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No. 1405—High Court of Justice (King's Bench Division)—13th, 14th and 15th May, 1946

Court of Appeal — 30th, 31st October, 1st, 4th and 22nd November, 1946

House of Lords—3rd, 4th, 5th, 6th and 9th February and 14th July, 1948

Gold Coast Selection Trust, Ltd. *v.* Humphrey (H.M. Inspector of Taxes)[1]

Humphrey (H.M. Inspector of Taxes) *v.* Gold Coast Selection Trust, Ltd.[1]

Income Tax, Schedule D—Profits of trade—Company dealing in gold mining concessions, etc.—Concessions sold for fully paid shares—Shareholding in one company changed into a shareholding in another company by reason of the liquidation of the former company—Whether the sales and the exchange constitute realisations—Valuation.

The G.C.S. Trust carried on the business of financiers, dealers in stocks and shares, and exploiters of and dealers in gold mining concessions. Its practice was to acquire concessions over land which might be gold bearing and, if on investigation a concession proved suitable, to promote a company to which the concession was transferred at a stated consideration which was satisfied by the issue to the Trust of fully paid shares.

The Trust was assessed to Income Tax on the footing that such transactions constituted realisations of the concessions and gave rise to immediate profits to be included in the trading profits for the purposes of Case I *of Schedule D. On appeal the General Commissioners accepted this view, determining the amounts of the assessments under appeal by reference to the par value of the shares received.*

With reference to one transaction the General Commissioners found that no profit for Income Tax purposes had arisen. In this case the Trust had purchased a controlling interest in company A which owned a concession. The concession was sold by company A to company B for fully paid shares in company B. Company A was liquidated, and its assets being distributed in specie the Trust received shares in company B. The Crown's appeal against the decision of the Commissioners on this point was allowed in the King's Bench Division, and was not further contested except on the question of the valuation of the shares in company B.

Held, *that the Commissioners' main decision was correct (Court of Appeal); but that the shares acquired by the Trust on the transfer of the concessions and also the shares in company B should be valued as at the end of the accounting years of receipt, consideration being given to all the circumstances—marketability, etc. (House of Lords: Lord Oaksey dissenting). The cases were remitted to the Commissioners to reconsider the assessments accordingly.*

(1) Reported (C.A.) [1946] 2 All E.R. 742; (H.L.) [1948] A.C. 459.

CASE

Stated by the Commissioners for the General Purposes of the Income Tax for the City of London pursuant to the provisions of Section 149 of the Income Tax Act, 1918, for the opinion of the High Court of Justice.

1. At meetings of the said Commissioners held on 5th, 12th and 19th June, and 3rd, 17th and 31st July, 1944, at Gresham College, Basinghall Street, in the said City, Gold Coast Selection Trust, Ltd., an incorporated company having its registered office at Finsbury Pavement House, Moorgate, in the said City (hereinafter called "the Trust"), appealed against assessments to Income Tax made upon it under Case I of Schedule D of the Income Tax Act, 1918, in respect of "profits from trade, etc., of "financiers" as follows:—

For the year ended 5th April, 1935:		
First assessment in the sum of	£22,224	
Additional assessment in the sum of	£227,776	(hereinafter called "the Anfargah assessment.")
	£250,000	
For the year ended 5th April, 1936:		
First assessment in the sum of	£7,500	
Additional assessment in the sum of	£1,292,500	(hereinafter called "the Marlu assessment.")
	£1,300,000	
For the year ended 5th April, 1937:		
Assessment in the sum of	£150,000	(hereinafter called "the Main Reef assessment.")
For the year ended 5th April, 1938:		
Assessment in the sum of	£500,000	(hereinafter called "the Bremang assessment.")

2. The Trust is a public company. It was incorporated on 16th November, 1928, under the Companies Acts, 1908 to 1917, as a company limited by shares with a capital of £70,000 divided into 50,000 ordinary shares of £1 each and 400,000 deferred shares of 1*s.* each. By special resolutions the said capital has from time to time been increased and is at present £750,000 divided into one class of 3,000,000 shares of 5*s.* each. Some of these issues were made at a considerable premium, the share premium account (after deducting expenditure on option leases abandoned) standing at £639,528 in the balance sheet as at 31st March, 1936. The objects for which the Trust was established included the following:—
"(A) To carry on and execute all kinds of financial, commercial trading, "and other operations and to carry on any other business which may seem "to be capable of being conveniently carried on in connection with any "of these objects . . . "

A copy of the memorandum and articles of association of the Trust is annexed hereto, marked "A", and may be referred to as part of this Case[1].

In the prospectus offering the shares of the Trust for subscription it was stated that the Trust had been formed with the object of acquiring, developing and floating gold-mining properties situated on the Prestea Reef formation in Gold Coast Colony adjoining or in the vicinity of the mine now being developed by Ariston Gold Mines, Ltd.

(1) Not included in the present print.

3. The business carried on by the Trust was that of financiers, dealers in stocks and shares and exploiters of and dealers in gold mining concessions as described below. Its practice was to acquire concessions over land in the Gold Coast Colony which it was thought might be gold bearing. The concessions were exploited to the extent necessary to ascertain their potentialities, and if they were proved to be gold bearing in such circumstances that with further expenditure gold might be produced on a profit-making basis, the Trust proceeded to part with the concession to another company the business of which would be to develop and work the gold. It was not the business of the Trust to continue its investigation of any concession beyond the initial stage, as herein described, and at no time did it attempt the production of gold on a commercial scale. The usual method was to incorporate or promote a public company and to transfer to that company the concession at a price to be satisfied by the issue of fully paid shares. The Trust and its associated companies were represented on the boards of such mining companies and from time to time the Trust, in addition to its vendor shares, took up further shares offered for subscription in such companies as appeared to it likely to be successful.

4. The main questions for the determination of the Commissioners were (i) whether the transactions hereinafter described, whereby the Trust parted with concessions in consideration of issues of fully paid shares in companies formed to exploit the concessions, amounted to realisations of the concessions giving rise to immediate profits to be included in the computations of the profits of the trade of the Trust for the purposes of Income Tax under Case I of Schedule D, and, if so, (ii) upon what basis should such profits be ascertained.

5. Up to 1930 mining in West Africa was not very successful owing to the climate, labour insufficiency, high working costs and difficulties of transport. In 1930 the port of Tarkwa was constructed and new motor roads were made, the mosquito menace was under control, and these improvements, together with an expert report on the Prestea Reef, caused the beginning of a revival of interest. In 1931 Great Britain went off the gold standard and the value of gold rose considerably, and concessions which were on the margin in 1930 had become profitable by 1933, and the share market in West Africa gold mines became active from early in 1933. In the course of 1932 and 1933 the capital of the Trust was increased, and the board of directors was reorganised, some prominent figures in gold mining and gold mining finance, including Mr. H. G. Latilla who was chairman, being directors. In 1933 the following important mining companies held large blocks of shares in the Trust as under:—

Ashanti Goldfields Corporation, Ltd., 213,000 shares—10 per cent. of the capital of the Trust.

Anglo-American Corporation of South Africa, Ltd., 170,000 shares—8½ per cent. of the capital of the Trust.

Consolidated Goldfields of South Africa, Ltd., 266,000 shares—13 per cent. of the capital of the Trust.

6. The Marlu, Main Reef, and Bremang assessments were raised in respect of concessions sold by the Trust to the following companies respectively, viz., Marlu Gold Mining Areas, Ltd. (hereinafter called "Marlu"); Gold Coast Main Reef, Ltd. (hereinafter called "Main Reef"), and Bremang Gold Dredging Co., Ltd. (hereinafter called "Bremang"). These companies were incorporated or promoted by the Trust as above-mentioned

for the purpose of acquiring its concessions, and details of each of the said companies and of the concessions transferred to them by the Trust appear more fully in the paragraphs next hereinafter following.

7. The report of the directors of the Trust upon the audited accounts for the year ended 31st March, 1933, shows that at 11th December, 1933, the Trust held 20 concessions and 17 options. Of these concessions those named Bogosu North, Bogosu South, Damassie and Mansalaie (subsequently renamed New Bogosu) and those named Assekukessi North, Assekukessi South, Kukrokukro North and Kukrokukro South (subsequently renamed New Assekukessi) were in due course transferred to Marlu. One option—the option relating to the Ntubia concession—was exercised. A lease of the concession was taken and was in due course transferred to Ntubia Gold Areas, Ltd. (hereinafter called "Ntubia"). In the cases of the remainder of these concessions and options, prospecting and preliminary development operations showed unfavourable results and the concessions and options were abandoned.

A copy of the report of the directors and the statement of the accounts of the Trust for the year ended 31st March, 1933, is annexed hereto, marked "B", and forms a part of this Case(1).

The four concessions above-mentioned, namely, Bogosu North, Bogosu South, Assekukessi North and Assekukessi South, were acquired by the Trust at a cost of £62,845, and on exploration and prospecting in connection with these concessions the Trust spent a further sum of £45,030, making a total of £107,875.

8. Marlu was incorporated on 26th July, 1934, with a capital of £2,000,000 divided into 8,000,000 shares of 5*s*. each. The board contained representatives of important gold mining groups. By an agreement dated 28th July, 1934, the Trust agreed to sell to Marlu the Bogosu and Assekukessi concessions above-mentioned. These concessions were covered by two leases. The consideration for the sale was to be £800,000 and this was to be satisfied by the allotment to the Trust of 3,200,000 shares of 5*s*. each credited as fully paid. A copy of the said agreement is annexed hereto, marked "C", and may be referred to as part of this Case(1).

9. On 30th July, 1934, Marlu issued a prospectus offering for subscription at par 2,000,000 shares of 5*s*. each. The object of the issue was to provide funds for the continuance of development work on a larger scale and the provision of the equipment necessary for the commencement of mining operations on the scale of 50,000 tons of ore per month. The proceeds of the issue, after providing preliminary expenses estimated at £20,000, would provide £480,000, which in the opinion of the directors would be sufficient working capital. The issue was underwritten by the vendors and the Trust accordingly underwrote 1,600,000 shares at par in consideration of an option to subscribe 1,200,000 shares of 5*s*. each at the price of 6*s*. per share up to 31st July, 1936.

A copy of the said prospectus is annexed hereto, marked "D", and may be referred to as part of this Case(1).

10. The whole of the 2,000,000 shares offered by the said prospectus was duly subscribed, the Trust taking up and paying at par for 10,759 shares as its proportion of the shares underwritten after allowing for shares which were released in order to satisfy the requirements of late applicants. In addition the Trust purchased in the market or otherwise a further 11,826

(1) Not included in the present print.

shares, and, in exercise of its option under the said underwriting agreement, the Trust subscribed for 545,939 shares at 6*s*. per share. Other underwriters of Marlu shares were the Consolidated Goldfields of South Africa, Ltd., Anglo-American Corporation of South Africa, Ltd., Ashanti Goldfields Corporation, Ltd., and Sir Abe Bailey.

11. The said 3,200,000 shares, the consideration under the said sale agreement of 8th July, 1934, were duly allotted to the Trust credited as fully paid on 30th November, 1934.

12. The Ntubia concession above-mentioned was acquired by the Trust under leases, and the total expenditure of the Trust upon the acquisition of these leases and upon the prospecting and development of the concession amounted to £49,238.

13. Ntubia was incorporated on 22nd May, 1935, with a capital of £200,000 divided into 800,000 shares of 5*s*. each.

14. By an agreement dated 4th July, 1935, the Trust agreed to sell to Ntubia, *inter alia*, the said leases relating to the Ntubia concession. The consideration for the sale was the sum of £100,000 and this was to be paid and satisfied by the allotment and issue to the Trust or its nominees of 400,000 shares of 5*s*. each in the capital of Ntubia credited as fully paid up.

A copy of the said agreement is annexed hereto, marked "E", and may be referred to as part of this Case(1).

Pursuant to this agreement 320,000 shares of Ntubia were allotted to the Trust and the remaining 80,000 were allotted to Anglo-African Goldfields, Ltd., as provided by clause 3 thereof. No shares of Ntubia were issued to the public.

15. In accordance with the provisions of the said agreement, the Trust advanced to Ntubia upwards of £77,000. Of this amount only £26,800 odd has been repaid. Ntubia is in liquidation, and as there is little possibility of any further repayment on account of the amount advanced and no possibility of any distribution among the shareholders, the Trust will suffer a loss of upwards of £100,000 as a result of the whole transaction.

16. Main Reef was incorporated on 6th September, 1933, with a capital of £400,000 divided into 1,600,000 shares of 5*s*. each. By a prospectus dated 8th September, 1933, 400,000 of these shares were offered for public subscription at par. The issue was fully subscribed. A copy of the said prospectus is annexed hereto, marked "F", and forms part of this Case(1).

17. By an agreement dated 9th July, 1935, the Trust agreed to sell to Main Reef a concession covered by lease known as the New Ekotokroo concession. This concession had been acquired by the Trust on 16th December, 1933, at a cost of £3,098. The consideration for the sale was to be £150,000 and this was to be satisfied by the allotment to the Trust of 600,000 shares of 5*s*. each credited as fully paid.

A copy of the said agreement is annexed hereto, marked "G", and may be referred to as part of this Case(1).

18. The said 600,000 shares, the consideration under the said sale agreement of 9th July, 1935, were duly allotted to the Trust credited as fully paid on 4th November, 1935. Pursuant to its obligation under clause 10 of the said agreement of 9th July, 1935, the Trust subscribed in cash for a further 300,000 shares in Main Reef at par. These further shares were allotted to the Trust on 20th December, 1935.

(1) Not included in the present print.

19. Bremang was incorporated on 1st December, 1936, with a capital of £1,000,000 divided into 4,000,000 shares of 5*s.* each.

20. By an agreement dated 2nd December, 1936, the Trust agreed to sell to Bremang certain leases relating to dredging and mining concessions on the Ankobra river in the Gold Coast Colony. The total cost to the Trust of these leases and of development work thereon was £78,940. The consideration for the sale was to be £432,500 and this was to be satisfied by the allotment to the Trust of 1,730,000 shares of 5*s.* each credited as fully paid. The said agreement contained an undertaking by the Trust to guarantee subscription of the 1,750,000 shares offered in the terms of the prospectus next hereinafter mentioned.

A copy of the said agreement is annexed hereto, marked "H", and may be referred to as part of this Case(1).

21. On 17th December, 1936, Bremang issued a prospectus offering for subscription 1,750,000 shares of 5*s.* each at 6*s.* per share. The object of the issue was to provide funds to equip the properties with modern dredging plant and necessary ancillary equipment, and to complete the testing of partially proved areas. The issue, after payment of the cash consideration to one of the vendors and preliminary expenses, would provide approximately £485,000, which sum was considered adequate for carrying out the objects above-mentioned.

A copy of the said prospectus is annexed hereto, marked "I", and may be referred to as part of this Case(1).

22. The whole of the 1,750,000 shares offered by the said prospectus were duly subscribed and on 15th July, 1937, the said 1,730,000 shares, the consideration for the said sale agreement of 2nd December, 1936, were duly allotted to the Trust credited as fully paid.

23. In the books of the Trust the cost to the Trust of the concessions sold to Marlu was entered as the purchase price for the fully paid shares allotted under the sale agreement, and then year by year as shares were sold the profit on such sales was brought to account.

A copy of the property account and of the shares account in respect of Marlu is annexed hereto, marked "J", and may be referred to as part of this Case(1).

The transactions in respect of Ntubia, Main Reef, and Bremang were recorded in the books of the Trust on the same lines as in the case of Marlu.

24. Marlu made its first profit in 1937 of £102,509, and paid its first dividend (15 per cent.) in 1938. During the years 1934 to 1938 the market price of Marlu shares varied between 17*s.* 3*d.* and 7*s.* 3*d.*

Main Reef paid its first dividend (7½ per cent.) in 1940. Its accounts show a loss of £34,973 for the year 1936, and a loss of £3,735 for the year 1937. The market price of Main Reef shares during the years 1935 to 1937 varied between 8*s.* 6*d.* and 4*s.* 6*d.*

Bremang made a loss in 1937 of £3,628 and has so far paid no dividend. The market price of Bremang shares during the years 1937 to 1939 varied between 6*s.* 9*d.* and 3*s.* 3*d.*

25. The following are annexed hereto and form part of this Case(1), viz:—

(1) Not included in the present print.

(1) a document (marked "K") described as "Statements and Summary as to Market Transactions";
(2) a graphic statement (marked "L") relating to Marlu shares, showing month by month during the period from August, 1934, to December, 1939, the number of shares issued, the number of shares held by the Trust, the number of shares dealt in on the market, the market price of the shares, and the percentage of issued shares dealt in;
(3) a similar graphic statement (marked "M") relating to Main Reef shares, covering the period from October, 1934, to December, 1941, and
(4) a similar graphic statement (marked "N") relating to Bremang shares, covering the period from February, 1937, to October, 1941.

It was submitted on behalf of the Trust that the inferences to be drawn from these statements were (*a*) that there was never an active market in Marlu, Main Reef, or Bremang shares, and (*b*) that the market prices of these shares during the material years afforded no indication of the realiseable values of large holdings of the shares.

26. The report of the directors of the Trust for the year ended 31st March, 1935, contained the following statement:—

"Investments

"At the 31st March last, the Investments retained by the Company "consisted of the large shareholdings in the Ariston Gold Mines (1929) "Limited and the Marlu Gold Mining Areas Limited. Since that date your "Company has acquired a large share interest in the Amalgamated Banket "Areas Limited.

"The Company has also received the 600,000 fully paid shares in the "Gold Coast Main Reef Limited, being the purchase consideration for our "new Ekotokroo Concession.

"At to-day's date our total cash and share investments have a market-"able value of approximately £3,300,000."

A copy of the report of the directors and statements of the accounts of the Trust for the year ended 31st March, 1935, is attached hereto, marked "O", and may be referred to as part of this Case(1).

Similar statements as to the market value of the investments of the Trust appear as a note to the amount entered in the balance sheet as the cost thereof in all the balance sheets from 1934 to 1939 inclusive. In all the said balance sheets the concessions and options are shown under a separate head of assets as distinct from investments, as is illustrated in that for 1934-1935 hereto annexed(1).

Passages from speeches made by the chairman of the directors at general meetings of the Trust, which were cited to us as showing the policy of the Trust before and during the relevant period, are set out in the document annexed, marked "P"(1).

27. The Anfargah assessment was raised in respect of shares held by the Trust in a company called Anfargah Gold Mines (1929), Ltd. (hereinafter called "Anfargah"), and exchanged for shares in a company called Ariston Gold Mines (1929), Ltd. (hereinafter called "Ariston"), under the circumstances hereinafter mentioned.

(1) Not included in the present print.

28. In 1929 Anfargah owned a concession in the Gold Coast Colony called the Anfargah concession which included an area also included in (and forming about one-third of) a neighbouring concession called the Esserman concession. The rights of Anfargah in the overlapping area had been acquired in 1903. A map showing the relative position of the two concessions is attached hereto, marked "R", and may be referred to as part of this Case(1).

29. Anfargah had a capital of 800,000 shares of 10*s*. each. In the years 1929 and 1930 the Trust purchased 505,000 of these shares fully paid at 2*s*. per share in the circumstances mentioned below, and so held a controlling interest. The Anfargah concession had not been a success. All development work had ceased in 1914, and in 1930 the Court had sanctioned a reduction in its capital by writing off 5*s*. per share of the 800,000 issued 10*s*. shares. The rest of the Esserman concession was at that time held by Ariston, subject to Anfargah rights over one-third as above-mentioned. Ariston (in which the Trust held 148,182 shares out of a total issued capital of 4,630,523 shares) was anxious to acquire the whole of the Esserman concession which it was actively developing. On 7th March, 1933, Anfargah sold its concession, including its rights over the Esserman concession, to Ariston for 800,000 fully paid Ariston shares of 2*s*. 6*d*. each.

In view of their sale there ceased to be any object in keeping Anfargah alive, and on 20th April, 1933, special resolutions were passed whereby Anfargah went into voluntary liquidation and the liquidator was authorised to make a distribution in specie. Under the distribution the Trust in respect of its Anfargah shares received 694,375 shares of 2*s*. 6*d*. each fully paid in Ariston. The market quotations for Ariston shares at this time were 7*s*. 6*d*. per share or upwards.

30. The following witnesses were called on behalf of the Trust:—

Lord Teviot a director of Lloyds Bank, Ltd. and other companies, and a late senior partner in a firm of stock and share brokers, gave evidence to the following effect. He had had upwards of 40 years' connection with the London Stock Exchange. The market price of a particular share on a particular day afforded no criterion of the price that could be realised on the sale of a large holding. An attempt to sell a very large block of shares on the Stock Exchange would probably kill the market altogether. The Stock Exchange was not the normal market for very large blocks of shares. To sell a big number of shares the normal course would be to go to an issuing house or to large controlling interests supporting the company. Such a purchaser would take into consideration the intrinsic or minimum asset value of the shares and the prospects of the company.

Mr. Sydney Garton Vanderfelt, a member of the London Stock Exchange, senior partner in the firm of Messrs. Vanderfelt & Co., stock and share brokers, gave evidence to the following effect. He had been a member of the Stock Exchange for 42 years and was particularly connected with the mining market. Market prices were no reliable guide to the realiseable values of large blocks of shares, particularly so in the case of speculative shares such as those of Marlu, Bremang, Main Reef and Ariston. It would be quite impossible to sell them on the Stock Exchange. He thought that 250,000 Marlu shares could have been sold by the various groups interested co-operating and taking them. He would himself have

(1) Not included in the present print.

taken a seat on a syndicate purchasing at par a maximum of 250,000 Marlu shares. Although a bid might be obtained for 1,000,000 Marlu shares it would probably be a very low figure. If a mining concession sufficiently proved to be ready for transfer to a mining company were compulsorily acquired by the Government, an arbitrator could be expected to award the dispossessed owner something more than his mere out-of-pockets. If the Trust had offered 3,200,000 Marlu shares, people would have been very chary of dealing with them at all.

Mr. Arthur Victor Franklin, senior partner in the firm of Messrs. C. S. Williamson & Co., stockjobbers, and a member of the London Stock Exchange, gave evidence to the following effect. He was a mining market jobber. To sell a million shares on the floor of the house would be impossible. Jobbers were retailers and would not buy more shares than they could quickly resell. If asked, he would go to the trust companies or financial houses to endeavour to place them.

Sir Joseph Ball, who joined the board of the Trust in 1941 and had been chairman since 21st October, 1941, gave evidence to the following effect. The policy of the Trust was to create dividend paying assets but always having in mind the possibility of realising them, not necessarily at any given time, and reimbursing itself in that way and being, therefore, in a position to perform the same operations with regard to other concessions. The Trust had had no difficulty in increasing its capital and had issued further shares at a large premium.

Mr. Frederick Allen, a director of the Trust since 11th March, 1933, a former director of Marlu, and a director of a number of mining and finance companies, gave evidence to the following effect. He claimed an extensive experience of the financing of the mining industry. The business of the Trust was that of a mining exploration company. It sent out its engineers to the Reef to prospect and drill. The vendor shares were looked on as the Trust's working capital. If opportunity arose by which same could be realised, they worked on the principle of keeping the Trust liquid financially. Shares were sold as opportunity offered, but there had not been much opportunity to sell. When it was impossible to sell shares, the Trust borrowed. The shares held by the Trust were given as security for loans and had a marketable value. A concession after it was proved was worth a great deal more than the out-of-pocket expenses. The Marlu concession was worth £800,000 to Marlu. The Trust always held enough shares to have a controlling interest in a subsidiary, which was the common practice followed by many companies, and sold as opportunity offered to provide working capital. The shares of the three companies had a good minimum asset value, and there were strong supporting groups for them.

31. Mr. Ernest George Frankland, a senior examiner in the Estate Duty Office, was called on behalf of the Crown and stated that his duties consisted in valuing shares in private companies and large blocks of quoted shares, including shares in mining companies. To sell large blocks of shares you would go to the big financial houses who were the wholesalers, as opposed to the jobbers who were the retailers. To determine a value, first the prospectus had to be considered to arrive at the minimum asset value, then the capital expenditure and its repayment by sinking fund, a mine being a wasting asset, and then the problem of risks and the prospects. He estimated the value of Marlu shares in 1934 at not less than 5*s*. to 6*s*., of Main Reef shares at 3*s*. 4*d*., and of Bremang shares at 4*s*.

32. It was contended on behalf of the Trust:—
(*a*) that no profit or gain can arise from a sale of an asset unless the transaction amounts to a "realisation" of the asset;
(*b*) that a "realisation" of an asset involves its conversion into either cash or assets readily convertible into cash;
(*c*) that in the case of none of the transactions in question were the shares issued to the Trust readily convertible into cash, and accordingly,
(*d*) that no profits or gains arose or accrued to the Trust from said transactions or any of them; and, in the alternative,
(*e*) that the said shares were required, for the purposes of the Income Tax Acts, to be treated as stock-in-trade of the Trust to be brought into account at cost or market value, whichever was the lower;
(*f*) that the cost to the Trust of shares acquired in consideration for the transfer of a concession must necessarily be a sum equal to the value of the concession;
(*g*) that, in default of evidence to the contrary, the value of a concession in the hands of the Trust must be taken to be the total amount expended by the Trust in acquiring the concession, and
(*h*) that in none of the cases in question was there evidence to support a conclusion that at the time of the transaction the value of either the concession sold or of the shares received by way of consideration for the sale exceeded the total amount expended by the Trust in acquiring the concession; and, in the case of the Anfargah assessment,
(*i*) that if any advantage accrued to the Trust as a result of the exchange of the Anfargah shares or of any related transaction (which was not admitted), such advantage was not profits or gains of the trade of the Trust.

33. It was contended for the Inland Revenue:—
(*a*) that, in the circumstances of the case, the sale of a concession for shares was a realisation enabling a fresh starting point to be made and the arising of a trading receipt;
(*b*) that upon the facts of the case the trading scheme of the Trust was not (as contended for the Appellant Company) that of a continuous venture wherein a mining concession was to be acquired and as soon as possible converted into cash, the formation of a sufficiently capitalised company and the sale of the concession to it for shares being mere intermediate steps towards the sale of the vendor's shares for cash;
(*c*) that if there is a realisation of a concession for shares, the value of the shares can be fairly and reasonably fixed when received;
(*d*) that the out-of-pocket costs of the concession cannot be accepted as the value of the shares allotted, or the price of the concession;
(*e*) that the shares could not, in the absence of further evidence, be treated as having been issued at a discount, so they must be deemed to be worth their par value to the issuing company and to have some corresponding value to the shareholders;

(*f*) that the price of the concessions as agreed between the parties was the par value of the shares;

(*g*) that, in the case of Marlu, the subscription by shareholders of the vendor companies for 2,000,000 shares at par and the underwriting of these shares by important mining companies and interests was clear evidence that the vendor shares had a value greatly beyond the cost of the concession to the Trust;

(*h*) that sale of these shares by private treaty to mining finance houses and groups and not through the Stock Exchange was admitted to be the proper line of approach and, in the interest of the mining market generally, was considered the method most likely to be successful;

(*i*) that on the authorities it was a matter for the Commissioners whether or not they accepted the par value of the shares, this being the basis agreed by the parties on which the concessions were sold;

(*j*) that if the Commissioners wished to take a different view, then the Crown invited consideration of the values submitted by their witness;

(*k*) that, as to the Anfargah assessment, the Trust purchased a controlling interest in the company holding the concession instead of purchasing the concession itself and received their share of the purchase price when it was sold, and that this was the only difference between this assessment and the other assessments under appeal, and the contentions put forward as to those assessments applied equally to the Anfargah assessment.

34. The following cases were referred to:—

Californian Copper Syndicate v. *Harris,* 5 T.C. 159.
Royal Insurance Co., Ltd. v. *Stephen,* 14 T.C. 22.
Westminster Bank, Ltd. v. *Osler,* 17 T.C. 381.
John Emery & Sons v. *Commissioners of Inland Revenue,* 20 T.C. 213.
Russell v. *Aberdeen Town and County Bank,* 2 T.C. 321.
Whimster & Co. v. *Commissioners of Inland Revenue,* 12 T.C. 813.
Craddock v. *Zevo Finance Co., Ltd.,* 27 T.C. 267.
John Cronk & Sons, Ltd. v. *Harrison,* 20 T.C. 612.
Osborne v. *Steel Barrel Co., Ltd.,* 24 T.C. 293.
Lace Proprietary Mines, Ltd. v. *Commissioners of Inland Revenue,* South African L.R., [1938] Appellate Division, 267.
Commissioners of Inland Revenue v. *Burrell,* 9 T.C. 27.

The findings of the Commissioners were as follows:—

1. That when the Marlu, Main Reef and Bremang shares were allotted to the Trust there was a realisation of the assets sold to those companies.

2. That at the date of allotment the value of the shares received by the Trust was par, the price agreed to be paid by the purchasing companies.

3. That in the case of the Anfargah shares there was no realisation and no taxable profit.

4. That the assessments be adjusted accordingly.

It was agreed between the parties that in the event of our findings being upheld the assessments under appeal should be adjusted as follows:—

1934-35	...	£27,850.
1935-36	...	£671,248.
1936-37	...	£106,477.
1937-38	...	£268,786.

Both parties thereupon expressed dissatisfaction with our decision as being erroneous in point of law and required us to state a Case for the opinion of the High Court of Justice, which we have stated and do sign accordingly.

CECIL LUBBOCK.
ALAN HOTHAM.
G. F. HOTBLACK.
HAROLD SNAGGE.
A. C. GLADSTONE.
FRANCIS J. F. EDLMANN.

W. W. LEUCHARS, Clerk to the Commissioners
for the City of London.
8th February, 1946.

The case came before Wrottesley, J., in the King's Bench Division on 13th, 14th and 15th May, 1946, and on the last-named date judgment was given dismissing the Company's appeal and allowing the Crown's appeal, with costs.

Sir Cyril Ratcliffe, K.C., and Mr. F. Heyworth Talbot appeared as Counsel for the Company, and the Solicitor-General (Sir Frank Soskice, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Wrottesley, J.—I have come to a conclusion in this case, and I will state it and give my reasons now. The question here is whether, first of all, the Appellant Company, the Gold Coast Selection Trust, Ltd., whom I will call "the Trust", made a profit upon which it can be taxed when it sold all its rights in certain concessions on the Gold Coast to the Marlu Gold Mining Areas, Ltd., which I will call "Marlu"; secondly, whether it made such profits when it sold its rights in another lot of concessions to what I will call "Main Reef"; and thirdly, a similar question with regard to a similar sale to a company called Bremang, which I will call "Bremang."

I will not paraphrase the facts set out in the Case, but broadly speaking they show that the business of the Appellant Company consisted of prospecting, as it used to be called, in order to find gold in the Gold Coast in quantities justifying the setting up or sinking of modern mines, or, as I think the phrase is, "payable ore bodies."

The business of the Trust appears sufficiently from paragraph 3 of the Case Stated, which I will read in full: "The business carried on by the "Trust was that of financiers, dealers in stocks and shares, and exploiters "of and dealers in gold mining concessions as described below. Its prac- "tice was to acquire concessions over land in the Gold Coast Colony which

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" it was thought might be gold bearing. The concessions were exploited to " the extent necessary to ascertain their potentialities, and if they were " proved to be gold bearing in such circumstances that with further expendi- " ture gold might be produced on a profit making basis, the Trust proceeded " to part with the concession to another company the business of which " would be to develop and work the gold. It was not the business of the " Trust to continue its investigation of any concession beyond the initial " stage, as herein described, and at no time did it attempt the production " of gold on a commercial scale. The usual method was to incorporate or " promote a public company and to transfer to that company the concession " at a price to be satisfied by the issue of fully paid shares. The Trust " and its associated companies were represented on the boards of such min- " ing companies and from time to time the Trust, in addition to its vendor " shares, took up further shares offered for subscription in such companies " as appeared to it likely to be successful."

Now one of the concessions which turned out well was that which they sold to Marlu, a company which indeed they promoted in order that it might take off their hands rights which would enable the purchasers to set up a mine. Altogether the Trust spent on proving gold in commercial quantities here a sum of £107,000 odd, and bearing in mind that this was a successful venture, as contrasted with the various unsuccessful explorations which such a company must, I suppose, encounter, it is not surprising to find that they asked for, and got from the Marlu Company, the price appearing in the agreement of sale as £800,000, which is described as " the consideration for " the said sale and transfer of the said Leases ". It is true that it was not in cash that they took that price, but in shares, namely, 3,200,000 shares of 5*s*. each, and it is quite fair to say, as Sir Cyril Radcliffe suggested in the course of his argument, that those two provisions were contemporaneous. There was never a question, as between these parties, of the payment taking the form of cash. So the account is closed and a line is drawn across the Company's account. In its accounts the Company never regarded itself as having, at this stage, made a profit. The expenditure account on this concession came to an end; a new block of shares stood in the books of the Company, and only as some of those shares were sold (as some of them were) at a profit did the Company acknowledge a profit in the way of income, at any rate until, I suppose, Marlu started, as it very soon did, to pay dividends. With this attitude on the part of the Company the Commissioners of Inland Revenue were not content.

The observations of Rowlatt, J., in the case of *The Royal Insurance Co., Ltd.* v. *Stephen*, 14 T.C. 22, seem to me to be in point. He was there dealing, it is true, with quite a different case, but this is what he said, at page 28: " At the bottom of this principle of waiting for a realisation, I " think there is this idea: while an investment is going up or down for In- " come Tax purposes the Company cannot take any notice of fluctuations, " but it has to take notice of them when all that state of affairs comes to " an end, when that investment is wound up I will say—' wound up ' is an " unfortunate expression perhaps and I will say when an investment ceases " to figure in the Company's affairs, when it is known exactly what the hold- " ing of that investment has meant, plus or minus to the Company, and then " the Company starts so far as that portion of its resources is concerned " with a new investment." That appears to me to describe pretty well what occurred in this case.

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Now the law on this matter was laid down (even if it did not have its beginning there) in the case of the *Californian Copper Syndicate* v. *Harris,* 5 T.C. 159, where it was held: "Company formed for the purpose, *inter* "*alia,* of acquiring and reselling mining property; after acquiring and work- "ing various property, it resells the whole to a second Company, receiving "payment in fully paid shares of the latter Company. *Held,* that the differ- "ence between the purchase price and the value of the shares for which the "property was exchanged is a profit assessable to Income Tax."

At page 165 I find the Lord Justice Clerk opening his judgment with this observation: "It is quite a well settled principle in dealing with ques- "tions of assessment of Income Tax, that where the owner of an ordinary "investment chooses to realise it, and obtains a greater price for it than he "originally acquired it at, the enhanced price is not profit in the sense of "Schedule D of the Income Tax Act of 1842 assessable to Income Tax. "But it is equally well established that enhanced values obtained from real- "isation or conversion of securities may be so assessable, where what is "done is not merely a realisation or change of investment, but an act done "in what is truly the carrying on, or carrying out, of a business. The sim- "plest case is that of a person or association of persons buying and selling "lands or securities speculatively, in order to make gain, dealing in such "investments as a business, and thereby seeking to make profits."

There are other passages which are now so time-honoured that they may be said to form a *locus classicus* on the subject, where what is described is exactly what the Commissioners have described in this case, prefacing it, as they did, with the paragraph that I read, paragraph 3 of the Case, describing the business of the Appellant Company.

So that here we have just such a company, and indeed this was agreed by Sir Cyril Radcliffe in the course of his argument on behalf of the Appellants. It was also agreed by him that if this is a realisation, and if a value can fairly be put upon the shares which the vendors got for their concession, and that shows a profit, that profit is taxable.

Now, that it is realisation appears pretty clearly, I think, from the passage that I have read from the judgment of Rowlatt, J., in the case of *The Royal Insurance Co., Ltd.* v. *Stephen,* 14 T.C., at page 28; and one finds the same principles laid down in the case of *John Emery & Sons* v. *Commissioners of Inland Revenue,* 20 T.C. 213, where what was sold was a house and its curtilage, which had been built by a builder and was sold, as I understand it, first of all for a sum of money, and secondly the reservation of an annual to himself, that is to say, a perpetual rentcharge, as I think it would be called in this country, or a fee farm rent, and it was one which it is true, as the learned Judges in that case pointed out with emphasis, was readily capable of being valued.

Therefore, whether you have a case of land being sold, as that was, for (amongst other considerations) a perpetual annuity, or whether you are dealing with a block of shares, as in the case of *The Royal Insurance Company* v. *Stephen*—shares which are wiped out of existence by a statute and compensation is granted to the owners of the shares in the form of new shares in four amalgamated companies set up by the Railways Act of 1921—in either case you find this, that provided you have a realisation or a conversion in such a sense as Rowlatt, J., described in the case of *Royal Insurance Company* v. *Stephen,* and provided that you can value that which is

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given in exchange for the new investment or the thing into which the old investment is converted, if the result is to show an advance or a benefit or an increase of value to the holder, that is liable to Income Tax.

Of course it is equally true to say that it is no use to allege, or even to prove, a realisation, in the sense in which Rowlatt, J., used those words, if you cannot go on and also value the shares taken in exchange; and, really, the narrow ground upon which this case is fought is that here it is not possible to value the shares which the Trust obtained in Marlu, Main Reef or Bremang.

Now Sir Cyril Radcliffe further says this, that even supposing these shares can be valued, as I understand his argument, the learned Commissioners in fact have not done it. They wrongly thought that there was some lawyers' mystery which bound them to say that the value was par.

Going back to the first contention, if a value cannot be put on that which is obtained, for instance, in this case the shares of Marlu, then clearly, while there may be a profit, it is one which cannot be taxed. As long as this basis exists of taking from a man a percentage or share or proportion of his profits, if you cannot find out what the profits are you cannot tax them. On the other hand, if it can be done, and if the Commissioners have in fact refrained from doing that because of some such inhibition as that the lawyers have discovered a rule by which they must be valued at par, then the Commissioners must be instructed to do it.

Whether the valuation can be made or not depends upon the evidence, and this shows that you could not sell the whole block all at once for its real value, if indeed you could sell the whole block at all, after the sale by which they obtained the shares. It is, of course, the old story of supply and demand. But that was true so far as the Stock Exchange was concerned in the case of the *Lace Proprietory Mines, Ltd.*, decided in the Appellate Division of the Supreme Court of South Africa (South African Law Reports, [1938] Appellate Division, page 267). It is also true, of course, with regard to such things as tea or sugar, in ordinary times, but I will not say now. The fact is that you must go to work in the right way, and you must go to work in the right place, and it was undoubtedly the duty of the Commissioners here to approach the matter from that point of view.

In the case of *John Emery & Sons* v. *Commissioners of Inland Revenue*, 20 T.C. 213, for instance, the case about the builder, it is not really a question of whether there was a ready market in these annuals or perpetual rentcharges, although the Judges did use words which appeared to warrant that argument, but it seems to me that the test there was whether you could sell the annuals for an actual sum, and if so, then that would enable the profit to be ascertained or the loss to be ascertained, and it is clear that the fact was that such a chose in action as an annual could be sold, and so it could be valued.

If the market is not easy, then it appears to me that it must be the case that the value will fall, and it is certainly not necessary for me to instruct the Commissioners on that point, and indeed I think the Case shows that they had it well in mind. The evidence here shows, or appears to me to show, that the shares were marketable provided that you went to the right place to do it, and if it were necessary to be done. I am not convinced that it was necessary to be done, for it was the policy of this Trust to take

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and keep a large holding; and as to valuation I should have thought that the value of these shares to this Trust is no more a matter to be disregarded than is the value of land to the owner to be disregarded, for instance, in an arbitration for compensation, as to the value of land under the Lands Clauses Acts.

That is one of the matters which the Court, or in this case the Commissioners, should have in mind; and indeed it is agreed between the parties here, I think, that that which was said in one passage, " that the incidence " of tax cannot depend on the policy of the Trust ", is correct. The Trust, of course—and I am dealing particularly with the Marlu case—might have taken the consideration in money, with all its advantages and disadvantages, but the Trust did not do that, they chose to take shares. I cannot see why that was not ordinary good policy, seeing that they were shares in an undertaking about which they knew everything there was to be known down to that moment, and in an area of the Gold Coast, a gold-bearing area, which they well understood. In money no one could say what price they would have stood out for, or how long they would have had to wait for it. In shares they fixed a high price, £800,000, to be satisfied by the granting of 3,200,000 5*s*. shares, and they got it.

In any event the deal was, as it appears to me, and as it must obviously have appeared to the Commissioners, I think, cogent evidence, and that it affected their minds I think is clear from the second finding which is: "That " at the date of allotment the value of the shares received by the Trust was " par, the price agreed to be paid by the purchasing companies."

The fact that they got what they apparently were willing to take, a block of shares so large that they could not be sold *en bloc,* even if it were true, would not, I think, be relevant. In point of fact all that the evidence amounted to was that you could not sell these shares on the Stock Exchange, about which everybody is agreed, and that in order to negotiate the transfer of so large a block of shares as they had in Marlu, if they had wanted to get rid of them, this Trust would have had to go off to persons rather of their own kind, or others dealing in an even greater way of business, here in the City of London. That may well be, but the directors of the vendor Company must have known that well enough when they sold, and it is to be observed that the fact that this large block of shares remained in their hands did not prevent some of the shares from rising to a substantial premium, at any rate in the case of Marlu.

I think it is also to be borne in mind that by taking in shares the price of this concession, which they had developed and brought to a suitable condition for exchange for shares, the Trust might well seem to be bearing testimony to the value of that proposition, but after all, all that is only to set out that which these Commissioners know better than I do, and obviously weighed in their minds, and that is clear from the way in which they set out the facts. I think it is sufficient upon this part of the case to say that the very words of the finding demonstrate that the Commissioners thought that the bargain struck at the time was one to which they could well look to see what value these well qualified men were putting at that moment on this asset, for there is nothing in this case to detract from the value of that evidence. There is no suggestion of fraud, there is no suggestion of inflated value, and there is no suggestion of any endeavour, by putting face values on shares, to get rid of those shares and disappear with the profits. Nothing of that kind is suggested.

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That being so, it seems to me that the inference that these Commissioners drew is one which no Court of law can possibly challenge. The premises were ample, and the inference was reasonable.

Sir Cyril Radcliffe has raised, nevertheless, I am bound to say, two or three very interesting points, with which I do not think I am called upon to deal, and I do not think I can deal with them, but I can mention them in passing. He put it in this way, that unless the Commissioners were satisfied that the whole of these stocks or shares could all of them be dealt with, realised and got rid of in the twelve months, the year of assessment, then there is no properly realised profit upon which tax can fairly be raised.

It may well be that the very best evidence of the value of an article which a person buys is the price which he himself puts upon it. It may be an article of such a nature that you could not expect to be able to realise it in the course of the year of its assessment, but nevertheless it seems to me that it might be a case where such a person might be said to have made a fairly large profit. Again, there might be circumstances where there would not be such evidence, and where, therefore, there would be nothing in the way of evidence of market value and of how things can be disposed of in the market. It may be that one of these days a case will arise where it will be possible to convince the Commissioners that it will take some years to obtain the proper value of an article. There are, as I suggested to Sir Cyril, two ways of dealing with that problem. One would be to postpone the assessment or rather the collection of the tax over a long period, and another would be to use the familiar device of valuing and taking that profit at the date when it can be realised, and discounting it and bringing it back to the year of assessment.

Another point which was taken by Sir Cyril Radcliffe was the practical difficulty: Can it really be, within the taxation statutes, that a company like this or a trust like this should be called upon to do that which is quite contrary to its policy and, in order to meet a payment for taxation, sell that which in the ordinary course of events it would keep? Well, that is a practical difficulty, and I do not think I am called upon to deal with it. It is not one which can, I think, affect the incidence of tax, provided that the authorities and the statutes are clear, as I think they are.

That leaves me only with the Ariston case, and here I am bound to say that the Commissioners appear to me to have gone wrong. If the test of what is a conversion or a realisation is that which is to be found in the passage that I have read from the judgment of Rowlatt, J.,[1] then it seems to me that the evidence here, as set out by the Commissioners themselves, is all one way. The transaction is well described by the chairman of the Company in an address to the shareholders on 21st December, 1933, appearing in exhibit "P". He said: "Since the date of the balance sheet "our investment in Anfargah Gold Mines and Finance Company, Ltd., has "been changed into a large shareholding in Ariston Gold Mines (1929) "Ltd."; and it is quite obvious that such an exchange, however it came about, was well within the normal business carried on by the Trust.

That being so, it seems to me that it clearly is a realisation within the meaning of that passage to which I have referred, and therefore it does not seem to me to make any difference that it was brought about in this way, that instead of being purchased, instead of being obtained by selling a concession, it appears that they had formerly held a large block of shares in a

(1) 14 T.C. 22, at p. 28.

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company called Anfargah, and that that company had an interest in a concession which it became important for the Ariston Gold Mines Company to obtain, and accordingly the Anfargah Company, which had gone through a rather depressing period, sold its interest to the Ariston Company receiving therefor a large holding of fully paid Ariston shares. As that was all that the Anfargah Company had in the world at the time, as I am told, it was unnecessary to keep Anfargah any longer in existence, and therefore it was wound up and its property was distributed in specie to the Trust, the Appellants here. That was the way in which they became possessed of that investment.

These facts do not seem to me to make it any the less a realisation within the meaning of the language used by Rowlatt, J. It seems to me that, as I have said, the evidence is all one way and, therefore, it will be necessary for the Commissioners to consider two things in order to come to a right conclusion here—first whether they can value the Anfargah shares and secondly whether they can value the Ariston shares at the time when they became the property of the Trust, and if so, if they can find out whether that amounted to a profit. For this purpose the case must go back.

The Solicitor-General.—Then will your Lordship say that the Appellants' appeal should be dismissed with costs, and the cross-appeal of the Crown should be allowed with costs?

Wrottesley, J.—Yes.

The Solicitor-General.—May I just say one thing, with great respect to your Lordship? Your Lordship has directed the case to go back to the Commissioners to ascertain two values.

Wrottesley, J.—Yes.

The Solicitor-General.—With regard to the value of the Ariston shares, if I may say so respectfully, I have no comment to make, but with regard to the value of the 505,000 Anfargah shares, there was of course the fact that these shares were purchased at 2*s.* per share and the cost to the Company was in fact £50,500. I do not know whether your Lordship would think it would be necessary, therefore—

Wrottesley, J.—I am not precluding them from approaching the matter in that way. I do not know.

The Solicitor-General.—Your Lordship leaves it to them?

Wrottesley, J.—Certainly, I leave it to them. It seems to me that they have got to put a value on the two things. How they will do it I am not sure. I do not know the matter well enough.

The Solicitor-General.—Then the position is as your Lordship has indicated?

Wrottesley, J.—Yes.

The Solicitor-General.—If your Lordship pleases.

Appeals having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Scott, Somervell and Cohen, L.JJ.) on 30th, 31st October, 1st and 4th November, 1946, when judgment was reserved. On 22nd November, 1946, judgment was given unanimously in favour of the Crown, with costs.

Sir Cyril Radcliffe, K.C., and Mr. F. Heyworth Talbot appeared as Counsel for the Company, and the Solicitor-General (Sir Frank Soskice, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Scott, L.J.—I will ask Somervell, L.J., to read the judgment of himself and myself.

Somervell, L.J.—This is the judgment of Scott, L.J., and myself.

This is an appeal by the taxpayer Company, which following the Case we will call "the Trust", against a decision of Wrottesley, J. The first appeal dealt with three years, 1935-36, 1936-37 and 1937-38. Wrottesley, J., upheld the decision of the General Commissioners for the City of London. Sir Cyril Radcliffe, who appeared for the Trust, did not argue the second appeal which was concerned with the assessment for 1934-35, and we will deal with the position on that appeal at the end of our judgment.

In the three years with which we are concerned the Trust carried out three separate transactions of the same kind. There was in each year a sale by the Trust of mining concessions and property to three other companies for blocks of fully paid ordinary shares. The relevant words in the first agreement, a sale to a company called Marlu Gold Mining Areas, Ltd. incorporated two days before the sale, are as follows: "The consideration "for the said sale and transfer of the said Leases shall be the sum of Eight "Hundred Thousand Pounds which shall be paid and satisfied by the allot-"ment and issue to the Vendor or its nominees of Three million two "hundred thousand shares of Five Shillings each in the capital of the Pur-"chaser credited as fully paid up". Although Sir Cyril based his argument in part on the different facts relating to the three transactions, the principle raised as to each year is the same.

It was not disputed that these transactions were in the course of the Trust's trade. In other words, it was not suggested that the transaction was the realisation of a capital asset. The assessments challenged were on the basis that the Trust had made a profit in the year in which the transaction took place and that the shares were money's worth, and the assessing Commissioners valued the shares at figures the details of which are not material.

The main or at any rate the first point argued before the Commissioners is set out in paragraph 32 of the Case: "It was contended on be-"half of the Trust:—(*a*) that no profit or gain can arise from a sale of an "asset unless the transaction amounts to a 'realisation' of the asset; (*b*) "that a 'realisation' of an asset involves its conversion into either cash or "assets readily convertible into cash; (*c*) that in the case of none of the "transactions in question were the shares issued to the Trust readily con-"vertible into cash". The Commissioners found that there was a realisation of the assets, and Sir Cyril accepted the position that this finding could not be challenged. He did not, we think rightly, regard this finding as meaning that, in the opinion of the Commissioners, the shares were readily convertible into cash, but that there was a realisation, whether the shares were so convertible or not. The question whether there has been a complete realisation is not really affected by difficulties that may be found to exist as to the valuation of the asset received.

(Somervell, L.J.)

The alternative argument related to the value to be put on the shares. On this the Commissioners found: "That at the date of allotment the value "of the shares received by the Trust was par, the price agreed to be paid "by the purchasing companies." On this finding the figures of all three assessments were reduced to figures agreed between the parties and set out at the end of the Case.

Sir Cyril's argument may be stated as follows. He, of course, accepted the position laid down in many cases that a trade or income receipt may be in money or money's worth. He submitted that, in principle and on authority, when the asset received by the trader is other than money, the sum to be taken is the sum which could be realised by the trader in the market in the accounting year in which the transaction took place. He admitted that the mere fact that the taxpayer chose not to realise was irrelevant. If, however, the taxpayer can show that it was impossible to realise, except presumably at a ridiculously low price having regard to the intrinsic value of the asset, then no sum should be brought in. In other words, money's worth means what you can obtain, seeking the most likely purchasers, in the accounting year on which the assessment is based. He further submitted that on the evidence, and on the wording of their finding, the Commissioners could not have applied this principle. He invited the Court first, we think, to deal with the matter on the basis that on this principle on the evidence in the Case no sum ought to be brought in in respect of any of the years. Alternatively, he asked that the case should be sent back with a direction to the Commissioners to state whether the par value was arrived at as the figure that the shares could be expected to fetch if all had been sold during the Trust's accounting year for the best price obtainable, and, if not, to fix the value, if any, on this basis.

Before passing to the Crown's argument we will refer to how the matter was dealt with in the Trust's accounts, which Sir Cyril submitted was correct on his submission as to the evidence. The Trust valued the 3,200,000 shares which they had received from Marlu at the sum of £107,875, being the original cost to the Trust of the properties and rights transferred plus the sum which had been spent on them since their original purchase by the Trust. The method of keeping accounts is often a guide but is never conclusive in Income Tax issues. We express no opinion on this as accountancy. The picture it presents is as if the transaction had provided no profit for the Company, whereas, according to the terms of the agreement, these properties were now estimated to be worth £800,000, for which sum the shares were taken in satisfaction. That the accounts as drawn up did not disclose the whole truth is evidenced by a note to this and another similar item in the balance sheet for the year attached to the directors' report. The "Investments, at cost or valuation", which include these shares, shows a figure in the balance sheet of £259,420 18*s.* 2*d.* The note in a bracket says: "Market value 29th March, 1935, "£2,560,491 7*s.* 0*d.*" This, of course, may not have been the whole truth either. In subsequent years, as shares were sold in accordance with the Trust's policy, the profits as shown on such sales on the above basis were brought into the accounts.

The Solicitor-General, on behalf of the Crown, agreed that money's worth must be an asset of the kind which can be turned into money. He instanced the bank manager's residence in *Tennant* v. *Smith*, 3 T.C. 158, as an example of an "advantage" that could not be turned into money.

(Somervell, L.J.)

If by a transaction the taxpayer gets an asset of the former kind which can be valued, that is his profit. It is unnecessary to show that he could in fact in his accounting year get this sum in cash. This may be an element in arriving at the value. He submitted that this was right in principle and also on authority. He was, we think, inclined to argue in the alternative that there was evidence on which the Commissioners could have found the par value, applying their own knowledge to the evidence, on Sir Cyril's principle.

We will now summarise what seem to us the most important points in the evidence, which is set out very fully in the Case. We will deal primarily with Marlu. On 30th July, 1934, two days after the agreement, Marlu issued a prospectus offering for subscription at par 2,000,000 shares of 5*s*. each. The Trust underwrote 1,600,000 of these shares at par in consideration of an option to subscribe for 1,200,000 shares of 5*s*. each at the price of 6*s*., up to 31st July, 1936. The whole of the shares were subscribed, the Trust taking up and paying at par for 10,759. The Trust purchased some additional shares in the market, and later bought 545,939 shares at 6*s*. under its option. The shares were dealt with on the Stock Exchange at prices which varied between 17*s*. 3*d*. and 7*s*. 3*d*. between 1934 and 1938. The percentages of shares dealt in were small, never exceeding 4 per cent. of those issued after the shares had been allotted to the Trust on 30th November, 1934.

The Trust called a number of witnesses of experience in Stock Exchange transactions and financial dealings. They gave evidence that an attempt to sell these large blocks of shares on the Stock Exchange "would "probably kill the market altogether." It might have been possible to get a syndicate or financial house to take 250,000 at par, but if a bid were asked for for 1,000,000 it would probably be at "a very "low figure." If the Trust had offered 3,200,000 Marlu shares, "people "would have been very chary of dealing with them at all." Mr. Allen, a director of the Trust, said there has not been much opportunity to sell, but shares of this kind held by the Trust "were given as security for loans and "had a marketable value." He also said that "a concession after it was "proved was worth a great deal more than the out-of-pocket expenses." Some of the sentences quoted above emphasise, to our minds, though it is in no sense conclusive of the argument, the difficulty of applying the kind of test for which Sir Cyril contends in cases of this kind. The whole transaction, as known to financial and mining circles, was on the basis that the Trust had confidence in the value of the property, and were taking the shares not for immediate realisation, though they contemplated realising parcels over the years as and when they wanted money for their business. If one assumes a financial company with the necessary liquid resources equally interested in this form of undertaking, there seems no reason why they should not purchase the shares as worth £800,000, which was admittedly an honest estimate by highly skilled people of the value of the rights and property transferred. In transactions such as these there will not usually be a possible purchaser of this kind. If the Trust suddenly tried to place the whole block of shares on the market everyone would want to know why. We are prepared to accept the view that there might in practice have been great difficulty in disposing of the whole block shortly after the purchase at a price which reflected the intrinsic value of the shares.

(Somervell, L.J.)

It is necessary now to consider the authorities, dealing first with those relied on by Sir Cyril. In the *Californian Copper Syndicate* v. *Harris,* 5 T.C. 159, there was a sale of mining properties for fully paid shares The contest was as to whether this was a trading transaction or a realisation of a capital asset. On this issue the taxpayer lost. It was also held there was a profit, although shares were received and not cash. Lord Trayner said (at page 168): "The shares were realisable and could have been turned "into cash, if the Appellants had been pleased to do so."

In *John Emery & Sons* v. *Commissioners of Inland Revenue,* 20 T.C. 213, also a Scotch case, a firm of builders sold plots with houses on them for a sum in cash, ground annuals on the property being created and retained by the builders. Lord Morison said (at page 221): "It is quite "immaterial in what form the profits or gains are taken—money or kind "or money's worth..... The full amount of the profits and gains arising "or accruing from such transactions is affected with Income Tax." He went on to hold that the ground annual was part of the price: "Ground "annuals are a trustee security and have at any given date an ascertain- "able cash value.... In short, the profits of the Appellants' business "cannot be ascertained unless the whole consideration which they receive "for the houses sold is definitely ascertained." Lord Fleming said (at page 224): "The realisable value of the ground annuals must be taken "into account... there is no serious difficulty... in ascertaining its "realisable value". The case went to the House of Lords. Lord Atkin said (at page 226): "It is established that that obligation"—the ground annual—"or that right on the part of the Appellants, was a realisable "right, a marketable security in the sense of something which they could "have realised at any moment by going into the market." Lord Thankerton said (at page 227): "Ground annuals such as these have a well- "known market value and... they are constantly traded in, and in that "respect they seem at least as good money's worth as any ordinary "security quoted on the Stock Exchange."

Sir Cyril also relied on dicta in *The Royal Insurance Co., Ltd.* v. *Stephen,* 14 T.C. 22, and on *Westminster Bank, Ltd.* v. *Osler,* 17 T.C. 381; *B. G. Utting & Co., Ltd.* v. *Hughes,* 23 T.C. 174; *Scottish and Canadian General Investment Co., Ltd.* v. *Easson,* 8 T.C. 265. It is, we think, unnecessary to refer to these in detail as we have already cited the statements from Lord Atkin and Lord Thankerton which afforded to our minds the firmest foundation for the argument.

Sir Cyril agreed that in all these cases the asset was either on the face of it readily realisable or no point was taken of the kind which he was arguing. He also drew our attention to two Indian appeals to the Privy Council, reported in (1933) 60 Ind. App. 146 and 133, and referred to in the judgment of Sir Wilfrid Greene, M.R., in *Cross* v. *London and Provincial Trust, Ltd.,* [1938] 1 K.B. 792 (21 T.C. 705). The main issue in that case, and the Indian cases, was different from that which arises here. It is perhaps worth noting that in *Commissioner of Income Tax for Bihar and Orissa* v. *Maharajadhiraja of Darbhanga,* 60 Ind. App. 146, one of the items to which Lord Macmillan referred as items which may reasonably be regarded as the equivalent of cash was a colliery. The question is whether these statements, particularly those of Lord Atkin and Lord Thankerton, should be read as limiting what is to be

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treated as money's worth, or whether they are emphasising what was the fact in those cases, namely, that the asset in question could easily and immediately be turned into money by the taxpayer.

The Crown relied on two decisions of the House of Lords as negativing the former view, and it is necessary to examine them. *John Cronk & Sons, Ltd.* v. *Harrison,* 20 T.C. 612, arose out of a building society transaction. The taxpayer, who was the builder, was required to guarantee part of the advance made by the society to the purchaser to make up the purchase price. The builder was also required to deposit with the society, as collateral security for the guarantee, the whole or part of the sum guaranteed. The Crown contended that the builder had received the whole of the purchase price. The builder contended that *quoad* the sums deposited they did not come in for Income Tax purposes until they were released to him, an event which could not happen for some years and might not happen at all if the purchaser defaulted. Alternatively, he said they should be brought in at their present values, regard being had to the risk of their loss. The Court of Appeal in effect decided the case in favour of the builder on his alternative contention. The Crown appealed but there was no cross-appeal. Lord Thankerton gave an opinion in the House of Lords with which the other noble and learned Lords agreed. Lord Thankerton (at page 641) was inclined to think the builders' first contention was right, but he adopted the view of the Court of Appeal which he understood to be that, in addition to sums in cash, the builder received "an asset in the shape of a credit in "the books of the building society, on which interest was payable to the "Company, but which was subject to a contingent liability, which "materially affected its value to the Company". A valuation was therefore directed, but, in the event of an "actuarial valuation" being impracticable, no sum was to be brought in until released. This decision, and the words used by Lord Thankerton and in the Order, seem to us difficult to reconcile with the view that the limiting criterion of value in valuing an asset as money's worth is what money can be got for it in the market at the moment or in the year relevant to the assessment. On the other hand, the builder did not put forward the immediate realisable value test; he put forward, as an alternative, the kind of valuation ordered.

Absalom v. *Talbot,* 26 T.C. 166, was also a building society transaction. Again the taxpayer was the builder, but in this case he advanced the balance which the purchaser could not find and the building society would not advance, on the security of a second mortgage from the purchaser and, in some cases, a promissory note. The Crown argued that the sums secured by the second mortgages and promissory notes should be brought in at their face value as debts unless and until shown to be bad. The majority in the House of Lords accepted the taxpayer's contention that they should be valued. We do not want to burden an already long judgment with too many citations. Lord Russell of Killowen, who was inclined to think the actual receipts as they came in would be the proper measure, accepted the majority view that a valuation was proper, and he used these words (at page 196): "The valuation which I contemplate is one which "takes into account all the risks which a creditor runs who (like the Appel-"lant in this case) gives very long credit on doubtful security, and which "may at some future time convert a presently good debt into a bad one."

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Sir Cyril distinguished these cases on the ground that they were dealing with debts. It is clear, however, that in neither case was the suggested valuation one to be made under the Rule dealing with bad debts. As it seems to us the trader in each case had not received money. He had in the one case a doubtfully secured debt payable *in futuro*. In the other he had a right to the return of a deposit *in futuro* if the purchaser fulfilled all his obligations over a fairly long period. He had an asset which was regarded as money's worth. If the test is what could he get for it there and then, the noble and learned Lords, as it seems to us, would have used very different words.

We do not regard the task of this Court as an easy one in applying these authorities because in none of the cases cited on either side was the point raised before us argued. It is, therefore, right for us to express our own view on the matter. We were at one time attracted by the argument that, Income Tax being a demand for a sum of money, the taxpayer should not be treated as having received money's worth unless what he has can, as a matter of fact, be turned by him into money within the year. This argument has special force today with the present high rates of taxation. This, however, is perhaps an unreliable guide to the construction of words which never contemplated those high rates. We have come to the conclusion that when there has been, as is now admitted here, a realisation of a trading asset and the receipt of another asset, and when that latter asset is marketable in its nature and not some merely personal advantage which by its nature cannot be turned into money, the profits and gains must be arrived at for the year in which the transaction took place by putting a fair value on the asset received. The fact that it could not, as we will assume here, owing to its size be disposed of in the market in that yeat does not mean that no profit or gain for Income Tax purposes has been made out of the transaction. It might be wrong to say it is the value to the individual trader which is to be taken, because that might bring in irrelevant matters. We think it would be right to say that it is the value to him or to any similar trader who would have been in a position to carry out the deal, in other words, a fair intrinsic value. If the words used by the House of Lords in the two last cases we have cited are applicable, or if what we have just stated is right, then in the case of Marlu there was, in our view, ample evidence on which the Commissioners' finding can be upheld. In the other two cases the purchasing companies had a less successful history, and the shares, though at times above, were at times below par. It may well be that later history is irrelevant, but there was, in our opinion, clearly evidence on which the Commissioners could come to their findings in these two cases, and there are no grounds for inferring that they applied the wrong principle of law.

In the result we think the learned Judge was right. On the argument as presented to us we have thought it right to deal fully with the matter, which is, we think, one of some difficulty which may affect many transactions. The learned Judge's view of the case, we think, is the same as that which we have tried to express. He does not, however, deal in any great detail with Sir Cyril's main argument as presented to us. If we had thought that Sir Cyril's principle of law was right, we would have sent the case back. The words used by the Commissioners suggest to our minds that they applied the principle which we think to be right, and not that contended for by Sir Cyril.

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So far as the first year is concerned Wrottesley, J., reversed the Commissioners, who had held that the transaction in that year did not amount to a realisation. The transaction was the exchange of an investment in Anfargah Gold Mines, which was wound up, for shares in Ariston Gold Mines. Sir Cyril ultimately accepted the learned Judge's decision. It is agreed that on this decision the matter must go back to the Commissioners to determine the profit (if any) arising from the transaction.

For these reasons the appeal will be dismissed with costs.

Cohen, L.J. (read by Scott, L.J.)—I agree that this appeal should be dismissed.

Sir Cyril Radcliffe admitted that the effect of the agreements for sale of the concessions was a realisation thereof in the course of the Company's trade, and a substitution of a new asset, namely, the vendors' shares issued in satisfaction of the purchase price. He argued, however, that, unless the vendors' shares were capable of being presently realised in the relevant accounting year, they could only be brought into the profit and loss account for that year at a sum equal to the cost of the concession plus the amount expended on the development thereof prior to the sale. He agreed that there was no decision binding us so to hold, but he said that his argument was supported by judicial opinion in a number of cases, the most important of which was *John Emery & Sons* v. *Commissioners of Inland Revenue.* 20 T.C. 213. The facts of that case, and the principal passages on which Sir Cyril relied, have already been cited by my brother Somervell. I would only observe that in that case it was common ground that the ground annuals could be readily realised at any time. Their Lordships were not directing their attention to a case such as we have to decide, where, although the shares had a market quotation, the number involved was so large that it might be impossible to realise the whole block in the accounting year. I do not think it follows from anything said in that case that their Lordships were of opinion that, unless the real "money's worth" which formed part of the consideration could be obtained in money in the accounting year, the asset could not properly be brought into account at that money's worth ascertained by valuation.

The Solicitor-General relied first on the observations of Lord Halsbury, L.C., in *Tennant* v. *Smith,* 3 T.C. 158, where his Lordship said, at page 164: "I come to the conclusion that the Act refers to money payments made to the person who receives them, though, of course, I do not deny that if substantial things of money value were capable of being turned into money they might for that purpose represent money's worth and be therefore taxable." This statement is not conclusive, as their Lordships had not to direct their minds to the question of the date at which the "substantial things" had to be "capable of being turned into money", but the Solicitor-General said that another decision of their Lordships in *John Cronk & Sons, Ltd.* v. *Harrison,* 20 T.C. 612, made it clear that it was sufficient that an estimate of the value of the substantial things could be made in the accounting year, although it might be impossible to realise that value in that year. In that case the appellant company, a firm of builders, had sold a number of houses under an arrangement by which in each case a building society advanced a large proportion of the purchase price and the appellant company guaranteed a portion of that advance, depositing with the society as collateral security the whole or part

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of the sum guaranteed. The deposit was released when the purchaser had reduced the mortgage by an agreed amount. In the meantime the society allowed to the appellant company interest on the deposit. The question that arose was whether the sums deposited were trading receipts and, if so, at what value they should be brought into the accounts. It was held "that "the sums deposited with the building society should be taken into account "at the time of completion of the sales of the houses at their actual value "at that time, and not at their face value, but that, in the event of an "actuarial valuation being impracticable, they should not be treated as "receipts of the Company's trade except in so far as such sums or any "part thereof were released to the Company during the trading periods in "question." In the Court of Appeal (whose decision was confirmed by the House of Lords) Maugham, L.J., as he then was, said, at page 632: "The balance" of the purchase money "is made up by an asset of an "uncertain character which ought to be subject to valuation, and which is "one of the trade receipts of the Appellants which ought to be taken into "account for the purposes of ascertaining their profits or gains as traders." In the House of Lords Lord Thankerton said, at page 641: "In my "opinion, it would be more correct to treat the retention of the deposit as a "retention of part of the nominal purchase price with the consent of the "Company, such sum to be applicable to reduction of the advance made by "the society to the purchaser in the event of the latter's default, any sur-"plus going eventually to the Company. In other words, in the example "referred to, the true purchase price was not £625, but two sums of £35 "and £558 6*s.* 8*d.*, payable at the time of the sale, with a further addition "of any balance eventually available from the deposit. On the other hand, "I am not prepared to say that the view taken by the Court of Appeal is "not a legitimate one, though I should prefer my own view expressed "above. The view of the Court of Appeal, as I understand it, is that, at "the time of the sale, the Company received, in addition to the £35 and "the cheque for £558 6*s.* 8*d.* an asset in the shape of a credit in the books "of the building society, on which interest was payable to the Company, "but which was subject to a contingent liability, which materially affected "its value to the Company; that such asset should be valued as at the "time of the completion of the sale, and that such value should be entered "as part of the price received for the house." The other learned Lords concurred in this opinion. Lord Thankerton was, I think, differing from the Court of Appeal as to the nature of the transaction. I do not think he was in any way dissenting from the view expressed by Maugham, L.J., that, if the deposit was properly regarded as an existing asset of uncertain value, it ought to be valued and brought into the account.

Viewed as the Court of Appeal viewed the matter, that case is, I think, clear authority for the view that, if an asset is capable of valuation, it should be valued and brought into the account, even though that value may not be presently realisable in the accounting year. Sir Cyril sought to distinguish that case on the ground that the asset in question was a book debt and that special rules apply to book debts. He referred us in particular to Rule 3 (*i*) of the Rules applicable to Cases I and II of Schedule D. Now that Rule deals only with deductions which are not to be allowed in computing profits and gains, and I think it is plain from the judgments of the Court of Appeal that they were not considering the matter from the point of view of deductions, but were regarding the deposit as an asset

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which had to be valued. If that be so the observations of Maugham, L.J., are of general import. I respectfully agree with the view he expressed, which seems to me in accordance with the general tenor of the Act. It is admitted that the profit and loss account must include assets which have to be valued, and I can see no reason why, if valuation is possible, an artificial value, whether high or low, should be placed on an asset merely because that value cannot be wholly realised in the accounting year. The fact that it cannot be realised in the accounting year is no doubt an element which the Commissioners should take into account in estimating the value, but it is not a reason for attributing to the asset a value far below that which other facts—e.g., the terms of the sale agreement, the market quotation, and the prices at which the Appellant Company itself acquired shares in the market and its own statements to its shareholders about their value—show that the asset should rightly bear.

Scott, L.J.—The appeal will be dismissed with costs.

Mr. Talbot.—I am instructed, my Lord, to ask your Lordships for leave to appeal to the House of Lords in this case.

Scott, L.J.—The Crown takes its usual attitude, I suppose, Mr. Hills?

Mr. Hills.—Yes, my Lord.

Scott, L.J.—We give leave.

Mr. Talbot.—If your Lordship pleases.

Appeals having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Simon and Lords Thankerton, Uthwatt, du Parcq and Oaksey) on 3rd, 4th, 5th, 6th and 9th February, 1948, when judgment was reserved. Judgment was given on 14th July, 1948.

Sir Cyril Radcliffe, K.C., and Mr. F. Heyworth Talbot appeared as Counsel for the Company, and the Solicitor-General (Sir Frank Soskice, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Viscount Simon.—My Lords, these are two appeals from Orders of the Court of Appeal (Scott, Somervell and Cohen, L.JJ.) dismissing appeals by the Appellant from Orders of the King's Bench Division of the High Court (Wrottesley, J.), whereby (1) an appeal by the Appellant upon a Case stated by the Commissioners for the General Purposes of the Income Tax for the City of London was dismissed and the determination of the said Commissioners affirmed, and (2) an appeal by the Respondent upon the said Case Stated was allowed. The main question involved is one of substantial importance and of considerable difficulty.

The Appellant, the Gold Coast Selection Trust, Ltd. (hereinafter called "the Trust"), has at all material times carried on the trade of a dealer in stocks and shares, and an exploiter of and dealer in gold mining concessions in the Gold Coast Colony. Its practice has been to acquire concessions for land considered to have gold bearing possibilities. Concessions so acquired were exploited by the Trust to the extent necessary for the ascertaining of their potentialities. If a concession was proved to be gold

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bearing, and if it appeared to the Trust that further development might result in the profitable production of gold, the Trust transferred such concession to a company, the business of which was to work the concessions and market the gold produced. The transferee company was in every case a public company; its directors were drawn from the directorate of the Appellant Company, and the consideration for the transfer of the concession was in each case satisfied by an issue of fully paid up shares in the transferee company.

The shares so issued (hereinafter called "vendor shares") were of a par value equal to the price named in the agreement for the sale of the concessions as the sale price. Permission to deal in the shares of the transferee companies was, in due course, accorded by the London Stock Exchange in each case, and dealings in these shares in limited quantities in fact took place. The vendor shares issued to the Trust, together with other holdings acquired by it, were large enough to give the Trust control over the company which was acquiring the concession from it. So large a block of shares could not be readily disposed of in the stock market without killing the market, and there was evidence before the Commissioners that the proper way to deal with them, if it was desired to turn the block of shares into cash, would be to approach trust companies or financial houses and endeavour to place them. The evidence is of somewhat ambiguous effect, for while it indicates that a successful operation of this sort might be accomplished in reference to a substantial fraction of the total holding, it was not clearly stated that the whole block could be realised in this way, at any rate within a short time.

Three sales of a concession by the Trust are involved. One by an agreement made on 28th July, 1934, with the Marlu Gold Mining Areas, Ltd. (hereinafter called "Marlu"); the second by an agreement made on 9th July, 1935, with the Gold Coast Main Reef, Ltd., and the third by agreement made on 2nd December, 1936, with the Bremang Gold Dredging Co., Ltd. The main question of law is the same in all three cases, and it will be convenient to take the Marlu case as an example. Marlu had been incorporated on 26th July, 1934, with an authorised capital of £2,000,000 divided into eight million shares at 5*s*. each. The consideration moving from Marlu to the Trust for the sale and transfer of the concession was stated in the agreement of 28th July, 1934, to be "the sum of "Eight Hundred Thousand Pounds which shall be paid and satisfied by the "allotment and issue to the Vendor or its nominees of Three million two "hundred thousand shares of Five Shillings each . . . credited as fully "paid up". The purchase was completed and the fully paid shares allotted on 30th November, 1934. On 30th July, 1934, two days after the agreement, Marlu issued a prospectus offering for subscription at par 2,000,000 shares of 5*s*. each. The Trust underwrote 1,600,000 of these shares at par in consideration of an option to subscribe for 1,200,000 shares of 5*s*. each at the price of 6*s*. up to 31st July, 1936. The whole of the shares offered were subscribed; the Trust itself took up and paid for 10,759. The Trust purchased some additional shares in the market, and later bought 545,939 shares at 6*s*. under its option.

The question is whether fully paid shares acquired under the agreement of 28th July by the Trust, should, for Income Tax purposes, be valued at any and what figure in money and thus enter into the computation of

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the profits and gains of the Trust for the year ending 5th April, 1935, so as to justify a corresponding assessment to Income Tax for the year ending 5th April, 1936. A similar question arises, with a difference in figures and amounts, in the other two cases.

The books of the Trust entered the cost to the Trust of the concessions sold to Marlu, viz., £107,875, as the purchase price for the 3,200,000 fully paid shares allotted under the sale agreement. It seems obvious that when the concession has been proved to be auriferous, its value cannot be limited to this. Then, year by year, as shares were sold, the profit on such sales was brought to account.

The Commissioners found: "1. That when the Marlu, Main Reef "and Bremang shares were allotted to the Trust there was a realisation "of the assets sold to those companies. 2. That at the date of the allot- "ment the value of the shares received by the Trust was par, the price "agreed to be paid by the purchasing companies."

The Appellant does not dispute the first finding. But it challenges the second which, in the case of the Marlu shares, has the result that the 3,200,000 shares credited as fully paid up, which were received by the Trust as the consideration for parting with the relevant concession to Marlu, must be valued for Income Tax purposes in the year 1934-35 at the figure of £800,000.

The Appellant's argument comes to this, that no asset such as a block of shares fully paid up can, for Income Tax purposes, be represented by a figure of cash in the year of account in which the transaction takes place unless the asset is readily convertible into money in that year. If it was not, no money value could be attributed to it, because realisation was not presently possible. The Appellant further contended that, upon examining the material set out in the Case Stated, the Commissioners' conclusion as to value was vitiated since they had proceeded on the assumption that the block of shares must be valued at £800,000 because they were allotted as the agreed method of satisfying a consideration of £800,000.

The Respondent concedes that if the Commissioners had arrived at their figure on the view that the block of shares must necessarily be valued at the figure named, this was an error, and that the fact that the contract stipulated for an allottment of fully paid shares to an amount which at par was equivalent to the money figure might raise a presumption that this was the correct value, but was not conclusive. If, for example, at the time of the purchase of the concession the shares of the company stood at a high premium, an allotment of 5*s.* shares as fully paid as the method of discharging the consideration might confer on the company an asset worth more than the par equivalent of the shares. Equally, if contemporary dealings indicated a fall, the money value of the new asset might be less than par. But the Respondent argues that it is all a question of valuation, which is a matter for the Commissioners to determine, provided they do not proceed on a wrong view of the law, and that the Commissioners in this case arrived at the figure, not because they were bound to do so, in view of the terms of the agreement, but because, after having considered all the circumstances in the case, they reached the conclusion that this was the right figure.

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We are left, therefore, with two issues, and I must express my opinion on both. One is what is the proper way of treating an asset not immediately realisable. The other is whether the Commissioners have proceeded on the correct principle.

It seems to me that it is not correct to say that an asset, such as this block of shares, cannot be valued in money for Income Tax purposes in the year of its receipt because it cannot, in a commercial sense, be immediately realised. That is no reason for saying that it is incapable of being valued, though, if its realisation cannot take place promptly, that may be a reason why the money figure set against it at the earlier date should be reduced in order to allow for an appropriate interval. Supposing, for example, the contract conferring the asset on the taxpayer included a stipulation that the asset should not be realised by the transferee for five years, and that if an attempt was made to realise it before that time the property in it should revert to the transferor. This might seriously reduce the value of the asset when received, but it is no reason for saying that when received it must be regarded as having no value at all. The Commissioners, as it seems to me, in fixing what money equivalent should be taken as representing the asset, must fix an appropriate money value as at the end of the period to which the Appellant's accounts are made up, by taking all the circumstances into consideration. It is a relevant circumstance that £800,000 was the figure fixed upon as the appropriate consideration to be satisfied by fully paid shares. But it is also a relevant consideration that the asset could not be realised at once.

I adopt the conclusion expressed in the judgment of Somervell, L.J., where he says(1): "When there has been, as is now admitted here, a "realisation of a trading asset and the receipt of another asset, and when "that latter asset is marketable in its nature and not some merely personal "advantage which by its nature cannot be turned into money, the profits "and gains must be arrived at for the year in which the transaction took "place by putting a fair value on the asset received. The fact that it "could not, as we will assume here, owing to its size be disposed of in "the market in that year does not mean that no profit or gain for Income "Tax purposes has been made out of the transaction."

Cohen, L.J., who delivered a separate judgment, reached the same conclusion, saying, with reference to the case of *John Cronk & Sons, Ltd.* v. *Harrison,* [1937] A.C. 185; 20 T.C. 612; "That case is, I think, clear "authority for the view that, if an asset is capable of valuation, it should "be valued and brought into the account, even though that value may not "be presently realisable in the accounting year . . . It is admitted that the "profit and loss account must include assets which have to be valued, and I "can see no reason why, if valuation is possible, an artificial value, whether "high or low, should be placed on an asset merely because that value can-"not be wholly realised in the accounting year. The fact that it cannot "be realised in the accounting year is no doubt an element which the "Commissioners should take into account in estimating the value, but it "is not a reason for attributing to the asset a value far below that which "other facts—e.g., the terms of the sales agreement, the market quotation, "the prices at which the Appellant Company itself acquired shares in the "market and its own statements to its shareholders about their value—"show that the asset should rightly bear. (2)" By "artificial value" in

(1) Page 232 *ante.* (2) Page 234 *ante.*

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this passage the Lord Justice meant the figure of £107,875 which was the amount the Trust had spent in acquiring the site and proving the concession before they could ascertain that it was auriferous.

Counsel for the Appellant called the attention of the House to a number of reported cases in which the valuing of an asset was simplified because the asset was readily realisable, but this circumstance, though dwelt upon when deciding that the unrealised asset must none the less be given a money value, is nowhere declared to be the ground of the decision. Thus, in *Californian Copper Syndicate* v. *Harris,* 5 T.C. 159, where the syndicate was engaged in acquiring and reselling mining property, and it was held that the difference between the purchase price of such property and the value of the shares for which the property was exchanged is a profit assessable to Income Tax, Lord Trayner dealt with the contention that there was no realised profit since the shares had not been sold. He said (at page 167): "A profit is realised when the seller gets the price "he has bargained for. No doubt here the price took the form of fully "paid up shares in another company, but, if there can be no realised "profit, except when that is paid in cash, the shares were realisable and "could have been turned into cash, if the Appellants had been pleased to "do so." I read this last sentence as rejecting the syndicate's contention that it could not be liable because the shares had not been realised; it should not be understood to mean that the crucial test is prompt realisability.

In *Scottish and Canadian General Investment Co., Ltd.* v. *Easson,* 1922 S.C. 242, at page 246; 8 T.C. 265, at page 271, the Lord President (Clyde) upheld the conclusion of the Commissioners that the profits of the company in the year in which it had received certain debentures should be assessed at a sum equal to 75 per cent. of the face value of those debentures, as representing their actual value. The Lord President said: "The "question is just one of ascertaining the profits and gains of the Company, "and if instead of receiving cash the Company get a saleable security, that "saleable security is just part and parcel of the Company's profits and "gains." The Lord President pointed out that the debentures themselves were saleable and had a value on the market, but he nowhere suggests that the true test is whether they could be sold immediately.

Neither in *Royal Insurance Co., Ltd.* v. *Stephen,* 14 T.C. 22, nor in *Westminster Bank, Ltd.* v. *Osler,* [1933] A.C. 139; 17 T.C. 381, do I find the proposition laid down which is essential to the Appellant's main argument, that an asset in kind cannot be valued for the purpose of entering into the computation of profits and gains unless it is immediately realisable.

In *John Emery & Sons* v. *Commissioners of Inland Revenue,* 1935 S.C. 802; 1936 S.C. (H.L.) 36; 20 T.C. 213, where a firm of builders erected dwelling-houses and thereafter sold them for a cash payment, subject to the ground annuals which they had created and retained in their possession, it was held in the Court of Session, and the decision was approved in the House of Lords, that the realisable value of the ground annuals should be accounted for in ascertaining the firm's trading profits. The judgments point out that ground annuals could be readily realised, but the test of immediate realisability is nowhere declared to be the essential point of the case. There is indeed authority to the contrary effect

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contained in, or at any rate implied by, the decisions of this House in *Cronk's* case (above referred to)(1) and in *Absalom* v. *Talbot*, [1944] A.C. 204; 26 T.C. 166.

In my view the principle to be applied is the following. In cases such as this, when a trader in the course of his trade receives a new and valuable asset, not being money, as the result of sale or exchange, that asset, for the purpose of computing the annual profits or gains arising or accruing to him from his trade, should be valued as at the end of the accounting period in which it was received, even though it is neither realised nor realisable till later. The fact that it cannot be realised at once may reduce its present value, but that is no reason for treating it, for the purposes of Income Tax, as though it had no value until it could be realised. If the asset takes the form of fully paid shares, the valuation will take into account not only the terms of the agreement but a number of other factors, such as prospective yield, marketability, the general outlook for the type of business of the company which has allotted the shares, the result of a contemporary prospectus offering similar shares for subscription, the capital position of the company, and so forth. There may also be an element of value in the fact that the holding of the shares gives control of the company. If the asset is difficult to value, but is none the less of a money value, the best valuation possible must be made. Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor indeed is it possible. It is for the Commissioners to express, in the money value attributed by them to the asset, their estimate, and this is a conclusion of fact to be drawn from the evidence before them.

I therefore reject the main contention of the Appellant, and agree with the Court of Appeal. This would lead to a dismissal of the first appeal without further enquiry were it not that I entertain considerable doubt whether the Commissioners' second finding is not, as its language might imply, a conclusion reached on the view that the shares must be valued at par because the price agreed to be paid for the concession was a sum of £800,000 to be satisfied by an allotment and issue to the Appellant of shares which at par would be equivalent to that amount. One of the contentions of the Inland Revenue set out in the Case is that numbered (*f*): "that the price of the concessions as agreed between the parties was "the par value of the shares", and if the Commissioners arrived at the figure of £800,000 on the view put forward in (*f*) that this must be the one and only proper figure of valuation, they were mistaken. The best course seems to be to refer the case back to the Commissioners and request them to fix a proper figure of valuation in the light of the material before them as set out in the Case and of any facts disclosed by further evidence before them. It may be that they will still arrive at the same figure, but if so this will be because the relevant factors, such as I have indicated above, lead them to this conclusion of fact, but the correct conclusion is not a figure inevitably forced upon the Commissioners by the terms of the agreement taken alone, but is a question of fact to be answered after taking into account the relevant surrounding circumstances at the time of the transaction.

This view of the matter also determines the question of the second appeal.

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(1) 20 T.C. 612.

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I therefore move that the appeals be allowed, but only to the extent that the matter be referred back to the Commissioners to reconsider and fix the proper figure in the light of these directions. There will be no costs awarded in respect of the appeals to this House.

The late **Lord Thankerton**, who took part in the hearing of these appeals, expressed to me, before his death, his agreement with this conclusion.

Lord Uthwatt.—My Lords, I have had the advantage of reading in print and considering the opinion which has just been delivered by the noble and learned Lord on the Woolsack. I find myself in complete agreement with his conclusions and with his reasoning, and I am content to express my adherence to his opinion.

My Lords, my noble and learned friend **Lord du Parcq**, who is unable to be present here, desires me to say that he also agrees with the opinion which has just been expressed by the noble and learned Lord on the Woolsack.

Lord Oaksey.—My Lords, in my opinion the appeal should be allowed and the case remitted to the Commissioners on the ground that they appear to have thought that they were bound, as matter of law, to assume that the shares in question were worth their par value. It remains to consider what is the true test for the Commissioners' decision.

It has been argued on behalf of the Crown that the fact, if it be the fact, that all the shares retained by the Appellant could not be sold in the years in question is irrelevant, and that the Commissioners may put a valuation upon the shares regardless of whether they could be realised at that value in the years of computation. In my opinion this argument is unsound.

In the first place it is, I think, important to consider what is meant by an Income Tax on annual profits and gains. In my view it is a tax in money on profits in money which arise to the taxpayer in the year of computation. Income must not be confused with the source of the income. A taxpayer's obligation cannot be satisfied except by money: he has no option to offer other forms of property. The reason why he is not permitted to contend that he has made no profit in a transaction if he has made a profit but taken it not in money but in other forms of property, is that the property is the equivalent of money because it can be sold for money in the year. The word annual must at least connote "in the year" if it is to have any meaning at all, and that it has this meaning was laid down in *Ryall* v. *Hoare*, [1923] 2 K.B. 447; 8 T.C. 521, and approved in *Martin* v. *Lowry*, [1927] A.C. 312; 11 T.C. 297. It follows, in my opinion, that what the Commissioners had to decide in the present case is what profit in money, if any, was or could be derived by the Appellant Company in the years in question from the transaction by which they transferred the concessions to the Marlu, Gold Coast Main Reef and Bremang companies for shares in the companies.

Now it is, of course, true that the concessions had an actual or intrinsic value at the time of the transactions, but that value lay in the future and was unknown. It is also true that the Appellant Company was prepared to part with the concessions on the terms of the prospectuses, that is to say, in the hope of getting capital from the public sufficient to develop the concessions, whilst retaining the shares in question, but the par value of

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the shares retained was not an estimate of the actual value of the concessions either at that time or in the future, for both the Appellant Company and the public who subscribed for shares must have estimated the value of their shares both at the time and in the future at a higher figure. But the fact that the Appellant Company parted with the concessions does not mean that they realised or could realise at the time the money value of the concessions, for they did not receive cash but still retained in the shares their interest in the concessions. The Appellant Company will, of course, ultimately realise the value of the concessions to the company by selling their shares or holding them and receiving dividends on them. But all that the Commissioners have to do in this case is to assess the profit on the transactions in the years in question, and for that purpose to bring into the Appellant Company's accounts the money value of the shares in the years of computation. The only true test of the money value of an article at a certain time is what can be got for it in money at that time: if it cannot be sold at that time or exchanged for something which can be sold at that time, no one can make a profit out of it which can be stated in terms of money at that time.

If a picture dealer exchanges a picture for another picture and it is proved that the picture taken in exchange cannot be sold in the year, not for want of time, but because having been put up at auction there is no bid, can the Revenue claim that a profit has been made on that transaction? I am assuming, of course, in this illustration that it is proved that the picture cannot be sold in the year. In the present case there was evidence that some of the shares could have been sold, and the figure which they might have realised should, of course, be brought into the Appellant's accounts. Moreover it is not a question whether they could be sold in any particular market such as the London Stock Exchange. But if the Commissioners are satisfied that the shares could not have been sold for money in Paris, New York or London or anywhere in the world in the years in question, then to bring in a cash figure for those shares is, in my opinion, attributing to the years in question profits which might or might not be realised in future years. It is, in my opinion, unsound accounting and unsound law to lay down that the Commissioners should value the shares by estimating what they may bring in by way of dividends and sales in future years, and then discounting that figure so as to arrive at their present value. There are no facts upon which the Commissioners can base such an estimate: it is simple guesswork and as a matter of fact has probably been entirely falsified by the course of events which has included the recent war. If one assumes that the Commissioners are satisfied as a matter of fact that the shares could not have been sold in the years in question, such a valuation must either be a contradiction of the fact or an estimate of future value. The Commissioners should, in my opinion, come to a conclusion on the evidence how many of the shares in question could have been sold in the years of computation, and at what price, and should bring into the Appellant Company's account that figure as against the cost of the concessions to the Appellant Company. To adopt this principle appears to me to be in accord with every case which has been cited to your Lordships' House on this appeal, and with the fundamental principles of the Income Tax Acts.

Question put:

That the Order appealed from and the Order of the King's Bench

Division be discharged and that the case be remitted to the Commissioners for the General Purposes of the Income Tax with a direction to reconsider and fix the proper figure in accordance with the majority opinions expressed in this House.

The Contents have it.

Viscount Simon.—My Lords, there is a second appeal which really is governed by the opinions already expressed, and I therefore put from the Woolsack this question in the second appeal.

Question put:

That the Order appealed from and the Order of the King's Bench Division be discharged and that the case be remitted to the Commissioners for the General Purposes of the Income Tax with a direction to reconsider and fix the proper figure in accordance with the majority opinions expressed in this House in the former appeal.

The Contents have it.

[Solicitors:—Birkbeck, Julius, Edwards & Coburn; Solicitor of Inland Revenue.]