

the workman was specially exposed. Both these cases, in my humble judgment, were rightly decided.

An illustration of the second proposition will be found in the case already cited of *Barnes v. Nunnery Colliery Company*, where Lord Atkinson said—"The unfortunate deceased in this case lost his life through the new and added peril to which by his own conduct he exposed himself, not through any peril which his contract of service directly or indirectly involved or at all obliged him to encounter."

Lord Atkinson added the words "It was not, therefore, reasonably incidental to his employment. That is the crucial test." In the case of *Watkins v. Guest, Keen, & Nettlefolds, Limited* (106 L.T.R. 818), Lord Moulton criticised this sentence as cutting out the sub-section as to serious and wilful misconduct. With great deference to my noble and learned friend, I think he was forgetting that Lord Atkinson was only applying a test and not substituting it for the words of the Act. I cannot see that the serious and wilful misconduct section really introduces any difficulty. Reverting to the words of the Act, you have first to show that the accident arises out of the employment. Then in the older Act came the rider that even when that was so the workman still could not recover if the accident was due to the serious and wilful misconduct of the workman himself—a rider limited in the later Act to cases where death has not ensued. But the very fact that it is a rider postulates that the accident is of the class which arises out of the employment. A man may commit such a piece of serious and wilful misconduct as will make what he has done not within the sphere of his employment. But if death ensues and his dependants fail to get compensation it will not be because he was guilty of serious and wilful misconduct, but because the thing done, irrespective of misconduct, was a thing outside the scope of his employment. I have forborne to comment on the particular application to the facts of each case of the principles laid down in them. But in view of what has been said I think I must add that in my view the judgment of Buckley, L.J., who dissented in *Watkins v. Guest, Keen, & Nettlefolds*, was more in accordance with what has been laid down in this House in the case of *Barnes v. Nunnery Colliery Company* than the judgment of the majority.

Tried by either of the two tests I have examined, the appellant in this case seems to me equally to fail. But he does fail, not because he was acting outside the sphere of his employment, nor because by his conduct he brought on himself a new and added peril, but because he has failed to show any circumstances which could justify a finding that the accident to him arose "out of his employment."

Their Lordships dismissed the appeal.

Counsel for the Appellant—H. C. Davenport—T. H. Parry. Agents—Hurford & Taylor, for J. B. Marston, Wrexham, Solicitors.

Counsel for the Respondents—Scott Fox, K.C.—R. K. Chappell. Agents—Pritchard, Englefield, & Company, for J. N. Glover, Liverpool, Solicitors.

HOUSE OF LORDS.

Wednesday, December 10, 1913.

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

CHARRINGTON & COMPANY, LIMITED
 v. WOODER.

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

*Contract—Construction of Agreement—
 "Market Price."*

The lessors of a "tied house" agreed to supply their tenants with malt liquors at "the fair market price." The respondent claimed to be supplied at such price as he could have bought in the open market, the appellants to charge the ordinary rates applicable to tied houses. *Held* that the "market price" was the ordinary price charged to tied houses.

Lord Atkinson's judgment contains a full statement of the facts of the case, which was originally tried before Lord Alverstone, C.J., and a special jury, who found in favour of the appellants.

Their Lordships' considered judgment was delivered as follows—

LORD CHANCELLOR—If the appellants are right in their construction of the covenant in the underlease of the 4th July 1900, I think that they are entitled to succeed, both on their claim and on the respondent's counter-claim in the action. For the only real question is that of the construction of the covenant in question. It is suggested for the respondent that he is entitled to a new trial on the ground that Lord Alverstone, C.J., ought to have left to the jury as a separate question whether, even on the footing that the fair market price was the price to the lessee of a tied house, fair market prices were charged on that footing. But I do not think that the respondent really asked that such an issue should be put to a jury, and he brought forward no evidence on which he could have succeeded on it. The real point to be determined is whether the language of the covenant means that the fair market price was the price to be paid by a tenant of a tied house, as distinguished from the price at which beer could be bought in an altogether open market.

It is evident that the Court of Appeal and the Lord Chief-Justice himself were much influenced by the previous decision of the Court of Appeal in *Russell v. Crawford* (not reported), a decision to which the Lord Chief-Justice was a party. There it had been held that in an analogous covenant the words "fair current market price"

meant the market price between people unrestricted in their right of bargaining.

We have to construe the covenant in the present case, not abstractly, but in the light of the circumstances to which it applied. If the language of a written contract has a definite and unambiguous meaning, parole evidence is not admissible to show that the parties meant something different from what they have said. But if the description of the subject-matter is susceptible of more than one interpretation, evidence is admissible to show what were the facts to which the contract relates. If there are circumstances which the parties must be taken to have had in view in entering into the contract it is necessary that the court which construes the contract should have these circumstances before it.

The covenant in the present case was directed to the circumstances of the London brewers' trade. There was evidence as to these circumstances of a kind which did not appear in *Russell v. Crawford*, and which ought, I think, to have made the Court of Appeal hesitate before treating that case as governing the present one.

It was proved in this case that all the principal London brewers, including the appellants, supply their malt liquors to their customers at fixed standard prices which the brewers have agreed on among themselves. The net price is based on the standard price in every case, whether the customer is a publican who owns a tied house or a free house, any differences made consisting in variations of discount allowed on the standard prices. The ordinary discount is 5 per cent. on the price of London beers. On Burton beers the discount is on a sliding scale depending on the amount of trade, and it varies from 10 per cent. to 17½ per cent. Discounts beyond these amounts are matter of special bargain. There is no fixed scale for untied buyers, but they bargain individually and sometimes, but by no means always, obtain discounts substantially in excess of the ordinary discount. So at times do the individual tenants of tied houses, but not to the same extent. The respondent was allowed the ordinary 5 per cent. discount on London beer bought by him from the appellants, and 17½ per cent. on Burton beer. It was proved that the great bulk of the trade of the London brewers is done in tied houses. Of about 6300 licensed houses in London (excluding off-licences) 93 per cent. are tied—90 per cent. by covenant and 3 per cent. by loan. The appellants themselves have 590 tied houses to which they charge the standard prices less discounts on the scale I have mentioned with reference to tied houses. Then they have six free houses to which they charge the standard price with similar discounts, and seven free houses to which they charge them with extra discounts.

These facts having been proved, the Lord Chief-Justice left to the jury the question whether the beers supplied to the respondent were charged to him at fair market prices, meaning by that the standard prices less the usual discounts. The jury found that there were two market prices, one for

tied and one for free houses, and that the respondent had been charged the fair market price as applying to a tied house. On this finding the Lord Chief-Justice entered judgment for the appellants on their claim for the price of beer delivered to the respondent, and for the appellants also on the counter-claim of the respondent for a declaration that the appellants were not entitled to charge him prices higher than the ordinary market prices charged to persons who were not tied.

The Court of Appeal, following its previous decision in *Russell v. Crawford*, took a different view and reversed the judgment, so far as the counter-claim was concerned, but affirmed the judgment for the appellants on their claim for goods delivered, and ordered a new trial on the issue raised by their counter-claim. They held that the words "market price" made it impossible to look at the prices to tied houses, and must be taken to mean the prices in the open market.

In the face of the evidence which was given, I do not think that this judgment on the counter-claim can stand. What is the fair market price must depend on what is meant by the market, and this must be ascertained by reference to the facts proved. The great bulk of the business of the London brewers is transacted with the tenants of their tied houses. These tenants bid for these houses, and they know that the terms on which they get the right to be supplied with malt liquor are that they should take it exclusively from the owning brewer at the standard price less certain discounts, the variation of which was to be limited by the prevailing practice. This seems to me to be the well understood meaning of the term "market" in this connection, and I do not believe that the respondent when he entered into his contract understood it in any other sense. "Market" is a word covering a variety of possible forms, and the evidence appears to me to establish that it had a special significance in the trade done in tied houses with the London brewers. The fallacy in the view taken by the Court of Appeal appears to me to have been that they endeavoured to interpret the covenant without reference to the circumstances of the particular trade and of the situation of the parties who entered into the contracts contained in the leases.

As the result I think that judgment ought to be entered for the appellants on both their claim and on the counter-claim, the order for a new trial being discharged. I think further, that, for the reasons which I have already given, there is in reality no other question before us. The appellants ought to have their costs here and in the Courts below. I move accordingly.

LORD KINNEAR—I agree with the judgment of the Lord Chancellor. The question depends upon the meaning and effect of a proviso in the sub-lease by which the obligation of the lessee to deal exclusively with the lessors for all malt liquors which shall be sold or consumed upon the premises is made to depend upon their being "willing

to supply the same to the lessee at the fair market price." I am unable to accept the contention that the term "market price" has a fixed and definite meaning which must attach to it invariably, in whatever contract it may occur, irrespectively of the context or the surrounding circumstances. The argument was rested chiefly on the force which, it is said, must be given to the word "market." In a different connection this may be a technical term, but in the covenant in question it is not used in any technical sense, and in ordinary language it is a common word of the most general import. It may mean a place set apart for trading; it may mean simply purchase and sale; and in either sense there are innumerable markets, each with its own customs and conditions. Words of this kind must vary in their signification with the particular objects to which the language is directed; and it follows that a contract about a market price cannot be correctly interpreted or applied without reference to the facts to which the contract relates. It is said that this involves a violation of the rule which does not allow a written instrument to be varied by oral evidence. But the objection is in my opinion groundless. Evidence is not admissible to put a peculiar meaning upon plain and unambiguous words. But it may be necessary to prove the relation of the document to facts; and I take it to be sound doctrine that for this purpose evidence may be given to prove any fact to which it refers or may probably refer, or to identify any person or thing mentioned in it. In so stating the law I am using the language of Sir James Stephen; and, accepting his doctrine as I do, I cannot think it doubtful that in order to interpret the contract before us we must know the facts about which the parties were bargaining and consider the circumstances of the market to which they refer as that in which they propose to deal.

I do not examine the evidence in detail, because I agree with what is said about it by the Lord Chancellor and by my noble and learned friends, whose judgments I have had the advantage of reading, and the result is that in the ordinary course of trade the appellants and other London brewers supply their customers with malt liquors at standard prices which they fix by agreement among themselves, but on actual sales discounts are allowed at certain rates. The discount allowed to licensees of tied houses on London beers is nearly uniform, and on Burton beers it is fixed according to a sliding scale. Further discounts are generally allowed to untied houses, but these are made at varying rates and as the result of special bargains. The net price to untied houses is thus in general lower than to tied houses. It is material to observe in this connection that the great bulk of trade is with tied houses. Of 6300 licensed houses 93 per cent. are tied, 90 per cent. by covenant and 3 per cent. by loan; and the appellants themselves have 590 tied houses, six free houses to which they charge the standard price with the same discounts as are allowed to the tied houses, and seven

free houses to which they give a larger discount. In these circumstances the jury found that there are two market prices, one for tied and one for free houses, and that the respondent had been charged the fair market price as applying to a tied house; and on this finding the Lord Chief-Justice entered judgment for the appellants. It is said that this judgment cannot stand because the jury ought not to have considered the prices charged to tied houses, and ought to have been so directed, since the words "market price" exclude tied houses from consideration. The Court of Appeal has given effect to this view. But, with great respect, I find nothing in the language of the covenant to support this restriction. It is not the open market price but a fair market price which is to be the stipulated standard. The words seem to me to refer to the conditions of purchase and sale in the particular trade contemplated by the contract, and to the relations which the contract creates. If the prices charged to the respondent are those charged by London brewers generally and accepted by the great mass of their customers, there may still be a question whether they are fair market prices or not, but they are not the less market prices, because the parties have made a contract of purchase and sale on terms which are generally adopted by the majority of London publicans and the brewers from whom they buy. I cannot, with great respect, agree that these publicans are shut out of the market. The covenant in question is only one part of a complex contract, and the persons who make such contracts being the great majority of the publicans in London make or help to make the market. The proposed restriction which would exclude the great mass of the trade from consideration thus appears to me to be arbitrary. The question as to the fairness of the prices still remains, but that is decided by the verdict of the jury.

LORD DUNEDIN—I concur in the opinion of the Lord Chancellor. I cannot agree with the view that the term "market" has any fixed legal significance, and yet that, I think, is the view on which the judgment of the Court of Appeal, following the authority of *Russell v. Crawford*, really depends. I do not think it rests with either party to say to the other, "If the meaning is as you contend, why did you not express it otherwise?" Both contentions as to the true meaning can be expressed by a gloss. The appellants say a "fair market price" means such a price as persons in your situation are ordinarily charged. The respondent says it means the average price at which a man who is not tied can get his beer. If either of these glosses had been expressed there would be no possibility of dispute. It therefore comes back to the question, What is the true interpretation of the expression in the contract?

Now in order to construe a contract the Court is always entitled to be so far instructed by evidence as to be able to place itself in thought in the same position as the parties to the contract were placed—in fact when they made it, or, as it is sometimes phrased, to be informed as to the surround-

ing circumstances. In the case of *Bank of New Zealand v. Simpson* (1900 A.C. 182, 188) Lord Davey refers to the following passage from Lord Blackburn's work on Contract of Sale (3rd ed., p. 51), quoted by the latter in *Grant v. Grant* (L.R., 5 C.P. 727)—“The general rule seems to be that all facts are admissible (to proof) which tend to show the sense the words bear with reference to the surrounding circumstances concerning which the words were used.”

The circumstances found are that there are in London a vast number of tied houses and comparatively few free, and that for the tied houses there is a recognised price charged by the brewers for the two kinds of beer and a recognised discount on these prices. In the case of free houses the price of beer is the same, but the discount is made matter of special bargain, and often exceeds the discount allowed to the tied houses. I mention this as the result of the evidence—evidence which, had the case been tried, as I think it ought to have been, by a judge without a jury, would have been that on which the Court would have proceeded to interpret the contract. But the trial having been by a jury, we must, I think, take the findings of the jury as we get them, unless we ought to say these findings are unsupportable on the evidence. I do not think that can be said. The jury accordingly have found that there is a market for tied houses, and that the price charged to the respondent is a fair price to a tied house. They also add that there is a market price for houses not tied.

On such a finding, which I cannot say was not justified by the evidence, I think that the Lord Chief Justice was right in directing the verdict to be entered for the plaintiffs. In so doing he doubtless construed the contract, but I think he construed it rightly. He was entitled, I think, to consider the facts of the case for himself so far as the import of facts was not explained for him by the findings of the jury along with those findings.

So doing, he came to the conclusion I should have come to, viz.—that the market which the parties meant in the contract was the market for tied houses—in other words, that the expression was really equivalent to standard price charged by brewers to tied houses.

The Court of Appeal overruled this view, because they held that the verdict of the jury could not stand consistently with the law laid down in *Russell v. Crawford*. That law is thus expressed by Vaughan Williams, L.J.—“The finding of the jury . . . cannot stand . . . because such a finding is inconsistent with the decision in *Russell v. Crawford*, which decision is expressed by Fletcher Moulton, L.J., in these words, ‘To my mind the words “market price” are absolutely fatal to the contention that you are to look at the prices to tied houses.’”

With that, as I have said, I cannot agree. There is no authority that “market” is a term of fixed legal significance. You have always to ask yourself “what market,” and in the sense of there being a ruling price it is just as easy to think of a market for tied

houses as a market for free houses. And so the jury have found.

I should like to say in conclusion that although, of course, this case must be determined by the true interpretation of the words used, and the appellants must have suffered, whatever they intended, if the expressions made use of had gone beyond what they intended, yet I have no moral doubt or misgiving that the judgment we are now to pronounce is in accordance with what the parties really intended. Not only did the respondent not raise this question for ten years after the contract, but he says in his evidence “I really did not know at what price I could obtain beer in the open market, and I never have known till recently.”

LORD ATKINSON—This is an appeal from so much of an order of the Court of Appeal, dated the 12th December 1912, as reverses the judgment entered for the plaintiffs on the defendant's counter-claim by Lord Alverstone, C.J., in an action brought by the appellant company against the respondent to recover the sum of £239, 5s. 8d. balance of an account due for goods sold and delivered, and as awards a new trial of this counter-claim.

The facts, which are not complicated, are, so far as material, as follows:—

The appellants are a London brewery company carrying on an extensive business at the Anchor Brewery, Mile End Road, London. They also own a brewery at Burton-on-Trent, where they brew Burton beers.

They are, in addition, owners, either as free-holders or lessees, of a large number of licensed houses in London, and substantially the whole of the malt liquors brewed by them are sold to the licensees of these houses. A standard scale of prices has been fixed by all the London brewers for their beers. It has, subject to trifling alterations made in the years 1887, 1900, and 1909, remained unchanged for the last thirty years. Though this scale is adopted by all London brewers, on actual sales discounts are allowed to purchasers at certain rates. In the case of sales to licensees of tied houses in the London area the rate of discount allowed on London beers is almost uniformly 5 per cent. The discounts allowed by the appellants on their Burton beers are fixed on a certain sliding scale, varying according to the quantity sold. On sales to the licensees of untied houses and to other customers further discounts are almost universally allowed, and the net price of the beers to these purchasers is consequently reduced. These reductions, however, are not uniform, and it was contended by the appellants that the true nature of the transaction is that the sales are made in the ordinary course of trade to both classes of licensees at the same rates of discount, but in the case of the free licensees special bargains are, for different reasons, made, allowing further discounts at varying rates, so that in the result the net price of the beers sold to the latter class of customer is by no means uniform, and no average reduction

struck on these varying reductions would represent accurately the true course of dealing. In some instances, few in number, special bargains are made with tied buyers.

According to the evidence of the defendant, the practice of allowing larger discounts to untied licensees is of somewhat modern growth. Thirty years before the trial the standard price, less 5 per cent. discount, was charged to both kinds of lessees alike. There were then existing, he said, a number of tied houses, not nearly so great, however, as at present. About twenty years before the trial the brewers began, he said, to buy houses. The so-called boom in licensed houses began in 1895. It was not disputed that this practice of buying up licensed houses continued until, at the present time, out of the 6300 houses having on-licences in the London area, 93 per cent. are tied—90 per cent. by covenant and 3 per cent. by loan. These houses are owned by fourteen or fifteen breweries in London, and it was not disputed that the prices paid to all of them on London beers are the old prices which have remained unchanged for the last thirty years. There was no suggestion whatever that the respondent was not perfectly well acquainted with this course of trade, at all events as to tied houses. According to the sliding scale adopted by the appellants for the sale of their Burton beers, 17½ per cent. discount was allowed on purchases amounting to £700 per annum.

The respondent obtained from the appellants an under-lease, dated the 4th June 1900, of a public-house called the Bay Malton, situate in Great Portland Street, London, for a term of seventy-four years from the 24th June 1897 at the rent of £105 per annum. He entered into occupation of this house, and continued to buy all his beers and malt liquors from the appellants—the London beers at 5 per cent., the Burton beers at 17½ per cent., less than the standard price, though in fact his consumption did not reach £700 per annum. The precise mode in which the appellants and respondent carried on their business was this—The goods were ordered by post-card or letter addressed to the appellants or by verbal communication. Two books were kept by the respondent—one for the London beers, the other for the Burton beers purchased. The appellants' collector, carrying his account books with him, visited the respondent's public-house monthly, and from these account books entered in the two books kept by the respondent the particulars of the beers supplied to the latter during the preceding month, and also the sums due in respect of them.

These entries were then generally checked by the respondent, and invariably thereupon a payment on account was made, usually by cheque. A debit balance in his favour was usually allowed. The monthly account averaged about £80. No specific appropriation was ever made by the respondent of the payments on account. The appellants accordingly applied them to discharge the earlier items. This debit balance increased until in the month of August

1911 it reached £298, 5s. 8d. On the 1st of that month the respondent offered the appellant's manager to pay £5 per month to reduce it, but he would accept nothing less than £20 per month. On the 14th August 1911 he actually paid £5 on foot of this balance, and in answer to the appellants' application by letter dated the 19th of the same month raised the defence that the appellants had not since July 1900 supplied him with beers at the prices stipulated for in his sub-lease, that he therefore was released from the tie, and was entitled to buy his beers elsewhere.

The covenant in the sub-lease on which the defendant relies runs as follows:—"And also that he, the lessee, his executors, administrators, underlessees, or assigns, will deal exclusively with the lessors or their successors in business or other the assignees of the benefit of this covenant for all malt liquors which shall be sold, disposed of, or consumed upon the said premises, or shall be brought thereon to be so sold, disposed of, or consumed, and will not upon any pretence whatever during the said term, upon the said premises, directly or indirectly buy, receive, sell, dispose of, or have in his or their possession, or either directly or indirectly permit to be brought, received, sold, or disposed of, or consumed in, upon, out of, or about the said premises or any part thereof, any porter, stout, ale, beer, or other malt liquor whatsoever other than such as shall have been *bona fide* purchased of the lessors or their successors in the business, or from the assignees of the benefit of this covenant, provided they shall be willing to supply the same to the lessee at the fair market price, and with the intent that this present covenant shall run with the said premises and be enforceable by the person or persons for the time being entitled to the reversion in the said premises, and bind any assignee, tenant, or occupier thereof for the time being."

In this state of circumstances the appellants on the 25th August 1911 instituted an action under Order XIV to recover from the respondent the sum of £298, balance of an account for goods sold and delivered.

The respondent filed a defence and counter-claim. The relief prayed for by the latter was—(1) An account of the sums paid to the plaintiffs. (2) A declaration that on the true construction of the above-mentioned covenant the plaintiffs were not entitled to charge the defendant prices higher than the ordinary market prices charged to persons who were not tied. (3) A declaration that on the true construction of this covenant that the defendant was entitled to purchase his beers from persons other than the plaintiffs unless the latter were willing to supply him at prices charged in the open market to persons who were not tied. (4) A declaration that the defendant had not been guilty of any breach of covenant, and an injunction to restrain the plaintiffs or their servants or agents from taking steps to re-enter, &c., the demised premises. (5) Damages.

To this defence and counter-claim a replication was filed by the appellants. It is,

I think, plain from these pleadings that the three substantial questions intended to be raised by them are—(1) The right of the defendant to have beers supplied to him at the prices or market prices charged to persons who were not tied; (2) the right to cease to deal with the plaintiffs if they refused to supply their beers to him at those prices; (3) the right to recover damages from the plaintiffs for breach of covenant in refusing to supply him with their beers at those prices; and (4) the right to have the settled account opened, and the plaintiffs required to account for the moneys received by them.

There is nothing in the pleadings or in the course of the trial to suggest that the prices charged were other than those universally demanded from the lessees of tied houses, or were in themselves exorbitant. That case was not made at the trial, and should not be permitted to be made now. The evidence would lead one to the conclusion that a tied house supplied at the net prices charged to untied houses would be, if not an anomaly, certainly an exception to the general rule adopted by almost all the London brewers, and certainly adopted by the plaintiff company. Of the 603 accounts the appellants have in the London area 580 are with licensees tied to them by covenant, ten tied to them by loan, as it is called, and only ten free, all the licensees of tied houses being charged the same prices as those charged to the defendant.

Lord Alverstone, before whom and a special jury the case was tried, ruled that there was no defence to the plaintiff's claim, and entered judgment for the amount claimed with costs. The majority of the Court of Appeal approved of that ruling. I respectfully concur with them, and think it was clearly right. Abundant evidence was given as to the prices charged to the licensees of both tied houses and free. The following passage in the Lord Chief-Justice's summing up contains, I think, the pith of the whole. He said—"Gentlemen, I have done my best to assist you; I really do not know whether I have been successful or not. It is difficult enough, but you have got to answer this question—Were the beers supplied to Mr Wooder up to August 1911 charged to him at fair market prices, meaning by that the standard less 5 per cent. for London and 17½ per cent. for Burton? If you think they were you need consider no more. I do not go over the case again. The fact that with full knowledge of them they were paid without any direct complaint to Charringtons is only a circumstance. If on the whole evidence you think that the prices were too high you will please say what extra discount you think ought to be allowed."

The jury subsequently asked the Chief-Justice whether the defendant was a tied tenant. He answered "Yes," and they then asked if there could be two prices, and he replied that that was for them to decide.

The jury, in answer to the questions left to them, found that there were two market prices—one for tied houses and one for free

—and that "the defendant had been charged the fair market price as applying to a tied house." The learned Chief-Justice said—"I must take that to be a finding for the plaintiffs." He accordingly entered judgment for the plaintiffs on the counter-claim. This verdict and judgment have been set aside by the unanimous judgment of the Court of Appeal, for misdirection, and a new trial awarded, as I understand it, on the ground that on the true construction of the covenant contained in the lease the words "fair market price" refer to the fair market price charged to untied houses; that the Lord Chief-Justice should have so instructed the jury, and have asked them to find what that fair market price was.

Before dealing with the decision of the Court of Appeal on these two points, it is necessary to determine what were on the true construction of this covenant the reciprocal rights and obligations of the two contracting parties apart from the question of the precise meaning to be given to the words "fair market price" as used in the covenant.

On the authority of *Wolveridge v. Steward* (Cx. & M. 614) and *Treloar v. Bigge* (L.R., 9 Ex. 151) it is, I think, clear that under this covenant the appellants were not bound to supply any beer whatever to the respondent. It is quite optional with them to do so. If they do supply it they can only charge "a fair market price," whatever that may mean, and if they decline to sell to the respondent at all, or demand a price higher than the fair market price, the respondent's only remedy is to cease to deal with them and deal elsewhere. He has therefore no right whatever to sue as he has sued for damages for breach of covenant.

Upon the other point, namely, the meaning of the words "fair market price," the authorities stand thus—In the case of *Arnold Perrett & Company v. Radford* (17 Times L.R. 301), tried at the Gloucester Assizes before Wright, J., that very learned and accurate Judge held that in a covenant in a lease of a tied house very similar to the covenant in question in the present case the words "fair current market price" meant a price which was fair and current in the case of tied houses which was not in excess of the general market rate, and that the price did not cease to be fair and current because the tenants of free houses who were exceptionally circumstanced obtained lower prices by special bargains. The facts of the case were these—In Gloucester, as in London, the vast majority of the licensed houses are tied similarly to the defendant's. Houses to the number of 210 are tied out of a total of 219. The mode in which the trade was carried on there was this—The brewers issued price lists which were practically identical the one with the other, and supplied the tied houses at these prices subject to a discount of 10 per cent. They supplied free houses at the same prices subject to a deduction varying with the quantity supplied or with other special circumstances, but ordinarily amounting to 20 per cent. and sometimes to 25 per cent. They supplied the general public at the full list prices subject to any

discount which might be specially agreed upon in any particular case. Wright, J., did not consider that the meaning of the words "fair current market price" as used in the particular covenant could be determined in the abstract and without due regard to the condition of the trade in the locality in which the tied houses were situated, and to the mode in which and the methods by which that trade was carried on. On the contrary, he said—"The expression 'the fair current market price' is not, as it seems to me, equivalent to the expression 'the lowest price at which the tenant could buy.' The word 'fair' and the word 'current' seem to import some reference to the general conditions of the particular trade and to the nature of the relations between the parties, and to mean in substance what is current and fair in the case of tied houses and not in excess of the general market rate. The landlord would not establish his case merely by showing that his charges were the same as those of other brewers if it appeared that the brewers generally were maintaining an excessive scale of prices; but if he shows that his prices are the prices usual and general under the circumstances, and if it is not made to appear that those prices are such as to leave an unreasonable profit or to be in excess of the prices charged in the general course of the trade, I do not think that he ought to be held to have broken his contract merely because there are some cases in which persons exceptionally circumstanced may as matter of special bargain obtain lower prices. In the present case there is no evidence to show that the prices charged are excessive or exceptional. They are the prices universally charged under similar circumstances, and they are materially less than the prices charged to the general public. I think, therefore, that the defence and counter-claim fail."

The next case on the subject was that of *Russell v. Crawford*. The appellants in the present case have furnished your Lordships with the copies of the pleadings in that case, with a transcript of the evidence given at the trial, and of the summing-up of Darling, J., who presided at the trial, as well as a print of the judgment delivered in the Court of Appeal. The material facts which it is essential to consider are as follows:—The defendant held a certain licensed public-house called the Pitt's Head, situate in Brunswick Mews, Cumberland Place, in the county of London, under a lease dated the 19th December 1889, for a term of thirty-one and a quarter years, less twenty-eight days, from the 24th June 1889, at the yearly rent of £60. The reversion expectant on the determination of this lease, and the benefit of the covenants contained in it, became on the 11th January 1909 vested in the plaintiff. The original lessors were the Belgrave Brewery.

The lease contained a covenant by the lessee that he would buy all his beer from this brewery, and that if he did not do so, and bought it elsewhere, he should pay an additional rent of £100 per annum. The lease contained a covenant by the lessors

that they would be willing to supply the lessee with beer at "fair current market prices." The plaintiff was himself a licensed dealer in beer, buying the beer he sold or was willing to sell to the defendant from different breweries. He bought and sold at the same price, which was the regular standard price of beer in London, he was willing to continue to do so, and he gave, and was willing to continue to give to the defendant a discount of 5 per cent. on these prices, thus dealing with the defendant on the general terms upon which all licensees of tied houses are dealt with by London brewers, but he himself received from the brewers discount at a rate higher than 5 per cent. The defendant demanded a higher rate of discount, refused to take beer supplied by the plaintiff, and dealt elsewhere. Thereupon the plaintiff brought an action to recover the sum of £100 in respect of the penal rent for one year, and damages for breach of covenant. The defendant in his defence relied, amongst other things, on this covenant, denying that the plaintiff had been willing to supply him with beer at fair current market prices, which according to him meant the fair current market prices charged to the licensees of free houses. Darling, J., ruled that according to the true construction of the covenant the words in controversy applied to the licensees of tied houses exclusively, and left to the jury the question, Was the plaintiff willing to supply beer to the defendant at fair current market prices? To which they answered yes. No evidence was given such as was given in the present case as to the vast preponderance of tied over untied houses in the London area, or as to the matters which Wright, J., considered such helps in arriving at the meaning to be attributed to the disputed words, namely, "the general conditions and course of the trade and the relations between the contracting parties. The evidence was mainly, if not altogether, confined to the discount on the standard price allowed to tied tenants and free tenants respectively.

The Court of Appeal reversed the decision of Darling, J., as to the defendant's liability for the increased rents, and directed a new trial of that question.

I have read and re-read most carefully the judgments delivered in the Court of Appeal. The judgment of Fletcher Moulton, L.J., as he then was, with all respect appears to me to turn almost altogether on the meaning of the word "market." He attributes to the word its primary meaning. He says—"Fair current market prices are settled by the operations of the great causes supply and demand. They are actually fixed by what is called the higgling of the market . . . I have not the slightest hesitation in saying that the normal meaning of such a contract is that you have to see what the fair current market price between people free to bargain is, and that that is the price which is to be taken as the price at which the purchase and the sale in these non-free conditions are to be taken to have been made." And further on he says—"There are the free houses. The free houses can

pick and choose the persons from whom they will buy . . . to my mind the words 'market price' are absolutely fatal to the contention that you are to look at the prices to tied houses. The essence of a tied house is that it is banned from the market. When you say that it is to be fair current market price you say that you are to decide for those who are shut out from the market. But the price to be paid is ascertained by looking at the prices which are paid by those who are not shut out from the market."

It is, no doubt, true that a tied tenant after he has taken his public-house and become tied is shut out from the open market, just as a railway company that has contracted with a mining company for the supply of all its coal for twelve months at a given price is shut out from the market while this contract lasts, but the tied tenant before he entered into his contract was just as free to take or not to take a tied house and buy and sell malt liquors in and through the medium of it as was the publican who desired to take an untied public-house free to take or not to take it, and to buy beer in the open market and sell it through his untied house. And as 93 per cent. of the publicans of London who are customers of the brewers sell beer in the former way, not the latter, and as all the brewers sell the vastly larger portion of their produce to the former class of licensees, not to the latter, it would certainly seem to me but natural that in these trade bargains the parties to them should use the term "market price," which is not a term of art, in reference to the vast body of these transactions and not in reference to transactions few in number and of a wholly different character. There does appear to me to be something anomalous from a business point of view in fixing the price of beer for the entire body of publicans, bound and free, by the price paid by the minute fraction of them who happen to be free. The more especially would this be so where, as in this case, according to the evidence, the sales to free tenants are to a great extent sales of a dumped commodity, as it is called, meaning thereby the surplus produce which remains on the manufacturer's hands where his plant has been worked to its highest or to a very high capacity, and the main body of his assured buyers have been supplied.

Buckley, L.J., expressed himself thus—"I think that the true direction was that the fair current market price pointed to is of course a fair current market price to a publican . . . but not to a limited class of tied publicans but to publicans generally." I presume he meant by the words "publicans generally" the body of publicans trading in the London trade area, not to all the publicans in the British Isles, though these latter are free to buy in the London market; but if he meant the publicans in the London area it seems strange that he should style the tied tenants a limited class, since they are 93 per cent. of the whole. He proceeds—"I rest that opinion upon three grounds. The first ground is this, as to what, looking at the transaction, would probably be the broad fair meaning of the

parties. I think the broad fair meaning is this, that on the one hand the owner of the reversion stipulates that the lessee shall buy from him, that he shall have the benefit of dealing with him in these liquors, and that, on the other hand, the lessee who is to be thus bound is not to be handicapped in his trade, his profits are not to be diminished by reason of that covenant, he is only to take that from the lessor if the lessor is prepared to supply him at the price at which he could get it elsewhere if he were not tied by the covenant. On the one hand the lessor is to enjoy the benefit of the tie. On the other hand the lessee is not to lose profit by reason of the tie. I think that is the broad fair meaning of the stipulation."

The Lord Chief-Justice took a somewhat different view. He was apparently of opinion that the prices actually paid by all tied houses in the London area, as well as those paid by the insignificant number of untied houses which exist in that area, should be taken into account in arriving at the meaning of the phrase "fair current market price" as used in this covenant. I am not certain that he did not think that the prices charged by brewers to clubs, as well as to all customers other than publicans, should also be taken into account, and he adhered to this opinion on the trial in the present case. The Court of Appeal appear to me to have adhered in this case to the opinion expressed by them in *Russell v. Crawford*, though the facts proved in the present case are entirely different from those proved in that case.

I do not think one can determine what the parties to this covenant had in their minds when they used the words "fair market price" by simply considering the meaning of the word "market" and its incidents in the abstract. The word "market" has many meanings. It may mean the exchange of goods or provisions for money, purchase, or the rate of purchase and sale. One says markets are low or high. One says commodities find a quick or ready market, or markets are dull, or one cannot find a market for one's goods—it may mean the opportunity of buying and selling, &c.—(see Imperial Dictionary, title "Market," Webster's Dictionary, same title).

I concur with Buckley, L.J., in thinking that to arrive at a true construction of this covenant one must ask oneself the question—What was the broad fair meaning of the parties to it? In what sense did they use the words "fair market price"? What did they mean to express by them? Did this company mean to charge this lessee the prices almost universally charged to tied houses in the London area for the last thirty or forty years, or did they mean only to charge him the prices which they demand for their dumped beers from an insignificant fraction of the whole number of their customers. Moreover, it was proved in evidence that if they sold their beers to their tied customers at these latter prices it would rapidly lead to their own bankruptcy. The defendant deposed that the standard prices, less 25 per cent. discount,

would be a fair market price for untied tenants. No reason has been suggested why he should be specially favoured with such a discount, or treated differently from all other tied tenants, and if the prices charged were not exorbitant, what prices other than these can these words have referred to? In *Grant v. Grant*, L.R. 5 C.P. 727, Lord Blackburn adopted and judicially approved of the rule stated by him in his work on *Contract of Sale*, 3rd ed., p. 51. It runs thus—"The general rule seems to be that all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances concerning which the words were used, but that such facts as only tend to show that the writer intended to use the words bearing a particular sense are to be rejected."

In *Bank of New Zealand v. Simpson*, Lord Davey, delivering the judgment, approved of this statement of the law.

The fact that so many judges have formed different opinions as to the meaning of these words "fair current market price" and "fair market price" as used in this contract and contracts like it, should suffice in itself to show that they are susceptible of either of two meanings. If that be so, as I think it is, the relations of the parties and all the surrounding circumstances may be taken into consideration, not to add to or alter their contract, but to interpret it, to show the nature and qualities of the subject-matter, or, in other words, to show the meaning the parties themselves attached to the language they have used. Viewing the expression "market price" through the light of the surrounding circumstances proved in this case, it is to my mind clear that their meaning was the price at which the appellants sold their beers to the vast preponderance of their customers, the licensees of their tied houses. And that by the use of the word "fair" it was, I think, simply meant to protect the lessee from being required to pay some extortionate price kept up by combination amongst the brewers or by some such like device. I do not think that the use of the word "market" excludes this construction.

The jury have found that the defendant had only been charged a fair market price as applied to a tied house. In my view that was all he was entitled to. The evidence given sustains that conclusion abundantly. The facts are all before your Lordships, and Order XXXIX, r. 6, and Order XL, r. 10, of the Rules of the Supreme Court 1883 therefore apply. This House has full jurisdiction to finally determine the matter in dispute and make such order as justice requires. That order in the present case, in my opinion, is that the decision of the Court of Appeal should be reversed, with costs, and the order made by the Lord Chief-Justice at the trial restored.

Their Lordships sustained the appeal.

Counsel for Appellants—Sir R. Finlay, K.C.—Holman Gregory, K.C.—H. A. M'Cardie. Agents—Loxley, Elam, & Gardner, Solicitors.

Counsel for Respondent—Rawlinson, K.C.—Douglas Hogg. Agent—S. Tonkin, Solicitor.

HOUSE OF LORDS.

Friday, December 12, 1913.

(Before the Earl of Halsbury, Lords Kinnear, Dunedin, and Atkinson.)

METROPOLITAN WATER BOARD v. AVERY.

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

Local Government—Water—“Domestic Purposes”—“Trade Manufacture or Business”—Supply to an Eating-house—Metropolitan Water Board (Charges) Act 1907 (7 Edw. VII, c. cxc), secs. 8 and 25—Water-works Clauses Act 1863 (26 and 27 Vict. c. 93), sec. 12.

The respondent occupied a licensed public-house in which besides the ordinary trade of a publican she carried on a subsidiary business in supplying lunches to the number of twenty or thirty a-day. The appellants claimed to impose an extra charge for water used for the purposes of such business, on the ground that it was used for a "trade, manufacture, or business." Held that the test of what constitutes "domestic purposes" is the character of the purpose for which the water is used, not the character of the premises on which it is used, and that therefore in this case the water was supplied "for domestic purposes," not for a "trade, manufacture, or business."

The facts of the case so far as material are stated by Lord Atkinson.

The 25th section of the Metropolitan Water Board (Charges) Act 1907 (7 Edw. VII. cap. cxc), sec. 25, reads as follows:—"In and for the purposes of this Act the expression 'domestic purposes' shall be deemed to include water-closets and baths constructed or fitted so as not to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons, but shall not include a supply of water for any of the following purposes, namely—steam, gas, motor, and other like engines; railway purposes; ventilating purposes; working any machine or apparatus; consumption by or washing of horses and cattle; washing carriages or other vehicles; watering gardens by means of any outside tap or any hose, tube, pipe, sprinkler, or other like apparatus; fountains, or any ornamental purpose; cleansing sewers and drains; cleansing and watering streets or roads; fire extinction; flushing drains by means of any apparatus discharging automatically; public pumps, baths, or washhouses; any trade, manufacture, or business; any bath constructed or fitted so as to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons."

Their Lordships considered judgment (in which LORD KINNEAR concurred) was delivered by

EARL OF HALSBURY—This case turns upon the construction to be given to the