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No. 38 of 1958

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N

THE COUNCIL OF THE CITY OF NEWCASTLE
Appellant

AND

ROYAL NEWCASTLE HOSPITAL
Respondent

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C A S E FOR THE RESPONDENT

ON THE APPELLANT'S APPEAL.

RECORD

1. This is an Appeal brought by Special Leave from the judgment and order of the High Court of Australia, dated the 21st day of March 1957, affirming an order of the Supreme Court of New South Wales dated the 18th day of June 1956, which affirmed a verdict and judgment of the Supreme Court of New South Wales (Richardson J) made and entered on the 24th day of June 1955 in favour of the Respondent in an action brought by the Appellant for the recovery of £4,001. 9. 8. for rates levied by the Appellant for the years 1946 to 1952 inclusive upon the Respondent's land at New Lambton within the City of Newcastle.

p.165-6.
p.138-9.

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p.119-127.

p. 1-2.

2. The question for decision in this Appeal is whether the lands of the Respondent upon which rates were levied by the Appellant for the years above mentioned were exempted from rating under the provision of Section 132(1)(d) of the New South Wales Local Government Act 1919 to 1954 by reason of the said land being used or occupied during those years for the purpose of a public hospital.

p.3, 1.10

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3. The relevant provisions of the Local Government Act 1919 are as follows :-

p.121, 1.45. **Section 132.**

(1) All land in a Municipality or Shire (whether the property of the Crown or not) shall be rateable excepting ......

(d) land which belongs to any Public Hospital, Public Benevolent Institution or Public Charity and is used or occupied by the Hospital, Institution or Charity, as the case may be for the purposes thereof. 10

Section 144.

Every rate shall, except where this Act otherwise expressly provides, be paid to the Council by the Owner of the land in respect of which the rate is levied.

p.122, 1.10. 4. It has been conceded by the Appellant that the Respondent at all relevant times was a Public Hospital and that the lands upon which the rates claimed were levied belonged to the Respondent within the meaning of Sub-Section (1)(d) of Section 132. 20

5. The Respondent is a General Public Hospital established within the boundaries of the City of Newcastle. The main buildings of the Hospital have been established for many years in the Commercial Centre of the City.

p. 20, 1.7.
p. 20-21. 6. The City of Newcastle is a highly industrialised City in which are located many heavy Industries and Factories which give rise to a considerable smoke nuisance. 30

p.119-120. 7. In the relevant years the Respondent owned land approximately 327 acres in area situated upon heights on the western side of the City about 5 miles from the main Hospital buildings of the Respondent.

p.14,1.11 seq.
p. 9, 1.29
p. 13, 1.19. 8. The said land is bounded upon the east by an important road leading into the City known as Lookout Road and on the west by an unmade road known as Marshall Street and on the north and south by residential areas. On the easterly side of Lookout Road opposite the land is a residential area known as New Lambton. 40

RECORD

9. The present action is brought by the Appellant for rates levied upon portion of the said land such portion being approximately 291 acres in area. Rates were not levied by the Appellant in the relevant years upon the remaining 36 acres which have been treated as exempt for rating purposes.

p.22, 1.11 seq.

10. During the relevant years the Respondent had established on the eastern portion of the 327 acres fronting Lookout Road, a convalescent home for the treatment of general patients of the Hospital and along side the convalescent home a chest hospital or sanatorium, known as Rankin Park, for the treatment of patients suffering from tuberculosis.

11. Rankin Park is regarded as the tuberculosis sanatorium of the northern parts of New South Wales and is the only chest sanatorium within the State located within a city area. Expert evidence accepted by the trial judge showed that the area of which the subject lands form portion is desirable for the purposes of the Respondent's chest hospital and that such hospital is serving an equal purpose with the other tuberculosis sanatoria in New South Wales.

p.54, 1.21.
p.55, 1.13.
p.125, 1.27.
p. 55-56.
p. 94, 1.36.
p.116, 1.33.

12. An area surrounding the hospital buildings of the sanatorium and convalescent home is fenced except for a short distance and the area so enclosed is approximately 17½ acres. Within the fenced area the grounds between in front of and behind the buildings are laid out in lawns, gardens and pathways. The area of 17½ acres is part of the area of 36 acres which is treated as exempt.

p. 6, 1.28 seq.
p. 22, 1.22-30.

13. On the western side of the fence at the rear of the hospital buildings the land owned by the Respondent consists of rugged land in its virginal state in which there are steep and rough gullies running off a number of high ridges. The whole of this portion of the land is thickly covered with trees and scrub. It is poor land containing little herbage suitable for any grazing and contains very little flat land. Through it run a few bush tracks one of which is well defined and runs to Lookout Road from the western portion of the land. This portion of the Respondent's land is wholly unfenced and

p.7, 1.35 seq.
p. 8, 1.24.
p. 9, 1.6.
p. 9, 1.29.
p.17, 1.22.

RECORD

p.21, l.30 seq. without improvements of any kind apart from 5 white posts which the Town Clerk of the Appellant Council instructed a surveyor to place in the land to delineate the boundary between that part of the land alleged by the Appellant to be rateable and that portion exempted by it from rating. These posts were planted years after a general but undefined area of 36 acres had been treated as exempt namely in the year 1953. The land at this point is heavily timbered and the white posts are not easily discernible; indeed no two of them can be seen at one and the same time. In his judgment the trial judge said of these posts "I cannot see any reason for adopting the line of white posts put in by the surveyor as the boundary of the additional exempted area". (p.121, l.20.; p.127, l.17.)

14. The land between the white posts and the westerly fence behind the rear of the Respondent's buildings is in the same virginal state as the land on the western side of the white posts and the western boundary of the Respondent's land at Marshall Street. The land between the white posts and the said western fence behind the buildings of the Respondent is approximately 18½ acres in area and comprises a strip of land running from the south eastern corner of the main southerly building erected upon the Respondent's land to the northern boundary of that land.

p.13, l.37 seq. 15. Established residential areas of the city are situated on the eastern and northern sides of the Respondent's land and some little distance beyond the western and southern boundaries of the land.

16. The history of the acquisition development of the said land by the Respondent and of its rating is as follows :-

(a) About the year 1926 the Respondent first purchased portion of the said land, namely 24 acres, on which was then erected buildings known as the Croudace Home. This area was immediately used as a Convalescent Home for patients of the Hospital and was so continued to be used until about the years 1951 or 1952 when it was used as a Sub Acute Ward for General Patients of the Hospital. (p.119, l.26.; p.119, l.38.; p. 68, l.8.; p. 68, l.15.)

p.119, l.39. (b) The 24 acres of land has never been rated by the Appellant and lies outside and to

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the north east of the land now alleged by the Appellant to be rateable.

(c) Shortly after the year 1926 the Respondent purchased the additional 68 acres of land situate along side its original purchase and thereupon the area exempt from rating was extended to 32 acres and the Respondent paid rates levied upon the balance of the land then owned by it. — p.119, l.29. p.120, l.1-10.

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(d) About the year 1934 the Respondent purchased a further 4 acres of land adjoining its then existing holding and the land exempt from rating was increased to 36 acres. — p.119, l.30. p.120, l.4.

(e) In about the year 1942 the Respondent commenced to erect on part of the site now occupied by Rankin Park Hospital, a Commonwealth War Emergency Hospital and work continued upon this building during the next few years. In 1944 when this building was still partially completed, the Respondent decided to establish a sanatorium for the treatment of tuberculosis patients and for that purpose to complete the existing buildings of the War Emergency Hospital and acquire a further area of land to the west of its existing holding comprising approximately 220 acres. — p. 67, l.26 seq. p.68, l.31. p. 69, l.9. p. 69, l.17.

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(f) With this end in view about the middle of 1944 Mr. Rankin the President of the Hospital Board, Dr. McCaffrey the Medical Administrative Superintendent of the Respondent Hospital and Dr. Hughes of the Department of Health inspected on foot a large tract of land adjoining the Hospital's then existing holding and selected the land subsequently acquired as the minimum additional land necessary for the purpose of a Sanatorium. — p. 52, l.30. p. 52, l.36.

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(g) In 1946 the Respondent acquired the land so selected, comprising 220 acres, so far as it was private property by Resumption under the New South Wales Public Works Act 1912 for the purpose of the Newcastle — p. 53, l.8. p.171.

Hospital and so far as it was Crown Land by Grant from the Crown.

p.69, 1.7.
p.69,1.31 seq.

(h) In the month of April 1946 the Hospital buildings for the Sanatorium had been completed but staffing difficulties delayed the admission of patients until the month of July 1947.

p.70,1.12 seq.

(i) In the period from the opening of the Hospital to about 18 months from the opening of it the inmates of the Hospital from time to time have varied in number from 80-100.

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p. 1-3.

(j) From the year 1946 the Respondent has failed to pay rates levied by the Appellant on that portion of the 327 acres of the Respondent's land alleged to be rateable namely 291 acres.

p. 27-31.
p. 54, 1.25.

17. The usual course of treatment of tuberculosis patients since the year 1948 is bed rest, good food, fresh air and exercise and treatment by certain drugs, known as chemo therapy treatment. Upon admission the patient is put to bed and treated with drugs until the disease is arrested and after the arrest of the disease is kept under supervision with graduated exercise and therapy until he or she is fit to return to civil life.

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p. 57, 1.39.
p. 58, 1.8.

18. Prior to the year 1948 when the drugs now in use were first used the prospects of the patient recovering from the disease was much less and the period of treatment much longer than has been the case since 1948.

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19. Since 1948 the average period of hospitalisation for patients suffering the disease is approximately 1 year.

p.38,1.21 seq.
p.71, 1.37.

20. Patients suffering from tuberculosis enter hospital frequently suffering from severe physical and mental stress. They are then informed that they will be absent from their employment and their home for a long period of time and this gives rise to mental stress arising from the breaking of family ties and economic hardship arising from prolonged treatment in hospital. These circumstances call for the selection of sites and the provision of

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p. 72, 1.5.

		RECORD
	accommodation for such patients that will ensure equanimity of mind in the patient and allow convenient visiting by relatives. The defendant's evidence showed that a sanatorium of this type can only operate with full efficiency if it occupies a large area of land.	p.72, l.17. p.96, l.10. p.96, l.35 seq.
	21. The Appellant called in its case William Charles Burgess, Town Clerk of the City of Newcastle and Dr. Idris Morgan.	p. 5; p.25.
10	22. The former witness stated that he had lived near the subject land and had observed it for some years and that apart from one occasion he had not seen any persons in the subject land and that there were no improvements upon it. This witness generally described the topographical features and then condition of the land.	p. 5, l.23. p. 9, l.39. p.10, l.24. pp.5-18.
20	23. The latter witness was not a specialist in tuberculosis but stated that he had treated certain patients in Rankin Park. He stated that in his opinion climate played no part in the treatment of tuberculosis and that the wooded area to the west of the Hospital buildings had played no part in the treatment of the disease and that whilst both a General and Chest Hospital each required spacious grounds the ideal limit of space was no different for a Chest Hospital than for a General Hospital.	p.34, l.33. p.26, l.12. P.31, l.1. p.31, l.40. p.43, l.13.
30	24. The Respondent in its case called Dr.Hughes, Deputy Director of the Tuberculosis Division of the New South Wales Department of Health, Dr. McCaffrey the Medical Administrative Superintendent of the Respondent Hospital, Dr. Byrne the Medical Officer in Charge of Rankin Park and Dr. Mills the Medical Officer second in charge at Rankin Park, the last two witnesses being Specialists in the treatment of Tuberculosis.	p.51. p.66. p.93. p.115.
40	25. Dr. Hughes expressed the opinion that the whole of the 327 acres was a necessary adjunct to the Hospital and that the wooded area at the back of the Hospital helped to provide fresh air and was an aid to and eesential to treatment of the patients. He further stated that area contributed towards fresh air because it prevented the building up on the allotment and	p.55, l.31. p.55, l.9. p.62, l.1. p.62, l.9.

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	that it had been taken for granted that if	
p.62, l.19.	there were parklands there was more fresh air,	
	and that in an industrialised city with a lot	
p.62, l.24.	of fog and smoke he would expect a Sanatorium	
	to have attached to it a fairly large allotment	
p.64, l.20.	and that the area at the rear of the buildings	
	had made a bank and stopped the industrial area	
	encroaching upon the Hospital.	
	26. Dr. McCaffrey stated that the acquisition	
	of 220 acres by the Respondent in 1946 and the	10
	completion of the then existing buildings was	
p.69, l.9.	carried out in implementation of the decision	
	by the Respondent in 1945 to establish a	
	Sanatorium. He further stated that he had	
	personally inspected the area west of the	
	Hospital to define what further land should be	
	acquired by the Respondent and had personally	
p.70, l.23.	recommended the acquisition of the land acquired	
	and that for the purposes of treatment of	
	Tuberculosis it was necessary to have, among	20
p.72, l.13.	other things, an adequacy of land and that the	
	327 acres held by the Respondent was no more	
p.72, l.16.	than adequate and that he would prefer more land	
	and that in a city the greater area of land	
	attached to such hospital the less the atmos-	
p.75, l.2.	phere would be vitiated by smoke and fog whether	
	from domestic or commercial sources and also	
p.75, l.5.	future encroachment towards the hospital would	
	be prevented. He further stated that the new	
	methods of treating patients introduced in 1948	30
	had intensified the need for a large area of	
p.73, l.35.	land because the death rate for the disease had	
	fallen and the number of moderately advanced and	
	advanced patients will tend to increase. He	
p.92, l.28.	further stated that apart from other matters	
	when the 220 acres was acquired he had in mind	
	providing a full service for the treatment of	
	Tuberculosis patients providing occupational	
	therapy in a form of some protected industry for	
	patients continuing under Medical supervision	40
p.93, l.11.	and that intention prevailed in the relevant	
	years.	
	27. Dr. Byrne expressed the opinion that the	
p.94, l.33.	whole of the area of 327 acres had played a part	
p.97, l.5.	in the treatment of patients at Rankin Park and	
p.97, l.6.	that the whole of the area was needed and that	
	purity of air was a prominent part in the treat-	
	ment and that it was desirable that such	
p.97, l.14.	sanatorium should be near centres of population	
	providing that purity of air could be obtained.	50

28. Dr. Mills stated that it was desirable that such a sanatorium should if possible be placed near a city and should always have a large area of grounds to obtain purity of atmosphere and the area of land (held by the Respondent) had played a material part in the treatment of patients.

p.117, l.1.
p.117, l.11.
p.117, l.14.

29. The action came on for hearing before Richardson J. sitting without a Jury on the 14th, 15th and 16th days of March 1955 and Judgment having been reserved His Honour found a verdict and entered Judgment for the Defendant.

p.128.

30. In his Judgment His Honour stated that he preferred to accept the medical evidence called by the Respondent rather than that called by the Appellant and that the evidence called by the Respondent showed that the Hospital Authorities made much use of the natural therapeutic agents to be found in the continuous area of the Respondent's land in the treatment of Tuberculosis. He found further that the evidence of physical user by patients of the land rated was so indefinite that it must be rejected and after referring to the Judgment of Sir Samuel Griffith C.J. in Knowles v. Newcastle Corporation (9 C.L.R. 534 at pages 539-540) said -

p.119-128.
p.128, l.14.
p.124-7.
p.123, l.10.
p.124, l.20.

"I have reached the conclusion, looking at the whole of the evidence, that the subject land is in fact used for the attainment of a desirable result in connection with the treatment of tuberculosis at this hospital and which could not be attained without the use of the subject land, and therefore it is used for a purpose connected with the hospital. There is a connection between the user and the purposes of the hospital. It is not essential to the user of land that it be used physically, it is also used if it is applied to any advantageous purpose. To hold otherwise would be to limit the ordinary meaning of the word "use". In my view the hospital has proved the fact of it serving an advantageous purpose and therefore there is a connection between the user and the purposes of the hospital."

p.126, l.39.

31. The Appellant appealed to the Full Court of the Supreme Court of New South Wales (Owen J.,

p.128.

Roper C.J. in Eq. and Maguire J.) and an appeal came on for hearing on the 31st day of May 1955 and on the 18th day of June 1956 the Court, Roper C.J. in Eq. and Maguire J., Owen J. dissenting, dismissed the Appeal with costs. In his Judgment, with which Roper C.J. in Eq. agreed, Maguire J. said -

p.138-9.
p.133-8.

p.135, l.3.

"The answer to the question whether land can be said to be used for particular purposes depends upon the consideration of what those purposes are and what is necessary to achieve them, and this, in turn, when the matter arises to be considered in litigation, must depend upon evidence".

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His Honour then examined the particular evidence upon this aspect and stated that he agreed with the preference of the Trial Judge in accepting the medical evidence called by the Respondent. His Honour then said -

p.136, l.12.

p.136, l.19.

"'Rankin Park' can be said, on the evidence, to stand in a different position from the majority of other hospitals. Its purpose is to treat patients who are required to remain in the hospital for protracted periods and who are suffering from a disease the effective treatment of which requires not merely medical and nursing skill but the provision of surroundings which are conducive to repose and equanimity of mind in an atmosphere as free as possible from dust and other vitiating elements. I think that the preponderance of evidence is in favour of the view that the retention of a large area of undeveloped land attached to the hospital is necessary for the attainment of this purpose. It seems to me that it can truly be said that by retaining the land in question so that the purposes of the hospital might be achieved, the hospital is "using" that land for its purposes. Ordinarily, the use of land would involve some activity on or in relation to it, but where the question is whether land is used for a particular purpose, an enquiry into how that purpose can best be achieved is necessary. The evidence establishes that the land, the subject of the present action is necessary to the fulfilment of the purposes of the hospital and, in my view, the hospital, by retaining it in its virgin

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"condition, is using it for these purposes."

32. His Honour held that -

"having regard to the unique purposes of the hospital at Rankin Park, I am satisfied that there has been, during the relevant period, an intangible use for the purposes of the hospital of the whole of the land owned by the respondent at New Lambton." p.137, 1.44.

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33. In his dissenting judgment Owen J. after referring to the evidence said - p.130-32.

"The derivation of benefit is, however, not the test. The question is whether the Hospital used or occupied this land for a hospital purpose. As to "occupation" I feel no doubt. It was not "occupied" as that word is used in rating law." p.132, 1.15.

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His Honour cited the judgment of Isaacs J. in Knowles v. Newcastle Corporation (9 C.L.R. 534-544) and said "occupation" is not synonymous with mere legal possession but it includes something more. p.132, 1.20.

34. His Honour held that it was a misuse of language to say the land was being "used" by the hospital in that it was being used for the purpose of providing fresh air and that although the patients may well have derived a benefit from the fact that land was there the derivation of benefit was not the test, the real fact was that the Hospital was not using the land. p.132, 1.38.

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35. The Appellant appealed to the High Court of Australia (Williams, Webb, Taylor, Kitto and Fullagar JJ) and the Appeal came on for hearing on the 8th day of November 1956 and on the 21st day of March, 1957 the High Court by a majority (Williams, Webb, Taylor JJ, Kitto and Fullagar JJ dissenting) dismissed the Appeal with costs. p.139-141. p.165-66.

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36. In his Judgment Williams J. held that although it may be that the opinion of Richardson J. and the majority of the Full Court that the whole of the Respondent's land p.142-52. p.146, 1.46.

could be said to be "used" in the special circumstances of the case for the purposes of the hospital, was right, it was unnecessary for the Respondent to rely on the word "used".

p.147, l.19. 37. After referring to the dissenting judgment of Isaacs J. in Knowles v. Newcastle
p.147, l.24. Corporation (supra) and the judgment of Lush J. in Regina v. St. Pancras Assessment Committee (2 Q.B.D. 581 at page 588) His Honour dealt at
p.147, l.40. length with the decision in Liverpool Corporation v. Chorley Union Assessment Committee and Withnell Overseers reported in Divisional Court (1911 1 K.B. 1057) in the Court of Appeal (1912 1 K.B. 270) and in the House of Lords (1913 A.C. 197). His Honour
p.148, l.37. briefly referred to the judgment of Hamilton J. (as Lord Sumner) at pages 1073, 1075 in the
p.149, l.12. Divisional Court and to the judgment of Buckley L.J. in Court of Appeal at pp 288-289 and the
p.149, l.27. judgment of Kennedy L.J. in the same Court at pp 292-293. His Honour added :-

p.150, l.30. "There can be no question that the respondent as the owner in fee simple of the two hundred and ninety-one acres is in occupation of the whole of this area. There is no suggestion that anyone else is in occupation of it. There is nothing in the nature of the case to rebut the prima facie presumption. On the contrary, the nature of the case supports the presumption."

His Honour concluded by stating :-

p.151, l.50. "How can it be said in the present case that the respondent occupies only a part of the three hundred and twenty-seven acres? It is impossible to say that the respondent occupies the developed but does not occupy the undeveloped part. It occupies the whole. It is all occupied for the same purposes, that is, the purposes of the hospital. The whole of the area need not be put to an active physical use in order to be so occupied. Bare occupation is sufficient so long as that occupation is for the purposes of the hospital and in this case one could not well conceive, in the absence of evidence to the contrary, that the respondent could itself occupy it for any other purposes."

RECORD

38. In his judgment Taylor J., with whose reasons and the reasons of Williams J. Webb J. agreed, held that the land was used for the purposes of the Hospital.

p.159-65.
p.152.

39. His Honour set forth the submissions of the Appellant in course of argument before the Court and then said -

p.161, l.14 seq.

"Three observations should be made at once concerning these submissions. First of all, it may be said that, although the evidence is scanty it sufficiently appears that the project envisaged in 1944 and which, about that time, the respondent commenced to carry out involved a single, though comprehensive, purpose. But though it was a long term project capable of development only over a number of years it could in no sense be said that it comprised a series of projects to be carried out on several parcels of land. Secondly, although the contrary assertion was made in argument, the evidence does not show that the land in question was acquired or held for the establishment of a village settlement or that it was held, merely, to fulfil a future purpose which it was, for a time, contemplated that the land might serve. It may be that, originally, it was thought that some part of the land might be put such a use but, even if this were so, I can find nothing to suggest that it was a material factor in determining the area which Dr. McCaffrey and Dr. Hughes appear to have thought desirable or necessary for the establishment of a sanatorium and hospital. Finally, it may be said that it is of little assistance to the appellant to assert that the acquisition of the whole of the area by the respondent was, in point of fact, unnecessary to permit the effective establishment of a sanatorium and hospital, if, upon the facts, it may be said that it has been used for the purposes of the respondent as a public hospital. If, within the meaning of s.132(1)(d), it was so used it is nothing to the point that newly developed forms of treatment made it unnecessary in the opinion of some people for a tuberculosis sanatorium to be established in open country or that, in the present case, the appropriation of a substantial area of

p.162, l.8.

"bushland did not, in fact, result in any benefit or advantage in the treatment by the hospital of its patients."

His Honour concluded by stating :-

p.164, l.18.

"The word 'used' is, of course, a word of wide import and its meaning in any particular case will depend to a great extent upon the context in which it is employed. The uses to which property of any description may be put are manifold and what will constitute "use" will depend to a great extent upon the purpose for which it has been acquired or created. Land, it may be said, is no exception and s.132 itself shows plainly enough that the "use" of land will vary with the purpose for which it has been acquired and to which it has been devoted. It may be used for a public cemetery, for a common, for a public reserve, in connexion with a church or school and so on. Each of the forms of user referred to in the section relate to use by the owner and some of them, no doubt, contemplate a use which is synonymous with actual physical occupation and enjoyment. Other contemplate a use in a less direct form. But where an exemption is prescribed by reference to use for a purpose or purposes it is sufficient, in my opinion, if it be shown that the land in question has been wholly devoted to that purpose even though, the fulfilment of the purpose does not require the immediate physical use of every part of the land. In my opinion where a hospital acquires or sets apart, for a project which may properly be described as a purpose of a public hospital, a tract of land which it considers is the minimum requirement for its contemplated project and thereupon proceeds to carry out that project it, thereby, uses the whole of the land. How its purposes shall be fulfilled is, within reason, for it to decide and, as I have already said, it is nothing to the point to say that it has employed in the project more land than may, upon the views of others, be thought to have been necessary, or that in fact, it has derived no benefit or advantage therefrom in the fulfilment of its purposes."

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RECORD

40. In his dissenting judgment Kitto J. held — p.154-8.

(1) That legal possession, conduct amounting to actual possession and some degree of permanence is involved in the word "occupy" in paragraph (d) (Section 132(1) of the Local Government Act 1919 (N.S.W.). — p.155, 1.48.

(2) That the word "used" does not involve more than physical acts by which the land is made to serve some purpose and that such acts must be recurring but the notion of continuity or permanence is absent. — p.156, 1.12.

(3) That the principle in English rating cases that title in fee simple in possession is prima facie evidence of occupation did not apply. — p.156, 1.24.

(4) That the expression "occupied by the hospital for the purposes thereof" is not satisfied unless there is proof of actual continuous possession directed to serving the purposes of the Hospital. — p.156, 1.31.

(5) That on the evidence the only area of land in the 327 acres in fact used and occupied during the relevant years by the Hospital was the fenced area of 17½ acres in which stood the hospital buildings and immediately surrounding grounds. — p.157, 1.25 seq.

(6) That the evidence of the Respondent, if accepted, established no more than that the Respondent derived a negative advantage from ownership of being able to exclude any form of development which it might not wish to see in that area and the positive advantage of being to make future use of the land as desired. — p.158, 1.26.

41. In his dissenting judgment Fullagar J. agreed with the judgment of Kitto J. and further said that the case was fought on a false issue and decided on a fallacy by reason of it being assumed that an advantage from the ownership of the land is identical with the use of it and that an advantage may be derived from the ownership without the land being — p.153-4.

"used" and that in the present case evidence that an advantage was derived was not evidence of use.

42. The Respondent submits that the judgments and orders of Richardson J. and the Supreme Court of New South Wales and the High Court of Australia appealed from are correct and should be affirmed for the following amongst other

R E A S O N S

1. On the admissions made by the parties and the findings of fact of the trial judge and the evidence accepted by him the subject land was rightly held to be exempt under the provisions of s.132(1)(d) of the Local Government Act 1919 as amended. 10

2. That the words "used" and "occupied" in Section 132(1)(d) of the Local Government Act 1919 are words of wide import and in their context require consideration of that mode of use or occupation by which 20 the particular purposes of the public hospital concerned are or may be carried into effect. It is not a correct approach to treat such words as importing fixed and absolute concepts which must be satisfied apart from and prior to consideration of the means of determining the purposes of the public hospital.

3. That having regard to the particular purposes of the respondent of establishing and 30 conducting a chest sanatorium within an industrial city, the subject land was used and occupied in a manner consonant with and in furtherance of such purposes because the respondent conducted a sanatorium on the land owned by it and as part of the treatment given to the patients the latter derived advantages and benefits from the natural condition and qualities of surrounding lands of the respondent, including the 40 subject land.

4. That in order that the subject lands should fall within the phrase "used or occupied by the hospital for the purposes thereof" as used in s.132(1)(d) of the said Act it was not necessary for the respondent to

establish in addition to ownership of one continuous area and overt acts of user and occupation in respect of portion thereof overt acts of user or occupancy of the said subject lands being the remainder of the said area.

5. That as the subject land at all relevant times belonged to the respondent hospital and as there wa no suggestion that any other person at any relevant time occupied the same, and as it formed part of a total and cotinuous area portions of which were admittedly occupied by the respondent hospital for its purposes it follows that the subject land properly falls within the description "occupied by the hospital for the purposes thereof."

6. That as the subject land at all relevant times belonged to the respondent hospital and formed part of a larger and continuous area portions of which were admittedly used and occupied for the respondent's purposes and as the expert evidence accepted by the trial judge established that the whole area was the minimum area required to establish and conduct a tuberculosis sanatorium in the neighbourhood of a large industrial city and to give abundant fresh air and proper conditions in the treatment of the patients, it follows that the subject land properly falls within the description "occupied by the public hospital for the purposes thereof". In the alternative it follows that the subject land properly falls within the description "used by the public hospital for the purposes thereof".

7. That on the evidence it was fully open to the trial judge to find as a fact (as His Honour did) that the subject land was used for the attainment of a desirable result in connection with the treatment of tuberculosis at the respondent's hospital and which could not be attained without the use of the subject land, and in the light of such findings His Honour correctly held that the land was used for a purpose connected with the hospital.

8. That the question whether land is "used" must be determined in the light of the

permitted purpose and there is no rule of law or canon of construction which determines that the word "used" in the phrase "used for the purposes of a public hospital" means physical user or overt acts of physical use.

9. That it is not correct to hold that the derivation of an advantage can never be a user in the relevant sense and as in the present case the evidence discloses that the purpose of the respondent was both (a) to use and occupy by overt acts portion of its whole area and also (b) to derive an advantage in the treatment of its patients from the balance of such area (namely the subject lands) in connection with the establishment and maintenance of a sanatorium on the whole area it follows that the derivation of an advantage from the subject lands was an integral part of the use and occupation of the whole area. 10 20

GORDON WALLACE

No. 38 of 1958

IN THE PRIVY COUNCIL

O N   A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N

THE COUNCIL OF THE CITY OF NEWCASTLE (Plaintiff) Appellant

AND

ROYAL NEWCASTLE HOSPITAL (Defendant) Respondent

C A S E FOR THE RESPONDENT

ON THE APPELLANT'S APPEAL.

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