I agree most entirely with every word which has fallen from the Lord Chancellor, that it will not do to allow that novelty and originality must necessarily be imported for the purpose of a single case because of an admission that has been made in respect thereof. I well recollect that the late Lord Watson in this House, in a case not unlike the present, commented severely upon admissions of that kind, or injunctions obtained *in absentia*, which he said were used for the purpose of bludgeoning honest rivals in business who may be innocently conducting a trade one of the natural requirements of which is that execution and skill should be exhibited in making and adapting their goods for the demands of the public. With regard to the novelty and orginality of any design, I think that the duty of a court of law is to protect an honest tradesman who has in the expertness and cleverness of his trade—such expertness and cleverness as distinguish a good tradesman from a bad tradesman—made an article of commerce; and it is only if it goes beyond that into the region of novelty and originality, and not until it goes into that region, that protection can be awarded. Accordingly, notwithstanding the admission (and it must be remembered that abuses may enter into admissions), I end as I began with the conviction that there is no novelty and originality, and that the protection of the statute granting the monopoly cannot be claimed.

Appeal dismissed.

Counsel for Appellants—A. J. Walter, K.C.—J. H. Gray. Agents—Broad & Company, Solicitors.

Counsel for Respondents—T. Terrell, K.C.—Sebastian. Agents—Miles, Hair, & Company, Solicitors.

HOUSE OF LORDS.

Tuesday, February 14, 1911.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Atkinson and Shaw.)

SMITH (SURVEYOR OF TAXES) *v.* LION BREWERY COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Inland Revenue—Income Tax—Profits of Trade—Deductions—"Tied Houses"—Compensation Levy—"Money Wholly and Exclusively Expended for the Purpose of Such Trade"—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Sched. D, Cases* 1 *and* 2—*Licensing Act* 1904 (4 *Edw. VII, cap.* 23), *sec.* 3.

A brewery company were, as part of their business, and as a necessary incident of the profitable exploitation of such business, the owners of certain licensed premises. These premises, which were let by the company to tenants as tied houses for the retail sale of the company's beer, "had been acquired by the company and were held by them solely for the purposes of their said business." Under section 3 of the Licensing Act 1904 the company became compelled to pay a portion of the annual compensation levy, amounting, in respect of the various licensed premises, to £3600. The Income Tax Commissioners allowed a deduction of £1200 from the company's assessments, and stated the facts above-mentioned in a special case.

Held (on an equal division of the House of Lords *affirming* the Court of Appeal) that on the facts as stated the compensation levy falling upon the company under the Licensing Act was "money wholly and exclusively laid out or expended for the purposes of" the company's brewery business, and was therefore a proper deduction in terms of the Income Tax Act 1842, sec. 100, Sched. D, case 2, rule 1.

A Special Case was stated by the Income Tax Commissioners embodying the facts stated *supra* in rubric and in their Lordships' opinions. A deduction allowed upon the respondent company's assessment was confirmed by the Court of Appeal (COZENS-HARDY, M.R., and FARWELL, L.J., *diss.* KENNEDY, L.J.).

The Surveyor of Taxes appealed.

Their Lordships gave considered judgment as follows—

LORD CHANCELLOR (LOREBURN)—I consider that this order ought to be reversed. The point raised 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 a right 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, sec. 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 company'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 steady market for their beer, and this is the utmost which can be conveyed by 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 which he pays, and his landlord may in turn deduct from the rent which 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 Scheds. 1 and 2. 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 for which compensation is to be made, 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 Sched. A, and as to Sched. 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 Sched. 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 also 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 house, is paid out of the profits of the retail licensed trade or out of the rent of the licensed house, and provides a fund to compensate those interested in licensed houses 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 which 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 Sched. A, not under Sched. D, and I cannot perceive how they can claim a deduction in the terms of Sched. 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 Sched. A to sched. D, and still less, in my opinion, can you claim a right 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 Kennedy, L.J., that the levy is in substance a premium, which those interested in a licence, whether as landlords or as holders 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, sec. 3." I do not think that 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 OF HALSBURY—I regret that 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 opinion. I think that the judgment about to be delivered by Lord Atkinson is that with which I should agree if for reasons which 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 much more, and indeed more important, involved in the question, namely, whether or not we are able, or entitled, to go outside what has been already 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 that 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 Farwell, L.J., quote, as I think that

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 exploitation" (I may have a word of protest to say presently against the use of the French word, though it is very intelligible what is here meant) "of such business, the owners of" these houses which "have been acquired" by them "in the course of and solely for the purposes of their said business." 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 is not the subject of taxation. It is true that Kennedy, L.J., says that according to pars. 3 and 4 of the case, which he adds, of course, that we are bound to accept, such expressions as are there used are metaphorical. But to my mind the language of the Lord Justice himself is open to criticism. I can find no metaphor at all, but a plain business statement of fact that these 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 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, not 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, employment 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 notice (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—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 houses licensed for the sale of intoxicating liquors, and let by them to certain publicans who are bound by covenant to buy and sell in the houses 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 sec. 100, Sched. D, 1st and 2nd 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 decision. 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-houses system an exclusive market for their beer. Under these circumstances it would appear to me impossible to contend, at least successfully, that these licensed houses 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. 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 house. 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 house, 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 house wholly and exclusively for the purpose of using that interest to secure a market for the commodities which he manufactures, the money he must expend to satisfy the charge thus imposed is necessarily disbursed wholly and exclusively for the purposes of his trade. In the present case the respondents cannot set up the system of trading through tied houses unless they first acquire these houses 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 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 house, 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 become 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 a house in which to establish a depot 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 urged that regard must be had to the purpose to which the contribution was devoted. I think that Sir Robert Finlay's contention that this is an altogether irrelevant 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 understand, 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 appellant. The contributions are appropriated to form a fund out of which the publicans and the other persons interested in the licensed house 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 houses have been acquired was to secure a market. Incidentally no doubt it may also insure the company in the present case against the depreciation in the value of their property caused by the loss of the licence; and if the respondents had acquired licensed houses 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 house against destruction by fire, his paramount purpose is to insure against the loss of his trade and business, though incidentally he insures against the destruction of the fabric in which apart from the licence he may have little or no interest. Yet it is not, as I understood, contended that the payment of the premium in such a case should not be deducted from his receipts as an expenditure made wholly and exclusively for the purposes of this trade. Lastly, it was objected that the licence, which draws after it the liability to pay the compensation contribution, authorises 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 which they claim a right 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* ([1898] 1 K.B. 95). 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, parts 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 landlord (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, class 1, sec. 100, Sched. D. Smith, L.J., in the course of his judgment goes on to say—"There is a further provision in the rules applying to both cases 1 and 2, rule 1 of which provides that 'in estimating the balance of the profits or gains to be charged according to either 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 and exclusively laid out or expended for the purposes of such trade.' In my opinion that provision covers the present case. It is impossible to say upon the facts stated in this case that the whole of the money expended upon the repairs of these tied houses was money expended exclusively for the purposes of the appellants' trade as brewers. It was expended for many other things, one being for 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 may have been, and probably was, one of the many things to which the learned Lord Justice alluded. And Rigby, L.J., in dealing with the same point, says—"In my opinion this money, which was expended in repairs of these tied houses, was not expended wholly and exclusively for the purpose of the trade. Even if it were conceded that the money was expended partly for the purpose of the trade—and I am not at all certain that even that can legitimately be conceded—it certainly was not wholly and exclusively so expended." It is clear, therefore, in my view, that it was not expressly decided in that 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 houses 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, and 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—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. I express diffidence in differing from anyone of your Lordships and in expressing an opinion either on the one side or on the other. With these cross-currents of feeling, 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:—The decision of your Lordships' House must proceed upon the facts as they are set forth in the case stated. The respondents are brewers, and sell beer to what are known as "tied houses." What is their position in relation to these houses? The case states it thus—"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 houses, and also the lessees of other licensed houses, all of which houses 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 houses 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 houses would warrant. By these means and by the possession and use of the said houses, which are employed by the respondents substantially as a part of their plant or outfit necessary for carrying on the business profitably, the respondents are enabled to earn, and do earn, profits upon which they pay the income tax, which without the said houses 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 houses 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 houses are essentially necessary, and except for the purposes of and employment in their business of such houses 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 get rid of it as soon as possible." To this narrative it must be added that, as stated in the respondents' case in this appeal, "the licences current in respect of the said houses 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, that 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 occupiers of any of the licensed houses. The respondents own some of these houses, having the licensees as their tenants. They lease others, having the licensees as their subtenants. For the purpose of the decision of this case the point to be settled appears to me to be the same in either case; and I may accordingly, 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 houses, 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 the Act. Such payments being made by the licensees, the Act (sec. 3, sub-sec. 3) provides that "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 licenceholder 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 their profits in their wholesale business as 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 charge, including the deductions, has 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 of a reduction in the number of licences, are to be compensated in respect of such loss of

licence. So far as the particular house is 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 disappears, the value of his property in the market will suffer depreciation. Accordingly, so far as the owner of the house is concerned, he by making this payment insures his own proprietory interest. That is to say, he pays a premium against the depreciation of the house in the property market. Whether a payment of that kind, fixed by statute, to be made as a deduction from the rent paid by the tenant, is a deduction falling under Sched. 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 Sched. A. But the present case is argued as one falling under Sched. D. It is said that the very owning of the property is a part of the means employed in the business without which the brewing 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 one 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." Now, 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. We are accordingly driven to rule 1 of the first and second cases under Sched. D of the Act of 1842. This provides that "in estimating the balance of the profits or gains . . . no sum shall be set against or deducted from . . . such profits or gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade." Section 159 of the statute further expressly forbids the making of any deductions other than those enumerated in the Act. The true question accordingly is, in my judgment, that which has been put by 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 the moneys, in the sense of the compensation charges or levies, were expended as a whole for the purpose of securing that the houses should be continued on the list of houses 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 house as a house 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 houses the payment falls upon the owner, whatever may be the trade in which he is engaged, and the purpose of the payment is to keep up the value of the houses as licensed houses 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 landowner 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 though there were no such relations, and the scale is fixed by statute in proportion to the rental and period of occupation and to nothing else. 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 house, is a payment for preserving the owner's rights as such, and cannot be said to be devoted exclusively to the purpose of some business in which the owner happens to be engaged. In short, it appears to me difficult logically to affirm—and were it not for the opinions of some of your Lordships, and of some of the learned Judges in the Court below, I should deem it impossible to affirm — that a payment is devoted exclusively to the purposes of the wholesale brewing trade carried on by the owners of a house when the same payment to the same amount and in respect of the same house 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 transactions with the licensee. I have, as I say, difficulty in seeing how an owner's payment can be said to be exclusively for the purposes of a brewer's trade when the payment would fall upon the owner whether he were a brewer or not. Accordingly I think that the judgment of the Court of Appeal should be

reversed. In my opinion Channell, J., and Kennedy L.J., came to a sound conclusion.

Appeal dismissed.

Counsel for Appellant—Attorney-General (Sir Rufus Isaacs, K.C.)—Rowlatt—W. Finlay. Agent—Sir F. C. Gore, Solicitor of Inland Revenue.

Counsel for Respondents—Sir R. B. Finlay, K.C.—Bodkin. Agents—Godden, Son, & Holme, Solicitors.

PRIVY COUNCIL.

Saturday, March 18, 1911.

(*Present* — The Right Hon. Lords Macnaghten, Atkinson, Collins, and Shaw.)

WERTHEIM *v.* CHICOUTIMI PULP COMPANY.

(ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.)

Contract—Breach—Sale of Goods—Delay in Delivery—Measure of Damages—Market Value of Goods at Date of Actual Delivery—Goods afterwards Sold at Higher Price.

In a case of breach of contract to deliver goods by a certain date, the measure of damages is the difference between the contract price and the value of the goods to the purchaser when obtained. Therefore when the market price of the goods at the date of delayed delivery is lower than the contract price, but the purchaser re-sells at a price higher than the market price, his loss from the breach of contract must be calculated with reference to the price actually obtained by him on re-sale.

The appellant claimed damages for breach of contract under circumstances stated *supra* in rubric and in their Lordships' judgment. He appealed against a judgment of the Court of King's Bench for the Province of Ontario, whereby he obtained decree in respect of a portion only of his claim.

The considered judgment of their Lordships was delivered by

LORD ATKINSON—This is an appeal from a judgment of the Court of King's Bench for the Province of Quebec (Appeal side), dated the 3rd October 1908, affirming in part and reversing in part a judgment of the Superior Court of that Province, dated the 12th November 1907. By the former judgment the respondent company was condemned in the sum of 2434 dollars and costs. The defendant company carry on the manufacture of wood pulp at the town of Chicoutimi, which is situate on the river Saguenay, a tributary of the St Lawrence in the Province of Quebec. The plaintiff is the sole partner in a German firm of merchants carrying on business at Hamburg in Germany. He has an agent at Manchester named Reichenbach, where he trades in the pulp which he imports from Canada and elsewhere, and an agent at New York named Goldman. He claims in this action to recover damages from the respondents under three separate heads for three separate breaches of a contract entered into between them on the 13th March 1900, to deliver at Chicoutimi f.o.b. 3000 tons of moist wood pulp between the 1st September and the 1st November in that year, at a price which was equivalent to 25s. per ton. The contract was in the terms following—"*Quebec*, 13 *Mars*, 1900. —La Compagnie de Pulpe de Chicoutimi consent à livrer à A. Wertheim & Cie, de Hambourg, trois mille (3000) tonnes de sa pâte en bois habituelle, humides, de 2240 lbs. à $11.00 la tonne de 2000 lbs. sèche, livrée à Chicoutimi sur vapeur ou vaisseau ou char, du premier Septembre au premier Novembre courant si possible si faire se peut en partie plutôt. Ceci en règlement complet total et absolu de toute réclamation quelconque qu'ils ont ou pourraient avoir sur les transactions faites jusqu' à ce jour, en vertu du contrat du 9 Decembre 1898. Termes de paiement comme ci-devant, La Cie de Pulpe de Chicoutimi, J. E. A. Dubuc, Dir.-Gt.—A. Wertheim & Cie, V. Hillern Flinsch." The first breach relied upon consists in the respondents having delayed the delivery of this quantity of pulp till the month of June 1901; the second in the alleged inferior quality of the pulp actually delivered; and the third in its alleged deficiency in weight. In the view which their Lordships take of the appellant's claim under the second and third heads, it is unnecessary to deal with the amount demanded in respect of each. The first was the main claim. In respect of it the appellant claimed 27s. 6d. per ton on the three thousand tons mentioned in the contract, that being the difference between the market price of such pulp at Manchester, the ultimate destination of the pulp, at the time it should have been delivered, namely, 70s. per ton, and its market price there at the time it was in fact delivered, namely, 42s. 6d. per ton; the difference between the market values of the pulp at these respective times being, according to the contention on behalf of the appellant, the well-established and indisputable measure of damages for delay in breach of contract in delivery of goods. The appellant in reality never sustained this loss nor anything like it, because he sold the goods under contracts, some anterior in date to the contract sued upon, the others anterior in date to the actual delivery, at the price of 65s. per ton, which is only 5s. per ton less than the top market price for which the pulp could presumably have been sold in Manchester had it arrived there in November 1900, the contract time. Yet so rigid, it is insisted, is this formula or rule, that the re-sales must be ignored as collateral and irrelevant matters and damages be awarded for a loss which in reality has never been sustained. That, however, is not the only peculiarity of the appellant's claim. He admits that 13s. per ton would cover all the costs and expenses of the transport of the pulp from Chicoutimi to