1933 *Present :* **Dalton A.C.J. and Poyser J.**

COMMISSIONER OF STAMPS *v.* LOGAN *et al.*

108—D. C. (Inty.) Colombo, 1,939.

Estate duty—Partnership deed—Good-will of business—Bona fide *purchase for money or money's worth—Consideration—Ordinance No. 8 of 1919, s. 9 (1).*

A deed of partnership entered into between three persons contained the following clause :—"In the event of the death of the said Henderson during the subsistence of the partnership hereby created the good-will of the business including the right to use the firm name of Henderson & Company shall belong to the said Hanscomb and the said Hanscomb shall be entitled to purchase the share of the said Henderson in the partnership business . . . . it being hereby declared for the purposes of this clause that no value shall be placed upon the good-will as a partnership asset and the representatives of the said Henderson shall not be entitled to be paid anything in respect of good-will."

A memorandum of agreement signed the same day recited that Henderson was the owner of the good-will of the firm and provided as follows : "Whereas in consideration of the fact that the said Hanscomb has for many years past devoted himself to the business of the said firm and has advanced its interests and helped to develop its business, the said Henderson by the said deed of partnership agreed that in the events fully set out the said Hanscomb should be entitled to the good-will of the firm without any payment therefor."

Held, that there was no purchase by Hanscomb of the good-will from Henderson for consideration so as to bring it within the exception provided by section 9 (1) of the Estate Duty Ordinance.

Held, further, that the good-will passed by way of gift to Hanscomb, only on Henderson's death to be held by him under the conditions set out in the agreement.

THIS was an appeal from an order of the District Judge of Colombo allowing an appeal from a decision of the Commissioner of Stamps on a question of estate duty. The first and second respondents are the executors of the last will of James Alexander Henderson. Henderson died on April 18, 1928, and at the date of his death was a partner in the firm of Henderson & Company. The third respondent Hanscomb was a partner with the deceased and with the first respondent in the firm of Henderson & Company. The Commissioner of Stamps assessed the value of the good-will of the business of Henderson & Company for the purpose of estate duty to be paid by the estate of the late James Alexander Henderson. The District Judge held, reversing the Commissioner's decision, that the good-will had passed to Hanscomb for consideration and that estate duty was not payable.

L. M. D. de Silva, K.C., S.-G. (with him *Pulle, C.C.*), for appellant.—"Full consideration" is to be understood as consideration within the meaning of the English law. Wherever the word "consideration" occurs in a local Ordinance, it bears the meaning which it has in English

law. See *Salman v. Obias* [1] and *Waharaka Investment Co. v. Commissioner of Stamps* [2]. That being so, it is insufficient to show that the consideration which has passed is past consideration, because past consideration is no consideration at all. See *Anson on Contracts (16th ed.), p. 119.*

Section 9 (1) of the Estate Duties Ordinance is the same as section 3 (1) of the Finance Act of 1894. That is an added reason why the word "consideration" has to be given a meaning which it enjoys under English law.

The stipulations contained in the deed and memorandum are inconsistent with the idea of a purchase for money or money's worth. The only basis upon which the idea of purchase can be put is the services rendered to the partnership during Henderson's life-time. It is entirely inconsistent with that idea that, if Hanscomb died during the continuance of the partnership, the representatives of Hanscomb should get nothing. A purchaser must be owner before he dies.

The one point in this case is whether Hanscomb purchased this goodwill for money or money's worth. In the deed there is an expression which indicates that the consideration is for past services. That is inconsistent with the idea of a *bona fide* purchase. If it is not a *bona fide* purchase, then section 9 will not operate.

The District Judge, in his judgment, has failed to give effect to the document P 3, and has misapplied the decision in *Attorney-General v. Boden* [3].

Hayley, K.C. (with him *Choksy*), for respondents.—The transaction must be looked upon as a whole. It became a sale although, at first sight, it deos not seem a sale.

The question of past consideration is put forward for the first time in this Court. Past services rendered form an exception to past consideration.

Finance Acts should not be given a highly technical interpretation. The language of such Acts is intentionally wide and untechnical. See *Attorney-General v. Sandwick* [4] on the interpretation of Finance Acts. The term "purchase" is of wide interpretation in English law.

Counsel also cited *Lampleigh v. Braithwaite* [5] *and Harris's Case* [6].

De Silva, K.C., in reply.

Cur. adv. vult.

December 1, 1933. DALTON A.C.J.—

This appeal is from an order of the District Judge, Colombo, who allowed an appeal from the decision of the Commissioner of Stamps on a question of estate duty. The Commissioner assessed the value of the good-will of the business of Henderson & Company for the purpose of the payment of estate duty by the estate of the late James Alexander Henderson. The District Judge held, reversing the Commissioner's decision, that no estate duty was payable in respect of the good-will.

The first and second respondents to this appeal are the executors of the will of the late James Alexander Henderson, dated March 19, 1928. Henderson died on or about April 18, 1928, and at the date of his death

[1] *21 N. L. R. 410.*
[2] *34 N. L. R. 266, at 272*
[3] *(1912) 1 K. B. 539.*
[4] *(1922) 2 K. B. 500, at 518-20.*
[5] *1 Sm. L. C. (11th ed.) 136.*
[6] *3 Dyer 272.*

was still a partner in the firm of Henderson & Company. The third respondent, Herbert Joseph Hanscomb, was a partner with the deceased and with the first respondent, George Kenneth Logan, in the firm which carried on the business of merchants, and estate and commission agents in Colombo. For convenience I will hereafter use the surnames only of the parties. The deed containing the terms and conditions of this partnership (exhibit P2) is dated February 28, 1922. Under that deed and a further memorandum of agreement (exhibit P3) of the same date, Hanscomb was to become entitled to the good-will of the firm, subject to the terms of the deed of partnership and memorandum. The appellant, for the purpose of assessing estate duty, valued the estate of the deceased J. A. Henderson at a figure, including the value of the good-will of the business. This good-will has been valued separately in the sum of Rs. 58,000, and the correctness of this valuation is not challenged by the respondents. It is urged, however, on their behalf that, under the provisions of section 9 (1) of the Estate Duties Ordinance (No. 8 of 1919), duty is not payable in respect of the good-will, as the title thereto passed by reason of a *bona fide* purchase by Hanscomb from Henderson, for full consideration in money or money's worth paid to Henderson. This sale and purchase of the good-will it is urged was effected by the deed of partnership P2 on February 28, 1922.

The learned District Judge has held that the good-will in question passed to Hanscomb absolutely under the deed P2 for full consideration paid in money's worth for the sole use of Henderson, and therefore the estate duty claimed was not payable. He held the case to be a stronger one on the facts to bring it within the exception provided for in section 9 (1) than the case of *Attorney-General v. Boden*[1] that was relied upon by the respondents.

The material portions of the deed P2 for the purpose of this case are clauses 3, 18, 19, 20, and 24.

The deed begins by reciting that Henderson and Hanscomb had been carrying on the business in partnership under an earlier deed of 1916 (exhibit P1), and that they were desirous of terminating that partnership and of forming a fresh partnership taking in Logan as a partner. This new partnership is thereupon constituted to commence from July 1, 1922, the capital of the partnership consisting of such sums contributed in such proportions as may from time to time be agreed upon by the partners.

Clause 3 provides that the partnership may be terminated by any one of the three partners giving not less than six months' notice in writing of his intention to terminate the partnership, and at the expiration of the period of such notice the partnership shall end.

Clause 18 provides for what is to happen in the event of the death of Logan during the subsistence of the partnership. First Henderson, and then Hanscomb shall have the right to purchase the share of Logan, but for the purpose of this clause Logan is not entitled to any share in the good-will of the business, and the representatives of Logan shall not be entitled to be paid anything in respect thereof.

[1] *(1912) 1 K. B. 539.*

Clause 19 provides for what is to happen in the event of the death of Hanscomb during the subsistence of the partnership. Henderson is then to have the right to purchase his share, and a similar provision to that in clause 18 follows. Hanscomb's share of the business for the purpose of this clause includes no share in the good-will of the business.

Clause 20 begins as follows: "In the event of the death of the said James Alexander Henderson during the subsistence of the partnership hereby created, the good-will of the business including the right to use the firm name of Henderson & Company shall belong to the said Herbert Joseph Hanscomb, and the said Herbert Joseph Hanscomb shall be entitled to purchase the share of the said James Alexander Henderson in the partnership business." After various provisions the clause continues:—"It being hereby declared for the purposes of this clause that no value shall be placed upon the good-will as a partnership asset and the representatives of the said James Alexander Henderson shall not be entitled to be paid anything in respect of good-will . . . . ."

Clause 24 provides that if Henderson terminates the partnership by giving notice to Hanscomb and Logan or either of them as provided for in clause 3, Henderson shall be entitled to purchase the share or shares of the outgoing partner or partners, the outgoing partner, however, not being entitled to be paid anything in respect of the good-will of the business.

The memorandum of agreement (P3) between Henderson and Hanscomb, signed the same day, after making reference to the partnership that has been or is about to be instituted between the three persons named, contains important provisions in respecct of the good-will of the business. It recites that Henderson is the owner of the good-will of the firm, and continues:—

"And whereas in consideration of the fact that the said Herbert Joseph Hanscomb has for many years past devoted himself to the business of the said firm and has advanced its interest and helped to develop its business the said James Alexander Henderson by the said deed of partnership agreed that in the events therein fully set out the said Herbert Joseph Hanscomb should be entitled to the good-will of the said firm . . . . . without any payment therefor.

And whereas it is understood between the said James Alexander Henderson and Herbert Joseph Hanscomb that notwithstanding that in the events fully set out in the said deed of partnership the said Herbert Joseph Hanscomb shall become entitled to the said good-will without payment therefor, the said Herbert Joseph Hanscomb, in the event of his so becoming entitled to the said good-will, is to regard the ownership of the said good-will as being in the nature of a trust for such of the future partners in the said firm as may be worthy of ultimately being given the said good-will or a share therein."

The memorandum then provides that Hanscomb shall not be free to sell or dispose of the good-will, so long as there shall be any partner or assistant in the firm "who by conduct or character shall have proved himself or themselves worthy of being given the said good-will or a share or shares in the said good-will just as the said good-will has been given by the said James Alexander Henderson to the said Herbert Joseph Hanscomb in manner aforesaid, the intention of the parties hereto being that the

said good-will shall without payment therefor be passed on to worthy successors by the said Herbert Joseph Hanscomb just as it has been or is to be passed to him by the said James Alexander Henderson."

Was there here a *bona fide* purchase on February 28, 1922, by Hanscomb from Henderson of the good-will for full consideration in money or money's worth paid to Henderson for his own use or benefit? This is a question of fact to be decided by the Court upon the evidence before it. The question has been answered by the District Judge in the affirmative, but I regret I am unable to come to the same conclusion. I will refer to the learned Judge's reasons for his conclusions later.

If one examines the terms of the clauses of the partnership deed P2 referred to above, it is clear that Henderson could terminate the partnership whenever he wished to do so, on giving the notice required. If he did so, Hanscomb either as individual or partner had no rights of any kind in the good-will of the firm. If the partnership was not so terminated, and Henderson died during the subsistence of the partnership, then and only then was Hanscomb to become the owner of the good-will. In those events, can it be said that he had purchased the good-will on the execution of the deed of partnership? So long as Henderson was alive it seems to me the good-will, subject to the terms of the partnership, was his and his interest in the good-will ceased only on his death. This is made clear, I think, by the provisions of clause 20. It was in the event of the death of Henderson during the subsistence of the partnership that the good-will was to go to Hanscomb, and then too only if he were alive, the same clause making it clear, however, that the representatives of Henderson were not to be paid anything for it.

An examination of the terms of the memorandum of agreement of the same date between Henderson and Hanscomb fortifies one in that conclusion. It sets out that the good-will is the property of Henderson, and goes on to state that, whereas in the events set out in the deed of partnership Hanscomb would be entitled to the good-will without any payment, if he does become entitled to the good-will in the events set out, he is to regard the ownership of it as in the nature of a trust for such of the future partners in the firm as may be worthy of being given the good-will. It then states that just as the good-will has been given (in the events mentioned) to Hanscomb by Henderson, so it shall be passed on by Hanscomb to worthy successors without payment.

The recital of the past services of Hanscomb to the firm in which he had advanced its interests and helped to develop the business, I am inclined to think, is merely for the purpose of showing why Hanscomb was regarded by Henderson as a wothy successor to him, and as worthy of being given the good-will subject to the terms of the partnership. It has been urged by the Solicitor-General, however, that, if there was any *bona fide* sale of the good-will to Hanscomb in February, 1922, the consideration therefor was services rendered in the past, which in law is no consideration at all. There is nothing to suggest it was moved by a previous request, nor is it shown to have been rendered under such circumstances that a request is implied.

Section 9 (1) of the Estate Duties Ordinance has been taken over from section 3 (1) of the Finance Act, 1894 (57) & 58 Vict. c. 30) and it

would seem therefore that "consideration" as used in the section of the Ordinance must mean what it means in English law. (Vide *Salman v. Obias*[1] and remarks of Macdonell C.J. in *Waharaka Investment Co., Ltd. v. Commissioner of Stamps*[2].) Taking, however, the terms of the deed and memorandum together, I am of opinion that in the event of Hanscomb becoming entitled to the good-will under the terms of the deed, it was to be by way of gift to him from Henderson, without payment of any kind.

In Attorney-General v. Boden (*supra*) relied upon by the District Judge the facts are not the same. The indenture of partnership of January 30, 1907 (after an earlier partnership had expired by the effluxion of time) was made between Henry Boden, H. S. Boden, and R. S. Boden. The business was one of lace manufacturers carried on in five towns in England. All the assets of the business of Boden & Company as existing immediately after the commencement of the present partnership were to be the assets of the partnership. The salaries and shares in the profits of the partners were fixed, whilst H. S. Boden and R. S. Boden were to give so much time and attention to the partnership business as the proper conduct of its affairs required. Henry Boden on the other hand could give so much time to the business as he thought fit. If Henry Boden died or otherwise should cease to be a partner, his share was to accrue to H. S. and R. S. Boden in equal shares, subject to their paying out to his representative the value of his share and interest, but without any valuation of or allowance for good-will, which good-will was to accrue to H. S. Boden and R. S. Boden in equal shares.

If either H. S. Boden or R. S. Boden should die or otherwise cease to be partner, his share was to accrue to the other partners in proportion to their existing shares in the same way, subject to valuation, the good-will to be valued and allowed for in the general account at the rate set out in the indenture.

Henry Boden died on November 14, 1908, the value of his share and interest in the partnership being ascertained as provided for in the indenture. H. S. and R. S. Boden paid the sum of £186,734.0.0 to Henry Boden's executors for the value of deceased's share, no account being taken of the good-will in the valuation. The Attorney-General thereupon claimed estate duty upon the value, as at the death of Henry Boden, of the good-will of Boden & Company. It was urged in support of the information with alternative pleas that Henry Boden died possessed of an interest in the good-will, which interest ceased on his death. For the defendants it was urged that the good-will had no value, and therefore nothing passed on Henry Boden's death. Secondly, if Henry Boden's share had any value it was amply paid for in money's worth by the covenants of the defendants under the indenture of January 30, 1907. On the question of the value of the good-will of the business, Hamilton J. came to the conclusion that it was of every little value. To the limited extent which he pointed out he held there was a good-will, but from a practical point of view it was worth extremely little.

With regard to the defendants' argument that the good-will was property which passed on the death of Henry Boden by reason of a *bona fide* purchase by them from him for full consideration in money or

[1] *21 N. L. R. 410.* [2] *34 N. L. R. at p. 272.*

money's worth, Hamilton J. pointed out that it was a question of fact whether the consideration for the property was full or not. He then sets but three facts which lead him to the conclusion that full consideration was given, in the shape of H. S. and R. S. Boden's convenants to serve and their other convenants, for any property which accrued to them on his death. These three facts, first that the partnership was to last as long as Henry Boden lived, secondly that he was to have his capital employed in the business, a lucrative one, as long as he lived, and thirdly that the good-will of which they thought little was to pass with the rest of the corpus of his interest to them on payment of a price which was liberal to himself. Looking at the substance of the transaction and looking at the combined effect of all the terms of the contract, Hamilton J. came to the conclusion it was a sale and purchase to take effect upon the death of Henry Boden. He finds that Henry Boden and his sons believed and were justified in believing that full consideration was being given in their covenants to serve for any property that accrued to them on his death otherwise than by payment in cash.

A comparison of the terms of partnership in Boden's case, in so far as they relate to the good-will of the business, with those in the case before us is necessary to enable one to say whether the District Judge was right in the conclusion to which he came. A comparison shows at once certain definite points of difference between the two cases. In the former the good-will passed with the rest of Henry Boden's interest under the deed of partnership, the partnership lasting as long as Henry Boden lived, his interest then accruing to the survivor or survivors. If Henry Boden died, the value of his interest in the partnership included no part of the good-will. If, however H. S. or R. S. Boden died or ceased to be partners, the value of the good-will was to be included in estimating the share of the partnership of either of them. In the case before us, however, Henderson could put an end to the partnership at any time on due notice, in which case he could purchase the shares of the outgoing partners. If he did so, neither Hanscomb nor Logan was entitled to any share in the good-will which, the memorandum states, was his property. In any event Logan was not entitled to any share in the good-will, since the memorandum P3 makes it clear it was, in certain eventualities, given to Hanscomb alone.

Further, in Boden's case it is found that the good-will was worth extremely little. This fact undoubtedly played an important part in helping towards an answer to the question whether full consideration was given or not, or whether what was given was a fair equivalent for what was received. In Henderson's case the good-will is valued at Rs. 58,000. In the former case the full consideration for the good-will was held to be the covenants to serve. In the latter case there are such covenants also, but I am unable to say, having regard to the value of the good-will, that they are a fair equivalent for what was received. Service was paid for in salary and a share in the profits. In the latter case it is, it is true, set out in the memorandum that Hanscomb should be entitled to the good-will, in the events set out in the deed of partnership, in consideration of his past services for many years. Having regard to the combined effect of the terms of the memorandum I am inclined, however, as I have already

stated, to construe the recital of the past services of Hanscomb as giving a reason why he has been thought worthy of the good-will, rather than as setting out the consideration for the good-will. It must be remembered of course that he had been duly remunerated for those services in accordance with the terms of the earlier partnership. If, however, it be regarded as consideration in the legal sense, then clearly it is past consideration which in this case is not consideration at all. In Boden's case there is no doubt that the consideration was future services. That case, as is pointed out by Hamilton J., was a purely commercial transaction, whilst the case before us is one, so far as the disposal of the good-will is concerned, which appears to be based upon gratitude. I do not think, on this point, that any assistance can be derived from cases dealing with family settlements. It was indeed pointed out that family arrangements are not inconsistent with full money's worth being given, but such cases do not seem to me to be helpful in such a case as this.

For these reasons, therefore, I am unable to agree with the learned District Judge's conclusion or to hold that there was a purchase on February 28, 1922, by Hanscomb from Henderson of the good-will which was to pass to Hanscomb on the death of Henderson. The transaction entered into between them on that date, in respect of the good-will, in my view of the evidence, was that the good-will was to go to Hanscomb only in the events set out in the deed P2, Henderson's interest therein ceasing only on his death. In that latter event a benefit arose to Hanscomb by cesser of Henderson's interest. It was further provided that, if it ever did pass to Hanscomb in the events set out, it was to be of the nature of a gift by Henderson to Hanscomb, for which no payment of any kind was to be made, and it was to be held by him under the conditions set out in the memorandum, and passed on by him in the same way.

There is one more matter to which I must refer. Counsel for the respondents has called our attention to the fact that the Inland Revenue Authorities in London informed the Solicitors for the parties in England that the value of the good-will need not be brought into account in England for estate duty purposes there. The correspondence on the matter was produced in the lower Court and is in evidence in the case. On what grounds this conclusion was reached of course we are not aware. It is conceded that the indenture P2 was before the English authorities but not the memorandum P3, which was not brought to their notice, it being apparently thought that the latter document would not be required. The fact that this opinion was expressed by the Inland Revenue Authorities in no way leads me to think, after consideration of all the material before the Court, that the conclusion to which I have come is wrong.

I would therefore allow the appeal from the District Judge's order, and restore the revised assessment made by the Commissioner of Stamps. The appellant is entitled to the costs of this appeal and to his costs in the Court below.

POYSER J.—I agree.

Appeal allowed.