

entitled to give him. I think it perfectly clear that the pursuer of this action was not the purchaser, and that there was no acceptance of his offer, no knock-down of the hammer, and he never was under any obligation and was due nobody anything because he had made the offer. I think, further, as your Lordship has said, although it is not necessary for the decision of this case to say, that in my opinion it was the intention of the seller, that is, of the owner, and that intention was sufficiently intimated to all who followed the catalogue, that there should be a reservation in his favour—in short, that he was at liberty to fix a sum at any period of the sale below which the subject should not be sold. That was done, and it is singular in my experience, for I have never seen a reservation of a right to make one bid. But the plain object of that, and the meaning of it to everybody who read it, was that it was in the owner's power to determine the amount below which the animal should not be sold. I think that anyone with this catalogue in his hand would see that that was the intention; and it was acted upon in the ordinary way. He intimated to the auctioneer in the course of the sale "You are not to let this go at the price which has been offered," and he named £150 as the amount below which it was not to go. He might have named the amount of the National Debt, or anything he pleased, which is just reserving the right to prevent the article going away at a price less than he thought it was worth. This action at the instance of the present pursuer proceeds upon the footing that the article was sold to him, and that he is entitled to damages because his right as a purchaser has not been fulfilled. For the reasons which your Lordship has explained, and in which I concur, and to which I add these observations, I am of opinion, and that without any doubt whatever, that there was no sale whatever to the pursuer, and if there was no sale whatever to him, it is clear that there is no damages due—his right as a purchaser by a completed sale having been fulfilled is plainly untenable. I think, therefore, that the judgment of the Lord Ordinary is well founded and ought to be affirmed.

LORD TRAYNER—I think it was the law of Scotland prior to 1893 that a subject exposed for sale by public auction and for which a single bid had been made could not be withdrawn from the sale, and the person who had made the offer was entitled to call upon the auctioneer to knock it down to him at the amount he had offered. I think that is the import of the case of *Cree v. Durie*. But that case proceeded upon a view which is to be found stated in the successful argument in the report, to the effect that "in the circumstances an offerer was bound when he gave his offer and could not withdraw it," and it bound the exposor, because there was thus a contract made between

them. But that is not the law now, for by the Act of 1893 it is provided that a sale by auction is completed by the auctioneer announcing its completion by the fall of the hammer or in any other customary manner, and until such an announcement is made any offerer may retract his bid. If it is in the power of any competitor at an auction sale to retract his bid before the fall of the hammer, it follows that the offerer is equally entitled to withdraw his subject, because if the competitor is not bound the exposor is not bound either. If that is the law, I think there was nothing done here to subject Mr Hamilton in any damages, because he was merely exercising the right which by implication the statute confers upon him. If the owner, Mr Hamilton, was entitled to withdraw the subject, then the auctioneer did no wrong in withdrawing it in obedience to Mr Hamilton's instructions.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Campbell, K.C.—Hunter. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defenders and Respondents Macdonald, Fraser, & Company, Limited—Chree—W. Æ. Mackintosh. Agents—Guild & Guild, W.S.

Counsel for the Defender and Respondent Hamilton—C. N. Johnston, K.C.—Cullen. Agents—Ronald & Ritchie, S.S.C.

Friday, July 1.

## SECOND DIVISION.

[Exchequer Cause.]

### CALIFORNIAN COPPER SYNDICATE (LIMITED AND REDUCED) v. INLAND REVENUE.

*Revenue—Income-Tax—Profits or Gains—Purchase and Re-sale of Property—Property and Income-Tax Act 1842 (5 and 6 Vict. cap. 35), Schedule D.*

A company was formed for the purpose of acquiring certain mineral fields, and these were purchased at a price which left the company with a share capital quite inadequate for the working of the minerals. During the two years succeeding the formation of the company the mineral fields referred to were sold at a large profit, in exercise of powers conferred by the company's articles of association, the company taking payment of the purchase price in fully paid-up shares of another company, which shares were not converted into cash. *Held* that the profits arising from the purchase and re-sales of mineral fields, whether received in cash or in shares of another company, were assessable to income-tax.

The Californian Copper Syndicate (Limited and Reduced), 188 St Vincent Street, Glas-

gow (hereinafter referred to as the company), appealed to the Commissioners of the Income-Tax for the Lower Ward of the County of Lanark against the following assessments made upon them under Schedule D of the Income-Tax Acts, in respect of the profits of the business carried on by them, that is to say, an assessment of £10,000 (duty £625) for the year ending the 5th April 1903, and an assessment of £20,000 (duty £916, 13s. 4d.) for the year ending the 5th April 1904. The Commissioners confirmed the assessment on 10th June 1904. The company obtained a case for the opinion of the Court of Exchequer. The case stated—“The following facts were admitted or proved—1. The company was incorporated on 5th February 1901, under the Companies Acts 1862 to 1900, as a company limited by shares. 2. The objects for which the company was established are set forth in the third article of its memorandum of association, and embrace, *inter alia*, the following objects, viz.—(1) To acquire copper and other mines, mining rights, metalliferous and auriferous land, in California or elsewhere in the United States of America, and any interest therein, and in particular to acquire [certain specified mines] situate in the county of Fresno, state of California, in the United States of America. (2) To carry on mercantile, commercial, trading, and financial businesses of any and every description, either as principals or agents, and to buy, sell, and enter into contracts, either as principals or agents, and to buy, sell, and enter into contracts, either absolute or conditional, in respect of stocks, shares, debentures, debenture stock, bonds, obligations, options, and securities, of every or any description, in any part of the world. (4) To work, win, quarry, convert, manufacture, use, crush, wash, smelt, reduce, refine, or otherwise treat and render marketable, and sell or otherwise dispose of or deal in metalliferous quartz and ore. (10) To establish, form, and subsidise, or otherwise assist in the establishment, promotion, or formation of any other companies having for their objects, or some of them, any of the objects mentioned in this memorandum, or the prosecution of any other undertakings or enterprises of any description having objects which may advance, directly or indirectly, the objects of this company, and to secure by underwriting or otherwise the subscription of all or any part of the share or loan capital of any such company, and to pay or receive any commissions, brokerage, or other remuneration in connection therewith. (17) To sell, lease, charter, or otherwise dispose of, absolutely or conditionally, or for any limited interest, the whole or any part of the undertaking, property, rights, concessions, or privileges of the company for such consideration in cash, shares, or otherwise as the company may think fit, and to abandon any part of the business for the time being of the company, and to carry on any of the objects mentioned in this clause to the exclusion of the others. (18) To subscribe for, purchase, or otherwise acquire the shares or stock,

whether ordinary, preferred, or deferred, or the debenture bonds, or other securities of any company, and to accept the same in payment for any property sold, or business undertaken, or services rendered by this company, and to hold, sell, or otherwise dispose of the same. (20) To promote any company for the purpose of acquiring all or any part of the undertaking, property, and liabilities of the company, or for carrying on any business, or doing any act or thing which may be deemed conducive to the prosperity of this company. Also to acquire the whole or any part of the undertaking and assets, and undertake the whole or any part of the liabilities of any now existing or future company, and to conduct, liquidate, or wind up the business of any such company. (29) To distribute among the members in specie any property of the company or any proceeds of sale or disposal of any property of the company, but so that no distribution amounting to a reduction of capital be made except with the sanction, if any, for the time being required by law.’ 3. The fifth article of the memorandum of association sets forth that the capital of the company is £30,000, divided into 30,000 shares of £1 each. The company commenced business shortly after the date of its incorporation, and has since continued to carry it on. 4. Of the 30,000 shares into which the capital of the company is divided, 28,332 shares have been issued. The remaining 1668 shares are unissued. Of the 28,332 shares issued 4332 shares representing £4332 of capital were subscribed for in cash, and are fully paid up, and 24,000 shares, representing £24,000 of capital, are held as fully paid. 5. The company acquired copper-bearing land in the county of Fresno aforesaid, extending to 480 acres, at the price of £24,000, and expended the paid-up capital of the company in the purchase and development of the property. The accounts show that the cash capital of £4332 of the company was spent in development, preliminary, and head office expenses. In April 1902 the company sold 80 acres of its property to the Fresno Copper Company, Limited (hereafter referred to as the Fresno Company), at the price of £105,000, payable wholly in fully paid shares of the Fresno Company, and in August 1903 the company sold the remaining 400 acres of its property to the Fresno company at the price of £195,000 payable wholly in fully paid shares of the Fresno Company. The shares of the Fresno Company, representing the prices aforesaid, in all 300,000 £1 shares fully paid have been allotted to the secretary of the company meantime in trust for the company. 6. At an extraordinary general meeting of the company, held on 11th December 1903, the following resolution was unanimously passed:—‘That the capital of the Californian Copper Syndicate, Limited, be reduced from £30,000 divided into 30,000 shares of £1 each (of which 28,332 are issued and fully paid, and 1668 are unissued), to £3320, 14s. divided into 28,332 shares of 1s. 2d. each, issued and fully paid, and 1668 shares of £1 each

unissued, and that such reduction be effected (1) by transferring to the existing holders of the said 28,332 shares of the syndicate rateably 283,320 shares of £1 each fully paid of the Fresno Copper Company, Limited, which latter shares form part of the capital assets of the syndicate, and are presently registered in the name of the secretary thereof in trust for the syndicate; and (2) by reducing the nominal amount of the said 28,332 shares of the syndicate from £1 to 1s. 2d. each. This resolution was unanimously confirmed as a special resolution at an extraordinary general meeting of the company held on the 29th December 1903. 7. The Fresno Company was incorporated on 2nd April 1902 under the Companies Acts 1862 to 1900 as a company limited by shares. The capital of the Fresno Company, originally £175,000 divided into 175,000 shares of £1 each, was afterwards increased to £400,000 by the creation of 225,000 new shares of £1 each. Of the 400,000 shares, 300,000 were allotted to the secretary of the company as before mentioned in payment of the prices of the lands acquired by the Fresno Company from the company, 75,000 shares have been subscribed for in cash, and 25,000 remain unissued. The shareholders of the Fresno Company are six times as numerous as those in the company. 8. The company have made no profit assessable to income-tax, unless the nett gain derived by the company from sales of its property, and represented in shares of the Fresno Company, be deemed to be profit in the sense of the Income-Tax Acts.

The contentions of parties were as follows:—9. The company maintained—(1) That the company has had no income, that the sales of the property of the company were truly transactions by which the company substituted for its capital in the form of land a capital in the form of shares, and that any benefit which might result to the company by the sales was a growth of capital and not income; (2) That even supposing a company in the position of the company to be liable for income-tax on any excess they may receive over cost on a sale for cash, the liability does not attach when the price is received in shares of another company—at all events until the shares so received have been realised. (3) That the Inland Revenue will receive income tax on any profits of the Fresno Company effecting to the shares in the Fresno Company held by the company, and that to charge income tax on the value of their shares would be to charge income tax twice. (4) That if instead of raising capital by means of a new company to work the mines, the capital of the company had been increased, the company would not have been liable to income tax on the increased capital, and that what was done in the present case was a difference in form only. (5) That although the company had power under article 3, sub-section 17, of its memorandum of association, to sell any part of its property, it was not in fact a

company for making profit by the purchase and sale of property, and had not done so. The shares held by the company in the Fresno Company were merely the form in which the company now holds the capital formerly held in the form of land. (6) Reference was made to the following cases:—*Assets Company Limited v. Inland Revenue*, February 23, 1897, 24 R. 578, 34 S.L.R. 486; *Northern Assurance Company v. Inland Revenue*, reported as branch of *Scottish Union and National Insurance Company v. Inland Revenue*, February 8, 1889, 16 R. 461, at p. 473, 26 S.L.R. 330; and *Scottish Investment Trust Company, Limited v. Inland Revenue*, December 12, 1893, 21 R. 262, 31 S.L.R. 219. (10) The Surveyor of Taxes (Mr Edward Harris) maintained:—(1) That as the company was formed for the purpose, *inter alia*, of acquiring and reselling the property specified in article 3, sub-section 1, of the memorandum of association of the company, any profits made on such re-sales are assessable under section 2, Schedule D, of the Income Tax Act 1853, and section 100, Schedule D, case 1, of the Income Tax Act 1842. (2) That the profits of the company are assessable whether received in cash or in shares of another company. (3) That any profits on the working of the copper field which may hereafter be obtained in respect of the company's holding in the Fresno Company (which is in law a company separate and distinct from the company) will be assessable as profits of the Fresno Company, but that what is assessed at present are the profits which the company have made on the sales of their property to the Fresno Company. (4) That although the company might have increased its capital for the purpose of working the mines, it did not do so, the capital being provided by and spent at the risk of the Fresno Company. (5) The surveyor founded particularly on the opinion of the Lord President in the case of the *Scottish Investment Trust Company, Limited v. Inland Revenue*, already referred to, and referred also to *Mersey Docks Harbour Board v. Lucas* (1883), 8 App. Cases, 891. 11. The company and the Surveyor agreed and represented to the Commissioners that in the event of its being decided that the company is liable to be assessed on profits arising from the sales of their property, the assessments are properly made at £10,000 for the year ending the 5th April 1903, and £20,000 for the year ending the 5th April 1904.

“The Commissioners, on a consideration of the evidence and arguments submitted to them, and for the reasons stated in the note hereto, find that by the purchase and re-sales of the property acquired by the company they carried on an adventure or concern in the nature of trade in the meaning of the first case of Schedule D of the Income-Tax Act of 1842, and that profits arising from such purchase and re-sales, whether received in cash or in shares of another company, are assessable to income-tax. The Commissioners accordingly confirmed the assessment of £10,000 for the year ending the

5th April 1903, and the assessment of £20,000 for the year ending the 5th April 1904. Whereupon the company declared their dissatisfaction with the determination of their appeal as being erroneous in point of law, and having duly required the Commissioners to state and sign a case for the opinion of the Court of Session as the Court of Exchequer in Scotland, it is hereby stated and signed accordingly."

"*Note.*—It seemed clear to the Commissioners, on the evidence furnished by the accounts of the appellant company, that the property purchased by the company was acquired with the object of being resold, and that by the purchase and re-sales of their property the company carried on an adventure or concern in the nature of trade in the meaning of the first case of Schedule D of the Income-Tax Act of 1842. In such cases as the present the profit consists of the difference between the price paid, with the addition of outlays made on and expenses incurred in connection with the subject purchased and the price received, and it appears to the Commissioners immaterial whether the price obtained is received in cash or in shares. In the present case it has not been necessary to inquire into the value of the shares received by the company, as the parties have agreed on the amounts of the assessments if it be held that liability to assessment exists."

The arguments presented at the hearing are disclosed in parties' contentions *supra*. In addition to the cases there referred to the following authorities were cited for the appellants—*Glasgow Water Commissioners v. Inland Revenue*, May 26, 1875, 2 R. 708, 12 S.L.R. 466; for the Surveyor of Taxes—*Palmer's Company Precedents*, 8th ed., i. 424.

At advising—

LORD JUSTICE-CLERK—It is quite a well-settled principle in dealing with questions 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, and therefore assessable to income-tax. But it is equally well established that enhanced values obtained from realisation 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 simplest 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 many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that where they make a gain by a realisation, the gain they make is liable to be assessed for income-tax.

What is the line which separates the

two classes of cases may be difficult to define, and each case must be considered according to its facts, the question to be determined being, is the sum of gain that has been made a mere enhancement of value by realising a security, or is it, again, made by an operation of business in carrying out a scheme for profit-making.

In this particular case a syndicate was formed with a capital of £30,000, *inter alia*, to acquire copper and other mines, and certain mines named in particular, and to prospect and explore for the purpose of obtaining information, and to enter into treaties, contracts, and engagements with respect to mines, mining rights, and a number of other matters in the United States and elsewhere. It was also to carry on mercantile, commercial, financing and trading business, and to work minerals, to establish and form companies for such objects, to subscribe for, purchase, or otherwise acquire shares or stock of any company, and accept payment in shares for property sold or business undertaken or services rendered, and to hold, sell, or dispose of the same, to promote companies for the purpose of acquiring the undertaking, property, and liabilities of the company, or carrying on business deemed conducive to the prosperity of the company.

These are shortly some of the main purposes of this company, and they certainly point distinctly to a highly speculative business, and the mode of their actual procedure was in the same direction. Of the £28,332 realised by shares which were subscribed for, £24,000 was invested in a copper-bearing field in the United States, and the balance was spent in development of the field and in preliminary and head office expenses.

The company then were successful in selling the property to the Fresno Company, £300,000 in fully paid-up shares being given by the Fresno Company for the property, and although that was a sale, the price to be paid in shares, I feel compelled to hold that this company was in its inception a company endeavouring to make profit by a trade or business, and that the profitable sale of its property was not truly a substitution of one form of investment for another. It is manifest that it never did intend to work this mineral field with the capital at its disposal. Such a thing was quite impossible. Its purpose was to exploit this field and obtain gain by inducing others to take it up on such terms as would bring substantial gain to themselves. This was, that the turning of investment to account was not to be merely incidental, but was, as the Lord President put it in the case of the *Scottish Investment Company*, the essential feature of the business, speculation being among the appointed means of the company's gains.

In these circumstances I am of opinion that the finding of the Commissioners was right.

LORD YOUNG concurred.

LORD TRAYNER—I agree with your Lordship that the determination of the Commissioners is right. This is not in my opinion the case of a company selling part of its property for a higher price than it had paid for it, and keeping that price as part of its capital, nor a case of a company merely changing the investment of its capital to pecuniary advantage. My reading of the appellant company's articles of association along with the other statements in the case satisfy me that the sale on which the advantage was gained, in respect of which income-tax is said to be payable, was a proper trading transaction—one within the company's power under their articles, and contemplated as well as authorised by their articles. I am satisfied that the appellant company was formed in order to acquire certain mineral fields or workings—not to work the same themselves for the benefit of the company, but solely with the view and purpose of reselling the same at a profit. The facts before us all point to this. The properties were bought for £24,000, leaving only a share capital of less than £6000—a capital quite inadequate (even if all subscribed, which it was not) to enable the company to work their minerals and bring them to market. It is said the company commenced business shortly after its incorporation in February 1901, and continued to carry it on until the sales which were effected in April 1902 and August 1903, but it is not said that in the course of that time—and the period was short—the appellants worked any part of the minerals. The business they carried on may have been solely connected with their efforts to sell the property, and selling it was part of the business which the company was formed and directly authorised to carry on. The price obtained, namely £300,000, for a subject which cost £24,000, points in the same direction.

But it was said that the profit, if it was profit, was not realised profit, and therefore not taxable. I think the profit was realised. 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 cannot think that income-tax is due or not according to the manner in which the person making the profit pleases to deal with it. Suppose, for example, a seller under a profit on a trade transaction, but leaves the price (including the profit) in the hands of the buyer at so much per cent. interest. That he so deals with it rather than take the cash into his own pocket would not affect the claim of the Revenue for the tax payable on the profit. No more, in my opinion, does it affect the liability for the tax that the appellants left their profit in the hands of the company they sold to and took that company's shares as their voucher.

LORD MONCREIFF was absent.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellants—Clyde, K.C.—Cooper. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Board of Inland Revenue—Campbell K.C.—A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor for Inland Revenue.

Friday, July 1.

## SECOND DIVISION.

[Lord Pearson, Ordinary.]

### GRAHAM v. MILL.

*Lease—Landlord and Tenant—Arbitration in Common Form—Construction of Lease—Valuation of Waygoing Crop and Manure—Quantum meruit.*

A, the outgoing tenant of a farm, had been taken bound by his lease at its expiry to sell to the incoming tenant the whole dung produced on the farm subsequent to the turnip season in the year preceding the expiry, and also the waygoing crop, corn, and straw, at such price or prices as should be fixed "by arbitration in common form." B, the incoming tenant, came under a corresponding obligation in his lease in similar terms to purchase the subjects.

A and B not being agreed as to the amount payable, referred the matter by a formal submission to two farmers as arbiters. The arbiters chose another farmer as oversman, and had numerous meetings, but a year and a day having elapsed without any formal award having been signed the submission fell. Meanwhile B had consumed the waygoing crop, corn, and straw, and used up the dung.

Thereafter A raised an action against B for the value of the waygoing crop and the manure, but was met by the defence that arbitration was in terms of the lease the only mode competent for valuing the subjects.

*Held* (rev. judgment of Lord Pearson and *diss.* Lord Moncreiff) that the arbitration stipulated for in the lease was a valuation by skilled persons who had personally inspected the subjects, and that such a valuation having been rendered impossible by reason of the submission having fallen, A was restored to his common law right of suing for the value of the waygoing crop and manure.

John Graham, the outgoing tenant of the farm of Greenhill, Selkirk, raised an action against John Spottiswoode Mill and David Mill, the incoming tenants of the said farm, for the sum of £403, 13s. 6d., with interest at 5 per cent. from 18th June 1903.

The following narrative of the facts is taken from the opinion of the Lord Ordinary (PEARSON):—"The pursuer was tenant of the farm under a lease for ten years