[HIGH COURT OF AUSTRALIA.]

THE ROSEHILL RACECOURSE COMPANY . APPELLANTS;

AND

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 12, 13, 14, 18.

Griffith C.J. Barton and O'Connor JJ.

Stamp Duties Act (*N.S. W.*) (*No.* 27 *of* 1898), *sec.* 4, *Sch. II.—Transfer or conveyance of land on sale—Land used as racecourse—Duty payable on consideration for conveyance—Business and goodwill.*

By sec. 4, Sch. II. of the *Stamp Duties Act* 1898, *ad valorem* duty is payable on the amount or value of the consideration for a transfer or conveyance of property on sale.

By a transfer under the *Real Property Act* 1900, a company, the proprietors of land used by them as a racecourse, conveyed the land to a new company for £10,000, which was admitted to be a fair value for the land alone. By a separate agreement, which was only liable as such to a fixed duty which had been paid, the vendors, for the consideration of 32,792 fully paid up £1 shares in the new company, agreed to transfer to the new company, in addition to the land, their undertaking, name, business, and goodwill. The vendors had been carrying on race meetings on the land under a licence from the Australian Jockey Club, on certain specified dates in the year, appointed by that Club. This privilege was the exclusive right of the old company as a race club, and was not attached to the ownership of the particular land. The Australian Jockey Club had agreed to transfer to the new company the rights of the old company in this respect. The evidence showed that this licence was of great value inasmuch as it was practically impossible without it to carry on race meetings with success in New South Wales.

Held, on the facts, that the undertaking, business, and goodwill were separable from the land, and, having been separately dealt with by the parties as a matter of contract, did not pass by the conveyance, and that, therefore, *ad valorem* stamp duty was only payable on £10,000, the consideration for the land as stated in the conveyance.

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Decision of the Supreme Court: *In re the Rosehill Racecourse Company*, (1905) 5 S.R. (N.S.W.), 402, reversed.

APPEAL from a decision of the Supreme Court of New South Wales, on a special case stated by the Commissioner of Stamp Duties, under sec. 18 of the *Stamp Duties Act*, No. 27 of 1898.

The Rosehill Racecourse Company (in liquidation), which was being voluntarily wound up for the purpose of reconstruction, on 5th April, 1904, entered into an agreement with the appellants, called the new company, by which it was agreed that the old company and its liquidator should transfer, and the appellants should take over, all the lands, buildings and appointments of the old company, with its undertaking, business, and goodwill. The consideration for the transfer was that for each five shares held by the shareholders in the old company they were to receive two fully paid up shares of £1 each in the new company, these shares being 32,792. It was also agreed that, for the purpose of apportioning the stamp duty payable in respect of the transfer, the lands, tenements and other hereditaments not capable of transfer by manual delivery, and forming part of the purchased property, should be taken to be of the value of £10,000. On 6th April a transfer of the land under the *Real Property Act* 1900, was executed for the stated consideration of £10,000. The Commissioner for Stamp Duties held that the value of the 32,792 shares formed part of the real consideration of the transfer, and to this he added £100, the amount of the costs of reconstruction agreed to be paid by the new company, making in all the sum of £32,892 as the consideration on which stamp duty should be paid, and assessed the duty payable at £164, which was paid by the new company under protest.

The appellants contended that stamp duty should have been assessed only upon the £10,000, the consideration stated in the conveyance, and requested the Commissioner to state a case for the opinion of the Supreme Court on the question whether his assessment was right in law.

On the matter coming before the Supreme Court, that Court held that the Commissioner for Stamp Duties was right, and that stamp duty on the transfer was payable on the £32,792, and not

merely on the £10,000, since, in their opinion, the business and goodwill of the undertaking were inseparable from the ownership and use of the land as a racecourse, and passed by virtue of the transfer of the land: *In re the Rosehill Racecourse Company* (1).

From this decision the present appeal was brought by special leave.

The facts are more fully set out in the judgments.

Knox, for the appellants. The *ad valorem* duty is payable on the consideration for the conveyance, not upon what passed under the contract independently of the conveyance. The only property which passed under the conveyance was the land and what was inseparable from it, *i.e.*, buildings, improvements, &c. The goodwill was a valuable asset, was entirely separable from the land, and, but for the agreement, would not have passed to the transferees of the land. The licence by the Australian Jockey Club was given to the old company as a racing club, not in respect of this particular land. Without it the land was of no value as a racecourse, because by the rules of the Australian Jockey Club persons racing horses at a meeting not registered were disqualified from racing at any meeting held by a registered club. Moreover the name of the old company was a valuable asset, and passed by the agreement. The old company practically bound themselves not to carry on business under the old style in competition with the new company. Without the agreement they might have done so. The new company might have bought the land and buildings and used them for some other purpose. There was no dispute that £10,000 would have been a fair consideration for them under those circumstances. It can make no difference that the same company also bought the goodwill, for, on the case, they might have bought that independently, and carried on races on another course altogether. If the goodwill is separable from the land, there is no fraud in disposing of it separately. Mere evasion of duty is not fraud. The English Stamp Acts make contracts for the sale of property liable to taxation *ad valorem*, so that the cases decided upon them are not conclusive: *Potter* v. *Commissioners*

(1) (1905) 5 S.R. (N.S.W.), 402.

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of Inland Revenue (1), merely decided that a goodwill was property, and therefore within the scope of a tax on a transfer of property. It may be that in certain cases the goodwill is inseparable from the premises, as in *Ex parte Punnett, In re Kitchin* (2). In *West London Syndicate* v. *Inland Revenue Commissioners* (3), goodwill was held to be separable from the premises. In *Commissioners of Inland Revenue* v. *Glasgow and South Western Railway Co.* (4), the decision was that on a resumption of land on which a business was carried on, the compensation assessed by the jury must be taken to include compensation for the goodwill. There is no case deciding that a conveyance of land necessarily passes the goodwill, or that it must be stamped in respect of the consideration for it. Here the goodwill was separable from the land, was dealt with by the parties independently, and cannot be said to have passed by the conveyance.

C. B. Stephen, (*Harry M. Stephen* with him), for the respondent. The goodwill, so called, was really only the enhanced value of the land equipped as a racecourse, and had no independent existence. The licence and the privileges which went with it were wholly personal, and might never have been accorded to the new company; they certainly could not be bought. There was only a chance of getting them. It is impossible that such a large portion of the consideration should be attributable to this chance. It had practically no ascertainable value. Without paying anything at all for it, or purporting to purchase it, the new company had an equal chance of obtaining a licence, provided that it had the land. The really valuable part of the goodwill was the habit of customers resorting to that particular place. That could not be separated from the land, any more than could that of a public-house business be separated from the premises. In that case also there is a risk of non-renewal of the licence, in the hands of the transferee. So here the conveyance of the land carried with it whatever was of value in the goodwill, and the whole consideration must be attributed to it. Persons cannot evade paying duty by nominally

(1) 10 Ex., 147.
(2) 16 Ch. D., 226.
(3) (1898) 2 Q.B., 507.
(4) 12 App. Cas., 315.

separating things which in their nature are inseparable; the separation must be *bonâ fide*: *West London Syndicate* v. *Inland Revenue Commissioners* (1). Whether they wished it or not, the old company parted with their goodwill when they transferred the land. A mortgage of premises in which a business was carried on was held to convey the goodwill to the mortgagee: *Chissum* v. *Dewes* (2); *Pile* v. *Pile* (3); *King* v. *Midland Railway* (4). The fact that, apart from the agreement, the old company would have been entitled to carry on business in competition with the new company does not make the goodwill a separate entity from the land; an agreement of that kind is always necessary where it is intended to assign the goodwill with the land. [He referred to *Trego* v. *Hunt* (5).] The present case is analogous to the sale of a theatre which has acquired popularity.

[O'CONNOR J.—The whole concern may have to go with the land, but it does not necessarily increase the value of the land itself. The duty is only on the consideration for the conveyance of the land, if the land only is conveyed.

GRIFFITH C.J.—There ought to be some evidence that £10,000 was not the real value of the land.]

There was this, that the value of the whole was £32,000 odd, and we contend that the whole of that must be ascribed to the land and what the land necessarily carries with it. The land must be considered as a racecourse, not merely acreage and buildings. As a racecourse it necessarily carries with it goodwill: *Potter* v. *Commissioners of Inland Revenue* (6); *Ricket* v. *Metropolitan Railway Co.* (7); *Ex parte Punnett, In re Kitchin* (8); *Inland Revenue Commissioners* v. *Glasgow and South Western Railway Co.* (9); *Commissioners of Inland Revenue* v. *Angus* (10); *Muller & Co.'s Margarine Ltd.* v. *Inland Revenue Commissioners* (11).

[GRIFFITH C.J. referred to *Jack* v. *Smail* (12).]

Knox, in reply.

Cur. adv. vult.

(1) (1898) 2 Q.B., 507.
(2) 5 Russ., 29.
(3) 3 Ch. D., 36.
(4) 17 W.R., 113.
(5) (1896) A.C., 7.
(6) 10 Exch., 147.
(7) L.R., 2 H.L., 175.
(8) 16 Ch. D., 226.
(9) 12 App. Cas., 315.
(10) 23 Q.B.D., 579.
(11) (1900) 1 Q.B., 310; (1901) A.C., 217.
(12) 2 C.L.R., 684.

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15th December.

GRIFFITH C.J. The question raised in this case is as to the proper amount of *ad valorem* stamp duty payable on a transfer of real property subject to the provisions of the *Real Property and Conveyancing Act* 1898. Under the *Stamp Duties Act* of 1898, sec. 4, *ad valorem* duty is payable on a conveyance of land on sale. The scheme of the Act is to make it payable on the conveyance, that is, on the instrument, not on the transaction, and the duty is calculated at so much *per centum* on the amount or value of the consideration for the sale, which I take to mean the amount or value in money, or if there was some other consideration, then on the pecuniary value of that consideration. The Statute does not tax the transaction.

Thus, if there is a sale of a mixed property, consisting of several items, some of which pass by the contract without a conveyance, the *Stamp Act* does not catch the transaction as to those items. This is expressly recognized by the Statute, in sec. 37, which provides: "Where any property has been contracted to be sold for one consideration for the whole, and is conveyed to the purchaser in separate parts or parcels by different instruments, the consideration shall be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel shall be set forth in the conveyance relating thereto, and such conveyance shall be charged with *ad valorem* duty in respect of such distinct consideration."

Thus the total consideration is to be apportioned amongst the different instruments in such a way that the full amount of duty is paid. The legislature has not expressly provided that the same result is to follow when only a part of the property is the subject matter of a conveyance. But we are assured that it is the universal practice to follow this rule; for instance, in the sale of a station property consisting of real property, freehold and leasehold and live stock, we are told that the duty is charged on the instrument conveying the freehold or the leasehold, and not upon the chattels unless they are included in the conveyance. In the course of the argument I suggested the case of a mercantile business which consists of a so-called goodwill. This goodwill may perhaps comprise licences to exercise patents, and contracts with various persons and other rights of that nature.

In a case of that kind the consideration for the goodwill may be a very large sum in some cases, whilst in others it may be very small. But it is not suggested that the consideration could not be apportioned, and the stamp duty only charged on the instrument in respect of so much of the consideration as is attributable to the property comprised in the conveyance. That being the scheme of the Act, I proceed to apply it to the present case.

The appellants are the Rosehill Racecourse Company Ltd., a company lately incorporated, being the successors, under what is called a reconstruction, of an older company of the same name. The original company had a nominal capital of £85,000, and it was decided to reconstruct it and establish a new company with a nominal capital of £32,892. As part of the arrangement for carrying out this purpose an agreement was executed, dated 6th April, 1904, between the old company and the new company, reciting the arrangement for reconstruction, in which it was agreed that the old company should sell and the new company should purchase the whole of the assets of the old company. The old company had been in possession of the land in question, which was called the Rosehill Racecourse, and was used by the old company for the purpose of carrying on the business of racing. We have not before us the articles of association of the new company, but it has been assumed that the objects of the company are the carrying out of the various matters appertaining to the business of racecourse proprietors. It is stated in the case before us that the old company was registered as a race club with the Australian Jockey Club, which is a body exercising voluntary control of racing matters in general in New South Wales, and duly incorporated by a special Statute, and any club which is desirous of carrying on racing with success in New South Wales is practically obliged to register with the Australian Jockey Club, which allots to the various clubs certain dates for race meetings. And it is a fact, arising entirely from the voluntary compact between the different race clubs and the Jockey Club, that if any horses are allowed to compete in races held on courses not registered in the way I have mentioned, they and their owners lose the benefit of the permission given by the Jockey Club. It is obvious that this privilege is a substantial one. It appears also that the privilege

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is not given in respect of a particular racecourse, but that it is accorded to a particular club. So that if a club was registered with the Australian Jockey Club, and was given certain dates for race meetings, those engagements or fixtures, as they are called, might be fulfilled on any racecourse that was registered. The privilege of holding meetings is not attached to any particular piece of land. There is no law dealing with the subject, it is entirely a matter of compact. The assets of the old company consisted substantially, first of the land, secondly of the *quasi*-goodwill or advantage and profit derived from the habit of people frequenting the racecourse, and thirdly of the name of the company. That in itself is an intangible sort of asset, having no particular value, and is not attached to the land. But it is an asset in this sense, that, unless the old company thought fit to relinquish its right to it, no other company could carry on the business of racecourse proprietors under such a name, so long as the company retained their name.

By the agreement between the old company and the new it was agreed that the new company should have the advantage of the name. There were some other assets of relatively small value, but it was agreed between the parties to the appeal that they should be disregarded. The case may therefore be treated on this footing, that the substantial assets were, first the land, second the *quasi*-goodwill, and third the name. By the agreement it was stipulated that of the total consideration, which was assumed to be £32,000 odd, the nominal value of the shares in the new company, £10,000 was to be taken to be the value of the land and buildings. For the purpose of transferring the land, a real property transfer was necessary. For the transfer of the goodwill and the name, no conveyance was necessary. When the new company proposed to stamp the transfer with the amount of *ad valorem* duty on the £10,000, the Commissioner of Stamp Duties claimed that the whole of the consideration must be attributed to the land, on the ground that the business or goodwill was inseparable and non-existent apart from the ownership and use of the land. I have already pointed out that the name of the company has nothing to do with the land. And with respect to the goodwill it is a fact that, under the arrangements made with the Australian Jockey Club,

the so-called goodwill is not appurtenant to a particular race-course, but is a privilege of the club. So that the basis of the Commissioner's contention appears to be erroneous. He claimed stamp duty on the total consideration of £32,000 odd. A case was then stated for the opinion of the Supreme Court. That Court was of the opinion that the Commissioner was right. The learned Chief Justice thought that the *quasi*-goodwill passed with the conveyance, and Mr. Justice *Cohen* concurred in that view. If the goodwill passed with the conveyance, there can be no doubt that the conclusion arrived at by those learned Judges was correct. Mr. Justice *Pring* came to the conclusion that the so-called goodwill had no value. He said (1): "There is not the faintest suggestion in the special case that the so-called goodwill was worth anything." And, as I understand his judgment, he went on to say that there was really nothing conveyed by the old company to the new except the land, and therefore the whole consideration was attributable to the land, and the contention of the Commissioner was right. I have already pointed out that when a man has a right which is not saleable in one sense, but he is in such a position that, unless he will consent to relinquish the privilege or right so that someone else may enjoy it, nobody else can enjoy it, that may be made the subject matter of a contract. But it does not follow that the right is transferred by a conveyance of land.

The first question is, what actually passed by the conveyance? That depends on the terms of the deed. This is a conveyance under the *Real Property Act*. Now, in considering what passes by a conveyance, the name of the transferor is *primâ facie* immaterial. By a transfer in general terms no doubt all that would pass would be the land. If there is a contemporaneous agreement executed, by which the vendors also sell something else, the purchaser gets this, not by virtue of the conveyance, but by reason of the contract by the vendor to give it to him. I am quite unable to come to the conclusion that anything passed by this conveyance except the land itself. If that is so, the only question is, what was the consideration for the land? To use the words of sec. 37, where any "property has been contracted to be sold for one consideration

(1) (1905) 5 S.R. (N.S.W.), 402, at p. 411.

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for the whole, and is conveyed to the purchaser in separate parts or parcels by different instruments, the consideration shall be apportioned in such manner as the parties think fit," and the duty is to be charged in respect of each consideration, that is, where chargeable at all. The total consideration is to be apportioned, in proportion to the respective values of the different things transferred. I think, therefore, that in this case the consideration for the transfer of the land is so much of the aggregate value of £32,000 odd as is attributable to the value of the land alone, in proportion to the total value of the properties sold. The parties have agreed that that is to be taken as £10,000, and it is not suggested that that is an unfair value.

I am therefore of the opinion that the Commissioner was wrong and that the appeal should be allowed.

BARTON J. I am of the same opinion.

The fairness of the consideration of £10,000 for the land and buildings is not seriously impeached. But it is contended that, because the new company are taking over the assets of the old company, and intend to carry on and use the place as a racecourse, it must be taken to be their intention to include the goodwill in the land, and that, in any case, the goodwill is inseparable from and passes with the land, and therefore that the transfer should have included consideration for the goodwill. I find that the cases do not establish the proposition that goodwill passes necessarily with the land unless that consequence arises from the construction of a Statute, as in the case of *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Co.* (1), or unless there is an intention of the parties to that effect evinced in the document which is the subject of construction.

In this case I see no such intention at all. First of all, there is nothing in the *Stamp Duties Act*, the only Statute in question here, and there is certainly nothing in the documents which are attached to the special case, to lead to any other conclusion than that this goodwill, being separable, as was established by the case of *West London Syndicate* v. *Inland Revenue Commissioners* (2), was separated by the parties; I think the evidence is that there was not any intention to include the goodwill in the

(1) 12 App. Cas., 315.

(2) (1898) 2 Q.B., 507.

land so as to make the transfer of both one transaction. In the case which I have just mentioned, the litigation was under sec. 59 of the *Stamp Act* 1891, which does what our own Statute does not, that is, imposes on certain contracts and agreements "made in England or Ireland under seal, or under hand only . . . for the sale of any equitable estate or interest in any property whatever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments or heritages . . . or goods wares or merchandise," an *ad valorem* duty "to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold." In that case the vendor, by an agreement under seal, agreed to sell the goodwill of the business of an hotel proprietor and licensed victualler, and the lease of the hotel in which the business was carried on, together with the furniture, stock in trade and book debts. Of the total consideration part was apportioned to "lease and goodwill," another part to furniture &c., and the balance to book debts. The vendor was to shew a good title to the lease and to assign the lease and goodwill to the purchasers, and in the event of the consent of the landlords to the assignment of the lease not being obtained, it was provided that the vendor should, at the option of the purchasers, execute a declaration of trust of the leasehold premises in their favour. The consent of the landlords not having been obtained, a declaration of trust was executed in favour of the purchasers, which was stamped with the fixed duty of ten shillings. It was held by *A. L. Smith* and *Vaughan Williams* L.JJ., that the agreement was not an agreement for the sale of an equitable interest in property within the meaning of sec. 59 of the *Stamp Act* 1891, but by *Rigby* L.J., that although the agreement was not on the face of it an agreement for the sale of an equitable interest, the proper inference to be drawn from the facts was that the bargain was for the sale of an equitable interest only. And it was held by *A. L. Smith* and *Rigby* L.JJ., reversing the decision of the Divisional Court, that the goodwill was not merely an enhancement of the value of the leasehold premises, but was capable of being sold independently of them, and, as it was property other than lands, the agreement was liable to *ad valorem* duty in respect of the value of the goodwill. It was held, how-

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ever, by *Vaughan Williams* L.J. that the goodwill was inseparable from the leasehold premises which were the subject of the sale, and that the instrument was not liable to *ad valorem* duty upon that portion of the consideration attributed to "lease and goodwill." The decision on that question, whether the goodwill was merely an enhancement, is the part material to this case, and the portion of the judgment of *A. L. Smith* L.J. which seems to me to apply—because for this purpose there is no distinction in principle between freehold and leasehold properties—is this (1): "It is said that goodwill in this case is, therefore, nothing but the enhancement of the value of the premises agreed to be sold, and cannot be, and is not, property apart from such premises. I do not agree in this, for in my opinion goodwill is as capable of being sold as a separate entity for what it is worth as is the tenant's interest in the lease. It may be that by the terms of a lease each must be sold, if sold at all, to the same person; but that does not prevent them from being sold as separate and distinct entities; and if so sold, goodwill, in my judgment, is property, and is clearly not land." If the goodwill and the Rosehill land had not been sold as distinct entities, if on the face of the present transaction it had appeared that land only was being sold, and if there had been evidence on the documents that the goodwill was intended to pass with the land, the case cited might have no application. But it seems to me that it does apply in this instance, for if we look at these documents we find that in the contract of even date with the conveyance, the land and goodwill and other subjects of property and choses in action comprised in the sale are separately mentioned. And in the contract itself we find that the old company and its liquidators are to transfer to the new company and the new company to take over "all the lands buildings goods chattels moneys credits debts bills notes and things in action of the old company and the undertaking business and goodwill thereof with the full benefit of all contracts and agreements and of all securities in respect of the said things in action to which the old company is entitled and all other the real and personal property of the old company whatsoever and wheresoever subject nevertheless to the several mortgages charges liens and encumbrances affecting the

(1) (1898) 2 Q.B., 507, at p. 513.

same or any part thereof." We find, then, not only that the land and buildings are dealt with under separate descriptions from the undertaking business and goodwill, although in the same clause, but that for the whole of the subject matters of the contract there is a total consideration of 32,792 shares in the new company. And we find also a provision in the same contract that, for the purpose of apportioning stamp duty, the land tenements and hereditaments not capable of transfer by manual delivery and forming part of the purchased property, should be taken to be of the value of £10,000. That description clearly does not comprehend or include the goodwill and business, and, when we come to the conveyance and the stamp duty on the transfer, that is to say on the real property, we find that the parties had in their contract separately described the land on the one hand and the business and goodwill on the other, and had apportioned what is not contended to be an unfair value for the land *quâ* land, and in furtherance of that there is this contract executed by which the properties other than land are separately transferred in pursuance of the apportionment mentioned in the contract. To my mind it is clear that in this document the parties have shown their intention to deal separately with the goodwill and the land. In pursuance of this intention there is a transfer by which the land is separately conveyed and for the consideration mentioned in the contract. Now it is contended that, inasmuch as the land is the principal subject of value in the transaction, the consideration in the contract is intended to be the consideration for the land and goodwill, for the land carried with it the goodwill. I am not of that opinion. We are dealing with the case of an old company and a new one formed to take over its business and property by way of reconstruction. The shares of the old company were some 85,000, of which 81,980 had been allotted, and they were expressed in the contract as being of the value of some fourteen shillings each. The shares in the new company were to be 40,000 or thereabouts, and inasmuch as the old company is to be transformed into the new, and so far as we know without any change in personality, the consideration in the contract is specified in this way. First, as part of the consideration, the new company undertook to pay and satisfy all

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debts and liabilities and obligations of the old company and perform all contracts and engagements binding on it, and keep the old company and its liquidators and contributories indemnified against all such liabilities, and all actions and claims in respect of them. As a further part of the consideration the new company undertook to keep the old company and its liquidators and contributories indemnified against all costs and expenses incident to the winding up of the old company and carrying the transfer into effect. As the residue of the consideration, every member of the old company was in respect of every five shares held by him in the old company to be entitled to two fully paid up shares in the new company. That is the way in which the number of 32,792 shares is arrived at. This transaction seems to me to be a mere change by way of reconstruction of the old company into the new with a reduction of capital, so that for every five shares in the old each shareholders is to receive two shares in the new. It is a very difficult thing to say that under these circumstances, looking at the contract, the consideration for the land was £32,000, because there is involved an exchange of the old shares for the new. And the transaction must be looked at in this light, that it is intended that there shall be a reduction of the capital, and that the larger amount of nominal capital in the old company shall be exchanged for the less amount in the new one. It is impossible to take the 32,000 and attribute the whole of it to the purchase of the land. That necessitates putting too great a strain on the meaning of the contract. If we cannot do that, it remains clear that the consideration for the transfer of the land was £10,000, which is not contended to be an unfair valuation, and that nothing more was intended to be conveyed than the land.

It was competent for the parties to transfer, if they had wished to do so, the goodwill and the land together, although that might have necessitated some change in the form of the instrument. That the transfer was of the land only is clear from the fact of its being under the *Real Property Act*, as a transfer of lands and hereditaments, and a goodwill or business is clearly not within words.

I am of opinion that the contention that it was the intention of the parties to transfer the goodwill as well as the land in the

one document, as to which we have to consider what stamp duty is to charged, cannot be reconciled with the fact that there is also an agreement to assign the goodwill and business. In the absence of any provision for an *ad valorem* duty on similar transactions such as is contained in sec. 59 of the English Stamp Act of 1891, that agreement is subject only to the trifling fixed duty exacted by the Act of this State. We are restricted solely to the question what passed by the transfer, and, as I have pointed out, that was nothing but the land, whatever consequences may ensue between the old company and the new.

I am therefore of opinion that the appeal should be upheld.

O'CONNOR J. Under the *Stamp Duties Act* 1898, *ad valorem* duty is chargeable on the amount or value of the consideration in a conveyance or transfer. We must first look at the document on which the duty is charged in order to see what it really transfers. On the face of the instrument it transfers the land only and for the consideration of £10,000. That is admitted to be a fair value for the land, if the land only is considered to be transferred.

The parties to the instrument took advantage of sec. 37 of the Act which enables a separation of transfers where mixed property is contracted to be sold for one consideration. It was open to the parties to transfer the land and goodwill in one instrument, or, if they thought fit, the land in one instrument and the goodwill in another. They have thought it necessary, as the object was to complete the title of the new company, to make a transfer of the land only. The whole question is what is included in the transfer of the land.

It is admitted that, if the land only is transferred by this conveyance, the contention of the appellants as to the amount of duty is correct. But it is said that more than the land is transferred, that is to say, the name and goodwill, and that to the goodwill and name, together with the land, must be attributed a very much larger consideration than £10,000. It is clear that if the goodwill and the land are separable the parties have separated them. They have picked out the land for a special conveyance and left the goodwill to be transferred under the rights given by the agreement. The parties have severed the land and goodwill,

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and the question is whether the goodwill is capable of being so severed or not. If it is not, then the decision arrived at by the Commissioner and the Supreme Court is correct.

There is no doubt that the determination of what is goodwill in any particular case depends entirely on the circumstances. There are cases in which it would be clear that the goodwill could not be separated from the land or premises. In a case of that sort the conveyance of the land must carry with it the goodwill. But there are other cases in which it is equally clear that the goodwill is separable from the land having an independent existence apart from the land, and is capable of being carried away from the land by the vendor. Under those circumstances, as the goodwill does not necessarily go with the land, it may be separated from it in a transfer. There is a very good explanation of what is goodwill in the judgment of Lord *Herschell* in *Trego* v. *Hunt* (1), where he cites several definitions of goodwill and, amongst others, one by Lord *Eldon* in which he said: "The goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place." And again (2), quoting from what was said by *Sir George Jessel* in *Ginesi* v. *Cooper* (3) he said: "'Attracting customers to the business is a matter connected with the carrying of it on. It is the formation of that connection which has made the value of the thing that the late firm sold, and they really had nothing else to sell in the way of goodwill.' He pointed out that, in the case before him, the connection had been formed by years of work." Lord *Herschell* went on to say: "I cannot myself doubt that they were right. It is the connection thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the goodwill of a business. It is this which constitutes the difference between a business just started, which has no goodwill attached to it, and one which has acquired a goodwill. The former trader has to seek out his customers from among the community as best he can. The latter has a custom ready made. He knows what members of the community are purchasers of the articles in which he deals,

(1) (1896) A.C., 7, at p. 16. (2) (1896) A.C., 7, at p. 17.
(3) 14 Ch. D., 596.

and are not attached by custom to any other establishment." Now, let us apply the principle contained in these definitions to the circumstances of the present case. The fact that a racecourse is properly equipped and connected with the main line of railway does not of itself constitute its value. There is another very important element to be taken into consideration. It appears that the Australian Jockey Club takes upon itself the regulation of racing in New South Wales. There is no contest in this case that the power exercised by the Australian Jockey Club in connection with racing matters throughout the State, is an exceedingly important power, and one to which all racecourse proprietors and owners of racehorses must have regard, if they wish to be successful in attracting the public to their racecourses. The Australian Jockey Club have established a registry, not of racecourses, but of racing clubs. They also fix the dates on which race meetings are to be held by the various clubs. These dates have been referred to in this case as "racing fixtures." One of the Australian Jockey Club rules provides that if any racehorse is raced at an unregistered meeting, that is at a meeting of a club which is not registered with the Australian Jockey Club, or on a date which is not registered, then the horse, trainer, and owner, and everybody connected with the horse are disqualified from racing at any registered meeting for the future. The result of that rule, supported as it is by public opinion, is that the horse trainers and owners will not run their horses at meetings not registered by the Australian Jockey Club. Under these circumstances it is clear that the racecourse, with appointments and buildings and goodwill, is valueless as a racecourse unless used under the right given by registration of its racing fixtures under the rules of the Australian Jockey Club. So that the most important element in the goodwill of this business is the right of registration and the right to fixtures appointing the days of race meetings. It is evident from the correspondence that this is a personal right, attached to the Rosehill Race Company, and not a right existing in respect of the land on which the races are held. The club, if it thought fit, might carry that right with it to another course. Consequently the goodwill in the sense of these definitions could have no effective existence outside the rights given by Australian Jockey

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Club registration of its racing fixtures. Under these circumstances it seems to me that when so large an element of what constitutes goodwill is separate from the land, it is impossible to hold that the goodwill and the land are so inseparably attached as to prevent the parties from separating one from the other if they please. I think, under these circumstances, that the goodwill is separable from the land, that it has been separated by the acts of the parties, and that all that is conveyed by the instrument of transfer is what it purports to convey, the land, and the land only. For that purpose it is admitted that the £10,000 is adequate consideration.

Two cases referred to by Mr. Stephen seemed, at first sight, to have a strong bearing on the argument. The first was *Pile* v. *Pile* (1). In that case there had been a compulsory sale of the land to a railway company, and compensation had been assessed for the land, and it was held that, as the jury had awarded compensation for the taking of the land, it must be deemed that compensation for the goodwill was included as part of the compensation for the land. In the same way in the case of *Commissioners of Inland Revenue* v. *Glasgow and South Western Railway Company* (2), upon which Mr. Stephen also relied, there had been a compulsory purchase, and the question was whether the value of the land taken included the goodwill and the business, and the loss which the deprivation of those things meant to the owner of the land. It was held, to use the words of Lord *Halsbury* (3), that "in strictness the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation." In those cases, where the question was the assessment of compensation, no difficulty arose as to whether the goodwill was separable from the land, because what was assessed was the land with its potentialities, everything capable of going having gone with it. And as the goodwill could go with the land, that was assessed as part of the value of the land, and was to be considered as part of the value for which the owner had been compensated. That distinction was pointed out in the judgment

(1) 3 Ch. D., 36.

(2) 12 App. Cas., 315.

(3) 12 App. Cas., 315, at p. 321.

of Lord *Halsbury* in *Commissioners of Inland Revenue* v. *Muller and Co.'s Margarine Limited* (1), where he says: "In the case of a public-house, owing to the convenience of its situation and its being known as a favourite place of resort, the advantages of its situation are so mixed up with the goodwill of the business that, as a matter of fact, it may well be that it is very difficult to sever them, and to say how much is goodwill and how much is local situation. But these difficulties of fact will not necessarily make their separate existences impossible. In compensation cases, for instance, where a man is being turned out of his holding and has to be put into the same position, so far as compensation can do it, by money which is to be awarded to him, it is unnecessary to regard any such severance into the different elements which make up the advantages of his holding. He is to be compensated for the loss which he has sustained by the alteration of his premises, or the removal of his trade from those premises, and for the extent to which his business may be injured under the circumstances, and it would be quite unnecessary to consider how much he is to be allowed for each element because he is, so far as the tribunal can do it, to be placed in the same position as he was in before." Now, that is exactly what had taken place in these resumption cases, and the only matter to be considered was the whole value of the land, with all its potentialities, to the person from whom it was taken. It appears to me that this distinction must be given effect to in considering the applicability of such cases to a case like the present. They are not authorities for the contention that where the parties wish to separate the value of the goodwill from that of the land in the transaction, they may not do so.

Under these circumstances I am of the opinion that the Commissioner was mistaken, and that the judgment of the Supreme Court should be reversed.

Appeal allowed. Assessment declared erroneous. Duty fixed at £50, and the excess to be repaid to the appellants.

Solicitors, for the appellants, *Minton, Simpson & Co.*

Solicitors, for the respondents, *The Crown Solicitor of New South Wales.*

C. A. W.

(1) (1901) A.C., 217, at p. 239.