

1932

Present : Macdonell C.J. and Garvin S.P.J.

WAHARAKA INVESTMENT CO., LTD. v.  
COMMISSIONER OF STAMPS.

18 (Inty.)—Appeal under section 32 of Stamp Ordinance.

*Stamps—Incorporation of Company—Transfer of shares to Company—Consideration for transfer—Market value of shares—Duty on instrument—Ordinance No. 22 of 1909, ss. 20 and 22.*

A company styled the Waharaka Investment Company was formed, principally for the purpose of acquiring all the interests in Ceylon of one R. D. and was registered on March 15, 1930.

It was part of the arrangement entered into with R. D. upon which the Company was incorporated, that the Directors would not allot any shares in the Company to any persons other than the said R. D. or persons nominated by him, and that upon the application and payment in full by the said R. D. for shares, they would be allotted to him or his nominees.

On March 18, 1930, a resolution was passed at a meeting of the Directors, all of whom were nominees of the said R. D., that they should negotiate for the purchase of the assets, the property of R. D., specified in the resolution for the prices stated therein.

One of the assets conveyed consisted of 670 shares in the Great Western Tea Company transferred to the Company by the instrument in question. The consideration for the transfer was Rs. 13,400 while the market value of the shares was Rs. 63,650.

*Held*, that the consideration for the transfer was the price specified in the instrument and that the instrument was chargeable with duty assessed on that consideration.

**A** PPEAL from a decision of the Commissioner of Stamps under section 30 of the Stamp Ordinance to the effect that the transfer of certain shares in the Great Western Tea Company of Ceylon by one A. R. Dawson to the appellant Company was liable to a stamp duty of Rs. 640 instead of Rs. 135, which the Company claimed was the duty chargeable. The facts are briefly stated in the headnote.

*H. V. Perera* (with him *Choksy* and *D. W. Fernando*), for appellant.—The true consideration is the actual value paid. It is only legal consideration that matters. A person may be willing to sell at different prices to

different individuals. If the transaction is genuine then the reasons that determine the consideration do not matter. A transaction is genuine where it is for the agreed consideration. Stamp duty is payable only on the consideration stated in the document. If the consideration is more than the value of the property then stamp duty will be payable on the consideration and not on the value of the property, (*Ex parte Chellappa*<sup>1</sup>). There is no doubt that consideration is not merely money consideration. But the consideration must be stated in the document. The word consideration must be understood in its legal sense. Motive is excluded. Section 74 of the Finance Act of 1891 deals with cases in which the consideration is so inadequate as to make the transaction almost a gift. Valuable consideration does not mean adequate consideration. The element that matters is the good faith of the parties.

In the present case it cannot be said that there is another consideration over and above the one expressed in the instrument of transfer. There is no evidence of an agreement to that effect. The transferor is the major shareholder in the Waharaka Company but he cannot for that reason be identified with the Company, which being a corporate body is a separate legal entity. (*Foster & Sons. v. Commissioner of Inland Revenue*<sup>2</sup>.) The transfer in this case falls within the principle in *Spargo's case*<sup>3</sup>.

*M. W. H. de Silva, Acting Deputy S.-G. (with him Basnayake, C.C.), for the Commissioner of Stamps.*—The shares were sold to the Company at the rate of 20 rupees. The market value is 75 rupees. Therefore on the face of the transaction it was one that no ordinary person would have entered into. The Commissioner was entitled therefore to inquire into the circumstances under which the transfer was made (*Gunawardene v. Gunasekera*<sup>4</sup>). The mention of a payment in the transfer does not make it the true consideration. The payment for the shares at a rate far below the market value clearly shows that there is some other consideration. The further consideration is the agreement to allot shares in the Waharaka Company. Even though there is no express agreement, since the shares were actually allotted, it must be presumed that there was an agreement to allot shares. The money payment is not the real transaction. The real transaction was a transfer of the assets of Dawson to the Company of which he was the major shareholder for shares in the Company. A money value had to be placed on the assets in order to determine how many shares in the Company were to be given in exchange. The value of the assets might be fixed by an expert or be merely arbitrary. In either case Dawson is in the same position. The true value of the shares would be the value of the assets conveyed. If the contention of the appellant is to succeed every time a person conveys assets to a company in lieu of shares the revenue can be defrauded considerably. The Commissioner has a right where he suspects that property transferred is not properly valued to inquire into the proper value and to require stamps accordingly. For stamp duty one must inquire what the actual transaction is, not what is on the face of the

<sup>1</sup> 19 N. L. R. 116 at p. 119.

<sup>2</sup> (1894) 1 Q. B. 516.

<sup>3</sup> (1872) L. R. 8 Ch. Ap. 407.

<sup>4</sup> 1 Times Law Reports 90.

document. (*The Great Western Railway Co. v. The Commissioner of Inland Revenue*<sup>1</sup>). The case is also governed by section 20 of the Ordinance. The instrument is a conveyance of marketable security. Section 20 comes into operation only when an instrument becomes chargeable *ad valorem* (*Jayawickreme v. Amarasuriya*<sup>2</sup>). If the Commissioner is not satisfied he can call for the proof of the true consideration. This word is here used as meaning any motive which induces a man to act in the way he does. It is a matter entirely within the discretion of the Commissioner to decide what consideration passed. His decision must be treated as a decision on a question of fact by a subordinate Court.

*H. V. Perera*, in reply.—The facts are all in our favour. The decision of the Commissioner is based on his interpretation of section 20. The words “in respect of any stock” must not be read with the word “instrument”. They go with the words “chargeable *ad valorem*”. The ordinary rule of contracts would apply. Section 20 does not apply where you take into account not the value of the shares but the money consideration. See section 6 of the Stamp Act, 1891. The Commissioner if he has been guided by section 20 has ruled on a wrong principle. Consideration cannot include what is known as *causa* under the Roman-Dutch law. Under that law *causa* may support a contract where there is no consideration. The word consideration here is used in the English sense as something passing from one party to the other.

November 14, 1932. MACDONELL C.J.—

This is an appeal under section 32 of the Stamp Ordinance, No. 22 of 1909, against a decision of the Commissioner of Stamps under section 30 of that Ordinance that the transfer of a certain 670 fully paid shares in the Great Western Tea Company of Ceylon by one James Anderson Ramage Dawson to the appellant Company was liable to stamp duty of Rs. 640 instead of Rs. 135 which the appellant Company claim was the stamp duty chargeable. The facts were these:—

The appellant Company was registered as a company limited by shares on March 15, 1930, among the objects in its Memorandum of Association being the purchase of property of every kind. Its nominal capital was Rs. 5,000,000 in shares of Rs. 100 each, and the seven signatories to the Memorandum state therein that they agree to take one share each. On March 18, 1930, the Directors of the Company passed a resolution to acquire certain assets, landed property, mortgages, debenture stocks and ordinary stocks, the property of the said Ramage Dawson as at April 1, 1930. These assets and the price at which each was to be acquired were set out in the resolution. Eventually on a date not given the appellant Company did acquire all these assets, save one item, at a total stated price of Rs. 1,978,460. Among the ordinary stocks acquired by the appellant Company from Mr. Dawson were these 670 shares of the Great Western Tea Company of Ceylon priced at Rs. 13,400, that is at Rs. 20 a share being their value at par; it would appear that the date when the appellant

<sup>1</sup> (1894) 1 Q. B. 507.

<sup>2</sup> 20 N. L. R. 289.

Company acquired these shares from Mr. Dawson was May 5, 1930. The "issued capital" of the appellant Company is stated at that date to have been Rs. 21,500, *i.e.*, 215 shares of Rs. 100 each—the word "issued" is clearly an error, clerical or other—and it is further stated that Mr. Dawson had by then been allotted, and was the registered owner of 8 shares, that he was also the beneficial owner of another 7 shares registered one each in the name of each signatory to the Memorandum of Association, and that he was an applicant for shares to the value of Rs. 723,500, *i.e.*, 7,235 shares. At some date not stated but prior to September 15, 1931, the position was as follows:—the total issued capital of the Company was 21,000 shares of Rs. 100 each, whereof 20,800 had been allotted for cash in the name of Mr. Dawson or his nominees—these latter being the 7 signatories of the Memorandum of Association and one other—and Mr. Dawson is stated to be the beneficial owner of these 20,800 shares; the remaining 200 shares had been allotted to Mrs. Dawson and her daughter as beneficial owners. The appellants in stating the above add "the total consideration paid for the property transferred by Mr. Ramage Dawson to the Company was Rs. 1,978,460 which constituted the valuation agreed upon between the parties prior to the sale". On June 10, 1931, the proctors for the appellant Company had stated as follows:—"It is not correct to assume that Waharaka Investment Company was formed to take over all Mr. Ramage Dawson's interests in Ceylon and that Mr. Ramage Dawson transferred his assets in Ceylon to the Company in consideration of the Company allotting to him shares to cover the value of the assets so transferred. The Company was formed to take over all Mr. Ramage Dawson's interests in Ceylon and as vendor he transferred his assets for a cash consideration paid by the Company to him."

The above facts are taken from the correspondence between the appellant Company and the Commissioner of Stamps. On October 25, 1930, the appellant Company had sent to the Commissioner of Stamps a transfer by Mr. Dawson in his favour of these 670 shares in the Great Western Tea Company of Ceylon, Limited, with a request that he would in terms of section 30 of the Stamp Ordinance let the Company have his opinion as to the duty with which the transfer was chargeable. The transfer, a printed form, is a declaration by Mr. Dawson as follows:—

"I, James Anderson Ramage Dawson of Balado, in the County of Kinross, Scotland, in consideration of the sum of Rupees Thirteen thousand Four hundred (Rs. 13,400) paid to me by the Waharaka Investment Company, Limited, of 45, Queen street, Fort, Colombo, do hereby transfer to the said the Waharaka Investment Company, Limited, Six hundred and seventy (670) fully paid shares numbered 6,844/6,968, 29,544/29,993, and 31,879/31,973 respectively all inclusive in the Great Western Tea Company of Ceylon, Limited, standing in my name in the books of the Company, to hold unto the said the Waharaka Investment Company, Limited, its successors and assigns, subject to the several conditions on which I hold the same; and I, the said the Waharaka Investment Company, Limited, do hereby agree to take the said shares subject to the same conditions."

A lengthy correspondence followed between the appellant Company and the Commissioner of Stamps, and on February 11, 1932, the latter announced his decision that the instrument, *i.e.*, this transfer of the 670 shares, was "liable to a stamp duty of Rs. 640, the duty being assessed on the basis of the market value of the shares on the date of the execution of the transfer", which would be May 5, 1930. It is from this ruling that the present appeal is brought.

The Commissioner had in the correspondence between him and the appellant Company asked for and received the information set out above as to the relations between Mr. Dawson and the Company, and in his own letters he does not anywhere question or doubt any of the statements of fact made to him on its behalf. The only passages in the correspondence throwing light on the reasons of the Commissioner for his ruling of February 11, 1932, are to be found in the following letters from him. On March 25, 1931, he asks "whether it is correct to assume that the Waharaka Investment Company was formed to take over all Mr. Dawson's interests in Ceylon and that Mr. Dawson transferred his rights in Ceylon to the Company in consideration of the Company allotting to him shares to cover the assets of the Company so transferred". The answer to this has been given above in the Company's letter of June 10, 1931, the gist of which is that Mr. Dawson transferred his assets not in consideration of the Company allotting him shares but for a cash consideration paid by the Company to him. Then in a letter of June 18, 1931, the Commissioner inquired what was the present value of the shares in the appellant Company allotted to Mr. Dawson, and the Company answered on June 25 that it was of opinion that the shares could not be valued at more than par. Finally on December 23, 1931, the Commissioner asked the following question:—"Was the consideration, Rs. 20 per share, the average price or the market value of a share in the Great Western Tea Company, Limited, on the date of the transfer, *viz.*, the 5th May, 1930? If neither, what was the average price or the market value of such share in that Company on that day?" It will be seen that this question follows very closely the wording of section 20 of Ordinance No. 22 of 1909. The answer to this was contained in the Company's affidavit of January 27, 1932, of which the following is the relevant passage:—"There were no transactions affecting shares in the said Great Western Tea Company of Ceylon, Limited, on the said 5th day of May, 1930, other than the transfer referred to above in which the price paid per share was Rs. 20 as expressed in the relative instrument and was the true purchase consideration agreed upon between the purchaser and the seller and paid in cash at the execution of the said transfer." But the same affidavit states that the market value of such shares on May 5, 1930, was Rs. 95 per share and this statement is supported by a certificate from a well known firm of brokers. With regard to the question that the Commissioner asked on December 23, 1931 (quoted above), the appellant Company replied on January 27, 1932: "It is not understood what the average price or the market value of the shares in question has to do with the chargeability of the instrument with stamp duty, seeing that the instrument clearly expressed the

'purchase consideration or money' as required by item 22 (b) of Part I., Schedule B, to the Stamp Ordinance, namely, a certain sum of money agreed upon between the parties and paid, and ample evidence is available to establish this."

At the conclusion of the argument of this appeal it was agreed that the appellant Company could, if it so desired, file an additional affidavit, which it did. This affidavit was sworn to by Mr. D. C. Wilson who has been a Director of the appellant Company continuously from May 5, 1930, to the present time and is one of the signatories to the transfer of the shares in question. In it he states "Neither before nor at the date of nor after the execution of the aforesaid transfer was or had there been any undertaking given by the Directors of the Waharaka Investment Company, Limited (hereinafter called 'The Waharaka Company'), to the aforesaid James Anderson Ramage Dawson or his attorney in Ceylon by which the Directors undertook to allot shares in the Waharaka Company to the said James Anderson Ramage Dawson or in accordance with his directions to the value of the consideration paid by the Waharaka Company to the said James Anderson Ramage Dawson for the said 670 shares in the Great Western Tea Company, Limited, or for all the assets acquired by the Waharaka Company from the said James Anderson Ramage Dawson or at all. Although there was no formal agreement between the parties it was part of the arrangement come to with the said James Anderson Ramage Dawson upon which the Waharaka Company was incorporated and was well understood by the Directors of the Waharaka Company that the Directors would not allot any shares in the Waharaka Company to any persons other than the said James Anderson Ramage Dawson or persons nominated by him and that upon the application and payment in full by the said James Anderson Ramage Dawson for shares in the Waharaka Company such shares would be allotted to him or to his nominees by the Directors." These then are the facts in the present appeal.

At the argument it was maintained that section 20 of Ordinance No. 22 of 1909 was strongly in favour of the ruling of the Commissioner of Stamps, and it becomes necessary, therefore, to consider this section and its effect. It is as follows:—

"20. Where an instrument is chargeable with *ad valorem* duty in respect of any stock or of any marketable or other security, such duty shall be calculated on the value of such stock or security according to the average price or the value thereof on the day of the date of the instrument."

This section seems simply to provide for the manner in which *ad valorem* duty on an instrument relating to a stock or other security is to be arrived at, once it is clear that such instrument relating to a stock or security is chargeable with an *ad valorem* duty, but it does not say what those instruments are, nor does it say that because an instrument relates to a stock or other security, therefore it must be chargeable with an *ad valorem* duty. In effect, it is not an enabling section conferring a power but one

saying how a power given elsewhere in another part of the law, is to be exercised. This is clear from the previous section 19 :—

“ Where an instrument is chargeable with *ad valorem* duty in respect of any money expressed in any currency other than that of Ceylon, such duty shall be calculated on the value of such money in the currency of Ceylon according to the current rate of exchange on the day of the date of the instrument.”

It could hardly be argued that because an instrument is expressed in a currency other than that of Ceylon it must be chargeable with a duty *ad valorem*. What section 19 does is to explain how a sum of money expressed in a currency other than that of Ceylon is to be reduced to the currency of Ceylon whenever the instrument expressing such sum is an instrument chargeable with an *ad valorem* duty. It is not, then, section 20 of the Ordinance which makes the present instrument, the transfer of these shares, chargeable with duty.

The provision which does so is article 22 (b) of Part I., Schedule B, which is as follows :—

“(b) Conveyance or transfer of any movable property for any consideration—

Where the purchase or consideration money therein or thereupon expressed, or if the consideration be other than a pecuniary one, or partly pecuniary and partly other than pecuniary, the value of the property shall be—

	Duty. Rs. c.
Over Rs. 500 and not over Rs. 1,000	.. 10 0
Every further Rs. 500 or part thereof	.. 5 0

These shares were certainly movable property and the instrument of May 5, 1930, was a conveyance or transfer of them. In that instrument the consideration is stated definitely to be Rs. 13,400, then this is “the purchase or consideration money therein or thereupon expressed”. If so, it would seem that the stamp duty according to the scale set out in article 22 (b) would be Rs. 135. If effect is to be given to the words of the article 22 (b), then this was an instrument where “the purchase or consideration money” was expressed to be a certain sum of money, and if so the article says sufficiently clearly that the stamp duty should be calculated on and with relation to that sum of money.

First, however, the words of the article must be considered. They deal with the consideration for the transfer and state that it may be a pecuniary consideration or one other than pecuniary or partly one and partly the other. It seems to me beyond question that “consideration” as used here must mean what it means in English law. It cannot be equated with the *causa* of Roman-Dutch law which is not only a legal notion wider than the consideration of English law, *Jayawickrama v. Amarasuriya*<sup>1</sup>, since it looks to the deliberation of the purpose shown by the party to be charged as the test whether his promise is to bind him,

but is based on a different idea, since consideration looks rather to the possibility of placing a money value on the act or forbearance as the test whether the person acting or forbearing or promising to do so, is to be bound. If it cannot be equated with *causa*, there is certainly nothing else in Roman-Dutch law with which it can be, and indeed consideration being a doctrine peculiar to English law and found in no other system—how far it resembles or differs from the *quid pro quo* of the Canonists from which historically it seems to have been derived, can be left to those learned in Canon law to decide—I would say that wherever in one of our statutes the term “consideration” occurs, there is a strong presumption that it must be given the meaning it has in English law, and indeed what other meaning can you give it, if it is a term peculiar to English law? Then, in this article 22 (b) “consideration” must have the meaning given to it in that law where it has been defined thus, “a valuable consideration in the sense of the law may consist in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given suffered or undertaken by the other” (*Currie v. Misa*<sup>1</sup>). Here “the profit or benefit accruing” to the vendor and the “detriment or loss suffered” by the Company is stated as Rs. 13,400. This then is the consideration money on the instrument and the stamp duty payable will be Rs. 135, as the appellant Company contends.

From the argument one did not understand that the above statement of the law was disputed by the respondent, but it was argued that the Rs. 13,400 expressed in the instrument as the consideration was not the ‘purchase money’ or ‘consideration money’ but that on the true construction of the whole transaction the consideration was “other than a pecuniary one” or was at any rate “partly pecuniary and partly other than pecuniary”, in which case the stamp duty payable on the instrument must be fixed according to “the value of the property”, which was Rs. 95 a share, its “average price or value” on the date of the instrument, section 20. The contention that the consideration for the transfer effected by this instrument was other than pecuniary or only partly pecuniary was put in various ways. This was confessedly a one-man Company. The signatories of the Memorandum of Association who are also its Directors, were the nominees of Mr. Dawson, since it is admitted that though each of them had one share registered in his name, Mr. Dawson was the beneficial owner of each such share. These Directors were trustees for him, not purchasers from him for cash. They had given a promise to allot him shares in the Company in proportion to or at any rate in return for the assets he transferred to the Company. Then that promise or the shares allotted in accordance with that promise, would be the consideration for the transfer by him of these shares in the Great Western Tea Company, obviously a consideration other than pecuniary, and by consequence the transfer of the Great Western Tea Company shares would require a stamp according to the value of those shares at the date of the instrument transferring them. It was urged that though the appellant Company might call it a sale or purchase of assets from Mr. Dawson, really the transaction between them, viewed as a whole or in detail was, not a

<sup>1</sup> L. R. 10 Ex. 162.



purchase or sale, that is a transfer for money, but a taking over of his assets in return for something other than money, that is for shares or the promise thereof in the appellant Company. It was argued further that this transfer by Mr. Dawson of his assets to the appellant Company was an "evasion" of the stamp law: a price had to be put on those assets, in sum and in detail, and the only factor which influenced the price was the obligation to pay stamp duty and the intention to pay as small a stamp duty as possible, "his property to the value of so much is taken over by the Company but he credits himself with something less and so evades payment of stamp duty on the difference", and the Court was urged to look at the real, essential nature of the transaction between Mr. Dawson and the Company.

One answer to these arguments seems to be this; is the respondent prepared to say that the statements of the appellant Company in its letters and affidavits are untrue? Those statements are clear and definite—the transfer of these shares was for a cash consideration of Rs. 20 a share, that was the "purchase or consideration money" for their transfer, and if that be so, then the stamp duty thereon must be governed by the amount of that cash consideration. Now at no stage in this matter, neither when it was before the Commissioner of Stamps nor when before this Court, was it suggested that the statements of the appellant Company were untrue. Section 30 (2) provides that the Commissioner of Stamps when asked to adjudicate on any instrument "may require such affidavit or other evidence as he may deem necessary to prove that all the facts and circumstances affecting the chargeability of the instrument with duty, or the amount of the duty with which it is chargeable, are fully and truly set forth therein, and may refuse to proceed upon any such application until such affidavit or other evidence has been furnished accordingly", and it may be doubtful how far this sub-section binds the Commissioner of Stamps to accept the statements in the affidavits furnished him under its provisions, and how far it allows him to find that the facts are contrary to what has been stated in such affidavits. In the absence of anything to the contrary one must take the facts to be as deposed to by the appellant Company. The evidence in this matter is wholly documentary, and therefore this Court is in as good a position to find the facts as was the Commissioner, but, if I understood the argument for the respondent correctly, this Court was not asked to find as a fact that what the appellant Company stated was untrue, but rather to look at "the real nature of the transaction".

This was pressed upon us again at the further argument of this matter after the filing of the additional affidavit sworn to by Mr. D. C. Wilson. That affidavit, it was urged, proves that there was an agreement—"part of the arrangement" between the parties—that shares in the Company were to be allotted to Mr. Dawson as well as money paid to him for the Great Western shares he transferred to it, and that this agreement could not be split up and each bit of property transferred to the Company taken separately; the agreement or undertaking was therefore part of the consideration. To this there seem to be two answers, each decisive.

Let us suppose that after these Great Western shares have been transferred by Mr. Dawson and he has received from the Company the Rs. 13,400 agreed upon, the Company suddenly develops an independent will of its own and delays or declines to allot him shares at his request, and that Mr. Dawson then sues the appellant Company for something more than the Rs. 13,400 it has paid him, say for an allotment of shares in the Company proportioned to the market value on May 5, 1930, of the Great Western shares transferred to it; the Company could then have replied with the plea, payment, and to that plea I can see no answer; see for the same principle *In re Harmony & Montague &c. Company*<sup>1</sup>. The contract was for the Company to buy certain Great Western shares and to pay Rs. 13,400, it has received the shares and paid the money, and that money was the consideration in law for those shares. Then that was the contract between the parties, it has been carried out between them, and there is nothing further in that contract for the law to take hold of. If this be doubted, consider the matter further. The Company having developed a will of its own presses for cancellation of the contract for the purchase of these Great Western shares, and Mr. Dawson consents. The Company gives back to Mr. Dawson the scrip of these shares, Mr. Dawson gives back to the Company the Rs. 13,400; could it possibly be contended that the contract had not been cancelled, that some further portion of it remained in existence? And if it could not be so contended, where is the consideration for the purchase of these Great Western shares other than, in addition to, the Rs. 13,400? Test the question yet further. After the cancellation of the contract in this manner, the appellant Company asks that there be given back to it a block of the shares it has allotted to Mr. Dawson (we will assume that it has actually allotted them) and in so asking adopts the argument of the respondents, "it was part of the arrangement that shares were to be allotted as well as money paid", could such a request be maintainable in law, and if you say it could, how would you frame the action?

The further answer to the respondent's argument is this. The "arrangement" or "understanding" upon which he relies seems on the evidence before us to have been made before the Company was formed and before as a legal entity it had any existence. Then it was not made by the Company at all and the Company could not be bound by it, and could not ratify it even. *Kelner v. Baxter*<sup>2</sup>—a case whose authority has never been doubted—decides that a Company cannot be bound by an agreement entered into by a person or persons professing to contract on its behalf at a time when it, the Company, did not yet exist. *Natal Land &c. Co. v. Pauline &c. Syndicate*<sup>3</sup>—a Privy Council decision on appeal from a Colony governed by Roman-Dutch law—decided that a Company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before it came into existence. The combined effect of these decisions is that the Company can neither be bound by nor have the benefit of an agreement made before it came into existence—a *fortiori* if, as in the present case, it was

<sup>1</sup> L. R. 8 Ch. App. 407.

<sup>2</sup> L. R. 2 C. P. 174.

<sup>3</sup> (1904) A. C. 120.

not a definite agreement but an "arrangement" or an "understanding" merely. But if so, how can that arrangement be part of the consideration for a sale which *ex confesso* can only have been made after the Company came into existence?

For the foregoing reasons I think that this appeal should be allowed with costs and a declaration made that the transfer, the subject of this appeal, is liable to stamp duty to the amount of Rs. 135 and not of any larger sum.

GARVIN S.P.J.—

This is an appeal from the determination by the Commissioner of Stamps of the duty chargeable in respect of an instrument submitted to him under the provisions of section 30 of the Stamp Ordinance. The document is in form a transfer by James Anderson Ramage Dawson of 670 fully paid shares in the Great Western Tea Company of Ceylon, Limited, to the Waharaka Investment Company, Limited, for a consideration of Rs. 13,400. The instrument bore a stamp of Rs. 135 computed on the basis of the consideration mentioned in the transfer. The question having arisen as to whether or not the transfer was duly stamped, it was submitted to the Commissioner of Stamps who on February 11, 1932, intimated his decision that the instrument was chargeable with a stamp duty of Rs. 640. In reply to an inquiry addressed to him the Commissioner stated that the computation was the result of his decision that the instrument was stampable under Item 22 (b) of Schedule B, Part I., of the Stamp Ordinance.

Now, Item 22 (b) is as follows:—

Conveyance or transfer of any movable property for any consideration.—

		Duty.
		Rs. c.
Where the purchase or consideration money therein or thereupon expressed, or if the consideration be other than a pecuniary one, or partly pecuniary and partly other than pecuniary, the value of the property shall be—		
Over Rs. 0 and not over Rs. 50	..	0 50
Over Rs. 50 do. Rs. 100	..	1 0
Over Rs. 100 do. Rs. 200	..	2 0
Over Rs. 200 do. Rs. 300	..	3 0
Over Rs. 300 do. Rs. 400	..	4 0
Over Rs. 400 do. Rs. 500	..	5 0
Over Rs. 500 do. Rs. 1,000	..	10 0
Every further Rs. 500 or part thereof	..	5 0

The determination of the amount of duty payable shows that the Commissioner has computed the duty not upon the consideration expressed in the document but upon the value of the property. The inference suggested is that in his opinion the consideration expressed is not the true consideration and that the true consideration is other than a pecuniary one or alternatively partly pecuniary and partly other than pecuniary. In his argument in support of the determination of the Commissioner of Stamps, Counsel urged that there was another reason why the stamp duty should be charged on the value of the property

and not on the consideration. He referred to section 20 of the Ordinance and sought to found upon it the argument that whenever an instrument chargeable with *ad valorem* duty relates to any stock or any marketable or other security duty was chargeable upon the value of such stock or security.

Section 20 is in the following terms:—“Where an instrument is chargeable with *ad valorem* duty in respect of any stock or of any marketable or other security, such duty shall be calculated on the value of such stock or security according to the average price or the value thereof on the day of the date of the instrument.” Counsel would appear to seek to place upon this section the same interpretation as if it read, “where an instrument relating to or having any reference to any stock or any marketable or other security is chargeable with *ad valorem* duty such duty shall be calculated on the value of such stock or security”. That, however, is not how the section reads. Its meaning appears to me to be quite clear. It lays down a rule for the valuation of stocks or securities in any case in which an instrument is chargeable with *ad valorem* duty upon the value of such stocks or securities. Before the section can be made applicable to any instrument one has first to ascertain whether the instrument “is chargeable with *ad valorem* duty in respect of any stock or of any marketable or other security”, that is to say, whether the instrument is chargeable with duty assessable on the value of any stock or marketable security. When that has been determined, and it can only be determined by a reference to the provisions of the Ordinance, in particular Schedule B of Part I., the value of the stock or security will have to be assessed in accordance with the rule of valuation prescribed in the section.

An instrument transferring stock or other security is not specially provided for in the schedule containing the duties on instruments, but, as the Commissioner of Stamps has determined, the case is caught up by the general provisions of Item 22 (b), “conveyance or transfer of movable property for any consideration”. Whether the instrument is chargeable upon the consideration or upon the value of the property must therefore depend upon the answer to the question what is the true consideration for this transfer. If the consideration expressed upon the face of the instrument is the true consideration, then it has been rightly stamped and the appeal must succeed. On the other hand, if it can be said that the consideration is other than a pecuniary one or partly pecuniary and partly other than pecuniary, the determination of the Commissioner of Stamps is correct and must be affirmed.

Much correspondence has passed between the petitioner and the Commissioner of Stamps, the purpose and object of which was to ascertain all the facts and circumstances affecting the chargeability of the instrument and the amount of the duty with which it was chargeable. That correspondence is before us and we have in addition an affidavit sworn to by D. C. Wilson one of the Directors of the Company on October 1, 1932, in which he deals specifically with the question of the consideration for this conveyance. The Waharaka Investment Company, Limited, the petitioner, was formed primarily for the purpose of acquiring all

Mr. Ramage Dawson's interests in Ceylon. It was registered on March 15, 1930. Three days later on March 18, a resolution was passed at a meeting of the Directors all of whom are nominees of Mr. Ramage Dawson that they should negotiate for the purchase of the assets, being the property of Mr. Ramage Dawson, specified in the resolution for the prices therein stated. The assets were to be acquired as at April 1, 1930. The total sum offered for all the assets amounted to Rs. 2,073,460. With the exception of one valued at Rs. 100,000 all these assets have been conveyed to the Company for the prices respectively set against them in the resolution. One of these consists of the 670 shares in the Great Western Tea Company of Ceylon, Limited, transferred to the Company by the instrument with which we are concerned. The market value of these shares at the date of this transaction was Rs. 95 per share. The Company has by this transaction acquired shares of the market value of Rs. 63,650 for Rs. 13,400 or less than a quarter of their real value. Despite the striking disparity between the market value of these shares and the amount specified in the transfer as the purchase money, was it the full and true and only consideration for the transfer?

In his affidavit of October 1, 1932, Mr. D. C. Wilson says, "Although there was no formal agreement between the parties it was part of the arrangement come to with the said James Anderson Ramage Dawson upon which the Waharaka Company was incorporated and was well understood by the Directors of the Waharaka Company that the Directors would not allot any shares in the Waharaka Company to any persons other than the said James Anderson Ramage Dawson or persons nominated by him and that upon the application and payment in full by the said James Anderson Ramage Dawson for shares in the Waharaka Company such shares would be allotted to him or to his nominee by the Directors."

This arrangement or understanding was after the incorporation of the Company faithfully observed by the two signatories who in accordance with the Articles of Association became the first Directors.

On September 16, the total issued capital of the Company was Rs. 2,100,000 consisting of 21,000 shares of Rs. 100 each, whereof 20,800 shares were allotted to Mr. Ramage Dawson or his nominees—

	Shares.
To Mr. Ramage Dawson .. .. .	20,792
To Mr. J. A. D. Finch Noyes .. .. .	1
To Signatories to Memorandum of Association .. .. .	7

Mr. Dawson was the beneficial owner of all these shares amounting to 20,800. The remaining 200 shares were allotted to Mrs. Ramage Dawson and her two daughters. The total consideration paid to Mr. Dawson for the assets transferred by him was Rs. 1,978,460. It is to be noted that even the seven shares held by the signatories they held in trust for Mr. Dawson. Mr. Dawson therefore is the beneficial owner of every share issued with the exception of the 200 shares allotted to his wife and daughters.

The immediate purpose of the incorporation of this Company and of all these transactions, of which the transfer of the 670 shares in the Great

Western Tea Company is one, was that these assets which were in the individual ownership of Mr. Ramage Dawson should be conveyed to and held by a Company in which he was to be virtually the sole shareholder.

Although the Directors have faithfully carried out the arrangement made prior to the incorporation of the Company not to allot shares to any person other than Mr. Ramage Dawson or his nominees the arrangement was not one which bound the Company.

But whether any remedy would have been available against the Company or not the question is whether the arrangement referred to can be treated as part of the consideration for the transfer. In answer to inquiries addressed to him Counsel stated that at no time was any resolution passed by the Directors adopting the arrangement made by the signatories with Ramage Dawson; and in the affidavit and statements before us it is specifically denied that as between the Company and Ramage Dawson it was at any time agreed that this arrangement was to be part of the consideration for the transfer of his shares in the Great Western Tea Company or of any or all his assets.

Had Ramage Dawson sued for rescission of his contract on the ground of failure or partial failure of consideration his action could not but fail first for want of evidence that the arrangement with the signatories was part of the consideration and secondly because the arrangement was one which was with the signatories or some of them and not with the Company and could not therefore form part of the consideration proceeding from the Company.

The transfer of these shares was to the Company for the price specified in the instrument of conveyance. Whatever arrangements or understanding there may have been between Ramage Dawson and the signatories or any of them prior to the incorporation, there is no evidence upon which it can be found that the Company gave any consideration for the transfer of these shares other than or in addition to the pecuniary consideration mentioned in the instrument.

Ramage Dawson was doubtless influenced by the assurance he had received from those who would be Directors, when the Company came into existence, that no shares would be allotted to any one but himself or his nominee to part with his property to the Company for very considerably less than its true value, thereby avoiding the payment of larger stamp duties which would have been payable, had he insisted that the property should be taken over by the Company at their true market value. But, however strongly he may have been influenced by the arrangement and the confidence he had that those with whom he made that arrangement would not break faith with him after the Company came into existence, it is not possible to say that the arrangement was part of the consideration proceeding from the Company for the transfer.

In selling these shares to the Company for less than a quarter of their value Mr. Ramage Dawson took a risk, for had those whom he trusted to allot the shares in the Company only to him or his nominees acted otherwise than they did, he would have sustained a serious loss. He evidently thought the risk negligible and events have proved that he was

right. In the result the Company in which he is virtually the sole shareholder has saved a considerable sum which might otherwise have been payable as stamp duty, and in the capacity of shareholder he has derived the benefit of this saving. But the Company as such having given no consideration other than the agreed pecuniary consideration this instrument is only chargeable with duty assessed on that consideration and was therefore rightly stamped.

The determination of the Commissioner is accordingly set aside with costs.

*Appeal allowed.*

