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DAMAGES IN FATAL ACCIDENTS CLAIMS: AMOUNTS NOT DEDUCTIBLE.

II.

THE effect of s. 3 (5) of the Law Reform Act, 1936, is now to be considered with relation to claims under the Deaths by Accidents Compensation Act, 1908. Section 3 (5) of the Law Reform Act, 1936 (which reproduces s. 1 (5) of the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41)), provides as follows:

> (5) The rights conferred by this Part of this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred by the Deaths by Accidents Compensation Act, 1908, and so much of this Part of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under that Act.

In *Rose* v. *Ford*, [1937] A.C. 826, 853, [1937] 3 All E.R. 359, 375, Lord Wright observed that if damages in a common-law action for loss of expectation of life passed to the personal representative under (our) s. 3 of the Law Reform Act, 1936, there may be a risk of duplication of damages, in particular, because of the language of the subsection above quoted; but he thought that the Act did not involve this consequence, as the object of damages in a common-law action was compensation for the benefit of the deceased's estate. He added:

> It is true that the claims under Lord Campbell's Act are independent and are for the separate pecuniary loss sustained by the dependants.

Lord Atkin expressed the view that any overlapping would be avoided by the ordinary method, referred to in the earlier part of this article, in claims under the Fatal Accidents Acts, of setting off gains against losses where the facts so require.

Before considering the later House of Lords decision dealing with the matter directly—because in *Rose* v. *Ford* the question did not arise and was not argued—we must look at the modification of Part I (and, in particular, of s. 3 of the Law Reform Act, 1936, which was enacted after the House of Lords judgment in that case). Section 17 (1) of the Statutes Amendment Act, 1937, provides:

> Where by virtue of Part I of the Law Reform Act, 1936, a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include any damaget for his pain and suffering, or for any bodily or mental harm suffered by him, or for the curtailment of his expectation of life.

The judgment of their Lordships in *Davies* v. *Powell Duffryn Associated Collieries, Ltd.*, [1942] A.C. 601; [1942] 1 All E.R. 657, is not applicable to New Zealand, by reason of the amendment just referred to, apart from the effect of s. 7 of the Law Reform Act, 1936, by which, it will be remembered, in any action under the Deaths by Accidents Compensation Act, 1908, any gain that is consequent on the death of the deceased may not be taken into account, whether the gain is to his estate or to any person for whose benefit the action is brought. The effect of the judgment in *Davies's* case is, for those two reasons, inapplicable in New Zealand; but it does serve to show the reverse of the effect of s. 7 of the Law Reform Act, 1936, and it emphasises the dictum of Ostler, J., in *Alley* v. *Alfred Buckland and Sons, Ltd.*, [1941] N.Z.L.R. 575, 582, that s. 7, on its true construction, upsets the principle of compensation for loss upon which the Deaths by Accidents Compensation Act, 1908, was based, and turns the action, in cases where the dependants have suffered no loss by the death, into a purely punitive action; and allows the dependants to bring their action, notwithstanding the unfortunate result that, by sharing in the estate of the deceased as well, they become better off than they were in the deceased's lifetime.

In *Feay* v. *Barnwell*, [1938] 1 All E.R. 31, it had been decided by Singleton, J., that, in order to prevent the overlapping of damages, so much of the amount awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, for pain and suffering by the deceased and for loss of expectation of life as ultimately reached the dependants who claimed under the Fatal Accidents Acts should be deducted in assessing their compensation under the latter statutes. Thus, the damages awarded to a husband for the pain and suffering and loss of expectation of life by the wife, amounting to £600, less the administration expenses of his wife's estate, £25, were set off against the compensation awarded him under the Fatal Accidents Acts, £625. On balance, he received, therefore, the £625 less the

£600 diminished by the £25, so that what was left to him under Lord Campbell's Act was £50.

In New Zealand, we comment, the dependent husband would have been entitled to share in his wife's estate, either under the provisions of her will or, on her intestacy, by virtue of the Administration Amendment Act, 1944, whereunder, on the facts of this case, he would receive the whole of her estate (including any damages recoverable by her estate), and, as this was a "gain" not to be taken into consideration as being consequent on the wife's death, the whole of the amount awarded as compensation under the Deaths by Accidents Compensation Act, 1908, in addition.

The question arose directly, and in another form, in *Davies* v. *Powell Duffryn Associated Collieries, Ltd., supra*, which was an appeal from the judgment of the Court of Appeal (*sub nom. Yelland* v. *Powell Duffryn Associated Collieries, Ltd.*, [1941] 1 All E.R. 278) in so far as the Court had held on a cross-appeal that, in assessing damages under the Fatal Accidents Act, 1846, damages awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, must be taken into account in the case of dependants who will benefit under the latter Act.

In the House of Lords, the argument centred on the effect of (our) s. 3 (5), reproduced above. Lord Russell of Killowen, at pp. 607, 658, said:

> All that this subsection does, according to the language used, is to provide that the rights shall co-exist, but I can find no words which would justify me in holding that the sub-section purports to alter the measure of the damages recoverable for the benefit of a dependant under the Fatal Accidents Acts. The language of the subsection falls far short of this, and its weakness for the purpose to which the appellants seek to apply it is emphasized by a comparison of the language used therein with the clear and unambiguous provisions of the two statutory exceptions to which I have referred [the insurance and pensions provisions referred to on p. 251, *ante*], and by the fact that the Act which enacts the earlier of the two exceptions is actually mentioned in the subsection in question. It was sought to extract some special meaning from the dual phrase "shall be in addition to and not in derogation of". This, it was said, was not idly tautological, but intentionally cumulative, and the words "not in derogation of" involved a direction that there was to be no taking away or deduction from or diminution of the damages obtainable under the Fatal Accidents Acts. For myself, I can see no sufficient ground for reading subtle hidden meaning into the subsection. I agree with the Court of Appeal that the words "and not in derogation of" merely emphasize what has been already said, that the right conferred by one Act are additional to the rights conferred by the other Acts, and are to that extent tautological. It was suggested that a difficulty would arise if at the time of assessing the damages under the Fatal Accidents Acts, no proceedings had been taken under the Act of 1934, and it was unknown whether any such proceedings would ever be taken. I see no real difficulty here. The authority assessing the damages could always take into account the possibility of such proceedings and make allowance accordingly. A difficult matter, no doubt, and quite incapable of accurate valuation, but, as Lord Watson observed in delivering the judgment of the Judicial Committee in *Grand Trunk Railway Co., of Canada* v. *Jennings*, (1888) 13 App. Cas. 800: "In some circumstances, that principle admits of easy application; but in others, the extent of loss depends upon data which cannot be ascertained with certainty, and must necessarily be a matter of estimate, and, it may be, partly of conjecture."

In his speech, at p. 610, 661, Lord Macmillan said that the rights conferred by the Law Reform Act for the benefit of the estates of deceased persons are the rights to maintain after the death of such deceased persons all causes of action vested in them. These rights are to be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts. He continued:

> This means, as I read the words, that on the death of a deceased person it shall be competent to maintain actions both under the Law Reform Act and under the Fatal Accidents Acts. The rights of action in the two cases are quite distinct and independent. Under the Law Reform Act the right of action is for the benefit of the deceased's estate; under the Fatal Accidents Acts the right of action is for the benefit of the deceased's dependants. But, inasmuch as the basis of both causes of action may be the same, namely, negligence of a third party which has caused the deceased's death, it was natural to provide that the rights of action should be without prejudice the one to the other. It is quite a different thing to read the provision as meaning that in assessing damages payable to dependants under the Fatal Accidents Acts no account is to be taken of any benefit which the dependants may indirectly obtain from an award under the Law Reform Act through participation in the deceased's estate. When the Legislature intends such an exclusion it employs appropriate and quite precise language, as may be seen from the two instances I have quoted to which, as being *in pari materia*, it is legitimate to refer by way of contrast. It will be observed that in both these instances the benefit arising on the deceased's death is independent of the manner in which the deceased met his death.

His Lordship concluded that it was reasonable to exclude such benefits from the computation of damages due in respect of negligence causing the deceased's death; but the damages due under the Law Reform Act and under the Fatal Accidents Acts are both awarded in respect of the same negligence, and it is appropriate that any benefit taken indirectly by a dependant by way of participation in an award under the Law Reform Act should be taken into account in estimating the damages awarded to that dependant under the Fatal Accidents Acts.

Lord Wright, at p. 614, 663, referred to appellant's counsel's "strong point" that the words of (our) s. 3 (5) mean that any sums recovered under the Law Reform Act were not to be taken into consideration in assessing the damages under the Fatal Accidents Acts; that the causes of action are distinct and independent, and the word "rights" under the Acts includes all rights, including the right to recover a sum of damages; and this right is not to be derogated from or diminished by reason of the new right of action or damages recovered under it. His Lordship took the same point as Ostler, J., had taken in *Alley's* case (*supra*). He said:

> To accept these contentions would, in my opinion, involve changing the whole basis of the Fatal Accidents Acts, which give a claim for damages to be assessed on the basis of profit and loss. The damages are to be proportioned to the injury resulting from the death of the individual. The injury suffered by the individual from the death cannot be computed without reference to the benefit also accruing from the death to the same individual from whatever source.

We pause here to show that this is the position that is completely negatived by s. 7 of the Law Reform Act, 1936, because there can be no "reference to the benefit accruing from the death . . . from whatever source", because every such benefit is a "gain . . . consequent on the death of the deceased person" within that section, and, consequently, there can be no basis of profit and loss available in a fatal accidents claim. And it must not be forgotten that, notwithstanding the modifying effect of s. 17 of the Statutes Amendment Act, 1937, all causes of action, apart from some minor exceptions in s. 3 (2), vested in a deceased person survive for the benefit of his estate. In fatal—accident actions, the damages

recoverable must be calculated without reference to any loss or gain to the deceased's estate consequent on his death. Therefore, notwithstanding the high authority of *Davies's* case, it has not the slightest effect in New Zealand, by reason of s. 7, except to delineate the deep chasm between the existing positions in England and here.

Lord Wright went on to say that the purpose of s. 3 (5) may have been to exclude any idea that the Law Reform Act, by giving the executor or administrator an action under it, prevented the same person from also suing as executor or administrator under the Fatal Accidents Acts on his personal behalf for the same negligence or breach of duty. The two causes of action, he added, are, however, independent, though a duplication of damages is to be avoided. In his opinion, that could not arise if the ordinary rule in assessing damages under the Fatal Accidents Acts is observed. (But s. 7 of our Law Reform Act, 1936, abrogated that rule). Later on, he said, in explaining his *dicta* in *Rose* v. *Ford* (*supra*), that he could not see how damages under the Law Reform Act could be liable to abatement if damages came to the same beneficiary under the Fatal Accidents Act, because this could not happen, since in theory the former damages must be taken into account in assessing the latter. Again, in New Zealand, we are reminded, since the former damages are a "gain consequent on the death of the deceased person", the former damages may not be taken into account when assessing the latter.

Lord Porter, in his speech at pp. 620, 666, was even more forthright in his consideration of (our) s. 3 (5).

It is clear that their Lordships considered as fundamental the distinction of a common-law action being for the benefit of the estate of the deceased, from a fatal accidents claim being compensation for an individual pecniary loss by reason of the deceased's death. And this distinction is the basis of the case next to be considered. But our s. 7 of the Law Reform Act, 1936, abolishes this distinction so far as the assessment of damages in fatal-accidents claims is concerned; as it specifically says, "any gain *whether to the estate* of the deceased person *or to the person for whose benefit* the action [under the Deaths by Accidents Compensation Act, 1908] is brought."

Their Lordship's judgment in *Davies's* case came under consideration, by the High Court of Australia, in *Public Trustee* v. *Zoanetti*, (45) 70 C.L.R. 266. Sections 19 and 20 of the Wrongs Act, 1936–40 (S.A.), confer a right of action corresponding to that conferred by our Deaths by Accidents Compensation Act, 1908, with this exception: s. 23b renders the wrongdoer liable to pay to the surviving wife or husband of the deceased person such sum, not exceeding £500, as the Court thinks just by way of solatium for the suffering caused to the wife or husband by such death. Section 23c, parallel with s. 5 (3) of the Law Reform Act, 1936 (considered in *Davies's* case as to its English equivalent), provides that the right conferred by s. 23b shall be in addition to and not in derogation of any rights conferred on the husband or wife by any other provisions of the Act. The Survival of Causes of Actions Act, 1940 (S.A.), as to survival of causes of action after death reproduces, in s. 2, the same language as is contained in s. 3 (1) of our Law Reform Act, 1936.

In proceedings taken by the widow of Zoanetti against the Public Trustee of one Reid, who, it is remarkable to relate, had feloniously injured Zoanetti with a shot-gun, and Zoanetti died from the injury, Reid himself dying on the same day. The action against the Public Trustee survived by virtue of the statute mentioned, and Mrs. Zoanetti was awarded £485 by way of solatium under s. 23b of the Wrongs Act, and £1,505 by way of damages under s. 19 of that statute. It was contended that the damages under s. 19 should be reduced by the amount of solatium awarded. Richards, J., rejected this contention. He said:

> It is difficult to see what additional right of any value is conferred upon a widow, or what "solace for injured feelings" she derives if what she gets by way of solatium is to be deducted from what she gets by way of damages for the injury resulting from the death of her husband.

He therefore added the amount of solatium (£485) to the amount of damages (£1,505), and gave judgment for £1,990. On appeal, objection was taken that such an award of compensation as s. 23c (our s. 5 (3)) does not alter the measure of damages, which, by a long course of judicial decisions, had been held to be proper, under Lord Campbell's Act; but that the effect of the provision is only to make it clear that the right to solatium is not substituted for the rights under that Act. Their Lordships' unanimous judgment, following the unanimous judgment of the Court of Appeal, in *Davies's* case, was strongly pressed in support of the appellant's case. The interesting part of the judgments in the High Court of Australia is the distinguishing of their Lordships' judgment, in holding that the amount of the solatium received by the widow should not be deducted from the damages awarded her under the equivalent of our Deaths by Accidents Compensation Act, 1908. As such a solatium is a "gain consequent . . . on the death of the deceased", the judgment has some bearing on the construction of s. 7 of the Law Reform Act, 1936.

In his judgment Sir John Latham, C.J., at pp. 272, 274, said that he did not agree with the argument that, if an amount given by way of solatium is deducted from damages given under Lord Campbell's Act, the solatium provisions are deprived of all effect. Solatium for mental suffering of parent, husband or wife may be awarded even though the claimant is not a dependant of the deceased, and therefore is unable to claim any damages under Lord Campbell's Act. Similarly, if the sum awarded as solatium is greater than the damages under Lord Campbell's Act, a larger sum will be recoverable than could be awarded before the enactment of s. 23c. Thus, it was inaccurate to say that the application of the principle of *Davies's* case (*supra*) completely destroys the provision for solatium. The learned Chief Justice disagreed with the proposition that a sum awarded by way of solatium is given in respect of the mental suffering experienced by a dependant and that it should not be regarded as a benefit accruing to the dependant by reason of the death. In his opinion, this suggested ground of distinction could not be supported. He added:

> The suffering cannot, I think, be regarded as a source of benefit independent of the death. In cases where the deceased made a will or died intestate or was insured against accident or where the claiming dependant received a pension, it was the death plus the will or the intestacy or the contract of insurance or the provision for pension which produced the benefit which, it has been held, must be deducted. In the present case, it is the death plus the suffering which produces the benefit by way of solatium in the same manner as in the other cases mentioned.

There was, however, a ground of distinction which, in the learned Chief Justice's opinion, could be supported. The *Davies* case related to a provision under the Law Reform Act, which, in its relevant application in that case, enabled damages to be given for the benefit of the estate of the deceased for loss of expectation of life. The result was to increase the value of that estate. If the claiming dependant gained a benefit by such increase of value (as beneficiary under a will or as next-of-kin under an intestacy) the application of well-established principles brought about the result that such benefit must be taken into account in estimating damages under Lord Campbell's Act. But, in the case of solatium, there was no benefit to the estate of the deceased. The solatium went direct to the dependant. Thus the principle upon which *Davies's* case was decided could be said to be irrelevant in the present case. Upon this ground, though, he admitted, with some degree of doubt, he reached the conclusion that the *Davies* case did not prevent the Court from holding that s. 23c means that an additional right to receive damages, ultra damages previously recoverable, is given to a dependant who is entitled to claim solatium. He expressed his conclusion shortly by saying that it had long been the law that Lord Campbell's Act did not allow a compassionate allowance to be given to a dependant: see, *e.g.*, *Royal Trust Co.* v. *Canadian Pacific Railway Co.*, (1922) 38 T.L.R. 899, and that s. 23c—s. 5 (3) of our Law Reform Act, 1936—might fairly be construed as intended to alter the law in this respect.

III.

The question may arise here some day whether the remarriage of the widow of the deceased in respect of whose death damages have been awarded under the Deaths by Compensation Act, 1908, is a "gain consequent on the death of the deceased", and therefore not to be taken into account in assessing such damages. In ordinary cases, the widow is entitled to receive damages commensurate with her "pecuniary loss" resulting from her husband's death. This, as Sir John Latham, C.J., put it in *Willis* v. *Commonwealth*, [1946] A.L.R. 349, 350, comprises the loss of what she had a reasonable expectation of receiving if her husband had lived longer, such as support out of the available income of the husband; as, for instance, the income less, *inter alia*, premiums paid out of a life policy the proceeds of which she received on his death; and the probability of receiving the whole or a share of his estate when he died at a later age, which might include the proceeds of the same policy. The latter benefit would, he said, depend on whether the husband kept up his payments of premiums, on whether and to what extent he was in debt when he ultimately dies, and whether the widow survived him (she might die before the maturity of the policy) or lived until after the policy matured in his lifetime. Furthermore, the chances of remarriage of a widow are relevant to the assessment of damages under the Fatal Accidents Acts.

In this case, a widow claiming damages in respect of the death of her husband on her own behalf and on behalf of her children had remarried five months after her husband's death, and before the trial of the action. Her second husband's financial position was proved to be at least equal to that of her late husband. It also appeared at the trial before the Supreme Court of Western Australia that the deceased husband had taken out an endowment policy on his life, and that, as the proceeds of this policy had formed part of his intestate estate, the widow had received her share of them. The Court awarded, in respect of the elder child, £300, and in respect of the younger child, £275. No damages were awarded the widow.

On the appeal, it was argued on behalf of the widow that the widow's chances of remarriage were relevant to the amount of damages to be awarded, but that the matter should be looked at by way of estimate as at the time of the death of the person that is the foundation of the claim, and that the circumstance that the widow had in fact remarried should not be taken into account. On this point the learned Chief Justice, Sir John Latham, at p. 350, said:

> Where actual facts are known, speculation as to the probability of these facts occurring is surely an unnecessary second best. Damages are awarded for injury actually suffered and for prospective injury. Prospective injury can only be estimated with more or less probability. But where the extent and character of what would at one time be described as prospective injury depends upon the happening of a particular event and that event has in fact happened, it is unnecessary to speculate as to whether or not this event might happen, and if so when. In such a case prospective damage (or diminution of damage) has become actual. I give a simple illustration of the general principle. A man is injured by accident and his eyes are gravely damaged. Immediately after the accident there is every reason to believe that he will be permanently blind. He sues for damages. In such a case he would not be given damages as for permanent blindness.

In the Chief Justice's opinion the case of *Williamson* v. *John I. Thornycroft and Co., Ltd.*, [1940] 2 K.B. 658, [1940] 4 All E.R. 61, is conclusive upon this point. In that case it was necessary to assess damages under the Fatal Accidents Act in the case of a widow. The widow died before the trial. It was held that the Court was entitled to take into account the fact that she had only a short tenure of life before her dependence was brought to an end. He was, therefore, of opinion that the learned Judge was right in holding that, in respect of support during the period following her second marriage, the widow had not suffered any pecuniary loss by reason of the death of her first husband.

On the point that the widow had received no damages, the learned Chief Justice referred to the assessable value of the probability of what the widow might have received in sharing in whatever estate her husband had upon his death at a later date. For this probability, in this case, there had been substituted an immediate and certain payment of a sum of £566 from the policymoneys. The excess of this benefit, which had actually been received, over the prospective and uncertain benefit of sharing on his death at some time in the future, if she lived long enough, he held to be more than equal to the lost benefit of support during her five months of widowhood. His Honour thought it was a reasonable conclusion that, in the circumstances, the widow suffered no pecuniary benefit in relation to the period of five months which elapsed before her second marriage.

Mr. Justice Starke agreed. He said that the fact that the widow had remarried, within a few months, a man whose financial position was as good as, if not better than, that of her former husband, the deceased, was a fact to be taken into consideration: *Williamson* v. *John I. Thornycroft and Co.* (*supra*); *In re Bradberry, National Provincial Bank* v. *Bradberry*; *In re Fry, Tasker* v. *Gulliford*, [1943] Ch. 35, [1942] 2 All E.R. 629.

Mr. Justice Dixon considered that the objection that the widow's position should have been considered at the date of the death of her first husband, with only the probabilities then existing as to her remarrying, was no longer tenable, as the decided cases were almost uniformly against it. He referred to the authorities cited by Starke, J. (*cit. supra*), and also to the authorities cited by du Parcq, L.J. (as he then was), in *Williamson's* case, at pp. 660, 661, 63, and those discussed by Uthwatt, J. (as Lord Uthwatt then was), in *Bradberry's* case, at pp. 42–45, 635–637, from which His Lordship said the principle was to be drawn that, where facts are available, they are to be preferred to prophesies; and to the cases cited by Williams, J., in *Trustees, Executors, and Agency Co.* v. *Commissioner of Taxes for Victoria*, (1941) 56 C.L.R. 33, 41, and in *McCathie* v. *Commissioner of Taxation*, (1944) 69 C.L.R. 1, 16, and *In re North's Settled Estates*, (1946) 174 L.T. 303, 305.

A consideration of the foregoing judgment will lead to the conclusion that, whether or not a widow's remarriage is a "gain consequent on the death of the deceased" within s. 7 of the Law Reform Act, 1936, is not so fantastic a question as might at first appear. It is accepted law that the chance of the remarriage of a widow is a relevant matter to be taken into consideration in assessing compensation to her for the pecuniary loss occasioned to her by the death of her husband, though it is incapable, it would seem, of any accurate valuation. The High Court of Australia considered that a widow's deprivation of a husband, in view of her early marriage, was so little in the nature of a loss to her that on the balance of profit and gain—allied to the fact that her second husband's financial position was at least equal to that of her first husband—she was not entitled to any compensation by reason of her first husband's death. Thus, the matter may yet come up for serious consideration in New Zealand; as it may well be asked whether, in view of s. 7 of the Law Reform Act, 1936, any pecuniary advantage a widow might gain through remarriage, and even the actual chances of remarriage, must not, in future, be eliminated in considering the assessment of compensation under the Deaths by Accidents Compensation Act, 1908.

The several cases of high authority cited above emphasize the point we set out to make at the outset of this article, namely, that the injury suffered by the individual dependant from the death of the bread-winner must, in view of s. 7 of the Law Reform Act, 1936, be assessed without reference in any way to the benefit also accruing from the death of that bread-winner, no matter what the source of such gain may be. Thus, we have seen, no account may be taken of the value of the inheritance of the dependants by reason of their sharing on the death of the deceased; or of the damages awarded at common law in an action for negligence against the wrongdoer, inclusive of the damages (if any) accruing to the estate of the deceased by reason of the survival of any cause of action vested in him at his death; as well as of the receipts by the dependants from any policy of insurance, superannuation scheme, or pensions benefit. As Ostler, J., pointed out in *Alley's* case, and as Lord Wright indicated in *Davies's* case, the effect is to undermine the principle of the Deaths by Accidents Compensation Act, 1908, and to give the dependants a possible overlapping of benefits, or an enrichment to such an extent that they are much better off by reason of the gain they receive by sharing the estate of the deceased, added to the benefit to them of compensation for the loss they received by reason of the negligent act of the person who caused his death. And that person, hit from two directions, feels the impact of s. 7 as a punitive provision: a result that both the language of the Deaths by Accidents Compensation Act, 1908, and the authoritative decisions for exactly a century since the passing of the parent statute, were equally at pains to obviate.

SUMMARY OF RECENT JUDGMENTS.

ANGEL v. COMMISSIONER OF STAMP DUTIES.

SUPREME COURT. Gisborne. 1946. July 1, 17. JOHNSTON, J.

Public Revenue—Death Duties—Medical Practitioner—Accounts Due from Patients—Value Unascertained at Date of Death—Accountant's Fee for ascertaining Amount of such Accounts—Whether Deductible as Expense against Value of Book-debts—Income Tax levied on Accounts paid to Administratrix—Whether deductible from Value of Book-debts—Death Duties Act, 1921, ss. 9 (1), 11, 72, 73—Land and Income Tax Act, 1923, s. 21 (3).

The appellant was the administratrix of a deceased medical practitioner, to whom large sums of money were owing by his patients at his death. Owing to the insufficiency of his memoranda of his attendances, she had to make extensive inquiries and employ a qualified accountant. Eventually the total value of the debts due to the deceased was agreed between the administratrix and the Commissioner of Stamp Duties at £4,000, which was taken into account in assessing the final balance of deceased's estate.

The appellant claimed that in determining the value of those debts, she might take into account as an expense against value, the accountant's fees amounting to £734 8s. 9d., incurred in ascertaining and settling the existence and quantum of the book-debts due to the estate.

The appellant also claimed as a deduction on the assessment of the dutiable estate of the deceased, income tax levied for the years ending March 31, 1943, and March 31, 1944, on income derived from the said book-debts received by the administratrix since the death of the deceased, on March 21, 1942.

On a case stated pursuant to s. 62 of the Death Duties Act, 1921,

Held, 1. That the sum of £734 8s. 9d. was an expense incurred in the administration of the estate after the deceased's death; and, therefore, it was expressly excluded from computation in the final balance of his estate by s. 11 of the Death Duties Act, 1921.

2. That the said income tax was not a debt by the deceased existent at the time of his death, as it had been levied on debts which came into the hands of the administratrix after his death, and had not accrued to the deceased as income.

Conway v. *Commissioner of Stamp Duties*, [1932] N.Z.L.R. 1260 referred to.

Counsel: *Sim*, K.C., and *Kember*, for the appellant; *Byrne*, for the respondent.

Solicitors: *Woodward and Iles*, Gisborne, for the appellant; *Crown Law Office*, Wellington, for the respondent.

WELLINGTON RUGBY FOOTBALL UNION v. NATHAN AND ANOTHER.

SUPREME COURT. Wellington. 1946. September 2, 11. O'LEARY, C.J.

Landlord and Tenant—Lease—Letting "on a yearly tenancy"—Whether an Agreement concerning Duration of Tenancy—Determination of Tenancy—When Notice to be given—Property Law Act, 1908, s. 16.

An agreement to let "on a yearly tenancy" is a tenancy "from year to year." Such a tenancy is a tenancy concerning which there is an agreement as to its duration, and therefore, s. 16 of the Property Law Act, 1908, is inapplicable. In order to determine such a tenancy, a reasonable notice terminating at the end of the first or any subsequent year of the tenancy is required.

Tod v. *McGrail*, (1899) 18 N.Z.L.R. 568, distinguished.

Counsel: *Sir William Perry*, for the appellant; *Putnam*, for the respondent.

Solicitors: *Perry, Perry, and Pope*, Wellington, for the appellant *Fell, Putnam, and Macandrew*, Wellington, for the respondent.

NEAME v. YOUNG.

SUPREME COURT. Nelson. 1946. July 9, 31. FAIR, J.

Carriers—Sea Carriage of Goods—Passenger's Luggage lost on Launch—No Ticket referring to such Luggage—Effect of Absence of Bill of Lading or other Shipping Document—Maximum Liability of Launch Proprietor—Sea Carriage of Goods Act, 1940, ss. 5, 6.

The provisions of Part I of the Sea Carriage of Goods Act, 1940, are confined, at least, to the carriage of goods in respect of which a bill of lading or other shipping document is desired; and s. 6 does not extend to the luggage of a passenger travelling without a ticket referring such luggage.

Semble, That does not apply to passenger's luggage at all.

Counsel: *Wicks*, for the appellant; *Scantlebury*, for the respondent.

Solicitors: *Gascoigne* and *Wicks*, Blenheim, for the appellant; *Ongley, O'Donovan and Arndt*, Wellington, for the respondent.

REFRESHER COURSE 7.

GIFT AND DEATH DUTY LAW.

Changes since 1939.

By E. C. ADAMS, LL.M.

A solicitor returning to practice in New Zealand after an absence abroad for the duration of the War, and applying himself sedulously to the study of our death and gift duty—as he would need to do, if desirous of giving sound advice to his wealthy clients—would soon observe, not without amazement perhaps, two outstanding features of the period, to wit, the considerable *increase* in the *rates* of death and gift duty, and the comparatively large amount of litigation which the taxpayers have had with the Stamp Duties Department. He would also notice that quite a large proportion of the litigation has concerned the value of share unlisted on the share-market. The increase in litigation as to the value of shares has probably been caused by the high rates of duty and a tightening up in the administration of the Department in this respect.

VALUATION OF UNLISTED SHARES.

The contest as to values usually hinges on the question of goodwill, the existence or *quantum* of which is always a most arguable matter.

What is goodwill? To my surprise I recently discovered that Dr. Johnson, "the Grand Cham" of English Literature, had a good idea of what it was. About the year 1781, Thrale, the wealthy brewer, died, having made Johnson one of the executors of his will. "I could not but be diverted," says Boswell, "by hearing Johnson talk in a pompous manner of his new office, and particularly of the concerns of the brewery, which it was at last resolved should be sold . . . When the sale . . . was going forward, Johnson appeared bustling about, with an inkhorn and pen in his button-hole, like an excise man; and on being asked what he really considered to be the value of the property which was to be disposed of, answered, 'We are not here to sell a parcel of boilers and vats, *but the potentiality of growing rich*, beyond the dreams of avarice.'"

Goodwill is the difference between the value of the business as going concern, and the value of the individual assets comprising that business. Goodwill is more likely to exist where the business is a monopoly or quasi-monopoly, or has the element of permanence.

A study of the numerous cases decided in New Zealand since the War shows that valuation of unlisted shares is not yet a science—still less is it an exact science. The Courts do not appear to place much reliance on the calculations of accountants, unless they also have had experience in buying and selling shares of the same nature. "In other words it is not so much an arithmetical or academic ascertainment of a figure with which the Court is concerned, as the attitude of mind to be expected of a man desiring to buy the shares. If I may say so, without discourtesy, I think there was a tendency on the part of the accountants called for the respondents to apply themselves to an interesting problem of accountancy rather than to attune their minds to that of an hypothetical person desiring to buy the shares" *per* Northcroft, J., in *In re Monro, Turnbull* v. *Commissioner of Stamp Duties*, [1944] G.L.R. 58, 59: see also the remarks of Fair, J., in *In re Crawford, Public Trustee* v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 170, 174.

Thus, also, when in the *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Commissioner of Stamp Duties*, [1943] G.L.R. 1, the chief witness for the Commissioner admitted that, if he had been valuing the shares for the purpose of advising a client who was a potential buyer of the shares, his valuation would have been lower than his estimate for the purposes

of the case, it was inevitable that the Commissioner's case could not be sustained. Conversely, in an unreported case dealing with the goodwill of a hotel, the Commissioner was able to sustain his valuation *in toto*, because a hotel-broker was able to prove to the Court that the hotel had been sold several times at a price approximating to the Commissioner's valuation: the Commissioner had based his valuation on the sale made to deceased shortly before his death. The Court did not appear to devote very much attention to the evidence of two accountants—one for the taxpayer, the other for the Commissioner—who had arrived at very divergent results.

The test always is, what would a willing purchaser give to a not unwilling seller? Fair market value means such sum as could be obtained under conditions where you have a willing, but not an anxious seller, and where you have all possible potential purchasers acting under normal circumstances brought into consideration: *In re Smyth. Smyth* v. *Revenue Commissioners*, [1931] I.R. 643, 653.

Gifts wherein Donors Reserve Interests.

During the period under review two important cases have been decided under s. 5 (1) (*c*) of the Death Duties Act, 1921, which is as follows:

> 5. In computing for the purposes of this Act the final balance of the estate of a deceased person his estate shall be deemed to include and consist of the following classes of property: . . .
>
> (*c*) Any property comprised in any gift, within the meaning of Part IV of this Act, made by the deceased *at any time*, whether before or after the commencement of this Act, unless *bona fide* possession and enjoyment has been assumed by the beneficiary not less than three years before the death of the deceased, and has been thenceforth retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise, if the property was situated in New Zealand at the time of the gift.

Donor Retaining Immediate Possession.—In *Shrimpton* v. *Commissioner of Stamp Duties*, [1941] N.Z.L.R. 761, deceased *twenty-nine years* before his death settled the fee simple of certain parcels of land on his children. Later he took leases back, first, from the trustees of the settlement, and afterwards from the beneficiaries, and remained in possession under these leases until the date of his death. Deceased, in short, was in immediate possession at the dates of the settlements and he was still in immediate possession at date of his death, having farmed the lands *continuously* for very many years. It is also important to note that the gift was a gift of the fee simple. The Court of Appeal (applying *Lang* v. *Webb*, (1912) 13 C.L.R. 503), held that the settled lands came in under s. 5 (1) (*c*).

Reservation of Beneficial Interest by Donor where Trust Property vested in Trustees.—The other case was in favour of the tax-payer, and was heard by the Privy Council, on appeal from the highest Court in Australia, *Commissioner of Stamp Duties for New South Wales* v. *Perpetual Trustee Co., Ltd.*, [1943] A.C. 425, [1943] 1 All E.R. 525. It decides that where a gift is constituted by a trust any interest reserved or excepted by the donor, is not a part of the gift, but is something not given and therefore s. 5 (1) (*c*) has no application. As that veteran English writer, Mr. J. M. Lightwood, puts it: "Where a gift is constituted by means of a trust it is the beneficial interest which is really the subject-matter of the gift." But the taxpayer in New Zealand cannot take too much hope from this Privy Council case, for the average settlement where deceased reserves a life-interest is caught by s. 5 (*i*) (*j*): the case does not in any way deal with that subsection.

Stamp Duty Law.

Duty payable on Transfers of Mortgaged Property from Trustees to Trustees or to Beneficiaries.—In stamp duty law I need mention only one case. After the coming into operation of the Stamp Duties Act, 1923, it was a moot point as to whether a transfer from a trustee to the devisee of a mortgaged land was entitled to be stamped as a deed not otherwise charged under s. 168, or was liable to *ad valorem* conveyance duty on the amount of the mortgage liability assumed by the devisee. *Pattison* v. *Commissioner of Stamp Duties*, [1940] N.Z.L.R. 93, was a transfer to the beneficiaries of settled land which had been purchased by the trustees, subject to an existing mortgage, in pursuance of authority conferred by the trust instrument, and the Commissioner had assessed it with *ad valorem* conveyance duty on the amount of the mortgage, basing his assessment on s. 82 of the Stamp Duties Act, 1923, which is the section which provides that on a transfer of a property subject to a mortgage the amount of the mortgage is deemed to be a conveyance on sale. The appellant, on the other hand, submitted that it was exempt under s. 81 (*d*), which exempts from conveyance duty a conveyance by a trustee to a beneficiary of property to which such beneficiary is entitled under the trust, to the extent to which he is so entitled at p. 96, l. 40. In deciding in favour of the taxpayer, Mr. Justice Blair, said:

> In my view, the transfer in this case is precisely within not only the words but the spirit of the exemption contained in s. 81 (*d*). A contrary decision would render all specific devises of mortgaged property in a deceased's estate liable to conveyance duty on the amount of the mortgage debt upon each devise.

His Honour also pointed out that if the Crown's submission were correct, a transfer of mortgaged property from one trustee to another on change of trustees would render the transaction liable to conveyance duty on the amount of the mortgage on each change of trustees. [It has never been the practice to impose conveyance duty on a change of trustees: s. 81 (*c*)]. As this case was not appealed against, it may be taken that the Crown has concurred in the result which may be expressed thus, that s. 82 of the Stamp Duties Act, 1923, must be read subject to ss. 81 (*c*) and 81 (*d*), and not that those subsections must be read subject to s. 82

RESTITUTION OF CONJUGAL RIGHTS

Practice Note.

The following Practice Note has been issued by Their Honours the Judges:—

Where a petition for the dissolution of marriage is founded on the respondent's failure to comply with a decree of the Court for restitution of conjugal rights, the Court will require, in addition to the evidence of the petitioner, corroboration of such failure, before the making of the decree *nisi*.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Statutes Amendment.—Sir Cecil Carr, in his introduction to the recent *Journal of the Society of Comparative Legislation*, refers to the necessity for minor preliminary amendment as a serious obstacle to progress with consolidation in England. In this Dominion, the practice of passing annually, since 1936, a Statutes Amendment Act, in order to amend a large number of dissimilar and unrelated Acts, provides a solution, although of a somewhat loose kind, to this problem. The often bewildered practitioner, searching for some elusive legislative pearl in this bran-tub of statutory amendment, will find the position as follows:—

Act.	*Sections.*	*Unrelated Acts.*
1937	30	20
1938	62	35
1939	70	42
1940	62	33
1941	87	44
1942	35	22
1943	30	20
1944	71	35
1945	93	44
1946	80	34

In the 1946 Act, the fascinated reader unearths the protection of bees running alongside the administration of trust accounts of deceased solicitors, and these accompanied by provisions for the removal of bodies for anatomical examination. Scriblex notes, without comment, that s. 79 deals with the academic head of Victoria University College, while the next succeeding section defines "wool" for the purposes of the Wool Industry Act, 1944.

Victorian Litigant.—Arrayed in a bonnet like a coif and a long black coat to resemble a barrister's gown, Mrs. Georgina Weldon was a well-known court character of Victorian times. She seems to have become badly infected with litigious virus after she had appeared, in person, on a claim for defamation and been awarded heavy damages. Her long suit was an action in trespass against anyone who, in her view, had done damage to her corporeal or incorporeal rights; and in most instances her action was as misconceived as such actions usually are, and she was mulcted in substantial costs. On two occasions, in consequence of libelling an impresario with whom she had quarrelled, she was sent to prison. But, to some extent, she was an exception to the old adage that "one who is his own lawyer has a fool for a client", since she enjoyed a married woman's immunity from costs, and was thus able to pursue to final appeal the expensive and uneven tenor of her ways. Her affidavits often commenced: "Weepingly, I make oath and say: . . . ." On one occasion, when a solicitor who had a judgment against her for costs appealed against the refusal of the Court to appoint a Receiver to collect income as it accrued from her trustees, Lord Esher, M.R., dismissed the appeal without calling upon her to argue, whereupon she vigorously protested against being deprived of the right to address. In this litigation which was exceedingly protracted, Montague Lush, Q.C. (afterwards Lush, J.), appeared throughout for the solicitor, and is said to have become so impressed by the protection then given to women by English law that he wrote his famous text-book, *Lush on Married Women*. To-day, the emancipation of women has resulted in the loss of certain immunities, but in the acquisition of other rights,—*e.g.*, the right to sit upon a common jury and thereby glean something of the wisdom of the modern world.

"**Oomph**"—It is doubtful whether the supplement to Burrows's *Words and Phrases* will contain any legal definition of "oomph", which called for interpretation in the Chancery Division last month, when an American footwear company appealed against the refusal of the Registrar of Trade Marks to register the word "oomphies" as a trade mark for its products in Britain. The appeal was allowed, Evershed, J., holding that there was no improper or salacious significance in applying the word to women's footwear, although he doubted whether it deserved the dignity of being considered articulate human speech. In *Origin of Words* (1939), Tamany describes "oomph" as "an articulation of common male appraisal of a personable girl", and refers to the film actress Ann Sheridan as the first "oomph girl of America", this distinctive honour being conferred upon her in 1937. There was precedent in the case of Clara Bow, who typified "it" for an earlier generation. The verb, *to de-oomph*, currently used in Hollywood, is of the same genre as *to delouse*, which appeared during World War I, and *to debunk*, for which Callan, J., has a fondness, according to a statement made by O'Leary, C.J., during his reply to the toast of "The Judiciary" at the Wellington Bar Dinner. And, speaking of food, "oomphburger" is defined by Dwight L. Bollinger as "a *hamburger* served with *oomph*". It must be evident that the humble sausage infused with animal magnetism or spine-tingling emotion would thereby have a greatly enhanced status. When the appropriate occasion arises, it can only be hoped that judicial notice will be taken of this fact.

A Harsh Judgment.—Exhibits in a case in the Court of Appeal the other day served to remind Scriblex that there are still practitioners who prefer to spell judg(e)ment with its mute and seemingly parasitical "e." Worthy men all, they adhere tenaciously to the form sanctioned in the Revised Version of the Bible. There was one well-known writer on legal subjects who some years ago had a difference of opinion on this point with Dawson Williams, editor of the *British Medical Journal*. He wanted the scribe to adhere to the Biblical rendering, but the latter argued that in modern literature the middle "e" was invariably omitted. "In legal textbooks, for example———," he said. "Legal textbooks!" snorted Williams, "surely, you don't call *them* literature."

From My Notebook.—"Judges are entitled, if they form the opinion that a witness is not trying to help the Court, to do what counsel cannot do, and say: 'You behave yourself, and tell me the truth.' It is sometimes very useful to be able to say that. Sometimes it pulls a witness together and makes him say what is the truth, but, of course, it must not be done until the witness has given some indication that he or she is not trying to tell the truth."—Humphreys, J., in *R.* v. *Bateman*, (1946) 110 J.P. 133.

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Lands Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 88.—*In re* B.

Rural Land—Compensation—Land taken by Crown—Committee's Award—Appeal by Owner and by Crown—Productive Value—Expenditure—Maintenance and Depreciation—Locality Value—Potential Carrying Capacity—Capacity for Development—Buildings—Excess or Deficiency—Servicemen's Settlement and Land Sales Act, 1943, s. 53.

(*Concluded from p. 204*).

"*Manuka-covered area.*—The Crown acknowledged in its budget that an area of 152 acres at present covered by manuka scrub and of no immediate farming value should be credited at the rate of £2 per acre. The claimant, on the other hand, called evidence to the effect that the manuka could be sold for firewood, at a profit equivalent to £2 15s. per acre and that the land, after clearing, would be worth £6 an acre. On these grounds the claimant asked for a sum of £1,277 10s., being 152 acres at £8 15s. an acre. The Court is impressed by the fact that the initial claim filed on behalf of Mrs. B. made no claim in respect of this scrub-covered area, nor did any of the reports and budgets filed by the claimant make any reference thereto. The Crown invited the Court to draw the inference that it was only after its valuer had very fairly allowed a sum of £2 per acre for what is at present almost a derelict area of land that the claimant realized that some claim could properly be made under this heading and that in fact the Crown's offer was an adequate and, indeed, a generous one. The Court was not impressed with the possibility as envisaged by Mr. McD. of turning the manuka on this area to commercial account. Mr. McD. admitted that the timber would have to be taken out over an adjoining property and that his whole scheme was dependent upon the adjoining owner granting a right of access. Up to the present time this area has been of no value whatever to the Pukeatua property, and we are of opinion that the sum of £304 allowed by the Crown represents its full value.

"*Locality value.*—The favourable situation of this property in relation to the town of Dannevirke was strongly relied upon by the claimant as a ground for allowing a special value under s. 53 (2) (*c*). It cannot be denied that by reason of its proximity to sale-yards, educational facilities and other amenities of a substantial town, the property is more attractive than were it situated in some more distant locality. In so far as easy access reduces cartage and labour costs, it is, of course, reflected in the budget and leads to a higher productive value. There are, however, other advantages accruing from proximity to town which in no way facilitate production. It is not, however, in our opinion, the intention of the Act that an increase should be allowed over and above the productive value of a farm property merely because it possesses these advantages. Any allowance above the productive value involves a capital outlay in excess of the amount justified by a reasonable forecast of actual production, and it would be more appropriate to depreciate a property lacking such advantages than to increase the price of the property which enjoys them. It is the clear intention of the Act that the productive value should, in normal circumstances, be the basic value of farm properties. It is obvious that if a sum is to be added to the productive value in every case where a property is advantageously situated in respect of access to town or other amenities the productive value would no longer provide a stable basis of valuation and all properties in the vicinity of towns would be loaded with an additional capital cost on which there would be little prospect of the actual farming income providing a return. The Court is, therefore, of opinion that no locality value can properly be allowed, notwithstanding the advantages claimed for this property by reason of its position. In the case of a property lacking normal or reasonable amenities by reason of its situation, the proper course would be to make a deduction from the productive value. We think, moreover, that before an addition for 'locality value' can properly be added to the productive value of farm land, some unusual or abnormal advantage arising from its locality, such as a subdivisional value due to a prospective demand for the land for industrial or housing purposes, must be shown to exist.

"*Capacity for development.*—The Committee, for reasons set out in the chairman's report, allowed a total sum of £4,151, or £1 per acre, as an addition to the productive value by reason of what it held to be the capacity of this property for future development and Mr. O'Leary, on behalf of the claimant, urged that the Court should adopt the reasoning of the Committee and should allow, under this heading, at least the sum so awarded. It is evident that the Committee accepted the opinion expressed by Mr. S. that with the application of a higher rate of fertilizer the Pukeatua property would be capable of a greatly increased carrying capacity, with the consequence of a considerably increased production, and thought that because the purchaser would have the opportunity of obtaining this increased production it would be fair to credit to the vendor and to charge to the purchaser an additional £4,151, or £1 per acre above the amount determined as the 'productive value.' This argument, in the view of the Court, is based upon two fallacies. The first is that by some simple expedient such as the application of one hundred tons of fertilizer per annum the carrying capacity, and therefore the production of this property, can be greatly enhanced. The second is that in the present case any increase in production which is in fact likely to be achieved by the purchaser should be capitalized in favour of the vendor instead of belonging to the purchaser responsible for such actual increase. The Court has no hesitation in holding that the weight of evidence is entirely against Mr. S.'s contention that the carrying capacity of this property can be readily increased. His own management of the property for over ten years has produced no such increase. In the years 1938 and 1939, Mr. S. applied over eighty tons of fertilizer per annum, but his flock returns gave no indication of any substantial increase in carrying capacity resulting therefrom, and it is significant that notwithstanding that there was a free market for fertilizer during 1940 and 1941 Mr. S. reverted, during those years, to the application of much smaller quantities. It would seem from the evidence that the application of fertilizer to pastures comprised in the main of native grasses which, in fact, cover all but a very limited area of Pukeatua, is of very doubtful value. The Crown has allowed for fifty tons of fertilizer, which appears to be ample for such portions of the property as are in English grasses and, in the opinion of its experts, the application of a greater quantity would be uneconomic and would have no substantial effect on the carrying capacity. We are, therefore, of opinion that any claim for potential value based upon the supposed capacity of Pukeatua for immediate and substantial development must fail.

"It should be remembered that Mr. McK. envisages both higher income returns and a higher carrying capacity than have in fact been achieved by Mr. S., so that his budget would appear to make reasonable allowances for any degree of understocking which can be established on the part of the claimant.

"Mr. O'Leary developed the argument that unless such a capacity for substantial development can be foreseen, the property must necessarily be unsuitable for subdivision and for the settlement of returned servicemen. We are not satisfied that this view is necessarily sound. Assuming that the property is at present developed to its full capacity as one unit, it may well be that when subdivided into several units each may be capable of providing an adequate living for a returned soldier, without any substantial change in the aggregate capacity of

the property viewed as a whole. On the other hand, notwithstanding the views expressed by the Crown's witnesses as to the difficulties attendant upon further development, the Court has little doubt that with more intensive farming, after division into smaller areas, there will in fact be some increase in the aggregate carrying capacity and income returns. Such increase will, however, in our opinion be entirely due to the efforts of the new owners who will be justly entitled to the full benefit of such increased productivity as they may be able to secure. The Court is, therefore, unable to agree that any amount should be added to the productive value for 'capacity for development' and the amount awarded by the Committee under this heading must be disallowed.

"*Excess or deficiency in buildings.*—The final matter requiring consideration is whether any amount should be added to or deducted from the productive value by reason of the fact that the value of the improvements on the land exceeds or is less than the value of improvements normally required. It is not contended by either party that the improvements differ from the normal in any respect save with regard to buildings. As to them, however, it is contended by the claimant that the value of the existing buildings is considerably in excess of normal, but by the Crown that there is a serious deficiency in buildings. The facts as they are found by the Court are as follows:—

"There is on the property a house or cottage suitable, subject to repairs and possibly to additions, for occupation either by the owner or by his head shepherd, together with quarters for all other employees, other incidental buildings, and yards. Assuming, however, as the Court holds to be the case, that the buildings normally required include a suitable dwelling for the owner or manager in addition to a dwelling for the head shepherd, it is clear that the property is deficient in that it is provided only with one house, where two are normally required. The existing dwelling in its present state is suitable for a married shepherd, but not for an owner-manager, and it would seem that an owner buying this property would either erect a new dwelling for himself, or (if he chose to erect a new house for the shepherd) would effect substantial improvements to the present house for his own use. In either case the Court is of opinion that an expenditure of not less than £1,890, as claimed by the Crown, would have been required in 1942, to supply the deficiency in housing.

"In addition to the buildings before mentioned, there is a woolshed, or rather a unit comprising woolshed, covered dip and implement shed, which is without doubt more expensively built than a normal or average woolshed which would have done duty for this property. The owner claimed that the value of the woolshed unit in 1942 would be over £3,000 (Mr. W., indeed, valued it at nearly £4,000) and as it seems to be clear that buildings of normal standard would not have cost more than £1,500, it was urged on behalf of the claimant that a substantial sum should be allowed for an excess in the value of the woolshed unit.

"The estimation of such a sum as may properly be so added or deducted naturally presents some difficulty and the intention of the Legislature was discussed by Finlay, J., in the decision reported as No. 73, *P.T. to S.* It was there pointed out that the value of an excess or deficiency in buildings cannot be assessed merely by reference to cost.

"By what criterion, then, is such 'value' to be determined? It is pertinent to remember that the purpose of any adjustment in the productive value is to secure a 'fair value' for the purposes of the Act. It is conceived that the discretion vested in the Court is intended to be exercised in such a manner as to arrive at a basic value or price which is fair to all parties having regard always to the provisions and purposes of the Land Sales Act.

"We think that justice will be done and a fair value arrived at if we assess, upon the evidence, the amount which an average willing buyer would be prepared to pay and which an average willing seller would reasonably be prepared to accept in addition to the productive value, by reason of any building which is in excess of the normal, and similarly if we assess the amount by which an average willing buyer would reduce his offer, and which an average willing seller should reasonably be willing to allow, by reason of a deficiency in buildings.

"We are satisfied that if in a free market it were left to vendor and purchaser to make their own assessment of the monetary sum to be added in respect of an excess or to be deducted in respect of a deficiency in buildings, entirely different considerations would govern the evaluation of an excess from those governing the evaluation of a deficiency. An excess of buildings is generally in the nature of a luxury: it adds little if anything to the productive value, and it involves the purchaser not only in an unproductive outlay of capital, but in increased annual charges for maintenance and depreciation. In a normal free market a vendor might reasonably be expected to have to discount his excessive improvements heavily, in order to effect a sale. A deficiency of buildings, however, means that something which is necessary for the production of the anticipated income is missing and must immediately be made good by the purchaser. Notwithstanding that buildings of considerable age would suffice to enable the budgetted income to be earned, a purchaser has no option but to erect at present day costs such necessary buildings as may be lacking. It is conceived, therefore, that in a normal free market a purchaser would properly seek and obtain a substantial reduction in the price to go towards his outlay involved in the erection of necessary buildings.

"To apply these considerations to the present case, we find on the one hand an exceptionally elaborate and well-built woolshed unit, but one built with little regard to expense and adding little to the productive value of the property, save as to convenience of working. On the other hand, a necessary house is entirely lacking. We cannot believe, however, that any purchaser would consider, or could properly be expected to consider, this elaborate woolshed as the equivalent in value to him or to the farm of a necessary house. It is our duty to assess what we consider should be allowed for the one and deducted on account of the lack of the other

"We are satisfied that the woolshed unit cost very much more than the sum of £1,500 or thereabouts which would be the normal cost of suitable but less pretentious buildings. On the evidence, voluminous though it was, we find it difficult to assess its actual cost in 1937, or its value in 1942 on a cost-less-depreciation basis. Be it sufficient to say that we do not accept the very high estimates of value submitted on behalf of the claimant, and we doubt if the value of this unit upon a 'cost' basis has ever exceeded £3,000. In our view, however, the cost of these buildings is largely immaterial. The question is their 'value' to a purchaser, or the amount which a purchaser should reasonably be asked to pay for their excess beyond the normal in value and convenience. After giving careful consideration to all the evidence we consider £600 to be a fair sum to add to the productive value on this account.

"Coming now to the house, we are satisfied that an expenditure of not less than £1,890 would have had to be incurred by a purchaser in 1942, as claimed by the Crown. After this outlay the purchaser would have had the benefits and amenities of a new house, but apart from such minor advantages he would be no better off than had there already been a house upon the property and one of a considerable age and erected at much less cost. In our view, therefore, a purchaser in 1942 would reasonably have been justified in asking for a reduction from the productive value equal to the whole of his estimated expenditure in necessary housing improvements, subject only to a fair allowance commensurate with the advantages he would receive from having the benefit of a new house to his own design. We are of opinion that the sum of £1,500 should be debited against the productive value by reason of the lack of this necessary house.

"As to the other buildings on the Pukeatua property, we are of opinion that in general the minor buildings are somewhat in excess of normal. Without finding it necessary to attempt to value the remaining buildings in detail, we consider that justice will be done by allowing a further £200 to the claimant on this account.

"It was agreed that the award of interest as made by the Committee should not be disturbed. The remaining claims made by the claimant were not proceeded with.

"Summarizing the findings of the Court as above set out and making the adjustments which have been provided for, the basic value of the Pukeatua property is therefore assessed and compensation is awarded, as follows:—

	£ s. d.	£ s. d.	£
Net income as per Mr. McK.'s budget			1,670
Deductions allowed from expenditure side:			
A/c Casual shepherd	36 0 0		
,, General-hand and scrub-cutter	52 0 0		
,, Bulls	10 10 0		
,, Haymaking	55 0 0		
,, Fencing	19 0 0		
,, Rates	7 0 0		
		179 10 0	

Additions allowed :					
Maintenance buildings	9	0	0		
Depreciation buildings	9	0	0		
Maintenance Plant	25	10	0		
Depreciation Plant	32	0	0		
Interest on stock and plant	10	0	0		
				85	10	0
Net reduction in expenditure						94
Amended net income						£1,764
Productive Value : £1,764 capitalized at 4½ per cent.						39,200
Allowance for Plantations						340
Allowance for area of 152 acres						304
						£39,844

Less Building Deficiency :						
Deficiency in house				1,500	0	0
Excess in woolshed	600	0	0			
Excess in other bldgs.	200	0	0			
				800	0	0
						700
Basic Value ..						£39,144
Six months interest on mortgage to be repaid ..						70
Compensation Awarded						£39,214

"The claimant is allowed interest on the compensation moneys at the rate of 4½ per cent. per annum from the date of possession to date of payment."

CANTERBURY LAW SOCIETY.

Annual Bar Dinner.

The annual Bar Dinner of the Canterbury Law Society, held on October 1, was a great success. There was a large gathering, thoroughly representative of practitioners in the Society's district.

The President, Mr. L. D. Cotterill, presided, and welcomed the Society's guests: His Honour Mr. Justice Smith, Dr. E. D. Pullen (representing the British Medical Association), and the three local Magistrates, Messrs. H. P. Lawry, F. F. Reid, and Raymond Ferner.

The Common Law.

After the loyal toast, Mr. A. T. Donnelly proposed the toast, "The Common Law." The full text of the speech appears on p. 257, *ante*.

Mr. Edgar Bowie, who replied to the toast, said that at first he was a little embarrassed by what appeared a totally unmerited supposition. He thought the Committee must be attributing to him a knowledge of the history and development of law which, in this busy post-war time, he had not yet, unfortunately, had the time or perhaps the industry to acquire. But then, when he heard that the proposer was to be Mr. A. T. Donnelly, it occurred to him that the Committee was disposed to present a study in contrasts. On one hand Mr. Donnelly, with all the weight which he carries, on the other—I to respond. On the one hand the proposer with the facility of expression, the easy humour which only Irish blood can produce. On the other, the respondent of mixed Scots and English descent, with the dour Scot somewhat prominent. He remarked that he was glad to hear Mr. C. S. Thomas say, "Hear! Hear!" because he was going to point out that the dourness was fostered and nourished for three years in the office of the President of the Caledonian Society.

"This is an important toast, because it emphasises the tradition of Law," Mr. Bowie said. "In these times of change people are inclined to be sceptical of tradition. 'Something new! Something new!' is the cry—making change an end in itself, rather than a means to an end.

"At least I should tell you upon whose behalf I am responding to this toast. I am speaking for all those who made the Common Law, for those who now administer it, and for those who practise under it.

"Those who made the Common Law were indeed the Legal Giants. I speak for all that illustrious line from the days when the Common Law can be said to have been firmly established until to-day when it is so cherished and should be jealously guarded.

I speak for Chief Justice Glanville who held office in 1180 in the reign of Henry II; for Lord Coke, whose love of liberty and hatred of tyranny cost him his office at the hands of James I; for the silver-tongued Lord Mansfield, to whose decisions the Law of Contract owes so much. And for all those other less-known but strong Judges who carried on, strengthened, and developed the principles laid down by their more famous brethren.

"I speak for the Sergeants-at-Law, who valiantly fought the introduction of the Roman Civil Law by refusing the graduates of Oxford and Cambridge the right of audience in the Common-law Courts.

"You may think me impudent or at least presumptuous in taking upon myself the right to speak on behalf of such illustrious men, but the only reason I do so is because they cannot speak for themselves.

"I represent our present New Zealand Judges and Magistrates also, because they administer the Common Law. But if I do not mention any by name it is because they are very much alive, and able to speak for themselves much more forcibly than I can.

"I speak also for those who practised the Common Law: for those ancient pleaders to whose precision, care, clarity of mind the Common Law owes much of its best characteristics. I represent Mr. Bullen of the famous Bullen and Leake partnership. Bullen was nothing if not careful, as can be seen by the story which will probably be known to many of you, of the pleading in a seduction case "The defendant denies that he is the father of the said twins—or of either of them."

"Let me turn for a little while to what the Common Law is. It has been described as 'a unique contribution to the civilization of the World.' Chief Justice Coke described it as 'nothing else but reason.' It rose supreme over the inclination towards the Roman Law as exemplified in the Court of Star Chamber. It refused to acknowledge the despotic doctrine of the absolute Royal Prerogative. It declared the liberties of the subject: free speech: right of proper trial: privilege of Judges, jurors, counsel, and witnesses. It stood unchallenged for 200 years from James II onwards.

"The basic assumptions of liberty and justice which we revere in this land, on the other side of the World are dependent on the Common Law.

The men who made this Law, or more properly, who declared it, were described by Lord Bryce as 'having plenty of acumen, plenty of logical vigour, but not running to the spinning of theories or the trying of experiments.' In fact, they were typical Englishmen, insular, jealous of liberty, conservative, and critical. Some were direct of speech, caustic of wit, and impatient of humbug.

"As I have to touch on ancient history I may be forgiven for picking a chestnut out of the fire to illustrate this. Mr. Justice Maule, one of the caustic Judges, once tried a libel action. There was a good deal of heat on each side and public opinion was roused and fairly evenly divided. After the trial had proceeded some days, counsel for the plaintiff rose and said 'M'Lud, I have a protest to make. Since the case opened I have received anonymous letters, very threatening letters, very hostile letters. I wish to protest.' Counsel for the defendant rose: 'M'Lud, I also have received anonymous letters, very threatening letters, very hostile letters, and I wish to add my protest to that of m' learned friend.'

"'That's all right, that's all right, Gentlemen,' said the Judge, 'I also have received anonymous letters, very threatening letters, very hostile letters directed against me. But it ill befits me sitting in this place to tell you what I did with them sitting in another place!'

"As I was to reply on behalf of those who developed and declared the Common Law, I went to our Library, in what was the Judges' bay. There are to be found many old books well worthy of some study, if only we had more time. But I browsed through some of these to see what kind of men were these who gave us the Common Law.

"As I did so the yellow dust from the leather bindings came off on my hands and coat. I was reminded of the story of

Baron Parke, who had a profound reverence for ancient precedents. He was asked to advise the House of Lords and while there was seized with a fainting fit. Restoratives were applied without effect. But when a musty volume of Statutes was held to his nose and the dust rubbed off under his nostrils, he at once opened his eyes, gave them a rub, and in a few seconds was as well as ever.

"I looked at *Foss's Judges of England*, from 1066 to 1870, and browsed here and there.

I looked up Lord Coke. I found he was obsequious and subservient when Speaker of the House. I found that he was brutal as Attorney-General. I was told of his language in the trial of Sir Walter Raleigh where, among other pleasantries, he said: 'Thou art thyself a spider from hell.'

I was told that his second marriage was celebrated without banns or licence. He narrowly escaped excommunication and got out of it only by a humble submission to the Archbishop of Canterbury by pleading—what must have been a novel plea for him—Ignorance of the Law!

"When he became a Judge his whole manner changed. He was arrogant and proud. Yet with all his faults he was a man of great learning and his writings were the wonder of his age. He refused to bow to the King on the question of Commendams and was dismissed from office.

"I then skipped a bit more than a century and found John Willes, Chief Justice of the Common Pleas in 1737. A man of learning and ability, but out of Court intriguing and ambitious, and of very questionable private morality.

"Towards the end of that century I was glad to find that Judges were becoming more respectable.

"I turned to Lord Mansfield, whose fairness and whose ability lent lustre to the Bench. He should not be thought of only as the father of the Commercial Law, but remembered also as the Judge who decided that a Jamaican slave could not be sent out of England against his will—slaving being odious to English Law. His love of liberty was characterized by his toleration to the persecuted in the No-Popery riots, when his house was burnt down by the mob. Yet he was scrupulously impartial in the trial of Lord George Gordon whose harangues had so inflamed the mob.

"I turned to Lord Abinger—formerly Sir James Scarlett, the foremost advocate of his day. He had had an extraordinary influence over juries—appealing to their understanding. He took great pains with all his cases, and refused to take fees for briefs when he could not attend to the case. He might have been the model for that verse of Gilbert, who wrote:

Ere I go into Court I will read my brief through,
(Said I to myself—said I,)
And I'll never take work I'm unable to do,
(Said I to myself—said I.)
My learned profession I'll never disgrace
By taking a fee with a grin on my face,
When I haven't been there to attend to the case,
(Said I to myself—said I!).

"He was an advocate in advance of his times, when thundering periods and bullying cross-examination were so often heard. But as a Judge, he was like some other Judges of quite modern times, in that he made a habit of deciding which party was right and arguing in his favour. It is said that poetic justice was done, as juries irritated by this often gave judgment to the other side.

"I do not go further, because I found all these and others were ordinary men with the faults and foibles of ordinary men. Nevertheless they left their mark by the pronouncement of the rights and liberties of the common man.

"Then I turned to the question of the future of the Common Law.

"The Common Law is in peril. It is in as great danger now as it was in the days of the Tudors and the Stuarts. It was then saved by the Great Rebellion in the reign of James II. From then on it has stood as the guardian of English rights.

"But what now?

"Social experiments are promoted by statute after statute. Economic controls are imposed by regulations. There are petty tribunals created and often presided over by persons without judicial training. Rights of appeal are being limited. Control of lesser tribunals by *certiorari* and prohibition is being curtailed. The lesser tribunals are not bound by the precedents of the Common Law. There is a tendency towards codification—the scrapping of the established Common Law in favour often of hastily-conceived and often sectional legislation.

"We are living in a rapidly changing world. In fact last week just as I was leaving home for the office I was horrified to hear the radio announcer say that the next section of the programme was the 'Co-respondents talk to schools!'

"But leaving the children to the 'Co-respondents' and returning to the Common Law, it can be seen that there is a steady process of attrition which is making inroads on the liberties of the subject. It is also impairing both the function and the status of the judiciary. Economic justice is the plea. But we all have different ideas of economic justice, which may well become like Equity before Lord Eldon 'as long as the Chancellor's foot.'

"Contract is no longer sacred. Torts are giving way to absolute liability. Ownership carries with it no longer its former rights.

"Sir Henry Slesser recently asked the question 'Is it possible to maintain the old traditional Common Law in this collective age?' He ended a recent article dealing with these matters, in the *New Yorker*, by pointing out that only in the greater part of the British Empire and in the United States has the Common Law found favour. He pointed out the coincidence that only in those countries has that peculiar blend of liberty and order, of toleration and duty, found a permanent footing. He ended with the words:

> The future of the common law is plainly much more than a matter for lawyers. The Law of England is a unique contribution to Christian civilization; its decay may prove to be one of the greatest tragedies of our age.

"Speaking again to the Toast, I point out that there are rays of hope. If the profession and the public will watch jealously over the Common Law and right unreasonable, or unnecessary change, all may yet be well.

"The Common Law is still a living force and we do not have to look far for its supporters. Our last Chief Justice, Sir Michael Myers, has always been vigorous in the defence of the Common Law and its institutions. Looking to England, I remind you of the dissenting opinion of Lord Atkin in *Liversidge* v. *Anderson*, where detention under Order of the Home Secretary acting under emergency legislation was in issue. Lord Atkin said:

> I view with apprehension the attitude of judges who, on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive.

Strong words, Gentleman, for a Judge to use. He pointed out that he had listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I. And he struck a note of reassurance and of pride in our Common Law when he said:

> In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which, on recent authority, we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

The Profession.

The toast of "The Profession" was proposed by Mr. H. P. Lawry, S.M., Senior Magistrate at Christchurch.

Although the title was a wide one, Mr. Lawry said that he proposed confining most of his remarks to the local Law Society.

"There has been considerable comment of recent years about the B.M.A. being a large and close corporation, and similar to a trade union in many respects, but to my mind the similarity is limited to the uniting together," the speaker continued. "The Law Society, too, is a united body; but just as different from a trade union as the B.M.A. The difference, mainly, is one of the aims and objects. A trade union's purposes are mainly for the benefit—mainly financial—of its members, such as extra pay, better working conditions, or terms of employment. Whoever heard of a trade union having as its object the safeguarding of the interests of employers, or the maintaining or raising of qualifications of its members? Yet, with both the B.M.A. and the Law Societies, the main purposes indicate the safeguarding of the interests of clients (who are to be likened to employers), by ensuring a proper standard of ability, qualifications, and professional conduct. The main objects are such as to safeguard the interests of clients, not to see how great an amount of money can be secured for themselves as individuals." Mr. Lawry said that he had been associated with the profession for forty-six years, approximately half of which was spent as a law clerk or practising solicitor, and half on the Bench. Whether in practice or on the Bench, there was always a decided preference that Court cases should be conducted by members of the profession rather than by the litigants in person.

"Your local Society was originally called 'The Law Society of the Province of Canterbury,'" he proceeded. "Its minutes disclose that the first meeting was held on October 16, 1868, so to-night can be termed the Society's seventy-eighth anniversary. Eleven practitioners were present at the first meeting, and rules were adopted.

"At the next meeting—on December 1, 1868—officers were elected as follows: President, Mr. T. S. Duncan; Treasurer, Mr. P. Hunmer; Secretary, Mr. Nottidge; Council, Messrs. Fisher, J. S. Williams, W. H. Wynn-Williams, and Fereday.

"On December 22, 1868, complaints were dealt with regarding unqualified persons practising as solicitors. Three complaints were investigated, but no action was taken. It will thus be seen that there was no delay in the Society being vigilant to protect the public from the risk entailed by engaging persons without proper qualifications.

"Law Societies generally continue to watch the interests of the public in this way. One of my earliest duties on appointment as Magistrate was to deal with a person charged with acting as a conveyancer, while unqualified. One of the persons against whom the complaint was made in 1868 ultimately became one of the leaders of the Bar in an important Provincial town in the North Island.

"At a general meeting, held on September 17, 1869, ten members were present, and there were three apologies for absence.

"The first Annual General Meeting was held on December 1, 1869, and at that date the members numbered nineteen. The first Bar Dinner was held on the same date, and an invited guest was Mr. Justice Gresson. A few days ago, Mr. Hensley showed me a sheet of the names of the Council of the Society and the members for the year 1894–1895, with corrections for the following year. By the favour of your President, I have the paper here to-night for inspection. The members at that time numbered forty-nine, and of those forty-nine I think only Mr. T. D. Harman survives.

"To-day, the roll of members has increased from a small beginning of eleven, to 190, including one lady, Miss Raymond, of Timaru."

In conclusion, Mr. Lawry wished the profession and particularly the Canterbury Society, continued prosperity.

In replying to the toast, Mr. G. Lockwood said that one of the few remaining pleasures of the practice of the profession of the law was in their relationship with the Bench. No practitioner could fail to add that this is due to the Bench being still recruited largely from the ranks of active practitioners. It was no secret that the proposer of this toast, having served already in Christchurch, was as glad to return to them as they were to welcome him home. This was surely one of the strengths as well as one of the pleasures of the profession, and the speaker doubted whether other high officials whom he named would ever be entertained by their subordinates on quite these terms. The speaker continued: "This is a levelling age when the coinage of words has become as debased as our Reserve Bank notes. So the word 'profession' has suffered with many others, and your leveller labels us either as trade unionists or as members of an anti-social brotherhood of charlatans. From either point of view, he seeks to regulate us into his pattern of bureaucracy. You have heard some of the troubles of the Common Law, but here the conveyancer surely suffers more than the common law man. Think only of the agonies of any one of these harmless recluses confronted first with the Mortgage Adjustment Commissions, then with the Fair Rents Act, and now the Land Sales Court. His craft has become a bush-lawyer's dream, and a conveyancer's nightmare. When a client quotes a land agent's opinion to him, he may well question the whole foundations of society.

"Of course, the Court man has his crosses, too—the Manpower Committee, the Transport Licensing Authority, the Price Tribunal, and all the other quasi-judicial authorities he is called upon to face without benefit of rules of any kind, least of all the laws against perjury. Of these quasi-judicial authorities, it may be said that the politician emphasizes their judicial status until he wishes to get rid of one, while the lawyer emphasizes their quasi-ness until he is appointed to one. However, in that adaptability lies, perhaps, the high survival value of both the politician and the lawyer.

"When we think of the past glories of our profession and its present state, those ambitious for it or for themselves may be tempted to despair. The Rushbrook Report, if taken literally and in too large doses, would justify the deepest pessimism; but the profession has humanized many counsels of perfection since barristers were forbidden to take fees; and I rather suspect that the advocate, the man of counsel, and the man of business will always have their rewards. In the history of England the law has been well called the strongest of the profession and the most conservative. It should always conserve man's permanent values; but I think its strength in the long run depends no less on adaptability and cohesion than on conservatism.

"After the levellers of the Commonwealth came the Restoration; and I am apt to believe that, after these present-day levellers, the profession will come into its own again. Meanwhile we have our consolations, not the least being that we can be here together to-night."

Basic Value.

The toast of "Basic Value" was proposed by Mr. E. B. E. Taylor, who, after dealing with the extremely elusive nature of "Basic Value" as at present set out in the legislation of this country, drew an analogy between the various magicians who have visited New Zealand, and the evasive tactics adopted with respect to the "little friend" they were toasting. He then illustrated his point by quoting from the judgment of Mr. Justice Worthy, in the unreported case of *In a Proposed Sale by Sally Sold*. He said:

"Mr. Justice Worthy puts a good example in his rather homely judgment in *In re a Proposed Sale by Sally Sold*, an unreported case, heard at Puddleton in the Marsh. The case is in point in this country as the wording of the English legislation is identical with our current Act here. In fact, it might reasonably be submitted that each was copied from the other. The case concerned the sale of the Little Puddleton Manor. It had been in the Sold family for generations, but, owing to the declining fertility in the male line, and the fact that the estate was entailed and consequently could not pass to the rather extensive line of illegitimates begat by the girls Sold, Sally Sold was faced with selling the property. The property consisted of 61 acres 3 perches, and it had many buildings, the principal one dating back to 1645.

"In the course of his judgment, His Honour says:

'The concept of basic value is one of the most elusive that the erudition of juristic ability has had to attempt to solve in more recent years. In this case I have followed the statute as carefully as possible, and I fixed the basic value at £5,617 11s. 7d. Then I felt that I should give full consideration to the further directions in the section to see if the basic value I had fixed was, in addition, a fair value.

'The first is the nature of the vendor's title. This, everyone knows, is an entailed estate, a form of estate that is becoming all too rare in England—if it is worth a penny I feel it is worth at least £500, even in the depreciated currency of to-day. This made the price £6,117 11s. 9d.

'Then I had to consider the value of the improvements and decide whether *in toto* they exceed—*i.e.*, are more than, or less than, the value of those normally required. Here was a poser indeed. The main buildings are exactly 300 years old. That is not old for England, but it is by modern conception. The house is wooden, but as no evidence was led on the point, I do not know if it had borer or not. My conscience, a few years ago, would not have allowed me to calculate depreciation on such a building at less than 2 per cent. I admit my conscience has become more elastic with my advancing years, but stretch it as I would it threatened to snap at 1 per cent. In the absence of any evidence as to its original costs or of any subsequent sale since 1691 (which at this date is pure assumption of which this Court can take no, or at least very little, cognizance), I felt bound by statute to say that the house was not only worth nothing, but was a liability which I fix quite arbitrarily but definitely, pending the direction of the Minister of Lands, at £3,000, as counsel said it could not possibly be built for that figure to-day. This made the price £3,117 11s. 9d. It was quite impossible for me to say that the property has more or less improvements than are normally required. Miss Sold said she and her children had all they wanted there. The purchaser intends to demolish all the buildings, and erect a factory for manufacturing underclothes. At any rate I am not a farmer, nor a manufacturer, nor have I an entailed estate. I am just a High Court Judge of the Admiralty Division, and I do not mind admitting that I'm rather at sea in this type of case. So I added on my finding, and I still had £3,117 11s. 9d.

'My next consideration was as to special value by reason of locality. Candidly, I felt more at home here. This property is excellently situated. It is only three minutes from the "Pig and Whistle" by foot. It has a charming view of the wold, in fact unequalled, in my opinion, from what I have seen of the locality in my walk in the week-end. I feel the locality value is exceedingly high. I feel I can hardly estimate it at less than £2,750 8s. 8d. This gives a total of £5,868 0s. 5d.

'The only remaining things to consider were such matters as I deemed relevant. I spent the whole week-end trying to think of something relevant. Candidly, I had great trouble; but finally I remembered the contract made by the parties at £5,500. It did seem to me to be relevant, and I fix the sale price accordingly at £5,500.'

Mr. Taylor further exemplified the ludicrous set-up between the conceptions of "Basic Value" by describing a Land Sales application at Christchurch which was overheard and appropriately commended on by the smiling face of the author of *Alice in Wonderland*. The audience was finally assured, however, that the whole treatment of Land Sales applications was going to be greatly improved on account of the fact that the various Ministers of the Crown concerned had decided to place the whole question of applications on the basis of a national lottery.

Mr. J. K. Moloney began his reply to the toast by remarking that, after the Lord Mayor's Show, came the scavengers. He expressed great pleasure at the presence of Mr. Justice Smith, whom he described as the "architect of the Licensing Committee's Report, with its promise of heavier gravity beer, in larger containers." Mr. Moloney went on to explain that he had taken counsel's opinion as to what he could properly say: and had been advised that it did not matter what he said, as nobody would pay any attention to his remarks at that time of the evening. He explained that any resemblance of his speech to the subject-matter would be purely coincidental; and he proceeded to entertain the guests in a witty and eloquent speech.

During the evening, musical items were given by Messrs. E. D. R. Smith and Colin Campbell, and Mr. J. Skeddon was the accompanist.

Annual Golf Match.

On the afternoon of October 1, the weather was not very favourable to the contestants for the Hunter Cup, the annual match for which was played at the Shirley links.

The best scores were: M. W. Simes, all square; J. D. Hutchison, 2 down; W. K. L. Dougall, 2 down; R. L. Ronaldson, 5 down; and E. A. Clelland, 5 down.

The President, Mr. L. D. Cotterill, and Mrs. Cotterill entertained the competitors and members of the profession, their wives, and friends, at afternoon tea at the Golf House, after the match.

LEGAL LITERATURE.

Trial of William Joyce.

Trial of William Joyce (Notable British Trials Series). Edited by J. W. HALL, M.A., B.C.L. (OXON.), of the Middle Temple, Barrister-at-Law. Pp. xii-312, with illustrations. Butterworths. Price 23s. (with postage 11d.).

Of all the many volumes which have appeared in the *Notable British Trials Series*, none will appeal to the lawyer more than the recent volume on the trial of William Joyce. In his admirable Introduction, Mr. J. W. Hall soon makes this apparent. "It is almost wholly of legal interest," he says. "The reader will find none of that conflict of evidence on crucial matters of fact, and that nice weighing of counter-probabilities, nor even that insight into the baser motives of the human mind, which lend a fascination of their own to many murder trials." On the other hand, it is of great legal, as well as historical, importance. The question of jurisdiction, argued in the Court of first instance, again in the Court of Criminal Appeal, and finally in the House of Lords, is, to the lawyer, a fine blending of carefully-reasoned argument and a nice balancing of those arguments in the judgments in both Courts. The law under consideration is summarized clearly and with commendably brief analysis in the Introduction, so that the able arguments, which are reported *verbatim*, can be followed without reference to textbooks or volumes of statutes. On the narrow but important question of passports, there had been little judicial authority: but the Joyce case furnisnes a complete treatise on the subject. It will be remembered that, in the House of Lords, the Lord Chancellor (Lord Jowitt), and Lords Macmillan, Wright, and Simonds, were in agreement. Lawyers will, however, find the dissenting judgment of Lord Porter of great professional interest. The indirect result, as the reader will appreciate, has been to introduce, for the first time, into criminal law, the doctrine that a British Court has, in certain circumstances, the right to try an alien for a crime committed abroad. The decision is no longer open to argument: but the reasoning underlying it is, as the editor says, a legitimate subject of legal discussion. A matter of even closer interest, which lawyers will discuss wherever they foregather, is whether eight out of the nine learned Judges have not been led by the special facts of this case to introduce the doctrine of estoppel into the alien territory of criminal law.

As has been said, the arguments before their Lordships are reproduced *verbatim*, and thus are of absorbing interest in the hands of the leaders of the Bar, to whom they were entrusted. They are accordingly of educative value to young as well as to older members of the Bar. The book is completed with notes of some of "Lord Haw-Haw's" broadcasts from Germany, and specimens of others.

This new "Notable Trial" is thoroughly recommended to the interest of all practitioners, as being almost exclusively a "lawyer's" trial.

PRACTICAL POINTS.

1. Sale of Land.—*Land-tax—Apportionment of "other outgoings"—Whether inclusive of Land-tax.*

QUESTION: Recently some farmer clients of ours entered into a contract to sell part of their property, and one of the clauses in the contract reads as follows: "The property shall be at the risk of the Vendor until the date of possession and thereafter at the risk of the Purchaser and all rates, insurance premiums and other outgoings shall be apportioned as at the date of possession." An argument has arisen as to whether under this contract the land-tax is apportionable. We contend that "other outgoings" covers land-tax, but the purchasers state that this is not so.

ANSWER: Before 1940, any agreement was void so far as it altered the incidence of land-tax: Land and Income Tax Act, 1923, s. 170. By s. 12 of the Amendment Act, 1940, however, the reference to land-tax in s. 170 was deleted, so that there is now nothing to prevent a contract for the sale of land providing for the apportionment of land-tax.

Whether the agreement of the parties is sufficiently wide to provide for apportionment may be open to doubt, on the ground that *expressio unius exclusio est alterius*. However, it would seem that the Court would construe the agreement as sufficiently wide and comprehensive to cover land-tax.

A.2

2. Adoption of Children.—*Widow applicant—"Unmarried woman"—Infants Act, 1908, s. 16* (d).

QUESTION: Some time ago I was instructed by a husband and wife to apply for an order of adoption for a male child, but before the application was filed the husband died. The widow now wishes to adopt the child. Can she do so? According to s. 17 of the Infants Act, 1908, a male child may be adopted by (*a*) husband and wife; (*b*) a married man alone; (*c*) an unmarried man at least 18 years older than the child; (*d*) an unmarried woman at least 40 years older than the child. No mention is made of a widow.

ANSWER: If the application can be made by the widow, she can do so only as an "unmarried woman." It is, therefore, necessary to ascertain if a widow can be regarded under the Act as an unmarried woman: *Soleman Bibi* v. *East Indian Railway*, (1933) I.L.R. 60 Calc. 820; *5 Words and Phrases Judicially Defined*, 382. It would seem to be reasonably clear that the interpretation to be adopted is that a widow is an "unmarried woman": see *Stone's Justices Manual*, 77th Ed. 440.

It appears, therefore, that the widow is entitled to apply and to have an order made in her favour, subject to the fact that amongst other requirements she is at least forty years older than the child, unless the Magistrate, acting under the provisions of s. 17 of the Statutes Amendment Act, 1942, relaxes that requirement.

C.2.