tributory negligence was one of circumstances which would arise at the trial and upon which the jury would then have to form their judgment.

Accordingly the only question which we are called upon to consider at this stage is whether it is relevantly averred that the defenders were in fault for permitting this young child to be upon the lift on the occasion in question. The pursuer alleges that "it was the duty of the defenders or their servants to see that the public had no access to the said cage or to the said hoists or to the operating gear thereof, and to prevent these being used by anyone except the defenders' servants. No precautions to ensure this were taken." According to my own experience at railway stations the public are strictly excluded from luggage hoists and are not allowed to use them. The pursuer undertakes to prove that the system adopted by the defenders at this particular railway station was dangerous, and that the only safe method is to allow no one to operate a luggage hoist except one of their servants—all passengers, and particularly all children, being strictly excluded. I do not see why the pursuer should not be entitled to prove that his accident was due to this dangerous system, leaving the defenders to prove if they can that he was guilty of contributory negligence. But the pursuer goes further, and offers to prove that the defenders' servants allowed young boys like himself to go up and down in the hoist for their own amusement. If that averment is true, such of the defenders' servants as knew of the practice incurred a grave moral responsibility, and as at present advised I do not see why they may not also have incurred a legal responsibility, and one which would result in liability on the part of the Railway Company. The concluding averment of cond. 5 is that "the said hoist, and the freedom allowed to young boys to make use of the same unattended by the defenders' officials, and the open condition of the same as above stated, formed a dangerous attraction and a trap to young people." That is rather cumbrous language, but what is intended to be averred is clear enough, namely, that this boy who had been in the habit of frequenting this station almost every evening for the purpose of meeting his father had come to know that boys and others were allowed to use this hoist without objection by the Railway Company's servants, that it was perfectly open to go into the hoist—there being no door to it—and that accordingly he was attracted to enter the hoist and to go up and down—a thing which any child would enjoy doing. The question of law, to my mind, is whether the defenders unnecessarily and unreasonably exposed this child to the danger of losing his limb, and I respectfully think that the pursuer has stated a relevant case for inquiry before a jury.

LORD HUNTER—I concur with your Lordship in the chair in holding that the pursuer, in the circumstances of this case as set forth in his record, has not made out a relevant case against the defenders. I also agree with the reasons which your Lordship has given in detail for so holding.

LORD JOHNSTON and LORD MACKENZIE were not present.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for the (Defenders) Reclaimers—Macmillan, K.C.—D. Jamieson. Agents—John C. Brodie & Sons, W.S.

Counsel for the (Pursuer) Respondent—Cooper, K.C. — Armit. Agents — Lister Shand & Lindsay, S.S.C.

HOUSE OF LORDS.

Thursday, December 3, 1914.

(Before Earl Loreburn, Lord Atkinson, Lord Parker, Lord Sumner, and Lord Parmoor.)

INLAND REVENUE *v.* WALKER.

(In the Court of Session March 6, 1913, 50 S.L.R. 470, 1913 S.C. 719.)

Revenue — Valuation — Increment Value Duty—Site Value on Occasion of Sale—"Like Deductions" — Finance (1909-10) *Act* 1910 (10 *Edw. VII, and* 1 *Geo. V, cap.* 8), *secs.* 2 *and* 25.

A tenement was valued, under the Finance (1909-10) Act 1910, as at 30th April 1909, the original total value £400, the original assessable site value £20, £380 being the deduction made for buildings. In June 1911 the property was sold by a widow to her brother-in-law, a man up in years, who had long lived and carried on a draper's business there. The price paid was £650. Nothing admittedly had occurred calculated to affect the value of the buildings or the site since April 1909. The Inland Revenue claimed increment value duty on £250, viz., on the £650 less the £380 which had been allowed for buildings in the original valuation, and less £20, the original assessable site value. A referee being of opinion that the property had not altered in value since April 1909, but that the figures then taken were too low, made a new valuation, the total value £470, the deduction for buildings £400, the assessable site value £70. As regarded the price obtained, he, purporting to act under section 25 4 (*d*), deducted £180, which he stated must be attributed to some personal consideration, bringing out the occasional site value at £70.

Held (1) that the case being ruled by the English case of *Lumsden* v. *Inland Revenue* (*v. infra*) the deduction for buildings on the occasion of sale was £400, the "like deductions" in section 2(2) (*a*) meaning deductions ascertained by the same method as in the original valuation—*i.e.*, by obtaining a gross value and total value by valuation and

not by reference merely to the purchase price, which might or might not correspond with open market value; and (2) that no deduction for personal matters fell to be made, as that did not arise on the facts, the referee merely surmising, not finding as a fact, that part of the purchase price was due to personal matters. Increment value duty was consequently due on £230, *i.e.*, on £650, less £400 for buildings, and less £20, the original assessable site value.

This case is reported *ante ut supra*, where will be found the sections of the Finance (1909-10) Act 1910 (10 Edw. VII and Geo. V, cap. 8).

The Inland Revenue appealed to the House of Lords.

At delivering judgment—

EARL LOREBURN—I regard this case as concluded by the decision of this House in the *Lumsden* case (*v. infra*). In view of the opinions of your Lordships, which I have had the advantage of reading in print and in which I concur, it is not necessary for me to enter upon the consideration of this complicated Act, for all that I have to say is better expressed in those opinions. I understand that the question of costs is settled between the parties.

LORD ATKINSON—As the authorities must now be taken to stand, I think the present is a perfectly plain case. The consideration for the sale of this property, the increment value of which is to be determined with a view to its taxation, is £650.

The market value of that same property, within the meaning of the 25th section of the Finance Act of 1910, was fixed by Mr Binnie, the referee, at £475, the total value at £470. The main question for decision is which of these two sums — the purchase price or the estimated market value, *i.e.*, the sum which in the open market would on sale presumably be paid for it by a willing purchaser—is to be taken as its gross value within the meaning of the above-mentioned section.

It must now be assumed that according to the decision of this House in *Lumsden* v. *The Commissioners of Inland Revenue*, (*v. infra*), the estimated value, £475, and not the purchase price, £650, is to be so taken. Though the noble Lords who heard that case were divided in opinion equally, the opinion of those who voted in the negative on the question being put, that the judgment appealed from be reversed, must be taken as the decision of the House—*Beamish* v. *Beamish*, 9 H.L.C. 274. Well, if that be so, then so far as the first point relied upon by the respondent is concerned, the contention of the Crown must prevail, and the occasional site value be fixed at £250, the increment value at £230.

These figures are set out in the Case stated, and so far as they go, subject to the second point raised, cannot be questioned.

This second point is this. Section 25, subsection 4, directs that any part of the total value of land attributable to "goodwill or any other matter which is personal to the owner or occupier or other person interested for the time being in the land" is to be taken into account in estimating the total value.

It was urged that the purchaser in this case, who happened to carry on the business of a draper in a shop forming a portion of the premises, either from his aversion to be disturbed in his occupation, or from his being attached to the premises, paid for them a sum of £180 in excess of their market value, as estimated, and that this sum should be deducted from the total value—£470.

It is a sufficient answer to this contention to say that the point does not arise on the facts of the case. The supplemental statements of Mr Binnie, the referee, to be found in the Special Case stated, cannot, in my view, with any regard to the ordinary meaning of the language, be styled findings of fact. He says he was unable to get any statement from the purchaser as to what was in his mind when he purchased the property, and that no other person could give him that information. He then proceeds:—"I have therefore had to form my conclusions on the matter as best I could. After full consideration, I am satisfied as matter of fact that in paying the purchase price of £650 James Burns Walker was actuated by some one or other of the considerations alleged in contention (*b*) of the original appellant. Further, I am of opinion that in law the facts warrant a deduction in respect of some such personal element from the purchase price, under section 25 (4) (*d*) of the statute. Further, I consider, assuming such a deduction competent in law, that the sum of £180 should be allowed in respect thereof. *For the reasons stated above, I was not able to arrive directly at the sum just mentioned; I could only arrive at it by ascertaining to the best of my ability the market value of the subjects, and then, taking the difference between this and the consideration on sale as necessarily the proportion of the consideration on sale given for the personal element, the figures of the calculation being*—" [The italics are mine.]

That amounts simply to this, that he surmises that the purchaser gave £180 more than his own estimate for the property for some such reason as is mentioned, but save by that surmise he cannot give the amount due to those undisclosed motives.

That does not amount to a finding that any portion of the total value, or any other value, is directly attributable to "the goodwill or other matter personal to his occupation of portion of the property." The second point relied upon does not therefore arise upon the facts of the case.

The whole of the gallant effort (on the part of his client) of the learned counsel who appeared for the respondent consisted in reality in an attempt to make the gross value and the purchase price convertible terms. But that is precisely what this House has decided cannot be done.

In my opinion therefore the contention of the Crown is clearly right. The judgment of the special tribunal before which the case came was erroneous, and this appeal

should be allowed; but having regard to the fact that the case was decided in Scotland before the case of *Lumsden* v. *The Commissioners of Inland Revenue* had been decided in this House, I think the Crown should pay the respondent's costs of this appeal between solicitor and client when taxed and ascertained, and that each party should abide his or her costs in the Court below.

LORD PARKER—(*Read by Lord Parmoor*)—It is quite clear that occasional site value on a sale of land is by virtue of section 2 (2) (*a*) of the Finance (1909-1910) Act 1910 the consideration for the sale, subject to the like deductions as are made under section 25 (4) in arriving at original or assessable site value.

The first of these deductions is the difference between gross value and full site value. It was held in the case of *Lumsden* v. *The Commissioners of Inland Revenue* (*v. infra*) that for the purpose of ascertaining the amount of this deduction the gross value as well as the full site value on the occasion of the transfer must be determined by a process of valuation, and that it would be wrong to take the gross value as the consideration for the sale plus the capitalised value of the burdens subject to which the land was sold; and similarly, that for the purpose of ascertaining the amount of the second, third, and fourth deductions the total value must be ascertained by valuation and cannot be taken as the consideration for the sale.

This decision is one of far-reaching importance. It converts the increment value duty imposed by the Act into a duty which is wholly independent of any increment value at all, and it enables the Crown on any sale of land to exact as increment value duty one-fifth of the sum by which the actual consideration given by the purchaser may in the opinion of the valuing authority have been too large—even though the original or assessable site value may have remained the same or have actually decreased.

Under these circumstances I can only regard it as unfortunate that the case fell to be determined on the principle that where your Lordships are equally divided in opinion the decision of the Court below must be affirmed, more especially as I find it difficult to reconcile the decision with that view of the Act which was unanimously adopted by this House in *Herbert's Trustees* v. *The Commissioners of Inland Revenue*, [1913], A.C. 326, 50 S.L.R. 569. It is, however, well settled that a case decided on the principle to which I have referred is as binding upon this House as a decision pronounced *nemine contradicente*—*Attorney-General* v. *The Dean of Windsor*, 8 H.L.C. 369—so that the present respondents are precluded from reopening the question, although had their appeal been heard first there might well have been a binding decision the other way.

It follows that, the gross value of the land in the present case having been determined by the referee at £475 notwithstanding the consideration of the sale was £650 and the full site value having been determined at £75, the amount to be deducted from the £650 by virtue of section 25 (4) (*a*) is £400 only. And it equally follows that the respondent can make no further deduction from the £650 under section 25 (4) (*d*) unless she can prove that some part of the total value of the land as estimated by the referee, namely, £470, is directly attributable to one or other of the matters referred to in sub-section (*d*). It being quite clear that no part of this £470 is so attributable the respondent is precluded from claiming any deduction under this head.

It was suggested by the respondent that on a true reading of the findings of the referee he did in reality estimate the total value of the land sold at £650 and not £470, and the gross value at £655 and not £475. I find it impossible so to read these findings, nor do I think that any argument based on a contention that under the circumstances of the land having actually realised £650, the referee could not find the total value at less than £650, could be accepted without wholly disregarding the decision in *Lumsden* v. *The Commissioners of Inland Revenue*.

In my opinion, therefore, the appeal must succeed. The Crown has agreed to pay the respondent's costs of the appeal, and under the peculiar circumstances of the case I think that your Lordships should direct each party to bear his own costs of the proceedings before the referee and in the Courts below.

LORD SUMNER—Upon the facts found in this case the main question is clearly the same as that raised in the case of *Lumsden*, and is concluded by your Lordships' decision upon that occasion.

Further, to my mind the facts do not raise the respondent's contention that something should be deducted from the total value "for goodwill or any other matter which is personal to the owner, occupier, or other person interested for the time being in the land." Such a deduction is only warranted in respect of "any part of the total value which is proved to the Commissioners to be directly attributable" to such matters, and, as I read it, the case stated admits frankly that no proof was obtainable upon the point, and that the conclusion upon it in favour of the respondent was only a plausible speculation as to the purchaser's motives.

I think that the Crown is entitled to succeed on this appeal.

LORD PARMOOR—The main point in this case—the method of ascertainment of site value on the occasion of a transfer—is not open to argument after the decision of this House in the case of the *Commissioners of Inland Revenue* v. *Lumsden*. The result of the decision in that case was in part to levy increment value duty on builders' profits. In the present case the referee found, so far as it was a question of fact, that the site value of the land on the occasion was £70. The effect, however, of the *Lumsden* decision is to include in the valuation of site value and to subject to increment value duty a sum of £180, paid partly by family

affection towards a brother's widow, and partly by fear that if the property was acquired by an outsider the occupier might be compelled to quit the premises he had long occupied and in which he carried on business as a draper.

I expressed an opinion in the *Lumsden* case that the relevant sections of the Finance Act 1910, if properly construed, did eliminate from the site value on the occasion of a transfer all the factors which had not entered into the calculations of the original site value, in which case the increment value duty would be levied on an increment in value of the same interest between the two dates, but it would be of no purpose to repeat the reasons on which that opinion was based. The counsel for the respondent very properly admitted that he was precluded from questioning the decision in the *Lumsden* case, and raised three points which he said that that decision did not cover.

The first point was that by arrangement the Inland Revenue authorities had agreed to accept certain figures as the basis of valuation, and they could not now be heard to put forward different figures. I can find no evidence of any such arrangement in the correspondence to which the attention of the House was directed.

Secondly, it was argued that the valuation of the referee was not properly made, in that he excluded from consideration the actual transaction of the 9th June 1911. I think it is clear from the statement of the referee that he did not exclude from his consideration the sum of £650 paid as the consideration for transfer on 9th June 1911, but held that for special reasons this sum was in excess of the market value. It is difficult to think that any referee would refuse to regard as relevant evidence the actual sum paid on a recent sale of the land which he is called upon to value. It is a very different matter to say that the referee is bound to accept the amount of the consideration as the market value, and unless the argument for the respondent is carried to this length it fails to show that there is any ground for the suggestion that the referee neglected any relevant consideration in fixing the market value.

In the third place, it was argued on behalf of the respondent that section 25 (4) (*d*) justified a claim to deduct the sum of £180 or some part thereof as expenditure attributable to goodwill or some other matter personal to the owner, occupier, or other person interested for the time being in the land. This section, however, only allows such a deduction if the amount claimed to be deducted is included as part of the total value. In the present case no part of the sum of £180 has ever been included in the estimate of total value, and the claim for deduction under such circumstances appears to me to be inconsistent with the whole framework of section 25 of the Act of 1910.

The appellants are entitled to succeed, having a decision of this House in their favour.

Their Lordships allowed the appeal, the appellants of consent paying the respondent's expenses of the appeal and each party paying their own costs before the referee and in the Court below.

Counsel for the Appellants—The Attorney-General (Sir John Simon, K.C.)—The Solicitor-General for Scotland (Morison, K.C.)—W. Finlay, K.C.—R. C. Henderson. Agents—Solicitors of Inland Revenue for Scotland and for England.

Counsel for the Respondent—Roberton Christie, K.C.—King Murray. Agents—Patrick & James, S.S.C., Edinburgh—Beveridge, Greig, & Co., Westminster.

HOUSE OF LORDS.

(ENGLISH CASE.)

Monday, July 20, 1914.

(Before the Lord Chancellor (Haldane), Lord Shaw, Lord Moulton, and Lord Parmoor.)

LUMSDEN *v.* INLAND REVENUE.

Revenue — Valuation — Increment Value Duty—Site Value on Occasion of Sale—"Like Deductions"—Finance (1909-10) *Act* 1910 (10 *Edw. VII and* 1 *Geo. V, cap.* 8), *secs.* 2 *and* 25.

The Finance (1909-10) Act 1910, sec. 2 (2), enacts—"The site value of the land on the occasion on which increment value duty is to be collected shall be taken to be (*a*) where the occasion is a transfer on sale of the fee-simple of the land, the value of the consideration for the transfer . . . subject . . . to the like deductions as are made, under the provisions of this part of this Act as to valuation, for the purpose of arriving at the site value of land from the total value."

Held, by Lord Chancellor Haldane and Lord Shaw, upholding a decision of the Court of Appeal, that the "like deductions" were deductions calculated from a gross value and total value ascertained by valuation as provided in section 25, not ascertained by reference to the consideration, *dissenting* Lord Moulton and Lord Parmoor, who held that such gross value and total value should be ascertained by reference to the consideration.

Lumsden, *appellant*, appealed against an assessment to increment value duty under the Finance (1909-10) Act 1910 (10 Edw. VII and 1 Geo. V, cap. 8), sections 1 and 2, for a dwelling-house and shop, 32 Lansdowne Road, Forest Hill, Northumberland, in respect of an alleged gross increment value of £125.

The *provisional valuation* which had not been objected to was—Original gross value £658; original full site value (arrived at by deducting from the gross value the difference between that value and the value of the fee-simple of the land divested of buildings, trees, &c., £430) £228; original total