shall be set off against the costs and other moneys due from the other in respect of the proceedings in the Supreme Court and the High Court, execution to issue for balance only.

H. C. OF A. 1905.

PATERSON v. MCNAGHTEN.

Solicitors for appellant, *Stephen, Jaques & Stephen.*

Solicitor for respondent, *L. B. Bertram.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

GEORGE DOWN, JUSTIN FOX, GREENLAW FOXTON, THOMAS DIBLEY, FREDERIC CHARLES LEA AND GEORGE WILKIE GRAY . . . . . APPELLANTS;

DEFENDANTS,

AND

HIS MAJESTY'S ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND, ON THE RELATION OF JOHN CURRIE RESPONDENT.

PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1905.

BRISBANE, *May* 30, 31, *June* 1.

Griffith C.J., Barton and O'Connor JJ.

Public Parks Act 1854 (*Queensland*) (18 *Vict. No.* 33)—*Trustees of Public Lands Act* 1869 (33 *Vict. No.* 2)—*Trustee—Breach of trust—Declaration of trust—Injunction—Costs.*

Where land is granted to trustees in trust "for cricket and other athletic sports and for no other purpose whatsoever," the trustees are entitled to permit the use of the land for any lawful purpose not inconsistent with its use when required as a place for holding athletic sports, and in particular for any purpose which, while not interfering with such use, is conducive to the main object of the trust.

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

Where land in Brisbane so granted was leased by the trustees to one S. to use the ground and buildings thereon for bicycle racing, and such other sports, pastimes, and purposes as he might desire every Saturday evening between seven and eleven p.m., and every Wednesday afternoon, provided fourteen days' notice in writing was given the trustees, and provided also that the said ground was not otherwise engaged or required by the trustees:

Held, in a suit for a declaration of the trust, and for an injunction, that the plaintiff was entitled to a declaration that the trustees were not entitled to permit horse racing or pony racing to be carried on in the ground, except by way of incidental use, and so as not to interfere with the use of the land for the main purposes of the trust.

Held also, on the terms of the particular lease, that the trustees had transgressed the conditions of the trust.

Judgment of the Supreme Court of Queensland, *Attorney-General* v. *Down*, Q.W.N., 17th March, 1905, No. 9, varied.

APPEAL from an order of the Supreme Court of Queensland, *Attorney General* v. *Down* (1).

The following statement of the facts is taken from the judgment of *Griffith* C.J.:—

This is an appeal from a decision of the Full Court affirming a decision of *Real* J. in an action brought by the Attorney-General, on the relation of a resident of South Brisbane, against the appellants, who are trustees of the Brisbane Cricket Ground under a deed of grant from the Crown, dated 21st March, 1905, by which the land in question was granted to the trustees upon trust "as a reserve for cricket and other athletic sports and for no other purposes whatsoever." The respondent alleged that the appellants had used the land, or permitted its use and occupation, for the purpose of horse racing and pony racing, and otherwise than as a reserve for cricket and other athletic sports, and threatened to continue to do so, and he claimed a declaration that the appellants were not entitled to use or occupy, or permit the use and occupation of the land for the purposes of horse racing or pony racing, or otherwise than as a reserve for cricket and other athletic sports, and that such use or occupation is a breach of trust. He also claimed an injunction against such use in the future.

The appellants admitted that the land had been used for pony races and other races, and set out an agreement with one

(1) Q.W.N., 17th March, 1905, No. 9.

Sharpe under which such use had been permitted. They denied that the use under the agreement was contrary to the trusts of the grant, and further said that the pony and trotting races objected to were held temporarily, at such times, and under such circumstances, as did not prevent the land being used for the purposes for which it was granted, and that the terms of the agreement with Sharpe were conducive to the attainment of those purposes, and that, without the aid of such an agreement, it would be impossible to obtain money to pay the principal or interest due upon a mortgage of the land which had been lawfully made by the trustees with the consent of the Governor-in-Council, or to preserve the land in a fit state of repair, or to attain the objects and purposes for which the land was granted.

The case was tried before *Real* J., who made a declaration that the appellants were not entitled to use or occupy or permit the use or occupation of the land for the purposes of horse racing or pony racing, or otherwise than as a reserve for cricket and other athletic sports, and that in so permitting the use of the ground for horse racing the appellants were guilty of a breach of trust. He refused to grant an injunction, but without prejudice to an application for an injunction after the termination of Sharpe's agreement.

On appeal to the Full Court the judgment was affirmed by a majority (*Chubb* and *Power* JJ.), *Cooper* C.J. dissenting.

Feez (with him *Stumm*), for appellants. The terms of the grant, viz., "for cricket and other athletic sports and for no other purpose" do not preclude the land from being used for horse and pony racing when not required for the purposes mentioned in the grant. The land may be used for any purpose not inconsistent with the main purpose. If one small corner of land granted for cricket were used for tennis, in such a way as not to interfere with the use of the rest of the land for cricket, such user would not amount to a breach of trust. The expression "and for no other purposes whatsoever" in the grant means for no other purpose than as a reserve for cricket and other athletic sport. The real limitation upon such user is that it must not be permanently

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

inconsistent with the original purpose: *Attorney-General* v. *Hanwell Urban Council* (1).

[GRIFFITH C.J.—That is not a direct authority that mere temporary user is permissible.]

Where portion of land granted to trustees is not immediately required for the purposes of the trust, that portion may be used by them for any lawful purpose. Here the whole of the pony track is outside the cricket and football ground.

[O'CONNOR J.—But this grant contains the words "and for no other purpose."]

Here the land was being used for raising funds to pay interest on the mortgage—a purpose auxiliary to the trust, and not antagonistic to it. In *Attorney-General* v. *The Mayor &c. of Southampton* (2), where the trust was to keep the land in proper condition for purposes of recreation, the use of the land for a cattle fair was held to be a breach. But in that case the user was inconsistent with the main purpose of the grant.

[GRIFFITH C.J.—That case was decided on the construction of the particular Act of Parliament.]

Where portion of the land granted subject to such limitations as these is not immediately required for the purposes of the trust, that portion may be used for any lawful purpose: *Attorney-General* v. *Teddington Urban Council* (3); *Attorney-General* v. *Corporation of Sunderland* (4). Here the user is not inconsistent with the express objects of the grant, and in addition yields substantial profits with which the trustees are enabled to improve the ground.

[GRIFFITH C.J.—Under the Act 33 Vict. No. 2, clearly a lease can be given for less than three years; and by sec. 10, the proceeds by way of rent reserved upon a lease under the Act are required to be applied solely and strictly to purposes within the express trusts.]

Sec. 9 provides that the land may be leased for a longer period than three years with the consent of the Governor-in-Council In those cases leases could be granted for any purpose.

(1) (1900) 1 Ch., 51; (1900) 2 Ch., 277.
(2) 1 Gif., 363.
(3) (1898) 1 Ch., 66, *per Romer* J., at p. 68.
(4) 2 Ch. D., 634.

[GRIFFITH C.J.—But would the words of the grant "and for no other purpose" take the case out of the scope of the Act?]

This case is not governed by the Statutes under which the trustees are appointed; but the words of the Act making the trustees the managers of the land have a strong bearing on the construction of these trusts. In *Grand Junction Canal Co.* v. *Petty* (1), where land was acquired and used by a canal company under their Statutes for the purposes of a towing-path, it was held that such land might be dedicated as a public highway, if such use be not incompatible with its use as a towing-path when required by the company. Here the trustees are in the position of absolute owners, and are not using the land for purposes inconsistent with the trust.

[O'CONNOR J.—Anything which would make the ground more attractive to the public and provide more facilities of access would be permissible. But does this case come within that rule?]

The general incidents of ownership cannot be curtailed except so far as their exercise is inconsistent with the trust. The Acts under which the trustees are appointed make them owners or managers, empower them to lease up to three years, so long as such power is not interfered with by the terms of the grant, and over three years with the consent of the Governor-in-Council.

[GRIFFITH C.J. referred to *In re Gonty and Manchester, Sheffield and Lincolnshire Railway Co.* (2); *Caledonian Railway Co.* v. *Turcan* (3); and *Foster* v. *London, Chatham, and Dover Railway Co.* (4).]

The question is, will the user objected to prevent the use of the ground for the main purpose of the trust: *Bayley* v. *Great Western Railway Co.* (5). Here the main purpose of the trust would not be interfered with, as the agreement provides that the ground can only be used for pony racing when not required for cricket or football, and that during pony racing, the playing ground is not to be used by the spectators: *Attorney-General* v. *Teece* (6). Paragraph 10 of the defence, which states that the pony and trotting races were only held temporarily, and at such times and on such conditions as would not prevent the land from

(1) 21 Q.B.D., 273.
(2) (1896) 2 Q.B., 439.
(3) (1898) A.C., 256.
(4) (1895) 1 Q.B., 711.
(5) 26 Ch. D., 434.
(6) (1904) 4 S.R. (N.S.W.), 347.

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

being used for the purposes for which it was granted, raises the real question. By such use of the land, the trustees are enabled to keep the ground in good repair. In *Attorney-General* v. *Hanwell Urban Council* (1), there was a permanent absolute interference with part of the land. In *Attorney-General* v. *Mayor &c. of Southampton* (2) there was an absolute interference as to place but limited as to time. Neither of these cases is affected by Statutes such as the *Parks and Public Lands Act* 1869. In grants the words "only" and "for no other purpose" are really superfluous. The construction of a gift to trustees "to the use of A." would not be affected by the addition of either phrase. The decision in *Attorney-General* v. *Teece* (3) turned on a question of fact, viz., whether cycling under certain circumstances interfered with cricket. Here pony racing always gave way to cricket or football whenever any question arose as to whether both should be carried on together. In *Fitzpatrick* v. *Waring* (4), it was held that a trustee having the legal estate, who has active duties to perform, may, without any express leasing power, grant a lease for a reasonable term. Here the trustees have the general management, and have also to see that the interest is paid on the mortgage. Where land was granted for common of pasturage, it has been held that the trustees may, until it is required for that purpose, use the land in any way not inconsistent with its ultimate use for pasturage. *Municipal Council of Sydney* v. *Attorney-General and Milroy* (5).

Lukin (with him *O'Sullivan*) for respondent. The question here arises on the construction of the terms of the legal grant. By the grant it was intended that a user for any purpose other than those specified should work a forfeiture.

[GRIFFITH C.J.—Here the trustees have a statutory right to lease for a period not exceeding three years.]

But the grant in this case specified particular uses, and contained a general prohibition against any use other than those specified. If it were expedient to use the land for other purposes, a licence could be obtained from the Crown allowing such user,

(1) (1900) 2 Ch., 377.
(2) 1 Gif., 363.
(3) (1904) 4 S.R. (N.S.W.), 347.
(4) 11 L.R., Ir., 35.
(5) (1894) A.C., 444.

and even if the granting of such licence constituted a breach of trust the Attorney-General need not take action: *London County Council* v. *Attorney-General* (1).

This grant was made under sec. 95 of the *Crown Lands Act* 1884, and, as the Trustees were given special power to mortgage in their Act, it would appear that the legislature had not intended the *Trustees of Public Lands Act* 1869 to apply. If it be held that the terms of this grant do not prohibit pony racing, it would be impossible for the Crown to make a grant exclusively for any one purpose. The statutory power of leasing must be read subject to the restrictions placed on any such power by the terms of the grant. *Attorney-General* v. *Mayor &c. of Southampton* (2) governs this case. There power was given to the Corporation to appropriate waste lands "exclusively for the recreation of the inhabitants," &c.

The phrase "exclusively" is no more prohibitive than "for no other purpose." In that case the reason of the decision was that the land could not, according to the trusts, be used even temporarily for the purpose of recreation. *Attorney-General* v. *Teddington Urban Council* (3); *Boyce* v. *Paddington Borough Council* (4); *Bostock* v. *North Staffordshire Railway Co.* (5).

The respondent is entitled to a declaration not only that any use of the land inconsistent with its use for cricket and other athletic sports is a breach of trust, but also that its use for pony racing at any time is a breach.

[O'CONNOR J.—It is then necessary to show an absolute prohibition in the deed.]

In *Foster* v. *London, Chatham and Dover Railway Co.* (6), the letting of the shops was allowed because there was no prohibition in the special Act constituting the company.

[GRIFFITH C.J.—In *Ashbury Carriage and Iron Co.* v. *Riche* (7), it is laid down that everything not specially allowed in the charter of a company is prohibited. Where was the authorization in *Foster's Case*?]

It was held there was an implied authority: *Trustees of the*

(1) (1902) A.C., 165.
(2) 1 Gif., 363.
(3) (1898) 1 Ch., 66, per *Romer* J., at p. 70.
(4) (1903) 2 Ch., 556.
(5) 4 El. & Bl., 798.
(6) (1895) 1 Q.B., 711.
(7) L.R. 7 H.L., 653.

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

Royal Agricultural Society v. *Mayor &c. of Essendon* (1); *Trustees of the Victorian Rifle Association* v. *Mayor &c. of Williamstown* (2). The words "and for no other purpose" must have a meaning ascribed to them. As far as possible meaning should be given to every word used: *Ditcher* v. *Denison* (3); *Cargo ex "Argos"* (4); *Cowper Essex* v. *Local Board for Acton* (5).

Cur. adv. vult.

The following judgments were read:—

June 1.

GRIFFITH C.J. [after stating the facts as before set out, continued]: It was not suggested that the horse racing and pony racing complained of were illegal sports, or that they had been conducted in such a manner as to constitute a nuisance. The case must therefore be treated on the footing that the uses complained of were lawful purposes except so far as they were forbidden by the express terms of the trust.

The first question for consideration is the construction of the deed of grant. The respondent contended that its terms, and particularly the use of the words "and for no other purposes whatsoever," absolutely forbade the use of the land for any purpose, or at any rate for any sport, other than athletic sports. The appellants contended that those words did not prevent the use of the land for any lawful purpose at times when it was not required for athletic sports, provided that such use did not interfere with its use for the latter purposes when required, and they maintained that on the evidence no such interference was shown to have occurred or to have been threatened.

It appeared from the preambles of various private Statutes referred to that the form of declaration of trusts with the words "and for no other purposes whatsoever" is one commonly used in Queensland in grants of land to trustees for public purposes. In the State of Victoria, on the other hand, it appears to have been the practice to include in the deed of grant a provision that the trustees should not permit any part of the land to be used for

(1) 18 V.L.R., 85.
(2) 16 V.L.R., 251.
(3) 11 Moo. P.C.C., 324, *per Knight Bruce* L.J., at p. 337.
(4) L.R., 5 P.C., 134.
(5) 14 App. Cas., 153.

any other purpose. The respondent contended that the words in the Queensland form of grant imply a similar provision.

The New South Wales Act, 18 Vict. No. 33, called the *Public Parks Act* 1854, which recites that it is expedient that bodies of trustees with perpetual succession should be created for the purpose of holding managing and protecting lands granted for or dedicated to purposes of public recreation, convenience, health and enjoyment, provides that when lands are granted by the Crown to trustees for such purposes the trustees shall be a body corporate, and declares (sec. 5) that trustees appointed by virtue of the Act shall have all the powers of absolute owners except for the purposes of alienation, and that they may make rules and regulations (subject to the approval of the Governor-in-Council) for, amongst other things, "regulating the use and enjoyment of the lands."

The Trustees of Public Lands Act 1869, (33 Vict. No. 2), recites in the preamble that from time to time sundry Crown Lands have been granted and may hereafter be granted to various individuals "upon certain trusts for public purposes and no other," and that by an Act 28 Vict. No. 22, certain powers had been given to such trustees the exercise of which had proved prejudicial to the public interests. The Act then repeals the Act of 28 Vict., and substitutes other provisions. It provides, amongst other things, that, notwithstanding the provisions of the *Real Property Act* 1861, and in particular, the provisions of sec. 79 of that Act, (which in terms confers an absolute power of alienation upon registered proprietors who are trustees), it shall not be lawful for such trustees, *i.e.*, those referred to in the preamble, to sell, transfer, or mortgage any land vested in them for any such public purpose, "nor to lease the same for any term exceeding three years" except under the provisions of the Act (sec. 3). Sec 7 provides that it shall be lawful for such trustees to lease the lands vested in them upon trust subject to certain conditions set out in secs. 8 and 9. These provisions do not seem to affect the power to lease for a term not exceeding three years, which is formally conferred by the *Real Property Act* as well as by sec. 5 of the Act of 1854, unless the word "alienation" in that section includes leasing.

The appellants contend that, having regard to these Statutes,

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

Griffith C.J.

they have all such ordinary powers of ownership as may be exercised without prejudice to the main object of the trust, *i.e.*, to hold the land "as a reserve for cricket and other athletic sports." They maintain that, having regard to the Statutes and to the general rules applicable to statutory owners of land for specific purposes, those words do not mean that the land shall be "reserved" for such sports in the sense that the use of the land for all other purposes is forbidden.

It will be convenient, then, to consider the general rules of law applicable to the case of such owners. In *R.* v. *Leake* (1) the question was with regard to land vested by an Act of Parliament in Commissioners for draining the Lincolnshire Fens. The precise question was whether they could dedicate a portion of the land as a highway, so that the parish became liable for repairing it. *Parke* J. said (in a passage quoted with approval by *A. L. Smith* L.J., in *Foster* v. *London Chatham, and Dover Railway Co.* (2)):—"If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some specific purpose incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think that the commissioners have that power. The mere circumstance of their not being beneficial owners cannot preclude them from giving the public this right." The learned Judge then proceeded to consider whether the special purposes indicated by the Act of Parliament were inconsistent with the use of the land in question as a highway, and came to the conclusion that they were not. In *Attorney-General* v. *Great Eastern Railway Co.* (3), Lord *Selborne* L.C., said :—"I assume that your Lordships will not now recede from anything that was determined in *The Ashbury Railway Carriage and Iron Co.* v. *Riche* (4). It appears to me to be important that the doctrine of *ultra vires* as it was explained in that case, should be maintained. But I agree with Lord Justice *James*, that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and

(1) 5 B. & Ad., 469.
(2) (1895) 1 Q.B., 711, at p. 722.
(3) 5 App. Cas., 473, at p. 478.
(4) L.R. 7 H.L., 653.

that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*." Lord *Blackburn* dealing with the same case of *The Ashbury Railway Carriage and Iron Co.* v. *Riche* (1), said (2):—"That case appears to me to decide at all events this —that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited," and added:—"My Lords, I quite agree with what Lord Justice *James* has said on this first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited." In *Foster* v. *London, Chatham and Dover Railway Co.* (3), the question was whether the defendants, a railway company, might let the spaces under their arches for shops. The Court of Appeal, constituted by Lord *Halsbury*, C., and *Lindley* and *A. L. Smith* LJJ., held that the company had an implied power to use land acquired by them for the purposes of their undertaking, in any manner which was not an infringement of the rights of other persons, and which was not inconsistent with the purposes for which the company was constituted. Lord *Halsbury*, in the course of his judgment said (4):—"I have now to see whether there is anything in the Act of Parliament which prevented this use of the railway arches; and I think the question must come to that. If the company have the right to let the railway arches it is impossible to contend that they cannot let these little pieces of land, which give additional accommodation to the railway arches, in the form in which they are let. I for one entirely deny that there is any established proposition of law which prevents the railway company using this land and their arches for some collateral purpose that may give profit to them. A great variety of examples have been given by various judges of things which may be done by railway companies besides their own particular business. It is familiar to us all that coal stores

(1) L.R. 7 H.L., 653.
(2) 5 App. Cas., 473, at p. 481.
(3) (1895) 1 Q.B., 711.
(4) (1895) 1 Q.B., 711, at p. 718.

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

Griffith C.J.

and bookstalls, and a great variety of things may be set up by railway companies which, although not actually used in the business of carrying passengers and goods, are nevertheless things which they may do, and yet carry on their own particular business quite consistently. I for one should be sorry to place any restriction on their power to make, to the best of their ability, their undertaking profitable to their shareholders and a convenience to the public."

Lindley L.J. said (1): "It is necessary to consider whether the defendants are exceeding their statutory rights. What is the measure of their rights? The law on that point is now settled." He then read the passage above quoted from Lord *Selborne's* judgment in *Attorney-General* v. *Great Eastern Railway Co.* (2), and, after pointing out that there was nothing in the company's Act which expressly authorized the letting of the arches, said that, with the exception of a single case before *Malins* V.C., all the authorities are consistent with the proposition that any mode of enjoying a company's own land is impliedly permitted if it is not inconsistent with the provisions of the company's Acts, and is not an infringement of the rights of other persons. *A. L. Smith* L.J. quoted with approval from the judgment of *Parke* J. in *R.* v. *Leake* (3), the passage above cited; and also quoted the passage above cited from Lord *Blackburn's* speech in *Attorney-General* v. *Great Eastern Railway Co.* (2). Again in *In re Gonty and Manchester, Sheffield and Lincolnshire Railway Co.* (4), the Court of Appeal held that, when the giving of a private right-of-way over land taken by a railway company is not inconsistent with the purposes for which the lands have been taken, it is not *ultra vires* of the company to grant such a right-of-way.

In *Attorney-General* v. *Teddington Urban Council* (5) the question was whether part of lands held by the defendants "for the reception and disposal of sewage" might lawfully be used as a recreation ground and certain other purposes objected to by the relator. *Romer* J. said (6): "I think it right, therefore, to state shortly the views I take as to what the powers of the

(1) (1895) 1 Q.B., 711, at p. 719.
(2) 5 App. Cas., 473.
(3) 5 B. & Ad., 469.
(4) (1896) 2 Q.B., 439.
(5) (1898) 1 Ch., 66.
(6) (1898) 1 Ch., 66, at pp. 69, 70.

defendants are with reference to the interim user of the land not immediately required for sewage purposes. Now I agree that the defendants could not apply the land to or use it for any purpose inconsistent with the purpose for which it was acquired; but in the present case those purposes did not require immediate use of every part of the land for sewage purposes. Some part only was required for immediate sewage works, and the remaining part has to be retained because needed hereafter for those works, and for the actual application of this remaining part for such purposes the defendants could retain it, and one of the purposes for which they acquired it might be said to be such interim retainer. Of course, while so retaining it they could not use or deal with it in such a way as to prevent or substantially interfere with its immediate use for sewage purposes whenever it was needed for those purposes. But subject to that exception while retaining it, I do not see how it was inconsistent, for the purposes for which they acquired it to use it, in any lawful manner in which in its then condition it could be used, provided it did not substantially interfere with the main purpose of drainage for which it was ultimately wanted. I know nothing which makes it unlawful for a council such as these defendants to permit vacant land in their possession, and not at the time required for the ultimate purpose for which they acquired it, temporarily to be used as a recreation ground, provided care is taken to prevent any rights being acquired over it by the public or otherwise which would prevent or interfere with the council using it for such ultimate purposes whenever required."

He then pointed out that the case of *Attorney-General* v. *Mayor &c. of Southampton* (1), (on which the respondent in the present case mainly relied), in nowise interfered with this view. In that case, land was held by trustees *solely* for the purposes of recreation, and it was held that it could not be used, even temporarily, as a fair for the sale of cattle, a purpose which would, while it lasted, prevent its use for recreation. In my opinion that case does not govern the present.

Having regard to the general law applicable to land held by trustees for public purposes as declared by these authorities, and

(1) 1 Gif., 363.

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

Griffith C.J.

to the express provisions of sec. 5 of the *Public Parks Act* 1854, and to the power to grant leases for terms not exceeding three years, recognized by the *Trustees of Public Lands Act* 1869 as existing in trustees of lands granted upon trust for a specific purpose "and for no other purpose," I am of opinion that the appellants are entitled to permit the use of the reserve in question for any lawful purpose not inconsistent with its use, when required, as a place for holding athletic sports, and in particular for any purpose which, while not interfering with such use, is conducive to the main object of the trust, for instance, for raising funds by way of rent, which may be applied to make the land more useful for carrying out that main object. In view of the Statutes I cannot think that the words "and for no other purposes" ought to be construed as prohibiting the use of any part of the land for any purpose other than athletic sports. Such a construction would be contrary to the general law applicable to such trusts. Nor can I see any sound basis for the conclusion that those words exclude from what would otherwise be legitimate uses the holding of sports which are not athletic.

The next question for consideration is whether the use of the land for horse and pony racing is inconsistent with its use for athletic sports. The obvious answer to this question is that it must depend on circumstances. It is plainly not inconsistent with the use of land as a racecourse that the space encircled by the racing track should be occasionally used for cricket. Nor is it inconsistent with the use of such an encircled space as a cricket ground that the track should occasionally be used for racing. It is equally obvious that the two sports could not ordinarily be carried on at the same time, except in distinct parts of the land.

For these reasons I am of opinion that the declaration contained in the judgment under appeal is too large, and that it should have been limited, if the circumstances were such as to justify the bringing of the action at all, to a declaration that the appellants were not entitled to use or occupy or permit the use or occupation of the land for horse racing and pony racing except under conditions not inconsistent with its use for athletic sports when required for that purpose. I will state later the precise terms of the declaration which I think should have been made.

The appellants, however, contended that their agreement with Sharpe does not transgress this rule, that they have never indeed violated it, and that the litigation was uncalled for, and the action should have been dismissed. It is necessary, therefore, to consider the facts proved in evidence. It appeared, as indeed might be inferred from the nature of the grant, which was of waste lands of the Crown, that the land when originally granted was in a state entirely unsuited for carrying on sports upon it, and that the trustees had been obliged to raise money for the purpose of improvements, some of which they had raised on mortgage of the land itself.

The agreement with Sharpe, which is dated 18th January, 1903, stipulated that he should have the right for a term of three years from 1st December, 1902, to use, occupy and enjoy the privileges and advantages of occupation as lessee of the cricket ground, with all buildings and improvements, for the purposes of bicycle racing and such other lawful sports, pastimes, and purposes as he might desire on every Saturday evening during the term between 7 and 11 p.m., and should have the further right or option of using the land for any of such purposes on any Wednesday afternoon during the term from noon until 6 p.m. upon giving the trustees fourteen days' previous notice in writing of his desire to use the land on any such Wednesday afternoon, "provided always that the said ground is not otherwise engaged or required for some purposes by the trustees or by any person approved by them." I think that this proviso must mean that the requirement of the ground by the trustees must be notified to the lessee when he gives his fourteen days' notice.

The lessee was, in addition, to have the right to use a portion of the ground described as "that portion heretofore used for pony and horse racing" between the hours of 5 and 9 every day during the continuance of the agreement, excepting Sundays and such other days as the trustees might require the ground or permit it to be used for other purposes for matches, sports or other pastimes commencing or announced to commence at or before 1 p.m. on any day during the continuance of the agreement.

It appeared that the racing track encircles the land prepared

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

Griffith C.J.

for use as a cricket field, which is also encircled by a bicycle track inside the racing track, and that cricket matches and bicycle matches could not be played while racing or training of the horses was going on. Nor could cycle-training and horse-training be carried on simultaneously. There was, therefore, a possible interference with the right of members of the general public who might desire to use the land for such purposes. But the learned Judge who heard the case thought that, if there was any interference, it was of a most minute character. Still, in my judgment, the agreement with Sharpe did not sufficiently protect the rights of the general public to use the land for the specific purpose for which it was granted. There was therefore sufficient ground for bringing the action.

For these reasons I think that the judgment should be varied by substituting for the declaration of right contained in it a declaration that the appellants are not entitled to permit horse racing or pony racing to be carried on in the land in the statement of claim mentioned, except by way of incidental use and so as not to interfere with the use of the said land for the purposes of a reserve for cricket and other athletic sports, and in particular are not entitled to permit horse racing or pony racing to be carried on in any part of the said land in which the use or occupation of such part for such purposes would interfere with the suitability of the land in general as a place for carrying on cricket or other athletic sports, or to permit any part thereof to be used for such first mentioned purposes at any time when such part is reasonably required for such sports, or at any time when such use would interfere with the reasonable use of any other part of the land for such sports.

As the plaintiff has established his right to bring the action, but has failed as to a substantial part of his claim, there should be no costs either in the Supreme Court or of this appeal.

BARTON J. The Chief Justice has just stated so fully the contentions of the parties, and the provisions of the Statutes cited, that I need not say anything on either score. An injunction having been refused by *Real* J., and that part of his decree not having been appealed from, the question is now

whether the declaration made by him on the hearing as to the rights of the parties, which declaration is affirmed by the judgment of the majority of the Full Court, ought to stand, and, if we think there has been a breach of trust, whether the declaration ought to be varied.

First, as to the construction of the grant, I cannot agree with counsel for the respondent in his argument that the words "and for no other purposes whatsoever" enlarge the meaning of the preceding words of the trust, "to hold . . . . as a reserve for cricket and athletic sports." The words of prohibition may give emphasis, but I do not see how they can add to the meaning. To say that this grant is to be held as a reserve for cricket and athletic sports cannot mean that it may be held as a reserve for other sports. Its purpose is to be held as such a reserve and not any other kind of reserve. If I hold land "in trust for A" without more, I am no more entitled to give the benefit of it to B. than if I held it "in trust for A. and for no other person whomsoever."

But the question is, what is *prohibited* by a trust in these terms? In *Attorney-General* v. *Great Eastern Railway Co.* (1), Lord *Blackburn*, discussing *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2) says:—"That case appears to me to decide at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited." And he went on to say, "I quite agree with what Lord Justice *James* has said on this first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited." So much then is implied in the grant. But does the implied power go further? The earliest case cited to us was *R.* v. *Leake* (3). A Statute had vested land in commissioners for drainage purposes. A continuous user of part of this land by the public as a way had taken place, and it was claimed that such user was sufficient evidence of dedication

(1) 5 App. Cas., 473, at p. 481. (2) L.R. 7 H.L., 653.
(3) 5 B. & Ad., 469.

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

Barton J.

of that part by the commissioners as a highway. Answering in the affirmative the preliminary question, whether the evidence would have been sufficient to prove a dedication in the case of an ordinary owner, the Court then decided in the affirmative the main question, whether having regard to the purposes for which they held the land, the commissioners were capable of dedicating it as a highway. *Parke* J. said in his judgment (1): "If the land were vested by the Act of Parliament in commissioners so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think the commissioners have that power." This passage seems to place the matter on a broader basis than Lord *Blackburn* does in *Attorney-General* v. *Great Eastern Railway Co.* (2). But probably the difference is more apparent than real. For two considerations suggest themselves:—first, that things may be held "incident" to the main purpose—may be "impliedly authorized" —if they are not "incompatible" with that purpose; and secondly, that if there is a distinction in terms, it has been sufficient for the purposes of many cases to declare that things are incident to the main purpose, and for that reason impliedly authorized, because in the particular instances it has not been necessary to consider whether there are not uses compatible with the main purpose, not quite implied in the grant, which nevertheless are in the circumstances not prohibited. At any rate, *Parke* J.'s statement of the law has often been cited, and I cannot find that any effort has ever been made to qualify it or to cut it down. *A. L. Smith* L.J. in *Foster* v. *The London Chatham and Dover Railway Co.* (3) quotes the passage and relies on it, though that case might perhaps have been decided as it was, without resorting to so broad a proposition, and the learned Lord Justice evidently placed great reliance on it, as will be seen in *In re Gonty and Manchester, Sheffield and Lincolnshire Railway Co.* (4), where a railway company were held entitled to give a right of way over

(1) 5 B. & Ad., 469, at p. 478.
(2) 5 App. Cas., 473.
(3) (1895) 1 Q.B., 711.
(4) (1896) 2 Q.B., 439.

lands they had acquired under the *Lands Clauses Consolidation Acts*, on the ground that to do so was not inconsistent with the purposes for which the lands were taken. In giving judgment Lord *Esher*, then M.R., said (1): "Then it is suggested that the railway company cannot give this right of way. If to give that right of way were inconsistent with the purposes for which they were taking this land, then they could not give the claimant that right. . . . . Looking at the cases that have been cited to us other than the case of *Mulliner* v. *Midland Railway Co.* (2) they are direct authorities, as it seems to me, particularly the *Grand Junction Canal Co.* v. *Petty* (3), that the company can give this right of way, because it is not inconsistent with any purpose for which they have bought the land." In the same case *A. L. Smith* L.J. (4) put the matter again in the terms stated by *Parke* J. in *R.* v. *Leake* (5): "If such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power." And *Rigby* L.J., in concurring, pointed out that *Mulliner* v. *Midland Railway Co.* (2) in no sense conflicted with the view which the Court of Appeal was then expressing.

In the case cited by Lord *Esher*, *Grand Junction Canal Co.* v. *Petty* (3), decided in 1888, it was held that land acquired by a canal company under an Act of Parliament for the purposes of a towing path might be dedicated by them as a public footpath, subject to its use by the company as a towing path. Here again *R.* v. *Leake* (5) was approved and followed. Lord *Esher* M.R., said (6): "I adopt what that learned Judge" (*Parke* J.) "there laid down." He cited the passage quoted above, and said, "I think, therefore, that the case comes within the principle laid down in *R.* v. *Leake* (5), and that the company could legally make the dedication. . . . It must be, I think, a dedication to the public of the towing-path, for the purpose of such user as a footpath as will not interfere with its ordinary use as a towing-path by the company." *Lindley* L.J., in the same case says (7): "The

(1) (1896) 2 Q.B., 439, at p. 445.
(2) 11 Ch. D., 611.
(3) 21 Q.B.D., 273.
(4) (1896) 2 Q.B., 439, at p. 448.
(5) 5 B. & Ad., 469.
(6) 21 Q.B.D., 273, at p. 275.
(7) 21 Q.B.D., 273, at p. 277.

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

Barton J.

true principle appears to me to be laid down in the judgment of *Parke* J. in that case" (*R.* v. *Leake*).

The Attorney-General v. *Teddington Urban Council* (1) was a case in which land had been acquired by an urban authority under the powers of the *Public Health Act* 1875 for the purpose of receiving and disposing of sewage. Only part of it was immediately required for this purpose, but it is likely that the remainder would be ultimately so required. They proposed to use it, until so required, for purposes in themselves lawful, such as a recreation ground. *Romer* J. held that the council could so use it, and in his judgment occurs the following passage, which is material in its bearing on the present case (2):—"Of course . . . they" (that is the council) "could not use or deal with it in such a way as to prevent or substantially interfere with its immediate use for sewage purposes whenever it was needed for those purposes. But subject to that exception . . . I do not see how it was inconsistent, for the purposes for which they acquired it, to use it, in any lawful manner in which in its then condition it could be used, provided it did not substantially interfere with the main purpose of drainage for which it was ultimately wanted. I know nothing which makes it unlawful for a council such as these defendants to permit vacant land in their possession, and not at the time required for the ultimate purpose for which they acquired it, temporarily to be used as a recreation ground, provided care is taken to prevent any rights being acquired over it by the public or otherwise which would prevent or interfere with the council using it for such ultimate purposes whenever required."

I am of opinion that, although, as will appear, the agreement entered into between the appellant trustees and Sharpe was itself a breach of trust, and that under its operation the appellants have been guilty of further breaches of trust, I cannot say that it follows that pony racing or other sports not named in the grant cannot be carried on under any circumstances so as to be compatible or consistent with the trusts of the grant. I should think it possible to "use or deal with" the land "in such a way as" not "to prevent or substantially interfere with its use for" the expressed "purposes whenever it was needed for those pur-

(1) (1898) 1 Ch., 66. (2) (1898) 1 Ch. 66, at p. 70.

poses." I am of opinion, therefore, that the declaration in the decree of *Real* J. is too wide, and should be varied.

The case of *Attorney-General* v. *Corporation of Sunderland* (1), was cited, but does not in my opinion throw any light on the present question. Land was held by the defendant corporation only "as public walks and pleasure grounds." The Court of Appeal decided that they could appropriate part of the land not only as a site for a museum and conservatory, but also as a site for a free library, all these objects being held to be conducive to the better enjoyment of the public walks and pleasure grounds as such. I do not think it can be held that pony racing on this reserve is "conducive" to its better use for cricket and other athletic sports. The profits of pony racing may be so, but in a different sense, and not in the sense that is material. But if pony racing is not conducive to the expressed purposes in the sense maintained, it may nevertheless be consistent with the purposes for which the land was granted, to use it for pony racing in a manner which would not "prevent or substantially interfere with its immediate use" for the expressed purposes "whenever it was needed for those purposes."

Now the leading facts, so far as the present case is concerned, of *Attorney-General* v. *Hanwell Urban Council* (2), appear in a few words of the judgment of Lord *Alverstone*, then Master of the Rolls (3). "The defendants' predecessors, and therefore the defendants, acquired the land under statutory powers and were authorized to acquire the land for the purpose of using it for the disposal of sewage. It turned out that two acres of the land so acquired were not fitted for sewage purposes, and thereupon in the year 1897 or thereabouts the idea occurred to the defendants that they might use these two acres, not for a merely temporary purpose, not for anything in connection with sewage, but for the purpose of permanently establishing thereon an isolation hospital for infectious diseases." It was held that, although the two acres were unfitted for the purpose for which the whole area was acquired, the local authority could only use them permanently for purposes consistent with those for which they originally

(1) 2 Ch. D., 634.
(2) (1900) 2 Ch., 377.
(3) (1900) 2 Ch., 337, at p. 382.

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

Barton J.

acquired them, and the Court of Appeal upheld the decision of *Kekewich* J. granting an injunction against the proposed user. It was plain that such user as this local authority contemplated was wholly incompatible with the purpose for which the land was held.

It is unnecessary to refer at length to the case of *Attorney-General* v. *Mayor &c. of Southampton* (1). There a corporation was directed by Act of Parliament to cause a piece of ground to be drained and levelled, and kept in a proper condition for the purpose of public recreation. *Stuart* V.C. restrained the corporation by injunction from permitting a cattle fair to be held on the land. The correctness of this decision has never been questioned from the Bench, and it obviously was inevitable in the particular circumstances. A trust for recreation generally implies that the land must be open for that use every day. That is not so in the present case, and I take the same view of *Attorney-General* v. *Mayor &c. of Southampton* (1) as *Cooper* C.J. did in the Full Court of Queensland.

Having referred to the principal cases, I find that the statement of the law by *Parke* J. in *R.* v. *Leake* (2) is recognized as of unchallengeable authority, and that in *Attorney-General* v. *Teddington Urban Council* (3), a case which is not unlike the present, apart from the agreement with Sharpe, *Romer* J., in 1898, has applied the same principle. And I think that, when the present agreement is out of the way, the two cases mentioned will be found to be a safe guide to the trustees in determining as to their future action.

Now, as to the agreement, it is impossible to escape the conclusion arrived at by my learned brother, that it does not sufficiently protect the public in their right to use the land for cricket and other athletic sports. The agreement itself amounts to a more than technical breach of trust both in respect of the times at which, and the extent to which, it puts the trust premises out of the control of the trustees, and prevents their being used for the expressed purposes of the deed. In view of the near expiration of the term of this lease or licence, and the fact that the

(1) 1 Gif., 363. (2) 5 B. & Ad., 469.
(3) (1898) 1 Ch., 66.

abandonment of the injunction application practically confines the decree to a declaration of the rights of the parties, I think I should not say anything which might be taken as a statement of the precise course open to the appellants in the future. They must be guided by the decree as varied, and I agree with His Honor in the terms of the decree which he proposes, and as to the costs. In the difficult circumstances which confronted the trustees, I am not surprised at the error into which they have innocently fallen.

O'CONNOR J. The Statutes to which we have been referred have only an indirect bearing upon the question to be determined. Sec. 5 of the *Public Parks Act* 1854, which declares trustees absolute owners except for purposes of alienation, cannot enlarge the scope of the trust. The powers of the trustees as owners must be limited by the terms of the deed creating the trust. In the same way the powers of leasing the trust lands given under the *Trustees of Public Parks Act* 1869 cannot be construed to authorize trustees to allow their tenants to put the trust lands to a use outside the terms of the grant, nor could the consent of the Attorney-General under sec. 8 of that Act render a lease for such a use legal. In every case the extent and limit of the trust is to be found only in the document which creates it. The deed under consideration defines the scope of the trust in these words:—

". . . . do hereby grant unto Thomas Joseph Byrnes &c. . . . . (*description of Land*) . . . . to hold unto the said Thomas Joseph Byrnes &c. (*and others*) for ever as trustees . . . . yielding and paying (*pepper corn rent*) upon trust as a reserve for cricket and other athletic sports, and for no other purposes whatsoever."

If these words created merely passive trustees, with a power to permit the lands to be used for the purposes named "and for no other purposes whatsoever," the negative words would afford a strong support to the respondent's contention. In my view the trust is not merely permissive: It imposes upon the trustees conditions as to draining and alignment which involve active duties in holding the trust lands so as to carry out the purposes of the trust. Their duty then being "to hold" the lands in trust "as a

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

O'Connor J.

reserve for cricket and other athletic sports and for no other purposes whatsoever," two questions arise—What are their powers? and have they on the facts proved exceeded them? I was at first much impressed by Mr. Lukin's argument that it would be impossible to give a meaning to the negative words of the trust if they were not to be taken as prohibiting any use whatsoever of the lands other than that expressly allowed. But on consideration that difficulty becomes less formidable. The deed must be taken as a whole. The trustees have to comply with the condition of draining the ground; they must form and maintain it. The law has recognized in the *Brisbane Cricket Ground Act* 1897 that there is a mortgage debt on the land, and therefore interest to be paid. All this implies that an annual income must be found by the trustees. The strict reading of the deed contended for by Mr. Lukin, and upheld by Mr. Justice *Real*, would close all sources of revenue except those derived from cricket and other athletic sports or from sources ancillary thereto. It would be impossible to let the ground,—say for such purpose as an evening concert, or to let any space on the ground or buildings for advertising purposes, or for purposes of agistment. In fact such a reading would prevent the temporary and casual use of the ground for many purposes, which, while bringing in revenue, could not in any way interfere with the use of the ground for the express purposes of the trust. A construction which leads to such consequences ought not to be adopted unless there is no other reasonable construction to be found. The case most in point for the respondent is *Attorney-General* v. *Mayor &c. of Southampton* (1). That decision turned upon the express words of the Statute defining the duty of the corporation in regard to the cricket ground there in question. The holding of the cattle fair on the cricket ground was so plainly contrary to the express directions of the Statute that there was no possibility of any other construction than that adopted by the Court. It has been urged by the appellants that the expression "and for no other purposes whatsoever," need not necessarily be construed as imposing a limitation narrower than that to be implied from the positive words defining the purposes of the trust, and they cite the observations of Lord *Watson* in

(1) 1 Gif., 363.

Attorney-General v. *Great Eastern Railway Co.* (1) in support of their contention. That was a case in which the powers of a railway company were conferred by Statute, and in reference to these powers Lord *Watson* says: "That principle, in its application to the present case, appears to me to be this, that when a railway company has been created for public purposes, the legislature must be held to have prohibited every act of the company which its incorporating Statutes do not warrant either expressly or by fair implication." That appears to be a correct statement of the rule of interpretation in such cases. It would seem, therefore, that Statutes authorizing the taking of lands for railway purposes must be read as if containing an express prohibition against the use of the land for any other purposes. Or, to put the proposition in another form, the only authority given by the Statute in such cases, is to use the land exclusively for railway purposes. That rule of interpretation would seem to be equally applicable to the deed under consideration, and, in that case, the prohibitory words relied on by the respondent would have no more force than the word "exclusively." Read from this point of view, the cases in which powers conferred by Statute on railway companies and public bodies, even although without express prohibition against other uses, become directly in point. From these cases a reasonable rule of construction is, in my opinion, to be gathered. In *Attorney-General* v. *Teddington Urban Council* (2) the land was acquired and held for sewerage purposes, but on a portion of it not at that time required for those purposes the council had made a temporary path, and placed benches for the recreation of the public. Mr. Justice *Romer* refusing to restrain the council from such use of the land, said (3): "I know nothing which makes it unlawful for a council such as these defendants to permit vacant land in their possession, and not at the time required for the ultimate purpose for which they acquired it, temporarily to be used as a recreation ground, provided care is taken to prevent any rights being acquired over it by the public or otherwise which would prevent or interfere with the council using it for such ultimate purposes whenever required." In *Foster* v. *London Chatham and Dover*

(1) 5 App. Cas., 473, at p. 486. (2) (1898) 1 Ch., 66.
(3) (1898) 1 Ch., 66, at p. 70.

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

O'Connor J.

Railway Co. (1), which has been cited by my learned brother the Chief Justice, Lord *Halsbury* says (2): "I for one entirely deny that there is any established proposition of law which prevents the railway company using their land and their arches for some collateral purpose that may give profit to them." The law enunciated in these cases has been laid down in the same terms in many others which were cited to us. The principle to be extracted from all of them seems to me to be this—that, so long as trustees hold and use the land for the purposes of the trust, there is nothing to prevent an incidental or collateral use for other purposes including profit to the trust provided that such use is not inconsistent with, and does not interfere with, the trust purposes, and that no rights are given to other persons, which are inconsistent with or which will authorize their interference with the trust purposes. Applying that principle to the interpretation of the instrument of trust in this case, the position may be thus stated. So long as the trustees hold and use the land for the purposes of the trust there is nothing to prevent the land being used either by themselves or their tenants for any other lawful purpose, such as horse racing, provided that the use of the land for that purpose amounts to no more than an incidental or collateral use of the land, and provided also that such use is not inconsistent with and does not interfere with its use for cricket or other athletic sports. The real difficulty in the case lies in the application of the principle thus stated to the facts proved, and in the answer to the question is, or is not, the use of the land authorized under the agreement with Sharpe an incidental or collateral use not inconsistent with and not interfering with the purposes of the trust? To determine this question it will be necessary to examine the agreement somewhat in detail. From its terms it appears that the ground is lighted by electricity for the purpose of carrying on sports at night, and that Sharpe purchases and takes over from the trustees the removable portion (other than fixtures) of the electric lights erected on the ground for the sum of three hundred and fifty pounds. The lights then became his property subject to the trustees' right at a certain rental to use them for the purposes of the ground when Sharpe

(1) (1895) 1 Q.B., 711. (2) (1895) 1 Q.B., 711, at p. 718.

is not using them. It seems therefore to be contemplated by by both parties that the ground shall be used regularly and systematically by night as well as by day for the purpose of certain sports, such as bicycle contests and pony racing, which could be carried on by night as by day. The lease, or licence, it is of no moment how it is described, is for three years from the 1st December, 1902, and it gives Sharpe a right to use the ground together with all the buildings and accommodation thereon for the purpose of bicycle racing, "and such other lawful sports pastimes and purposes," which include horse racing, every Saturday evening during the term between 7 p.m. and 11 p.m. It was afterwards agreed that Monday evening should be substituted for Saturday evening in this clause. He also has the right on giving fourteen days' notice in writing to the trustees to use the ground on Wednesday in each week between noon and 6 p.m., provided it is not required by the trustees or persons authorized by them at the same time. If by reason of wet weather, or any other cause, the ground is not fit on any Saturday night or Wednesday afternoon for the purpose mentioned, Sharpe has the option of using it on any other night or afternoon of the ensuing week without additional charge if the ground is not otherwise engaged. On the Saturday night and Wednesday afternoons and on the days substituted for them, Sharpe, when he uses the ground, is entitled "to use, occupy, and enjoy the privileges and advantages of occupation, as lessee," of the whole of the land with its buildings, seating accommodation, fencing, and other improvements. On every day except Sunday, or any other day on which the trustees may require the ground for themselves or their licensees, Sharpe has the right to use between 5 a.m. and 9 a.m. that portion of the ground theretofore used for pony and horse racing. As to Wednesday afternoons the trustees are to be liberty to arrange cricket and football matches, and in such cases players to a limited number are to be admitted to the ground free of charge. On these occasions members of the public who wished to see the play would apparently not be admitted free of charge if admitted at all. Finally, the trustees reserve to themselves the right to use the ground at any time for the purpose of any inter-national or inter-city matches

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

O'Connor J.

upon giving Sharpe fourteen days' notice of the requirement. There is no evidence that the trustees ever required the use of the land for such a purpose on any Monday evening, nor is such an occasion likely to arise in future. Taking the practical effect of the agreement as a whole it amounts to this. The systematic use of the whole of the ground is permitted at least one evening in each week during the term for the purpose of pony racing as a business, with all the accompaniments of a racecourse, to the exclusion, if Sharpe thinks fit, of any other form of sport. The use of the whole of the ground is allowed to Sharpe on the other afternoons referred to for the same purpose subject to certain conditions, and also the use of portion of the ground every morning during certain hours for purposes ancillary to pony racing. As far as Monday evenings, substituted for Saturday evenings, are concerned, Sharpe appears to have fully exercised his rights under the contract, and, taking his use of the ground altogether, it seems that he has substantially exercised the rights stipulated for on other days of each week. Under these circumstances it is evident that the use of the ground for the purposes of pony racing was a most important and substantial use of the ground, and not at all a mere incidental or collateral use. It is difficult to see how the rights given to Sharpe under the agreement can be exercised without substantially interfering with the use of the ground for the purposes of the trust. It is even more difficult to see how it can be said that Sharpe's use of the land under the agreement is consistent with the declared purpose of the trust, namely, to hold the land exclusively for the purposes of cricket and other athletic sports, when it is apparent that the carrying on of these race meetings every week was an important feature in the management of the ground bringing to the trustees that regular rental of ten guineas a week, which was their most important and permanent source of revenue. None of the decisions relied on by the appellants cover such a case as this. In all the cases cited by them the use held to be lawful was either a temporary use of some portion of the property not then required for the purposes of the trust, or was in itself an incidental or collateral use. The underlying principle of those cases is well stated by Lord *Halsbury* in *Foster* v. *The London, Chatham, and Dover Railway*

Co. (1), in these words: "It is said that the use which the defendants make of this particular piece of land is one not authorized by the Statute. Expressly authorized by the Statute it is not. No minute or ancillary use of such part of a railway company's property is ever expressly given by Statute; but I think it might just as reasonably be contended that a railway company are not entitled to sell the hay which grows on their banks or cuttings so as to make something out of it." That is to say, when trustees are called upon to justify a particular use of the trust property, they must either show the use to be authorized by the words of the trust, or they must show that, although not authorized by the words of the trust, it is a use merely incidental or collateral, and does not interfere with, and is not inconsistent with, the purposes of the trust. Many instances might be given of such uses, not directly authorized by the language of this trust, which yet would be permissible within the principle referred to by Lord *Halsbury*. Spaces on the buildings or fences might be let for advertising purposes. The public might be allowed to use the ground as a pleasure ground, so long as sports were not interfered with. Small portions of the ground, not required for sport purposes, might be let for shops and stalls. The ground might be let occasionally for purposes of concerts and theatrical entertainments, or public amusement of any kind, and one can well understand that under certain circumstances, and under proper conditions, it might be let without breach of trust for the purposes of a race meeting. It is unnecessary to multiply illustrations. In every instance, we must get back to the words of the deed, and, if the use sought to be justified is neither for the purpose of athletic sports nor some purposes ancillary thereto, then it must be shown that the use is not inconsistent with, and does not appreciably interfere with the purposes of the trust, and is in itself merely an incidental or collateral use, so that it may be truly affirmed that, notwithstanding such use, the land is being held by the trustees substantially for the purposes of the trust. Having regard to the terms of Sharpe's agreement, and the evidence of his exercise of rights under it, I find it impossible to hold that the use of the trust lands allowed to Sharpe by the trustees can be justified. In

(1) (1895) 1 Q.B., 711, at p. 716.

H. C. OF A. 1905.

DOWN v. ATTORNEY-GENERAL OF QUEENSLAND.

O'Connor J.

my opinion, therefore, the trustees, in making that agreement, have exceeded their powers, and have been guilty of a breach of trust. I agree with *Real* J. that no injunction should be granted, and that, under the circumstances, no more is required than to make a declaration as to the rights and obligations of the trustees. But, in my view, for the reasons I have given, His Honor's declaration is too wide, and I agree that it must be varied in the terms stated by my learned brother the Chief Justice.

Judgment appealed from varied. No costs in either Court.

Solicitors for appellants, *Roberts & Roberts.*
Solicitors for respondents, *Leeper & Biggs.*

H. E. M.

[HIGH COURT OF AUSTRALIA.]

POTTER . . . . . APPELLANT;
OBJECTOR,

AND

DICKENSON . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1905.

MELBOURNE, *August* 16, 17, 18.

Griffith C.J., Barton and O'Connor JJ.

Patents Act 1890 (*Victoria*), (*No.* 1123), *secs.* 15, 28, 29, 33—*Application for Patent—Opposition to issue—Award of costs by Commissioner—Right of appeal to law officer and from him to Supreme Court—Meaning of "costs"—Employment of Patent Agent—Witnesses—Qualifying fees—Rules of the Supreme Court* 1884 (*Victoria*), *Order LXV., r.* 27 (9).

Semble, an appeal does not lie to the law officer from an order made by the Commissioner of Patents under sec. 29 (3) of the *Patents Act* 1890 (Victoria), for the payment by one party to an application for a patent of the other party's costs.