[HIGH COURT OF AUSTRALIA.]

MUNICIPAL COUNCIL OF SYDNEY . APPELLANTS;

AND

ROYAL AGRICULTURAL SOCIETY OF NEW SOUTH WALES . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 30; *Dec.* 12, 13.

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

Rating—Exemption—Agricultural society—"Land vested in trustees for . . . public recreation, health or enjoyment"—Sydney Corporation Act (No. 95 of 1902), sec. 110.

Sub-sec. 5 of sec. 110 of the *Sydney Corporation Act* exempts from municipal taxation land "vested in trustees for the purposes of public recreation, health, or enjoyment."

Held, that in order to come within the exemption land must be vested in trustees exclusively for those purposes.

Certain land was vested by Act of Parliament in the Royal Agricultural Society of New South Wales, for the purpose of holding agricultural shows and exhibitions, and for other purposes, which were primarily and mainly purposes of "public recreation health or enjoyment," but with power to the Society to charge the public for admission to the land, and to devote the profits made from the use of the land towards the objects of the Society. These objects, as set out in the Society's Act of incorporation and rules, were in general such as came within the meaning of the exemption, but they included also certain privileges for the members beyond those enjoyed by the general public.

Held, that, as the members of the Society were entitled to a beneficial enjoyment from the land beyond that of the general public, the land was not within the exemption.

Decision of the Supreme Court, *Municipal Council of Sydney* v. *Royal Agricultural Society of New South Wales*, (1905) 5 S.R. (N.S.W.), 693, reversed.

APPEAL from a decision of the Supreme Court.

The respondents were assessed by the appellants for municipal rates in respect of a certain piece of land within the municipal boundaries of the Corporation of Sydney, under sec. 110 of the *Sydney Corporation Act*, 1902. The respondents appealed from the assessment to a Judge of the District Court. That learned Judge held that the respondents were not liable, on the ground that the land was vested in them as "trustees for purposes of public recreation health and enjoyment" within the meaning of sec. 110, sub-sec. 5, of the *Sydney Corporation Act*, 1902. From that decision the appellants appealed by way of special case stated for the opinion of the Supreme Court, and that Court dismissed the appeal with costs: *Municipal Council of Sydney* v. *Royal Agricultural Society of N.S.W.* (1).

From that decision the present appeal was brought.

The facts, and the various sections of the Acts referred to are sufficiently set out in the judgments.

Gordon, K.C., (*Leverrier* with him), for the appellants. The purposes for which the land is vested in the respondents are set out in sec. 4 of the Act No. 45 of 1902. Assuming that the respondents are trustees, the purposes for which it is vested in them are not necessarily "for public recreation health or enjoyment." The purposes must be exclusively of that kind, just as, in the case of land exempted by reason of its being used for public purposes, the land must be used exclusively for those purposes: *Mayor &c. of Essenden* v. *Blackwood* (2). The purposes actually enumerated in the section, down to the words "live stock," might possibly be within the exemption, but the Minister has power to sanction the use of the land for "other purposes." The "other purposes" are not necessarily *ejusdem generis* with those mentioned. The only restriction on the respondents is that pony racing is not to be allowed. Where a class or classes of purposes are specified, other purposes must mean purposes of another class. The doctrine of *ejusdem generis* only applies to cases where the objects mentioned are particular, not generic. Sec. 5 does not revoke the vesting upon the happening of the events stated; it merely gives power to revoke. Looking at this Act alone, the land is not

(1) (1905) 5 S.R. (N.S.W.), 693.

(2) 2 App. Cas., 574.

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vested in the respondents exclusively for purposes of public recreation health and enjoyment, and is not exempt.

Apart from this, the land is vested in the Society and therefore may be used to further the objects of the Society, as defined by its Act of incorporation and rules. The profits derived from the charge made upon the public for admission &c. may be devoted towards any of those objects, some of which are clearly not public. By rule 2 the Society may extend its operations to other parts of the country, and by rule 7 certain privileges are conferred upon the members as distinguished from the general public. The respondents have therefore a beneficial enjoyment of the land beyond that of the general public, and cannot claim to be trustees at all: *Mayor &c. of Essenden* v. *Blackwood* (1). They are bound to show that they come strictly within the exemption. "Trustees" in sec. 110 of the *Sydney Corporation Act*, 1902, must receive its legal meaning. A beneficial interest is inconsistent with trusteeship. The fact that the respondents are a Society, and that their beneficial enjoyment is subject to certain restrictions, does not constitute them trustees.

[GRIFFITH C.J., referred to *Caraher* v. *Lloyd* (2), and *Down* v. *Attorney-General of Queensland* (3)].

The provision of privileges for members is not a public purpose. The Act of incorporation 33 Vict., and the Act No. 45 of 1902, taken together, constitute the title of the respondents, and from them it appears that the respondents are not trustees, nor are the purposes for which the land is vested in them "purposes of public recreation health or enjoyment." The statement in the judgment of the Supreme Court that it was admitted that the respondents were trustees for the purposes mentioned is the result of a misapprehension. That was not admitted.

[He referred also to *Borough of Randwick* v. *Dangar* (4), and *Sydney Municipal Council* v. *Attorney-General for New South Wales* (5).]

Cullen K.C. and *Coghlan*, (*O'Reilly* with them), for the respondents. The point that the respondents were not trustees

(1) 2 App. Cas., 574.
(2) 2 C.L.R., 480, at p. 505.
(3) 2 C.L.R., 639.
(4) 15 N.S.W. W.N., 37.
(5) (1894) A.C., 444.

was never raised in the Supreme Court. If it had been raised at the proper time, evidence could have been given that the respondents received the land under circumstances from which the Court of Equity would have inferred a trust, and that the respondents were therefore estopped from denying that they held the land in trust, whatever the purposes were. The tenure of the Municipal Council was held to be a trust for a common of pasturage: *Sydney Municipal Council* v. *Attorney-General for New South Wales* (1), and the respondents agreed to take the land over subject to a trust.

[GRIFFITH C.J.—The preliminary arrangements between the parties are like negotiations preparatory to drawing up a contract. Here the contract is represented by the vesting Act, which is the respondents' title.]

Evidence of a trust could be given without cutting down the terms of the instrument.

The respondents have been held to be "trustees" within the meaning of the *Public Parks Act*, 18 Vict. No. 33: *Sydney Municipal Council* v. *Attorney-General for New South Wales* (2); and "trustee" in that Act means a trustee in whom a place of public recreation, convenience, health or enjoyment is vested by law. That is sufficient to bring them within the meaning of sec. 110 of the *Corporation Act*, for the terms of the Statute No. 45 of 1902, under which the respondents now hold, are in effect the same as those of the lease under which they originally held from the Council. If the land is not now vested in the respondents for the exempted purposes it is in the Council. In either case it is exempt.

The respondents have no power under the Act No. 45 of 1902 to derive a beneficial enjoyment from the land: sec. 3 and the preamble. All the objects mentioned in the Act are public, and there is no power to make rules inconsistent with those objects, and, so far as the rules exceed the power, they are void. The user of the land is immaterial. The reference to pony racing may be explained historically by the fact that the former lessees had been using the land for that purpose.

(1) (1894) A.C., 444.

(2) (1894) A.C., 444, at p. 449.

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The Minister can only sanction purposes of a kind *ejusdem generis* with those mentioned. [They referred to *In re Stockport Ragged Industrial and Reformatory Schools* (1).] The order of the words bears that out. The provision for the admission of the public and for making a charge comes after the provision as to the sanction of the Minister, showing that only purposes of a public character are contemplated. The profits can only be expended on the objects for which the land is vested, and they are public within the meaning of sec. 110. The power to charge for admission is not inconsistent with the purposes being public; in fact, as was pointed out by Lord *Halsbury* in *Sydney Municipal Council* v. *Attorney-General for N.S.W.* (2), the lands would be useless as a public institution unless the trustees had power to make some such charge. If the trust is, speaking generally, of a public nature, the use of the land for purposes of profit subordinate to the main purpose does not make the trust any the less a public trust: *Down* v. *Attorney-General for Queensland* (3); *London County Council* v. *Wandsworth Borough Council* (4); *Smith* v. *Kerr* (5); *Lambeth Overseers* v. *London County Council* (6); *Beaumont* v. *Oliveira* (7). The absence of the word *trust* is immaterial if the terms of the Act show that the members of the Society are not entitled to use the property for their own personal benefit: *Randwick Borough Council* v. *Australian Cities Investment Corporation Ltd.* (8); *Randwick Borough Council* v. *Cooper* (9); *Ex parte Bennetts* (10). The privileges given to members under the Society's Act of incorporation are for the purpose of carrying out the general objects of the Society, which are public. Even if these privileges were inconsistent with a trust, they would only supply an objection to the user of the land; the document of title, from which the trust appears, is the Act No. 45 of 1902. That Act limits the powers of the Society over the land to purposes of public recreation, health or enjoyment.

[GRIFFITH C.J. referred to *Smith* v. *Kerr* (11); and *London County Council* v. *Erith Churchwardens* (12).]

(1) (1898) 2 Ch., 687.
(2) (1894) A.C., 444, at p. 454.
(3) 2 C.L.R., 639.
(4) (1903) 1 K.B., 797.
(5) (1900) 2 Ch., 511; (1902) 1 Ch., 774.
(6) (1897 A.C., 625.
(7) L.R. 4 Ch., 309.
(8) 14 N.S.W. L.R., 417; (1903) A.C., 322.
(9) 8 N.S.W. L.R., 1.
(10) 21 N.S.W. L.R., 248.
(11) (1902) 1 Ch., 774, at p. 780.
(12) (1893) A.C., 562.

The result of the Act 57 Vict. No. 15, which first vested the land in the Society, was the transference of the trust from the Municipal Council to the respondents, and they cannot do anything with the land which the Council could not do, notwithstanding the incorporating Act of 33 Vict. [They referred also to *In re St. Botolph* (1); and *In re St. Bride's* (2).]

Leverrier, in reply. The profits of the land may be devoted to the objects of the Society, free of any trust, in the same way as before the vesting Act. The only effect of the Act was to make the respondents statutory tenants instead of mere lessees. All public rights are destroyed, save as mentioned in the Act. In order to negative the trust it is not necessary to establish that the individual members have a pecuniary or beneficial interest in the land, but that the Society as such, for its own purposes has such an interest.

Cur. adv. vult.

December 13.

GRIFFITH C.J. This is an appeal from a decision of the Supreme Court affirming a decision of the Metropolitan District Court on an appeal by the respondent Society from an assessment by the appellants under the *Sydney Corporation Act*, in respect of a municipal rate. The learned District Court Judge held that the respondents were not ratable, and in that opinion the Supreme Court concurred.

The question depends upon the proper construction of sec. 110 of the *Sydney Corporation Act*, No. 35 of 1902, as applied to the facts of the particular case. That Act was a re-enactment of earlier Acts, sec. 110 having been taken from the Act 43 Vict. No. 3. It is contained in Part IX., which deals with General Rates. Sub-sec. 4 of that section provides that: "Every building, whether vested in or occupied by the Crown or not, and all lands, whether occupied or not, within the city, save as hereinafter mentioned, shall be deemed to be 'ratable property' within the meaning of this Act." Sub-sec. 5 provides, *inter alia* that: "No land vested in trustees for purposes of public recreation, health or enjoyment . . . shall be liable to be assessed or rated in respect of any rate under this Act."

(1) 35 Ch. D., 142.

(2) 35 Ch. D., 147*n*.

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The respondents claimed that the land in question, which is vested in them under circumstances to which I will presently refer, is vested in them as trustees for the purposes of public recreation, health or enjoyment, and is therefore exempt from rating.

Now, the first question is what is the meaning of the expression "trustees for purposes of public recreation, health or enjoyment?" *Primâ facie*, bearing in mind that this is a rating Act, this expression relates to land vested in persons having no beneficial interest in the land, but holding it solely for the purposes of public recreation, health or enjoyment. An implied term in such a trust would be that any money which the trustees received from the use of the land by the general public should be applied for the purposes of the trust, that is, in expenditure upon the land, for the purpose of making it better available for the objects of the trust. Nor could it be said, *primâ facie*, that persons who have a beneficial use of the land, subject to the condition that they shall allow it to be used for the purposes of public recreation, health, or enjoyment, would properly be called trustees of the land for those purposes. An analogous matter to this was dealt with by the Privy Council in 1877, in the case of *The Mayor &c. of Essenden* v. *Blackwood* (1), on appeal from the Supreme Court of Victoria. The question in that case was whether the Flemington Racecourse was exempt from rating, as land the property of the Crown used for public purposes. In order to sustain the exemption, it was necessary, in the view their Lordships took of the matter, to establish both that the land was the property of Her Majesty, and that it was used for public purposes. The Judicial Committee did not decide the first point, whether the land was the property of Her Majesty, but confined its attention to the question whether it was used for public purposes within the meaning of the section conferring the exemption. The land was held by the trustees of the Victorian Racing Club, which was incorporated by a private Act, and the members of the Club had various privileges in respect of the land. After referring to the first point, whether the land was the property of the Crown, and making this observation (2), "Undoubtedly, if a grant were made by

(1) 2 App. Cas., 574.

(2) 2 App. Cas., 574, at p. 584.

ne Crown to its own nominee, as a bare trustee for exclusively ublic purposes, it might properly be held that the land, within ne meaning of the exemption, was still the property of the Crown," ney went on to say that they would not decide the case on that round, and said: "Their Lordships, however, do not think it ecessary to decide the appeal on this point, being of opinion that n order to bring the case within the exemption the respondent ught to shew that the land was used solely for public purposes, ithout any beneficial occupation by individuals; and this they re of opinion he has failed to do." Then, after referring to the se of *Hanna* v. *Seymour Road Board* (1), in which it had been eld that a bridge let for several years to a builder, to enable him repay himself the cost of building it, was not used for public urposes within the meaning of the exemption, because it was ot used solely for those purposes, their Lordships went on to efer to the nature of the holding of the land by the Victorian acing Club, and came to the conclusion that the members of the lub enjoyed privileges of an exclusive character, which constituted a beneficial enjoyment of the land beyond that of the eneral public. Then, after reviewing the special conditions of he tenure of the club, the judgment concluded, on that point, ith these words (2): "Besides, these provisions, coupled with hose already commented upon, afford tests for determining whether or not the land was vested in the respondent as a bare rustee, for a public purpose only." And then it was pointed out hat, though in the old cases it was supposed that land used for ublic purposes, and from which the occupiers derived no individual rofit, was exempt from ratability, it was nevertheless always eld that all the purposes must be public. The Committee therefore were of opinion that the race-course was not exempt from axation, on the ground that it was not used for public purposes nly, since the members of the club had a beneficial enjoyment of he land beyond that of the general public.

In my opinion the same principles apply to the construction of sec. 110, sub-sec. 5. If land is vested in trustees for the purposes of public recreation, health, or enjoyment under such circumstances that the trustees may themselves, for their own individual

(1) 2 W.W. & a'B. (L.), 93. (2) 2 App. Cas., 574, at p. 587.

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benefit or for that of a special and exclusive class, derive from the use of the land a beneficial enjoyment beyond that of the general public, it is not exempt from rating under the provisions of that sub-section.

It is necessary, therefore, to inquire into the nature of the respondents' title to the land. The land has already been the subject of litigation in the case *Sydney Municipal Council* v. *Attorney-General for New South Wales* (1). In the report of that case there is a historical summary to which we have been referred, and to which both parties claimed leave to refer, for any necessary information for the purpose of the construction of the respondents' special Act. The facts are set out in the judgment. By the *Crown Lands Alienation Act* 1861, sec. 5, the Governor was empowered (with the advice of the Executive Council) by "notice in the *Gazette*" to "reserve or dedicate in such manner as may seem best for the public interest any Crown Lands for" a number of purposes, including "for any pasturage common, or for public health, recreation, convenience, or enjoyment, or for the interment of the dead, or for any other public purpose." In October, 1866, a large area of land, of which the land now in question forms a part, was dedicated for public purposes, the purposes being a "permanent common."

By 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, health, convenience, or enjoyment," it was enacted that the Governor might, without any grant by the Crown, appoint trustees of land so dedicated, and that they should be a body corporate. Sec. 5 provided that the trustees so appointed should have certain powers, being in substance the powers of absolute owners, except for the purposes of alienation, in respect of the land placed in trust under them.

In 1871, a notice was published in the *Gazette* that the Governor approved of the appointment of the present appellants as trustees of the area already mentioned. In September, 1881, they as trustees executed a lease of the area now in question to the respondents

(1) (1894) A.C., 444.

for the purposes only of shows or exhibitions, and the respondents undertook to keep the land drained and cleaned and to comply with the Council's regulations as to access by the public.

The question was then raised whether the lease by the Council, who were trustees of the land which was held by the Privy Council to be dedicated for the purposes of public recreation, health or enjoyment under the *Public Parks Act*, was valid or invalid. The Chief Judge in Equity held that the lease was bad and declared accordingly, but the Privy Council on appeal were of opinion that there was no objection to the lease.

Before that time the present respondents had been incorporated by an Act of 1869, which is not numbered, and I assume, therefore, is to be taken as in one sense a private Act. It recited that a society called the Agricultural Society of New South Wales had been formed with certain rules and by-laws at Sydney for the encouragement and improvement of agriculture, and for promoting the success of pastoral and farming pursuits in the colony, and also for holding exhibitions of live stock, of agricultural, horticultural, and pastoral produce, of minerals, and of arts and manufactures. It then proceeded to declare that the President, Vice-Presidents, Governors, and members of the Society for the time being should be incorporated by the name of the "Agricultural Society of New South Wales," with all the privileges and liabilities of a corporation. It then provided that the then present rules and by-laws should be the rules and by-laws of the corporation, save and except so far as they might be lawfully altered or repealed or might be inconsistent or incompatible with or repugnant to any of the provisions of the Act or the laws of the colony. The sixth section provided that the corporation should have power to purchase, acquire, and hold lands, and any interest therein, and to sell and dispose of them, and that all lands then the property of the Society should become the property of the corporation. There was also a provision that, in the event of the funds and property of the corporation being insufficient to meet its engagements, each member should be liable to contribute, over and above his annual subscription, a sum equal to the subscription, towards liquidating the liabilities of the corporation, and should not be otherwise individually liable. Express

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power was given to the corporation to borrow money by way of mortgage, subject to certain limitations.

This, therefore, was a corporation established for certain definite purposes. Amongst its powers were the power to hold property, to incur liabilities, and to mortgage property, and involved necessarily in that was the right to expend money on almost any purpose that they might think conducive to the objects of the Society. For all these purposes a revenue was necessary, much larger than was likely to be obtained from the contributions of members. The Society expended in carrying out its objects many thousands of pounds. Those objects, as they are at present set out in the rules of the Society which are attached to the special case, include (rule 2, sub-sec. 3): "To purchase, take on lease, or otherwise acquire, and to lay out and improve, such lands and premises as may be required for carrying on the objects of the Society." The lands so acquired may clearly be anywhere in New South Wales. Sub-sec. 4 mentions the holding of "exhibitions in Sydney or elsewhere for the display of horses, cattle, sheep, and other live stock; wool, agricultural produce of all kinds, and machinery; together with such other subjects of manufacture, produce, or the arts as may be deemed desirable; and to establish in connection therewith a market for the sale of exhibited live stock, machinery," &c. Sub-sec. 5 includes the encouragement of skill in farm labour, and showing new machinery in operation, and so bringing it into notice, and sub-sec. 6 provides for the publication and distribution amongst the members of this and kindred societies, of the transactions of the Society. So much for the objects of the Society. The privileges, amongst other things, include, as appears from rule 7, the right to vote at elections of office bearers, of free admission to the library and reading room, and to the Society's exhibitions and other entertainments held in the grounds, on production of the member's ticket for the current year. It is a matter of common knowledge that in institutions of this kind the privileges of members are sometimes very considerable, and much more comfortable accommodation is provided for them than for other persons. But whether the privileges are small or great, it is clear that the members have a beneficial enjoyment of the property as distinguished from the general public.

This was the Society to which the Municipal Council granted lease of the land for a period to last during the will of the ouncil, or until notice given as provided in the lease. The ociety had power to determine the tenancy after fourteen days' tice in writing.

After the decision of the Chief Judge in Equity, to the effect at the Council as trustees for public purposes under the *Public arks Act* had no right to make this lease, the legislature inter- ned by passing an Act 56 Vict. No. 8, which declared that the nd should vest in the respondents for a short period. This was temporary Act. In the following year it was continued by the ct 57 Vict. No. 15, and, in 1902, by the Act No. 45 of that year, ie land was vested in the respondents for a term of twenty-one ars from 30th June, 1894. It is clear that when the *Sydney orporation Act* was passed it had no reference to this particular iece of land, although it is within the boundaries of the City of ydney, for at that time the Corporation were themselves the ustees of the land. Now, the nature of the title of the respond- nts to the land is to be determined with reference to the Act No. 5 of 1902, having regard to their own constitution and the pur- oses for which they were established as a Society, and of which ne legislature was aware. Sec. 3 of the Act declared that the land question should be deemed to have vested and to vest in the gricultural Society of New South Wales for a period of twenty- ne years from 30th June, 1894, and that "all rights of common respect of the said lands" were thereby suspended during that eriod. These last words taken in connection with the succeeding ections had the effect of exhaustively declaring the purposes for hich the land might be used during that term. Whether the ociety held the land as tenants of the trustees (the Corporation) r as *quasi*-trustees themselves, it can hardly be contended that hey were trustees of it solely for the purposes of public recrea- ion, health, or enjoyment. The trustees were the Corporation of ydney. The Society were in the position of lessees for the urposes of their own Society. The effect of the Act No. 45 of 902 is to declare them statutory lessees, that is, in the sense that he land was vested in them for a time. If there were no more n the Act, they would take the land for the purposes of their

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Society, that is, for the purpose of furthering the objects of the Society, including such benefits as were conferred upon the members, and clearly they had power to expend the profits derived from the public use of the land in any way consistent with the purposes for which the land was given them, for the improvement of the land itself, or for carrying out the other objects of the Society, such as holding shows in any part of the country, and for any other purposes not inconsistent with the objects of the Society. But the Act of 1902 prescribed, in my opinion exhaustively, the purposes to which the lands of the Society might be put. Sec. 4 provides that the Society may occupy and use the land for the purpose of holding shows and exhibitions of agricultural, horticultural and pastoral produce, implements and machinery, minerals, arts and manufactures, and live stock, "and for such other purposes as the Minister may sanction, and shall admit the public thereto, subject to such charges and conditions as shall be approved by the Minister, provided always that no horse races or pony races shall be held on the said land." The same section requires that they shall keep the land clean and free from offensive matter. Now, that section prescribes the purposes for which the land may be used. Shows and exhibitions are the primary purposes, with such other purposes as the Minister may sanction, and the Society must admit the public on payment of a charge for admission. But it is quite clear that whatever charges are imposed go into the coffers of the Society, and become subject to its obligations, and may be applied in accordance with the Society's rules. The Act contemplates that the Society shall make a revenue from the land, and says nothing about what they are to do with it. The next section confirms the view that they may make profits, which they must devote to the purposes of the Society. It provides that if the Society fails to comply with the provisions of sec. 4, or if the lands are used or occupied for any purpose other than those prescribed by the Act, or if the Society "shall sell, lease, mortgage, assign, charge or otherwise deal with or dispose of the land or any part thereof or attempt to do so or suffer the land or profits to vest in or become payable to any other person," or to be taken in execution, or if the Society shall cease to exist, the lands shall revest in the Crown.

That clearly recognizes that they may derive profits from the land. One asks then what is the nature of the interest of the Society in the land? A piece of land is given them by the legislature for certain purposes, with express power to receive money for the admission of the public, and without any control upon the expenditure of these profits except that they are not to do or suffer anything whereby the land should become vested in any other person or persons. I think the cases clearly show that under those circumstances the members of the Society had a beneficial enjoyment of the land beyond that of the general public.

There was a good deal of discussion as to the words "such other purposes as the Minister may sanction," and it was said that they must mean purposes *ejusdem generis* with those mentioned. But this argument was not very strongly pressed in this Court, though it was favoured in the Supreme Court. If the only other purposes were shows and exhibitions of that kind, there might be some force in the contention. But it cannot be disputed, since the decision in *Sydney Municipal Council* v. *Attorney-General for N.S.W.* (1), that the land might be used for any purposes of a *quasi* public nature as distinguished from private. As a matter of fact the Society derived a very considerable rental from letting a portion of the ground for the use of the mounted police of Sydney for stabling purposes. It was suggested that that might be *ultra vires*, but it is not necessary to determine in this case, what limit, if any, must be put on the meaning of the words "other purposes." It is sufficient, in the view I take of the case, to say that the members as such had conferred upon them by the legislature a beneficial enjoyment of this land. They are very much in the position of lessees whose lease is subject to restrictive covenants. The restrictions are certainly great, but the lease is a beneficial one notwithstanding.

For these reasons I think that they are not trustees of the land for the purposes of public recreation, health or enjoyment within the meaning of sec. 110 of the *Sydney Corporation Act*.

The learned Judge who delivered the judgment of the Supreme Court said that he understood that the point that the Society were trustees of the lands for purposes of public recreation, health

(1) (1894) A.C., 444.

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or enjoyment was conceded. If that were so, of course, they would clearly be within the meaning of the exemption, and the exemption would not be taken away by a mere misuse of the land, and I quite agree with the Supreme Court in that respect. But the question is what was the nature of the title of the Society. If they commit a breach of their trust, the remedy is provided in sec. 5 of the Act, and also by the general law applicable to trustees. But we are assured that this is a misapprehension, because it is really the only point in the case. The whole question of their liability depends on the nature of their tenure, that is, whether they are trustees for such purposes or not. For the reasons I have given I think that this land does not come within the exemption.

Reference was made to the use of the word "solely" in the same section of the *Sydney Corporation Act* with reference to hospitals and buildings used for public worship. But that is not sufficient to change what is, in my opinion, the clear construction of the words "vested in trustees for the purposes of public recreation health and enjoyment."

For these reasons I think the appeal from the District Court should have been allowed, and that this appeal should be allowed.

BARTON J. I agree that the appeal should be allowed, and for the reasons that the Chief Justice has given.

O'CONNOR J. I am of the same opinion.

On one part of the case I should like to add a few words to what has been said by the Chief Justice. I do not think it necessary to consider whether it is within the power of the Minister under the words " for such other purposes as the Minister may sanction," to authorize the use of this land for a purpose which is not one of public recreation, health, or enjoyment, within the meaning of sec. 110 of the *Sydney Corporation Act*. The consideration of that matter may involve difficult questions which it is not necessary now to enter upon, because on the other ground it appears to me that the appellants have made out a very clear case.

Sec. 110, sub-sec. 4, makes all land, whether occupied or not, within the city of Sydney "ratable property." Sub-sec. 5 is therefore an exception, and the Society must bring themselves within that sub-section before they can escape the taxation imposed generally by the Act.

It may be taken that, since the decision in *Sydney Municipal Council* v. *Attorney-General for N.S.W.* (1), commonly known as *Milroy's Case*, the holding of shows and exhibitions on this land is a purpose of public "recreation, health and enjoyment." But that does not settle the matter, because according to the rule laid down in *Mayor &c. of Essenden* v. *Blackwood* (2), for the interpretation of a section of this kind, there is no exemption from taxation unless the lands are vested in trustees *solely* for these purposes. Dr. Cullen endeavoured to distinguish the words of exemption in that case from those of sub-sec. 5 of sec. 110 in this case. But I find it impossible to see any distinction. The words in that case were " lands the property of Her Majesty occupied or used for public purposes." It was held there that the words must be considered as meaning used solely for public purposes. In the present case the words in sec. 110, " vested in trustees for purposes of public recreation, health, or enjoyment," seem to me to come exactly within the same principle, and must be construed in the same way.

The English decisions on the subject of rating are not, as has been already pointed out, altogether applicable to circumstances similar to those now under consideration. But, according to the principle which was followed by the Privy Council in the case to which I have just referred, one element for consideration always is, to what purposes is the money produced by the use of the land devoted. If it is not devoted altogether to public purposes or trusts, then there is a beneficial interest in the members, which has always been held sufficient to prevent the exemption applying. In the case just referred to Lord *Hobhouse*, in delivering the judgment of the Privy Council, said (3), quoting from a decision of Lord *Campbell* in *Reg.* v. *Harrogate* (4), "you have to shew that all the purposes to which the money was applied are public.'

(1) (1894) A.C., 444.
(2) 2 App. Cas., 574.
(3) 2 App. Cas., 574, at p. 588.
(4) 2 E. & B., 184.

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O'Connor J.

Now, in applying that test, we must see not only that this land is used for the purposes of the Society, but that it is vested in them for the purposes of public recreation, health and enjoyment, and solely for those purposes, and also that the proceeds which are derived by the Society from the use of the land are to be devoted also to the purposes of public recreation, health and enjoyment. To determine this question it is only necessary to look at the constitution of the Society. It is constituted by its own private Act, for a variety of purposes, which are in one sense public. My learned brother the Chief Justice has explained in detail what those purposes are. It is quite clear that all moneys received by the Society may be devoted to any of those purposes.

The land in question is vested in the Royal Agricultural Society by the Act No. 45 of 1902, (I do not think it necessary at present to refer to the earlier Acts), for a period of twenty-one years subject to certain conditions. These conditions are very definite. One stated in sec. 4, is that the Society may occupy and use the land for the purposes of holding shows of agricultural and pastoral produce, stock, machinery, arts, manufactures, and such other purposes as the Minister may sanction, and make charges for admission, provided that certain race meetings are not to be held there. The next condition is in the next sub-section, that the Society are to keep the land clean and free from offensive matter, that is to say, in a sanitary condition. The next sub-section is a restriction on selling, mortgaging or dealing with or disposing of the land. In the latter part of the same sub-section it is provided that if they shall do anything whereby any part of the land or of the profits thereof shall vest in or become payable to any other person, or if the Society should cease to exist, the land shall upon notification in the *Gazette* revest in His Majesty. These are the only conditions imposed upon their dealing with the land, and the only conditions which restrict their right to dispose of the profits derived from its occupation in any way they think fit. Clearly they have the right, so long as they do not infringe any of these conditions, to dispose of the profits in any way they please in carrying on the operations of the Society. It is quite true that we have to consider, not what use they made of the land, but for what purposes it is vested in them, taking them to be trustees for

the purposes of sec. 110 of the *Sydney Corporation Act*. The terms on which the land is vested in these trustees are to be ascertained entirely from the Act vesting it in them and from the Act by which the Society itself is incorporated. And, as there is power under the Society's Act to apply any of the profits derived from the occupation of this ground to the purposes mentioned in that Act, it appears to me that there is an obligation imposed to apply these profits to purposes, which, although in themselves public in a sense, are not the public purposes set out in sec. 110 of the *Sydney Corporation Act*. Inasmuch as this land is to be applied to the purposes of the Society, which are not purposes of public recreation, health or enjoyment, it seems to me impossible, in view of the decision in the case of *Mayor &c. of Essenden* v. *Blackwood* (1), to hold that the Society have brought themselves within this exception. When the expression "beneficial interest" is used, it is not intended to mean a personal interest. There may be a beneficial interest, as was pointed out by the Chief Justice, in the sense of a privilege or privileges enjoyed by the members, beyond those enjoyed by the general public. If the Society has such an interest in the land that it may apply the profits derived from it to its own purposes, which though public in one sense, are not enjoyed equally by the public in general, then there is a beneficial interest such as will prevent the application of the exemption in sub-sec. 5 of sec. 110 of the *Sydney Corporation Act*.

For these reasons I am of opinion that the decision of the Supreme Court was erroneous, and that this appeal should be upheld.

Appeal allowed with costs. Judgments of the District Court and Supreme Court reversed. Case remitted to the District Court.

Solicitors, for appellants, *Dawson, Waldron & Glover.*
Solicitor, for respondents, *H. Dawson.*

C. A. W.

(1) 2 App. Cas., 574.