correct, and that what was to be paid for was the value of "the undertaking," and, to estimate that properly, its profit-earning powers must be taken into consideration; but the Court of Appeal (Lindley, Kay, and Smith, L.JJ.) were of opinion that the arbitrator was correct in his mode of estimating the value, and that the terms of the Act expressly excluded any allowance based on the profit-earning power of the concern.

NUISANCE—POISONOUS TREES—YEW TREE NEAR BOUNDARY OF FIELD—DUTY OF OWNER OF POISONOUS TREE TO PREVENT ACCESS THERETO OF NEIGHBOUR'S CATTLE.

Ponting v. *Noakes*, (1894) 2 Q.B. 281; 10 R. July, 283, was an action brought by the plaintiff to recover damages for the death of a horse, caused by its having eaten of the leaves of a yew tree growing on the defendants' land. The yew tree in question grew near the boundary of the defendants' land, which was separated from the plaintiff's by a fence and a ditch belonging to the defendants, the plaintiff's boundary being on the farther side of the ditch. There was no obligation on the part of the defendants to fence against their neighbour's cattle. The plaintiff's horse ate of the branches of the yew tree, which extended over the fence and partly over the ditch, but not over the plaintiff's land. The Divisional Court (Charles and Collins, JJ.) dismissed the action, holding that there was no liability on the part of the defendants, and that there was no duty on them to take means to prevent the plaintiff's horse from having access to the branches of the tree. It was attempted to bring the plaintiff's case within the doctrine of the well-known case of *Fletcher* v. *Hylands*, 3 H.L. 330, but the court were agreed that it did not apply, because the tree was wholly within the defendants' land. The true test was held to be that pointed out by Gibbs, C.J., in *Deane* v. *Clayton*, 7 Taunt., at p. 533, where he says: "We must ask, in each case, whether the man or animal which suffered had, or had not, a right to be where he was when he received the hurt." If he had not, then (unless the element of intention to injure be present, as in *Bird* v. *Holbrook*, 4 Bing. 628, or of nuisance, as in *Barnes* v. *Ward*, 9 C.B. 392) no action is maintainable. If the obnoxious tree had extended over the plaintiff's land, and the horse had died from the eating of the branches which so extended, then the defendants would have been liable, as was held in *Crowhurst* v. *Amersham Burial Board*, 4 Ex.D. 5.