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been proved as to contents; and that neither should be admitted to probate. I understand it is admitted that the will of 1890 was duly executed. If so, probate should be granted of that will on an affidavit being filed as to searches for other caveats up to date.

Appeal allowed. Appellants' orders nisi made absolute. Executors of will of 13th June 1890 to be at liberty to apply for probate. Costs of all parties in Supreme Court and High Court to be paid out of estate, those of executors of will of 13th June 1890 as between solicitor and client.

Solicitors, for Gair and others, *Brahe & Gair.*
Solicitors, for Bowers and others, *Fink, Best & Hall.*
Solicitor, for Falconar, *Edward Hart.*

B. L.

Cons *Ryde Municipal Council* v. *Macquarie University* (1978) 139 CLR 633

Appl *A-G (ACT)* v *Commonwealth* (1990) 100 FLR 426

[HIGH COURT OF AUSTRALIA.]

GEORGE BARKLY KNOWLES . . . APPELLANT;

AND

THE COUNCIL OF THE MUNICIPALITY OF NEWCASTLE . . . . . RESPONDENT.

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SYDNEY, *Nov.* 23, 24, 25.

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

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Local Government Act 1906 (*N.S.W.*) (*No.* 56), *sec.* 131—*Rateable land—Land vested in the Chief Commissioner for Railways and used for station-master's residence—Actual user of land for railway purposes.*

The respondent Council, under the provisions of the *Local Government Act* 1906, rated certain land which was vested in the Chief Commissioner for

Railways and Tramways. The land in question was situated in Newcastle, about 200 yards from the railway station. A house which was built upon the land was occupied rent free by the station-master at Newcastle who, in the interests of the railway service, was required, as a condition of his employment, to reside there, so that he might be available in cases of emergency.

Held, that the land in question was actually used for the purposes of the Government railways, or for purposes connected therewith, within the meaning of sec. 131 (2) of the *Local Government Act* 1906, and was therefore not rateable under that Act.

Decision of the Supreme Court of New South Wales: *Knowles* v. *Municipality of Newcastle*, 9 S.R. (N.S.W.), 264; 26 W.N. (N.S.W.), 68, reversed.

APPEAL from the decision of the Supreme Court of New South Wales.

The appellant appealed to the Supreme Court, by way of special case, from the decision of a magistrate, sitting as an Appeal Court under sec. 138 of the *Local Government Act* 1906, by which it was held that certain land in the municipality was rateable.

The special case stated as follows:—"The Council of the Municipality of Newcastle, on March 1st last gave notice to the Chief Commissioner for Railways and Tramways, by serving on him a notice of valuation, and notice to pay rate. The land valued and rated was therein described as brick house, thirty-nine feet six inches by one hundred and forty feet Scott-street. The appellant Knowles, an officer of the Chief Commissioner, appealed against this valuation and assessment on the ground that the said land is not rateable (being set apart for residence of station-master), and should therefore not be assessed. The matter came on to be heard before me on April 7th instant when it was admitted that the land was vested in the Chief Commissioner. Evidence was given in support of the appeal that the house in question was built by the Railway Commissioners over 20 years ago as a departmental residence, and had been occupied as such until February 14th last, when the appellant who, as berthing master in the employment of the Chief Commissioner, had occupied the house by virtue of his office, gave up possession in accordance with departmental arrangement necessitated by the appointment of an assistant station-master. That the house was being renovated and when ready

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for occupation would be occupied by the station-master, (now occupying the house immediately adjoining), who in the interests of the railway service was required to reside in the vicinity of the railway station so as to be within call in case of emergency. That the station-master would not be permitted to reside elsewhere than in the residence provided for him by the Chief Commissioner, and that if he vacated his position he would at once have to give up possession of the house.

"The witness stated that the house in question was a two-storey brick building fronting Scott-street, about 150 to 200 yards from the railway station. That its rental value would be from £50 to £75 per annum, and that the station-master received a salary and free house. It was contended on behalf of the appellant that the land was used for railway purposes, or for a purpose connected therewith within the meaning of sec. 131 (2) of the *Local Government Act* 1906, and was therefore not rateable, and that the land was not in the occupation of the appellant on the date of the service of the notice of valuation.

"I determined that the land was rateable on the following grounds:—That the house thereon was a residence, and could not be said to be actually used for the purposes of the Government railways or tramways, or for purposes connected therewith, the said residence being situated about 200 yards distant from the railway premises.

"The question for the opinion of the Court is whether my decision was erroneous in point of law."

The Supreme Court held that the land in question was not actually used for the purposes of the railways or for purposes connected therewith, within the meaning of sec. 131 (2), and dismissed the appeal: *Knowles* v. *Municipality of Newcastle* (1).

The appellant now appealed from this decision.

Sir George Reid K.C. and *Mitchell*, for the appellant. The land in question was actually used for the purposes of the Government railways, or for purposes connected therewith. The land is used for the station-master's residence, and it is essential to the management of the railways that he should live near the

(1) 9 S.R. (N.S.W.), 264.

railway station so as to be available in case of an emergency. The case states that he is required to live in this house, and that he occupies it by virtue of his employment as station-master. The case would be clear if the house were built in the station yard. The fact that it is a short distance away makes no difference in principle, where the residence is an indispensable adjunct of the service to be performed. The insertion of the words "for purposes connected therewith" show that the legislature contemplated a case of this kind: *Commissioners of Taxation* v. *Trustees of St. Marks' Glebe* (1); *Mayor of Richmond* v. *Gray* (2); *Elliott* v. *London County Council* (3); *Leicester County Council* v. *Assessment Committee of Parish of Leicester* (4); *Gambier* v. *Lydford (Overseers)* (5); *Warden of Dover Harbour* v. *South Eastern Railway Co.* (6). The English cases as to liability under the poor law do not apply to the construction of this Act. [They also referred to *Bertie* v. *Beaumont* (7); *Mersey Docks and Harbour Board* v. *Cameron* (8).]

Piddington, for the respondent Council. In determining the liability of land for rates under sec. 131 (2) the test is for what purpose is the land actually used. The section does not exempt land which constructively, or by operation of law, is used for railway purposes. The land in question in this case is actually used by the station-master for a private residence. The Court must give some effect to the words "actually used."

[GRIFFITH C.J.—The question is, is the land actually used for railway purposes?]

The occupation of land for residential purposes is not an actual user of land for railway purposes. The dominant purpose for which the land is used is for domestic and residential purposes, and the station-master is entitled to exclusive possession of it while he occupies that position. The principle of the Act is that the municipality is entitled to be recouped for the expense of municipal services except in the case of land which is wholly used for some public or charitable purpose. [He referred to *R.* v. *St*

(1) (1902) A.C., 416, at p. 421.
(2) 29 V.L.R., 335; 25 A.L.T., 88.
(3) (1899) 2 Q.B., 277.
(4) 78 L.T., 463.
(5) 3 El. & Bl., 346.
(6) 9 Ha., 489.
(7) 16 East, 33.
(8) 11 H.L.C., 443.

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Nicholas, Rochester (1); *Martin* v. *West Derby (Assessment Committee of)* (2); *Borough of Randwick* v. *Dangar* (3); *R.* v. *Terrott* (4); *Ex parte Bennetts* (5).]

Sir George Reid K.C. in reply.

Cur. adv. vult.

Nov. 25.

GRIFFITH C.J. Before the *Local Government Act* 1906 land vested in the Chief Commissioner for Railways and Tramways was not liable to municipal taxation. By the *Government Railways Act* (No. 6 of 1901), sec. 15, all property vested in him was exempt unless the contrary was expressly provided by some Act. Sec. 131 of the *Local Government Act* 1906 provides that "all land shall be rateable" with certain exceptions, amongst which are buildings used exclusively for public charitable purposes, churches and other buidings used exclusively for public worship, and lands vested in the University of Sydney or in the colleges thereof, and occupied and used by the university or colleges solely for the purposes of education. Par. 2 enacts that all land vested in the Chief Commissioner for Railways and Tramways, which is used or occupied for any purpose, and is not actually used for the purposes of the Government railways or tramways, or purposes connected therewith, shall also be rateable.

The question therefore is, with respect to land vested in the Chief Commissioner for Railways, first, whether it is used or occupied for any purpose or is vacant and unused land; and, secondly, whether, if used, it is actually used for the purposes of the Government railways and tramways, or for purposes connected therewith. We were invited to apply the principle of cases decided on the construction of other Acts of Parliament, in which the question for determination was one of constructive occupation—whether land occupied by servants of the Crown was to be deemed to be occupied by them or by the Crown. I do not think any light is to be derived from those cases. There is nothing more illusory than to attempt to illustrate one Statute

(1) 5 B. & Ad., 219.
(2) 11 Q.B.D., 145.
(3) 15 W.N. (N.S.W.), 37.
(4) 3 East, 506.
(5) 21 N.S.W. L.R., 248.

by a differently-worded section of another. The words here are plain—"actually used for the purposes of the Government railways or tramways, or for purposes connected therewith." They have no technical meaning, and the question is simply whether the land is actually used for such purposes. The land in question in the present case is vested in the Chief Commissioner for Railways, and upon it stands a house which the station-master at Newcastle is required to occupy as his residence. It is situated 150 or 200 yards from the railway station. As I understand the case stated, it is necessary for the efficient management of the railway in the important city of Newcastle that the station-master should be practically resident at the station, as he may be required at any hour of the day or night. The Stipendiary Magistrate was of opinion, and the Supreme Court agreed with him, that the occupation of the house in question, being so far away from the station, could not be said to be absolutely necessary for the purposes of the railway. *Sly* J. thought that "there is no evidence here that the particular location of the house is necessary more than any other position for the residence of the station-master in the working of the railways" (1). With great respect, that is not the test prescribed by the Statute. If the word in the Act were "necessarily" and not "actually," and if the choice of the locality were a mere capricious choice, that argument might have some weight.

I will not attempt to give an exhaustive definition of what is the meaning of the words "for the purposes of the Government railways," but I think it may be said, at any rate, that land which is in fact used for the attainment of some ordinary or desirable result in connection with the operations of the railway department, and which cannot be attained without the use of land, is used for a purpose connected with the railway department. Of course there must be some connection between the user and the purposes of the department. If that definition is sound (it is not an exhaustive one), I think that the land in this case is used for the purposes of the railway department. If it is necessary or desirable for the efficient control of the operations of the railways in New South Wales that a railway station-master should

(1) 9 S.R. (N.S.W.), 264, at p. 266.

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reside at or close to the station, land used as his residence is used for the attainment of such a result, and is land used for a purpose connected with the department.

A simple illustration used in the course of the argument shows that it must be so. I believe that in 95 per cent. of railway stations, other than small country stations where there are no residences, the residence of the station-master is within the railway yard or fences. Would it occur to any one to suggest in the case of residences such as these, which are upon the platform or opening on to it, that the land so used is not land used in connection with the railway? Suppose, then, that, as traffic increases, the station premises are no longer large enough to hold the residence, so that it becomes necessary to acquire land for a residence outside the yard. Is not the purpose for which the land in that case is used still a purpose connected with the railway just as much as when the residence stood within the railway fences? If it is across a street, are the purposes for which the land is used changed because it is 66 feet, or even 100 yards, away from the original site? Another illustration given was the well-known practice in regard to State schools. In the country districts of the State you almost invariably find that the State school and the teachers' residence are in the same enclosure. Can it be said that the land used as a residence is not used for purposes connected with education? It is impossible.

For these reasons I think that it was established affirmatively that the land in question is used for purposes in connection with the railway, and that, therefore, it is not rateable.

BARTON J. I shall add but little. Cases such as *Gambier* v. *Overseers of Lydford* (1); *Martin* v. *Assessment Committee of West Derby* (2) and others of the same kind, afford little or no guidance to a decision on the enactment before us. This is not a question whether the building occupied is Crown property, or one of a class of buildings, which though not Crown property, are, according to the English cases, to be treated as such by analogy in questions arising under the Statute 43 Elizabeth c. 2, which does not mention the Crown. The sole matter for decision is

(1) 3 El. & Bl., 346. (2) 11 Q.B.D., 145.

whether this land, which is vested in the Chief Commissioner for Railways, is "actually used for the purposes of the Government railways or tramways, or for purposes connected therewith." If it is used for any such purpose it is exempt from the rate demanded. No case was cited as to the meaning given to similar words in the decision of a tribunal whose authority is binding on this Court, but there seems to me to be some commonsense help derivable from a remark made by Lord *Davey* in *Commissioners of Taxation* v. *Trustees of St. Marks' Glebe* (1):—"The words 'for or in connection with' (say) a hospital or a church are probably intended to include, not only the actual site of the hospital or church, but also other buildings or land occupied in connection with the principal buildings." And I should say the words "for purposes connected with" the Government railways are probably intended to include not only the buildings which are part of the system within the railway fences, but also a residence vested in the Chief Commissioner, occupied by such an officer as a station-master in connection with the working of the system, an officer who, except when on leave of absence, is in a very real sense on duty by night as well as by day in the discharge of his responsibility for the station and its working, and indeed in a degree, though not chiefly, or primarily, responsible for the whole traffic so far as that station is involved in it. If also, as stated in this special case, the officer resides in the house under orders, because in the interests of the railway service it is necessary that he should be within call in case of emergency, if by reason of the exigency of the service, and of his own duties, he must not reside elsewhere than in that residence provided for him by the Commissioner, and if he can only retain it while he performs the duties for the more efficient performance of which it was allotted to him, I should say that it is rather certain than probable that the house is used, and used by the Chief Commissioner, for purposes in connection with the Government railways. It is worth while to add that such words as "solely" or "exclusively" are not employed in sub-sec. 2 as conditions of the user or occupation, as they are in connection with the class of lands

(1) (1902) A.C., 416, at p. 421.

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dealt with in paragraphs (*b*), (*c*) and (*e*) of sub-sec. (1). I am of opinion that the appeal must be allowed.

O'CONNOR J. I am of the same opinion. An attempt was made to furnish guidance to the Court by the English cases. It appears to me that none of these cases throw any light upon the matter which we have to decide. Mr. *Piddington* attempted to lay down some rules derived from these cases to be followed in rating cases. It is impossible to apply any such rules here. All those cases turn on the words of a particular Statute, and the only rule that can be said to be laid down in any of them is as to the construction of the particular words in the Statutes to be construed. We have to determine whether in the very plain words of this Statute the facts are such as to exempt the railway premises from the payment of rates in respect of this particular house, and the issue to be determined by the magistrate was whether it had been proved that the house was actually used for the purposes of the Government railways, or for purposes connected therewith.

Now, in ordinary circumstances I think it is correct to say that when a station-master chooses his own residence, and lives there when off duty, that is not a user for the purposes of the railway. Where he may choose to live with his family when he is away from work is his own private affair, and it cannot be said, either directly or indirectly, that the railway authorities have anything to do with it. But the circumstances in this case are not the ordinary circumstances. It appears that the Railway Commissioners have deemed it necessary in the case of Newcastle that the station-master shall be always at immediate call at any hour of the day or night, and holding that view, they some time ago acquired this land and built this house for the purpose of a residence for the station-master, in order that the work of the station might be carried on according to that view of his duties. And since then it is considered so necessary a part of the working of the station that it has become a condition of his employment, that if the station-master objected to conform to it there he would not be employed at all. In living there, he performs one of his duties, just as he does in carrying on the ordinary

business of his office in the building which the Railway Commissioners have set apart for him.

In these circumstances it appears to me that, although the station-master does occupy this house for the purpose of his residence, that, being required so to occupy it by the Railway Commissioners, its occupation is part of his duty, and it becomes therefore impossible to say that such occupation is not for the purposes of the railway, or that it is not in connection with the railway. It is said that the actual use is by the station-master, not by the Commissioners, but if the station-master actually does use the house under the direction of the Commissioners, I find it difficult to see how it can be said that it is the station-master and not the Commissioners who uses the house. In the case of the Commissioners, there is no part of the railway premises in the vast extent of their operations which it can be said that the Commissioners themselves directly use, except the office in which they actually carry on their official business; but the user of all railway premises is, I think, a user by the Commissioners for the purposes of the railways, and the use of this house for the purposes of the station-master's residence in order that he may be available at any moment he is called upon seems to me to be clearly one of the purposes referred to in the sub-section. I do not see any difference between this case and the case of gate-keepers. It is well known that at ordinary railway crossings there is a gate which is in charge of a gate-keeper. The gate-keeper has the use of the adjoining cottage, and although not always on duty, he must be always ready to be on duty.

It appears to me therefore there was no ground on which the magistrate could lawfully come to the conclusion at which he arrived, that this house was not used for the purposes of the Government railways or purposes connected therewith. The Supreme Court in dealing with his finding having taken a wrong view, the appeal must be allowed.

ISAACS J. read the following judgment:— Mr. *Piddington* attempted to uphold the decision of the Supreme Court in the only way it could possibly be supported if supported at all. He said in effect this: that the premises were in fact beneficially

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occupied by the station-master and his family as a private residence, and that was the actual purpose for which the land was used; and he argued that, though the reason for permitting the land to be so used was to facilitate railway operations, the reason was an immaterial circumstance. The purpose only, he says, is important. He cited several English cases under the poor laws in aid of his contention. Now, as to those cases I will make one or two observations. One is that, as held as far back as *Rowls* v. *Gells* (1), the poor rate is not a tax on the land, but a personal charge in respect of the land. So that to determine who is the occupier is frequently the great object of inquiry where rateability is denied. In New South Wales the land itself is rated, and the rates are a charge on the land, with certain specified exceptions.

The next point in connection with those cases is that, as shown by the judgments of *Brett* and *Bowen* LL.J. in *Martin* v. *West Derby* (*Assessment Committee of*) (2), a somewhat arbitrary line has been judicially drawn in *Gambier* v. *Lydford* (*Overseers*) (3), and often adhered to, though it is impossible I think to reconcile all the cases.

The third observation I would make, and, as will be presently seen, it has materiality in the present case, because of the word "occupied" in the section, is that, as shown by the judgment of *Lush* J. in *R.* v. *St. Pancras* (*Assessment Committee of*) (4), occupation is not synonymous with mere legal possession. Occupation includes possession as its primary element, but it also includes something more. "The owner of a vacant house," says the learned Judge, "is in possession, and may maintain trespass against any one who invades it, but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year."

I now come to sec. 131, sub-sec. (2), on which this case depends. We must bear in mind that sec. 15 of the *Government Railways Act* 1901 declares this land free from rateability unless we find in some other Act liability expressly created.

(1) Cowp., 451.
(2) 11 Q.B.D., 145.
(3) 3 El. & Bl., 346.
(4) 2 Q.B.D., 581, at p. 588.

Now, in view of the discussion, it is important to examine closely the very words of the sub-section which is said to render the land liable.

The first condition of liability is that it must be "used or occupied for any purpose." "Used" is there not necessarily synonymous with "occupied," and probably points to utilization in some other way than merely actual occupancy. The land may, however, not be enjoyed except by means of actual occupation, in the sense indicated by *Lush* J.

Now, as one cannot well conceive of the Chief Commissioner himself using or occupying the premises except for railway purposes, it is plain that, in view of the succeeding words in the sub-section, the use or occupation which constitutes the first condition at all events includes that of some individual other than the Chief Commissioner. If Mr. *Piddington* were right, once you had that occupation no further investigation is material. But that is not the scheme of the statutory provision in New South Wales. Notwithstanding that circumstance, you have still to inquire whether the individual using or occupying the premises is doing so as the Act expresses it, "for the purposes of the Government railways or tramways, or for purposes connected therewith," which is only another way of saying "for departmental purposes."

If, therefore, we find that the purpose for which the individual is occupying the premises is one which is so proximately related to the working of the railway as to be properly said to be "connected" with it, the second condition of liability has not arisen, and the land remains free.

On broad and general considerations of necessity and convenience I should have thought it hardly open to doubt that where the Commissioner requires that a station-master, as part of his official duty, and to facilitate railway operations, and ensure their safe working, shall live in premises assigned to him, that is a use of the land for departmental purposes, and not for mere private convenience, and not the less so because mortal beings personally need shelter and protection from the elements.

But whatever vestige of doubt could otherwise exist as to the intention of the legislature is, in my opinion, swept away by sec.

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97 of the *Government Railways Act* which specifically refers to "dwelling house," placing it between "station" and "office," and indicating the clear contemplation of Parliament that the Commissioner would in the course of his public duty and as part of the management of the railway system provide dwelling houses for officers; and might require them speedily to be delivered up so that other officers might be enabled to occupy them in accordance with their duty.

I quite agree that on the facts as found by the magistrate this appeal must be allowed.

Appeal allowed.

Solicitor, for appellant, *J. S. Cargill*, Solicitor for Railways.

Solicitor, for respondent, *W. H. Baker*, Newcastle, by *MacKenzie & MacKenzie.*

C. E. W.