[HIGH COURT OF AUSTRALIA.]

THE MOUNT MORGAN GOLD MINING COMPANY LIMITED . . . . . } APPELLANT;

AND

THE COMMISSIONER OF INCOME TAX (QUEENSLAND) . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1922-1923.

SYDNEY, *Sept.* 18-20, 1922.

BRISBANE, *June* 19-20, 1923.

SYDNEY, *Aug.* 16, 1923.

Knox C.J., Higgins, Gavan Duffy, Rich and Starke JJ.

Income Tax (Q.) — Company—Income arising or accruing from business carried on in Queensland—Operations carried on partly in Queensland and partly outside Queensland—Ore mined in Queensland, refined in New South Wales, sold by agent outside Queensland to purchasers outside Queensland — Apportionment as between Queensland and places outside—Income Tax Acts 1902-1920 *(Q.)* (2 *Edw. VII. No.* 10—10 *Geo. V. No.* 35), *secs.* 3, 7 (1), (8), 12A (I.) (2), (3), 13 (1) (i.).

The *Income Tax Acts* 1902-1920 (Q.) levy income tax in respect of the income of all persons at specified rates. By sec. 3 "person" includes a company; "income tax" is defined as "the tax on income derived from personal exertion and the tax on income derived from the produce of property" &c.; "income derived from personal exertion" is defined as "all income consisting of earnings . . . earned in or derived from Queensland, and all income arising or accruing from any business carried on in Queensland" &c.; "income derived from the produce of property" is defined as "all income derived in or from Queensland and not derived from personal exertion." Sec. 7 (8) provides "in the case of a Queensland company"—that is (sec. 3), "a company the head or principal office or the principal place of business of which is in Queensland"—"carrying on business outside Queensland, tax shall be charged on the profits made in Queensland" at stated rates; and sec. 13 (1) provides that "in estimating the income subject to the tax, there shall be deducted from the gross income of every person (i.) all losses and outgoings actually

incurred in Queensland by him in production of that part of his income which is not exempted from tax." Sec. 12A (I.) (3) provides that when goods or articles produced in Queensland are sold outside Queensland the amount received for the sale shall be taxable as income earned in Queensland.

By a proclamation issued in 1915 the Government of the Commonwealth prohibited the exportation of gold, bullion or specie except with the consent of the Treasurer. During the War gold appreciated, and gold producers seeking to obtain benefit of the appreciation formed the Gold Producers' Association, one object of which was to buy, sell, exchange, transport, dispose of and deal in gold in any part of the world, and the business of which by its articles of association was confined exclusively to agency for and on behalf of its members for the sale and disposal of gold bona fide produced by its members. The Treasurer granted a consent to the exportation of the total gold production of the members in the form of specie or bullion.

The appellant, a company incorporated and carrying on business in Queensland and having branch offices in Sydney, Melbourne and London, produced blister copper at mining works in Queensland. The only board having power to carry on the business was the principal board in Queensland; the branches had no such power. The blister copper, which contained about 99 per cent. of copper and some gold and silver, was sent to a refining company in New South Wales and there converted into electrolytic copper and the gold and silver were extracted. The refining company did not treat the appellant's blister copper separately but smelted it with other consignments received from other producers in Australia and ascertained the interests of the different owners by assays made before the smelting. The Refining Company paid to the appellant in Sydney £4 4s. 2d. per ounce for the gold contents of the blister copper, cast that gold into bars, deposited the bars at the Bank of New South Wales, which weighed and assayed and re-smelted the gold, credited the Refining Company with £31 17s. 10½d per standard ounce less charges, deposited it at the Mint and ear-marked a quantity equivalent to that obtained from the appellant's blister copper as on account of the appellant. The appellant paid income tax on the money received from the Refining Company. The Mint issued a receipt and, after further treatment of the gold, delivered to the Bank in exchange for the receipt a memorandum of out-turn of gold left for coinage by the Bank on account of the appellant. A duplicate of the memorandum was given by the Bank to the Refining Company by which it was sent to the appellant which delivered it to the Gold Producers' Association. The Association lodged the memoranda of out-turn of its members with the Treasurer, obtained his sanction to make a disposal of gold, communicated such sanction to the Commonwealth Bank of Australia—its bankers—and that Bank disposed of gold in accordance with the sanction and the instructions of the Association. Over 93 per cent. of the total disposition was made outside Australia and the remainder was made under contracts entered into in Australia, but not in Queensland, for shipment f.o.b.; and the payments for the gold were all, substantially, made to the Commonwealth Bank in London. From time to

H. C. OF A. 1920-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

time that Bank remitted to the Association and ultimately the Association distributed the net returns amongst its members pro rata in accordance with the amount of standard gold available for sale and disposal on account of each member during the period covered by the accounts pursuant to the provisions of its articles of association. The appellant received from the Gold Producers' Association, for the year ending in 1920, £142,112 in respect of its share of the profits of the Association. The Full Court of Queensland held that the whole of this sum was taxable income.

Held, by *Higgins*, *Rich* and *Starke* JJ., that the sum of £142,112, in part at least (by *Higgins* J. *all*), was "income arising or accruing from a business carried on in Queensland," and was taxable income within the said Acts; and if all was not taxable income within the meaning of those Acts the said sum should be apportioned as between Queensland and places outside Queensland for the purpose of ascertaining what portion thereof was income arising or accruing from the business operations carried on by the appellant in Queensland.

Per Knox C.J. and *Gavan Duffy* J.: No part of the sum was liable to income tax.

Per Rich and *Starke* JJ.: The portion of the sum which arose or accrued from the appellant's business operations in Queensland was liable to the tax.

Decision of the Supreme Court of Queensland: *Mount Morgan Gold Mining Co. Ltd.* v. *Commissioner of Income Tax*, (1922) S.R. (Q.), 230, reversed.

APPEAL from the Supreme Court of Queensland.

On the hearing of certain objections taken by the Mount Morgan Gold Mining Co. Ltd. to an assessment for income tax made by the Commissioner of Income Tax, the Court of Review determined the objections in favour of the Commissioner, and stated, for the opinion of the Supreme Court, a special case, which was substantially as follows:—

2. The Mount Morgan Gold Mining Co. Ltd. (hereinafter referred to as the taxpayer) is a Queensland company within the meaning of the above-mentioned Acts, registered and incorporated in Queensland and having its head office and principal place of business at Mount Morgan in the said State, and branch offices at Sydney, Melbourne and London, with branch registers at Sydney and London.

3. The taxpayer carries on at Mount Morgan the business of mining, and there owns and works mines and smelters from which it produces from ores raised in Queensland a merchantable product known as blister copper, which contains about 98 to 99 per cent.

of copper, a quantity of gold, ranging from about 12 ounces to about 14 ounces per ton of blister copper, about 4 ounces of silver per ton, and certain impurities. This product, although merchantable, is not in a refined condition and is not in a state fit for commercial uses.

4. By an agreement in writing between the taxpayer and the Electrolytic Refining and Smelting Co. of Australia Ltd.—a company duly incorporated under the laws of the State of New South Wales and carrying on at Port Kembla in the said State the business of refining copper and gold and silver ores, matte, and blister copper, and having its registered office at Sydney in the said State, and in which the taxpayer holds 34,595 out of 60,000 shares issued, and hereinafter referred to as "the Refiinng Company"—dated the twenty-ninth day of December 1908, it was agreed (*inter alia*) as follows :— Quantity and Period.—(1) The Mining Company agrees to deliver to the Refining Company on wharf at Port Kembla and the Refining Company agrees to accept its entire product of blister copper for a period of ten years, to commence from the date of the first shipment of such blister copper, and after the expiration of the said ten years this agreement shall continue in force for a further term of five years, unless notice in writing of its intention to terminate this agreement shall have been given by either party not later than twelve months prior to the expiry of the said term, or such extension thereto as provided hereunder. Gold.—(9) Eighty-five days after arrival of the blister copper on wharf at Port Kembla, the Refining Company agrees to pay to the Mining Company for the gold contents in the blister copper as follows : If the contents are under ·05 of an ounce per ton of 2,240 pounds, no payment shall be made ; if the contents are over ·05 of an ounce per ton the price to be paid by the Refining Company to the Mining Company shall be £4 4s. 2d. per ounce for all the gold.

There was no evidence before me as to whether the notice referred to in clause 1 of the said agreement hereinbefore set out was or was not given by either of the parties thereto.

5. Under an agreement dated 14th August 1919, and made between the taxpayer and the Refining Company, the taxpayer ships the said blister copper in slabs from Rockhampton by steamer

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

to Port Kembla, where it is delivered to be dealt with and refined by the Refining Company in conformity with the terms of the said agreement.

6. After delivery to the Refining Company the slabs of blister copper are weighed in the manner provided for by the said last-mentioned agreement (hereinafter referred to as the 1919 agreement), and the gold, silver and copper contents of the said blister copper are thereby determined. These assays determine the basis on which the Refining Company accounts to the taxpayer for the contents of the said blister copper.

7. The said slabs of blister copper are then taken and smelted in a furnace, together with any other blister copper from other sources then undergoing treatment, the proceeds of such smelting being recast into anode plates of a suitable shape for electrolytic refining. This latter process essentially consists of the decomposition of the anode plates by a current of electricity in a suitable solution, and the redeposition of the copper in a pure form, known as cathode copper. In this state it is remelted and cast into bars suitable for commercial requirements. The gold, silver and other metals, which pass into the solution in the form of slimes, are taken out of the solution and refined by a series of subsequent processes, producing fine gold and silver. The blister copper from the taxpayer is not separately smelted by the Refining Company, but is smelted in conjunction with consignments of blister copper received by the Refining Company from other producers in various States of the Commonwealth, so that individual parcels of blister copper, and the gold and silver contents thereof, lose their identity as the produce of any particular mine or State or customer.

8. All arrangements as to weights, sampling and assays are governed by the terms of the 1919 agreement.

9. At the expiration of a period fixed by the 1919 agreement, after the delivery to the Refining Company of a consignment of blister copper, the Refining Company delivers to the taxpayer, free on railway trucks at Port Kembla or free on board steamer at Port Kembla jetty, as the taxpayer may direct, a quantity of electrolytically refined copper, equivalent to the quantity of copper shown by the weights and assays provided for by the 1919 agreement,

to be contained in such consignment. The electrolytically refined copper so delivered is not the product solely of the blister copper delivered by the taxpayer. The taxpayer subsequently makes its own arrangements for the disposal and sale of such electrolytic copper. Electrolytic copper is an article manufactured from blister copper.

10. There has not at any material time been any increase or decrease in the fixed standard price of gold, nor has any bonus been paid by the Government for the same, but gold producers in Australia, through the permitted export of gold by the Gold Producers' Association hereinafter mentioned, have as hereinafter set out in fact obtained the benefit of the increased price of gold in the world's markets. The taxpayer has not at any time exercised the power reserved to it by the terms of clause 6 of the 1919 agreement of requiring the gold contents of any consignment of blister copper to be returned to it, but has nevertheless shared in distributions made by the Gold Producers' Association, as hereinafter set forth, and has thus obtained the benefit of the higher prices for gold ruling in other parts of the world.

11. At all material times the fixed standard price of gold has been £3 17s. 10½d. per ounce of standard gold, the equivalent price of fine gold being £4 4s. 11.45d. The difference between the price of fine gold and the price paid by the Refining Company to the taxpayer for the fine gold contents of the blister copper (namely, £4 4s. 2d.) is accounted for wholly by certain refinery charges which are allowed for. The taxpayer has duly accounted in its income tax return for and has paid income tax in respect of all sums received by it from the Refining Company in respect of the full gold and silver contents of the blister copper payable by the Refining Company pursuant to the said agreement.

12. All gold, the resultant of the treatment of the consignments of blister copper treated conjointly as aforesaid, is cast into bars and delivered by the Refining Company to the Bank of New South Wales. The said Bank forthwith, after weighing, assaying and resmelting the gold, pays for the same by crediting the Refining Company with the ascertained value thereof at £3 17s. 10½d. per standard ounce, less certain charges.

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

13. Prior to the formation of the Gold Producers' Association as hereinafter mentioned, gold purchased by the said Bank was deposited with the head office of the said Bank and went into stock as bullion. When required for coinage the gold was deposited by the said Bank at the Royal Mint, Sydney Branch, the said Bank receiving in exchange a document called a "mint receipt," which acknowledged the receipt from the said Bank of a deposit said to contain gold of a named weight, and indicated that the price therefor would be payable on a certain date. The Mint then melted and assayed the gold, and after thus ascertaining its value at the rate of £3 17s. 10½d. per standard ounce and deducting certain mint charges, delivered in exchange for the said mint receipt a memorandum of out-turn, showing the said value and deductions and a cheque upon the Mint's bankers for the amount shown to be due by the said memorandum of out-turn.

14. Since the formation of the Gold Producers' Association the practice theretofore followed by the said Bank has been varied. As soon as the gold obtained from the Refining Company is assayed and treated by the Bank, it is forthwith deposited at the Mint. The said Bank, at the request of the Refining Company, ear-marks all gold purchased from the Refining Company as Mount Morgan gold, and obtains from the Mint a mint receipt, and a duplicate thereof in the form above described, showing that the said gold has been received from the said Bank on account of the Mount Morgan Gold Mining Co. The duplicate mint receipt is stamped "Duplicate. Issued for the information of the Gold Producers' Association Limited." After treatment and assaying, the Mint delivers to the said Bank in exchange for the original mint receipt, a cheque and memorandum of out-turn as previously described (which said memorandum of out-turn also ear-marks the said gold as Mount Morgan gold), and further delivers to the said Bank a duplicate mint memorandum of out-turn, which is also stamped as aforesaid. The said duplicate mint receipt and duplicate memorandum of out-turn are subsequently handed by the said Bank to the Refining Company, which subsequently delivers them to the taxpayer, which in turn then lodges them with the said Gold Producers' Association Ltd., to be dealt with as hereinafter set out.

15. The gold thus purchased by the Mint is subsequently refined and stored away in the shape of fine gold ingots until required for coinage, when it is standardized by being alloyed with a certain percentage of copper, cast into coinage bars and manufactured into sovereigns, which sovereigns are issued to the Mint's banker, who credits the mint account with the value thereof.

16. By a proclamation duly made under the provisions of the *Customs Act* 1901-1914 on 14th July 1915, and duly published in the *Commonwealth of Australia Gazette* on the same date, his Excellency the Governor-General, with the advice of the Federal Executive Council, prohibited the exportation of gold specie or bullion from the Commonwealth, except with the consent in writing of the Treasurer of the Commonwealth. This proclamation is still in force.

17. Since the issue of the said proclamation the value of gold outside Australia has greatly increased. The prohibition on the export of gold imposed great hardship upon the producers of gold, and representations to this effect were made to the Commonwealth Acting Prime Minister, and he was requested to remove the embargo on the export of new production, or alternatively to subsidize the industry by paying the parity value if the retention of new gold within Australia were for national reasons essential. As a result, it was finally arranged that the Treasurer should grant permits under the said proclamation during a limited period (which period was subsequently extended from time to time), on the understanding that the concession was to all the producers to aid them in the interests of the gold-mining industry, and that some machinery, such as a pool or association to which all bona fide gold producers in the Commonwealth should be eligible for membership, should be provided, to which permits should be granted to export gold, and that before any permit should be granted, satisfactory evidence should be presented to the Treasurer of the production in Australia of the quantity of gold desired to be exported.

18. On 6th March 1919, the Gold Producers' Association Ltd. (hereinafter referred to as the Association) was accordingly duly incorporated and registered under the *Companies Act* 1915, of the State of Victoria. The registered office and principal place of

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

business of the Association are situated at Melbourne in the said State. During the financial period in question, there were about eleven or twelve hundred shareholders in the Association, representing about 95 per cent. of the gold produced in Australia during that period. Pursuant to the arrangement referred to in clause 17 hereof, the Association from time to time applied for and was granted permits. At all material times the taxpayer was, and it still is, a member of the Association.

19. The Association under its said memorandum and articles of association carries on the business of selling gold in the form of sovereigns and, occasionally, mint bars in Australia and outside Australia. The Association from time to time distributes its net returns in accordance with its articles of association.

20. During the financial period in question, 93·5 per cent. of the total shipments made by the Association of sovereigns and mint bars was consigned by its Bank—the Commonwealth Bank of Australia—to that Bank's agents, in various parts of the East and in India and the United States of America, for sale by the agents of the Association, and was there sold by such agents and delivered by the agents of the said Commonwealth Bank to the purchasers thereof, under contracts made by such agents of the Association outside Australia, and providing as a general rule for payment in London to the Commonwealth Bank of Australia. In the case of such contracts, profits were made by means of premiums on exchange from the place of sale on London by means of premiums on remittances to the credit of the Association in Melbourne, and possibly by means of investment on loan at interest in London of payments there made. But no evidence was given as to the amount of such profits. During the same period 6·5 per cent. of the said total shipments were made in fulfilment of contracts made in Australia, but outside Queensland, for shipment of gold f.o.b. Sydney, Melbourne or Fremantle, payment in almost all cases being made in London to the Commonwealth Bank of Australia. In the case of such f.o.b. contracts, in addition to the profits directly attributable to such contracts, profits were made by means of premiums on remittances to the credit of the Association in Melbourne. But no evidence was given as to the amount of such profits. Substantially all

the profits of the Association were derived from such contracts as aforesaid in the proportion of 93·5 per cent. from contracts wholly made and carried out outside Australia, and of 6·5 from contracts f.o.b. Australia. The Association does not, and did not at any material times, carry on any business in Queensland.

21. The procedure in connection with the export of a shipment of gold by the Association is as follows: When the Association is ready to make a shipment it hands duplicate mint memoranda of out-turn, or in some cases duplicate mint receipts for new gold lodged with the Mint as hereinbefore referred to, sufficient to cover the proposed shipment, together with full particulars as to the value and destination of the shipment, and the name of the proposed consignee, the said consignee being the agent of the Commonwealth Bank at such place, to the Commonwealth Treasurer, who approves of the shipment and notifies the Association's Bank the Commonwealth Bank of Australia and the Customs, of such approval. The Association then informs the said Bank of its intention to make the shipment, giving it particulars as above mentioned, and instructs it to prepare for shipment on the date mentioned, and to effect the necessary insurances and shipping arrangements. The Bank thereupon ships sovereigns and/or mint bars in accordance with such instructions, and debits the agency account of the Association with the value of the said shipment and all freights, insurances and other charges in connection therewith. The sovereigns and/or mint bars included in any particular shipment are provided by the said Bank from its reserves of coin and/or bullion, and are not necessarily nor likely to be coined from the new gold deposited at the Mint and represented by the said duplicate mint memorandum of out-turn and duplicate mint receipts so lodged with the Commonwealth Treasurer in connection with that particular shipment. The gold so shipped by the Commonwealth Bank as aforesaid, when sold by the agents of the Association, is delivered by the agent of the Commonwealth Bank to the purchaser thereof, and the proceeds of practically all sales are paid on behalf of the Association to the Commonwealth Bank of Australia, London, and from time to time portion thereof as required is remitted to the said Bank to the credit of the Association at Melbourne.

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

22. The financial year of the taxpayer ends on 28th November in each year, and for the purpose of the Income Tax Acts the Commissioner of Taxes has accepted returns made up to that date.

23. In and for the financial year of the taxpayer ending on 26th November 1920 the share of the taxpayer in the distribution of the net returns in the hands of the Association from the sale and disposal of sovereigns and/or mint bars calculated as provided in the articles of association of the Association, amounted to the total sum of £154,136 3s. 9d. Of this sum £142,111 19s. 1d. was retained by the taxpayer, being in respect of gold produced from the taxpayer's blister copper, and the balance—i.e., the sum of £12,024 4s. 8d.—was paid by the taxpayer to the Refining Company, being in respect of gold not so produced. All settlements between the taxpayer and the Association were at all material times made outside Queensland.

24. On the above facts the Commissioner contended and the taxpayer denied that the sum of £142,111 19s. 1d. was taxable income of the taxpayer for the year ending 28th November 1920 within the meaning of the Income Tax Acts.

25. On 3rd March 1922 on these facts I decided that the said sum of £142,111 19s. 1d. was taxable income of the taxpayer within the meaning of the *Income Tax Acts* 1902-1920, and I dismissed the said appeal, with 50 guineas for costs, and confirmed the said assessment.

A copy of the judgment of *O'Sullivan* D.C.J. (which is reported in the *Queensland Weekly Notes* (1)) was annexed to the special case.

26. The questions submitted for the opinion of the Supreme Court were :—

(1) Whether the said sum of £142,111 19s. 1d., or any and what part of it, is taxable income of the taxpayer within the meaning of the *Income Tax Acts* 1902-1920.

(2) Whether I was right in dismissing the said appeal and confirming the said assessment.

(3) If not, what should be done by me in the premises ?

The Supreme Court of Queensland answered the questions—(1) The whole sum was taxable income ; (2) Yes : *Mount Morgan Gold Mining Co. Ltd.* v. *Commissioner of Income Tax* (2).

(1) (1922) Q.W.N., 15. (2) (1922) S.R. (Q.), 230.

Further material facts sufficiently appear from the judgments hereunder.

From that decision the Mount Morgan Gold Mining Co. Ltd. now appealed to the High Court.

The appeal was argued at Sydney before *Knox* C.J., *Higgins*, *Gavan Duffy* and *Starke* JJ. on 18th, 19th and 20th September 1922, and was now reargued at Brisbane before the same Justices and *Rich* J.

Feez K.C. and *Henchman*, for the appellant. No part of the sum is liable to income tax. First, it is not income derived from the produce of property (sec. 3 of the *Income Tax Acts* 1902-1920 (Q.)), because whether the Association is agent for the appellant or an independent operator those profits are not " income derived from the produce of property," for if the Association's position is that of an agent the appellant's profits arise from a business carried on in Victoria, and if the Association's position is that of an independent body the profits arise from an investment in Victoria. Secondly, sec. 12A (I.) (3) of the Acts has no application ; on its proper construction, the articles and goods sent out of Queensland must be identical with those manufactured or produced in Queensland, and in the present case the profits do not arise on the sale of any tangible identifiable article. The rule of interpretation is stated in *The King* v. *Ballarat Trustees, Executors and Agency Co.* (1), *Emmerton* v. *Federal Commissioner of Land Tax* (2) and *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (3). Thirdly, the profits are not income derived from personal exertion (sec. 3), for they were not earnings derived from Queensland or income arising from a business carried on in Queensland. The question is one of fact ; and in fact they were profits of the Association made on transactions entered into and performed outside Queensland in respect of gold which might not have been produced by the appellant. If the profits resulted from the appellant's business operations, those operations

(1) (1919) 27 C.L.R., 257, at p. 265.
(2) (1916) 22 C.L.R., 40, at p. 51.
(3) (1921) 1 K.B., 64, at p. 71 ; (1921) 2 K.B., 403.

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

were performed outside Queensland, and the *Income Tax Acts* impose taxation only on the profits made in Queensland in the case of Queensland companies carrying on business outside that State (sec. 7 (8)). Assuming the profits arise from the business operations in Queensland, they arise indirectly therefrom, but the words of the definition of "income derived from personal exertion" (sec. 3) require a direct association (*Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (1)). In no relevant sense can it be said that these profits arise in Queensland. If the appellant is liable to taxation, it is limited to the Queensland operations, and an apportionment will be necessary (*Commissioners of Taxes* v. *Kauri Timber Co.* (2); *Commissioners of Taxation* v. *Kirk* (3)).

Webb S.-G. for Q. and *Real*, for the respondent. The whole sum is taxable (i.) as income from personal exertion (sec. 3), being (a) earnings derived from Queensland, or (b) income arising or accruing from a business carried on in Queensland, or (c) income under sec. 12A (I.) (3); or (ii.) as income derived from the produce of property. The sum arose from the operations of the appellant acting in respect of the sale of gold through a remunerated agent under a contract, and, in respect of the refining, acting by a contractor paid by the appellant at a fixed rate. The whole of the business was carried on in Queensland by appellant's directors, although the locality of some of their transactions was elsewhere. Profits on a simple sale of gold are clearly taxable; and the fact that a series of transactions was necessarily undertaken to ultimately obtain the best price for gold, which had been ear-marked as representing the produce of the appellant's mine, does not substantially alter the nature of the business operation. The words "carry on business in Queensland" cannot be narrowed to mean "actually perform operations in Queensland." The real transaction was production and sale of gold in Queensland, the premiums from the Association being an additional price received for gold ear-marked as the appellant's production.

[During argument reference was also made to *Commissioners of Taxation (N.S.W.)* v. *Meeks* (4); *Nathan* v. *Federal Commissioner*

(1) (1908) A.C., 46, at p. 52.
(2) (1904) 24 N.Z.L.R., 18.
(3) (1900) A.C., 588, at p. 594.
(4) (1915) 19 C.L.R., 568.

of Taxation (1); *Grainger & Son* v. *Gough* (2); *Werle & Co.* v. *Colquhoun* (3); *De Beers Consolidated Mines Ltd.* v. *Howe* (4); *Erichsen* v. *Last* (5).]

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Aug. 16, 1923.

Cur. adv. vult.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. The respondent assessed the appellant to income tax in respect of a sum of £142,111 19s. 1d. received by the appellant during the year 1919-1920. This assessment was confirmed by *O'Sullivan* J., and he thereupon stated a special case for the opinion of the Supreme Court on the following question (among others): (1) whether the said sum of £142,111 19s. 1d., or any and what part of it, is taxable income of the taxpayer within the meaning of the *Income Tax Act* 1902-1920. The Full Court of the Supreme Court decided, in answer to this question, that the whole sum was taxable income; and it is against that decision that this appeal is brought. The facts are fully stated in the special case, and need not be repeated.

In our opinion the question at issue is determined by sec. 7 (8) of the Queensland *Income Tax Acts* 1902-1920. That sub-section provides that in the case of a Queensland company carrying on business outside Queensland tax shall be charged on the profits made in Queensland. This we take to be the only liability to taxation in the case of such a company; and the appellant is such a company. Whether the profits in question in this case were or were not so made is a question of fact; and, as a question of fact, we hold that they were made wholly outside Queensland. They represent the share of the appellant in the profits made by the Gold Producers' Association by the sale outside Queensland of gold not alleged to have been produced in Queensland. They may be regarded either as profits of the Gold Producers' Association—a company incorporated in Victoria and not carrying on any part of its business in Queensland—earned and distributed by that

(1) (1918) 25 C.L.R., 183, at p. 188.
(2) (1896) A.C., 325.
(3) (1888) 20 Q.B.D., 753.
(4) (1906) A.C., 455, at p. 458.
(5) (1881) 8 Q.B.D., 414, at p. 416.

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Knox C.J. Gavan Duffy J.

company outside Queensland, or as profits resulting from business operations of the appellant transacted outside Queensland. But, whether the operations with respect to the export and sale of gold from which these profits resulted were operations of the Gold Producers' Association or of the appellant, we think they must be regarded for the purposes of sec. 7 (8) as having their origin in the mint receipt. The mint receipt cannot be regarded as part of the price paid to the appellant for the gold produced by it in Queensland, for before that gold was lodged with the Mint it had been bought and paid for by and had become the property of the Electrolytic Company. It is true that possession of the receipt enabled the appellant through the Gold Producers' Association to obtain the profit made by the export and sale of a quantity of gold or sovereigns equivalent to the quantity of gold stated in the receipt to have been lodged with the Mint. This was the result of the arrangement made between the Commonwealth Government and the Gold Producers' Association, and in our opinion the purpose of that arrangement was not to pay the producers of gold an additional price for the gold produced by them and deposited with the Mint, but merely to give the producers an advantage or benefit in order to compensate them for the loss they sustained by reason of the prohibition which had been placed on the export of gold. An attempt was made to apply to this case the opinion of the Judicial Committee in *Commissioners of Taxation* v. *Kirk* (1); but the facts of that case were so different from those existing here as to make it inapplicable. In *Kirk's Case* a specific article produced in its raw state in one locality went through various processes in different localities and was ultimately sold in England. It was held that the price was the result of the various operations from the production of the raw material to the sale of the refined product, and that the profit realized should be regarded as attributable in part to each of the localities in which these operations took place, including that in which the raw material was produced. In the present case the gold which the appellant produced in Queensland was finally disposed of by the appellant by the sale to the Electrolytic Company and lost its identity when deposited with the Mint. The gold exported and sold from

(1) (1900) A.C., 588.

which the profit now in question was derived had no necessary or probable connection with Queensland. The profits now sought to be taxed were the result of a concession or privilege granted to the Gold Producers' Association by the Commonwealth Government. This we think to be the substance of the transaction, and the question under sec. 7 (8) is not whether any part of the price of the Queensland gold, or even whether any part of these profits, was either directly or indirectly connected with or derived from Queensland—the question is where were these profits made; and all profits made from the sale of the gold procured from the Commonwealth Bank by the Gold Producers' Association were, in our opinion, made outside Queensland. Whatever may be the connection between the gold produced in Queensland and that obtained by the Gold Producers' Association and sold by them, the profit made when they sold that gold was not made in Queensland; and there is nothing in *Kirk's Case* (1) to indicate that we should hold otherwise.

It was further argued that the amount was taxable under sec. 12A (I.) (3) of the Act. That section provides that, when goods or articles produced in Queensland are sold outside Queensland, the amount received for the sale shall be taxable as income earned in Queensland. In our opinion the only sale of the gold produced in Queensland was that made to the Electrolytic Company in respect of which income tax has already been paid, and the money received from the Gold Producers' Association was not received for the sale of any goods or articles produced in Queensland.

For these reasons we think no part of the sum of £142,111 19s. 1d. is taxable income; and that the appeal should be allowed, and questions 1 and 2 answered in the negative.

HIGGINS J. The facts set out in the special case have been so conveniently summarized in the judgments of the Chief Justice of Queensland and in the judgment of *Starke* J. that I omit that part of my judgment which restated them. Neither party contests the right of the Mount Morgan Company to receive, as it has received, the profits made by it through the agency of the Gold Producers' Association—£142,111 19s. 1d.; and whether that right comes through

(1) (1900) A.C., 588.

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Higgins J.

that agreement of the Mount Morgan Company, 14th August 1919, with the Refining Company (Ex. B, cl. 6, "Gold") or by the consent of the Refining Company, the profits have now to be treated as income of the Mount Morgan Company. The question is: Are these profits, or any and what part thereof, to be treated as taxable income of that Company for the year ending 28th November 1920? The special case does not show that there are any expenses to be deducted from that sum of £142,000 odd; and the whole sum must be treated as net income of the Mount Morgan Company, taxable, if and so far as it is "income derived from personal exertion," or "income derived from the produce of property," within the meaning of the definitions contained in sec. 3 of the *Income Tax Act* 1902 as amended, and as fully set out with the amendments in the reprint of the *Income Tax Acts* 1902 to 1920. The ultimate question is: Is this sum, in whole or in part, "income arising or accruing from any business carried on in Queensland"?

In my opinion, the judgment of the Full Court of Queensland is, in its result, right—that the whole sum is taxable. The whole of the business from which these profits were made was carried on in Queensland, although certain transactions of that business were carried out by the Company's agent in foreign parts. The income that is taxable under this Act is not income arising from operations or transactions which actually take place in Queensland, but income arising from "any business carried on in Queensland." To export goods to a foreign country is not to carry on business in that country (*San Paulo* (*Brazilian*) *Railway Co.* v. *Carter* (1); *Mitchell* v. *Egyptian Hotels Ltd.* (2)). "The only persons who can with propriety be described as carrying on the trade of the company, are its directors, who, for all purposes of administration and management, are the company itself" (per Lord *Watson* (3)). It is the brains of the members of the Board that directed the arrangements whereby the Gold Producers' Association became the agent of the Company to achieve for the Company these profits. A man does not carry on business in China merely because he makes sales to persons in China, directly or through an agent. The words "carry on business"

(1) (1896) A.C., 31. (2) (1915) A.C., 1022.
(3) (1896) A.C., at p. 42.

connote something more, something habitual, something continuous, generally some continuity of establishment. If a man keep a store in Queensland and sell his goods to persons over the border in New South Wales, he does not necessarily " carry on business in New South Wales " ; but, if he set up a branch store in New South Wales, the profits made in the branch would ordinarily be called income arising from a business carried on in New South Wales. If a spice-merchant in London, instead of buying his spices in London, charter a ship for a voyage to the Moluccas to fetch the spices, he does not necessarily " carry on business " in the Moluccas. The Merchant of Venice carried on business in Venice, although his " argosies with portly sail " were in all the seas.

It appears to me that not enough attention has been directed to the full significance of the words " carry on business in Queensland," in ordinary commercial usage. We have to interpret this Queensland Act ; and it is not a safe course to start our interpretation on the basis of decisions given under the Income Tax Acts of New South Wales, or of New Zealand, or of the Commonwealth. The duties of the taxpayer under the Queensland Act have to be ascertained from the Queensland Act alone, although we are at liberty, of course, to compare the provisions of other Acts, and to look for guidance to any general principles laid down by decisions under such Acts. But the differences in the Acts have to be closely considered. For instance, in the New South Wales Acts, " income " is defined as meaning " income derived from any *source* in the State " (of New South Wales)—a very different expression from " income arising or accruing from any business carried on " (in Queensland) —see sec. 4 of the Act No. 11 of 1912 of New South Wales. Moreover, by sec. 3 of the amending Act No. 9 of 1914, it is provided that nothing in the Act is to apply to " income *derived from sources outside the State.*" Again, in the New South Wales *Land and Income Tax Assessment Act of* 1895, on which *Kirk's Case* (1) was decided, it was provided that " no tax shall be payable in respect of *income earned outside the Colony of New South Wales.*" The source from which income is derived, or the place where it is earned, is, of course, not necessarily identical with the place where the business is carried

(1) (1900) A.C., 588.

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Higgins J.

on. The dividing line between taxable income and non-taxable is wholly different in the Queensland Act from the dividing line in the New South Wales Act.

Our first duty is to find what business is carried on by the Mount Morgan Company in Queensland. The nature of the business of the Company, the outside limits of its possible business, are set out in the objects set forth in clause 3 of its memorandum. By consent of both parties the memorandum is to be treated as an exhibit to the special case. There is not only power to carry on the business of auriferous quartz miners (clause 3 (c)), power to acquire any property real or personal which may be required for the purposes of the Company (d), power to sell and dispose of gold (i), power to sell or otherwise deal with any part of the property of the Company (w), power to enter into agreements for the purchasing or selling any metals (xa 2), power to remunerate any person or company for services rendered in the conduct of the Company's business (15), power to join or become members of an association formed for the protection of the interests of employers or others engaged in any trade or business (18), power to carry on any other business which may seem to the Company capable of being conveniently carried on with " the above," or calculated directly or indirectly to enhance the value of or render profitable any of the Company's property or rights (29); but there is also power to do or accomplish all or any part of the objects of the memorandum and either alone or jointly with others either within Queensland or *anywhere else* (32), power to do all or any of the things mentioned in the memorandum *in any part of the world* (33), power to do all such other things as are incidental to the attainment of the above objects (y). The object of all these objects is, of course, the " acquisition of gain " (*Companies Acts* of Queensland 1863-1909, sec. 3). There is, therefore, nothing in the steps taken which have resulted in this profit of £142,000 odd that transgresses the business of the Company as authorized by the memorandum. These steps were taken by the authority of the Board of Directors, who conduct the business of the Company (art. 110). The Company is incorporated in Queensland, its registered office is in Queensland, the principal place of business is in Queensland (memorandum, clause 2). There is no statement in the special

case that the Board meets anywhere else than in the principal place of business in Queensland. Par. 2 states that there are branch offices at Sydney, Melbourne and London, with branch registers at Sydney and London; but no such branch has power to "carry on the business" of the Company (arts. 123-126, 128). The only body having power to carry on the business, the only body that does carry it on, is the principal Board, which must be treated as operating at the principal place of business; and that Board, as I have shown, may carry out the objects of the Company in any part of the world. Even though the money comes from China or elsewhere in foreign parts, the profit in question in this case arises from the Queensland business—the business carried on in Queensland.

I do not concur—I need hardly say it—with the view that the Act makes this profit taxable income merely because the original mining operations take place in Queensland. That fact does not constitute the test; the test is, where was the business carried on from which the profits arise. If the Victorian agent of the Company selling in China were working for profit and a taxpayer, the agent's profit from the sales could not be treated in the agent's income tax returns as income from business carried on in Queensland; but from the point of view of this Queensland company, whose directors make the contract by which the original gold passes to the Refining Company, and then consent to the various transmutations of the Company's rights through the Bank and the Mint and the Treasury, and to the export of the sovereigns for sale at premium, it is clear to my mind, that the profits from the sales arise from the "business carried on by the Company in Queensland."

There is, indeed, a sub-clause in the Act which would be conclusive in favour of the view that the income tax was intended to apply to profits made by sales out of Queensland, only for the fact that in this case the identical gold produced in Queensland was not sold outside Queensland: "When goods or articles manufactured in Queensland or produced in Queensland are sold outside Queensland, or live-stock are exported or sent from Queensland for sale outside Queensland, the amount received for the sale of the goods, articles, or live-stock shall be taxable as income earned in Queensland, but the cost of selling the goods, articles, or live-stock outside Queensland

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Higgins J.

shall be allowed as a deduction" (sec. 12A (I.) (3)). I cannot rely on this sub-clause as being directly applicable to the sovereigns or the bar gold sold in China, for neither the sovereigns nor the bar gold were "manufactured" in Queensland or "produced" in Queensland; but I may fairly rely on the sub-clause as showing that the Queensland Legislature, in framing this Act, did not treat the mere fact of goods being sold in China, in the course of a business carried on by a Queensland company through its directors, as involving that any business in which the transaction takes place is business carried on in China, or outside Queensland. This is an express provision for inclusion of the profits of sales outside Queensland as profits of the Queensland business; the doctrine of *expressio unius exclusio alterius* is inapplicable; for the whole section is prefaced by "Without limiting the force or effect of any other provision of this Act." As for sec. 7, sub-sec. 8, on which much stress has been laid on behalf of the appellant Company, it applies only to a Queensland company *carrying on business* outside Queensland; and it does not in any way show that this Company "carries on business" outside Queensland. It provides that "In the case of a Queensland company *carrying on business* outside Queensland, tax shall be charged on the *profits made in* Queensland, . . . Provided that (i.) the deduction allowed for head office expenses shall be reduced by an amount which bears the same proportion to the total head office expenses as the sales made outside Queensland bear to the total sales." This does not mean that all sales made outside Queensland are sales made in "carrying on business" outside Queensland. According to the view which I take, this Company carries on all its business in Queensland, although certain *transactions* of the business takes place in China or other countries. The mention of "head office" seems, indeed, to imply that the existence of branch offices is contemplated. This sub-section seems to apply mainly (I do not say exclusively) to branch businesses or the like. Where a bank habitually deals with customers, or an insurance company issues policies, in China, through local directors, the business may generally be said to be carried on in China, not in the country where the bank or insurance company has its principal place of business. But in this present case, the profits were made wholly through the conduct

of the business by the Queensland Board. The converse case of a foreign company " carrying on business in Queensland " is consistent with the view which I have suggested (sec. 31). That view is consistent also with sec. 13 (1) (i.), as to the deduction of losses and outgoings: " In estimating the income subject to the tax, there shall be deducted from the gross income of every person . . . all losses and outgoings actually incurred in Queensland by him in production of that part of his income which is not exempted from tax." The words used are " actually *incurred* in Queensland," not actually *spent* in Queensland; and the outgoings are usually incurred by the company at the place where it makes the contracts or arrangements from which the outgoings result. Any obligations incurred by the Company as to the transactions now in question were actually incurred in Queensland. It is the Queensland directors, in Queensland, who " actually incur " the expenditure. As Lord *Parker* of Waddington said (1):—" A trade or business cannot be said to be wholly carried on abroad if it be under the control and management of persons resident in the United Kingdom, although such persons act wholly through agents and managers resident abroad. Where the brain which controls the operations from which the profits and gains arise is in this country " (Britain) " the trade or business is, at any rate partly, carried on in this country." [The words " at any rate partly " are relevant to the rule laid down in *Colquhoun* v. *Brooks* (2) as to the English Act, but are not relevant to this case.]

In my opinion, the appeal should be dismissed; and, if so, the answers of the Supreme Court of Queensland should stand. But my four colleagues are of opinion to the contrary; and, of course, the appeal must be allowed. On the basis that the appeal is to be allowed, I concur with the formal answer drawn up by my brother *Starke* to question 1; and, as the whole sum is not to be treated as taxable income, I concur also with his formal answer to question 3.

RICH J. This is an appeal from the Supreme Court of Queensland pronounced on 15th June 1922, dismissing an appeal from the Court of Review under the State Income Tax Acts. The matter was determined by *O'Sullivan* J. sitting as the Court of Review

(1) (1915) A.C., at p. 1037. (2) (1889) 14 App. Cas., 493.

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Rich J.

on 3rd March 1922, when his Honor dismissed the Company's appeal from an assessment made by the Commissioner of Income Tax whereby the sum of £142,111 19s. 1d. was included as taxable income of the taxpayer for the year ending 28th November 1920. The learned Judge of the Court of Review, in dismissing the appeal against the assessment, gave his reasons in a judgment which he has included in the special case stated by him for the opinion of the Supreme Court.

Before entering upon the examination of the intricate facts of the case, it may be as well to draw attention to some points that, as I think, have a great bearing on this appeal. The Queensland Income Tax Acts in providing for an appeal from an assessment (secs. 51 and 55 of the Acts of 1902-1920, now secs. 57 and 61 of the Acts of 1902-1922) also provide that the Court of Review shall hear and determine the question in dispute, and may on the application of either party made at the hearing or within fourteen days thereafter, state a special case for the opinion of the Supreme Court. Sec. 57 (now sec. 63) provides that "special cases stated for the opinion of the Supreme Court in pursuance of this Act shall be heard and determined in accordance with the ordinary practice of the said Court relating to special cases." It was conceded by both sides before us that this enabled the Supreme Court to draw inferences of fact—of course, let me add, not inconsistent with any facts or inferences stated in the special case. I would further add that this is in favour of the taxpayer, because the burden of displacing the assessment is thrown on him by the Acts. In sec. 81 (now sec. 87) it is provided by sub-sec. 4 that the Commissioner's assessment is conclusive evidence of absolute correctness, except that in appeal proceedings it is prima facie evidence only; and also in sub-sec. 12 this is enacted: "the onus of proof that any income is exempt from or not liable to payment of income tax, or is subject or entitled to any deduction, shall lie on the person claiming the benefit of such exemption, non-liability, or deduction."

Coming to the facts of the case, they are, as I have said, intricate, and, I would say, *sui generis*. Whether I start with the statutory presumption that the assessment is right and that the taxpayer has not succeeded in satisfying me by proof that it is wrong, or whether

I weigh the facts stated and the probabilities on their own merits, I have come to the conclusion that the sum of £142,111 19s. 1d. is to some extent taxable. That conclusion, or any satisfactory conclusion, can only be come to by considering the facts, the position of the Company and the real effect of its transactions in a practical business manner. To concentrate on any one or more facts in isolation would only lead to a result that does not fit in with the other facts or with business probabilities. The real question is what is the business meaning of the Company's operations from first to last —i.e., from the moment it produces blister copper down to the moment it receives its full net returns for everything that the blister copper contains.

The substance of the matter I can state generally. The Mining Company, as I shall call the taxpayer, raises ore and by means of preliminary smelting produces blister copper. This commodity, taking its name from the predominant metal in the mass, contains also very valuable proportions of silver and gold. Naturally the object of the Mining Company is to dispose of all these metals at best available prices. The complexity of metallurgical operations makes it more convenient, and perhaps more profitable, that the Mining Company should not pursue its refining operations, including the separation of the precious metals, any further than the production of blister copper. It therefore passes on these further operations to the Refining Company on terms which, so far as they are expressly stated, appear in the written agreement of 14th August 1919. Those terms require more than superficial examination. They have given me cause for a great deal of thought. If they are looked at for nothing but face value, I do not think it is possible to arrive at any reasonable understanding of the subsequent operations of a number of business men and institutions who, I suppose, are acting not as philanthropists but in their own interests so far as they have a right to. This will become clearer in a moment. Scrutinizing the terms of the agreement of 14th August 1919 so as to get at its substantial effect, I would state it in this way:—The Mining Company delivers to the Refining Company its blister copper, and the Refining Company treats that blister copper and the metals in it on certain terms and conditions (clause 2). The Refining Company

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Rich J.

after treatment delivers to the Mining Company a quantity of electrolytically refined copper equivalent to the quantity of copper shown by weights and assays to be contained in the blister copper. In other words, the Mining Company gets back the same quantity of refined copper as it would have if it did the refining of the blister copper itself. As to the silver obtained from the blister copper the agreement provides, so far as the words go, that the Mining Company sells and the Refining Company purchases the full silver contents of the blister copper. Prima facie it is an ordinary sale; but it is necessary to look at the price. That is regulated by *pro forma* payments based on certain average prices of spot standard silver, but is subject to what are called "final adjustments," which are to be made every six months, and in the final adjustments the price per ounce to be paid for the silver is to be the average price per standard ounce obtained during that period by the Refining Company for its sales of silver. If the final adjustment shows an excess value over the *pro forma* payments, the Refining Company is to pay the Mining Company the excess; if it shows a deficit, the Mining Company makes up that deficit to the Refining Company. The broad effect of that is that in the result the Refining Company is to return practically silver for silver and make neither profit nor loss. Then, as to the gold, there is also nominally a sale and purchase of the full gold contents of the blister copper at £4 4s. 2d. per ounce; but again it is provided that if the fixed standard price of gold be increased, or if a bonus is paid by the Government and if the increase or bonus is received by the Refining Company, that increase or bonus is to be paid over to the Mining Company, and if (alternatively) there should be any decrease in the fixed standard price of gold the Refining Company deducts the amount of decrease from the £4 4s. 2d. per ounce. There is also a proviso that the Mining Company may instead of selling the gold contents of any consignments require the gold contents to be returned to it, and in that case the Mining Company shall pay to the Refining Company sixpence per fine ounce of the gold contents. The broad result of the gold provision is the transfer to the Refining Company of the right to keep the gold, provided it hands over its exact value on a gold standard plus whatever bonus advantage may attach to it from the Government,

or the gold may be required to be accounted for without reference to price. Speaking generally, the amount of gold has to be accounted for either in specie or in bullion. Taking all three metals together, there is no substantial error in saying that the Refining Company treats electrolytically the blister copper and accounts to the Mining Company for the refined metals it contains for a remuneration. In saying what I have as to the substance of the agreement, it will, of course, be understood that I am not weakening any stipulation as between the parties themselves. I am looking at the effect of the agreement as between the Crown and the taxpayer. No taxpayer can by any technical expressions alter the real effect of his business operations so as to defeat the right of the Crown under a taxing statute. I regard the agreement of 14th August 1919 as a mere link in a long and somewhat involved chain of circumstances constructed by the taxpayer to connect its productions with its ultimate cash returns. This can only be appreciated when we take stock of the position in which the Mining Company and the Refining Company stood in relation to the gold immediately before the agreement of 14th August 1919 was entered into.

There had been a previous agreement made between the two companies dated 29th December 1908 for the treatment and disposal of the Mining Company's metals. That agreement was to last for ten years definitely, which period would end with the year 1918. It was subject to be continued for another five years unless negatived as therein provided. I do not find any direct evidence either way as to whether the continuance of that agreement beyond 1918 was negatived, but the making of the agreement of August 1919 is inconsistent with the further continuance of the other agreement. Some intermediate events are important. The War began in August 1914. In July 1915 the Federal Government issued a proclamation forbidding the export of gold except by its permission. As the War progressed, gold became more valuable abroad. The embargo deprived Australian gold producers of the opportunity of making considerable profits. Their interests, of course, had to be subordinated to the higher interests of the Empire ; for gold exported might easily reach the enemies' hands. However, prior to 17th February 1919 conversations had taken place between the Secretary

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Rich J.

of the Commonwealth Treasury and a representative of a proposed association of the gold producers as to the terms upon which the Treasury would give permits to export gold. Correspondence between the Treasury and the Gold Producers' Association took place prior to 6th March 1919, on which day the Association was incorporated and registered as a limited company under the *Companies Act* 1915 of the State of Victoria. The first object for which the Company was established was "to buy sell exchange transport dispose of and deal in gold whether in the form of coin or otherwise in any part of the world." Art. 6 of the regulations of the Company provides that "No share shall be issued to any person who is not at the time of issue thereof either actually a bona fide producer of gold in the Commonwealth of Australia or a person bona fide conducting operations for the production of gold in the Commonwealth of Australia." Art. 97 provides in effect that, unless and until the Company by extraordinary resolution otherwise determines, the business of the Company is confined exclusively to agency for and on behalf of its members for the sale and disposal of gold bona fide produced by members in the Commonwealth of Australia, subject to agency expenses and without allowing any profit to the Company itself. No contrary extraordinary resolution has been passed. Art. 98 provides for the method of distribution of moneys. During the financial period in this case there were about 1,100 or 1,200 shareholders in the Association, representing about 95 per cent. of the gold produced in Australia during that period. The Mining Company was one of the shareholders. After the Gold Producers' Association Ltd. was registered, further correspondence took place between it and the Treasury, continuing from 14th March 1919 to November 1920, by which permission was given for the export of gold by the actual producers. The understanding was that this permission might be taken advantage of through the agency of the Gold Producers' Association Ltd. That Association must therefore be looked upon merely as the hand of the actual producers respectively. The directors' first half-yearly report, which was issued on 22nd August 1919, dealt with the four months from the inception of the Company to 30th June 1919. It contains some very important statements, which show clearly the true relation of the Association

to its shareholders, the gold producers, and the true relation of the producers in respect of the moneys distributed by the Association, and also the true relation of the producers to the Commonwealth Government in respect of the export of gold and the liability for the moneys received in the distribution as part of income. I extract three passages :—" The formation of the Association as a limited liability company was the outcome of representations made to the Federal Government by delegates from the Australian Gold Producers' Conference, held in Melbourne on 22nd and 23rd January 1919. As a result of those representations, the Commonwealth Government agreed to the removal (subject to certain conditions) of the embargo on the export of new gold for a period of three months —February, March and April. This conditional permit was given on the understanding that a pool or association would be formed, and that all bona fide gold producers in the Commonwealth would be eligible for membership." " Arrangements were made with the Commonwealth Treasury and the Commonwealth Bank by means of which the members' production could be marketed abroad without any alteration of their usual method of selling their gold, and every effort has been, and will continue to be, made to keep banking, shipping, insurances and selling charges within reasonable limits." " The total gold produced by members, as shown by mint certificates lodged up to 30th June (an extension in favour of Western Australian producers and New Guinea was made to 15th July), was 430,346 standard ounces, valued at £1,675,659. Of this quantity £816,000 had been shipped and £616,000 sold. The net premium realized on the gold sold amounted to £122,905 representing 15s. 7d. per standard ounce, or, on the production, 5s. 8½d. per standard ounce produced. After deducting the administration expenses of £2,765 7s. 5d. the directors distributed £120,138 5s. 2d., or equal to 5s. 7d. per ounce produced ; and this sum was divided amongst the various States as follows :—(1) Western Australia, £90,402 5s. 3d. ; (2) Victoria, £15,110 3s. 6d. ; (3) Queensland, 11,741 9s. 5d. ; (4) New South Wales, £1,372 2s. 1d. ; (5) Tasmania, £688 14s. 1d. ; (6) South Australia, £491 1s. 1d. ; (7) Papua, £332 9s. 9d. : £120,138 5s. 2d. This sum is not to be regarded by members as a dividend, but as an additional revenue, from the sale of gold, and members must

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Rich J.

take the premium received into their accounts for the financial period which includes the month of June 1919. A return has been forwarded to the Federal Commissioner of Taxation showing the amount credited to each member as at 30th June."

These circumstances show that, at the time the agreement of 14th August 1919 was made between the Mining Company and the Refining Company, the Mining Company had adopted and was operating as part of its business affairs a scheme by which, in arrangement with the Commonwealth Government, it exported gold produced by it. The exigencies of the situation required that the gold produced by the several producers should lose its identity, but it was throughout, by general mutual arrangement, represented by an exactly equivalent amount. For all business purposes the substitution is immaterial. I agree with the observation of *O'Sullivan* J. in his judgment that the price of £4 4s. 2d. per ounce mentioned in the agreement of 14th August 1919 " did not include the right to premiums obtainable on the gold when exported. This right was retained by the appellant Company." This is the only conclusion consistent with what subsequently took place. The subsequent steps consisting of the Refining Company passing the gold to its bank, the Bank of New South Wales, receiving a certificate showing the proportion belonging to the appellant Company, the passing of the gold to the Mint for coinage, the issue of the mint certificate again ear-marking the gold of the Mining Company, the payment by the Mint to the Bank of New South Wales for the standard value of the gold, the " out-turn " certificate exchanged for the official receipt again ear-marking the Mining Company's gold, the payment of the sovereigns into which the gold had been coined, into the Commonwealth Bank for the Gold Producers' Association, the export by the Association of the gold in whatever form and the allocation of the receipts of the foreign premiums as set out in the directors' report referred to, and finally, the payment to the Mining Company of its share of the distribution, are all of them steps somewhat tortuous, but inseparably connected in the business scheme of operations in the production and realization of the gold. If there be any fact inconsistent with that conclusion, the burden is on the Mining Company to show it. That is the effect of the statute. It is also the effect of the common law,

since the Company and not the Commonwealth must be aware of it.

In the absence of such a fact there are some questions which I have considered, and have been unable to answer favourably to the Company, always assuming honesty and ordinary normal business motives. For instance :—(1) What right has the Mining Company against the Refining Company to receive a single penny of the £142,111 19s. 1d. if the gold was sold outright to the Refining Company without in some way reserving the export premium ? (2) What led all the various companies and banks and the Mint to treat the Mining Company as the true exporter of the gold assuming, as I do, there was no conspiracy to defraud the Government ? (3) If the right to export the gold and get the premium abroad was not reserved by mutual arrangement so as to make the Mining Company —whatever intermediate operations took place—the real exporter of the gold, how could the Mining Company honestly ask for or act on the Government's permission to export ? (4) If there were any prior arrangement by which the Government permitted the Mining Company to dispose of its metals in the way it did and still remain in the eye of the Government the exporting producer of the gold, an arrangement which, if made would be known to and acted on by the Refining Company, how can this be considered otherwise than as a mere incident in or method of carrying on the business of the Mining Company ? (5) And lastly, what explanation consistent with its present contention and with honesty can the Mining Company give of the passage in the directors' report of 22nd August 1919—eight days after the agreement of 14th August 1919—as to the distribution being not dividend but revenue in relation to the Federal Government ?

I, therefore, come to the conclusion that I stated at the outset, that the sum of £142,111 19s. 1d. is part of the business revenue of the taxpayer for the financial period in question. It is due in part, but only in part, to the acts and operations outside Queensland. What is the proper apportionment, having regard to the appropriate legal considerations and business facts, is not within the scope of this appeal. That must be determined by the Court of Review on proper material. It follows that I do not agree with the view on

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Rich J.

the one hand that the whole sum is attributable to Queensland alone or on the other hand that none of it is attributable to Queensland.

I have had the opportunity of reading the answers to the questions contained in my brother *Starke's* judgment, and agree with them.

In my opinion the proper order to be made is that the appeal should be allowed, the order of the Supreme Court discharged, and the case remitted to the Court of Review to proceed in conformity with the judgment of this Court (sec. 55 (8), now sec. 61 (8)).

STARKE J. The facts are fully set forth in the case stated; but those important for the determination of this appeal may be thus summarized :—The appellant is a company incorporated and carrying on business in Queensland, and has branch offices in London, Sydney and Melbourne. It carries on mining operations in Queensland, and there owns and works mines and smelters, from which it produces blister copper, which contains a high percentage of copper, together with a certain amount of gold and silver. The blister copper is forwarded to a refining company (known as the Electrolytic Refining and Smelting Co. of Australia Ltd.), at Port Kembla in New South Wales. It is there refined or converted into electrolytic copper, and the gold and silver separated. The blister copper of the appellant is not separately treated, but is smelted in conjunction with consignments of blister copper received by the Refining Company from other producers in Australia, and the proportion of the appellant's copper is determined by assays, &c., pursuant to the terms of an agreement dated 14th August 1919. It is unnecessary to trace the subsequent dealing with the electrolytic copper or the silver, for this appeal relates only to the gold content of the blister copper. The Refining Company pays the appellant, in Sydney, New South Wales, the sum of £4 4s. 2d. per ounce of gold, and it is admitted that the appellant has accounted for and paid income tax on all sums received by it from the Refining Company in respect of the gold content of the blister copper.

By a proclamation issued during the War, namely, on 14th July 1915, pursuant to a provision of the *Customs Act*, the Government of the Commonwealth prohibited the exportation of gold specie or

bullion from Australia except with the consent of the Treasurer. During the War, gold appreciated in the East and elsewhere, and gold producers in Australia sought to obtain the benefit of this appreciation. A gold producers' association was formed, of which the appellant was a member. Later, in March 1919, it was incorporated in Victoria under the *Companies Act* 1915. One object of the Association was to buy, sell, exchange, transport, dispose of and deal in gold, whether in the form of coin or otherwise, in any part of the world. And by the articles of association (clause 97) the business of the Company was confined exclusively to agency for and on behalf of its members for the sale or disposal of gold bona fide produced by its members, unless an extraordinary resolution should otherwise provide. We have not to consider any such resolution in this case. Before the formation of the Company, negotiations had been opened by the Association with the Treasury for the purpose of obtaining leave to export gold from Australia, and it obtained a consent to the export of the total gold production of its members in the form of specie and bullion. Naturally the appellant took advantage of this arrangement with the Treasury, which was made in the interests of the gold-mining industry (see clause 17 of the case).

The Refining Company, which had paid £4 4s. 2d. per ounce to the appellant for the gold content of its blister copper, cast the gold, when recovered, into bullion, and deposited the bars at the Bank of New South Wales, which weighed, assayed and resmelted the gold, and credited the Refining Company with £3 17s. 10½d. per standard ounce, less charges. The bank deposited the gold at the Mint, and ear-marked a quantity equivalent to that obtained from the appellant as on account of the Mount Morgan Gold Mining Co. The Mint issued a receipt, and, after assay and further treatment of the gold, it delivered to the Bank, in exchange for the receipt, a memorandum of out-turn of gold left for coinage by the Bank on account of the appellant. A duplicate copy of this memorandum was delivered by the Bank to the Refining Company, which passed the document to the appellant, which in its turn delivered the same to the Gold Producers' Association. The Association lodged the memoranda of out-turn of its members with the Treasurer of the Commonwealth, and obtained his sanction to a shipment of gold.

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Starke J.

This sanction was communicated to the Commonwealth Bank of Australia—the Bankers of the Association—and the Bank then shipped specie or bullion in accordance with the sanction of the Treasurer and the instructions given to it by the Association.

During the taxing period in question in this case, 93·5 per centum of the total shipments of gold were sold abroad, and 6·5 per centum was sold under contracts made in Australia (but not in Queensland) for shipment of gold f.o.b. Sydney, Melbourne or Fremantle. Payments for gold were, substantially, all made to the Commonwealth Bank in London. Remittances were made by the Commonwealth Bank to the Gold Producers' Association as occasion required, and the Association also made some profits by means of exchanges and investments of the proceeds of gold in hand from time to time. Ultimately, the net returns were distributed by the Gold Producers' Association amongst its members pro rata to the amount of standard gold available for sale and disposal on account of each member during the period covered by its accounts, subject to certain provisions of its articles of association (arts. 98-100a). The appellant received from the Gold Producers' Association, for the year ending 28th November 1920, the sum of £142,111 19s. 1d. in respect of its share of the profits made on the latter's transactions. Returns of income must be based upon income received during the financial year mentioned in the *Income Tax Acts*, but the Commissioner may accept a return up to the date of the annual balance of the accounts of the taxpayer, which, in the case of the appellant, was 28th November 1920. The question is whether the sum of £142,111 19s. 1d. is wholly or partly assessable to income tax under the provisions of the *Income Tax Acts* 1902-1920 of Queensland. The Supreme Court held that the whole amount is so assessable; and it is from that decision that an appeal has been brought to this Court.

By the *Income Tax Acts* 1902-1920 an income tax is levied in respect of the income of all persons (and "person" includes a company), at various rates specified in the Acts (see sec. 7, sub-sec. 1, clauses (i.), (ii.), (v.); sec. 7, sub-sec. 8). Income is not expressly defined, but "income tax" is the tax on income derived from personal exertion, and the tax on income derived from the proceeds of property (sec. 3). "Income derived from personal exertion" includes "all income

consisting of earnings, salaries," &c., "earned in or derived from Queensland, and all income arising or accruing from any business carried on in Queensland" (sec. 3). "Income derived from the produce of property" includes all income derived in or from Queensland and not derived from personal exertion. "Taxable income" is the "income on which income tax is chargeable after allowing for all deductions and exemptions allowable" under the Act. And there are certain special provisions as to companies. Thus a scale of rates is prescribed on the taxable incomes of all companies, other than certain specified companies and foreign companies, based upon the percentage of profits to capital (see sec. 7, sub-sec. 1, sub-clause (v.)). The assessment of the income of foreign companies, and the rates on the taxable income of those companies is dealt with in sec. 31 and in sec. 7, sub-sec. 1, sub-clauses (viii.) and (ix.). Then, in sec. 7, sub-sec. 8, it is provided that in the case of a Queensland company (that is, a company the head or principal office or the principal place of business of which is in Queensland), carrying on business outside Queensland, tax shall be charged on the profits made in Queensland, and the rate of tax for such case is fixed. I pass by sub-sec. 11 of sec. 7, in relation to mining companies; for that is irrelevant to the questions which now fall for decision. But the provision of sec. 13, sub-sec. 1, sub-clause (i.), must be noted: It enacts that in estimating the income subject to tax, there shall be deducted from the gross income of every person, all losses and outgoings actually incurred in Queensland by him in production of that part of his income which is not exempted from tax. These provisions recognize, in my opinion, in the case of an individual taxpayer, that he may carry on business in Queensland, and also outside Queensland, but that the subject of tax is the income arising or accruing in Queensland from the business there carried on, or, in other words, the income earned or derived in Queensland from the business operations there carried on. The case of companies is still clearer. The taxable income of foreign companies is the profits made on Queensland business, assessed in the manner prescribed by the Act. In the case of a Queensland company carrying on business outside Queensland, the tax is on the profits made in Queensland. But how are the taxable profits of such a company ascertained?

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Starke J.

The rate of tax is fixed by sec. 7, sub-sec. 1, sub-clause (viii.), but not the mode of assessment. Clearly, in my opinion, and apart from special provisions as in sec. 7, sub-sec. 1, sub-clause (iv.), the profits are arrived at in the same way as an individual's income is ascertained, namely, by estimating the income arising or accruing from the business carried on in Queensland, or, in other words, the income earned or derived in Queensland from the business operations there carried on.

This interpretation brings the present case into line with the decisions upon the *Income Tax (Management) Acts* 1912-1914 of New South Wales (*Kirk's Case* (1); *Meeks' Case* (2)), and upon the *Land and Income Tax Assessment Act* 1900 of New Zealand (*Lovell's Case* (3)). The various Acts are not identical in language; but they are sufficiently close in this respect to warrant an application of the principles laid down in the cases mentioned. The income must, as I understand the cases, arise or accrue directly from the operations carried on in Queensland. But the Acts do not contemplate going further back for the purpose of taxation than the locality of the business operations from which profits are directly derived. If contracts form "the essence of the business" (*Lovell's Case* (4)), then, for the purpose of determining the locality from which the income is derived, you look no further back than the place where the contracts are made. But, as was pointed out in substance by my brother *Isaacs* in *Meeks' Case* (5), if the essence of the business is a "whole set of operations" from production to realization, then the place where one operation is performed—be it the extraction of ore from the earth or the making of a contract—cannot be fastened upon as the locality from which the whole income is derived. All these operations "are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages" (*Kirk's Case* (6)).

Now, if we revert to the facts of the present case, we find that the business of the appellant involved a series of transactions, carried

(1) (1900) A.C., 588.
(2) (1915) 19 C.L.R., 568.
(3) (1908) A.C., 46.
(4) (1908) A.C., at p. 51.
(5) (1915) 19 C.L.R., at p. 588.
(6) (1900) A.C., at p. 592.

on partly within and partly outside Queensland. The realization of the commodities produced by the appellant is only the "final stage" of the business transacted—the other stages being equally essential portions of the business itself, and not merely preparatory steps necessary but collateral to the entry upon the appellant's "business" (*Meeks' Case* (1)). But an attempt was made to distinguish the present case on the ground that the sale of gold by the Gold Producers' Association was detached or isolated from the appellant's business, and had no connection with it. The gold produced by the appellant was disposed of to the Refining Company at £4 4s. 2d. per ounce, and that was the end, so it was argued, of the appellant's business. I am unable to agree with this view. The objects for which the Company was established, stated in the memorandum of association, are very numerous, but it will suffice to instance the following: "(c) To carry on the business of auriferous quartz miners"; "(i) to sell and dispose of gold . . . and other produce resulting from the operations of the Company"; "(xa) (2) to enter into agreements or contracts with any company or companies person or persons for the purchasing or selling or smelting refining . . . or otherwise treating all and any ores metals minerals metalliferous metallurgical and mineral products or substances." The essence of the Company's business was the winning of minerals from the earth and their realization at a profit. The arrangement with the Refining Company was such, that should the standard price of gold be increased, or should a bonus be received by the Refining Company, the amount of such increase or bonus so received in respect of the gold content of the appellant Company's blister copper should be paid to the appellant, and, should there be any decrease in the fixed standard price of gold, then the Refining Company was to benefit by paying to the appellant a correspondingly less amount. And it was also stipulated that the Mining Company might, instead of selling the gold content to the Refining Company, require such gold content to be returned to them, and pay the Refining Company sixpence per fine ounce of the gold content of any consignment. (See agreement of 14th August 1919, clause 6, "Gold"). The stipulation makes it plain that the appellant retained

(1) (1915) 19 C.L.R., at p. 586.

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Starke J.

for its own benefit all the value of the gold content of its blister copper beyond the price mentioned in the agreement. The arrangement with the Refining Company was one of convenience; for the price of gold did not, before the War at all events, fluctuate to any marked extent. But so soon as the arrangement was made with the Commonwealth Government for the export of gold, the Refining Company recognized that the appellant was entitled to the benefit of that arrangement. Consequently, upon a deposit of gold with the Royal Mint for the purposes of that arrangement, a quantity equivalent to the gold produced by the appellant, was treated as deposited on account of the appellant. The export and realization of the specie or bullion which took the place of that gold was, in truth, the final stage of the business carried on by the appellant. It was merely incidental to the main purpose of the appellant's business, namely, the realization of its products, and a convenient way of carrying it out. In my opinion, therefore, the learned Judges of the Supreme Court were right in holding that the sum of £142,111 19s. 1d. could not be wholly excluded from taxation in Queensland.

I cannot think, however, that they were right in holding that the whole amount, without apportionment of any kind as between Queensland and places outside Queensland, was taxable income for the purpose of the *Income Tax Acts* 1902-1920 of Queensland; *Kirk's Case* (1) and *Meeks' Case* (2) are, in my opinion, clear authorities to the contrary. If the income has been derived from a series of operations, some of which took place in Queensland and others outside that State, then that income cannot be wholly attributed to one locality, but must, by some method, be apportioned between the several localities. The view of the learned Judges in this connection was that if the Company had, by itself or its servants, refined and marketed its products outside Queensland, apportionment might conceivably have been required, but "where, as here, the refining is done by a contractor for a fixed sum, and where the selling is done by an agent under a contract, the agent being duly remunerated for his services" and (3), the appellant Company had little more to do than to hand over to the agent its document of title, then apportionment

(1) (1900) A.C., 588. (2) (1915) 19 C.L.R., 568.
(3) (1922) S.R. (Q.), at p. 250.

of the net proceeds was both inappropriate and impracticable. But what is the distinction, for the purpose of taxation, between the appellant carrying on part of its business outside Queensland by itself or its servants, and its doing so by its agents? I see none. And further, any such distinction is opposed, in my opinion, to such cases as *Werle & Co.* v. *Colquhoun* (1); *Tischler & Co.* v. *Apthorpe* (2); *Pommery* v. *Apthorpe* (3). Moreover, as my brother *Isaacs* observed in *Meeks' Case* (4), the position is not met by deductions of the agent's charges, because under the *Income Tax Acts*, those deductions apply to taxable income "which, in the gross, is wholly attributable to" Queensland (see *Income Tax Acts*, sec. 3, "gross income," "net income," "taxable income"). "Deductions from a gross sum, in order to arrive at a net sum, are entirely distinct from apportionment of the gross sum itself, or of the net sum when found." The question is, what income was arising or accruing to the appellant from the business operations carried on by it in Queensland? The actual income must be found by "some practical distribution and means of ascertainment." There has been no attempt to make any such apportionment, and the facts set out in the case stated are wholly insufficient for the purpose. The *Income Tax Acts* do not, so far as I have observed, lay down any rule or method of apportionment for cases like the present. The provisions of sec. 31 apply only to foreign companies, and may or may not suggest a method applicable to the facts of the case before the Court. There is no provision, as in the New South Wales Acts 1912-1914, sec. 19, for determining income based upon the proportion which the assets of the business of the State bear to the total assets of the business. The matter is one for the consideration of the Court of Review, with all the assistance it can obtain from further evidence and the arguments of the parties. But, as at present advised, I do not regard the profits earned by the gold-producing company by means of exchanges, and from investments of the proceeds of gold in its hands, as attributable to any business carried on by the appellant in Queensland.

Some stress was laid by the learned counsel for the Commissioner upon sec. 12A (I.), sub-secs. 2 and 3, but the present case does not,

(1) (1888) 20 Q.B.D., 753.
(2) (1885) 52 L.T., 814.
(3) (1886) 56 L.J. Q.B., 155.
(4) (1915) 19 C.L.R., at p. 589.

H. C. OF A. 1922-1923.

MOUNT MORGAN GOLD MINING CO. LTD. v. COMMISSIONER OF INCOME TAX (Q.).

Starke J.

in my opinion, fall within either provision. It appears to me that sub-sec. 2 is confined to personal property situate in Queensland. The application of the section to tangible things would not, in this view, raise any difficulty. As to other personal property, e.g., debts and choses in action, some nice questions regarding their local situation might no doubt arise, but they have been discussed, and very largely determined, in cases relating to probate and other duties (see *Dicey and Keith on Conflict of Laws*, 3rd ed., pp. 341 *et seqq.*). Nor does the present case fall within sub-sec. 3. The section requires, in my opinion, that the goods or articles there referred to, issue in a marketable condition from Queensland. Here the ore was mined in Queensland, but the gold content was recovered by the Refining Company in New South Wales. And, moreover, the gold sold abroad cannot be identified with any gold produced or recovered in Queensland, but is only an equivalent quantity of unidentifiable specie or bullion.

The appeal ought, in my opinion, to be allowed, and the judgment below set aside. The questions ought to be answered as follows:— (1) The said sum of £142,111 19s. 1d. cannot be wholly excluded from the taxable income of the taxpayer within the meaning of the *Income Tax Acts* 1902-1920. (2) No. (3) The said sum should be apportioned as between Queensland and places outside Queensland for the purpose of ascertaining what portion of the said sum was income arising or accruing from the business operations carried on by the appellant in Queensland.

Appeal allowed. Order of Supreme Court discharged. The questions for the opinion of the Court answered as follows:—(1) *The sum of* £142,111 19s. 1*d. cannot be wholly excluded from the taxable income of the taxpayer within the meaning of the Income Tax Acts* 1902-1920; (2) *No*; (3) *The said sum should be apportioned as between Queensland and places outside Queensland for the purpose of ascertaining what portion of the said sum was income arising or accruing from the business operations carried on by the taxpayer in Queensland. Remit case to Court*

of Review to proceed in conformity with this judgment. The respondent to pay the appellant its costs of the special case and of this appeal.

Solicitors for the appellant, *J. F. Fitzgerald & Walsh.*

Solicitors for the respondent, *H. J. Henchman*, Crown Solicitor for Queensland.

J. L. W.

[HIGH COURT OF AUSTRALIA.]

CARTER . . . . . APPELLANT;
DEFENDANT,

AND

HYDE AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Contract—Option to purchase—Consideration paid for option—Death of person to whom option given—Exercise of option by personal representative—Specific performance—Unconditional acceptance—Laches.

The defendant, who was in occupation of a hotel under an agreement with the owner for a lease of it for five years, signed a document by which, in consideration of £1 paid to him by the owner, he placed under offer to the owner the lease, licence, furniture and goodwill of the hotel for a certain sum, and agreed that this offer should not be revoked by him for a period of three months. Before the three months had expired the owner died without having executed any lease of the hotel to the defendant and without having accepted the offer.

Held, that upon the acceptance in writing of the offer within the three months by the personal representatives of the owner there was a valid contract for sale, specific performance of which could be enforced by the personal representatives.