

H. C. OF A. *Churchman v. Churchman* (1) in another part of his judgment (2),  
 1952. I think that she would be guilty of connivance ; but in my opinion  
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 GALE ‘corrupt intention’ would mean in this case that the wife showed  
 v. by her conduct that she willingly consented to the continuance of  
 GALE. the adultery ”.

Dixon C.J.  
 Webb J.  
 Kitto J.

The present is a case where a husband did choose to acquiesce in and encourage the continuance of an adulterous connection which his wife had formed ; he did so out of indifference coupled with considerations of advantage.

But the connivance of the appellant was directed to an existing situation. It could not, as connivance, be related back to the inception of the adultery so as retroactively to connive at that adultery. In this view we agree with the Full Court of the Supreme Court. But clearly enough the whole conduct of the appellant amounted to condonation of all past adultery of his wife with Osmond. He did not know when the adulterous character of the relationship began. But he knew that it had been going on for some time. He indicated quite plainly, both by his acquiescence in its continuance and by his cohabitation with his wife while it continued, that he waived it as a matrimonial offence.

The situation was indeed an unusual one. The appellant, so to speak, tacitly conferred upon his wife a licence of a general character to commit adultery with Osmond and at the same time maintained her in her full position as his wife. He condoned the past adultery, of which he had a sufficient knowledge although he may not have been completely aware of the duration of the adulterous relationship. He showed, however, that he was indifferent altogether to the precise facts and was agreeable nevertheless to continue to share his wife with Osmond. While in this way condoning her past adultery with him, the appellant connived at future adultery with Osmond.

In his dissenting judgment in *Beard v. Beard* (3) Vaisey J. appears to consider that the consequence of that decision must be that in English law absolute condonation cannot take place, no matter if both parties resolve that it shall be absolute and unconditional so as to render the offence incapable of being revived.

If the reason why a condoned matrimonial offence may be revived by a subsequent offence is that condonation is subject to an implied condition, it ought to follow that the implication may be excluded by a sufficient communication of a positive intention to do so.

(1) (1945) P. 44.

(2) (1945) P., at p. 52.

(3) (1946) P. 8, at pp. 30, 31.



It is to be noticed that in *Rose v. Rose* (1), where an agreement that prior offences should be considered condoned and should not be relied upon in any proceedings was held effective to prevent revival of the prior offences by subsequent offences, Sir *George Jessel* M.R. said:—"It appears to me to be perfectly consistent with public policy to hold that there may be what, for want of a better term, I will call final condonation. In the old Ecclesiastical Courts condonation was never final, but I do not see that public policy is against final condonation". In *Studdy v. Studdy* (2) Sir *Cresswell Cresswell* regarded permission by a wife to her husband to continue an adulterous connection as condonation of past adultery as well as connivance at future adultery: "If the wife thereby gave leave to her husband to commit adultery in the future, that would satisfy me that she condoned any such acts previously committed" (3). This sort of thing has been called anticipatory connivance: cf. *Higgins v. Higgins* (4). How far condonation must be conditional is perhaps in doubt; at all events the extent or duration of the operation of the condition is not clear: cf. *Beale v. Beale* (5). Condonation of the kind here under consideration is not of the kind to which forgiveness conditional upon fidelity has any sensible application. But assume that the waiver of redress for past adultery involved in the appellant's connivance is compatible with a revival of the past adultery as a ground of relief. Adultery connived at cannot amount to a matrimonial wrong that would revive the waived offences. In *Rayner v. Rayner* (6) *Hood* J. said: "This petitioner did not actively condone, but with full knowledge he did nothing, showing indifference and acquiescence, so as to give the wife a licence for her profligate life: *Durant v. Durant* (7). In America it has been held that—"If a man for a considerable space of time sees his wife living in open adultery, and takes no steps either to prevent it or to obtain a divorce, he is presumed to have forgiven or acquiesced in the past, and to acquiesce also in the present, and he cannot succeed in his suit"—*Bishop on Divorce*, vol. II., par. 104".

The facts of the present case are stronger than this doctrine would require. But it may be said that the acts of adultery committed after 9th April 1949 were not covered by the appellant's connivance. They went on until April or May 1950, but in strictness we are

H. C. OF A.

1952.

GALE

v.

GALE.

Dixon C.J.

Webb J.

Kitto J.

(1) (1883) 8 P.D. 98, at p. 99.

(2) (1858) 1 Sw. &amp; Tr. 321 [164 E.R. 747].

(3) (1858) 1 Sw. &amp; Tr., at p. 323 [164 E.R., at p. 748].

(4) (1924) 41 T.L.R. 25, at p. 26.

(5) (1951) P. 48, at p. 49.

(6) (1919) V.L.R. 617, at p. 620.

(7) (1825) 1 Hag. Ecc. 733, at p. 745 [162 E.R. 734, at pp. 738, 739].



H. C. OF A.  
1952.

GALE

v.

GALE.

Dixon C.J.  
Webb J.  
Kitto J.

concerned only with the period up to the commencement of proceedings, 29th August 1949.

The rule expressed as "once connivance always connivance" is not now obtainable if it ever did. The force of connivance may be lost by subsequent conduct. *Richmond v. Richmond* (2); *Monahan v. Monahan*. But the appellant's connivance had not spent its force when his wife parted. The course he took was not by any means to rescue his wife from her guilty relations with Osmond and it was likely to do anything but that. It was due simply to the appellant's having formed a determination to take advantage of his wife's adultery in order to get rid of her and obtain a divorce.

It follows that the adultery committed by the appellant's wife during the period from the beginning of 1947 to the commencement of the proceedings was connived at and that the continuance of cohabitation with his wife and the connivance at her adultery with Osmond precluded him from reliance upon the acts of adultery prior to that period.

*Ligertwood J.* dealt with the suit, after it was remitted to him by the Full Court of the Supreme Court for further hearing, on the footing of unreasonable delay. A difficulty in so dealing with the case lies in the fact that until the proceedings were commenced and the defendant and co-defendant admitted the commission of adultery in 1941 and onwards the appellant had never been in a position to prove adultery during the period before he began to connive at the relationship.

But in any case we think for the reasons we have given the dismissal of the suit was right.

The appeal must be dismissed.

*Appeal dismissed with costs.*

Solicitor for the appellant, *E. F. Skewes*, Naracoorte, by *Genders, Wilson & Bray*.

Solicitors for the respondent Gale, *Elliott, Elliott & Elliott*.

B. H.

(1) (1952) P. 94, at p. 105.  
(2) (1952) 1 All E.R. 838.

(3) (1949) 23 A.L.J. 469.



[HIGH COURT OF AUSTRALIA.]

BOX . . . . .
APPELLANT ;

AND

THE COMMISSIONER OF TAXATION .
RESPONDENT.

*Income Tax (Cth.)—Assessable income—Premium on lease—Consideration “for or in connexion with any goodwill attached to, or connected with, land”—Sale of business—Goodwill—Lease of business premises—Consideration for restrictive personal covenant entered into by vendor of business—Income Tax Assessment Act 1936-1946 (No. 27 of 1936—No. 6 of 1946), ss. 83 (1), 84 (1).*

Section 83 (1) of the *Income Tax Assessment Act 1936-1946* provides that premium means, *inter alia*, “any consideration . . . for or in connexion with any goodwill . . . attached to or connected with land a lease of which is granted assigned or surrendered”. Section 84 (1) provides, *inter alia*, that : “The assessable income of a taxpayer shall include, in addition to rent, any premium received by him in the year of income.”

A had carried on a bakery business, called the Elphin Bakery, in premises which he owned. Of the bread baked on the premises 6% was sold over the counter and 94% was sold on the delivery round. The premises were not situated in a good shopping area. A held an exclusive personal licence to sell bread in the zone in which the premises were situated. This licence was granted under the Bread Industry (Tasmania) Order made on 13th July 1942 under the provisions of the *National Security (General) Regulations*. A sold his business and granted a lease of the premises to the purchaser for a term of ten years. At the same time in consideration of the sum of £1,750, A agreed with the purchaser that during the term of the lease (or if the purchaser should exercise an option to purchase contained in the lease, for a period of ten years from the expiration of the notice exercising such option) he would not carry on the business of a baker or sell bread within a stated area, nor would he permit his own name or the business style of “Elphin Bakery” to be used for such purposes within the same area.

*Held* (1) by Dixon C.J., Williams, Fullagar and Kitto JJ. that the sum of £1,750 was consideration paid in connection with the goodwill of the business ; (2) by the whole Court that the goodwill was not “attached to or connected

H. C. OF A.

1952.

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MELBOURNE,

Oct. 7-9.

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SYDNEY,

Nov. 17.

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Dixon C.J.,  
Williams,  
Fullagar,  
Kitto and  
Taylor JJ.



H. C. OF A.  
1952.  
}  
Box  
v.  
COMMISSIONER OF  
TAXATION.

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with " the land the subject of the lease. Goodwill can only be said to be connected with land, however wide the meaning of the words " connected with " in s. 83, if the site forms a real element in the value of the business, so that the land has an added value because the purchaser of the business must purchase the land or obtain a lease and continue to carry on the business there, at least for a time, if he is to retain the real value of what he has bought.

APPEAL under the *Income Tax and Social Services Contribution Assessment Act 1936-1950*.

Albert Oliver Box carried on business as a baker for a number of years prior to 1946 in premises which he owned at 86 Elphin Road, Launceston, Tasmania. The bread was baked on the premises and about 6% of it was sold over the counter at the shop, the remaining 94% being sold on the delivery round. In February 1946 the said Albert Oliver Box entered into an agreement with John Henry Parkinson, which agreement was expressed as being subject to the consent of the Treasurer of the Commonwealth of Australia being obtained to a lease between the same parties of the premises at 86 Elphin Road, together with an adjoining block of land, for a period of ten years.

The agreement so far as is relevant provided as follows :—(1) that the vendor agrees to sell and the purchaser agrees to purchase the vendor's plant and utensils used by him in connection with the business of a baker pastrycook and confectioner carried on by the vendor at No. 86 Elphin Road, Launceston, aforesaid and known as the " Elphin Bakery " including the goods and chattels mentioned in the schedule hereto. The price for such plant and utensils shall be the sum of £1,250, whereof One hundred pounds shall be paid as a deposit and the balance on completion ; (2) that in consideration of the purchaser agreeing to purchase the said plant and utensils the vendor agrees that the purchaser shall be entitled to the goodwill of the said business together with proprietary recipes (if any) used in connection therewith and shall be entitled to the zone or area allotted to the vendor under the Bread Industry (Tasmania) Order made under the *National Security (General) Regulations* ; (3) that in consideration of the further sum of £1,750 to be paid by the purchaser to the vendor on completion the vendor agrees with the purchaser that during the term of the said lease or any extension thereof (and if the purchaser shall exercise the option of purchase contained in the said lease for a period of ten years from the expiration of the notice exercising such option) he the vendor his executors administrators or assigns will not directly or indirectly or in partnership with any person or persons whomsoever as a member of a public or proprietary



company as agent manager or employee of any person partnership or company carry on or assist in carrying on whether for remuneration or not the trade or business of a baker pastrycook or confectioner or sell bread smallgoods or confectionery on commission or as agent for any other person or persons or import bread smallgoods or confectionery for sale within a radius of five miles from the Launceston Post Office nor will he permit the name of the vendor or the business style of "Elphin Bakery" to be used for such purpose for or by any person carrying on or about to carry on or who might hereafter carry on such business within the same area and will not at any time during the said period knowingly do or cause to be done any act or thing whereby the purchaser may be injured or damaged in the conduct of his trade or business.

By an indenture made on 21st February 1946 Box leased the premises at No. 86 Elphin Road, together with the adjoining vacant allotment of land to Parkinson for a term of ten years from 10th March 1946 at a monthly rent of £21 13s. 4d. The indenture contained the following covenant by the lessee:—" (h) That during the operation of this lease or any extension thereof the Lessee will use and occupy the said premises as a shop for carrying on the trade or business of a baker and pastrycook and will at all times during this lease or any extension thereof keep the shop on the demised premises open for the sale of bread and smallgoods and will not permit or suffer the said premises or any part thereof to be closed or remain unused or permit or suffer the same to be used for any purpose other than as aforesaid without the consent in writing of the Owner".

And the lessor covenanted *inter alia* as follows with the lessee:—" (c) That if during the month of September One thousand nine hundred and fifty five the Lessee shall give to the Owner notice in writing that he desires to purchase the freehold of the demised premises (including the said allotment of land) for Two thousand four hundred pounds and shall pay the amount of the said purchase money and all arrears of rent and contribution towards rates up to the expiration of this lease then the Owner will at such expiration transfer or convey the freehold to the Lessee."

The Commissioner of Taxation regarded the sum of £1,750 referred to in cl. 3 of the agreement (*supra*) as being income and accordingly included it in Box's assessable income for the year ended 30th June 1946. The Commissioner of Taxation regarded the said sum as income on the basis that it was a premium within the meaning of s. 84 of the *Income Tax Assessment Act* 1936-1946.

H. C. OF A.  
1952.

Box

v.

COMMISSIONER OF  
TAXATION.



H. C. OF A.  
1952.  
}  
BOX  
v.  
COMMIS-  
SIONER OF  
TAXATION.  
—

On 5th April 1950 the taxpayer requested that the decision of the Commissioner of Taxation might be referred to a Board of Review, and it was so referred. On 23rd July 1951 the Commonwealth Board of Review No. 2 by a majority confirmed the assessment (1). From this decision the appellant brought the present appeal to the High Court of Australia. On 24th July 1952 the matter came before *Dixon C.J.*, who directed that the appeal be argued before a Full Court of the High Court of Australia pursuant to s. 18 of the *Judiciary Act* 1903-1950.

*N. L. Campbell* and *R. L. Franklin*, for the appellant.

1. Payment for the covenant in restraint of trade is not connected with the goodwill. Even without the covenant the purchaser could prevent the vendor from calling on his customers, as this would be soliciting. [He referred to *Californian Oil Products Ltd. v. Federal Commissioner of Taxation* (2); *Trego v. Hunt* (3); *West London Syndicate Ltd. v. The Commissioners of Inland Revenue* (4); *Commissioners of Inland Revenue v. The Duke of Westminster* (5).] 2. Alternatively, this is a "lease sold together with other assets (s. 83 (2)). But sub-s. (2) cannot be applied, and so the commissioner cannot apportion any sum to the goodwill. 3. Alternatively, the normal goodwill is superseded by the right given to the appellant under the Bread Industries (Tasmania) Order of 13th July 1942 made under the National Security (General) Regulations.

*R. L. Franklin.* The goodwill was not "attached to or connected with the land". The English decisions on "local" or "personal" goodwill are not directly relevant to this question: *Federal Commissioner of Taxation v. Williamson* (6). Goodwill is what induces people to deal with a particular business. *Commissioners of Inland Revenue v. Muller & Co.'s Margarine, Ltd.* (7); *Churton v. Douglas* (8); *Trego v. Hunt* (9). "Attached to or connected with" is a compound expression which must be read as a whole. It requires a certain logical nexus to be established between the goodwill and the land. "Connected with" is reduced in scope by its association with "attached to". [He referred to *Strong & Co., of Romsey Ltd. v. Woodfield (Surveyor of Taxes)* (10); *Holy Law South Broughton Burial Board v. Failsworth Urban*

(1) (1950) 2 T.B.R.D. 30.

(2) (1934) 52 C.L.R. 28.

(3) (1896) A.C. 7, at p. 17.

(4) (1898) 2 Q.B. 507, at p. 524.

(5) (1936) A.C. 1, at pp. 19-21.

(6) (1943) 67 C.L.R. 561, at p. 564.

(7) (1901) A.C. 217.

(8) (1859) Johns 174 [70 E.R. 385].

(9) (1896) A.C. 7.

(10) (1906) A.C. 448.



*District Council* (1). *In re Hedley*; *Ex parte Board of Trade* (2); *Whiteman Smith Motor Co. Ltd. v. Chaplin* (3).] The meaning of this expression and the proper test is: Do people deal with this business because it is situated where it is, or for some other reason? This is consistent with the four cases decided previously on this section, viz.: *Federal Commissioner of Taxation v. Williamson* (4); *Phillips v. Federal Commissioner of Taxation* (5); *Commissioner of Taxation v. Watson* (6); *Commissioner of Taxation v. Smith* (7).

[WILLIAMS J. *Phillip's Case* (5) and *Watson's Case* (6) seem to be irreconcilable.]

As to the test of "resorting to the premises": (a) If there is no such resort, the goodwill cannot be attached to the land. (b) If there is such resort the goodwill is *prima facie* attached, but not if it can be shown that it attaches to: (i) personal skill or reputation; (ii) personal property—e.g., a trade mark or patent; (iii) a legal or *de-facto* monopoly, in the area: *Rosehill Racecourse Co. v. Commissioner of Stamp Duties (New South Wales)* (8). In the present case customers did not deal with the business because it was situated where it was. There was no true resort to the premises. The Board of Review wrongly applied the test of resort to the premises.

*J. B. Tait* Q.C. (with him *B. J. Dunn*), for the respondent. Goodwill may be site goodwill, business goodwill, or personal goodwill. The former is attached to the premises in the narrowest sense. It is an added value which the land has because of its site. Business goodwill is that which would remain if the business were moved to any other place in a reasonably convenient locality. Personal goodwill depends on the particular character of the proprietor of the business. Site goodwill would be taxable without special provision, as it is reflected in an increase in the rental value of the land: In *Re Income Tax Acts* (9). Section 83 extends to cover all business goodwill, and only personal goodwill is excluded: *Commissioner of Taxation v. Smith* (7) is wrongly decided.

[DIXON C.J. referred to *Booth v. Curtis* (10).]

The goodwill of a business may be of all three types.

[DIXON C.J.: Must you not decide to what type it substantially belongs?

H. C. OF A.  
1952.  
Box  
v.  
COMMISSIONER OF  
TAXATION.

(1) (1928) 1 K.B. 231.

(2) (1895) 1 Q.B. 923.

(3) (1934) 2 K.B. 35.

(4) (1943) 67 C.L.R. 561.

(5) (1947) 75 C.L.R. 332.

(6) (1952) A.L.R. 427.

(7) (1952) A.L.R. 1052.

(8) (1905) 3 C.L.R. 393, at p. 400.

(9) (1932) V.L.R. 102.

(10) (1869) 20 L.T. 152.



H. C. OF A.  
1952.  
}  
BOX  
v.  
COMMIS-  
SIONER OF  
TAXATION.

FULLAGAR J. : Apart from the goodwill of an advertised product, must there not always be an element of site goodwill ? ]

Yes. If any element of the goodwill is within the section the whole is taxable.

[DIXON C.J. : Does this mean that every sale of goodwill is taxable if made in connection with a lease ? ]

Yes. Boards of Review have increasingly tended to take this attitude. The onus is on the taxpayer to show that none of the goodwill is taxable. The sum of £1,750 paid in this case was in connection with the goodwill. [He referred to *Trego v. Hunt* (1) ; *Townsend v. Jarman* (2).]

[TAYLOR J. : Is not this only connected to that part of the goodwill which is not connected with the land ? ]

It was not paid in connection with the right under the National Security Regulations. Therefore *Phillips v. Federal Commissioner of Taxation* (3) has no application. Here there is no evidence why people deal with the business. [He referred to *Commissioners of Inland Revenue v. Muller & Co.'s Margarine Limited* (4) ; *Federal Commissioner of Taxation v. Williamson* (5) ; *Charrington and Co. Ltd. v. Simpson* (6) ; *Daniell v. Federal Commissioner of Taxation* (7) ; *Commissioner of Taxation v. Smith* (8).] Accordingly there is no basis on which the Court could apportion the goodwill, even if this were permissible.

*R. L. Franklin*, in reply.

*Cur. adv. vult.*

Nov. 17.

The following written judgments were delivered :—

DIXON C.J., WILLIAMS, FULLAGAR AND KITTO JJ. This is an appeal under s. 196 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1950 (referred to the Full Court by the Chief Justice pursuant to s. 18 of the *Judiciary Act* 1903-1950) from a decision of the Commonwealth Board of Review No. 2, which by a majority upheld the contention of the respondent commissioner that the sum of £1,750 paid to the appellant by one John Henry Parkinson in February 1946 formed part of the assessable income of the appellant for the year ended 30th June, 1946. The material facts can be shortly stated. Prior to February, 1946, the appellant had been carrying on the business of a manufacturer and retailer of bread at 86 Elphin Road, Launceston. There is a cottage on the

(1) (1896) A.C. 7, at pp. 7, 27.

(2) (1900) 2 Ch. 698.

(3) (1947) 75 C.L.R. 332.

(4) (1901) A.C., at pp. 223, 226, 230.

(5) (1943) 67 C.L.R. 561.

(6) (1935) A.C. 325, at pp. 335, 341.

(7) (1928) 42 C.L.R. 296.

(8) (1952) A.L.R. 1052.



land, in which the appellant lived, one room of which, twelve feet square, was fitted up as a shop where bread was sold over the counter. The bakehouse was situated in the yard at the rear of the cottage. The trade over the counter was so small that it did not justify the employment of a whole time assistant and the customers were served by the housekeeper who looked after the home. A few orders for bread were received at the shop by telephone and a few customers preferred to pay their accounts at the shop rather than to pay the carters. The bread sold over the counter was approximately six per cent of the total sales. The rest of the bread was sold by delivering it in bread carts to the customers in their own homes pursuant to orders given to the carters on their rounds.

In February 1946 the appellant entered into a contract in writing with Parkinson whereby, subject to the consent of the Treasurer of the Commonwealth, he agreed to grant a lease containing an option of purchase of 86 Elphin Road to the purchaser for a period of ten years. He agreed to sell to Parkinson the plant and utensils used in the business for the sum of £1,250; and also agreed that for this consideration the purchaser should be entitled to the goodwill of the business, together with the proprietary recipes, if any, used in connection therewith; and that the purchaser should be entitled to the zone or area allotted to the vendor under the Bread Industry (Tasmania) Order made under the *National Security (General) Regulations*. By cl. 3 of the contract, it was provided that in consideration of the further sum of £1,750 (this being the sum claimed by the respondent to be assessable income) to be paid by the purchaser to the vendor on completion, the vendor agreed with the purchaser that during the term of the lease, or any extension thereof (and if the purchaser should exercise the option of purchase contained in the lease for a period of ten years from the expiration of the notice exercising such option), the vendor would not directly or indirectly carry on the trade or business of a baker or sell bread within a radius of five miles from the Launceston Post Office, nor would he permit the name of the vendor or the business style of "Elphin Bakery" to be used for such purposes within the same area. By an indenture made on 21st February 1946, the appellant, subject to the consent of the Treasurer of the Commonwealth, leased No. 86 Elphin Road to Parkinson for a term of ten years from 10th March 1946 at a monthly rent of £21 13s. 4d. The indenture contained an option for the lessee to purchase the premises during the month of September 1955

H. C. OF A.  
1952.

Box

v.

COMMISSIONER OF  
TAXATION.

Dixon C.J.  
Williams J.  
Fullagar J.  
Kitto J.



H. C. OF A.  
1952.  
}  
BOX  
v.  
COMMIS-  
SIONER OF  
TAXATION.

Dixon C.J.  
Williams J.  
Fullagar J.  
Kitto J.

for £2,400. It also contained a covenant by the lessee that during the lease, or any extension thereof, the lessee would use and occupy the premises as a shop for carrying on the trade or business of a baker and pastrycook, and would, at all such times, keep the shop open for the sale of bread and small goods, and would not permit or suffer the premises or any part thereof to be closed or remain unused or permit or suffer the same to be used for any purposes other than as aforesaid without the consent in writing of the owner. The reference in the contract to the zone or area allotted under the Bread Industry (Tasmania) Order was a reference to the exclusive personal licence held by the appellant under that order to sell bread in the zone where he was selling his bread. The order was made on 13th July 1942 under the provisions of the *National Security (General) Regulations*. Hostilities had ceased six months before the date of the contract and it was evident that the validity of this order as an exercise of delegated legislation under the defence power was likely to be short-lived. But while it existed it gave the holder of the licence a monopoly to sell bread in the area in question.

The £1,750 was paid as consideration for the vendor entering into the restrictive covenant. It was not paid directly for the purchase of the goodwill. But such a covenant enhances the value of the goodwill because without it a vendor is not precluded from commencing a new business although he must not hold himself out as carrying on the old business or solicit its customers. Thus in *Kennedy v. Lee* (1) Lord *Eldon* said :—" There is another way in which the good-will of a trade may be rendered still more valuable ; as by certain stipulations entered into between the parties at the time of the one relinquishing his share of the business ; as by inserting a condition that the withdrawing partner shall not carry on the same trade any longer, or that he shall not carry it on within a certain distance of the place where the partnership trade was carried on ". In *Vancouver Malt and Sake Brewing Co. Ltd. v. Vancouver Breweries Ltd.* (2), Lord *Macmillan*, delivering the judgment of the Privy Council, said : " The law does not condemn every covenant which is in restraint of trade, for it recognizes that in certain cases it may be legitimate, and indeed beneficial, that a person should limit his future commercial activities, as, for example, where he would be unable to obtain a good price on the sale of his business unless he came under an obligation not to compete with the purchaser ". In *Townsend v. Jarman* (3) *Farwell J.* pointed out

(1) (1817) 3 Mer. 441, at p. 452.  
[36 E.R. 170, at p. 174].

(2) (1934) A.C. 181, at p. 189.  
(3) (1900) 2 Ch. 698, at p. 703.



such a covenant plainly increases the value of the business in the hands of an assignee.

The contention of the respondent is that the sum of £1,750 was a premium as defined by s. 83 (1) of the *Income Tax Assessment Act* 1936-1946 and therefore assessable income of the appellant under s. 84 (1) of the Act. Section 83 (1) provides that premium means any consideration in the nature of a premium, fine or foregift payable to any person for or in connection with the grant or assignment by him of a lease or any consideration for or in connection with the surrender of a lease, or for or in connection with any goodwill or license attached to or connected with land, a lease of which is granted, assigned or surrendered. Section 84 (1) provides that the assessable income of a taxpayer shall include, in addition to rent, any premium received by him in the year of income, and any consideration so received for or in connection with his assent to any grant or assignment of a lease. The definition of premium in s. 83 has three limbs. The first applies where the transaction consists of the grant or assignment of a lease. The second applies where the transaction consists of the surrender of a lease. The third applies to the more complicated case where a lease is granted, assigned or surrendered as part of a transaction which includes a sum paid as consideration for the purchase of the goodwill of the business. In cases falling within the first and second limbs, no difficulty in ascertaining whether the sum is a premium would usually be encountered. The payment is made for the purpose of the lessee or assignee obtaining the benefit of the lease or of the reversioner obtaining possession of premises which have more value to him as premises in possession than as premises in reversion.

Neither the contract nor the indenture of lease of 21st February 1946 provided for the payment of any consideration for the lease in the nature of a premium: consequently the respondent cannot rely on the first limb. No lease was surrendered as part of the transaction that took place between the appellant and Parkinson so that the respondent cannot rely on the second limb. He must rely on the third limb. The £1,750 was consideration paid in connection with the purchase of the goodwill of the business, so that the crucial question is whether this goodwill was attached to or connected with 86 Elphin Road. The majority of the board found that it was, but in our opinion this finding was not in law reasonably open on the evidence. The attributes of goodwill as a legal conception have been explored in many cases, including cases of the highest authority. At first the tendency was to place upon goodwill the limited meaning of nothing more than the probability

H. C. OF A.  
1952.

—

Box

v.

COMMISS-  
SIONER OF  
TAXATION.

Dixon C.J.  
Williams J.  
Fullagar J.  
Kitto J.



H. C. OF A. 1952.  
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that the customers would resort to the old place of business. *Cruttwell v. Lye* (1). But a wider view soon prevailed. In *Trego v. Hunt* (2) Lord *Herschell* L.C. cited a passage from the judgment of *Wood* V.C. in *Churton v. Douglas* (3) that goodwill must mean every positive advantage that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was carried on, or with the name of the firm, or with other matter carrying with it the benefit of the business. He then cited a passage from the judgment of *Jessel* M.R. in *Ginesi v. Cooper & Co.* (4) in which his Lordship, discussing this passage, in relation to a business of stone merchants, 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 which the late firm sold, and they really had nothing else to sell in the shape of goodwill”. Lord *Herschell* then continued: “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”. In *Churton v. Douglas* (5) *Wood* V.C., after referring to *Cruttwell v. Lye* (6) and *Kennedy v. Lee* (7), pointed out that when in the latter case Lord *Eldon* was speaking of a nursery garden or a locality which customers must frequent to look at the plants and other things, and that when Sir *Thomas Plumer* in another case was speaking of a retail shop which a person must enter in order to buy the goods there exposed “they are only, as it appears to me, giving those as illustrations of what goodwill is. But it would be absurd to say that, where a large wholesale business is conducted, the public are mindful whether it is carried on at one end of the Strand or the other, or in Fleet Street, or in the Strand or any place adjoining, and that they regard that, and do not regard the identity of the house of business, namely, the firm . . . . When you are parting with the goodwill of a business you mean to part with all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it”. In *Inland Revenue Commissioners v. Muller and Co.’s Margarine Ltd.* (8) Lord *Lindley* said “Goodwill regarded as

(1) (1810) 17 Ves. Jun. 335, at p. 346  
 [34 E.R. 129, at pp. 133, 134].

(2) (1896) A.C. 7, at pp. 17, 18.

(3) (1859) Johns. 174, at p. 188  
 [70 E.R. 385, at p. 391].

(4) (1880) 14 Ch. D. 596, at p. 600.

(5) (1859) Johns, at pp. 188, 189. [70  
 E.R., at p. 391].

(6) (1810) 17 Ves. Jun. 335 [34 E.R.  
 129].

(7) (1817) 3 Mer. 441 [36 E.R. 170].

(8) (1901) A.C. 217, at p. 235.



property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. . . . That in some cases and to some extent goodwill can and must be considered as having a distinct locality, is obvious, and was not in fact disputed. The goodwill of a public-house or of a retail shop is an instance. The goodwill of a business usually adds value to the land or house in which it is carried on if sold with the business; and so far as the goodwill adds value to land or buildings, the goodwill can only be regarded as situate where they are. In such a case the goodwill is said to be annexed to them."

In the present case the £1,750 was paid as consideration for the vendor entering into a covenant not to compete with the purchaser in the business which he had previously been carrying on. It was paid to protect and enhance the value of that business so that the purchaser would be able to carry it on in the future in the same profitable manner as the vendor had previously carried it on without the risk of the vendor commencing or becoming engaged in a competing business. Goodwill includes whatever adds value to a business, and different businesses derive their value from different considerations. The goodwill of some businesses is derived almost entirely from the place where they are carried on, some goodwills are purely personal, and some goodwills derive their value partly from the locality where the business is carried on and partly from the reputation built up around the name of the individual or firm or company under which it has previously been carried on. It is, for instance, said in *Lindley on Partnership*, 11th ed. (1950), at pp. 539, 540, that "the goodwill of a business is frequently of no value at all, except in connection with the place of business. This, however, is by no means always the case. The value of the goodwill of a newspaper, for example, attaches to its name, and is scarcely, if at all, dependent on the place of publication". In the case of a monopoly such as letters patent, or an exclusive licence to sell a commodity only obtainable from the licensor, such as a newspaper, in a particular area, the real value of the goodwill would lie in the fact of sole ownership and, so far as it has a locality, would be situated in the area over which the monopoly extended: *Phillips v. Federal Commissioner of Taxation* (1).

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Section 84 (1) of the *Income Tax Assessment Act* makes premiums as defined by s. 83 part of the assessable income of a taxpayer. The Act does not provide for any apportionment of any sum paid for the goodwill of a business where the value of the goodwill may depend partly upon the business being carried on upon particular premises and partly upon other considerations. It would seem, therefore, that the whole of the consideration must form part of the assessable income if the situation of the premises of which the lease is granted or assigned is in any real sense an element in the value of the goodwill. Some premises have a site goodwill because the site has some particular advantage for carrying on a business as where premises adapted for a shop are situated in a position specially favourable for the business in a busy shopping area or where a licence can be obtained for carrying on a business such as that of a publican on a suitable site on which it would otherwise be unlawful to carry it on. Other premises may have acquired a site goodwill, as in the case of a retail store, because a profitable business has been carried on there for a number of years and people have become accustomed to resort to that site to do their business: *Potter v. Commissioners of Inland Revenue* (1). Clearly this is a common case where the goods are sold and delivered only over the counter, and it might often be so where the goods can also be ordered by telephone or mail and the store delivers the goods to the purchaser. In *Federal Commissioner of Taxation v. Williamson* (2) *Rich J.* said:—"The existence of local goodwill attached to premises is a matter of fact depending on the propensities of customers". These two forms of adherent goodwill have been discussed in the English decisions upon the meaning of s. 4 of the *Landlord and Tenant Act* 1927 (Imp.)—see, for instance, *H. Morell & Sons Ltd. v. Canter* (3); *Stuchbery v. General Accident Fire and Life Assurance Corporation Ltd.* (4); *Lawrence v. Sinclair* (5).

In the present case the value of the goodwill could not be said to be derived in any real sense from the situation of the shop and bakery at 86 Elphin Road. The premises are not situated in what is naturally a good shopping area and nothing had been done to build up a profitable trade over the counter resulting in a large number of customers forming the habit of resorting to the shop to buy their bread. The business did not add any value to the site. The land and premises would have had the same value whether the bakery was situated there or not. The uncontradicted

(1) (1854) 10 Exch. 147, at p. 159 [156 E.R. 392, at pp. 396, 397].

(2) (1943) 67 C.L.R. 561, at p. 565.

(3) (1947) 2 All E.R. 533.

(4) (1949) 2 K.B. 256.

(5) (1949) 2 K.B. 77.