

REASONS FOR JUDGMENT

COURT: High Court of Australia

PARTIES: Smithfield Pastoral Company Pty. Limited

v.

The Commissioner of Taxation of the  
Commonwealth of Australia

NATURE OF  
PROCEEDINGS:

Appeals to High Court from decisions of  
the Commissioner disallowing objections  
to assessments which included in the  
assessable income of the taxpayer  
company for the years of income ended  
30th June, 1957, 1961, 1962 and 1963  
pursuant to S.26(a) of the Income Tax  
and Social Services Contribution  
Assessment Act, the proceeds of sale of  
certain land.

MEMBER OF BENCH: Owen, J.

ORDER OF COURT: Assessments set aside.  
Appeals allowed with costs.

DATE OF JUDGMENT: 26th April, 1966 at Sydney.

86-90

SMITHFIELD PASTORAL COMPANY PTY. LIMITED

v.

THE COMMISSIONER OF TAXATION  
OF THE COMMONWEALTH OF AUSTRALIA

JUDGMENT

OWEN J.

The appellant Company, which I shall call the Company, was formed in September 1955 to acquire certain land in the neighbourhood of the small township of Smithfield and carry on agricultural and pastoral pursuits thereon. Smithfield is 15 or 20 miles north of Adelaide on the main North Road, and about two miles north of what is now the town of Elizabeth. The Company's Chairman and Managing Director was and still is Sir Ellerton Becker, then Mr. Becker, and for the sake of brevity I will refer to him as Becker. There were two other directors, both of whom were close friends of his, a Mr. Pickering, a well-known lawyer and Queen's Counsel of Adelaide and a Mr. Haseldine, an accountant practising in that city. Becker held the majority of the shares in the Company, the only other shareholders being Pickering and Haseldine each of whom held a small parcel in trust for Becker. Between October 1955 and June 1957 the Company purchased from various vendors a number of sections of land in the Smithfield neighbourhood at prices ranging from £102.10.0 to £156 per acre, the total cost of the purchases being something over £149,000. The lands purchased amounted in all to about 1,200 acres and I will call them the Smithfield land. In June 1957 the Company sold one section of it containing 62 acres to the Housing Trust of South Australia (the Trust) for £300 per acre. In February 1960 it sold to the Trust yet another area of 144 acres, some of it at £500 per acre and the balance at £800 per acre, and in August 1960 it sold to the Trust the balance of the land, about 1,060 acres, at prices ranging from £450 to £950 per acre. These sales

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totalled in all about £853,000, the purchase moneys being payable over varying periods of years. In assessing the Company to tax for each of the years ended 30th June, 1957, 1961, 1962 and 1963 the Commissioner treated part of the purchase money received by the Company in that year as being subject to tax, taking the view that the land had been bought for the purpose of resale at a profit. If this be right, it followed that in some of the tax years under review the Company had incurred a further liability to tax under Division 7 of Part III of the Act and the Commissioner issued assessments accordingly. The Company's case is that the land was not purchased for the purpose of resale at a profit but for pastoral and agricultural purposes and with a view to the ultimate establishment on it of a sheep stud. If this was its purpose or at least its dominant purpose, it is conceded that the assessments cannot stand. If, however, the Company fails to establish this, questions arise as to the manner in which the Commissioner has allocated to the years in question what he regards as the taxable profit arising from the sales.

Since Becker has, throughout the Company's existence, directed its activities, counsel on both sides agreed - and rightly agreed - that it was relevant to consider a number of land transactions with which he or companies with which he has been associated have been concerned over a long period of time. Unfortunately both Pickering and Haseldine are dead and I have not had the advantage of hearing evidence from them relating to the Company's reasons for buying and later reselling the Smithfield land. Its case therefore depends in large measure upon the evidence of Becker who said emphatically that the aim of buying the Smithfield land was to conduct pastoral and agricultural activities on it and to establish on it a sheep stud when the land was sufficiently improved. I formed a favourable view of Becker as a witness and, notwithstanding

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criticisms that were made of some parts of his evidence, I am satisfied that he was telling the truth, although on some matters which occurred long ago his recollection was naturally vague. He is a man who has had a remarkable career and I have no doubt at all that for many years past he has been intensely interested in such matters as pasture improvement and pasture grasses, animal nutrition and husbandry and, above all, the breeding of thoroughbred horses, stud sheep and stud cattle. His interest in these subjects is, to my mind, of great importance in determining the vital issue in these appeals.

Becker started in life as an apprentice to a manufacturing jeweller and later became interested in music. He was for some time the manager of a "musical warehouse" in Adelaide and later founded and for some years conducted a College of Music which he later sold. In 1930 his pastoral and agricultural activities began and in the result companies founded and directed by him now conduct a large merino stud and a cattle stud on a property called Brewarrana near Narrandera in New South Wales, a Hereford stud on a property called Bendooley in the Berrima District in New South Wales and a cattle stud and a sheep stud on a property in the United Kingdom.

In support of the Company's case a Mr. Auld was also called. He was appointed the Company's manager and stud master at the end of 1958 and thereafter he managed its merino stud which was then being established on the Smithfield land. He is now a director of the Company and is the general manager of the studs in New South Wales and the United Kingdom which I have mentioned. I will refer again to his evidence, but say at once that I was greatly impressed by him as a witness and accept him as a truthful and, on matters of expert opinion, as an honest and well-qualified expert. His evidence was mainly directed to sheep values, in particular to the value of

the sheep on the Smithfield land at relevant times, to the suitability of that country for sheep stud purposes and to describing the work done and the improvements made to the Smithfield land while he was in charge there. In many respects his evidence conflicted with that given by a witness called on behalf of the Commissioner, a Mr. Cuthbertson, and where there is such a conflict I accept Auld's evidence without hesitation.

Before setting out in some detail the purchases and subsequent sales by the Company of the Smithfield land and Becker's other ventures, it is convenient to refer to developments, which, during the 1950s and 1960s, served to increase the values of land in the Hundred of Munno Para in which Smithfield lies, quite apart from the increase in land values generally which occurred in Australia in the post-war years. The country in that Hundred has long been, and most of it still is, used for agricultural and pastoral purposes and for many years several well-known British breed sheep studs have been established in and around Angle Vale which lies three or four miles to the north-west of Smithfield. Between Angle Vale and Smithfield there is a large area of land owned by the Commonwealth, used as a munitions store and well protected by fencing. To this I will refer later. In 1950 articles began to appear in the Adelaide newspapers to the effect that the Government of South Australia planned to establish a "satellite" town (subsequently named Elizabeth) between Smithfield and Salisbury which lies some miles to the south of Smithfield in the direction of Adelaide. In the following years news items appeared from time to time dealing with the progress of the plan, stating that the Trust was buying land for housing purposes and that the price of land in the area was rising. Becker remembered reading one or two of these articles but said that if he had read others which were put to him in cross-

examination, they had not "registered" in his mind. It is reasonable to infer, however, and I do infer that he, along with many others, would have had a general knowledge of the plan to develop the proposed new town and of the probable effect of that development on the value of land in the neighbourhood. I have no doubt that any prudent man who was considering the purchase of land in the Smithfield District, to whatever use he proposed put it, would have taken into account the possibility or probability that, as time went on and the "satellite" town developed, land values in the surrounding countryside would increase. It would be, however, to take a long step to say that, because a purchaser expects an increase in the value of property which he is thinking of buying, it should be inferred that his purpose in buying is to resell at a profit. The existence of such an expectation is obviously a relevant fact to be considered in determining the purpose for which land is bought but it is a consideration which, I think, would be in the mind of any sensible person who was considering making a purchase of land whether he intended to farm it, use it as a residence or for business purposes, or resell it. I have no doubt that, in buying land at Smithfield, Becker, Pickering and Haseldine took into consideration the prospect, which eventuated, that land values would increase. It would be surprising if they did not do so.

Before turning to various transactions in pastoral and agricultural land with which Becker has been concerned since 1930, I will refer briefly to some purchases and sales by him of land in Adelaide and its suburbs. One such piece of land he bought in 1940 for the purpose of providing a club house and sports ground for the members of the Music League of South Australia in which he was interested. As the war came closer to Australia it became difficult to carry out the plan. Accordingly he sold the land and had to take in settlement or

part settlement of the price a house property and a number of subdivided allotments of vacant land at Torrens Park. These he sold over a period of years. Another property in Park Terrace, Eastwood, he bought as a residence in 1947 on his return to live in Adelaide after an absence of three or four years during which he was engaged in farming on land near Keith in what used to be known as the Ninety Mile Desert. He lived in the Eastwood house for a few months when, finding a flat which suited him better, he moved to the flat and sold the house. In 1952 he bought a house in Springfield, an Adelaide suburb, for £12,500, lived in it for 12 years and sold it for £37,500 in 1964 or thereabouts when he went to live in Sydney, his principal postoral interests then being in New South Wales. I only mention these transactions briefly because, as counsel for the Commissioner rightly said, they give little assistance in determining the purpose for which the Smithfield land was bought.

The history of Becker's dealings in country land and his pastoral, agricultural and stud-breeding activities is much more to the point and with the assistance of counsel, to whom I am much indebted, I have tried to piece it together with what I hope is a reasonable degree of accuracy. In 1930 he and two other men formed a company - the Leabrook Pastoral Company - which took over the lease of a property at Lower Light, north of Adelaide. On it the Company conducted a Dorset Horn sheep stud. The evidence does not, I think, disclose the size of the property or the price paid for it but the venture did not prosper and in 1939 the lease and the sheep were sold and the Company went into voluntary liquidation. I go next to 1934 when Becker was living in Adelaide in a house which he owned. He was then conducting the School of Music which he had established in the city. He exchanged his house for a property called Willow Dene at Aldgate in the Adelaide

Hills and went to live there, at the same time devoting much of his time to the School of Music. Willow Dene consisted of about 10 acres and on it he started a small Jersey stud and a pig stud. It was not a profitable venture and in 1940 or thereabouts he sold the land and the studs at a loss. He then bought a property at Dongarra in Western Australia about 50 miles north of Geraldton. What he described as the "homestead property" consisted of about 500 acres and "there were very big leases attached". He put a manager on the property and there ran beef cattle and sheep, bred pigs and grew cereal crops. The war made travel difficult between Dongarra and Adelaide where he continued to live and supervision of the management of the property became difficult. Accordingly he sold it, together with the stock, in 1943 at a loss. He then bought about 7,000 acres of land about 10 miles from Keith in the Ninety Mile Desert country. The price was 11/- per acre and the land was, as he said, "despised country at that time". He and his wife lived in a small cottage on the property until 1947 when they returned to Adelaide and it was then that he bought the house in Eastwood to which I have referred. While living on the Keith land he cleared some of it and sowed subterranean clover and veldt grass seed, which he had imported from South Africa. The results were disappointing and he formed the opinion that the land was deficient in what would in these days popularly be known as trace elements and for that reason was lacking in fertility. The idea of providing what would otherwise be regarded as poor soil with mineral elements not naturally in the soil is now commonplace and is, no doubt, known even to those who are interested in gardening, but it was not so in those days. Becker discussed these problems with a friend of his who was employed by an Adelaide chemical and fertilizer concern and was introduced by his friend to a Dr. Riceman of the C.S.I.R.O. with the result that Becker made



part of his land at Keith available to that organization for experimental purposes. Ultimately it was found that the soil was deficient in copper and zinc sulphates and within a comparatively short time after these elements were supplied, the land and the pastures on it were strikingly improved and land values in the so-called Desert area greatly increased. On some of the land at Keith, Becker planted and harvested clover and veldt grass seed with plant designed for that purpose. From neighbouring land owners he purchased the right to sow and harvest seed on their land and in time he developed a substantial business growing, harvesting and selling pasture seed, later forming a company - the Unarlee Seed Company - to carry on these activities. In 1945 he sold part of the Keith land and between 1949 and 1952 sold the remainder of it at prices greatly in excess of those which he had originally paid for it. The details of the sales are not, I think, of moment but, for reasons which will appear later, it should perhaps be noticed that the Taxation authorities claimed that the land at Keith had been bought by Becker for the purpose of resale at a profit and assessed him to tax accordingly. The appellant, however, appealed to this Court and his appeal was upheld (Federal Commissioner of Taxation v. Becker 87 C.L.R. 456).

Between the time of his return in 1947 to live in Adelaide after he had sold part of the Keith land and the time when possession of that land was given to its purchasers, Becker and his wife returned there, living in a caravan, during the seed harvesting seasons and harvested pasture seed and particularly veldt grass seed for cleaning and sale.

In 1949 and before the sale of the balance of the land at Keith, Becker bought for £6,400 a property of about four acres at St. James Park, a suburb of Adelaide. It had been used for the breeding of thoroughbred horses and was equipped for that purpose. For some years prior to its purchase

Becker had been interested in racing and had bred thoroughbred horses. He owned a stallion which he had imported from New Zealand and a number of brood mares, some imported from England, others bred in Australia. The stallion was kept on a stud property in Victoria and some of his mares were on agistment on various properties in that State while others were agisted on the land at Keith. The stud was widely scattered and agistment fees were substantial. He bought the St. James Park land to house his brood mares and to raise foals for sale as yearlings but, as the stud increased in size, the St. James Park land became too small to hold it. Accordingly he decided in 1951 to sell both the stud and land. Before selling, however, he visited Victoria and discussed the matter with Messrs. McQuillan & Robertson, blood stock agents in Victoria whom he knew and who were his advisers in the breeding of thoroughbred horses. They persuaded him to keep his stud. He adhered, however, to his decision to sell the land at St. James Park and in May 1952 he sold it to another breeder of thoroughbred horses, a Mr. Nitschke, for something over £10,000. He sought then for a property on which to house his stud, at least temporarily, and to use for the production of veldt grass seed and found an area of 2,000 acres at Meningie, about 100 miles south of Adelaide, which he thought might suit his purposes. In August 1952 he bought it for something over £5,000. He spent about £2,500 on improving it but for various reasons, including the disappointing results of sinking bores and wells in search of good and plentiful water, he came to the conclusion that it was unsuited for use for stud purposes and in 1955 he sold it for about £10,000. In 1954 anticipating, I would think, that his venture at Meningie would not succeed, he sought to buy land in Victoria to which to move his stud and made offers to two horse stud owners in that State to buy their properties but without success.. Following that, he saw

a Mr. Coles, a man whom he knew well and a member of the firm of Coles Bros., blood stock auctioneers and stock and station agents in Adelaide, and asked him to look for a property suitable for thoroughbred horse stud purposes. As a result Coles in August 1954 took him to see a property near Smithfield owned by a Mr. Crabb. Its area was about 232 acres and Crabb was then breeding horses on it. As a result of the visit Becker took an option to purchase it from Crabb at £100 per acre and, after taking McQuillan to see the land, he exercised his option in September 1954. The Crabb land (which is not part of what I call the Smithfield land with which these appeals are concerned) consisted of three sections. Section 3166 fronted the eastern side of the main North Road opposite Smithfield which lay on the western side of the main road. Section 3174 was to the north-east of Section 3166 and separated from it by a road, and Section 3251 was to the south-east of Section 3166 but separated from it by another section of land. Possession was to be given in March 1955. Becker's purpose in buying the property was to collect there his horse stud, to house his veldt grass harvesting plant and store there a large quantity of harvested veldt grass seed which he then had in readiness for dressing and sale. Before going into possession, however, Becker changed his plans and decided to give up the stud. A number of his brood mares had died or had had to be destroyed and he had lost a number of foals sired by his stallion. His bank was not prepared to advance him money to buy the Crabb land or to give him overdraft facilities to run a horse stud and in these circumstances he decided to sell the stud and "get into a more solid type of business where my money would be safer than where it was". He went to Melbourne to see McQuillan and arranged with the latter to sell the stud at the annual blood stock sales in Melbourne to take place in March 1955. Most of it was sold at those sales and the few horses that did not reach the reserve

prices placed upon them were sold soon afterwards. Since the bank would not assist him to buy the Crabb land, Becker sought and obtained a loan secured by mortgage from the Financial Board of the Church Office in Adelaide. The application for the loan was made by a letter signed by Pickering and dated 9th December 1955. It stated (inter alia) that "Mr. Becker understands that land in the close vicinity", that is to the Crabb land, "has been sold for £150 per acre" and that "the land is in close proximity to the new satellite town between Salisbury and Smithfield and has a substantial frontage to the Main North Road". I mention this letter because counsel for the Commissioner placed reliance on it as showing that Becker and Pickering were alive to the fact that values in the area were increasing. As I have said earlier, I have no doubt that they were aware of this and that it is one of the matters to be taken into account in deciding whether or not the Smithfield land was bought for the purpose of resale at a profit.

Having decided to sell his stud, Becker gave instructions to Coles early in 1955 to endeavour to resell the Crabb land with the exception of a small area fronting the main road on which a house stood and to which he had moved a quantity of veldt grass seed and harvesting plant and in April 1955 a man named Latz, an employee of A. & J. Stevens Ltd., licensed land brokers of Adelaide, told Becker that the Trust might be interested in buying the whole of the Crabb land. Becker gave the Trust an option of purchase for one month, but at the end of the month Latz told him that the Trust was not interested. The sale of the Meningie land had by this time been completed and Becker had formed the intention of buying other farming land, if it could be found, close to Adelaide, where he wished to continue to live, with a view to running sheep and possibly cattle on it and later establishing a sheep or cattle stud. He told Latz and Coles of his intention and asked them to look

out for a suitable property. In his evidence he explained why he thought that the Crabb land was not suitable for what he had in mind and why he had decided not to retain it. The sections of which it consisted were separated from one another and it was not a compact property. It was also, he thought, too small for his purposes and it was fitted up for breeding horses with horse stalls, loose boxes, stallion boxes, horse yards and the like, which would be of little or no use for sheep or cattle. Shortly afterwards Latz asked him if he would be interested in the purchase, at £150 per acre, of some land at Smithfield owned by a Mr. Nosworthy. He knew the land, which was close to the Crabb land, had seen the sheep and crops on it, knew that it had a good homestead larger than that on the Crabb land and had formed the opinion that it was good country. He told Latz that he was interested, that the price was too high but that he would be prepared to buy it at £100 per acre. Its area was about 600 acres, which was rather larger than he then wanted. It consisted of seven sections. One of them, Section 3173, fronted the eastern side of the North Road and was separated from the others by that road. Sections 1718, 1719 and 3172 fronted the western side of the North Road and the remaining Sections 1720, 4119 and 4124 lay to the west of Section 1719 and adjoined it. It would be, he thought, suitable for his purposes since it was reasonably close to his home in Adelaide and to the stock markets and abattoirs and if a stud was ultimately established on it, stud stock salesmen would find it easy to take possible buyers of stock to it from Adelaide. At the end of May 1955, Latz told him that Nosworthy had rejected his offer and from then until September 1955 no further move was made to buy the land. In September or October of that year the Crabb land was sold to a company controlled by Nitschke, who had earlier bought the St. James Park property from Becker and who wanted the Crabb land for a horse stud.

The price was about £175 per acre. About the time of this sale to Nitschke, Becker told Coles that he had earlier made an offer for the Nosworthy land without result and asked Coles whether he would take the matter up. Coles said that he thought he might be able to get an offer from Nosworthy to sell for £105 per acre and shortly afterwards obtained from him an option to sell it at that figure. Becker and Coles then went to see Nosworthy. Becker said that he was prepared to pay £100 per acre. Nosworthy replied that he wanted £105 per acre and finally they agreed on a figure of £102.10.0 and a contract was signed. Becker then told Coles that the property was rather larger than he wanted and asked him to try and sell sufficient of it to reduce the area to about 400 acres but nothing came of this.

Becker had discussed with Pickering and Haseldine the purchase of the Nosworthy land and the three of them agreed to form a company of which they would be the directors. In the result the company (the present appellant) was formed at the end of September 1955 and it entered into a contract to buy the land from Nosworthy at £102.10.0 per acre. The purchase was completed and possession taken in December 1955. This was the first purchase by the Company of the Smithfield land. A man named Pratt was at once appointed by the Company to manage the property and was told by Becker how it was proposed to develop it. It was to be stocked with about 350 merino ewes and Border Leicester rams. Field peas were to be sown to put nitrogen into the soil and also to provide cash crops. A tractor was to be bought, fences repaired and renewed and lucerne sown. Later it was proposed, he said, to establish a Dorset Horn stud. This last proposal was not in fact carried out. Instead it was later decided to establish a merino stud. It is unnecessary, I think, to detail the work that was done to improve the property under Pratt's management but in December 1955 and

January 1956, a number of ewes and rams were bought at a cost of some £1,900, as were field peas and later lucerne seed, and improvements to the land were begun. Not long after the purchase of the Nosworthy land, Becker and his co-directors changed their minds about reducing the area which the Company had bought and decided, if it were possible to do so, to buy additional adjoining land so as to bring the total area up to 1,000 to 1,200 acres. Latz, who seems to have been an energetic salesman, told him that a man named O. W. G. Argent, who owned Section 1721 containing about 80 acres, might be willing to sell it. Section 1721 adjoined Sections 1718 and 1720 of the Nosworthy land. Latz and Becker went to see Argent and in December 1955 the latter entered into a contract to sell Section 1721 to the Company for £106.5.0 per acre. The sale was completed in May 1956. About the same time as the approach was made to O. W. G. Argent, discussions took place between Becker, Latz and W.E. Argent, the father of O. W. G. Argent. W.E. Argent owned Sections 1716, 1717 and 1722 comprising about 238 acres. Sections 1722 and 1717 adjoined the northern boundary of Section 1721, which the Company was in process of buying from O. W. G. Argent, and of Section 1718 which had been bought from Nosworthy. Section 1716 was to the east of Section 1717 and separated from it by the main North Road. W.E. Argent offered to sell his three sections for £150 per acre. Becker said that the price was too high and that he only wanted the two sections (1722 and 1717) on the western side of the main road adjoining the Nosworthy land and not the section on the other side of the main road. Argent was not prepared to sell two of the sections only and eventually Becker agreed to take all three of them at £120 per acre. In January 1956 a contract of sale at that figure between Argent and the Company was signed and carried into effect. Following this, in February 1956, Latz told Becker that a man named Roberts

had contracted to buy from a Mr. Curtis three sections on the southern boundary of the Nosworthy land and lying between it and Smithfield. They were Sections 4099, 3171 and 3164 and contained about 205 acres. Roberts had agreed to buy them at £146 per acre. Roberts, so Latz told Becker, was unable to complete the purchase but did not want to lose his deposit. Thereupon the Company in effect took over Roberts' contract with Curtis and bought the land. This brought its holding of Smithfield land to about 1,267 acres.

In November 1955 and again in January 1956 A. & J. Stevens Ltd. wrote to Becker saying that one of its clients was interested in buying Section 3173 and asking if the Company was interested in selling it. To the first letter Becker replied verbally that it was not interested and brought the matter before the Company's Board on 27th January 1956. The directors approved of his verbal reply and resolved that a letter be written to A. & J. Stevens Ltd. to the effect that the Company's policy was not to sell land but to put it to farming and pastoral uses and that it was not prepared to sell any of it. Early in February a further letter was received from A. & J. Stevens Ltd. stating that the Trust wished to know if the company would sell Section 3173 and asking for an option to purchase. The letter added that the Trust needed the section to fit in with its planning scheme for Elizabeth. The Board resolved to inform A. & J. Stevens Ltd. that the land was not for sale and a letter to this effect was sent. I should interpolate here that in many of the minutes of the Company's Board meetings and in letters which it wrote to A. & J. Stevens Ltd. there are to be found statements to the effect that the Company's policy was not to sell land but to use it for pastoral and agricultural purposes. The minutes were dictated by Pickering and no doubt he had a hand in the drafting of the letters. In the course of his argument, counsel for the Commissioner directed my attention



to these matters and suggested that Pickering, the legal man on the Board, had included these statements in the minutes and letters with an eye to the provisions of s. 26(a) of the Income Tax and Social Services Contribution Assessment Act and did so or may have done so in order to give a misleading picture of the Company's policy and the purpose for which it had bought the land at Smithfield. I have no doubt that Pickering was fully aware of the existence of s. 26(a) and, since he had long been Becker's legal adviser, he was no doubt also aware of the tax difficulties that had arisen when Becker's land at Archer was sold. I infer that in framing resolutions and minutes of the Board and letters written by the Company one of his aims was to provide some safeguard against similar difficulties should the Company at any time decide to sell its Smithfield land. But I am not prepared to find that his or the Board's purpose was to present a misleading picture of the Company's activities and intentions.

Later in February 1956 yet another letter was received from A. & J. Stevens Ltd. stating that the Trust wished to obtain an option to buy Section 3173 and asking the Company to reconsider its earlier refusals to sell. The letter added that a refusal to sell the section to the Trust might jeopardize its plans. At or about this time, Latz had explained to Becker that the Trust planned to build a road by-passing Elizabeth and Smithfield which would pass through Section 3173 and join the main North Road north of Smithfield and that it was for this reason that it wished to buy the section. The Board considered the letter and resolved to reply that Section 3173 was considered to be the best of the Company's land, that if it was sold the Company would have to buy other land to take its place, probably at an enhanced price, and that it had steadily refused to sell land needed by it for its farming and pastoral activities. The letter was, however, to state that

the Company did not wish to jeopardize the Trust's plans and would give the Trust an option for one month to buy the land at £250 per acre. This was communicated to A. & J. Stevens Ltd. by letter but no more was heard from the Trust until May 1957, more than a year later, when Latz told Becker that the Trust was prepared to make a firm offer to buy Section 3173 at £200 per acre. Becker's reply was that the price asked by the Company in 1956 had been £250 per acre and it would not sell a year later at £200 per acre. A few days later Latz told Becker that the Trust was prepared to pay £235 per acre. He replied that the Company would not sell at that price but asked Latz where other land could be got to replace Section 3173 if it was sold. Latz mentioned a number of properties in the area which he thought might be bought - one of them belonging to O.W.G. Argent and his wife - at prices ranging from £80 to £250 per acre. Shortly afterwards Becker told Latz that he thought Section 3173 was worth £300 per acre and following this a letter of 27th May 1957 was received by the Company from A. & J. Stevens Ltd. referring to this conversation and asking the Company to give the Trust an option to buy the section at £300 per acre. The matter was discussed by the Board at a meeting in June and it was decided to sell Section 3173 to the Trust at that figure. The contract of sale was executed in June 1957 and the transaction was carried to completion. It appears also that in May 1957 A. & J. Stevens Ltd. wrote to the Company enquiring whether it would sell Section 1716, that being portion of the land bought from W.E. Argent in January 1956. The Board decided that it would not do so.

My next step is to give an account of the events which led to the final purchase which the Company made of Smithfield land (Section 3181 and part of Section 3182 containing in all about 112 acres). Section 3181 and part of Section 3182

were owned by O.W.G. Argent and the remainder of Section 3182 was jointly owned by Argent and his wife. These sections adjoined the northern boundary of Section 1722. During 1956 and the first half of 1957 the Unarlee Seed Company had been occupying portion of the Company's Smithfield land and buildings at a rental of £1,750 per annum. One of the houses on it was occupied by the Unarlee Company's manager, another by some of its workmen. It was using a large shed for seed cleaning and in it was installed machinery for that purpose. It was also using a number of other sheds for the storage of a large quantity of harvested seed and harvesting plant. Becker wished to obtain space elsewhere for occupation by the Unarlee Seed Company and in June 1957 Latz asked him if he would make an offer to the Argents for the 112 acres in Section 3181 and part of Section 3182. Becker said that he was prepared to buy the land for the Unarlee Seed Company at £150 per acre. A few days later Latz told him that the Argents would sell for £17,500, that being about £156.5.0 per acre. In the result a contract between the Argents and the Unarlee Seed Company for the sale and purchase of the land at that price was signed. Becker reported this to the Board of the appellant Company, which had just sold Section 3173 to the Trust, and it decided that in view of that sale it was desirable to buy other land to take the place of Section 3173. Accordingly the decision was made that the Company should replace the Unarlee Seed Company as the purchaser from the Argents of Sections 3181 and 3182. This transaction was carried out and the Company became the owner of the land. This completed the Company's purchases of the Smithfield land and, other than the sale of Section 3173 to the Trust in June 1957, none of that land was sold by it until 1960. In the interim, in May 1959, A. & J. Stevens Ltd. had written to the Company stating that the Trust was interested in the purchase of Section 4099, one of the three sections

bought by the Company from Curtis in 1956. The reply was made that the Company needed all its land for its pastoral and agricultural activities and was not prepared to sell any more of it.

In October 1957 the first sheep for the merino stud were purchased. In that month Becker, with Pratt and Coles, paid a visit to North Bungaree, a well-known South Australian merino stud, and there met Auld who was then the manager of North Bungaree. Becker, on behalf of the Company, bought 230 stud ewes for three guineas each and three stud rams costing 3,000 guineas. At the same time he arranged for Auld to visit Smithfield at the end of the year - and this Auld did - to class the ewes and decide which rams and which ewes should be joined. The sheep were taken to Smithfield and in December 1957 the Smithfield Merino Stud was registered. In 1958 another stud ram was bought from North Bungaree for 1,100 guineas and another Bungaree stud ram was bought at the Adelaide Show for 1,900 guineas. In November more stud ewes were bought, mainly of North Bungaree blood. Becker said that, speaking from recollection, he thought that these purchases of rams and ewes in 1957 and 1958 amounted to something of the order of £6,000 but in fact the amount seems to have been greater.

In October 1958 Auld came to see Becker and told him that he intended to leave North Bungaree. Becker asked him if he would take the position of stud master and manager at Smithfield, Pratt, the then manager who had looked after the farming and grazing activities at Smithfield satisfactorily, not being thought capable of successfully building up and running a stud. In the course of his conversation with Auld, Becker said that his aim was to build up the best merino stud in Australia. Auld said that he thought that that could be done but that it would take 5 to 10 years to do it. They exchanged views on animal husbandry, nutrition and the like matters, and

Auld said that he would accept the position. In January 1959 he took over from Pratt and from then until the land was sold in 1960, much was done to improve the property and establish the stud. The nature of the work done and planned to be done was described by Becker and by Auld and I do not think it necessary to give the details. It is sufficient to say that by the end of 1959 the flock sheep had all been sold and thereafter only stud sheep were carried on the property. Its carrying capacity was increased by improvement of the pastures so that in 1960 it would, in a normal year, carry well over two sheep to the acre. New fencing was erected and watering facilities were renewed and extended. Paddocks infested by "artichoke" weed were cleaned up by cropping the land, boxwood trees were cleared and large areas were chisel ploughed to prepare the ground for the sowing of lucerne seed, pasture grasses and crops for grazing. Lucerne for grazing was sown, as were pasture grasses and fodder crops. Improvements such as these were, as Auld said, made with a view to long-range and not short-term benefits. The evidence does not enable me to determine what was the cost of the improvements which were carried out. A schedule of some of them was put in evidence showing an expenditure of £5,700 over the period of the Company's occupancy of the land but this figure does not include items, to mention some only of them, such as the cost of improving the pastures by the application of superphosphate and the ploughing and sowing of lucerne and pasture grasses, or the costs of the improvements carried out by the men working on the property. I think it is plain that the total amount expended must have been substantial.

The company's balance sheets and profit and loss accounts covering the period of its occupation of the land were put in evidence. They showed a loss of £2,932 for the period (less than a year) ending on 30th June, 1956 and losses

of £1,614, £1,527, £13,990 and £10,195 for the years ending 30th June 1957, 1958, 1959 and 1960 respectively and a profit of £15,807 for the 1960-1961 year. The year 1959 was a bad drought year in South Australia and the losses in the years 1959 and 1960 were, in part at least, due to the necessity of buying large quantities of fodder. During the hearing the accounts were examined in some detail both in the course of the evidence and of counsel's addresses but I think it only necessary, in this judgment, to refer to two or three general considerations which I have borne in mind. In the first place, I am satisfied that the setting up of a good merino stud is a costly business and such a venture is not likely to show a profit in its early years. I have little doubt that Becker and his co-directors expected that losses would probably be made until the stud had become favourably known in the wool-growing industry. Next I think that the general picture of the Company's affairs as presented by the accounts is, in a sense, a misleading one. In its books and taxation returns the values of the sheep appeared at figures below their real worth. Their actual values were, Auld said, substantially in excess of the book values and for this reason the true financial position of the Company was much better than it would, on the book figures, appear to have been. Finally the question whether the Company's entry into the merino stud-breeding business proved during its early years to be profitable or otherwise appears to me, in the present case, to be somewhat distant from the question which I have to decide. The fact is that the Company did establish a stud and expended large sums of money in doing so and, when all the circumstances are looked at, it is, in my view, most improbable that it took the course it did in order to lend colour to the idea that it had not bought the Smithfield land for the purpose of reselling it at a profit.

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This is a convenient stage at which to mention evidence given in the course of the Commissioner's case by a Mr. Whicker, a land valuer employed by the Taxation Department, which was relied upon in support of the contention that the Company had not bought the Smithfield land for pastoral and farming purposes but had bought it for profitable resale. The substance of his evidence was that the prices paid by the Company for the Smithfield lands were in excess of their values as purely agricultural and pastoral land. As I understand it, he did not suggest that the land was not worth what was paid for it. It was directed to showing that the prices paid included what he described as a "future subdivisional potential". In some respects his evidence was open to criticism, more particularly since he had been called upon in 1966, shortly before the hearing commenced, to form an opinion of the values of the land for farming and pastoral purposes only as at dates many years before and this involved (inter alia) a determination - which must have been to some extent based upon guesswork - of what improvements there were on the various parcels of land at the dates when the Company bought them and what was their then state of repair. I think, however, that Whicker was expressing an honest opinion as to values and that the prices paid by the Company did include some "future subdivisional potential". Two other witnesses were called on behalf of the Commissioner. One was Cuthbertson, who gave evidence on sheep values and said, in effect, that no merino stud could be profitably run on the Smithfield land. I prefer to accept the evidence of Auld. The other was Crabb, from whom Becker had bought the Crabb land in 1954. His evidence was also directed to supporting the contention that the Company's purpose in buying the land was to resell it at a profit. He said that when Becker visited his property with a view to buying it, he pointed to an adjoining section owned apparently by a man named Church or by Church's "estate", and told Becker that he had seen

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a plan of subdivision of it. Becker, he said, did not appear to be interested in the remark. Becker, in cross-examination, at first denied the conversation and later said he had no recollection of it. I think Crabb probably did mention to Becker that he had seen a plan of subdivision. But while, as I have already said, I infer that Becker and those associated with him anticipated that land values around Smithfield would rise, the evidence of Whicker and Crabb does not lead me to conclude that the Company's purpose in buying the Smithfield land was to resell it at a profit, nor does it shake my belief that Becker and Auld were truthful and reliable witnesses.

I will deal next with the sale, in February 1960, by the Company to the Trust of part of the land (Section 4099 and part of Section 3164) which had been bought from Curtis in 1956. The first approach came from Latz who, in January 1960, told Becker that a Mr. Sutton, an agent acting for the Trust, had enquired whether the Company would sell Sections 3164, 4099, 4119, 4124, 1720 and 3171 and, if so, what price it wanted. Becker replied that he thought the Company would not sell but that if the Trust wished to make an offer it would be considered. This was followed by a letter dated 27th January 1960 from A. & J. Stevens Ltd. to the Company repeating the enquiry made by Latz. The total area of the sections mentioned was about 550 acres. Becker spoke to Latz on the telephone and told him that the Company could not sell an area of that size, that if any land could be spared it would not be more than 200 acres or thereabouts and that if any sale eventuated, long terms would not be acceptable to the Company because a substantial sum of money would be needed to establish irrigation and make other improvements on the remaining land to make up for the area sold. The Company at this time was short of ready funds with which to pay for further improvements which it wished to make. Three mortgages which it had given at the time of its



land purchases were falling due within the next fifteen months, and because of the drought it had had to spend and was still spending large sums of money buying fodder and had lost a considerable part of crops sown by it for fodder purposes. It owed Becker £60,000, which he had lent to the Company and on which he had not received any interest. In these circumstances the Board considered that the sale of some of the land would produce sufficient cash to make improvements to the remainder and that this would enable the same number of stud sheep to be carried on a smaller area. It decided therefore in February 1960 to offer to sell to the Trust any two of the following sections, Section 4124 of 135 acres at £500 per acre, Section 4099 of 80 acres at £600 per acre, Section 1716 of 80 acres at £600 per acre and Section 3164 of 64 acres at £800 per acre. A letter, dated 3rd February 1960, setting out these proposals was sent to A. & J. Stevens Ltd. This was followed by an offer from the Trust to buy Section 3164 at £800 per acre and Section 4099 at £500 per acre, the total acreage being about 144 acres. This was about 70 acres less than the maximum which the Company had been prepared to sell. The price offered amounted to £91,400 of which £1,000 was to be paid as a deposit and the balance in July 1962 with interest at 6%, the Company to remain in possession of and use the land until July 1962. The offer was considered by the Board towards the end of February 1960 and was accepted, a contract was signed and the sale was ultimately completed. Soon after the making of the contract Becker told Latz that the Company was prepared to sell one more section which, with the two already sold, would not exceed 215 acres, the approximate maximum area which it had been prepared to sell in order to obtain funds for the further development of the remaining land of about 1,000 acres. Becker said, however, that a sale would have to be for cash. He asked Latz to put this to the Trust and a letter dated 4th March 1960

to this effect was sent to A. & J. Stevens Ltd. A reply came back that the Trust was not in a position to accept the offer and that A. & J. Stevens Ltd. was offering the land to another possible buyer. Nothing came of this. In May 1960 discussions took place between Becker and the Trust, as the result of which the contract for the sale of Section 3164 and 4099 was varied with a view to providing the Company in the reasonably near future with more ready cash. In the result the Company agreed to reduce the interest rate on the outstanding balance of the purchase money from 6% to 5% and in return the Trust agreed to pay the balance of the price by sums of £20,000 each six months, the first payment to be made in November 1960 and the final payment of £10,400 to be made in July 1962.

The improvements planned to be made when funds were available included one to sink bores to tap underground water for use for irrigation. The water then being used on the property came from the Barossa Reservoir through a main which passed the land and this supplied all that was needed for the stock and for domestic use but there was a limit on the amount which might be used. For this reason its use for irrigation would be difficult and probably impossible. Accordingly it had been decided by the Board to ask the Mines Department for its opinion on the prospects of finding underground water for irrigation purposes. The Department replied in April 1960 that the prospect of finding sufficient underground water for irrigation was not good and the plan was accordingly abandoned. Since the proposed expenditure on irrigation would not be incurred combined with the fact that the result of the variation of the contract with the Trust would be that large sums of money would be coming in regularly from it, the Company, in July 1960, withdrew from sale the section which it had earlier in the year placed in the hands of A. & J. Stevens Ltd. for sale.

Other events occurred, however, in 1960 which

ultimately led the Company to a decision to sell the whole of the land which it then held at Smithfield and move the stud elsewhere. During 1959 there had been isolated occasions when trespassers and dogs had invaded the property and in 1960 this trouble became more serious, due no doubt to the increasing population of people and dogs at and around Elizabeth and I suppose also to the fact that once a dog becomes a sheep-killer its forays become more frequent. During 1960 there were many occasions when stud sheep were mauled or killed by dogs and on other occasions sheep and lambs were stolen. Auld said that about 30 stud sheep were killed or had to be destroyed because of their injuries and about 10 were missing. As well, stud ewes in lamb were cased by dogs with the result that the lambing percentage dropped from an anticipated 75% to about 52% and stud lambs were valuable assets. These developments made it necessary for Auld and his overseer to devote much of their time to carrying out armed "dog patrols" and in putting trespassers off the land, time which would otherwise have been devoted to normal work on the property. These increasing troubles were reported to the Board by Auld and caused it much concern since it was probable that, as Elizabeth grew, so would the troubles from dogs and trespassers and it might become impossible to keep the stud there. In this state of affairs Becker, in August, 1960, was again approached by Latz and asked whether the Company would consider selling the whole of its remaining Smithfield land to the Trust. Becker mentioned the troubles that were occurring, said that the Board would consider the matter and quoted the prices per acre which the Company would ask if it was decided to sell. These prices, I gather, he discussed with Latz. They totalled about £743,600. Later in the day Latz telephoned to say that the Trust was prepared to offer £650,000 for the land. This proposal came before the Board on 30th August, 1960 when it was decided to inform Latz that the Company

would consider a formal offer from the Trust and was prepared to negotiate with it. The Board also discussed a proposal put forward by Becker that land a good deal further to the north, in the Clare District, be sought so that the stud might be moved there. A decision on this was deferred pending negotiations for sale to the Trust. Latz was at once informed of the Company's decision to negotiate with the Trust and by letter of 30th August, A. & J. Stevens Ltd. put forward an offer by the Trust to buy the land for £650,000 on terms which were set out in the letter. The following day a written reply was sent by the Company which set out (inter alia) the prices per acre which the Company wanted for the various sections of the land. It stated also that if a sale eventuated the Company would want to stay in occupation of the land for 12 months after the date of completion in order to give it time to find another property to which to move the stud and offered, in the event of a sale, to take a lease of the land at a rental of £3,000. The upshot was that the Trust agreed to buy the land at the prices quoted by the Company and to give it a lease for 12 months from the date of completion at a rental of £3,000. Becker told Auld of the sale and of the proposal to move the stud further north to the Clare District if suitable land could be found there and Auld asked for time to consider the suggestion. A few weeks later, in September, Auld sent in a written report to the Board in which he urged that it would be better to find a property closer to Adelaide than the Clare District and suggested that land at Angle Vale would be suitable and might be available for purchase. Angle Vale was only a few miles from Smithfield, but it was, as Auld said, "a sleepy hollow well away from the main road". Other sheep studs were established there and he thought that the large tract of Commonwealth land where the munitions dump was established with a high and secure fence surrounding it would act as a "buffer" between Angle Vale on the one side and

the main North Road and Elizabeth on the other. He and Becker went to see the land which Auld had in mind. It was about 1,260 acres in extent and, in the result, the Company bought it for £330,000. On it the Company intended to establish a cattle stud in addition to the sheep stud which would be taken there from the Smithfield land but in fact the sheep stud was not taken there. What happened was that Auld was sent by the Company to Brewarrana, near Narrandera, to buy cattle for the proposed cattle stud at Angle Vale. While there he discovered that Brewarrana was for sale and, on his own initiative, he obtained an option to purchase it. Becker was not enthusiastic about the idea of buying it but, after inspecting it, he changed his mind. A company was then formed and the land, together with the sheep and cattle studs on it, was bought by it early in 1962. It was a property of about 12,000 acres and to it was taken the Smithfield stud. Angle Vale is still owned by the Company and has for some time been for sale at the price paid for it, so far without result. Later in 1962 the stud in the United Kingdom was bought by another company formed by Becker and in 1964 Bendooley was bought by yet another of his companies.

This, I think, gives a sufficient picture of the facts as I find them to be. What I have said in the course of my judgment makes it plain that I am satisfied that the Company bought the Smithfield land for pastoral and agricultural purposes and not for the purpose of resale at a profit.

I allow each of the appeals with costs and set aside the assessments.