[HIGH COURT OF AUSTRALIA.]

MUNICIPALITY OF SOUTH PERTH . . APPELLANTS;
PLAINTIFFS,

AND

JOHN WINTHROP HACKETT AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH,
Nov. 12.

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

Rating—Municipal Institutions Act 1900 (*W.A.*) (64 *Vict. No.* 8), *sec.* 324—*Land belonging to public body—Exemption—Zoological Gardens Act* 1898 (*W.A.*) (62 *Vict. No.* 32).

Land vested in trustees under the *Zoological Gardens Act* 1898 (W.A.) (62 Vict. No. 32) is not rateable, the trustees being a *public body created by Statute* within the meaning of sec. 324 of the *Municipal Institutions Act* 1900 (W.A.) (64 Vict. No. 8); and the failure of the trustees to appeal in accordance with sec. 342, does not prevent them from setting up the exemption as a defence in an action for the recovery of rates.

The fact that such a body allowed the land vested in them to be used in a way not within the limits of the trust is not material to the question whether it is rateable or not, nor is the fact that the grant may be invalid any reason for interference by the municipality.

Decision of Supreme Court of Western Australia affirmed.

APPEAL from the Supreme Court of Western Australia.

Certain lands situated within the municipality of South Perth were vested in the defendants in accordance with the provisions of the *Zoological Gardens Act* 1898. The plaintiffs sued for rates and claimed that certain breaches of trust had been made, viz., the setting aside of a certain portion of the land for the use of members of a tennis club to the exclusion of non-members. When the defendants received notice of the rate having been levied, they failed to appeal in accordance with the provisions of sec. 342 of the *Municipal Institutions Act* 1900.

Villeneuve Smith and *Henning*, for the appellants. The defendant trustees are not really a *public body created by Statute* within the meaning of sec. 324 of 64 Vict. No. 8. This section refers to boards such as road boards with power to levy rates, *cf.* a definition in an Imperial Statute, *The Public Bodies Corrupt Practices Act*, 52 & 53 Vict. c. 69, sec. 7; and even if they were they cannot now set up the exemption as they failed to comply with the provisions of sec. 342 of the *Municipal Institutions Act* 1900. The evidence shows that they allowed the lands to be used in breach of their trust, allowing the members of a tennis club the use of a certain portion to the exclusion of the general public. Counsel referred to the following Statutes and cases:—64 Vict. No. 8, secs. 324, 342, 345; 62 Vict. No. 32; 56 Vict. No. 14, sec. 19; 6 & 7 Vict. c. 36, sec. 1; 42 Eliz. c. 2, sec. 6; *Mayor of Essendon* v. *Blackwood* (1); *Municipal Council of Sydney* v. *Royal Agricultural Society of New South Wales* (2); *Churchwardens of Birmingham* v. *Shaw* (3); *Borough of Glebe* v. *Lukey* (4); *Perth City Council* v. *Gibney* (5); *Bates* v. *Plumstead Overseers* (6).

Northmore, for the respondents, was not called upon.

GRIFFITH C.J. The *Municipal Institutions Act* (64 Vict. No. 8), by sec. 324, provides that—" All land shall be rateable save as excepted, that is to say—(1) Belonging to the Crown, and not used or occupied otherwise than for public purposes; or (2) Belonging to the Metropolitan Waterworks Board, and Public Body created by Statute, or any religious body, and used exclusively as a place of public worship or Sunday school; or (3) Used exclusively as a public hospital, benevolent asylum, orphanage, public school,

(1) 2 App. Cas., 574.
(2) 3 C.L.R., 298.
(3) 10 Q.B., 868, 74 R.R., 523.
(4) 1 C.L.R., 158.
(5) 7 W.A. L.R., 245.
(6) 64 L.J.M.C., 127.

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private school (being the property of a religious body), public library, public museum, or mechanics' institute; or (4) Used or occupied exclusively for charitable purposes; or (5) Belonging to any religious body, and occupied only as a place of residence of a minister of religion; or (6) Belonging to any religious body, and occupied only as a convent, nunnery, or monastery, or by a religious brotherhood or sisterhood: Provided always, that no buildings otherwise exempted from being rated under this or any section shall be liable to be rated by reason of being used for the purposes of any bazaar, or as a place of meeting for any religious, charitable, temperance, or benevolent object." It will be seen, therefore, that the ground of exemption in all cases but two is the mode of use or occupation of the land. The exceptions are in the case of land belonging to the Metropolitan Waterworks Board, and land belonging to any public body created by Statute. In these two cases the use which the land is put to is not by the Statute made relevant. The proviso consequently has no application to lands so owned since ownership and not use is the test of exemption. The first question to be determined in this case is whether the respondents are a public body created by Statute. That depends upon the Act 62 Vict. No. 32, called the *Zoological Gardens Act* 1898, sec. 2 of which provides:—"The Governor may grant and demise unto John Winthrop Hackett, Edward Albert Stone, and George Throssell, and their successors (hereinafter called the trustees), by an instrument in the form of the Thirty-third Schedule to the *Land Act* 1898, with such modifications, and subject to such further terms and conditions as the Governor may think fit, the lands described in the Schedule to this Act; and such lands, together with any other lands to be acquired by the trustees, shall at all times be maintained and used as gardens for zoological and acclimatisation purposes and for public resort and recreation; and on the death, resignation, or other removal of the trustees or any trustee, the Governor may appoint new trustees or a new trustee to be their or his successors or successor." Sec. 3 provides:—"The said gardens shall be under the control and management of a committee of six members, to be called the 'Acclimatisation Committee,' three of whom shall be the trustees for the time being, and three shall be appointed from time to time by the Governor, and shall hold office for not longer than three years." The respondents, who were sued as the Acclimatisation Committee, have the control and management of the Zoological Gardens at South Perth, are the three trustees in whom the land is vested and the other appointed members of the committee. The appellants contend that they are not a public body created by Statute. I do not know of any definition of the term "public body created by Statute" which would not include them. They are not a private body, they are created by Statute, and they have, under sec. 9 of their Act, the powers conferred by the *Parks and Reserves Act* 1895, upon a board of parks and reserves. In my opinion they are a public body created by Statute, and, consequently, within the express provisions of sec. 324. I think also that the land belongs to them within the meaning of the Act, and is therefore exempt from rating.

Another point taken was that, although that may be so, yet the respondents cannot set up their exemption as a defence to the action. That argument is founded on sec. 342 of the *Municipal Institutions Act*, which provides that—"If any person think himself aggrieved by the valuation put upon land, whether as regards the amount thereof or the manner in which such valuation has been made or otherwise, such person may appeal against the same to the council, and from the decision of the council on any such appeal there may be an appeal to the Local Court." Sec. 345 provides:—"In the event of an appeal from the decision of the council to such Local Court, the appellant shall enter the appeal for hearing within ten days after the decision of the council, and at the same time pay to the clerk of the Local Court the sum of One guinea, to answer costs. The decision of the Local Court on any appeal shall be final." There can be no doubt that as to any matter which it is within the jurisdiction of the Council, and of the Local Court on appeal to them, to decide, their decision is final, and that such a question cannot be raised in an action brought for rates. But as to any question not determinable by the Council and the Local Court, their decision cannot be final. The question, therefore, is whether on appeal to the Council and the Local Court, they could inquire into the

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question whether the land was rateable or not rateable under sec. 342. It would be an odd thing—if, for instance, the Metropolitan Waterworks Board were, by mistake of the Council's officers, rated, and did not appeal—that the Local Court could decide that, in face of the plain language of sec. 342, the land was nevertheless rateable. The decision of the Local Court is declared to be final, but it is plain that the decision of any Court can only be final in cases within its jurisdiction. It is equally plain that, as to matters not within the jurisdiction of the Council, there can be no appeal to it, and that any such point must be taken when an attempt is made to enforce the rates. The appeal to the Council is given to persons thinking themselves "aggrieved at the valuation" put upon their land, not as to the land being rateable. In my opinion, the Council and Local Court had no jurisdiction to inquire into the question whether the respondents' land was rateable or not. The defence was, therefore, properly raised in the action.

Two other arguments were addressed to us by Mr. *Villeneuve Smith*. It was suggested that the respondents have put the land to purposes not authorized by their grant. Perhaps they have. I must not be supposed to suggest for a moment that I think so; but, if they have, that is no business of the appellants, but is a matter for the intervention of the Attorney-General, who may bring an action to restrain them and keep them within the limits of their trust. That does not alter their title to the land, or prevent the land from belonging to them. I have already pointed out that the use to which the land is put is not material to the question whether it is rateable or not. It was also said that under the respondents' Act all except one acre of the land in question (which is described in the Schedule to the Act) ought to have been demised to them for a term of years, whence it has been granted to them in fee. But the Act applies to all land acquired by the respondents. If the grant is invalid it may be set aside at the suit of the Crown, but the appellants are not entitled to raise the question in this action. At most, the objection is that the respondents' title to possession of the land, which is at present good, will not terminate as soon as it ought. The appeal must therefore be dismissed.

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BARTON J. Sec. 324 of the *Municipal Institutions Act* 1900 (64 Vict. No. 8) says:—[His Honor read the section and proceeded :] The proviso does not touch the present case. The specified purpose of the use or occupation is the criterion in every instance except those of the Waterworks Board and the public body created by the Statute, which are exempted without qualification, though in the third instance in sub-section (2) the exclusive use is again the criterion. But the argument is that in the two instances which are on the face of them free from anything of the kind, we should infer a qualification which Parliament has not thought it fit to express. Obviously, such a course would be out of all reason, for it would be based on a mere inelegance or carelessness in expression, which is no foundation at all. If, then, this is a public body created by Statute, the necessary result would seem to be that it is exempt. Whether it is such a body seems to depend upon the *Zoological Gardens Act* 1898 (62 Vict. No. 32, sec. 2), where power is given to grant and demise to John Winthrop Hackett, Edward Albert Stone, and George Throssell, and their successors (the trustees), by an instrument in the form of the Thirty-third Schedule to the *Land Act* 1898 the lands described in the Schedule at all times to be maintained and used as gardens for zoological and acclimatization purposes and for public resort and recreation. It is made the duty of the trustees to admit the public to the gardens every day, subject to such hours and payments as the committee prescribe, and parts of the garden may be reserved, and the gardens may be temporarily closed if the trustees see fit to do so. They have power to mortgage on the security of the land, buildings and other property, and then there are certain provisions in respect of moneys raised by mortgage, as to the method in which deeds are to be signed, and the rendering of the trust accounts. It seems to me impossible to contend that a body having duties of this kind to the public is not a public body. There is no definition of "public body" in the *Municipal Institutions Act*, and there is no reason for this Court to impose the narrowest construction on that term unless the necessity for such a construction is to be found in the context of the Statute; and no part of the Statute has been cited to us to show that such an implication

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arises. I take it that it is a public body because it is a body created for the purposes of the public, and entrusted with duties in relation to the public, duties from which it derives no emolument. Even if it did derive emolument in the way of fees or salary, it would, under circumstances like these, be a public body. Being a public body, and as such the creature of a Statute, it is exempted. It was argued, however, that it had misused its powers with reference to the occupation of the land, and that therefore the right of exemption ceased. That would be so if, by the Statute, there were a condition imposing such a consequence upon it for the misuse of its powers, or perhaps if the exemption were qualified in the same manner as it is with regard to the other bodies mentioned in the section. But in the absence of any such difficulty I cannot see any foothold for the argument which the appellants have been obliged to raise. It is true that the misuse of their powers may give the Attorney-General a remedy against them on behalf of the public, but such a misuse does not of itself affect the exemption ; no such consequences are imposed by the law, and it cannot be argued that they exist. Here I may notice the argument as to the fact that there is a grant in fee. According to Mr. *Smith*, there is room for argument that that is not the proper way to grant the land, but a discussion whether there should have been a grant in fee simple or a mere demise to the trustees is, I think, no concern of the Municipality in the present proceedings. They cannot challenge the title on that ground, because they are strangers to questions of title between the Crown and the trustees. On the main question, then, I have no hesitation in agreeing that the appeal should be dismissed. Then comes the question of jurisdiction, and it was argued that because a Court is provided in the first instance in the shape of the Council, which can hear appeals, and because an appeal is given from them to the Local Court, the question of exemption cannot be raised as a defence to an action, in the absence of such an appeal. That would be so if it could be gathered from the sections in question—secs. 342 to 345—that the Council or the Local Court had any jurisdiction in these appeals to deal with questions of exemption. The Statute, however, does not give these bodies any jurisdiction to entertain appeals except as to valuations, and therefore there is no necessity to appeal to them. Where a public body is created by Statute, and comes within sec. 324, it can treat itself as a stranger to these tribunals, as was done here, and no question of appeal arises. To elucidate this matter of jurisdiction I may mention a few words from two judgments in the case of *Allen* v. *Sharp* (1), where there had been failure to appeal to the body constituted by Statute for that purpose, and the Court of Exchequer held that afterwards in an action the ratepayer could not, in view of the terms of the Statute, raise the defence that he was not properly assessable. Baron *Parke* said:—"If a Statute gives magistrates jurisdiction to decide on a certain matter, and they, having the facts before them, do decide it, the propriety of their judgment cannot be inquired into, although they may have come to an erroneous conclusion. An assessment not appealed from stands precisely in the same situation as one confirmed after appeal." That was a case in which the reviewing body which had not been appealed to had authority and jurisdiction to inquire into the very points which were afterwards raised before the Court of Exchequer. In his judgment Baron *Rolfe* said (1):—"Our decision is not that an assessment made without jurisdiction will bind. For instance, if an assessor were to assess a person living altogether out of his district, or dealing in something in respect of which the Act did not give any authority to assess him, the assessment might be questioned in an action."

That seems to me to be a distinct indication of the difference that exists in a case like this, where the defence rests on a positive exemption from rating, while by the section giving an appeal, the jurisdiction of the Council, and afterwards of the Local Court, is confined to questions of valuation. As an appeal on the ground of exemption could not be entertained by either of those Courts, it is impossible to argue that the trustees were precluded from setting up the exemption as a defence in the present action. Notwithstanding the very careful way in which Mr. *Smith* put the matter before us, the appellants have not any ground for their action, and the appeal therefore fails.

(1) 2 Ex., 353, at p. 366.

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O'CONNOR J. The defendants in this case claim that they are exempt from rates, because they are a public statutory body, in respect of the land which is vested in them. On any fair construction of the Statute it seems to me impossible to contend that they do not come within the exemption created by sec. 324. The matter is so clear that I do not think it necessary to go over the ground that my colleagues have already traversed. I shall, therefore, state my conclusions and my reasons very shortly. It was contended that the land did not belong to the defendants because the form, which the Act constituting them a public body lays down for vesting the property, was not followed. That is immaterial to the question we have to consider. The Crown may grant or lease the land to them. The only question we have to consider is whether the land belongs to them, and it is clear on the face of the document before us that the land is vested in them. Then it is said that they are not a public body created by Statute. If they are not a public body created by Statute I am at a loss to understand to what kind of a body, entrusted with what kind of duties, sub-sec. 2 of sec. 324 was intended to apply. They are constituted by an Act which charges them with certain duties and gives them certain powers. Those duties and powers are to be exercised in reference to a public duty. That is sufficient to constitute them a public body. It is then urged that though they may be a public body, and though the land is vested in them as a public body, that they have committed some breach of trust and have therefore placed themselves outside of the exemption. It is difficult to find any support for such a contention. In the absence of express statutory provision the public body is responsible to the Crown, as representing the public, for any breach of trust, not to the municipality, and is certainly not liable to be punished for any alleged breach of trust by the municipal rating of its lands.

I pass to the other point, namely, that it is not open now to the defendants to raise this defence. It is clear that the first occasion on which they had an opportunity of raising it was when the action was brought. The argument against them is that, not having appealed against the valuation, they cannot

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now set up this defence. If it had been possible to set up this defence on the valuation before the Local Court, there might be something in the argument; but it is clear that the Local Court is empowered to deal with nothing other than valuation, and if this defence had been set up the Local Court would probably and properly have said—"We have nothing to do with it, we have simply to decide, in the words of sec. 326, whether the valuation was a proper valuation."

Not only do the words of the Act construed in their ordinary meaning confine the issue before the Local Court to valuation, but the reasons for the restriction are obvious. The Local Court, consisting of probably two ordinary Justices and a Stipendiary Magistrate, may be a good and competent Court to decide questions of valuation, but we can quite understand that the legislature would refrain from entrusting to a Court so constituted the decision of questions as to the ownership of, and title to land, and as to the construction of the sections dealing with exemptions. It follows that that ground also is untenable. That being so the appeal must fail altogether.

Appeal dismissed.

Solicitors, for the appellants, *Martin & Phillips.*
Solicitor, for the respondents, *Barker,* Crown Solicitor.

H. V. J.