to agree with the learned Judge in his construction of this clause. Cases such as *The Moorcock* (1) suggest that there is implicit in this stipulation a promise that the lessor would maintain control of Bohemia Theatre for the purpose of letting it during the currency of the lease. The plaintiffs have not made this case by their pleading and we cannot adjudicate upon it. Mr. *Hogan* applied for leave to amend, but it is too late at this stage of the case to make such an amendment and his clients must be allowed to commence other proceedings if so advised.

Appeal allowed. Cross-appeal dismissed. Judgment of Dixon A.J. restored.

Solicitor for the appellant, *Albert E. Jones.*

Solicitors for the respondents, *P. J. Ridgeway & Schilling.*

(1) (1889) 14 P.D. 64.

[HIGH COURT OF AUSTRALIA.]

AUSTIN PASTORAL COMPANY OF BRINGAGEE LIMITED . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

Income Tax (Cth.)—Assessment—Sale of station—Discontinuance of business—Proceeds of sale of sheep — Realization of capital — Assessable income — "Trading stock" — "Live-stock used for breeding purposes" — Income Tax Assessment Act 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *secs.* 4, 17.

By sec. 4 of the *Income Tax Assessment Act* 1922-1925 "'Trading stock' means anything produced . . . for purposes of . . . sale." By sec. 17 it is provided that "(1) the proceeds derived from the sale of the whole

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or part of the trading stock of any business . . . (. . . on the sale of a business . . . for the purpose of discontinuing the business) shall be assessable income," and also that " (4) in this section . . . the expression 'trading stock' does not include live-stock which in the opinion of the Commissioner . . . were ordinarily used by the vendor . . . for breeding purposes."

Held, that the mere fact that live-stock produced by a taxpayer for the purpose of being used in his business are eventually sold is not decisive of the question whether such live-stock were produced for the purpose of sale: it must be established that the main or primary purpose of the production of the live-stock was sale, and not use for breeding purposes.

APPEAL from the Federal Commissioner of Taxation.

The Austin Pastoral Co. of Bringagee Ltd. appealed to the High Court from the assessment by the Federal Commissioner of Taxation of its income for the year ending 30th June 1924. The material facts sufficiently appear in the judgment hereunder.

Owen Dixon K.C., *Ham* K.C. and *Stafford*, for the appellant.

Sir Edward Mitchell K.C. and *Keating*, for the respondent.

Cur. adv. vult.

June 12. KNOX C.J. delivered the following written judgment :—

The appellant, for some years before and up to the year 1924, carried on the business of a grazier on Bringagee Station. In March 1924 the station, with the station plant and 15,500 of the sheep depasturing thereon, was sold. Delivery was given in April 1924. The balance of the sheep depasturing on the station, described in the contract of sale as stud sheep of the approximate number of 11,000 and their progeny, remained on the station on agistment in accordance with the provisions of the contract. Of the sheep so remaining the appellant sold 8,732 on or before 30th June 1924. The appellant subsequently sold the balance of the sheep, and went into liquidation.

It is common ground that the whole 24,232 sheep sold on or before 30th June 1924 were sold for the purpose of discontinuing the business of the appellant.

In its return of income derived during the year ending 30th June 1924 the appellant treated the proceeds of sale of the whole of these

sheep as representing realization of capital and not as income. By notice of assessment dated 30th November 1925 the respondent assessed the taxable income of the appellant at £58,822, but this amount was reduced by amended notices of assessment subsequently issued to £43,279. In arriving at this amount the respondent treated 15,558 of the sheep sold as above mentioned as being in his opinion sheep ordinarily used by the vendor for breeding purposes within the meaning of sec. 17 (4) of the *Income Tax Assessment Act* 1922-1924, and the remaining 8,674 as trading stock within the meaning of sec. 17 (1) and not within the exception created by sec. 17 (4) of that Act. To these 8,674 sheep the respondent attributed a sale price of £15,049, and the question for decision on this appeal is whether the assessment should be varied by excluding that sum or some part of it from the taxable income of the appellant. Mr. *Owen Dixon* for the appellant contends that the 8,674 sheep now in question or some of them were not " trading stock " within the meaning of the Act and therefore do not come within the operation of sec. 17. Alternatively he contends that the whole, or at any rate some, of those sheep were sheep ordinarily used by the vendor for breeding purposes, and that the evidence shows that the Deputy Commissioner has not properly applied his mind to the determination of the question whether they were so used.

Particulars of these sheep and of the proceeds of their sale furnished by the respondent are as follows, namely, 400 ewes, £399; 988 weaners, £4,928; 797 culls, £1,088; 95 culls, £151; 2,455 wethers, £2,430; 642 weaners, £635; 85 killers, £84; 1,220 lambs, 208 lambs, £1,901 (£11,551 - £9,650); 1,784 mixed, £3,433: totals—sheep, 8,674; proceeds of sale, £15,049. The sheep depasturing on the station were divided into two flocks—the stud flock and the ordinary flock. All the sheep in these flocks were bred on the station. The normal course of management of the sheep, subject to seasonable conditions and other fortuitous circumstances, was as follows :—Stud flock.—In each year about 5,000 ewes were joined to the rams, about 75 rams being used. The lambs were dropped between March and May, the drop being about 65 per cent to 70 per cent. These lambs were classed when they were two-tooth, about 12 to 15 months old. The ram lambs—none of which were

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ever castrated—were divided into three classes. The best, to the number required, were kept for use on the station. Of the balance those up to a certain standard were sold from time to time as stud or flock rams and those which fell short of that standard were branded on the horn as culls and, after being shorn once or perhaps twice, were sold to butchers. The ewe lambs were divided into two classes—the best were put into the station stud flock and the balance into the station ordinary flock. Ordinarily no ewes which went into the stud flock were ever sold, though it appears from one of the exhibits that on one occasion 479 stud ewes were culled and sold. No explanation was given of this departure from the usual practice, but so far as the evidence goes it appears to have been an isolated transaction. When the stud ewes ceased to be useful for breeding purposes they were destroyed. The ewes in both flocks were joined with the rams when they were about 18 months old. About 3,000 lambs were produced from the stud ewes each year, and it may be taken that the sexes were about equal in numbers. The number of rams sold as stud or flock rams each year varied from about 500 to 700. Ordinary flock.—Normally about 10,000 ewes were joined with the rams each year. The rams, about 200 in number, were supplied from the station stud flock. The ram lambs were castrated and remained in the flock as wethers until about 3 years old when they were sold off shears. The ewe lambs were kept in the ordinary flock and used for breeding purposes. The surplus sheep in this flock were sold from time to time as required to reduce the numbers or to make room for younger sheep. The primary purpose for which the sheep in this flock were used was the production of wool, but sheep were necessarily sold from time to time in order to keep the number within the carrying capacity of the station.

The result of the evidence given as to the sheep specified by the respondent as comprised in the 8,674 which, in his opinion, were trading stock not ordinarily used by the appellant for breeding purposes was as follows :—400 ewes : These were very old ewes from the stud flock. They were sold to the purchaser of the property and would not have been sold but for the sale of the station. 988 weaners : These were ewe weaners the progeny of the stud flock. In the ordinary course if the station had not been sold these would

have been joined with the rams either in the stud flock or in the ordinary flock according to their class in the following November when about 18 months old. 797 culls—95 culls: These were rams culled as unsuitable for breeding purposes; in the ordinary course they would have been branded as culls and, after having been shorn, would have been sold for killing. 2,455 wethers: These were wethers sold to the purchaser of the station as part of the ordinary flock; in the usual course they would have been used for the purpose of producing wool until they were 3 years old and then sold off shears. 642 weaners: These were ewe weaners the progeny of the stud flock and are in the same category as the 988 weaners above mentioned; they were in fact delivered to the purchaser of the station in order to make up the 15,500 sheep to which he was entitled under the contract. 1,220 lambs—208 lambs: These were lambs of both sexes the progeny of the stud flock; they were given in with 1,930 stud ewes sold to the Colonial Spinning and Weaving Co. at 6 guineas each, the lambs at the date of sale being not more than two months old and not yet weaned; the price set against these lambs—£1,901—appears to have been arrived at by reducing the price of the ewes from 6 guineas to 5 guineas each and treating the balance of the total purchase-money as the price paid for the lambs. 1,784 mixed: The sheep represented by this item are not identified by the evidence and neither the number nor the price appears to correspond with any sale of mixed sheep—which I take to mean sheep of mixed sexes; Sir *Edward Mitchell*, however, stated that they were included in the 15,500 sheep sold to Hogan, the purchaser of the station, and that the price was arrived at by taking the average price paid by him for the sheep he bought. If this suggestion be well founded these sheep must, according to the analysis of the sheep sold to Hogan contained in another of the exhibits, have been ewes included in the ordinary station flock. Reading together the explanatory statement attached to the notice of amended assessment and the letter written by direction of the respondent it appears that on the assumption that the 24,232 sheep sold between 7th April and 30th June 1924 were trading stock within the meaning of sec. 17 the respondent has formally expressed the opinion that 15,558 of those sheep were sheep ordinarily used

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by the appellant for breeding purposes and that the proceeds of sale of such sheep, amounting to £48,095, were not part of the assessable income of the appellant. As to the proceeds of sale of these sheep therefore, no question arises for decision on this appeal—the only questions for decision relate to the proceeds of sale—actual or assumed—of the 8,674 sheep specified by the respondent.

The first question is whether any of these sheep are "trading stock" within the meaning of sec. 17 of the Act. That provision was introduced for the purpose of including in the assessable income of a taxpayer money which would not otherwise have been included therein, being in fact a realization of capital. It is not, and I think could not successfully be, contended that any portion of the proceeds of sale of these sheep should, but for the provisions of sec. 17, be included in the assessable income of the appellant. Their inclusion can only be justified on the ground that the sheep sold were "trading stock." That expression is defined by sec. 4 of the Act as meaning "anything produced, manufactured, acquired or purchased for purposes of manufacture, sale or exchange." Extracting from this definition the words appropriate to the subject matter in this case, the question is whether the 8,674 sheep, or any and, if so, which of them, were produced for the purpose of sale or exchange. I do not think that the mere fact that things produced, or manufactured, or acquired by a taxpayer, for the purpose of being used in his business, are eventually sold, is in any way decisive of the question whether such things were produced, &c., for purposes of sale. For instance, if a motor-car were purchased for use in the business the owner might and probably would, at the time of purchase, intend following the ordinary practice to sell that car before it became wholly unsaleable and apply the proceeds towards the purchase of a new car; but if he sold all the assets, including the motor-car, for the purpose of discontinuing the business I do not think it could properly be said that the motor-car was purchased for the purposes of sale or exchange and was therefore "trading stock."

To bring sec. 17 into operation the evidence must, I think, establish that the main or primary purpose of the production, &c., of the things in question was their manufacture, sale or exchange. In

Robinson v. *Federal Commissioner of Taxation* (1) *Rich* J. held that the operation of sec. 17 was limited to " trading stock " within the meaning ascribed to that expression by sec. 4. I agree that this is so ; but, even if I did not, I should think it my duty to act on that view in the absence of any expression of opinion on the question by the Full Court. I agree also in thinking that, assuming live-stock in any given case to be trading stock, the Act does not allow the Court to substitute its opinion for that of the Commissioner, Assistant Commissioner or Deputy Commissioner on the question whether such live-stock were ordinarily used for breeding purposes, though it may be that if the Court were of opinion that the Commissioner had not properly applied his mind to the determination of this question the assessment might be sent back to the Commissioner in order that he might do so. In the present case I do not find it necessary to come to a definite conclusion on this point. The purposes for which sheep were produced on the station of the appellant must be ascertained on a consideration of the normal course of management pursued.

The conclusions I draw from the evidence are as follows : (1) The ewe lambs the progeny of both flocks were produced for the purpose of being used as breeding ewes and not for purposes of sale or exchange ; (2) the ram lambs the progeny of the stud flock were produced for purposes of sale subject to the retention of the number required for use in the station flocks ; (3) the ram lambs the progeny of the ordinary flock were produced for the purpose of growing wool after being castrated and not primarily or mainly for purposes of sale.

I have not overlooked the fact that from time to time, as occasion required, sales were made of both ewes and wethers from the ordinary flock, but the inference I draw from the evidence is that these sheep were sold either because they had reached an age at which their usefulness for breeding or wool-growing purposes might reasonably be expected to deteriorate, or because it was necessary to make room for younger sheep, or because of seasonal conditions or other fortuitous circumstances. In this view of the evidence as to the course of management, I do not think the mere fact that sales

(1) (1927) 39 C.L.R. 297.

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were made from time to time establishes that sheep of these classes were produced for purposes of sale.

Applying these conclusions to the facts proved in respect of the 8,674 sheep now in question, my opinion is that neither the 400 ewes nor the 1,630 ewe weaners nor the 2,455 wethers nor the 85 killers were produced for purposes of sale or exchange, and that these sheep were consequently not "trading stock" within the meaning of sec. 17 of the Act. With regard to the 1,428 lambs, the proper inference to be drawn from the evidence seems to be that one-half were male and one-half female. The 714 assumed to be ewe lambs were not, in my opinion, produced for purposes of sale and are, therefore, not trading stock. The balance should, I think, be considered as having been produced for purposes of sale, and therefore within the operation of sec. 17, in the absence of evidence that any of these particular lambs would be required for use as rams in the station flocks. The respondent has estimated the price paid for these lambs at about 26s. 7d. per head. In fact they were given in with their mothers and could not have been sold separately, but it is admitted that it is probable that a higher price was obtained for the ewes than would have been obtained before the lambs were dropped. Mr. Albert Austin estimates the difference at 10s. per head of the 1,930 ewes sold with the lambs and I accept his evidence. On this estimate the amount realized for the assumed number of ram lambs (714) would be £482 10s. The 797 and 95 cull rams should, I think, be treated as having been produced for purposes of sale and therefore as trading stock. With regard to the 1,784 sheep described as mixed, there is nothing in the evidence to show to what class or sex these sheep belonged, and it is therefore not proved that they were "trading stock." But if Sir *Edward Mitchell's* suggestion referred to above be accepted they were flock ewes and, therefore, in my opinion, not trading stock.

In the result I think the amount of £15,049 assessed as the proceeds of realization of trading stock should be reduced by £13,327 made up as follows :—400 ewes, £399 ; 988 weaners, £4,928 ; 2,455 wethers, £2,430 ; 642 weaners, £635 ; 85 killers, £84 ; 1,784 mixed, £3,433 ; 1,428 lambs, £1,418 (1,901 - 483) : £13,327.

The order is that the assessment be amended accordingly. Costs of this appeal to be paid by respondent.

Order accordingly.

Solicitors for the appellant, *Whiting & Byrne.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

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[HIGH COURT OF AUSTRALIA.]

JONES AND STEAINS . . . . . APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

[No. 1.]

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MELBOURNE, *Mar.* 12, 13, 14.

SYDNEY, *April* 23.

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

War-time Profits Tax—Assessment—Pre-war standard of profits—No pre-war trade year—Option of taxpayer—"Pre-war period," meaning of—Profits of business—Sums withdrawn from banking account—Increase of capital—Deduction from profits where no pre-war trade year—Deduction in respect of partner devoting whole time to business—Whether deduction should be made in computing pre-war profits—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *secs.* 7, 11, 12 (1) (*b*), 15 (9), 16.

Held, by the whole Court, that for the purpose of assessing the war-time profits tax of a firm which had begun business on 31st March 1914 and which had exercised the option conferred by sec. 16 (6) of the *War-time Profits Tax Assessment Act* 1917-1918, the firm was entitled to have its pre-war standard of profits taken to be the amount prescribed by sec. 16 (6) (*a*), which was the greater of the two amounts mentioned.

The first balance-sheet and profit and loss account of the firm was made up as on 31st July 1914.

Held, by *Knox* C.J., *Higgins* and *Starke* JJ. (*Isaacs* and *Gavan Duffy* JJ. dissenting), that the period ending 31st July 1914, and not the period ending