[HIGH COURT OF AUSTRALIA.]

PEEL RIVER LAND AND MINERAL COMPANY (LIMITED) . . . . . } APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1954.

SYDNEY, *Oct.* 12, 15; *Nov.* 8.

Taylor J.

Income Tax (Cth.)—Assessable income—Pastoral business—Land—Grazing—Sale—Proceeds—Resumption—Compensation—"Profits"—Income—Profit-making undertaking or scheme—Sale of parcels of land over long period—Intention of taxpayer—Town allotments—Income Tax Assessment Act 1936-1949, *s.* 26 (*a*)—*Income Tax and Social Services Contribution Assessment Act* 1936-1952, *s.* 26 (*a*).

The appellant objected to the inclusion in its assessment for income tax for the year ended 30th June 1950, of the sum of £3,819 said to be profit which accrued to the appellant during that year upon the sale of approximately 1,844 acres of grazing land to D. for the sum of £7,622, the profit being arrived at by deducting from that sum the amount of approximately £3,688, or two pounds per acre which was treated as the cost price of the land. During the year ended 30th June 1952, some 24,300 acres more of the appellant's grazing land were compulsorily acquired by the State Government and the appellant received £143,821 as compensation therefor. On the basis that the cost of the land to the appellant was two pounds per acre the Federal Taxation Commissioner included the sum of £95,214, as profits in the appellant's assessable income.

The two parcels of grazing land formed part of a tract of land, 313,298 acres in extent, which was acquired by the appellant in 1854 and upon which it conducted an extensive pastoral business. Over a long period the appellant consistently sold town allotments so that townships might develop and settlers be attracted to the district. By 1950, however, the appellant's holding had shrunk to 50,000 acres, the balance having been disposed of, by sale or otherwise, or lost to it, during the intervening period, and upon disposing of the two parcels there remained in the possession of the appellant only, approximately, 26,500 acres of its original holding.

Held (1) that the evidence showed that the appellant at all times wished to retain its grazing land for the purpose of conducting the pastoral business

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thereon and that at no time did it intend to make a business of selling its land for a profit; (2) that the sale of the grazing land was not a transaction which took place in the course of the business of dealing in land, nor was the land acquired for the purpose of profit-making by sale, nor did the profit arise from carrying on or carrying out any profit-making undertaking or scheme; (3) that the systematic sale by the appellant of town allotments as a source of profit did not apply to or affect the grazing land; and therefore (4) that the amounts included by the commissioner were not assessable income of the appellant.

APPEAL.

The facts appear in the judgment hereunder.

Sir *Garfield Barwick* Q.C. and *J. D. O'Meally*, for the appellant.

B. P. Macfarlan Q.C. and *R. J. Ellicott*, for the respondent.

Cur. adv. vult.

Nov. 8.

The following written judgment was delivered by:—

TAYLOR J. These proceedings arise out of two appeals by the company against assessments to income tax in respect of income derived respectively during the years ended 30th June 1950 and 30th June 1952. The objection of the appellant to the first of these assessments is to the inclusion in its assessable income of the sum of £3,819 which is said to be the profit which accrued to the appellant during the relevant year upon the sale of certain land. The land in question consisted of approximately 1,844 acres of grazing land and was sold to one D. W. Wright for the sum of £7,622 whilst the profit on the sale was arrived at by deducting from this sum the amount of approximately £3,688, or two pounds per acre, which was treated as the cost price of the land, together with certain incidental charges. I should add that the amount of £3,819 was included by the appellant in its return of income for that year, but its contention now is that the profit was not an income receipt, nor a profit which arose from the sale of property acquired for the purpose of profit-making by sale or from the carrying on or carrying out of any profit-making undertaking or scheme.

In the second year under review some 24,300 acres of the appellant's grazing land were acquired by the Government of the State of New South Wales pursuant to the *Closer Settlement (Amendment) Act* 1907, as amended, and the appellant received the sum of £143,821 as compensation therefor. On the basis that the cost of the land to the appellant was two pounds per acre the profit on the resumption was some £95,214 and in assessing the

appellant for the year in question the respondent included this amount in the appellant's assessable income. The objection taken by the appellant to this assessment is similar to that taken to the assessment for the earlier year. Other objections were taken in respect of both years but they were not proceeded with and the only matters which were raised on these appeals were those to which I have briefly referred.

The two parcels of land upon the disposal of which the appellant is said to have made a profit in the nature of assessable income were portions of a tract of land, 313,298 acres in extent, which was acquired by the appellant in January 1854. By the beginning of the year 1950 the extent of the company's holding had shrunk to approximately 50,000 acres, the balance of the original holding having been disposed of or lost to it during the intervening period of nearly one hundred years. After the completion of the dealings in the years under review the appellant was left with some 26,500 acres of its original holding. It readily appears, therefore, that the question whether these two dealings resulted in a profit to the company in the nature of assessable income requires consideration of the company's activities over a very long period.

The appellant's original holding was acquired by it by conveyance dated 20th January 1854 from the Australian Agricultural Co. which was incorporated in 1824 by Royal Charter pursuant to an Act of the United Kingdom (5 Geo. IV. c. 86) intituled: "An Act for granting certain powers or authorities to a Company, to be incorporated by Charter, to be called 'The Australian Agricultural Company', for the Cultivation and Improvement of Waste Lands in the Colony of New South Wales and for other purposes relating thereto". The holding was part of a Royal Grant of one million acres made to this company on 20th November 1847. It does not appear from the evidence whether or not the grant was made upon conditions or after the giving of specific undertakings by the company but there is little doubt that the fundamental purpose of the grant was to enable the land to be used for the production of fine quality wool and that at the time of the grant it was the intention of the company to use it primarily for this purpose. Discussions concerning the making of the grant extended over many years, but, apparently, at an early stage it had been decided that a grant should be made for this purpose. This appears from a letter of instructions of 18th May 1825 addressed by the Secretary of State for the Colonies to the Governor of New South Wales, Major General Sir Thomas Brisbane. The letter specified that a grant of one million acres of land should

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be made to the company subject to such conditions as should thereafter be determined, that the agents of the company should be permitted (subject to the public convenience and not interfering with private rights) to select the situation of the proposed grant and that no rival incorporation or joint stock company with similar objects should be established in New South Wales for twenty years. The primary object of the company was stated to be the production of fine merino wool as an article of export to Great Britain and it appears from the letter that the company proposed to purchase in the colony such flocks of sheep as could be procured of good quality and to increase and improve them " by importations of the purest race from Spain and the Electoral Dominions of the King of Saxony ". The letter also stated that the company was to " engage to erect suitable houses and other buildings upon the lands granted to it ", to " send out free and experienced persons as agents and overseers ", and to " employ convicts under their superintendence and direction ". It was also stipulated that the shepherds and labouring men should consist principally of convicts and, on this basis, it was calculated that about 1,400 persons would be eventually employed and that that would diminish Government expenditure " to the extent of £30,800 annually ". Other engagements to be undertaken by the company were as follows :—

" 15. To send from Europe persons skilled in the management of merino sheep and in the mode of assorting and preparing the fleeces for the London market. To afford also facilities to the diffusion of this useful knowledge throughout the Colony.

16. To promote (subordinate to the raising of fine wool) the cultivation of the olive, vine, and such productions as may appear best adapted to the climate and soil, and with this view to send from France, Italy, or Germany some families skilled in the management of olive grounds and vineyards.

17. To encourage and assist, as far as may be found practicable, the emigration of useful settlers and female servants.

18. To promote to the utmost of their power the system of rural industry directed by His Majesty's Government (on the recommendation of the Commissioner of Inquiry), as being best adapted to the state and circumstances of the Colony, and to diffuse the knowledge and practice of it amongst all classes of the inhabitants ".

The actual grant, however, was not made until 1847 and, as I have already said, it does not appear whether these or any like conditions were annexed to the grant or made the subject of formal undertakings on the part of the company. But from the evidence

there is little doubt that the company's purposes were broadly as appears from the earlier part of the letter.

The parcel of 313,298 acres which the appellant subsequently acquired from this company is situated between the Peel River and what was at that time called the Turi Range. It is bounded on the north and the east by the Peel River for a distance of about sixty miles between Nundle in the south-east and a point west of Moree in the north-west. Tamworth is situated on the Peel River between these two places. The reason for its disposal by the Australian Agricultural Co. and its acquisition by the appellant lies in the fact that in 1852 it was ascertained that gold existed in the alluvial soil of the Peel River. In a circular published in December of that year to the members of the former company this fact was stated and the directors intimated that investigation justified the conclusion that the property was auriferous to a great extent. The circular pointed out that the terms of the company's charter did not permit it to work the minerals on the property on its own account, and after discussing the merits and demerits of selling the property to persons disposed to embark capital on a mining venture, it recommended to the shareholders that a new company "with the support of the present shareholders" and with adequate powers should be formed for the purpose of purchasing the property and "developing all its resources, whether mineral or otherwise". The proposal recommended was that a company known as the Peel River Land & Mineral Co. should be formed with a capital of £600,000, divided into shares of five pounds each, and that the shareholders in the Australian Agricultural Co. should be given the right to take up ten shares in the new company for every £100 share held in the old company. The adoption of this proposal in January 1853 resulted in the formation of the appellant company. It was formed by deed of settlement dated 4th February 1853 and on 4th October 1856 it was incorporated in England under the *Joint Stock Companies Act* 1856 with limited liability. At a comparatively recent date it altered the form of its constitution by substituting a memorandum and articles of association for the deed of settlement, and the order confirming this alteration was registered with the Registrar of Joint Stock Companies on 28th January 1920.

Clause (1) of the deed of settlement provided that the several persons parties thereto, and the several other persons who should thereafter become proprietors, should, while holding shares in the capital of the company, be and continue until it should be dissolved, a company under the name or style of the Peel River Land &

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Mineral Co. " for the purpose of purchasing and holding lands in New South Wales, and of cultivating, letting, and selling the same and of working gold and other mines and of conducting mineral operations, and of smelting and the disposing of gold dust, ore, and minerals, and the produce thereof, and of granting licences and privileges for working gold and other mines and minerals, and of doing and performing all such matters and things as are generally done by persons or companies engaged in business of the like, and as extensive a nature, and as may be deemed advisable or desirable for effectually carrying into effect the objects and purposes aforesaid ". Counsel for the respondent drew attention to the fact —and in view of the subsequent history of the appellant it should perhaps be mentioned—that the carrying on of a pastoral business was not specifically mentioned as one of the objects of the company. There was, however, nothing, as far as I can see, in the circumstances as they existed at the time the appellant was formed and the subject land was acquired by it to indicate that the land had been acquired for the express purpose of profit-making by sale. On the contrary, the contents of the circular published to the shareholders of the Australian Agricultural Co., so far as they throw any light on the problem, would seem to suggest that this was not a purpose of the purchase. Having discussed the difficulties involved in the other possible courses which might have been pursued by the company the circular went on to say: " Assuming that the shareholders in The Australian Agricultural Company will readily take the same interest in the new company that they now hold in the present company, the embarrassing question of valuation will be overcome; they will in fact buy from themselves, and if it should turn out that the valuation exceeds or falls short of what ultimate results may give, they will still be in the same position in all essentials that they now are; *they will possess the same properties as they do now, with the advantage of their resources in all respects being fully developed*, and by a process both practicable and simple, and without the uncomfortable feeling that might hereafter arise if a sale out-right could be effected, that they had parted with their property for less than it was worth ". The italicized passage was, I should think, intended to convey that no purpose would be abandoned by the adoption of the proposal, and that, on the contrary, its adoption would enable a wider policy of development to be followed.

There is nothing to indicate, and it is not suggested, that the adoption in 1920 of a new form of constitution resulted from any desire on the part of the company to make any radical change in

the nature of its business, nor is it suggested that it produced any such result. The only observation which is made by the respondent is that the carrying on of a pastoral business appears only as a subsidiary object.

The principal foundations of the respondent's case, however, are to be found in the facts proved in evidence. The evidence shows, it is said, that the appellant engaged in "multiform" business activities one of which was dealing in land. Indeed the claim is made that the evidence establishes that as early as 1854 the appellant embarked on a policy of selling and leasing portions of its land. Town lots were sold so that townships might develop and settlers be attracted to the district and there was evidence that the company consistently sold land for this purpose. Further, it appears that until 1949, profits on sales of land appeared in the revenue accounts of the appellant and that later, in several years, the profits were returned as assessable income and income tax paid thereon. Before going to the facts of the case it is proper to observe that the fact that the appellant has in the course of a century sold substantial portions of the land which it acquired upon its formation does not necessarily establish that the appellant was formed for the purpose of engaging in these dealings or that, when formed, it engaged in these dealings as part of its business operations. As one of several circumstances it may, of course, be of considerable probative value, but standing alone it is of little value. It may, of course, be suggested that if in 1854 the appellant had been able to foresee the development in New South Wales, which in fact took place during the next hundred years, it may well have realized that at times during that period it would become advisable for it to dispose of some of its land or that future circumstances would not permit it to retain the whole of its original holding indefinitely. But even if it realized that such a state of affairs must at some future time inevitably arise that does not mean that it acquired its lands or any portion of it for profit-making by sale. Probably the truth of the matter is that the company, at that time, had no immediate intention of selling any portion of its lands and intended to exploit their mineral wealth and other resources for an indefinite period, though it may have realized that if and as the colony developed future circumstances might well militate against it continuing to retain, in its entirety, a holding of such magnitude. But those circumstances were problematical, and, if they were bound to arise, it would be at some future time the remoteness of which could then have been only a matter of speculation.

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During 1855 the prospect of recovering gold from the appellant's land was a live matter, but in that year it was found that the deposits were so greatly dispersed and that the labour costs involved were so great that its recovery would be unprofitable. In the annual report of that year the directors expressed their disappointment at the outcome of the further investigations which had been made, and turned " with satisfaction to the pastoral resources " of the property and stated that they " had every reason to feel satisfied that the Peel River estate is capable of yielding a revenue, quite independent of all mining prospects ". They mentioned the fact that thirteen months before some 44,000 sheep had been purchased from the Australian Agricultural Co. and that since that purchase some pure merino rams and ewes from Saxony, and, by way of experiment, a few ewes from Mecklenburg, had been despatched to the property. That the pastoral prospects of the property had not been lost sight of in the excitement of the discovery of gold is apparent from a perusal of the first annual report made in February 1854. A perusal of this report indicates that the sheep acquired from the Australian Agricultural Co. were those depasturing on the property at the time of its purchase by the appellant. The sheep had been acquired, it was said, because, although the mineral resources of the Peel River estate " had been the great and moving cause " of the appellant's creation, the directors judged it right to preserve, as a source of income, the pastoral undertaking which had already been established by the Australian Agricultural Co. on the property which was said to be of " high value as a pastoral district ".

From that time on the appellant has conducted an extensive pastoral business on the subject property and its main source of income has been this business. From 44,000 sheep at the beginning of 1854 its flocks rose over the years to over 100,000 in 1868 and from then until 1910, with the exception of one year, they were substantially higher. The peak year appears to have been 1901 when they numbered over 170,000. Since 1910 their numbers have declined and in 1950 they numbered no more than 17,407. Over the years the property has also carried cattle. In 1854 there were 1,500 head on the property and their numbers were steadily increased. By 1873 their numbers exceeded 6,000 and in 1895 they numbered over 9,000. Since then their numbers have decreased and in 1950 there were about 2,500 head on the property.

During the period covered by this brief analysis the area of the appellant's holding decreased considerably and it is of some importance to refer to the manner in which this occurred. Substantial

decreases occurred in 1909 when an area of nearly 100,000 acres was resumed by the Government of New South Wales, and in 1912 when the appellant sold nearly 50,000 acres. Thereafter in 1926, 1927, 1930, 1935 and 1936 respectively comparatively large portions were sold totalling approximately 80,000 acres, whilst in 1938 another area of nearly 18,000 acres was resumed. Before referring in any detail to the circumstances in which these dealings took place, however, it is desirable to make some examination of the circumstances in which sales were made by the appellant from the earliest days of its activities. There were, as already appears, many sales of land by the appellant and such an examination is necessary in order to determine whether the correct inference from the facts is that the company engaged, or intended to engage, generally in the selling of its lands for profit-making, or whether, on the other hand, no such inference should be drawn. Such an examination establishes, I think, that the sales which were made fall into three distinct categories according to the nature of the land sold and that, in the main, the reasons which prompted the sales in any one category had no application to either of the others.

It will be remembered that three townships were situated on the Peel River along the eastern and northern boundaries of the appellant's holding. Another township, Goonoo Goonoo, was situated in the vicinity of the western boundary and towards its southern end. To the south of this last-mentioned township the main northern road crossed the southern boundary of the appellant's holding and proceeded across it to Tamworth. Some twenty years after the appellant acquired the holding 142 acres of it were resumed for the extension of the northern railway line. This line was constructed about the year 1878 and it traversed the north-western section of the holding. The nature of the holding itself was the subject of oral evidence. A large portion of the very substantial acreage which lies north of a line drawn easterly across the holding from Duri on the western boundary was said to be suitable, primarily, for farming whilst that to the south of that line with the exception of river flats, was classed as grazing country. None of the northern portion is now owned by the appellants and the parcels of land with which the present appeals are concerned are in the southern portion. With these briefly stated characteristics of the holding in mind it is possible to classify the sales of land which have taken place from time to time. They are the sales of town (and suburban) allotments, agricultural holdings and grazing land and I should, at once, say that no grazing land was sold by the appellant for

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many years, nor, with the exception of a small parcel of six acres, was any agricultural land disposed of before 1896.

Town Allotments : Counsel for the respondent emphasized that as early as 1854 the company had embarked on a policy of selling town allotments. In that year an area of fourteen acres was sold as town allotments and in nearly every year in the last century there were sales of small areas for this purpose. By the year 1896 these sales aggregated approximately 420 acres, or about .13 per cent of the appellant's holding. In the report to the first annual meeting of 1853 the shareholders were informed that every effort would be made to secure the profitable development of all the resources of the property " amongst which must not be omitted the enhanced value of land arising from the establishment of new townships and the sale of allotments in the very immediate vicinity as well as in that of Tamworth, the chief town on the estate ". It is not without interest to note that in the same report the directors informed the shareholders that they had been informed by the general superintendent that in his opinion the property was capable of carrying 102,000 sheep and that no opportunity would be allowed to escape of turning the pastoral capabilities of the estate to the best advantage. In the following year the directors reported that " as bearing on the question of labour and of inducements to attract population and settlers " the three townships of Tamworth, Goonoo Goonoo and Nundle had been established in " most eligible positions ", that they had " found favour with the colonial settler " and went on to say that during the past year at Tamworth ten and a half acres had been sold at the average rate of twenty-seven pounds per acre, whilst at Nundle three and a quarter acres had been sold at the average rate of £52 3s. 0d. per acre. A perusal of the reports of the directors in subsequent years clearly indicates that it was thought that the expanding requirements of Tamworth, Nundle and Goonoo Goonoo would create a demand for adjacent town allotments and that the appellant was prepared to satisfy this demand. Although its policy with respect to this matter resulted in profit-making it was not a policy dictated by any desire to sell its land generally for profit. It was a demand which, in the circumstances, could not long have been resisted and it was in the appellant's interest that neighbouring townships should be permitted to expand. Accepting these propositions the appellant was by no means loath to make a profit on the sale of land of this class, whilst at the same time retaining the grazing lands upon which depended the extensive business to which it had committed itself. I find it

unnecessary to determine whether or not profits made on the sale of town allotments constituted profits of an income character to the appellant for, even if they did, a finding to that effect would, in view of the other facts of the case, throw no light on the company's intentions with respect to its pastoral business and the lands involved in it.

Agricultural land: As early as 1855 the directors reported that the company's interest would be best promoted by the lease of agricultural lands, if practicable, and the sale of town allotments, "looking upon the estate as combining the pastoral with the agricultural and commercial interests, the pastoral requiring an extensive and undisturbed domain, the agricultural, the use of suitable lands and the commercial, small town lots 'as sites for houses, stores and warehouses'". With the exception already referred to no agricultural land was disposed of until 1897 when the company commenced to lease agricultural lands to farmers. In that year 251 acres were leased with options of purchase. By 1907 over 50,000 acres had been leased with options of purchase and from year to year some of the land under lease was converted to freehold by the exercise of lessees' options. In 1911 over 48,000 acres were under lease but in the following year only 3,000 acres were held on this tenure. The difference of 45,000 acres represented the amount of leasehold lands sold during 1912 and by 1921 the appellant had disposed of the balance of the leased lands. The reason for the extensive sales in 1912 is not far to seek. On 17th November 1910 the first land tax legislation of the Commonwealth became law and there is evidence that the appellant made endeavours to ensure that tax would not be attracted in respect of the leased lands. Its efforts in this direction were, however, fruitless and it is reasonable to conclude that the substantial sales of agricultural lands in 1912 were decided upon in order to relieve the appellant of this liability. In a letter of 19th December 1911 to the chairman of the appellant company the General Superintendent referred to the endeavours which had been made and estimated that the tax involved was £8,000 per annum on land producing an annual rental return of £14,000. In these circumstances he said: "It now remains to put into shape some scheme which the lessees may be induced to fall in with, for converting their position from that of lessees at a fixed rent with option of purchase, into that of owners of the land subject to a charge for the unpaid purchase money". The circumstances of these sales indicate to my mind that they were not made in the course of a business of land dealing

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and the fact that they occurred does not assist the respondent's contentions in the present case.

The fact that the appellant had, at an earlier stage—and as the demand for such land developed—adopted the policy of leasing land which was suitable, primarily, for agricultural purposes, and of granting options of purchase to the lessees, does not carry the matter any further. The appellant did not desire or intend to farm this land and its use solely for grazing purposes could not have continued indefinitely. In the circumstances, I am satisfied that the adoption of this policy was not inconsistent with a desire on the part of the appellant to retain its grazing lands for the purposes of its pastoral business.

Grazing land: In 1909 an area of 99,618 acres was resumed by the Government of New South Wales under the *Closer Settlement Act* then in force. This resumption was preceded by correspondence between the appellant and representatives of the Government, a perusal of which clearly indicates that the company was most reluctant to part with any of its grazing land. As early as January 1905 the appellant was informed by letter that the Government would be glad " to receive an offer of the Peel River estate for purposes of closer settlement ". After considerable correspondence the appellant, on 10th August 1905, informed the Government that it would be willing to dispose of 10,000 acres in the following January " with an additional section at some future time ". I have no doubt that this offer was made in an attempt to avoid or postpone the resumption of a larger portion of the holding. The offer was, however, regarded as quite inadequate to meet the demand for land in the district and the appellant, under a threat that it was the " fixed determination of the Government to acquire this estate ", was pressed to make a more substantial offer. At a later stage, November 1906, and after considerable further correspondence, the company made an offer to sell to the Government some 75,800 acres. Yet more correspondence passed between the parties as a result of which this offer was withdrawn and in due course the resumption above referred to was effected. There is in my mind no doubt that the company desired to retain this land for its grazing purposes; the correspondence is eloquent on this point and clearly indicates the desire of the company to pursue its pastoral business undisturbed.

From later correspondence, commencing in 1919 and 1920 and extending intermittently for some ten years, it appears beyond doubt that the threat of resumption for the purposes of closer

settlement was a very real and ever present one, and it is clear that the sales in 1926, 1927 and 1930 again proceeded from a desire to avoid or postpone dismemberment of the balance of the holding then retained by the appellant. That the same threat continued from 1930 onwards is apparent from the documents in evidence and, indeed, in 1938 17,844 acres were resumed, again for purposes of closer settlement. The contemporaneous documents make it transparently clear that the appellant was most anxious to retain as much land as possible for its grazing business. It was most reluctant to part with any of its grazing land and the sales which it had in fact made were intended to appease the ever-growing and insistent demands for land in the district and to ensure, for as long as possible, the appellant's tenure of the balance.

The parcel of 1,843 acres, the subject of the sale to D. W. Wright in 1950, and the parcel of 24,304 acres, the subject of the resumption for closer settlement purposes in 1952, were in the very heart of the grazing land theretofore retained by the appellant and there is no doubt that if it had been left to its own devices, it would not have parted with either parcel. On 10th November 1944 the company was informed by letter from the Chairman of the Closer Settlement Advisory Board that in furtherance of the Government's proposals to satisfy the demand for soldier settlement the Minister for Lands had authorized the inspection of certain estates in order to ascertain their suitability for that purpose. The appellant's property, it was said, was included in those which were under consideration. Subsequently, on 5th July 1945, a proclamation was made pursuant to s. 4 of the *Closer Settlement (Amendment) Act* 1907 announcing that the Lieutenant-Governor proposed " to consider the advisableness of acquiring " a parcel of some 50,000 acres of the appellant's property. Subsequent correspondence and discussions resulted in the appellant undertaking, on 14th June 1946, to sub-divide an area of about 17,000 acres of its property for the purpose of settling returned servicemen on the land. The conditions upon which the company was prepared to make this land available are set out in the letter of that date to the Chairman of the Board, the appellant intimating that " in view of the company making this voluntary sub-division, it would expect some recognition from the Government and would like to be assured that the remaining area of ' Goonoo Goonoo ' would not be disturbed for a reasonable period ". This proposal was rejected and thereafter the company made application for permission to deal with applications, which it then held, from returned servicemen for parcels

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of land comprised in the appellant's property. It was as a result of the later negotiations that the appellant was permitted to make the sale to Wright who was a returned serviceman and subsequently this sale was followed by the resumption of 24,304 acres.

Although somewhat lengthy, the above observations are but a brief resume of the circumstances in which the company's land dealings took place, and before stating my final conclusions I should add that whatever may have been the company's policy with respect to the sale of town allotments which were, of course, on the very fringes of its holding, or with respect to land primarily suitable for agriculture, consideration of the material in evidence has left me with the overwhelming conviction that the appellant at all times wished to retain its grazing land for the purpose of conducting its pastoral business and that at no time during the whole course of its history did it intend to make a business of reselling it for profit. Indeed, at no time did it contemplate with equanimity the prospect of parting with any of it.

The taxation history of the appellant presents some curious aspects. On many occasions, at least, substantial parts of the purchase money obtained on the sale of land were brought to account as revenue in the appellant's books. No part of these profits were, however, returned as assessable income under Commonwealth legislation between 1915 and 1925 inclusive, but in respect of the year ended 30th June 1926 the appellant included the profit on sales of land made during that year. Thereupon its assessments for the previous eleven years are said to have been amended to include profits from this source and thereafter from 1929 to 1932 inclusive profits accruing from this source were returned as part of its assessable income. In 1933 no such profit was made and in 1934 and 1935 over-all losses were made. Thereafter until 1944 profits of this character were disclosed but not included in the appellant's assessable income but, again, in 1945, 1946 and 1947 they were included as part of the appellant's assessable income. No such profits were made in the following two years and in respect of the year ended 30th June 1950—the first year under review in these appeals—the profit was again returned as assessable income. No explanation is given why the attitude of the appellant was subject to such constant change and the picture which these facts afford is one of considerable confusion. Nevertheless, the appellant's rights in respect of the years under review are by no means concluded by the fact that it has on other occasions taken up an inconsistent attitude. This attitude on other occasions may constitute, in the

circumstances of this case, some meagre evidence of an admission that it was engaged in the business of land dealing, but it must, I think, be disregarded if the evidence concerning the intentions and activities of the appellant clearly point in the other direction. In my opinion the evidence clearly establishes that the sale which took place in the first year under review was not a transaction which took place in the course of the business of dealing in land. Nor was the subject land acquired for the purpose of profit-making by sale, nor did the profit arise from the carrying on or carrying out of any profit-making undertaking or scheme. Whilst there may be something to be said for the proposition that the systematic sale of town allotments as a source of profit was envisaged from the very beginning of the appellant's activities there is no doubt upon the evidence that no such plan was entertained with respect to the grazing land. Nor was the grazing land ever committed to a business of land dealing or to the carrying on or carrying out of any profit-making undertaking or scheme. The appellant parted reluctantly with those portions of its grazing lands which it sold or which were taken from it and in spite of its overwhelming desire to devote the whole of them to its pastoral business.

Counsel for the respondent was disposed to contend that if the appellant devoted some particular part of its holding to land dealing, then any profit realized upon a sale of any other portion of it should be regarded as assessable income, but I do not accept this proposition. The appellant's original holding was a vast area of nearly 500 square miles. It embraced essentially grazing and agricultural lands and impinged on townships, which, it was probable, would expand from time to time. In these circumstances it is obvious that the company's intentions with respect to particular areas of it may well have differed. Those areas on the fringes of the holding and adjacent to growing townships may, perhaps, have been committed from the earliest days to a land-dealing venture. But to go further and say that a profit made on the sale of any other portion of the holding must therefore partake of the character of income would be to ignore the realities of the matter. The appellant's purposes with respect to its grazing land were vastly different. The pastoral business was the appellant's fundamental activity ; its grazing lands were committed to its pastoral business indefinitely and it had no intentions of committing them to a policy of land-dealing. The sale of town allotments was merely incidental to its primary business and in no way colours the sale of grazing land which, over the years, inevitably took place. These considerations are completely repugnant to the contention that the

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disputed items of profit in both years are of an income character and for the reasons given the appeals should be allowed.

Declare that the amounts of £3,819 *and* £95,214, *which were included as assessable income in the assessment of* 7*th May* 1951 *and the amended assessment of* 13*th July* 1953 *respectively, were not assessable income of the appellant and order that the said assessment and amended assessment be amended accordingly. Further order that the respondent pay to the appellant its costs of and incidental to these appeals.*

Solicitors for the appellant, *Stephen, Jaques & Stephen* for *Thomas & Hogue*, Quirindi.

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.