment of* £10,315 *was offered by the Admiralty, based on the actual cost of the rum and allowing a profit of about* 1*s. per proof gallon, and this amount was accepted on account by the Respondent Company, without prejudice to its claim for a larger amount. In regard to this claim litigation ensued, but before its conclusion the Indemnity Act*, 1920, *was passed, providing that any person who had sustained loss or damage by reason of interference with his property or business through the exercise or purported exercise of any power under the Defence of the Realm Regulations should be entitled to payment or compensation in respect of such loss or damage, to be assessed on the principles mentioned in the Regulation. Following a claim by the Company, the War Compensation Court in November*, 1921, *gave judgment for payment to them of a total sum of* £15,624, *and the balance of* £5,309 *was accordingly paid by the Admiralty in January*, 1922.

The original payment of £10,315 *was credited in the Company's accounts for the year ended* 30*th October*, 1918, *under the head of "Sales of Rum," and was included in an Excess Profits Duty assessment for that accounting period. No appeal was entered against this assessment, but in subsequent proceed-*

(1) Reported K.B.D., 42 T.L.R. 185, C.A., 42 T.L.R. 609, and H.L., 43 T.L.R. 476.

ings the Company did not admit that the payment was rightly included in its assessable profits. The further payment of £5,309 was credited under the same head in the accounts for the half-year ended 30th April, 1922, but was charged to Excess Profits Duty by an additional assessment for the accounting period ended 30th October, 1918.

The Special Commissioners, following the decision of the Court of Appeal in the Irish Free State in the case of Arthur Guinness, Son & Co., Ltd., *v.* Commissioners of Inland Revenue, [1923] 2 I.R. 186, *discharged this additional assessment on appeal on the ground that the sum received did not represent a trade profit.*

Held, *that the payment in question was a profit arising from the Company's trade, and that it must be included for Excess Profits Duty purposes in the profits for the accounting period ending the 30th October, 1918, in which the rum was taken over.*

CASE

Stated under the Finance (No. 2) Act, 1915, Section 45 (5), and the Taxes Management Act, 1880, Section 59, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 30th October, 1923, for the purpose of hearing appeals, the Newcastle Breweries, Ltd., hereinafter called the Respondent Company, appealed against an additional assessment to Excess Profits Duty in the sum of £4,247 for the accounting period of twelve months ending 30th October, 1918, made upon the Respondent Company by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III, and subsequent enactments.

2. The Respondent Company is a company incorporated under the Companies Acts, and carries on the business of brewers and wine and spirit merchants at Newcastle-on-Tyne. In the course of this business it imports rum and sells it either retail through public houses belonging to and managed by itself or wholesale to tied public houses and free customers. (A copy of the Memorandum of Association of the Respondent Company is annexed hereto and forms part of this Case[1].) The Respondent Company keeps a large stock of rum, of different kinds, the bulk of which is stored in bonded warehouse and is of a strength considerably over proof. This rum has to be and is always reduced and blended before it is removed from warehouse, and sales of the rum so reduced and blended are made in relatively small quantities, usually of about four liquid gallons. The largest bulk or wholesale sales in the ordinary course of business are of quarter-

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[1] Omitted from the present print.

casks, which vary from 25 to 30 liquid gallons, though this is a very unusual sale. No proof rum is sold by the Respondent Company, all sales being of reduced rum in bulk or in liquid gallons.

3. On 6th October, 1917, the Admiralty issued an order under Regulation 2B of the Defence of the Realm Regulations, issued under Section 1 of the Defence of the Realm (Consolidation) Act, 1914, giving notice of their intention to take possession of all stocks of rum in bonded warehouses in the United Kingdom, prohibiting any person owning or having control of any such stock from buying, selling, removing, or otherwise dealing in any such rum without the consent of the Admiralty, and requiring any person who owned or had in his custody or under his control more than ten puncheons of such rum to furnish them with full particulars thereof. (Copies of the said Regulations and Order are annexed hereto and form part of this Case(1).)

4. On 16th October, 1917, the Respondent Company made the required return of all the rum in bonded warehouses owned by it, amounting to approximately 700 puncheons. (A puncheon contains, on the average, about 150 proof gallons.) After permits had been granted to clear two small parcels for ordinary trade purposes, the Admiralty on 20th November, 1917, gave notice that they had decided to take over provisionally 239 puncheons of rum specified by them (over two-sevenths of the Respondent Company's stock of rum), and that, as it had not yet been definitely fixed what amount of profit should be allowed, it had been decided to pay in the first instance only the prices at which the Respondent Company had actually purchased the rum, plus the incidental charges which had since accrued in the ordinary course for carriage, rent and insurance to the 31st December then next, and interest calculated at the rate of 5 per cent. per annum. At the same time it was intimated that a further communication as to the extra amount to be paid to the Company for its profits would be addressed to the Company in due course, and that the Admiralty would not require any other quantities of the rum, and that a public notice removing the restrictions imposed by the Order of 6th October would be published during the next few days. Copies of the correspondence relating to the matters dealt with in this paragraph and in paragraphs 5, 6, 7, 8 and 9 of this Case are annexed hereto marked D and form part of this Case.(1) The whole of the rum so provisionally taken over was considerably over proof and was the oldest rum the Respondent Company had in stock. The rum taken was very largely Demerara rum, which was the best the Company had and which would not have been sold by the Company without blending it with others. It was stated by the Managing Director of the Company that the action of the Admiralty had injured their stock very seriously, and upset their business for some years.

(1) Omitted from the present print.

(29476) Wt. 16418/514/1061 4,750 2/28 Harrow G. 57

5. On 12th December, 1917, the Respondent Company wrote to the Admiralty protesting against the manner in which the rum taken over had been selected, on the grounds that the oldest rums had been selected, that an excessive quantity of Demerara rum had been requisitioned, thus leaving the Company with a proportion of Jamica rum in its stock enormously larger than it had ever used in its blends, and that unnecessary additional labour would be caused by taking all the rum requisitioned out of the stock at Newcastle, while the stock in London, which would not require to be carried a long distance by rail, had been left untouched, presumably because it had been bought later and at higher prices than the Newcastle stock. The Admiralty consented to the substitution of the rum lying in London for an equivalent quantity out of the Newcastle stock on condition that the substituted rum should be supplied on terms not less favourable than would have resulted if the parcels originally specified had been taken, and on 10th January, 1918, asked that delivery orders for the rum provisionally requisitioned should be forwarded at once. The Respondent Company thereupon (on 14th January, 1918) sent delivery orders for the parcels lying in London and explained that as the warehouse in Newcastle was its own property no delivery order was necessary for the rum lying there, and the whole quantity of 239 puncheons requisitioned was delivered in due course.

6. After some discussion and correspondence between the Admiralty and the Brewers' Society, the Admiralty wrote to the Respondent Company on 8th February, 1918, announcing that they were prepared to pay, over and above the payments already mentioned (*i.e.*, the actual first cost of the rum and all out-of-pocket expenses incurred in connection with it up to 31st December plus interest at the rate of 5 per cent. on all such expenditure actually incurred by the holders of the rum) the appropriate Customs rebates and also a sum of 1*s.* per proof gallon as a consolidated allowance to cover (1) appreciation in value, due to maturing in the rum itself, and (2) overhead profit on the transaction. They stated that the terms offered were the best which they felt justified in paying, though it would, of course, be open to any holder to appeal to the Defence of the Realm (Losses) Commission if he was not prepared to accept the Admiralty's offer, and they asked to be furnished with a statement of claim for these additional allowances accompanied by a statement shewing the actual gauges and strength of the rum supplied.

7. On 26th February, 1918, the Respondent Company wrote to the Admiralty stating that they did not accept the terms of the letter of 8th February, and protesting against the manner in which they were being treated. They also asked for reconsideration of the terms laid down, and enquired whether meanwhile they could have a payment on account, without prejudice to a final settlement, upon invoices shewing cost price, expenses and

interest in accordance with the Admiralty letter of 20th November, 1917. The Admiralty refused to reconsider the terms offered, but stated that there would be no objection to making payment for the rum on the terms offered both in Admiralty letters of 20th November, 1917, and 8th February, 1918, while allowing the Respondent Company to reserve its right to appeal to the Defence of the Realm (Losses) Commission.

8. On 8th April, 1918, the Respondent Company's Solicitors wrote to the Admiralty that they were instructed to contest the validity of any Regulation that could be construed as authorising the requisition of the goods by the Government without payment being made for them at the market price and as of right, and on 11th April they wrote a further letter, accepting the Admiralty offer to make a payment on account, and forwarding statements made up in accordance with the principles laid down by the Admiralty, without prejudice and reserving their clients' legal rights. On 15th April the Admiralty acknowledged the receipt of the Respondent Company's claims and stated that payment would be made in due course without prejudice and reserving all rights in respect of any action which the Respondent Company might intend to take, and on 17th May they replied to the letter of 8th April, referring to Regulation 2B of the Defence of the Realm Regulations, and announcing that any firm which considered that the amounts offered were inadequate was at liberty to appeal to the Defence of the Realm (Losses) Commission.

9. In the meantime (in May, 1918) a cheque had been sent to the Respondent Company by the Admiralty for the sum of £10,315 1*s*. 4*d*., which was brought into the Respondent Company's accounts under the head of " Sales of Rum," and thus entered into the calculation of the balance of profit in respect of which the Respondent Company was originally assessed to Excess Profits Duty for the period of twelve months ending 30th October, 1918. The Respondent Company did not appeal against the original assessment to Excess Profits Duty, and no question arises in the present case in regard thereto, but the Respondent Company does not admit that the said sum of £10,315 1*s*. 4*d*. was rightly included in its assessable profits. (The sum due in respect of the sum calculated according to the principles laid down by the Admiralty was £10,774 9*s*. 3*d*., and in the subsequent proceedings this sum was treated as having been received by the Respondent Company, although through a clerical error the Admiralty cheque had in fact been drawn for the sum of £10,315 1*s*. 4*d*. only.)

10. Following the course foreshadowed in its correspondence with the Admiralty, the Respondent Company presented a Petition of Right claiming the market value of the rum. The case was tried before Salter, J., who on 12th February, 1920, gave judgment in favour of the Respondent Company, holding that the Regulation 2B, so far as it purported to deprive persons whose goods were requisitioned by the naval or military authori-

ties of their right to the fair market value and to a judicial decision of the amount, was *ultra vires*, and declaring that the Respondent Company was entitled to be paid the fair market value of the 239 puncheons of rum acquired by the Admiralty, and in the event of dispute as to the amount of such market value, to have the same fixed by a County Court Judge. The case is reported in [1920] 1 K.B. 854.

11. The Crown gave notice of appeal against this decision, but before this appeal was heard, namely on 16th August, 1920, the Indemnity Act, 1920, was passed, whereby the proceedings taken by the Respondent Company were rendered void, and it was provided that a person who had incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise during the War of any power under any enactment relating to the Defence of the Realm, or any Regulation or Order made or purporting to be made thereunder, should be entitled to payment or compensation in respect of such loss or damage, such payment or compensation to be assessed on the principles and by the tribunal mentioned in the Regulation.

12. On 7th October, 1920, the Respondent Company presented a claim to the War Compensation Court for compensation in the sum of £28,571 less the amount already received on account. The War Compensation Court gave judgment on 7th November, 1921, adjudging that payment should be made to the Respondent Company of the sum of £15,624 11*s*. 4½*d*. as compensation for the 239 puncheons of rum (being at the rate of 8*s*. 9*d*. per gallon), credit to be given for the sum already received. The further sum of £5,309 10*s*. being the difference between the sum of £15,624 11*s*. 4½*d*. awarded and the sum of £10,315 1*s*. 4*d*. previously received, was paid by the Admiralty in pursuance of this judgment in January, 1922, and was brought into the Respondent Company's Profit and Loss Account for the half year ending 30th April, 1922, under the head of " Sales of Rum." The additional assessment under appeal was made in respect of the said sum of £5,309 10*s*. for the accounting period ending 30th October, 1918, at the rate of 80 per cent. in force for that period.

13. The War Compensation Court found as a fact that at the time of the requisition of the rum by the Admiralty there was no market price for rum, and it was stated to us on behalf of the Respondent Company that the only evidence available as to the market value of rum at that time was that some damaged rum which had been under water for some time sold at 14*s*. a gallon.

14. Copies of the Respondent Company's claim before the War Compensation Court, and the judgment of the War Compensation Court thereon, are attached hereto and form part of this Case.(1)

(1) Omitted from the present print.

15. It was contended on behalf of the Respondent Company :—

(*a*) That the sum of £5,309 10*s*. was not a receipt of the Company's trade or a profit arising from its trade or business.

(*b*) That the rum taken over by the Admiralty in the foregoing circumstances was not, and could not be said to have been, sold by the Respondent Company in the course of its trade or business or at all.

(*c*) That the case was concluded by the judgment of the Court of Appeal in Southern Ireland in the case of *Arthur Guinness, Son & Co., Ltd.* v. *Commissioners of Inland Revenue*, [1923] 2 I.R. 186, and the payment received by the Respondent Company under the judgment of the War Compensation Court as compensation for loss or damage by reason of interference with its property or business was not assessable to Excess Profits Duty as a profit arising out of its trade or business.

Reliance was also placed upon the decision in *Glenboig Union Fireclay Co., Ltd.* v. *Commissioners of Inland Revenue*(1), 58 S.L.R. 376; 59 S.L.R. 162.

(*d*) Alternatively, that if the said payment were a profit arising out of the Respondent Company's trade or business it did not arise in the accounting period ending 30th October, 1918, or in any other accounting period to which Excess Profits Duty applied. Reference was made to and reliance placed upon the decision in *J. P. Hall & Co., Ltd.* v. *Commissioners of Inland Revenue*(2), [1921] 3 K.B. 152.

(*e*) That the additional assessment under appeal ought to be discharged.

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

(*a*) That the rum in question was sold in the course of the trade of the Respondent Company.

(*b*) That the sum of £5,309 10*s*. was a receipt arising from the Respondent Company's trade or business.

(*c*) That the said sum of £5,309 10*s*. was properly to be included in computing the profits of the Respondent Company for the accounting period ending 30th October, 1918.

(*d*) That the decision of the Court of Appeal in Southern Ireland in the case of *Arthur Guinness, Son & Co., Ltd.* v. *Commissioners of Inland Revenue* above referred to was not applicable to the present case, and

(*e*) That the assessment under appeal was correct and ought to be confirmed.

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(1) 12 T.C. 427. (2) 12 T.C. 382.

17. We, the Commissioners who heard the appeal, considered that, whether or not we were strictly bound by the decision of the Court of Appeal in Southern Ireland in the case of *Arthur Guinness, Son & Co., Ltd.* v. *Commissioners of Inland Revenue*, we ought to follow it. In that case a large quantity of barley which had been purchased by Messrs. Guinness for use in the manufacture of stout had been requisitioned by the Food Controller under the Defence of the Realm Act and sold under his instructions at prices fixed by him. On an appeal heard in 1921 we held that the profit arising from the sale of this barley to or under the instructions of the Government formed part of the profits arising from the trade or business carried on by Messrs. Guinness and fell to be included in the computation of their profits for the purposes of Excess Profits Duty, but our decision, though upheld by the Court of King's Bench, was reversed by the Court of Appeal, who held, by a majority, that there was no sale of the barley by Messrs. Guinness and that the compensation money paid for it was not a trade profit. We were unable to distinguish the present case from that of *Arthur Guinness, Son & Co., Ltd.*, in any essential particular, and we accordingly felt it to be our duty to discharge the assessment under appeal.

18. The Appellants immediately upon the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance (No. 2) Act, 1915, Section 45 (5), and the Taxes Management Act, 1880, Section 59, which Case we have stated and do sign accordingly.

P. WILLIAMSON, } Commissioners for the Special
R. COKE, } Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.
12*th May*, 1925.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 15th and 16th December, 1925, and on the latter day judgment was given in favour of the Crown, with costs.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., and Mr. Cyril King for the Respondent Company.

JUDGMENT.

Rowlatt, J.—This case, which has required some little time for its proper explanation and comprehension by me, arises under these circumstances. The Brewery Company had a large quantity of rum, not yet refined or reduced or prepared for sale, which was requisitioned by the Admiralty. They became prohibited from dealing with it and, in short, had to let the Admiralty have it. That was done under a Regulation made

(Rowlatt, J.)

under the Defence of the Realm Act, which authorised the rum to be taken, and which purported to say that the price to be paid in respect thereof was to be settled by the Commission then sitting under the presidency of Sir Henry Duke (as he then was); and it purported to say, in effect, that what was to be paid was the cost of it to the person from whom the goods were taken, plus the pre-war rate of profit.

Now the Admiralty took these goods at the begining of the Company's year which ended in 1918, and towards the end of the year, or in the summer, they paid £10,000, which they said was the cost, and some other allowances, plus one shilling a gallon profit. What was done upon that is perfectly clear to my mind. Neither party gave up anything. The Admiralty said that was what they thought the sum was, and they were not prepared to pay any more, and the Brewery Company said it was not enough, but they took that sum; the Admiralty raised no objection. The Brewery Company said: "We do not take it "in satisfaction; we will reserve our rights to make any further "claim which we may be advised to make," and the Admiralty said, "Very well; we have no objection. You are at liberty to "make any further claim." That is what took place. Now if they had gone under the Regulation they would have got, to put it shortly, the cost to them plus the pre-war profit, as a price. That would have been a price. However, what they said was that this part of the Regulation is invalid, and they went by Petition of Right(1) to Mr. Justice Salter and obtained a judgment from him which said that the price was not to be so determined or so limited; their right was to have the market value, to be assessed by the County Court Judge. Now, if they had got that, they again would have got a price. But at that period the Indemnity Act came into effect, which avoided the judgment of Mr. Justice Salter, as well as other judgments *in pari materia* or within the ambit of the Act; and instead of that, it gave people in the position of the Brewery Company a right to go before a Commission presided over by Sir Francis Kyffin Taylor. They went there under Section 1 (2) (*b*), which deals with the case of anybody who sustains direct loss or damage by reason of interference with his property, and provides that such persons are to have payment or compensation; and the payment or compensation was to be assessed by Sir Francis Kyffin Taylor's Tribunal upon the footing, as it was held in this case, which would have been applied by Sir Henry Duke's Commission, had it gone before them, namely, the cost to the Brewery Company, plus the pre-war rate of profit. Now the words used here are "loss or damage" and "payment or compensation." Those, in my judgment, are general words. It is quite clear that "com-"pensation" includes—the Act says so—any price to be paid:

(1) Newcastle Breweries, Ltd. *v.* The King, [1920] 1 K.B. 854.

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" payment (including any price to be paid)." But when you work out the figure which is to be paid by way of compensation, you see it is a price; and of course, every day since we were chidren we have heard of compensation cases where, under the name of " compensation," people merely get, on a compulsory sale of land, the price of the selling value of their land, and the price which they get is alluded to as " compensation." There is no difficulty at all in coming to the conclusion that what they did get from this Tribunal was a figure representing a price. Then what happened was that they got that three years after the Company's year closed in 1918, and the question is whether this sum which they got from that Commission can now be brought into the accounts for 1918, so as to make the Brewery Company liable to Excess Profits Duty.

Now I am bound to say there is a very curious feature about the case at this stage, because it is really, I was going to say, almost humorous; they have been paid a very small profit—their pre-war profit; that is what they have been allowed in the price which has been paid to them. Having been allowed that, this sum is now to be carried into the Company's accounts and is going to be treated as excess profits, and 80 per cent. of the profit is going to be taken away from them as an excess profit, which *ex hypothesi* is only the pre-war rate of profit. It is very odd, but I do not think that affects the question I have to decide. I think it may be truly said that the right hand of the Government knoweth not what the left hand doeth. I do not think it affects the case I have to decide at all.

Now the question is: Are the Revenue right in point of law? It is first of all said this was not a profit of the trade at all, but was a compensation for an interference with the trade and the taking away of the trade, but it was not profit arising from the trade, as the words go. Now I have no doubt that a Government requisition, such as took place during the war, could destroy a trade, and anything which was paid would be compensation for such destruction. I can understand, for instance, if they had requisitioned in this case the people's building and stopped them either brewing and selling or doing anything else, and paid a sum, that could not be taken as a profit; they would have destroyed the trade *pro tempore* and paid compensation for that destruction; and in fact I daresay if they take the whole of the raw materials of a man's trade and prevent him carrying it on, and pay a sum of money, that is to be taken, not as profit on the sale of the raw materials, which he never would have sold, but as compensation for interfering with the trade altogether. So in a case like the *Glenboig* case(1), where what was done was to stop the trade without taking anything. It is another form of the same thing, perhaps. They do not take anything, but stop

(1) The Glenboig Union Fireclay Co., Ltd. *v.* The Commissioners of Inland Revenue, 12 T.C. 427.

(Rowlatt, J.)

the trade and pay compensation. Well, that is not a profit arising from the trade; it is compensation for having the trade stopped altogether. But in this case what really is it? The subject that was dealt with was rum. The Brewery Company bought the rum to keep it for a bit, to deal with it a little and then to sell it again at a profit. Before they had finished dealing with it, before its maturity was complete and before it was blended and so on, the Admiralty took it and paid, as I have said, a price for it in the end—something calculated upon what it cost and what a fair profit on the cost ought to be. Now what is that except a compulsory sale of the rum? It seems to me, when you really look at the substance of the thing, it is in a very small compass. That is all it is, a compulsory sale of the rum. Under those circumstances, what is the position? The mere fact of compulsion I cannot think makes any difference. I think I have authority for it in the *Sutherland* case(1) in the Court of Scotland. Of course, there the ship was not taken away by way of expropriation, it was only taken on compulsory hire; but they certainly say that compulsion makes no difference at all. And I think, as the Solicitor-General points out, nearly everything was done under compulsion during the war, and in some of the cases which have been discussed, such as the woolcombers' case(2), what was done was done under compulsion, and I cannot understand why a compulsory sale is any the less a sale for this purpose.

But now I have got to deal with a rather different aspect of it. It is said that this point has really been decided in Ireland. I am not sure it has not. The case(3) is very near this, if it is not absolutely the same. Of course, I am not bound by that decision; it is not like a case in the Scottish Courts, where they are dealing with the same point; it is a case in a Dominion. I am bound to say, if I do not agree with anything found by a Court presided over by Lord Justice Ronan, I feel diffident about it, but that case may not be quite the same as this case, because there they took the barley from the man who was going to brew with it. In a sense it was taking his raw material—rather nearer taking the raw material of a manufacturer and stopping him performing his functions than it was in this case, where they only took the rum when it was a little short of being completely matured. That is a narrow distinction. There was some distinction also in the way in which it was dealt with. In that case they were made to sell the barley to strangers, but I think in substance that case is very near to this one; but, as I have said already, it seems to me this case is simply a case of a sale, though a compulsory sale, and having regard to the fact that it is a

(1) Sutherland *v.* The Commissioners of Inland Revenue, 12 T.C. 63.
(2) Isaac Holden & Sons, Ltd. *v.* The Commissioners of Inland Revenue 12 T.C. 768.
(3) Arthur Guinness, Son & Co., Ltd. *v.* The Commissioners of Inland Revenue, [1923] 2 I.R. 186.

(Rowlatt, J.)

Dominion Court, I think it is my duty to give expression to what I myself think, although of course I express it with a certain amount of diffidence. I think that first point fails.

The second point is the point as to whether the sum can be brought into the year 1918 now. There was a case, *Hall's* case(1), where I took an executory contract as if it could be brought into the year in which it was made, and so close the book with regard to that particular debt; but in another case afterwards, the woolcombers' case, *Holden's* case(2), I there allowed to be brought into the year sums which were received afterwards under these circumstances: The sums were not received in respect of goods which were to be delivered—and so a price only became payable—after the year, but work was done in the year and the remuneration for it was left open; something was paid on account, but it was left open; perhaps it was going to be more, perhaps less, or perhaps it was going to be the same, but it was left open. Therefore those accounts could not properly be closed in that year; there was not the material to close them. There was only to be a payment on account, and some money might have to be paid back, or something more might have to come. Under those circumstances I said you have to treat the account as kept open until that amount is fixed, and then the amount has to be brought in. But in this case what is it? Of course, if it is merely compensation, and there is only a claim in the nature of tort—not technically a tort, but a claim for compensation only—I should say clearly that could not be brought into the year, if afterwards an action or proceeding is taken and compensation recovered. But I do not think that is the way one ought to look at it. Here what the Brewery Company have got is simply, afterwards, the sum by which the money they had received fell short of the full price that they ought to have been paid. There was not a debt due to them, but they had been given something. They said: "That is enough; we have a right in one way "or another to have a price which includes a further profit," and when they made that good, as they did ultimately before Sir Francis Kyffin Taylor; or if they had made it good before Sir Henry Duke's Commission; or if they had made it good, under Mr. Justice Salter's decision, before the County Court Judge as though the Indemnity Act had not been passed, they in my judgment were simply getting the price of which they had received only some, although the person paying that price had said it was enough. That is all there is in it, and I think it is exactly the same as it would have been if, after a year had expired, the Admiralty had reconsidered the whole position and had come and said: "We have reconsidered all this question;

(1) J.P. Hall & Co., Ltd. *v.* The Commissioners of Inland Revenue, 12 T.C. 382. Rowlatt, J.'s decision was reversed by the Court of Appeal.

(2) Isaac Holden & Sons, Ltd. *v.* The Commissioners of Inland Revenue, 12 T.C. 768.

(Rowlatt, J.)

" we think the one shilling has not been enough, and therefore, " of course, as we want to deal with it perfectly fairly, we think " you ought to have another shilling, or another two shillings," and paid them. Surely that could not have been brought into the subsequent accounts. There was no head under which it could be brought, and I should have thought absolutely the right result would be to re-open the accounts for 1918 and add this sum to them for this purpose.

Under those circumstances I think the Crown is entitled to succeed with costs in this case.

The Company having appealed against this decision, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Warrington and Sargant, *L.JJ.*) on the 13th, 14th, 17th and 18th May, 1926, when judgment was reserved.

Mr. A. M. Latter, K.C., and Mr. Cyril King appeared as Counsel for the Company, and the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the Crown.

On the 9th June, 1926, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

JUDGMENT.

Lord Hanworth, M.R.—This is an appeal of the Newcastle Breweries, Limited, hereinafter called " the Appellants," from a decision of Mr. Justice Rowlatt upon a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts against an additional assessment of Excess Profits Duty in the sum of £4,247 for the accounting period of twelve months ending 30th October, 1918, made upon the Appellants under the provisions of the Finance Act (No. 2), 1915, Part III, and subsequent enactments.

The assessment above referred to is in respect of a payment made to the Appellants for 239 puncheons of rum which the Admiralty took over from them by a notice to them dated 20th November, 1917. The Admiralty had acted in so doing under Section 1 of the Defence of the Realm (Consolidation) Act, 1914, and Regulation 2 (*b*) issued thereunder.

The facts relating to this transaction are fully stated in the Special Case and in the documents and the correspondence annexed thereto, and it is unnecessary to repeat them.

It is sufficient to state that the Admiralty on 8th February, 1918, announced that they were prepared to pay to the Appellants the actual first cost of the rum, and all out-of-pocket expenses incurred in connection with it up to 31st December, 1917, plus interest at the rate of five per cent. on all such expenditure actually incurred by the holders of the rum, the

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appropriate Customs rebates, and also a sum of one shilling per proof gallon as a consolidated allowance to cover (1) appreciation in value due to maturing in the rum itself, (2) overhead profit on the transaction. These terms were not accepted by the Appellants, but the Admiralty declined to increase their offer, and pointed out that the Appellants could appeal to the Defence of the Realm (Losses) Commission. On the 11th April, 1918, the Appellants, while reserving all their legal rights, accepted the offer of a payment on the basis proposed, on account of what they claimed to be due; and on or about the 16th May, 1918, the Admiralty paid to the Appellants £10,315 1*s.* 4*d.*, on the above terms.

The Defence of the Realm (Losses) Commission above referred to was constituted by a Royal Commission of Inquiry, dated 31st March, 1915, as to compensation in respect of loss or damage to property or business in the United Kingdom occasioned by the exercise of rights and duties in the defence of the Realm.

The Appellants, however, declined to submit their claim to that jurisdiction, and presented a Petition of Right claiming the market value of the rum. The rum in question was of a strength considerably over proof. It was always reduced and blended before it was removed from the warehouse, and no proof rum was ever sold by the Appellants. The rum after being so reduced and blended was sold in the ordinary course of the business of the Appellants in wholesale and retail quantities—about evenly divided.

The Petition of Right was tried before Mr. Justice Salter, who on 12th February, 1920, gave judgment in favour of the Appellants, holding that Regulation 2 (*b*), so far as it purported to deprive persons whose goods were requisitioned by the Naval or Military Authorities of their right to the fair market value and to a judicial decision of the amount, was *ultra vires*, and that in the case before him the Appellants were entitled by virtue of Section 115, Sub-section (4), of the Army Act, 1881, as amended by the Army (Supply of Food, Forage and Stores) Act, 1914, and other Acts passed in 1914 and 1915 in consequence of and for dealing with matters arising in the course of the War, to have the market value of the rum taken fixed by a County Court Judge. (See the report in *Newcastle Breweries, Ltd.* v. *The King*, [1920] 1 K.B. 854.)

Further steps to this end were avoided by the Indemnity Act, which received the Royal Assent on 16th August, 1920, and established the War Compensation Court.

Before this Court the Appellants claimed £28,571 as the market price of the 239 puncheons of rum at the date of its requisition, less the amount received on account. The Court, on 7th November, 1921, awarded the total sum of £15,624 11*s.* 4½*d.*, less the sum already paid; and in pursuance

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of this judgment the Admiralty, in January, 1922, paid the balance of £5,309 10*s*. 0*d*. to the Appellants.

At the relevant date the Excess Profits Duty was charged at 80 per cent., and thus the assessment of £4,247 was arrived at. This sum of £5,309 10*s*. 0*d*. was brought into the Appellants' Profit and Loss Account for the half-year ending 30th April, 1922, under the head of " Sales of Rum," as also was the £10,315 1*s*. 4*d*. included under a like heading in the year ending October, 1918; but no question arises as to this. The Appellants raise no question about this sum or that taxation with which they have been charged in respect of it, which they do not claim to reopen.

The Appellants contend that the sum of £5,309 10*s*. 0*d*., received as above, was not a receipt of their trade, or a profit arising from their trade or business; that the rum so taken and paid for was not sold by the Appellants in the course of their trade or business, for it was not a sale at all; and more, that in the state in which it was requisitioned it was never the subject matter of sale by the Appellants. Secondly, that the date of payment of this sum of £5,309 10*s*. 0*d*., namely, January, 1922, must be taken to be the true date of the transaction—if it was a sale—and that this date falls outside any accounting period in respect of which Excess Profits Duty is chargeable.

The Commissioners felt bound to follow the judgment of the Court of Appeal of the Irish Free State in the case of *Arthur Guinness, Son and Company, Limited* v. *Commissioners of Inland Revenue*, [1923] 2 I.R. 186, which it will be necessary to examine rather closely. Mr. Justice Rowlatt reversed their decision, holding that the above case did not conclude the matter, that the profit arose from the Appellant's trade or business, and, on the second point, that the sum paid in 1922 was only a deferred payment in respect of what was due for the rum sold in 1918, and gave judgment for the Commissioners—hence this appeal.

The words of Part III of the Finance Act (No. 2), 1915, by which Excess Profits Duty is charged, are wide and comprehensive. Section 38 charged the duty on the amount by which the profits arising from any trade or business in any accounting period exceeded by more than two hundred pounds the pre-war standard of profits as defined in the Act; and by Section 39 the trades and businesses to which that Part of the Act applies are " all trades or businesses (whether continuously carried on or " not) of any description carried on in the United Kingdom." For the purpose of the computation of profits, under the Fourth Schedule, " the profits shall be taken to be the actual profits " arising in the accounting period." This Court has held that a single transaction in trade or business is covered by these

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inclusive terms, as in *Martin* v. *Lowry*(1), 42 T.L.R. 233, where a large purchase of linen from the Government was made by a man whose ordinary business was of a wholly different nature. See also *The Cape Brandy Syndicate* v. *The Commissioners of Inland Revenue*(2), [1921] 1 K.B. 64.

It is difficult therefore to accept any distinction in favour of the Appellants, based upon the fact that the rum actually taken by the Admiralty was not in a condition in which rum was sold in their business by the Appellants. If it is to be held a transaction of trade or business of any description, whether continuously carried on or not, it is covered by the charge. Nor is it easy to accept the argument that as the transaction was carried out under a compulsory requisition, it cannot be treated as falling within trade or business.

During the War control was exercised by the Crown in almost all trades and businesses—certainly in the case of many foodstuffs—and prices were regulated; while the profits in many controlled businesses—of which munitions offers an example—were those which the Finance (No. 2) Act, 1915, was designed to charge to the revenue. An argument was addressed to this Court based upon Section 35 of the Finance Act, 1918, and particularly upon Sub-sections (1) and (4) of that Section, whereby profits arising from the sale of trading stock, otherwise than in the ordinary course of trade, are to be deemed to be profits arising from a trade or business. It was suggested that it was found necessary to pass this provision in order to include sales which were otherwise outside the charge imposed by the Finance (No. 2) Act, 1915, and that it might be used as indicating the interpretation to be put upon the earlier Act. This later statute appears to deal with cases of the sales of businesses as a whole, but in the view I take of this case the point suggested does not arise.

The Court of Appeal of the Irish Free State based their decision in *Arthur Guinness, Son, and Company, Limited*(3), largely upon the case of the *Glenboig Union Fireclay Company, Limited* v. *The Commissioners of Inland Revenue*(4), 1922 S.C. (H.L.) 112.

I agree with Mr. Justice Rowlatt that the *Glenboig* case does not afford any guidance in the present. It was a case in which certain mining rights were surrendered for a payment made, and those rights became sterilized. It was the sale of a capital asset out and out, and prevented the acquisition of profit that might have been obtained, if the mining rights had been exercised and the fireclay worked. The money received was capital. It was argued that similarly the payment made by the Admiralty was for loss or damage under the Indemnity Act, and connoted a

(1) 11 T.C. 297. (2) 12 T.C. 358. (3) [1923] 2 I.R. 186. (4) 12 T.C. 427.

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destruction of the Appellants' business in the rum taken and their user of it when blended. But it cannot be said that the Admiralty in taking the rum sterilized the Appellants' business, or any part of it. The rum—even if in a different strength—was intended to be sold at some time in the carrying on of the Appellants' business. Its requisition caused it to be dealt with rather sooner than later; but along the same channel down which it was always intended that it should pass from the Appellants' possession, namely, by sale. Their trade was not stopped altogether, and the rum was in time replaced. Both the rum and the sum paid for it were of the nature of circulating capital. (See *John Smith & Son* v. *Moore*[1], [1921] 2 A.C. 13.)

Coming now to the *Guinness* case, [1923] 2 I.R. 186, the question that arose there was whether certain profits arising from the sale of barley to the Royal Commission on Wheat Supplies in 1918, were profits arising from a trade or business carried on by Messrs. Guinness and Company. The barley had been requisitioned by the Barley Requisition Order of 16th April, 1917. The details of the transaction are fully set out in the case, and it is not necessary to mention them here. In effect, a large store of barley, held by Messrs. Guinness for the purpose of brewing stout, was compulsorily and at the instance of the Government sent to millers, who remitted the price to Messrs. Guinness. The contention on their behalf was that the profit arising from this disposal of barley was not a profit arising from the trade or business carried on by Messrs. Guinness, but was an accretion of capital and arose from a compulsory or involuntary transaction which was contrary to their interest. The Commissioners who heard the case held that the profit so made was chargeable with Income Tax and Excess Profits Duty and confirmed the assessment.

This decision was confirmed by Chief Justice Malony and Mr. Justice Dodd in the King's Bench Division. They distinguished the *Glenboig* case[2], and held that the transaction was in the nature of carrying on the business of the Appellants, although before it had been sold the barley would have had to be turned into stout. In the Court of Appeal, a majority, the Master of the Rolls and Lord Justice Ronan, agreed in reversing this decision. They followed the authority of the *Glenboig* case. The Master of the Rolls said: "The barley taken over was a "capital asset. That asset was sterilized as a profit-making "material. If instead of merely taking the barley the Govern-"ment took over the entire concern—the cooperage, the vats, the "coal, the machinery, the drays, the horses, the motors, the "premises—everything—for war purposes, surely the compensa-"tion payable therefor could not be called a profit made in the "course of trade or business. I say with Lord Wrenbury:

(1) 12 T.C. 266. (2) 12 T.C. 427.

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" ' What is true of the whole must be equally true of the part '."

Lord Justice Ronan in his judgment holds that the fallacy in the judgment of the King's Bench Division was " that whereas " Messrs. Guinness did buy this barley, they never sold it." The above passages (pages 204 and 206) indicate the reasoning on which the majority of the Court of Appeal based their judgment. I find it difficult to accept the view they take of the transaction. It was intended that the barley should be converted into stout, and that the stout should be sold. It is the language of hyperbole to say that the taking of this barley was on a par with the taking over of the entire concern by the Government, of which the barley formed part. There is no analogy between the machinery, the drays, etc., and the premises, which form part of the going concern, and the barley which was intended to be converted into the product for the sale of which the premises had been equipped and the plant laid down. I prefer and agree with the judgments delivered in the King's Bench Division, and by Mr. Justice Pim, who said (pages 215 and 216), that there was " no sterilization and no purchase of fixed capital," and that the sale of the barley was " apart from compulsion an " ordinary trading transaction." It was indeed so dealt with by the War Compensation Court.

In my judgment, the decision of the King's Bench Division and of Mr. Justice Pim was right. The case is not binding upon us, and it is unnecessary to say more, except that I differ from the Master of the Rolls and Lord Justice Ronan with regret and with great respect towards them.

It is important to remember that the Statute does not, in Section 38 or Section 39, refer to normal trade or business, or profits arising in the usual course of business. No such words of limitation appear; but, as I have pointed out, the words of Section 39 are " all trades or businesses of any description," and the Schedule embraces " all profits arising " in the accounting period. For these reasons I am of opinion that the first point taken by the Appellants fails.

The next question is as to the time when the profit arose. It is clear from the facts that the payment made in May, 1918, was on account only, without prejudice, and that the Appellants reserved their rights (see letter of the 16th May, 1918(1)). It is also clear from the claim made before the War Compensation Court that the transaction was treated as one and indivisible. The Appellants claimed a sum of £28,571 in respect of the 239 puncheons of rum, giving credit for the £10,315 received on account. The judgment of the War Compensation Court is upon the same basis. They determined the whole amount upon one principle, and the sum of £5,309 10*s.* 0*d.* is a balance only, due in respect of the original requisition which was made once only.

(1) Not reproduced.

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The case of *J. P. Hall & Co., Ltd.* v. *The Commissioners of Inland Revenue*(1), [1921] 3 K.B. 152, was pressed upon us, but in that case the payment became due one month after delivery and not until after delivery. There is in my opinion no justification for splitting up the sum paid by the Admiralty into fixed capital and profit, and treating them as separate items paid at different times. No doubt the War Compensation Court reached the figure awarded by consideration of the original price paid, plus a sum for profit; but this process does not justify the separation of the balance last paid from the interim payment made on account, or make the former different in nature from the latter.

There was no separate loss or damage which led to the payment of the later sum, apart from that which drew the payment of the earlier amount. The whole amount of £15,624 11*s.* 4½*d.* is one sum, ascertained later, but attributable to the requisitioning of the 239 puncheons as a whole in November, 1917. The case of *Gleaner Company* v. *Assessment Committee of Jamaica*, [1922] 2 A.C. 169, which was much pressed, appears to me an authority against the Appellants' contention.

For these reasons the second point fails also.

The appeal must be dismissed with costs.

Warrington, L.J.—The question in this case is whether for the purposes of Excess Profits Duty a sum of £5,000, or thereabouts, paid by the Government to the Appellants in the year 1922, ought to be treated as a profit arising from the Appellants' trade in the accounting period ending the 30th October, 1918. The Commissioners, considering themselves bound by authority, decided the point in favour of the Appellants; Mr. Justice Rowlatt decided in favour of the Crown; hence this appeal.

The Appellants are brewers and wine and spirit merchants. In the carrying on of their business they purchase large quantities of raw rum. This they do not, in ordinary course, sell in its raw state, but only after it has been reduced and blended. The rum so treated is then sold both wholesale and retail in about equal quantities.

In the month of October, 1917, the Admiralty issued an order under Regulation 2 (*b*) of the Defence of the Realm Regulations giving notice of their intention to take possession of all stocks of rum in bonded warehouses in the United Kingdom, and prohibiting all dealings with rum without the consent of the Admiralty.

In November, 1917, the Admiralty gave notice to the Appellants that they had decided to take over provisionally

(1) 12 T.C. 382.

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239 puncheons of rum specified by them and stated that they proposed in the first instance to pay only the actual cost prices of the rum, with the addition of certain charges and interest, but nothing in respect of profit. The embargo on the rum not actually taken over was shortly afterwards removed.

The Appellants and the Admiralty were unable to agree as to the amount to be paid for the rum so taken as above-mentioned, but in May, 1918, the Admiralty paid to the Appellants a sum of upwards of £10,000 on account of what might eventually be found to be payable. This sum of £10,000 was brought into the Appellants' accounts under the head of " Sales of Rum," and thus entered into the calculation of their profits for the accounting period ending 30th October, 1918. Ultimately, after some litigation, the Appellants' claim came before the Compensation Court under the Indemnity Act of 1920.

Under Regulation 2 (*b*) the Court, in ascertaining what was payable in respect of the goods, possession of which was, as in this case, taken by the Admiralty, were to have regard to the price paid for the goods and the rate of profit usually earned in respect of the sale of similar goods before the War. In the particular case they in effect treated the sales of blended and reduced rum as sales of " similar " goods, and they accepted the evidence of the Managing Director of the Appellant Company as to the rate per gallon usually earned in respect of such sales before the War. They ascertained the amount paid by the Appellants for the rum, added to it the amount of profit on the above footing, and awarded a sum of £15,624 11*s.* 4½*d.* in respect of which credit was to be given for the sum already paid, leaving the balance of about £5,000 now in question.

I think that the real question is, ought the £15,000 to be brought into calculation in ascertaining the profits of the trade or business for the year ending the 30th October, 1918, and that no distinction can properly be drawn between the £10,000 and the balance of £5,000. The £10,000 has already been so brought into calculation by the Appellants, and they do not seek to resile from the position thus created, so far as that sum is concerned. On the other hand, the Crown does not insist that their conduct in this respect precludes them from raising the question as to the £5,000, but it relies on that conduct as some evidence of the way in which reasonable business men would treat such a transaction as that in question.

The Appellants contend that the money in question does not form part of the profits arising from any trade or business carried on by them, but is rather to be treated as a realisation of part of their capital, and they rely in support of this contention on the unusual nature and magnitude of the transaction and on the fact that they were not free agents in the matter. In my opinion, on both these points there is authority which disposes of

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them adversely to the Appellants. The first point is, in my opinion, decided in effect in the *Gloucester Railway Carriage and Wagon Company, Limited* v. *Inland Revenue Commissioners*(1), [1925] A.C. 469, and the second by the judgment of the Court of Session in *Sutherland's* case(2). It is true that this latter case is not strictly binding upon us, but I agree with the reasoning of the Court, which is, in my opinion, applicable to the present case. The rum in question was a commercial asset capable of being put to a use by which gain might be acquired. It has been put to such a use and gain has been so acquired, and it seems to me, with deference to the contrary view expressed in *Guinness and Company* v. *Inland Revenue Commissioners*, [1923] 2 I.R. 186, the fact that the Appellants were not free agents in the matter is irrelevant. It was no doubt an unusual mode of deriving gain from the particular asset, but as I have already pointed out this fact is not enough to prevent that gain from entering into the account of profits arising from the business of which it was an asset.

The Commissioners relied upon *Guinness'* case, above-mentioned, but the decision in that case is not binding on us and, with all respect, I cannot agree with it. In that case the Appellant Company were brewers, and were possessed of certain barley which would in due course have been turned into malt, which would have been used for brewing beer. The Government took possession of the barley and a profit resulted to the Appellants. I will assume that there is no valid distinction between the barley in that case and the raw rum in this, though it might well be said that the rum was in the ordinary course of business in the present case sold as rum, though after receiving certain treatment preparatory to its being put on the market, whereas in the *Guinness* case the Company would not in the ordinary course have sold the barley in any case. The majority of the Court appear to have thought that there was no trade in that case because there was no exercise of commercial will on the Company's part. As already stated, I cannot see that the absence of will to trade can make any difference, if the transaction in fact is a commercial transaction giving rise to profit. They also seem to have regarded themselves as bound by the *Glenboig Fireclay* case(3). But the money there in question was compensation paid for surrendering the right to use a certain area of land for the purpose of making a profit in the trade of the Glenboig Company, and on that ground was held not to be profits arising from that trade. The *Glenboig* case is, in my opinion, plainly distinguishable both from the *Guinness* case and from the present case.

Finally, it was contended by the Appellants that if the £5,000 were to be taken into account at all for the purpose of

(1) 12 T.C. 720.
(2) Sutherland *v.* The Commissioners of Inland Revenue, 12 T.C. 63.
(3) The Glenboig Union Fireclay Co., Ltd. *v.* The Commissioners of Inland Revenue, 12 T.C. 427.

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ascertaining profits arising from their trade it must be so dealt with for ascertaining profits in the year in which it was received—by which time Excess Profits Duty had ceased to be leviable—and not in the accounting period ending 30th October, 1918.

Treating the transaction, as I think we ought to do, as a commercial transaction, the property in the goods passed by delivery during the accounting period and the money then became payable, although, owing to a dispute as to the amount, it was not ascertained or paid in full until some years later, and if this be so then the whole amount, and not merely that part of it which was paid on account would, in my opinion, be properly dealt with in ascertaining the profits for the accounting period.

The case of *J. P. Hall and Company, Limited* v. *The Commissioners of Inland Revenue*(1), [1921] 3 K.B. 152, was relied on by the Appellants, but in my opinion that case offers no support to their contention, inasmuch as the goods there in question were delivered during the period to which it was decided that the profits should be attributed. Lord Justice Atkin, in the course of his judgment, said(2) : " To my mind the " procedure of the Respondents in taking into account the profits " that they made as and when the goods were delivered was the " ordinary commercial procedure. Any other course would be " quite contrary to commercial procedure." The action of the Appellants themselves in dealing with the £10,000 is, I think, some evidence that they recognised that they were acting in accordance with commercial procedure, and in my opinion this point fails.

The result is that the appeal must be dismissed with costs.

Sargant, L.J.—The first and principal question here is whether the additional sum of £5,309, awarded to the Appellant Company by the War Compensation Court in respect of the taking by the Admiralty in the autumn of the year 1917 of a large quantity of raw rum, was a profit arising from the Company's trade or business within the meaning of the Finance (No. 2) Act of 1915, Section 38. The argument against the sum constituting such a profit may be summarised under the following heads, viz. :—First, the compulsory character of the taking; secondly, the exceptional amount taken; thirdly, the fact that the rum as taken was not in the state in which the Company ever disposed of rum, and merely formed the raw material used by the Company in producing a merchantable article; and fourthly, the conclusion that as a result of these facts the total sum paid for the raw rum, of which the £5,309 formed part, was not really a price for the rum, but was of the nature of compensation for an interference with the ordinary business of the Company. It was further urged that the case was concluded

(1) 12 T.C. 382. (2) *Ibid.* at p. 390.

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by the decision of the House of Lords in the case of the *Glenboig Union Fireclay Company*(1); and that this was clearly indicated by the judgments of the majority of the Court of Appeal of the Irish Free State in the case of *A. Guinness, Son and Company* v. *The Commissioners of Inland Revenue*(2), a case in which the relevant circumstances as to the taking of a quantity of barley were scarcely, if at all, distinguishable from the facts here.

The arguments based on the compulsory character of the taking and the exceptional amount taken seem to me, on consideration, of little weight. Had the property taken compulsorily been rum matured reduced and blended, that is in the condition in which the Company were accustomed to sell it, then however great the quantity so taken, the transaction would in my judgment have been a sale in the business, and the price paid would have been a profit arising in the course of the business. The real force of the Appellants' argument lay in the fact that what was taken was raw rum, in a condition in which the Appellants never sold rum; and that the effect of the taking was to prevent the Appellants from blending, reducing and generally making merchantable and thereafter selling the rum in the ordinary course of their business. It was urged for the Appellants that the result of the compulsory purchase was, in the words of Lord Wrenbury in the *Glenboig* case, to " sterilise " the asset consisting of the raw rum, and generally to bring the case within the authority of that case.

In support of this view the Appellants were entitled to, and did, rely upon the reasoning of the majority of the Court of Appeal of the Irish Free State in the *Guinness* case. There can, I think, be little doubt that the taking of one of the raw materials for stout, namely barley, in that case was in most respects equivalent to the taking of the raw rum here; that the majority of the Court of Appeal held that the compulsory taking " sterilised " the asset taken within the decision in the *Glenboig* case; and that if the decision had been one of the Court of Appeal in this country we in this Court should have been bound by it. But, as things are, though of course great respect is to be paid to the result in the *Guinness* case we are in no way bound to decide in accordance with it, should its reasoning fail to satisfy us.

Now in the first place the weight of the *Guinness* case is considerably lessened by the fact that the prior decision of the Divisional Court had been to the contrary effect, and that the judgment of the Court of Appeal itself was that of a majority only and was dissented from by Mr. Justice Pim. And, further, when the reasoning of the majority of the Court of Appeal is compared with that of the Divisional Court and of Mr. Justice Pim, the result, in my judgment, is that the latter reasoning is

(1) 12 T.C. 427. (2) [1923] 2 I.R. 186.

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preferable and should prevail. The former reasoning appears to give far too little effect to an essential distinction between the *Glenboig* case(1) and the *Guinness* case(2), namely, that in the *Glenboig* case the compulsory taking was of part of the fixed assets of the Company and therefore amounted *pro tanto* to a sterilisation of an asset essential to the conduct of the Company's business; whereas in the *Guinness* case the asset taken formed part of the circulating capital of the Company only, and the sum paid was available for replacing, and was actually used to replace, the whole or the greater part of the asset taken. To such a transaction the word " sterilisation," and the ideas connoted by that word are in my view wholly inapplicable.

The question in the present case and that dealt with in the *Guinness* case seem to me so similar that I have not thought it necessary to recapitulate and examine in detail the reasons which actuated the judges there, or the similar reasons which have been urged on us in argument. It is sufficient to point out, as I have done, that one critical distinction which in my judgment separates both the present case and the *Guinness* case from the *Glenboig* case, and to indicate a general preference for the result arrived at by the Divisional Court of the Irish Free State. But it is not immaterial to observe that the larger portion of the sum ultimately received by the Respondent Company here in respect of the raw rum taken, namely the £10,315 paid by the Admiralty in May, 1918, was in fact brought into the Company's accounts under the head of " Sales of Rum," and entered into the calculation of the balance of profit in respect of which the Company were originally assessed to Excess Profits Duty for the year ending on the 30th October, 1918 (paragraph 9 of the Case). There cannot be any distinction for this purpose between this sum of £10,315 and the sum of £5,309 now in question. And if this latter sum ought not now to be dealt with as a profit arising from the Company's trade, then the sum of £10,315 ought not to have been charged against them as a receipt, though there were of course allowed as disbursements the sums (exceeding as I understand it this sum of £10,315) which were expended in making good the depletion of their stock of raw rum. And it is significant that, favourable as such a view would have been to the Company, it was not one that was adopted by their Managers as business men. They obviously took the practical business view that the amount paid for the taking from them of the raw rum, and the amount subsequently paid by them for replacing the raw rum so taken, had both to be entered on opposite sides of their trading account as receipts and outgoing respectively.

In my view Mr. Justice Rowlatt was quite right in his view that throughout the various phases of the transaction that

(1) 12 T.C. 427. (2) [1923] 2 I.R. 186.

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which the Company were claiming, that which they were entitled to, and that which they ultimately obtained was a price for a certain part of their stock and not in any sense compensation for interference with their trade. And this undoubtedly involves the result that the whole of this price, namely, the £5,309 as well as the £10,315, must be treated as a profit arising from the Company's trade or business.

A second and less difficult question is whether this sum of £5,309 was a profit arising in the accounting period ending on the 30th October, 1918. On this question also I agree with the decision of Mr. Justice Rowlatt. The raw rum was taken, the right of the Company to receive a proper price for it accrued, or was earned, and the greater portion of the price was paid in the course of that accounting period; and indeed the whole transaction was concluded in that period except for the ascertainment of the balance of the price properly payable to the Company. For various reasons great delay occurred in that ascertainment, but the result of that delay was merely to keep the matter open, and not to alter the date at which the profit when ascertained had arisen. The date of the origin or " arising " of the £5,309 was, I think, the same as that of the origin or arising of the first payment of £10,315, namely, the date in the accounting period ending the 30th October, 1918, when the Admiralty took the raw rum in question and became liable to pay for it. It can hardly be that the two sums representing the total price of £15,624 for a single compulsory purchase can properly be said to have " arisen " at the two widely separate dates at which they were in fact paid. I think that the learned judge was quite right in distinguishing *Hall's*(1) case and in dealing with the matter upon the same basis on which he dealt with the problem in *Holden's*(2) case, namely, by treating the accounts of the Company for the accounting period in question as reopened so as to include in their profits the sum of £5,309 in question.

The Company having appealed against this decision, the case came before the House of Lords (Viscount Cave, *L.C.*, Viscount Dunedin and Lords Atkinson, Phillimore and Carson) on the 6th, 9th and 10th May, 1927, when on the last-named date judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. A. M. Latter, K.C., and Mr. Cyril King appeared as Counsel for the Company, and the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the Crown.

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(1) J. P. Hall & Co., Ltd. *v* The Commissioners of Inland Revenue, 12 T.C. 382.

(2) Isaac Holden & Sons, Ltd. *v* The Commissioners of Inland Revenue, 12 T.C. 768.

JUDGMENT.

Viscount Cave, L.C.—My Lords, the Appellants in this case are brewers and wine and spirit merchants, and they deal in rum, their practice being to buy raw rum, put it through a process of reducing and blending and then sell the thing so produced. In the year 1918 they had a stock of raw Jamaica rum, and the Crown, acting under Regulation 2(*b*) of the Defence of the Realm Regulations, took possession of a large quantity of that rum for the use of the forces. A question arose as to the price or compensation which should be paid to the Appellants for the rum so taken. The Crown said that the price was to be regulated by Regulation 2(*b*), and that under that Regulation the Appellants were not entitled to the market price of the rum taken but only to a sum calculated on the cost and the pre-war rate of profit. The Appellants, on the other hand, maintained that so much of Regulation 2(*b*) as purported to limit the price to be paid for goods taken was *ultra vires*, and they presented a Petition of Right claiming a declaration to that effect. Pending the dispute the Crown paid about £10,300 to the Appellants without prejudice to any claim for a further sum. On the hearing of the Petition of Right Mr. Justice Salter held in favour of the Appellants, and declared that the part of the Regulation to which they had objected was not binding upon them and that they were entitled to the market price of the rum. Thereupon the Indemnity Act, 1920, was passed. That Act prohibited all legal proceedings in respect of the exercise of the Royal Prerogative during the War and swept away all pending proceedings and judgments, including the judgment of Mr. Justice Salter in favour of the Appellants. The Act further provided that, if any person had suffered any direct loss or damage by reason of interference with his property or business through the exercise of any prerogative right, that person should be entitled, in any case in which a Regulation had purported to prescribe any special principle for assessment of any payment, including any price—a category which included the present case—to payment or compensation to be ascertained by the War Compensation Court in accordance with that Regulation. Accordingly, the Appellants applied to the War Compensation Court, and that Court awarded to them a further sum of about £5,300, which was duly paid. The question is whether for the purposes of Excess Profits Duty, that sum of £5,300 or thereabouts is to be treated as profit arising in the accounting year 1917–18. If it is, it is a net profit, for no deduction falls to be made from that sum in respect of outgoings, and accordingly Excess Profits Duty would be payable to the extent of 80 per cent. of the amount. If it was not a business profit or did not arise in the accounting period 1917–18, then, as Excess Profits Duty ceased to be payable at some date in the year 1920–21, no such duty would be payable on this sum.

(Viscount Cave, L.C.)

My Lords, it has been held by Mr. Justice Rowlatt and by the Court of Appeal that the sum in question is liable to Excess Profits Duty, and I agree with their conclusion.

Two points are made on behalf of the Appellants. First, it is said that the £5,300 is not a profit from the Appellants' business at all, but is a sum payable by way of compensation for the compulsory taking by the Crown of a part of the Appellants' capital. I cannot agree with that contention. It is true that the rum taken by the Crown had not been refined or blended and was not, therefore, in the state in which rum was usually sold by the Appellants; but it was rum which they had bought for the purposes of their business, and the cost of the rum was no doubt treated as an outgoing of the business. If the raw rum had been voluntarily sold to other traders, the price must clearly have come into the computation of the Appellants' profits, and the circumstance that the sale was compulsory and was to the Crown makes no difference in principle. Both the sums received for the rum—the £10,300 and the £5,300—were in fact brought into the Appellants' books under the heading " Sales of Rum "; and although that entry may not be binding upon the Appellants, it seems to me to have been correct. The transaction was a sale in the business, and although no doubt it affected the circulating capital of the Appellants it was none the less proper to be brought into their profit and loss account. As to the authorities cited, there is nothing in the *Glenboig* case[1] (reported in 1922 Sessions Cases at page 112) which is inconsistent with the view which I have taken; and if the *Guinness* case (reported in [1923] 2 I.R. 186) says anything to the contrary then I can only say that I do not agree with it.

Secondly, it is said that if the £5,300 was a business profit, at all events it was not profit which arose in the accounting year 1917–18. I think it did, and I cannot see in what other year it can be said to have arisen. The rum was taken in 1918, and the right to some payment arose at once, though there was delay in ascertaining the amount to be paid. It is true that the Indemnity Act, 1920, entrusted the duty of ascertaining the amount to a new tribunal, namely the War Compensation Court, but on the principle of the Regulation as it stood in the year 1918. The change of the tribunal which was to ascertain the amount and enforce payment did not create the right to payment, or alter the date when the right to payment in fact arose. An illustration was put in the course of the argument when it was asked whether, if a partner had been interested in the profits of the Appellants' business for the year 1918, he would have had a right to share in this sum. I think the answer

(1) Glenboig Union Fireclay Company, Ltd. *v.* Commissioners of Inland Revenue, 12 T.C. 427.

(Viscount Cave, L.C.)

should clearly be in the affirmative; and just as the sum was part of the profits of the year so as to entitle a partner to share in it, so it appears to me that it was profit of the year so as to entitle the Government to take a share in the form of Excess Profits Duty.

My Lords, my conclusion is that the sum in question was a profit arising in the accounting year 1917–18; and as it was not then either included in the Appellants' return or valued, and consequently was not then the subject of assessment to Excess Profits Duty, I think that it could be assessed to that Duty in the year 1923 at its actual amount as then ascertained.

I think that this appeal fails, and I move your Lordships that it be dismissed with costs.

Viscount Dunedin.—My Lords, I concur.

As to the first point, I think the taking of the rum had no analogy with the embargo on working the clay fields in the *Glenboig* case(1). The payment for the rum was in no sense a return of capital. It was simply a realisation of a portion of the stock-in-trade at rather an earlier stage of the process than was the case with ordinary sales. *Guinness's* case(2) is not identical with this. If it were, then I think the judgment in it would have to be reconsidered.

As to the date, if I should read the Indemnity Act as a statutory extension of the right which arose on the taking of the rum and the conferring of an entirely new right, then I should consider that the date was the date when the award was made by the War Compensation Tribunal. I do not so read it. I think it left the actual right to be paid where it was, but provided that that right could only be made effectual to the claimant in a certain way. Then the thing for which he was paid was the thing taken, and the date of the taking was 1918. The addition of the £5,000 odd is in the same position as the interim payment of £10,000 odd in the year 1918.

Lord Atkinson.—My Lords, I concur with the judgment that has just been delivered by my noble friend upon the Woolsack and have nothing to add to it.

Lord Phillimore.—My Lords, I am of the same opinion.

As to the first point I never had a doubt. It is quite usual in trade that manufacturers should from time to time for particular reasons dispose of the raw material which in ordinary course they make up for sale. The rum was purchased for trade purposes, and the particular sale was none the less a trade sale because the trade was forced upon the Appellant Company.

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(1) Glenboig Union Fireclay Company, Ltd. *v.* Commissioners of Inland Revenue, 12 T.C. 427.

(2) Arthur Guinness, Son and Company, Ltd. *v.* Commissioners of Inland Revenue, [1923] 2 I.R. 186.

(Lord Phillimore.)

The second point has given me more trouble. I think, however, that if the Indemnity Act had not been passed and the Appellants had been left to enforce their claim in accordance with the judgment of Mr. Justice Salter, the money which they should so recover would have represented profit earned in the year 1918, and that the taking away of this claim or right by the Indemnity Act, accompanied as it was *uno flatu* by the substituted remedy given by the same Act, did not create a new source of profit.

Lord Carson.—My Lords, I agree that this appeal fails. I do not think it necessary to express any opinion as to whether *Guinness's* case(1) decided by the Court of Appeal in Southern Ireland was rightly decided as I do not think it has any application to the facts of the present case.

Questions put:—

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

(1) Arthur Guinness, Son and Company, Ltd. *v.* Commissioners of Inland Revenue, [1923] 2 I.R. 186.