[HIGH COURT OF AUSTRALIA.]

THE LITTLE COMPANY OF MARY (SOUTH AUSTRALIA) INCORPORATED . . } PLAINTIFF;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANT.

THE MEMORIAL HOSPITAL INCORPORATED . . . . . } PLAINTIFF;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANT.

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ADELAIDE, *Sept.* 21, 22.

MELBOURNE, *Oct.* 20.

Latham C.J., Rich and Starke JJ.

National Security—War Damage to Property Regulations—Exemption from contribution to War Damage Fund—"Public hospital"—National Security (War Damage to Property) Regulations (S.R. 1942 No. 79), reg. 32.

Hospitals, which were established and controlled by organizations connected with the Roman Catholic and Methodist Churches and were not carried on for any personal profit, which accepted patients of all religious denominations and charged fees to most, but not all, patients, which were not subject to any form of public control, and in relation to which the members of the public had no rights, *Held*, by *Latham* C.J. and *Starke* J. (*Rich* J. dissenting), not to be public hospitals within the meaning of reg. 32 of the *National Security (War Damage to Property) Regulations.*

CASES STATED.

The Little Company of Mary (South Australia) Incorporated and The Memorial Hospital Incorporated brought separate actions in the High Court against the Commonwealth of Australia and the War Damage Commission. In each action the parties concurred in

stating, pursuant to Order XXXII., rule 1, of the *Rules of the High Court*, a special case for the opinion of the Full Court.

The Little Company of Mary (South Australia) Incorporated v. *The Commonwealth*.—The case stated was substantially as follows :—

1. The plaintiff is an association duly incorporated pursuant to the *Associations Incorporation Act* 1929-1935 (S.A.). The members of the association are the Sisters in the State of South Australia of the Congregation of the Little Company of Mary, a congregation of nursing sisters of the Roman Catholic Church.

2. The objects or purposes of the plaintiff association are as follows, and are thus stated in the rules filed pursuant to the said Act in the office of the Registrar of Companies in the said State :— (i) To acquire and hold property in the name of the association and for the association. (ii) To establish and carry on a nursing institution or nursing institutions. (iii) In particular to establish and maintain a hospital or hospitals for the benefit of the public generally, irrespective of class or religious belief, and particularly to maintain the same for the poor and those of limited means.

3. Pursuant to the rules of the Congregation and the rules of incorporation the plaintiff owns and conducts and has conducted during the year 1942 and for many years theretofore the hospital known as the Calvary Hospital, situate at Strangways Terrace, North Adelaide within one mile of the centre of the City of Adelaide.

4. Upon the lands of the hospital are erected the following buildings :—A general hospital consisting of one large building ; a maternity hospital adjacent to the general hospital ; a convent, or residence for the Sisters of the Congregation ; a chapel, open to the public, and frequented by such of the staff as are Roman Catholics and by patients of the same faith, in which are held regular religious services ; one large building used as nurses' quarters ; five smaller buildings used for nurses and domestics ; one laundry and boiler house ; one mortuary.

5. The hospital is fully equipped and staffed to render in a competent and up-to-date manner all such services, medical and surgical and nursing, as are usually rendered by hospitals of the larger sort. The total value of all the land and buildings of the hospital is over £100,000. The plant and fittings of the hospital are of the estimated additional value of £30,000.

6. The staff of the hospital consists of approximately thirty-five Sisters of the Congregation of the Little Company of Mary (all of whom are qualified nurses, and some of whom have special qualifications), about twenty-five registered nurses who are laywomen, and about fifty trainees or probationer nurses, as well as a number of

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men and women domestic and other servants. The Sisters themselves receive no salary or remuneration for their services, beyond their food and clothing.

7. The hospital is approved pursuant to the *Nurses Registration Act* 1920-1934 (S.A.) as a training school for the whole of the prescribed courses of both general nursing and midwifery.

8. In the hospital are 174 beds, including thirty-four cots in the maternity department. Subject to what is hereinafter stated as to free treatment and treatment at reduced rates of certain patients, the charges or tariffs for the said beds are as follows:— 39 beds at 10s. per day; 19 beds at 12s. per day; 29 beds at 13s. 6d. per day; 12 beds at 16s. 6d. per day; 31 beds at 21s. per day; 3 beds at 24s. per day. Infant cots are not charged for. Theatre fees, medicines and dressings are usually the subject of extra charges.

9. The hospital is open to the public at all times. Admission as a patient to the hospital is dependent upon the two conditions only (*a*) that he be the patient of a legally qualified medical practitioner, and (*b*) that there is a bed vacant. Over recent years the average number of persons in residence is 156, including an average of fifteen to twenty infants in the maternity hospital. For years past the accommodation of the hospital has at all times been used to the utmost of its capacity.

10. Patients of the hospital who are able to pay for their maintenance and treatment or to contribute towards the cost of the same are expected to and generally do so. It is, however, a common occurrence for the charges or tariffs set forth in clause 8 hereof to be reduced in the case of a patient who is not in affluent circumstances. Patients in genuinely necessitous circumstances are not expected to and generally do not pay anything. During the year 1941, out of a total of approximately 3,000 patients treated, some 500 patients either paid no fees or paid greatly reduced fees, and to these patients were in that year given, in the aggregate, 7,196 days of maintenance and treatment. Frequently, by reason of fully-taxed accommodation, patients who are able and willing to pay full fees cannot be admitted at times when free patients are inmates of the hospital.

11. The plaintiff has an arrangement with the South Australian Police Association to accept the members of that Association's hospital fund at 6s. per day; and an arrangement with the Hospitals Fund Association of the South Australian Railway Employees to accept sick officers and employees of the South Australian Railways at 4s. 6d. per day.

12. The foregoing figures and proportions are typical of any year and represent the conditions at present existing. Concessions to and free treatment of patients extend to both the maternity and general sides of the hospital.

13. The plaintiff is frequently able to arrange for attention to patients by legally qualified medical practitioners either free of cost or at reduced rates. The hospital has as yet no regular system of "honorary" practitioners; but there are about twelve specialists and other practitioners who are honorary attendants upon the Sisters and staff, and these gentlemen are always willing to help the Sisters in any charitable work.

14. The hospital treats out-patients in the matter of X-ray services, diathermy, minor operations, dressings and injections. In every year about 700 persons avail themselves of X-ray services and certain of the Sisters are skilled X-ray technicians. Care and treatment of out-patients are the subject of the usual reasonable charges, which however are in proper and deserving cases either reduced or remitted altogether.

15. No discrimination whatever is made at the hospital between patients or nurses or paid staff in respect of either class or religion. Neither is any distinction made as to maintenance or treatment or care between paying or non-paying patients. The majority of the patients received at the hospital are not of the Roman Catholic faith.

16. In addition to the beds and equipment hereinbefore mentioned the plaintiff has, during the year 1942, at the request of the State Medical Co-ordination Committee, arranged for the immediate reception at the hospital at any time of at least forty persons who may be the victims of enemy action and of up to twenty personnel of the United States Army. The provision arranged for will include all general nursing care by the Sisters and staff and facilities for blood transfusions and generally all or any surgical and medical treatment required.

17. The hospital was first established with moneys and property provided by members of the South Australian public and with moneys provided by the Australian Province of the Congregation of the Little Company of Mary; and it was carried on and extended by means of money borrowed on overdraft from the Commonwealth Bank of Australia and also by means of moneys obtained from gifts, legacies and bequests from members of the public of all religious denominations. Up to the present time the hospital has been the recipient of gifts, legacies and bequests from members of the public of all denominations, and it has also benefited by public subscriptions which have been raised by public functions.

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18. Some years ago the plaintiff borrowed from the Australian Mutual Provident Society on mortgage of all its real property a sum now totalling (with further advances) £60,000 to pay off the greater part of its overdraft and to provide for the building of its maternity hospital. The plaintiff still has an overdraft with the Commonwealth Bank of Australia which is kept under £5,000.

19. The hospital is not carried on for purposes of profit; and no person derives any profit or monetary gain therefrom.

21. It has always been the aim of the plaintiff association (as of the Congregation to which its members belong) to continually widen the scope of work of its members by assisting an increasing number of poor patients.

22. The hospital has not been declared a "public hospital" pursuant to the special provisions of sec. 5 of the *Hospitals Act* 1934 (S.A.).

The questions stated for the opinion of the Full Court were as follows:—

(i) Is the hospital known as Calvary Hospital, North Adelaide, a "public hospital" within the meaning of the *National Security* (*War Damage to Property*) *Regulations*?

(ii) Is any contribution payable under the said Regulations in respect of any fixed property or plant used primarily and principally as or in the hospital?

The religious rules of the Congregation (so far as material to the case), the rules of incorporation of the association, and the accounts of the association for the years ending 31st December 1938, 1939, 1940 and 1941, were appended to the case. Particulars of these, so far as material, appear in the judgments hereunder.

The Memorial Hospital Incorporated v. *The Commonwealth.*—The case stated was substantially as follows:—

1. The Memorial Hospital Incorporated is incorporated in the State of South Australia under the provisions of the *Associations Incorporation Act* 1929 (S.A.).

2. The objects of the plaintiff are:—(*a*) To provide and maintain hospitals and rest homes for the medical and surgical treatment of patients and persons requiring hospital treatment. (*b*) To perpetuate the memory and sacrifice of those who gave their lives in the Great War 1914-1919.

3. Pursuant to such objects the plaintiff carries on a hospital known as the Memorial Hospital at Pennington Terrace, North Adelaide.

4. The hospital (though not at first incorporated) was established in 1919 with gifts of £40,000 or thereabouts from members of the public of all religious denominations.

5. The land at Pennington Terrace, North Adelaide, on which the hospital is carried on is owned by the plaintiff.

6. On the said land are erected the following buildings:—Three large buildings used exclusively as hospitals; one large building used for nurses' quarters; one six-person laundry used entirely for hospital purposes; one small chapel used for private devotions at which a regular service is conducted each Sunday night.

7. The hospital is fully equipped and staffed to render in a competent and up-to-date manner all such services medical and surgical and nursing as are usually rendered by large hospitals in this country.

8. The hospital is approved pursuant to the *Nurses Registration Act* 1920-1934 of the State as a training school for the whole of the prescribed course for nursing.

9. The portion of the hospital premises used as a general hospital contains eighty-three beds as follows:—35 beds for which the tariff is £3 15s. weekly; 11 beds for which the tariff is £4 4s. weekly; 24 beds for which the tariff is £5 10s. weekly; 8 beds for which the tariff is £6 16s 6d. weekly; 5 beds for which the tariff is £7 17s. 6d. weekly. These tariffs do not include operating theatre fees or medicines purchased for or dressings supplied for patients.

10. The portion of the hospital premises used as a maternity hospital contains thirty-one beds as follows:—5 beds at £4 10s. per week; 12 beds at £5 5s. per week; 6 beds at £5 15s. 6d. per week; 4 beds at £7 7s. per week; 4 beds at £8 8s. per week.

11. Arrangements have also been made and expense incurred to enable the plaintiff to receive in its hospital at least twenty-five persons who may be victims of air raids. No arrangement has yet been made as to what tariff (if any) shall be charged such persons.

12. The tariffs set out in pars. 9 and 10 hereof are subject to the following automatic reductions:—(*a*) Twenty-five per cent to returned soldiers from the war of 1914-1919, to widows of such returned soldiers, to children of deceased returned soldiers from the said war, and to returned nurses from the said war. (*b*) Twenty per cent to all other nurses. (*c*) Thirty per cent to ministers of religion of any denomination. (*d*) The plaintiff has an arrangement with the South Australian Police Association to accept, and the plaintiff does accept, the members of that Association's hospital fund at 6s. per day.

13. In addition to the reductions set out in par. 12 hereof such reduction from all or any of the charges set out in pars. 9 and 10 hereof as the Board from time to time thinks fit is made in connection

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with other patients who may be deemed worthy necessitous cases. Not less than 200 patients per annum receive concessions in this way and in exceptional cases a remission of all charges is made.

15. The average number of patients in residence in the hospital (excluding infants in the maternity hospital) is about 115 and for years past the accommodation of the hospital has at all times been used to the utmost of its capacity. At the present time there are patients in the halls, in the doctors' sitting-room, and in a small room not normally used for patients. No inquiry is, before the admission of the patient, made as to such person's financial standing or ability to pay full fees and it often happens that while beds are being occupied by persons unable to pay full fees applicants for admission who are able to pay full fees have to be refused admission.

16. The hospital is open to the public at all times and is available to all classes and members of the public (irrespective of religious denominations) with the sole qualifications that each person admitted must be a patient of a legally qualified medical practitioner and that a bed is available.

17. No discrimination whatsoever is made between patients or nurses or paid staff in respect of either class or religion, nor is any distinction made as to maintenance or treatment or care between patients who pay full tariff and others. The majority of the patients received at the hospital are probably not Methodists, but this cannot be stated for certain, because no particulars are ever asked for or taken as to the religious denomination of any patient.

18. Notwithstanding considerably increased overhead charges no increase in tariff has been made since the commencement of the present war except that the tariff for the 35 beds at £3 15s. weekly referred to in par. 9 hereof was previously £3 10s. weekly. It has always been and is the desire of the Board to make the hospital available as widely as possible to all members of the public as reasonably as possible.

19. Since the establishment of the hospital in 1919 the whole of the surplus (with the exception hereinafter mentioned) derived from the working of the hospital has been transferred to a working account and has gone back into the hospital and has been used primarily for additional buildings or for the reduction of the liabilities of the hospital. The exception above referred to is that in the year 1941 the sum of £501 17s. 11d. was lent to the central finance committee of the Methodist conference in the said State. An indemnity from the Methodist conference has been obtained. The moneys so borrowed by the Methodist conference were used in connection with Methodist Church activities.

20. No person has received or receives any personal profit from the operations of the hospital or out of the surplus moneys thereof and in particular no-one concerned in the establishment or management of the plaintiff has derived or derives any pecuniary benefit from any excess of receipts over expenditure.

21. The Board contemplates that any future surpluses shall be used in paying off the remaining liabilities of the plaintiff and in the erection of further buildings that may be required for hospital purposes. Should the time ever come when all liabilities have been paid off and no further buildings are required the Board's present intention is to reduce the fees charged to patients.

22. The hospital has no honorary physicians or surgeons and there is no outpatients' department.

23. No proclamation has been made in respect of the hospital under sec. 5 of the *Hospitals Act* 1934 (S.A.).

The questions stated for the opinion of the Full Court were as follows :—

(*a*) Is the hospital known as the Memorial Hospital carried on by the plaintiff at Pennington Terrace, North Adelaide, a public hospital within the meaning of the *National Security* (*War Damage to Property*) *Regulations* ?

(*b*) Is any contribution payable under the said Regulations in respect of any fixed property or plant used primarily and principally as or in the hospital ?

(*c*) Is any contribution payable under the said Regulations in respect of any and which of the buildings set out in par. 6 hereof ?

The rules and regulations of the hospital, and a copy of the working account and balance-sheet of the hospital for the year ending 31st December 1941, were annexed to the case. Particulars of these, so far as material, appear in the judgments hereunder.

The two cases were heard together.

Ligertwood K.C. (with him *Culshaw*), for the plaintiff The Little Company of Mary (South Australia) Incorporated. The plaintiff is incorporated under the *Associations Incorporation Act* 1929-1935 (S.A.) and associations for the purpose of trading or securing pecuniary profit to the members are excluded from registration under that Act : see secs. 3 and 15. "Public hospital" is not limited to a hospital subject to public control. The important question is not the method of control, but the purposes of the hospital. Important considerations are the benefits derived by members of the public and the fact that no personal profit is

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made from the hospital's activities (*O'Connell* v. *Council of City of Greater Newcastle* (1); *Hall* v. *Derby Sanitary Authority* (2); *Shaw* v. *Halifax Corporation* (3); *Royal Masonic Institution for Boys* v. *Parkes* (4); *Verge* v. *Somerville* (5); *Dilworth* v. *Commissioner of Stamps* (6)). By virtue of the hospital's objects and the sources of its revenue there is an inalienable vesting in the public of the benefits of the hospital.

[LATHAM C.J. The public have no rights at all in relation to these hospitals.]

The test is exclusiveness of benefit to the public, and this is a question of fact, not of right.

Brebner (with him Miss *Gilmore*), for the plaintiff The Memorial Hospital Incorporated, adopted the argument of *Ligertwood* K.C. on the law, and dealt with the facts in the case of the Memorial Hospital in so far as distinguishable from those in the case of the Little Company of Mary.

Reed K.C. (with him *Whitington*), for the defendants. Neither institution is a public hospital. The phrase must be defined according to common understanding. No one element is necessarily conclusive, but the main inquiry is as to the terms on which and the circumstances in which treatment is given. It is not sufficient that there is some benefit to the public. In neither case is there any declaration of trust. Neither hospital is bound to admit patients, and neither is obliged to continue its activities. The Regulations themselves show that charitable purpose (treatment given free or for greatly reduced charges) is an important element. Another important element is that certainly the Memorial Hospital and probably the Calvary Hospital shows a surplus. [Counsel referred to *Girls' Public Day School Trust* v. *Ereaut* (7); *Otago Presbyterian Church Board of Trustees* v. *Commissioner of Taxes* (8); *Public Trustee (N.S.W.)* v. *Federal Commissioner of Taxation* (9).]

Brebner, in reply. The fact of a surplus is immaterial. It cannot be suggested that a hospital cannot be a public hospital unless its operations are conducted at a loss. Even if the hospital may hereafter cease its present activities, the question is what is it doing now, and its operations are policed by the Registrar of Companies and by the Crown or the Attorney-General (*Tudor* on *Charities*, 5th

(1) (1941) 41 S.R. (N.S.W.) 190; 58 W.N. 166.
(2) (1885) 16 Q.B.D. 163.
(3) (1915) 2 K.B. 170.
(4) (1912) 3 K.B. 312.
(5) (1924) A.C. 496.
(6) (1899) A.C. 99.
(7) (1931) A.C. 12.
(8) (1906) 26 N.Z.L.R. 11.
(9) (1934) 51 C.L.R. 75, at p. 100.

ed. (1929), p. 174). The public has no right to demand admission to the Adelaide Hospital, which is conceded to be a public hospital.

Ligertwood K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. I have had the advantage of reading the reasons for judgment of my brother *Starke*. I adopt his concise statement of the facts in these two cases. I add, however, that in the case of the Calvary Hospital the sealholders may with the consent of the Mother Provincial of the Congregation sell or dispose of any of the property of the association—including therefore the hospital itself. Further, the control of the hospital is vested in the Mother Superior, who is appointed by the Mother Provincial. In the case of the Memorial Hospital, the rules of the association provide that the Board may mortgage or lease the property of the association and that it shall observe and carry out all proper directions of the South Australian annual conference of the Methodist Church with regard to the sale and transfer of any property of the association. The Board is appointed by the conference, and only Methodists may be members of the Board.

Thus both hospitals are entirely under denominational control. There is no obligation resting upon any person to continue to carry on the hospitals. I can see nothing to exclude complete denominational control of any funds resulting from a sale of either hospital.

The hospitals could not have been established or carried on without original public contributions. But each hospital now shows a fairly regular and substantial profit. There is no obligation to devote this profit to hospital purposes, though that in fact is the practice which has hitherto been followed. The hospitals are nursing institutions. They have no medical staffs. Substantial fees are normally charged for beds in both hospitals. The charges in the Calvary Hospital range from £3 10s. to £8 8s. per week and in the Memorial Hospital from £3 15s. to £8 8s. per week. In some cases patients are treated gratuitously or at reduced fees.

In the case of the Memorial Hospital a sum of £1,232 represents the amount given up in fees in 1941. The amount received in patients' fees in that year was £27,437. Other fees were received for use of theatre, dressings, laundry, and X-ray clinic. The only other receipt was " interest £56 11s. 9d." After allowing £1,232 for the benevolent work mentioned, there was a surplus for the year of £2,210. Thus the hospital, in the only year for which particulars

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are stated, paid its way completely out of fees and made a profit. The amount of benevolent work was not very substantial.

In the case of the Calvary Hospital there is no such precise information, but "out of approximately 3,000 patients treated some 500 patients either paid no fees or paid greatly reduced fees." The accounts in this case show that the hospital is supported by the fees charged to patients—other receipts being quite negligible—e.g., in 1938 fees amounted to £20,945, and other receipts to £69; in 1939 fees were £19,934, and other receipts £101; in 1940 fees were £23,329, and other receipts £143; in 1941 fees were £27,679, and other receipts £126. In each year substantial amounts of surpluses on income and expenditure account were transferred to building account.

The question is whether these useful and valuable hospitals are public hospitals. The adjective "public" is used in many collocations, and the meaning varies with the noun with which it is used. In "public park" and "public house" it is not difficult to state the meaning. The distinction between a park to which the public has access and the grounds of a private house is clear enough. So also a public house is readily distinguished from a private house. The meaning is not so clear in the case of phrases such a "public school," "public institution," "public hospital." For example, in New South Wales a "public school" is a State school, while the "great public schools" are not State schools; in Victoria the term is applied only to certain schools which are not State schools.

In *Girls' Public Day School Trust* v. *Ereaut* (1) the difficulties of defining this term become very apparent. It was held that the term was not a term of art, and that the question what was the common understanding of the term was a question of fact. In *O'Connell* v. *Newcastle Municipal Council* (2), which was relied upon by the plaintiffs, the same rule was applied by the Full Court of the Supreme Court to the consideration of the question whether a particular hospital was a "public hospital" within the meaning of the New South Wales *Local Government Act* 1919-1940, sec. 132. *Jordan* C.J. said: "Whether a particular institution is a public hospital is a question of fact to be determined upon a consideration of all the relevant facts of the particular case, no one fact being necessarily conclusive" (3). It was held that the absence of any form of public control and the non-public ownership of the hospital property did not compel the conclusion in that case that the institution was not a public hospital. So far this decision assists the plaintiffs, though

(1) (1931) A.C. 12.
(2) (1941) 41 S.R. (N.S.W.) 190; 58 W.N. 166.
(3) (1941) 41 S.R. (N.S.W.), at p. 193; 58 W.N., at p. 168.

on a question of fact precedents are not of authority. It may, however, be pointed out that the hospital which was held to be a public hospital in *O'Connell's Case* (1) possessed characteristics which are absent in the present cases. The hospital was subject to the *Public Hospitals Act* 1929-1940 (N.S.W.) : see sec. 4. As a hospital mentioned in the Third Schedule it was bound to submit to any inquiry into administration and management which the Hospitals Commission might think proper to make ; it was subject to annual inspection ; it was eligible for subsidy from public moneys ; and the Commission could attach to the payment of any subsidy such conditions in respect of the maintenance, equipment, management, capital expenditure, building, or repairs to existing buildings as it might think fit (sec. 11). The hospital was bound to receive destitute persons without payment (sec. 30 (6)). It would have been difficult to hold that a hospital subject in this degree to a *Public Hospitals Act* was not a public hospital within the meaning of another New South Wales statute. The Calvary and Memorial Hospitals possess none of the characteristics mentioned.

I therefore ask whether, in common understanding, these hospitals would be called " public hospitals." I find it difficult to believe that the patients in them would not be very astonished if they or their friends were told that they were in a public hospital. So also I conceive that the authorities of both the Roman Catholic Church and of the Methodist Church would receive with incredulity a statement that their respective institutions were public institutions and not simply and entirely church institutions. The question is not merely whether there is any charitable element in the conduct of the hospitals. There is such an element, but it is not very great. From the point of view of the community—the public in the ordinary sense—these are, I think, private institutions, controlled by churches which would naturally most strongly object to any claim that the public had any rights whatever in relation to the hospitals—whether as to management and control, or as to admission of patients, or as to utilization of funds, or as to disposition of property, or as to development or continuance of the hospital undertakings. The hospitals are not carried on for the purpose of discharging any duties owed to the public : cf. *Griffiths* v. *Smith* (2). The only element which, in these cases, points to the opposite conclusion, is to be found in the degree to which benevolent treatment is given, and this, though admirable, is relatively small. The hospitals are open to the public only in the sense that there is no exclusion of any

(1) (1941) 41 S.R. (N.S.W.) 190 ; 58 W.N. 166.

(2) (1941) A.C. 170, at pp. 178, 186, 206.

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specific class on religious or other grounds. But that may be said of most, if not all, private hospitals. Further, these hospitals are not conducted for the private profit of the members of the associations which own and control them. But the profits can be used and rightly used for church purposes as the churches concerned think proper. It cannot be said, as it appears to me, that the churches are bound to continue to apply the profits to hospital purposes. I think that these hospitals are, to borrow the words of *Starke* J. in *Public Trustee (N.S.W.)* v. *Federal Commissioner of Taxation* (1) private organizations conducted by or in connection with churches.

As the principal question raised in each case is purely a question of fact, it should not have come before the Court by way of case stated under Order XXXII. of the Rules of Court. This order provides that the parties to a cause may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court. But no objection was taken upon this ground.

In my opinion the questions asked should be answered as follows :— In the case of the Calvary Hospital: (i) No. (ii) Yes. In the case of the Memorial Hospital: (*a*) No. (*b*) Yes. (*c*) Of all the buildings.

RICH J. *The Little Company of Mary (South Australia) Incorporated* v. *The Commonwealth.*—The questions submitted in this case stated are whether the hospital in question is a public hospital within the meaning of reg. 32 of the *National Security (War Damage to Property) Regulations* and is exempt from contributions payable in respect of any of its fixed property and plant. The condition of exemption mentioned in these Regulations is that the fixed property or plant should be used primarily and principally as or in a public hospital. No definition of the latter expression is given in the Regulations and in relevant judicial decisions as to the meaning of the word " public " judges have refrained from attempting an exhaustive decision. It is neither necessary nor desirable to do so. In every case which arises for determination a number of factors have to be considered, and none is an absolute criterion. " Public hospital " is not a precise or technical expression. In *Hall* v. *Derby Sanitary Authority* (2) the question for determination was whether a certain orphanage was a public institution and *A. L. Smith* J., as he then was, lays it down simply that if a thing is not " private " then it is " public " (3), recalling inevitably the definition of prose which we owe to *Le Bourgeois Gentilhomme.* The definition to which *Darling* J., as he

(1) (1934) 51 C.L.R. 75, at p. 100.
(2) (1885) 16 Q.B.D. 163.
(3) (1885) 16 Q.B.D., at p. 173.

then was, in *Royal Masonic Institution* v. *Parkes* (1) refers, is to be found in Acte II., Scène VI. : *Le Maître de Philosophie*—" Tout ce qui n'est point prose est vers et tout ce qui n'est point vers est prose." In *Seal* v. *Trustees of the British Orphan Asylum* (2) *Hamilton* J., as he then was, also adopts the language of *A. L. Smith* J. in *Hall's Case* (3), who distinguishes " public " from " private " by regarding the purposes which the particular institution served. The observations of *Hamilton* J. in *Seal's Case* (4) as to the publicity and purposes of the orphanage institution he was then considering are very relevant in the same connection in this case.

In the instant case the facts are stated by the parties as they exist at present, and we have not to do with any finding of a magistrate, commissioner or court, and speculations as to the future operations of the association, whether, e.g., it might cease to carry on the hospital or sell the property belonging to it, are irrelevant. The Calvary Hospital was first established partly by public subscriptions and is now partly subsidized by gifts, legacies and donations from members of the public. I am aware that these facts are not conclusive, but they are not immaterial (*Shaw* v. *Halifax Corporation* (5)). The association was incorporated pursuant to a public Act—*Associations Incorporation Act* 1929-1935 (S.A.)—an Act which excludes " associations for the purpose of trading or securing pecuniary profit to the members from the transactions thereof " (sec. 3). The objects or purposes of the association are stated in the rules filed in the office of the Registrar of Companies pursuant to sec. 11 of the Act. They are as follows :—(i) To acquire and hold property in the name of the association and for the association. (ii) To establish and carry on a nursing institution or nursing institutions. (iii) In particular to establish and maintain a hospital or hospitals *for the benefit of the public generally*, irrespective of class or religious belief, and particularly to maintain the same for the poor and those of limited means. (The italics are mine.) Additions and alterations to such rules must also be filed in the Registrar's office (sec. 11). The Registrar of Companies, who is charged with the administration of companies registered under the *Companies Act* 1934-1939 (S.A.), secs. 315-324, is also the public officer empowered to supervise and control associations incorporated under the *Associations Incorporation Act*, secs. 3, 10, 11, 12, 14, 15. Under sec. 25 the Governor may make regulations for or with respect to—(*a*) the inspection of documents kept by the Registrar under this Act ; (*d*) generally, all matters or things necessary or convenient to be prescribed for carrying this Act into effect.

(1) (1912) 3 K.B. 212, at p. 216.
(2) (1911) 104 L.T. 424, at p. 428.
(3) (1885) 16 Q.B.D., at p. 173.
(4) (1911) 104 L.T., at p. 428.
(5) (1917) 2 K.B. 170, at p. 180.

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And by sec. 20 of this Act every incorporated association may be wound up under sec. 345 of the *Companies Act* 1934-1939 (S.A.). Thus it cannot be predicated of the plaintiff association or of the hospital it "maintains" that it is private, domestic, peculiar, or essentially apart from the current national life (*The Trustees of the Cardinal Vaughan Memorial School* v. *Ryall* (1)). Under sec. 15 of the *Associations Incorporation Act* cancellation of the plaintiff's incorporation would follow, if its transactions became such that it was not, or had ceased to be, an association within the meaning of sec. 3, e.g., that it was trading or securing pecuniary profits to its members from its transactions. The effect of incorporation appears to vest in the corporation personal and real property held in trust or on behalf of the association (sec. 9). This is a provision which makes for permanency, but neither permanency nor ownership is conclusive or essential, although they are factors to be considered (*Girls' Public Day School Trust* v. *Ereaut* (2)). The Calvary Hospital is also approved under another public Act (*Nurses Registration Act* 1920-1938 (S.A.)) as a training school for the whole of the prescribed courses of both general nursing and midwifery. "*The hospital is open to the public at all times. Admission as a patient is conditioned on the applicant being a patient of a legally qualified medical practitioner and that a bed is vacant*" (par. 9 of the case). These conditions are insisted on in every hospital, and no member of the public has an unqualified right of admission, except perhaps in the case of casualties, and even in those cases the doctor who attends the outdoor patient and the senior to whom he reports decide whether the casualty in question should be admitted to a ward. As a hospital is primarily an institution for the reception of the sick and not a boarding house these conditions are necessary for its proper administration. Patients are expected to pay for treatment or contribute to their maintenance. Charges, however, are reduced where the person is not in affluent circumstances. Patients who are in genuinely necessitous circumstances are not expected to pay and generally do not pay for anything (par. 10 of the case). Outpatients are treated to special services such as X-ray and diathermy, &c., and in proper and deserving cases at reduced charges or without charge (par. 14 of the case). The hospital is fully equipped and staffed to render in a competent and up-to-date manner all such services, medical and surgical and nursing, as are usually rendered by hospitals of the larger sort. The total value of all the land and buildings of the said hospital is over £100,000. The plant and fittings of the hospital are of the estimated additional value of £30,000.

(1) (1920) 7 Tax Cas. 611, at p. 620. (2) (1931) A.C. 12, at p. 25.

The staff of the hospital consists of approximately thirty-five Sisters of the Congregation of the Little Company of Mary (all of whom are qualified nurses, and some of whom have special qualifications), about twenty-five registered nurses who are laywomen, and about fifty trainees or probationer nurses, as well as a number of men and women domestic and other servants. The Sisters themselves receive no salary or remuneration whatever for their services, beyond their food and clothing (pars. 5 and 6 of the case). The hospital is conducted by the plaintiff, which is a public corporation (par. 3 of the case). The fact that the Calvary Hospital was founded as a denominational institution and is carried on by a religious body does not derogate from its character and religion does not enter into the consideration of the question (*Trustees of the Cardinal Vaughan Memorial School* v. *Ryall* (1)). And I do not consider that the fact that the hospital has not been declared a public hospital pursuant to sec. 5 of the *Hospitals Act* 1934-1941 (S.A.) is in the circumstances of much or any importance. " Public control " is not, in my opinion, an essential element in the definition of " public hospital." In any event the sections of the *Associations Incorporation Act* to which I have referred show that the association, its rules and operations are subject to supervision by a public officer and a court. In this connection I concur in the interpretation of the expression " public hospital " occurring in a similar context in the *Local Government Act* 1919-1940 (N.S.W.) by *Jordan* C.J. in *O'Connell* v. *Newcastle Municipal Council* (2), where his Honour says :—" I can see nothing in the phrase ' public hospital ' nor in its immediate or general context to suggest that it is confined to hospitals which are subject to some form of public control (whatever is to be understood by this expression) and whose income and property are not at the disposal of any private authority. On the contrary, it is the purpose to which the hospital is directed, not the manner in which it is controlled, which determines whether it should be regarded as a public hospital " (3). The terms and circumstances in which sick relief is given are material conditions. Public service is the *discrimen*—and publicity may be gauged by the extensiveness of an institution's operations (*A.-G.* v. *Pearce* (4) ; *Shaw* v. *Halifax Corporation* (5)). The admitted facts show that the hospital, having regard to its objects and operations, is carried on for the benefit of the community or an appreciably important class of the community

(1) (1920) 7 Tax Cas., at p. 619.
(2) (1941) 41 S.R. (N.S.W.) 190 ; 58 W.N. 166.
(3) (1941) 41 S.R. (N.S.W.), at p. 193 ; 58 W.N., at p. 168.
(4) (1740) 2 Atk. 87 [26 E.R. 454].
(5) (1915) 2 K.B. at pp. 180-184.

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(*Verge* v. *Somerville* (1)) and "not for private gain but for the public good" (*Seal* v. *Trustees of the British Orphan Asylum* (2)). During the relevant period the profits from the hospital have been applied solely to the operations of the hospital. Par. 19 of the case stated emphasises the fact that "the hospital is not carried on for purposes of profit; and no person derives any profit or monetary gain therefrom." Indeed, any diversion of the profits to other purposes whether religious or otherwise would bring the association within the prohibition contained in sec. 3 of the *Associations Incorporation Act* and endanger its incorporation. Thus the hospital is clearly distinguishable from what is known as a private hospital established and carried on for private gain as a means of livelihood for the owners. And in my opinion the scope and operations of the hospital are sufficiently wide and large to make it a public hospital within the meaning of reg. 32.

I answer question (i) Yes; and question (ii) No.

The Memorial Hospital Incorporated v. *The Commonwealth.*—This is a case stated which was heard with the case of *The Little Company of Mary* (*South Australia*) *Incorporated* v. *The Commonwealth.* The facts in both cases are substantially similar and I refrain from rehearsing the facts or the reasons which led me to the conclusion I formed in the former case.

Accordingly I answer the questions submitted as follows:—(*a*) Yes. (*b*) No. (*c*) No.

STARKE J. *The Little Company of Mary* (*South Australia*) *Incorporated* v. *The Commonwealth.* Every owner of fixed property and every owner of plant which exceeds one thousand pounds in value is required by Part VI. of the *National Security* (*War Damage to Property*) *Regulations* (No. 79 of 1942) to contribute to the War Damage Fund. But clause 32 provides that notwithstanding anything contained in that part of the Regulations contributions shall not be payable in respect of any fixed property or plant used primarily and principally as or in a public hospital.

The Little Company of Mary is a congregation or association of nursing Sisters of the Roman Catholic Church whose general end is the sanctification of its members by the observance of the three simple vows of poverty, chastity, and obedience, and whose special end is the care of the sick and dying. The association has been incorporated under the *Associations Incorporation Act* 1929-1935 (S.A.) (Acts No. 1912 of 1929 and No. 2246 of 1935). The objects and purposes of

(1) (1924) A.C. 496, at p. 499.

(2) (1911) 104 L.T., at p. 428.

the association were thus stated in its rules filed in accordance with the provisions of the Act:—1. To acquire and hold property in the name of the association. 2. To establish and carry on a nursing institution. 3. In particular to establish and maintain a hospital or hospitals for the benefit of the public generally irrespective of class or religious belief and particularly to maintain the same for the poor and those of limited means.

Pursuant to the rules of the congregation or association of the Little Company of Mary and the rules of the incorporated association a hospital known as the Calvary Hospital has been erected and established in Adelaide. It is owned by the incorporated association and was conducted as a hospital during the year of contribution in question here (1942) and for many years prior thereto. The buildings, which are valued at more than £100,000, comprise a general hospital, a maternity hospital, a convent or residence for the Sisters of the Little Company of Mary, accommodation for nurses and domestics, a laundry, and a mortuary. The plant and fittings at the hospital are of a value of £30,000 or thereabouts. The hospital was established and is carried on by means of moneys provided by the Australian Province of the Little Company of Mary, by public subscriptions, gifts, legacies, borrowed moneys, and charges made to patients. And it is fully staffed with Sisters, nurses and domestics, but it has, as yet, no regular system of honorary or resident medical officers. The patients as a rule arrange for their own medical attendants, but the Sisters sometimes arrange for attention by medical practitioners, who in some cases render professional services without any fee. The hospital is open to the public of all denominations, but the public have no right of admission, and in any case admission is subject to a bed being available and to the person seeking admission being a patient of a legally qualified medical practitioner. Charges are made to patients for their maintenance and treatment at rates fixed by the management of the hospital, but it is a common occurrence that rates are reduced or not charged to poor and necessitous patients. The Sisters receive no salary or remuneration for their services, though their necessary accommodation, food, and clothing are provided. The hospital is not carried on for profit and in fact no person derives any profit or monetary gain therefrom.

In these circumstances it is claimed that property upon which the Calvary Hospital is erected, and the plant used therein, is fixed property and plant of the plaintiff used primarily and principally as or in a public hospital. Lord *Macmillan* observed upon the elusiveness of the adjective "public" in *Girls' Public School Trust*

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Ltd. v. *Ereaut* (1). The regulation does not set forth the *indicia* or characteristics of a public hospital. But the authorities establish that whether a hospital is public or private is, in the main, a question of fact and a question of degree in every case. It depends, not so much upon the manner in which the Calvary Hospital was established and is financed, as upon the character of the hospital and the nature of the services rendered: See *Girls' Public Day School Trust* v. *Ereaut* (2); *O'Connell* v. *Newcastle Municipal Council* (3).

The "dominant purpose," to adopt an expression used by Lord *Atkin* in *Girls' Public Day School Trust* v. *Ereaut* (4), of those who established and conduct the Calvary Hospital was charitable, that is, for the care of the sick and those requiring medical treatment irrespective of class or religious belief or, in the language of the constitution of the Little Company of Mary, the Sisters, without regard for rank, religious belief, age, or family, provide with equal faith for the care of all the sick. And the hospital is not carried on for any personal or private profit or gain, though in 1938, 1939, and 1940 the revenue from patients' fees was about twenty thousand pounds per annum, which was appropriated for building and maintaining the hospital. And it may be added that services of inestimable value are rendered to the people of South Australia in the conduct of the hospital. None of these facts, however, are decisive, though they are all matters to be considered, and there are other facts which require consideration.

The hospital was established by a private organization; it is not subject to the control or supervision of any public authority; the public have no right of admission—no trust or other right has been created in their favour and the patients are charged for their maintenance and treatment unless too poor to pay therefor. Apart from authority, I should not have thought that such a hospital would, in the ordinary and usual use of words, be described as a "public hospital," but the question is one of fact to be resolved upon a consideration of all the circumstances.

In my judgment, the Calvary Hospital, having regard to all the circumstances of the case, is not a "public hospital" within the meaning of the Regulations already mentioned. The facts which lead me to this conclusion are that the hospital was established and is conducted by a private organization, that it is not subject to the control or supervision of any public authority, that the public have no right of admission to the hospital, and, substantially, are charged for their treatment.

The questions stated should be answered:—(i) No. (ii) Yes.

(1) (1931) A.C. 12, at p. 34.
(2) (1931) A.C. 12.
(3) (1941) 41 S.R. (N.S.W.) 190; 58 W.N. 166.
(4) (1931) A.C., at p. 32.

The Memorial Hospital Incorporated v. *The Commonwealth.*—The question raised in this case is the same as that raised in the case of *The Little Company of Mary (South Australia) Incorporated* v. *The Commonwealth*, in relation to the Calvary Hospital. The facts of this case are set forth in the case stated herein, but the material facts are much the same as in the case of the Calvary Hospital, though they vary in detail.

The plaintiff owns fixed property and plant in Adelaide upon which is erected a hospital known as the Memorial Hospital. It was established by, and is under the control of, the Methodist Church. Its purpose is charitable, that is, for the care of the sick and those requiring medical treatment. The hospital is not conducted for the purpose of any personal or private profit or gain, though the revenue from the patients' fees in each of the years 1940 and 1941 exceeded £30,000. Any surplus from the carrying on of the hospital is used for the purposes of the hospital. Some small sums, I should add, have been applied for purposes in connection with the Methodist Church, but that does not necessarily preclude the hospital from being a public hospital : See *Girls' Public Day School Trust* v. *Ereaut* (1). It is a fact to be considered with all the other circumstances of the case.

But for the reason that the Calvary Hospital is not a "public hospital," so I think the Memorial Hospital is not a "public hospital" within the meaning of the *National Security (War Damage to Property) Regulations.*

The questions stated should be answered :—(*a*) No. (*b*) Yes. (*c*) Yes, all the buildings.

The Little Company of Mary (South Australia) Incorporated v. *The Commonwealth.—Questions answered as follows* : —(*i*) *No.* (*ii*) *Yes. Case remitted. Plaintiff to pay costs of case.*

The Memorial Hospital Incorporated v. *The Commonwealth.—Questions answered as follows* :—(*a*) *No.* (*b*) *Yes.* (*c*) *Of all the buildings. Case remitted. Plaintiff to pay costs of case.*

Solicitors for the plaintiff, The Little Company of Mary (South Australia) Incorporated, *Gunson & Culshaw.*

Solicitors for the plaintiff, The Memorial Hospital Incorporated, *Fisher, Jeffries, Brebner & Taylor.*

Solicitor for the defendants, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

C. C. B.

(1) (1931) A.C. 12, at pp. 23, 27, 35.