[HIGH COURT OF AUSTRALIA.]

COUNCIL OF THE CITY OF NEWCASTLE . APPELLANT; PLAINTIFF,

AND

ROYAL NEWCASTLE HOSPITAL . . . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1956, *Nov.* 8; 1957, *Mar.* 21.

Williams, Webb, Fullagar, Kitto and Taylor JJ.

Local Government (N.S.W.)—Rating—Exemption from liability—Land of public hospital—"Used or occupied by the hospital . . . for the purposes thereof"—Local Government Act 1919 (*N.S.W.*), *s.* 132 (1) (*d*).

Section 132 of the *Local Government Act* 1919 (N.S.W.) provides: "(1) All land in a municipality or shire (whether the property of the Crown or not) shall be ratable except— . . . (d) land which belongs to any public hospital . . . and is used or occupied by the hospital . . . for the purposes thereof".

A public hospital owned three hundred and twenty-seven acres of land, of which an area of two hundred and ninety-one acres was rough bushland comprising stony ridges and deep gullies and was heavily timbered and substantially in its wild natural condition. On the remaining thirty-six acres stood the buildings of the chest hospital conducted by the public hospital. Portion of the thirty-six acres, namely seventeen and one-half acres was fenced and formed the curtilage of the chest hospital buildings, whilst the balance of eighteen and one-half acres lying beyond the fence was in its natural state and, though not physically distinguished from the area of two hundred and ninety-one acres, had not in fact been rated by the local council which treated the whole of the thirty-six acres as "used or occupied by the hospital for the purposes thereof". The council levied rates on the area of two hundred and ninety-one acres and sued the hospital to recover the same. No physical use was made by the hospital of the area in dispute but at the trial of the action it was proved that this area ensured a clear atmosphere for the proper treatment of patients, that it barred the approach of buildings, particularly factories, likely to emit smoke, fumes or dust, that it provided quiet and serene conditions having psychological advantages to patients suffering from diseases in the treatment of which psychological conditions are important and

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that it gave opportunities for the future expansion of the hospital and the establishment of allied activities.

Held, by *Williams*, *Webb* and *Taylor* JJ., *Fullagar* and *Kitto* JJ. dissenting, that the disputed area was " used or occupied by the hospital for the purposes thereof " and accordingly was not subject to rating.

Decision of the Supreme Court of New South Wales (Full Court): *Newcastle City Council* v. *Royal Newcastle Hospital* (1956) 1 L.G.R.A. 21, affirmed.

APPEAL from the Supreme Court of New South Wales.

On 12th February 1953 the Council of the City of Newcastle brought proceedings in the Supreme Court of New South Wales against the Royal Newcastle Hospital to recover the sum of £4,001 9s. 8d. together with interest thereon at five pounds per cent per annum from the date of writ until judgment claimed by the council to be due to it by the hospital for rates levied on land of the hospital situated at New Lambton, Newcastle. The hospital denied liability, claiming that at all material times it was a public hospital within the meaning of the *Local Government Act* 1919 (N.S.W.), s. 132 (1) (d) and that the said lands were used or occupied by it for its purposes as a hospital and accordingly were exempted by virtue of the said section from liability to rating.

The action was tried by *Richardson* J. without a jury, who entered a verdict and judgment for the hospital (1). From this decision the council appealed to the Full Court of the Supreme Court of New South Wales (*Owen* J., *Roper* C.J. in Eq. and *Maguire* J.) which (*Owen* J. dissenting) dismissed the appeal (2).

From this decision the council appealed to the High Court. The facts appear fully in the judgments hereunder.

A. R. Moffitt Q.C. (with him *C. R. Allen*), for the appellant. The trial judge misapplied *Knowles* v. *Newcastle Corporation* (3) where the words there considered were substantially wider than those of s. 132 (1) (d) of the *Local Government Act* 1919. The presence of the words " or purposes connected therewith " in the section considered in the case cited make a material difference. Merely because an advantage comes from the ownership of land it cannot be said that the land is " used "; *a fortiori* where it is an advantage which accrues to the public at large. Before user can be established there must be some overt physical act done by the hospital on the land. Here there is no user beyond the fence erected around the curtilage of the buildings. A similar approach is to be

(1) (1955) 20 L.G.R. 95.
(2) (1956) 1 L.G.R.A. 21.
(3) (1909) 9 C.L.R. 534.

made to the question of occupation. [He referred to *Associated Cinema Properties Ltd.* v. *Hampstead Borough Council* (1).] The words " is used " require present physical action on the part of the hospital to turn the land to its use. It is wrong, as the majority in the Full Court did, to regard the retention of the land as a user within the section. It is necessary before the exemption is gained to find a use of the land itself and not of the product of the land. The advantages received by patients cannot constitute user, but even if it does it is not user of the land but of its products. [He referred to *Commissioners of Taxation* v. *Trustees of St. Mark's Glebe* (2); *Moon* v. *London County Council* (3); *Pointe Gowde Quarrying & Transport Co. Ltd.* v. *Sub-Intendent of Crown Lands* (4); *Sisters of Mercy Property Association* v. *Newtown and Chilwell Corporation* (5).] The true factual position is as found by *Owen* J. and not as found by the majority in the Full Court. Both on the law and on the facts the appellant is entitled to succeed.

G. Wallace Q.C. (with him *J. M. Williams*), for the respondent. There is no basis for reversing the findings of fact made in the court below. It is not necessary that the use contemplated by s. 132 (1) (d) should be a tangible or physical use. The hospital benefits its patients by giving them quietude, fresh air and serenity and it uses the subject land to achieve that result, and such a user is within the contemplation of s. 132 (1) (d). The land must be considered as one entity. Unless there is something in the section itself requiring physical user then the word " used " being a word of wide signification should be so construed here. The use of the land to provide a clear atmosphere for the patients and as a bulwark against the encroachment of buildings, particularly factories, with their attendant smoke, dust and noise, though intangible, is nevertheless a use proper to be considered as within the section.

[WILLIAMS J. You don't rely on the word " occupy " at all?]

Not especially. If part of the land is used or occupied for the purposes of the hospital it cannot be said on the way this case has been conducted that the whole is not being used or occupied. The majority of the Full Court took the view that the retention of the land amounted to a use for the purpose of the hospital and the respondent respectfully adopts that reasoning. *Owen* J. erred in saying that derivation of benefit is not the test of user. The object of the hospital is to improve the condition of tubercular patients

(1) (1944) 1 K.B. 412, at pp. 416, 417.
(2) (1902) A.C. 416, at pp. 420-422.
(3) (1931) A.C. 151, at pp. 157, 158, 171, 172.
(4) (1947) A.C. 565, at pp. 571, 572.
(5) (1944) 69 C.L.R. 369, at pp. 374, 376, 377, 386.

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and the fact that the object is achieved is a carrying out of the purposes of the hospital. If the patients benefit from the action of the hospital in retaining the land then the retention of the land is for the purpose of the hospital. So long as there is a real association between the land and the purpose of the hospital then it is proper to say that the land is " used " within the meaning of s. 132 (1) (d). The appeal should be dismissed.

A. R. Moffitt Q.C., in reply.

Cur. adv. vult.

Mar. 21, 1957.

The following written judgments were delivered :—

WILLIAMS J. This is an appeal by the plaintiff, the Council of the City of Newcastle, in an action in which the council sued the defendant, the Royal Newcastle Hospital, for rates alleged to be due upon certain land, approximately two hundred and ninety-one acres, situated at New Lambton within the area of the city, in respect of the years 1946 to 1952 inclusive. The appellant derived its power to levy the rates from s. 144 of the *Local Government Act* 1919 which provides that every rate shall, except where this Act otherwise expressly provides, be paid to the council by the owner of the land in respect of which the rate is levied. It is not in dispute that the two hundred and ninety-one acres were owned by the respondent in the relevant years. But it claims that it was exempt from rates by virtue of s. 132 of that Act which provides so far as is material that all land in a municipality or shire (whether the property of the Crown or not) shall be rateable except *inter alia* (d) land which belongs to any public hospital . . . and is used or occupied by the hospital . . . for the purposes thereof. It is admitted that the respondent is a public hospital within the meaning of para. (d). The question at issue is whether the two hundred and ninety-one acres in the relevant years were used or occupied for the purposes of the hospital. *Richardson* J. who tried the action without a jury held that the land was land used by the hospital for these purposes (1). An appeal to the Full Supreme Court of New South Wales was dismissed by a majority (*Roper* C.J. in Eq. and *Maguire* J., *Owen* J. dissenting (2)). The two hundred and ninety-one acres form part of a larger area of three hundred and twenty-seven acres. The whole of this area was not acquired by the respondent at the same time. It would seem that about 1926 the respondent wished to set up a branch away from the main hospital which is situated in the heart of the city. In that year it purchased twenty-four

(1) (1955) 20 L.G.R. 95.

(2) (1956) 1 L.G.R.A. 21.

acres of land fronting Croudace Street on which were erected the buildings known as the old Croudace home and opened a convalescent home. As this land was clearly used for the purposes of the hospital, it was exempt from rates. In the same year an additional sixty-eight acres of adjoining land and in 1934 a further four acres of adjoining land were purchased. Of this total area of ninety-six acres, thirty-six acres were regarded by the appellant as used for the purposes of the hospital and exempted from rates. The balance of the area was rated. In 1941, during the second world war, the convalescent home was reserved as a Commonwealth emergency hospital. But in 1944 it was no longer required for this purpose and reverted to the respondent. In that year a further ten acres of adjoining land were purchased. Up till this time patients suffering from tuberculosis had been treated at the main hospital but the board of the respondent under the chairmanship of the late Mr. A. Rankin was evidently anxious to set up a separate chest hospital for the reception of patients suffering from this disease and in particular for the reception of patients who with proper rest and treatment were likely to recover in the sense that the disease would be arrested and they would be able to return to their own homes and do light work. The treatment for such patients, apart from chemotherapy, consisted of plenty of rest and fresh air, proper food and attention and later, when the disease appeared to be arrested, a period of up to six months during which time the patients remained under medical observation to be sure that the arrest was permanent and so that they might by means of light exercise and some form of occupational therapy recover their strength and capacity to do such work.

Dr. McCaffrey was the superintendent of the hospital at this time and it is clear from his evidence that rightly or wrongly he and Mr. Rankin thought that for the purposes of such a chest hospital the area of land then owned by the respondent was inadequate. They, therefore, inspected the area of land adjoining the existing area to the west with a view to acquiring what they considered would be a sufficient area for that purpose. They thought that if this land to where it fronted Marshall Street, an unmade road, was added to the existing area the total area would provide the minimum space suitable for the purpose. Finally in April 1946 the area in question which was found to comprise two hundred and twenty acres was acquired so far as it comprised Crown land by appropriation and so far as it comprised private lands by resumption under the provisions of the *Public Works Act* 1912 " for the purposes of Newcastle hospital ". The new buildings required to accommodate the patients

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and nursing staff were erected in the vicinity of the existing buildings and the new chest hospital was opened for patients in July 1947. Since then there have been on an average about one hundred patients at the hospital. The only land actively used for the purposes of the hospital has been an area of about seventeen and one-half acres of land fronting Croudace Street enclosed with a fence on which the hospital buildings and surrounding paths, lawns and gardens are situated. Immediately behind the seventeen and one-half acres there is a further area of about eighteen and one-half acres now slightly delineated and separated from the remaining two hundred and ninety-one acres by five surveyor's white posts. These two areas of land comprising altogether thirty-six acres have always been regarded by the appellant as used for the purposes of the hospital and exempted from rates. Behind these thirty-six acres there lie the two hundred and ninety-one acres upon which the dispute centres. It would appear that the board of the respondent at the time the two hundred and twenty acres were acquired thought that it might want to set up some industry on part of the total area in which patients on the road to recovery could earn a living doing light work whilst still remaining under medical supervision. This scheme has never been carried out, it may be because about 1948 the treatment of tuberculosis was greatly advanced by the advent of new drugs which facilitated the arrest of the disease and limited the necessity for patients remaining in hospital for as long periods as before. There is a conflict in the medical evidence as to whether for the purposes of a chest hospital more land is required than in the case of a general hospital. But the preponderance of evidence, and this was the evidence accepted by *Richardson* J., is to the effect that it is necessary or at least very desirable that chest hospitals should be situated in a spacious area carrying a considerable body of natural vegetation so that there will be a plentiful supply of fresh air and an absence of smoke, dust, noise and other irritants or of any feeling of overcrowding. According to this evidence such an area not only assists the physical condition of the patients but also assists their mental outlook, the mentality of patients suffering from tuberculosis being subject to severe stress due to the fact that they have to be absent from their homes and families for at least a year and to the further fact that such a prolonged illness often has a very serious effect on their financial position and future economic prospects.

The defendant has taken no active steps to improve the two hundred and ninety-one acres. It is land in its virgin state comprising ridges and gullies heavily timbered with a good deal of

underwood. *Richardson* J. said: "The gullies are steep and rough, some of them so steep that they are impassable. There is very little flat land. It is described as poor land with insufficient herbage for the pasturing of stock. There are a few bush tracks, one of which is well defined running up to Lookout Road . . . . The remaining tracks all terminate in bushland" (1). It can safely be said that in the relevant years no physical use in any real sense was made of the two hundred and ninety-one acres. The use to which this land has been put, if it can be considered to be a use at all, has been the passive use of leaving the land in its virgin state with the resultant benefits that are derived from the presence of plenty of fresh air and the avoidance of overcrowding. In the argument before *Richardson* J., the Full Supreme Court and ourselves, this use of the land was described as an intangible use and it was contended that such a use is a use of land for the purposes of the hospital within the meaning of s. 132 (d). This contention found favour with *Richardson* J. and the majority of the Full Court. *Richardson* J. said: "I have reached the conclusion, looking at the whole of the evidence, that the subject land is in fact used for the attainment of a desirable result in connection with the treatment of tuberculosis at this hospital and which could not be attained without the use of the subject land, and therefore it is used for a purpose connected with the hospital. There is a connection between the user and the purposes of the hospital. It is not essential to the user of land that it be used physically, it is also used if it is applied to any advantageous purpose" (2). *Maguire* J. with whom *Roper* C.J. in Eq. concurred said: "'Rankin Park' can be said, on the evidence, to stand in a different position from the majority of other hospitals. Its purpose is to treat the patients who are required to remain in the hospital for protracted periods and who are suffering from a disease the effective treatment of which requires not merely medical and nursing skill but the provision of surroundings which are conducive to repose and equanimity of mind in an atmosphere as free as possible from dust and other vitiating elements. I think that the preponderance of evidence is in favour of the view that the retention of a large area of undeveloped land attached to the hospital is necessary for the attainment of this purpose. It seems to me that it can truly be said that by retaining the land in question so that the purposes of the hospital might be achieved, the hospital is 'using' that land for its purposes. Ordinarily, the use of land would involve some activity on or in relation to it, but where the question is whether land is used for a particular purpose, an enquiry

(1) (1955) 20 L.G.R., at p. 96. (2) (1955) 20 L.G.R., at p. 99.

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into how that purpose can best be achieved is necessary. The evidence establishes that the land, the subject of the present action is necessary to the fulfilment of the purposes of the hospital, and, in my view, the hospital, by retaining it in its virgin condition, is using it for those purposes " (1).

In these passages the case for the respondent is summed up. There is ample evidence which *Richardson* J. was entitled to accept that a chest hospital, or perhaps what would be a better description of Rankin Park, a sanatorium for tuberculosis patients, requires a large area of land to achieve the most beneficial results. The whole of the evidence, apart from the evidence of Dr. Morgan which his Honour was unable to accept, is to this effect. In other parts of Australia it has been found to be beneficial for other chest hospitals or sanatoria to be situated in large areas of land much of which is left in its virgin state. The old belief that persons suffering from tuberculosis should be isolated has gone by the board and modern opinion is that such institutions should be located as close as possible to the large cities or in other words to the large centres of population so that the relatives of the patients are able to visit them. If these institutions are situated in a large area of land they derive the double benefit of being as it were as much in the fresh air as if they were in the country and at the same time of being very accessible. It may be that the opinion of *Richardson* J. and the majority of the Full Court that the whole of such an area of land can be said to be " used " in the special circumstances of the case for the purposes of the hospital is right. But it is unnecessary for the respondent to rely on the word " used ". It is sufficient if the land is " used " or " occupied " for the purposes of the hospital. The passages that have been cited from the reasons for judgment of *Richardson* and *Maguire* JJ. are quite apt to show that if the two hundred and ninety-one acres in the relevant years were occupied by the respondent they were occupied for the purposes of the hospital. No real examination of the meaning of the word " occupied " was attempted in the courts below, probably because counsel for the respondent there, as he did here, preferred to concentrate his attention on the word " used ". *Owen* J., it is true, did refer to occupation but not with any enthusiasm. He said: " The question is whether the hospital used or occupied this land for a hospital purpose. As to ' occupation ' I feel no doubt. It was not ' occupied ' as that word is used in rating law. As was pointed out by *Isaacs* J. in *Knowles* v. *Newcastle Corporation* (2) ' occupation ' is

(1) (1956) 1 L.G.R.A., at p. 26.

(2) (1909) 9 C.L.R. 534, at p. 544.

not synonymous with mere legal possession. It includes possession, but it also includes something more" (1). His Honour referred to the well-known passage in the judgment of *Lush* J. in *Reg.* v. *St. Pancras Assessment Committee* (2):—"The owner of a vacant house 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" (3). But it must be remembered that *Lush* J. was there dealing with the meaning of rateable occupation in England where, to be rateable, the occupation must be beneficial, and his Lordship was discussing what constitutes the beneficial occupation of a house and there is a great difference between what constitutes the occupation of a house and the occupation of vacant land. In a case that was not cited to us, *Liverpool Corporation* v. *Chorley Union Assessment Committee and Withnell Overseers*, this distinction is brought out. It is reported in the Divisional Court (4), in the Court of Appeal (5) and in the House of Lords (6). The facts are set out fully in the report in the Divisional Court (7). The important facts are those relating to the eight hundred and fifty-nine acres of moorland. One question was whether the Liverpool Corporation who were the owners and occupiers of a system of reservoirs and waterworks known as the Rivington Waterworks were in beneficial ownership of this moorland. It formed part of an area of one thousand one hundred and sixty-five acres which the corporation used and controlled for the purposes of securing a water supply to their reservoirs and waterworks. Of the one thousand one hundred and sixty-five acres three hundred and six acres were planted with trees or used as a nursery for young trees and enclosed in a ring fence. The remainder of the land, the eight hundred and fifty-nine acres of moorland, was already enclosed by a fence when the corporation bought it. In order to reduce the population and cattle on the one thousand one hundred and sixty-five acres and to diminish the risk of pollution of the water flowing therefrom, the corporation demolished or caused to be left unoccupied certain farm houses and buildings and abolished certain rights of pasture and turbary which had previously been enjoyed thereon, and limited the user thereof, except for the afforestation upon the three hundred and six acres already mentioned, to letting sporting rights in respect of which the lessees were rated.

(1) (1956) 1 L.G.R.A., at pp. 23, 24.
(2) (1877) 2 Q.B.D. 581.
(3) (1877) 2 Q.B.D., at p. 588.
(4) (1911) 1 K.B. 1057.
(5) (1912) 1 K.B. 270.
(6) (1913) A.C. 197.
(7) (1911) 1 K.B., at pp. 1058-1063.

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Apart from letting these rights, the only use the appellants made of the eight hundred and fifty-nine acres of moorland was to keep them vacant so that the water that flowed over them would be unpolluted and none of it would be used thereby lessening the supply of water to the reservoirs. It was held that the corporation was not merely in occupation but in beneficial occupation of the moorlands. In the judgments in all three courts the rule that the owners of the fee simple of land in possession are prima facie in occupation of that land was relied upon. It was pointed out that this presumption is of course rebuttable first and most directly by proof that someone else is in occupation and by the nature of the case. The case of *Reg.* v. *St. Pancras Assessment Committee* (1) was distinguished as a case referring to a particular class of property, that is, a house. In the Divisional Court *Hamilton* J. (as Lord *Sumner* then was), after saying that " ownership is in most cases *prima facie* and useful evidence of occupation, failing proof that some other person is in occupation ", said : " Here not only is there *prima facie* evidence of occupation in the fact that the appellants are owners of the fee simple in possession, and an absence of any rebutting evidence that any one else is in possession, but any doubt that might remain seems amply covered by the conditions under which the ownership was acquired and the objects for which it is held by the appellants . . . . Here ownership was acquired and is held by the appellants for a specific purpose, and that specific purpose carries and is intended to carry with it—to use an uncontroversial term—control, and the whole object with which the land was acquired was the retention of control and the exercise of it in case of need " (2). His Lordship said : " But although it is preserved more or less in a state of nature, the land is anything but derelict and is in fact being used, in pursuance of a highly intelligent policy, in a manner which has involved and still involves continuous control by the appellants over the land and which is deliberately inconsistent with the transfer of occupation to any other person " (3). In the Court of Appeal *Buckley* L.J. said of the corporation : " It was worth their while to pay a large sum of money for the land to ensure the absence of a population which might (*a*) contaminate or (*b*) consume. They have put no other person in occupation. They are enjoying the benefit for which they bought the land. Further, by the demise of the sporting rights they are deriving profit from the land left free of population. Their purpose, which is to ensure absence of population, is thus in several ways of value to them. They are

(1) (1877) 2 Q.B.D. 581.
(2) (1911) 1 K.B., at p. 1073.
(3) (1911) 1 K.B., at p. 1075.

persons capable of maintaining trespass: they are enjoying a benefit from the land. In my opinion the conjoint effect of those two facts is to constitute rateable occupation" (1). *Kennedy* L.J. said: "I understand it not to be denied by the appellants that, if the corporation had placed and maintained upon the land works, however simple, for collecting and diverting water, an 'occupation' would have been created. At present the contour of the land renders any such artificial work unnecessary for the purpose of getting and maintaining its beneficial user. If beneficial user exists, and if beneficial user affords good ground for the inference of rateable occupation, it appears to me that the presence of artificial works cannot be essential to proof, but that, when it is proved, it strengthens of course the evidence of such occupation" (2). Finally in the House of Lords Lord *Atkinson* said: "I do not think the cases dealing with the rateability of vacant houses are applicable to such a property as this moor, which, through the operations of nature, unaided by man, produces each year products such as grass, heath, and bracken, useful and valuable to man, and in this case rears and harbours game upon it in addition, thus differing in almost every aspect from a vacant house, which produces nothing, and is used for no purpose whatever. Mr. *Balfour Browne* has urged that occupation includes possession plus use. He admitted, however, that if the appellants had built an embankment across the mouth of a valley on this moorland and flooded the valley, thereby turning it into a reservoir to supply their lower works, they would properly have been held to be in beneficial occupation of the lands upon which the water rested in the valley. I am quite unable to discover any principle upon which these latter lands can be distinguished on this point from those upon which the rainwater falls and over which it runs on its way to its resting place. The lands of each kind all help to this same end, and serve in different ways to effect the same ultimate purpose, namely, to feed the appellants' works with a supply of pure and unpolluted water for their commercial gain" (3).

All these passages would appear to be apposite, *mutatis mutandis*, to the present case. It would be impossible to describe any portion of the two hundred and ninety-one acres as derelict, that is, as forsaken or abandoned land. The respondent has not abandoned any of its land at New Lambton. On the contrary its board of directors must have been satisfied in 1946 that the land they then held was insufficient for the purposes of a chest hospital or sanatorium

(1) (1912) 1 K.B., at pp. 288, 289.
(2) (1912) 1 K.B., at pp. 292, 293.
(3) (1913) A.C., at pp. 211, 212.

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and the additional two hundred and twenty acres was acquired so that the defendant would have an area of land which it considered to be the minimum area of land with which it would be safe to open such an institution. There can be no question that the respondent as the owner in fee simple of the two hundred and ninety-one acres is in occupation of the whole of this area. There is no suggestion that anyone else is in occupation of it. There is nothing in the nature of the case to rebut the prima facie presumption. On the contrary, the nature of the case supports the presumption. The land is not fenced but a fence would simply be some evidence of occupation. Artificial works are not necessary to prove occupation. If they exist they are evidence, as *Kennedy* L.J. said (1), in support of it, that is all. The respondent is at present only making any active use in the physical sense of seventeen and one-half acres. But it would be little use commencing operations on an area of seventeen and one-half acres or even thirty-six acres if a sanatorium for tuberculosis requires for its full development a much larger area. The respondent is at least occupying the undeveloped land for the purposes of the hospital in the sense that it is preventing the public from purchasing it and building upon it or from otherwise occupying it. It is land too poor in fertility to be put to any monetary use in its virgin state. Its only benefit to the respondent in that state is derived from its natural therapeutic qualities of providing plenty of fresh air and a suitable environment for a particular class of patients. There is no reason to doubt the medical evidence that these conditions, particularly fresh air, are necessities if a sanatorium for tuberculosis patients is to provide the optimum treatment. Such an institution will no doubt require further buildings and other improvements as time goes on. It will develop with the years. If a large area of land will be required for such development those who are responsible for its start and growth must be entitled to secure an adequate area of land whilst it is still available. But the foundation of the case for the respondent is the medical evidence that such a sanatorium can only operate with full efficiency if it occupies a large area of land. It is spaciousness that counts to whatever extent that area may be developed. But it would seem that it should not be developed to such an extent as to destroy its natural therapeutic qualities. In supplying plenty of fresh air the area in its natural state provides for the sanatorium a corresponding benefit, having regard to their different functions, to that of the moorland in the *Liverpool Corporation Case* (2) in providing the

(1) (1912) 1 K.B., at p. 293.

(2) (1911) 1 K.B. 1057; (1912) 1 K.B. 270; (1913) A.C. 197.

reservoirs with plenty of unpolluted water. In that case the attempt was made, as we have seen, to prove that the moorland was not occupied because it was purchased not for the purpose of occupation but for the express purpose that it should not be occupied. But that attempt failed. There can be no suggestion in the present case that the area of two hundred and ninety-one acres was acquired to be left derelict. It was purchased so that it should be occupied by the respondent to the exclusion of anyone else and it is the respondent that is in occupation. In *Knowles* v. *Newcastle Corporation* (1) *Isaacs* J. said : " 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 " (2). On the same page his Honour said that one could not well conceive of the chief commissioner himself occupying railway premises except for railway purposes. How can it be said in the present case that the respondent occupies only a part of the three hundred and twenty-seven acres ? It is impossible to say that the respondent occupies the developed but does not occupy the undeveloped part. It occupies the whole. It is all occupied for the same purposes, that is, the purposes of the hospital. The whole of the area need not be put to an active physical use in order to be so occupied. Bare occupation is sufficient so long as that occupation is for the purposes of the hospital and in this case one could not well conceive, in the absence of evidence to the contrary, that the respondent could itself occupy it for any other purposes.

The appeal should be dismissed with costs.

WEBB J. I would dismiss this appeal. I have nothing to add to the reasons stated by *Williams* and *Taylor* JJ.

FULLAGAR J. The dissenting judgment of *Owen* J. in this case was, in my opinion, right, and I agree entirely with the judgment of my brother *Kitto*, which I have had the advantage of reading.

The trouble in this case seems to me to have begun when counsel for the plaintiff municipality called Dr. Morgan as a witness. This course was apparently adopted because it was known, or anticipated, that the defendant hospital would tender certain " expert " evidence. The evidence of Dr. Morgan, and the evidence of the four doctors who were called for the defendant, was, in my opinion, plainly irrelevant to any real issue in the case. The defendant, however,

(1) (1909) 9 C.L.R. 534.

(2) (1909) 9 C.L.R., at p. 545.

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very naturally, did not object to Dr. Morgan's evidence, and the plaintiff, having called Dr. Morgan, could not very well object to the calling of evidence which to some extent contradicted Dr. Morgan. The result was that the case was fought on a false issue, and decided on a fallacy.

The root of the fallacy lies in the assumption that deriving an advantage from the ownership of land is the same thing as using the land. The fallacy is helped out by the coining of an expression—"intangible user"—which has no real meaning. Actually, while using the land will practically always mean deriving an advantage from it, an advantage may clearly be derived from the ownership of it without its being "used" in any way. What has been done in this case is to begin with the proposition that he who uses land derives an advantage from it. (This proposition is probably true, but its converse is false.) Evidence is then adduced to show that an advantage is derived from the ownership of the particular land in question. The conclusion is then deduced that the land in question is being "used". It seems to me to be a clear example of a familiar fallacy.

The only other observation I would make is that the case of *Liverpool Corporation* v. *Chorley Union Assessment Committee* (1), seems to me to stand out in conspicuous contrast with this case, and to illustrate very well the kind of thing which it would have been sufficient for the defendant to prove in this case.

The appeal should, in my opinion, be allowed.

KITTO J. This appeal is from an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal (2) against a judgment (3) given for the defendant at the trial of an action by a municipal council for rates in respect of the years 1946 to 1952 both inclusive. The appeal depends upon the meaning and application of the provision in par. (d) of s. 132 (1) of the *Local Government Act* 1919 (N.S.W.) by which all land in a municipality is made rateable except (*inter alia*) "land which belongs to a public hospital, . . . and is used or occupied by the hospital . . . for the purposes thereof."

The land in question, being vested for an estate in fee simple in the appellant the Royal Newcastle Hospital, admittedly "belongs", in the relevant sense of the word, to a public hospital. The only question in dispute is whether, in the relevant years, it was "used or occupied by the hospital for the purposes thereof".

(1) (1913) A.C. 197.
(2) (1956) 1 L.G.R.A. 21.
(3) (1955) 20 L.G.R. 95.

The land is an area of two hundred and ninety-one acres of rough bushland comprising stony ridges and deep gullies, heavily timbered, and substantially in its wild natural condition. It is contiguous to other land of the hospital, thirty-six acres in area, on which stand the buildings of the Rankin Park Chest Hospital, a section of the Royal Newcastle Hospital. A portion of this smaller area, comprising seventeen and one-half acres, is fenced and forms what may be described as the curtilage of the chest hospital buildings. The remainder of the thirty-six acres, lying outside the fence, is in its natural state, and, though not physically distinguished from the land which is the subject of this appeal, has not in fact been rated by the council in the relevant years.

The expression " used or occupied " in par. (d) occurs also in par. (f) and the several sub-pars. of par. (h). " Used " suffices for pars. (a), (b), (c) and (e), and the extending portion of par. (j). " Occupied and used " is the expression in par. (g) (ii), in the general portion of par. (h), and in the main portion of par. (j). It seems to me that throughout the section care has been shown to observe a distinction between the occupation and the use of land. Of course, conduct which satisfies the one word may also satisfy the other, and it is not surprising to find the words treated in particular contexts, in some judgments for example, as if they were interchangeable. But there is a distinction nevertheless, and it is suggested by the celebrated passage in the judgment of *Lush* J. in *Reg.* v. *St. Pancras Assessment Committee* (1) as to the meaning of rateable occupation under the *Statute of Elizabeth* (43 Eliz. c. 2). In words frequently quoted, the learned judge made it clear that an occupation of land involves conduct over and above legal possession ; and he went on, in words which are quoted less often, to point out that even actual possession is not enough, for another element in occupation is permanence. Accordingly *Bigham* J. in *Borwick* v. *Southwark Corporation* (2) defined occupation, in words which the Court of Appeal approved in *Associated Cinema Properties Ltd.* v. *Hampstead Borough Council* (3), as being " ' constituted of legal possession and of permanent (as distinguished from mere temporary) user ' " (4). The three elements, legal possession, conduct amounting to actual possession, and some degree of permanence, seem to me to be involved in the word " occupy " as used in the *Local Government Act* (N.S.W.). So the courts of that State appear to have considered, for in *McLean* v. *Burrangong Shire Council* (5) emphasis was laid upon the necessity

(1) (1877) 2 Q.B.D. 581, at p. 588.
(2) (1909) 1 K.B. 78, at p. 83.
(3) (1944) 1 K.B. 412.
(4) (1944) 1 K.B., at p. 414.
(5) (1914) 14 S.R. (N.S.W.) 291 ; 31 W.N. 117.

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for something beyond proprietorship, " some physical act of occupation "; and in *Colonial Treasurer* v. *Albury Municipal Council* (1) it was said by *Pring* J. that occupation would appear to be something which is definite in its purpose and, to some extent at any rate, continuous. The word " used ", on the other hand, does not involve more than physical acts by which the land is made to serve some purpose. The acts no doubt must be recurring, but the notion of continuity or permanence is absent.

One other point should be mentioned concerning the word " occupied ". The English authorities as to rateable occupation belong to a specialised field of law, and great care is needed in using them out of context. In particular it is important to note that s. 132 (1) (d) of the *Local Government Act* (N.S.W.) does not refer to occupation generally ; it refers to occupation for specific purposes. I do not think it is correct to take from the English rating cases the principle that title in fee simple in possession is prima facie evidence of occupation and to conclude that, since any occupation which the Royal Newcastle Hospital has must be for its hospital purposes, its title to the subject land is prima facie evidence of occupation for those purposes. The expression in the section " occupied by the hospital for the purposes thereof " is not satisfied, in my opinion, unless there is proof of actual and continuous possession directed to serving the purposes of the hospital. Even in the realm of English rating law, the Court of Appeal said in *Associated Cinema Properties Ltd.* v. *Hampstead Borough Council* (2) that no case could be cited in which occupation had been held to be established without proof of some overt act amounting to user.

The case for the respondent hospital may be put in alternative ways : first, that the subject land, the two hundred and ninety-one acres, should not be considered separately from the rest of the three hundred and twenty-seven acres, and what was done on the seventeen and one-half acres in the relevant years was in truth a user or occupation of the whole three hundred and twenty-seven acres ; or, secondly, that the subject land was separately used or occupied for the purposes of the hospital in those years.

The trial judge seems to have accepted the first of these alternatives, for he held that " the exempted area is the continuous whole in the occupation of the hospital ". It is easy to imagine a case in which hospital buildings may take up a small part only of a large park-like area and yet the proper conclusion of fact may be

(1) (1915) 15 S.R. (N.S.W.) 320, at p. 324 ; 32 W.N. 122.

(2) (1944) 1 K.B. 412, at p. 416.

that the whole area is occupied or used for the purposes of the hospital. And of course it is clear that if the whole area is in fact being used or occupied for those purposes it is nothing to the point, in relation to s. 132 (1) (d), to inquire whether so large an area is actually necessary, or is considered by experts to be necessary, for those purposes. What area the hospital should use or occupy is a matter for its governing body to decide. The only relevant inquiry is one of objective fact: what land *is* the hospital using or occupying for its purposes. For this reason a good deal of expert medical evidence given at the trial in the present case had little if any bearing on the issues to be decided. That there was in the relevant period both a user and an occupation for the purposes of the hospital of the land which formed the site and curtilage of the hospital buildings, no one could doubt. That the conduct which constituted that user and occupation related at least to the whole of the seventeen and one-half acres is equally clear. But did it relate to the whole of the three hundred and twenty-seven acres so as to constitute a user and occupier of that entire area? I think the answer is that an observer of what went on in the years 1946 to 1952 on the respondent hospital's property would be struck at once by the difference in treatment of the seventeen and one-half acres on the one hand and of the rest of the land on the other—not only because a fence divided them, but because the whole of the activities that took place were confined to the land within the fence, that land having been developed and being maintained in a condition suitable for those activities, while the land outside the fence was completely neglected. If asked how much of the land the hospital used or occupied, I cannot doubt that the observer's answer would be that it used and occupied the seventeen and one-half acres, and left the rest completely unused and unoccupied. It would never occur to him, I think, to say that the whole area of virgin bushland, the stony ridges and the impassable gullies, formed a coherent whole, so that the hospital's activities on the seventeen and one-half acres were a use or occupation of that whole. The evidence of his eyes would be too strong. He would no doubt assume that it was considered by the hospital authorities expedient that the land outside the fence should be retained, either for future use by the hospital or to prevent its being used by anyone else; but a conclusion that there was a present and positive use or occupation by the hospital of the whole of the land would not be justified by that assumption and would be, I think, plainly contrary to the fact.

In support of the second alternative proposition reliance is placed by the hospital upon evidence given by several witnesses, which

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tended to show that the two hundred and ninety-one acres served four specific purposes in relation to the hospital: first, that it ensured the clear atmosphere necessary for the proper treatment of patients; secondly (which seems to come to the same thing), that it acted as a barrier against the approach of buildings, particularly factories, likely to emit smoke, fumes or dust; thirdly, that it provided quiet and serene conditions having psychological advantages to patients suffering from a disease in the treatment of which psychylogical conditions are important; and, fourthly, that it gave opportunity for future expansion of the hospital and the establishment of allied activities. But evidence of this character, even if given complete credence, means only that by owning the subject land the hospital derived the negative advantage of being able to exclude any form of development which it might not wish to see in that portion of its neighbourhood, and the positive advantage of being able to make any future use of the land which it might think desirable. It is surely undeniable that a bare holding of land is neither a use nor an occupation of it, and it makes no difference that the reasons which lead the owner to retain the land unused and unoccupied are logically connected with the pursuit of purposes which he is serving by means of a use or occupation of other land. When it is said that the hospital owned the two hundred and ninety-one acres in the relevant years, all has been said that can be said of the relation of the hospital to that land in those years. And that is not enough to bring the case within s. 132 (1) (d).

In my opinion the appeal should be allowed.

TAYLOR J. In the action which has given rise to this appeal the appellant sued the respondent to recover municipal rates alleged to be payable by the latter, in respect of the years 1946 to 1952 inclusive, as the owner of some two hundred and ninety-one acres of land situated on the outskirts of Newcastle. The action failed (1) and an appeal subsequently brought to the Full Court of the Supreme Court was dismissed (2). This appeal is brought from the order of dismissal.

The land in question is part of a larger area of three hundred and twenty-seven acres known as Rankin Park and upon the land, or part of it, is erected a number of buildings used by the respondent as a hospital and sanatorium for the treatment of tuberculosis. The main buildings, comprising Rankin Hall, the chest hospital and nurses' quarters, are erected towards the south-eastern boundaries of the land adjacent to Lookout Road and the land in the

(1) (1955) 20 L.G.R. 55. (2) (1956) 1 L.G.R.A. 21.

immediate vicinity of the buildings is laid out in lawns and gardens. The area so laid out is said to be seventeen and one-half acres in extent and this area is surrounded by a fence. Except for a short distance at its northern extremity the fence appears to consist of steel posts and wire strands. The residue of the land beyond the fence has been described as virgin country. It is still in its natural timbered state and it slopes away to the west. For some reason or other—and one explanation was suggested to us by counsel but this does not appear from the evidence—the appellant, whilst attempting to levy rates on approximately two hundred and ninety-one acres of this land has forborne to do so in respect of the remaining eighteen and one-half acres. The latter is in no way distinguishable from the balance of the unmade land; it is precisely of the same character though it is situated adjacent to the fence referred to and is, therefore, not as remote from the existing buildings.

The respondent is and at all material times was a public hospital within the meaning of s. 132 (1) (d) of the *Local Government Act* 1919 as amended and its answer to the appellant's claim is that the two hundred and ninety-one acres in question were at all material times used or occupied by it, being a public hospital, "for the purposes thereof".

The land which is now owned by the respondent was not acquired by it in one parcel. It purchased two parcels in 1926, aggregating ninety-two acres, and an additional area of four and one-half acres was purchased in 1934. The first purchase included an old home which apparently was, subsequently, used for the purposes of the respondent. In 1941, during the recent war, the area then owned by the respondent was taken over by the Commonwealth for the establishment of an emergency hospital. The Commonwealth retained control of the area until 1944 and at, or towards, the end of this period the possibility of the establishment of a hospital and sanatorium in this vicinity for the purpose of the treatment of tuberculosis appears to have come under consideration. At that time provision was made for the treatment of patients suffering from this disease at the respondent's main hospital, a large general institution situated in the City of Newcastle itself. The evidence of what was then done lacks a considerable amount of essential detail but it is plain enough that the project came up for consideration by the board of the hospital and by the Department of Public Health. About the middle of 1944 an inspection was made of the locality in which Rankin Park is now situated. This inspection was made by the president of the Hospital Board, who is now deceased, in company with Dr. Hughes, who was the Deputy Director of the Tuberculosis Division of the Department of Public Health, and Dr.

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McCaffrey, the superintendent of the hospital. Following this inspection, a further purchase of a small area was made by the respondent and, a few years later, the remaining portion of the present area, that is, two hundred and twenty acres, was resumed under the provisions of the *Public Works Act* 1912 " for the purposes of the Newcastle Hospital ". This occurred on 10th April 1946 and the land so resumed is included in the two hundred and ninety-one acres in respect of which the appellant seeks to recover rates. Apparently, in anticipation of the resumption, work had already commenced on the construction of one or some of the buildings previously referred to with the result that one of the main buildings, Rankin House, was in a position to receive some patients in 1947. Some thirty patients were then received and within eighteen months the hospital was in a position to receive approximately another seventy. The precise times at which the chest hospital and the nurses' quarters were erected do not appear but it would be unreasonable to suppose that they were not erected in the course of carrying out a project envisaged in 1944 and, indeed, actually commenced during or very shortly after that year.

The question in these somewhat scantily proved circumstances is whether, during the relevant years, the respondent, being a public hospital, used or occupied the land in question for its purposes. For the appellant it is asserted that it did not and as I understand the argument two notions are involved. The appellant concedes that the enclosed land was so used and, *ex gratia*, is prepared to treat the additional eighteen and one-half acres previously referred to as if they were so used. But the balance of two hundred and ninety-one acres, it is asserted, is neither used nor occupied by the hospital. Up to this point the argument treats the whole of the land owned by the hospital as consisting of several parcels some of which it has occupied and used and one, including the last land acquired, as never having been used or occupied for any purpose. The boundary between the latter portion and the residue of the land is marked out by a series of white posts which were placed in the position by the appellant, to delineate thirty-six acres which had been valued separately by the Valuer-General and this may account for the somewhat arbitrary division between the land which the appellant considers rateable and the land which it does not.

The second notion involved in the appellant's argument appears to have been intended to anticipate, at the hearing, a claim by the respondent that the land in its entirety had been devoted to the establishment of the project in question. It is said, first of all, that the original project conceived the establishment, in addition to a hospital and sanatorium, of a village settlement for the con-

valescence and regeneration of patients and, that in 1946 or shortly thereafter, recently devised forms of treatment rendered the establishment of such a settlement unnecessary. Evidence was given which indicated that new forms of treatment did tend to render obsolescent, in some cases at least, forms of after-treatment which, previously, had been more or less common and which could be effective only if administered over a long period of time. On this basis it was said that it became unnecessary for the hospital's purposes to occupy or use the whole of the land and that its continued retention of the land in question in no way served any such purpose.

Three observations should be made at once concerning these submissions. First of all, it may be said that, although the evidence is scanty it sufficiently appears that the project envisaged in 1944 and which, about that time, the respondent commenced to carry out involved a single, though comprehensive, purpose. But though it was a long term project capable of development only over a number of years it could in no sense be said that it comprised a series of projects to be carried out on several parcels of land. Secondly, although the contrary assertion was made in argument, the evidence does not show that the land in question was acquired or held for the establishment of a village settlement or that it was held, merely, to fulfil a future purpose which it was, for a time, contemplated that the land might serve. It may be that, originally, it was thought that some part of the land might be put to such a use but, even if this were so, I can find nothing to suggest that it was a material factor in determining the area which Dr. McCaffrey and Dr. Hughes appear to have thought desirable or necessary for the establishment of a sanatorium and hospital. Finally, it may be said that it is of little assistance to the appellant to assert that the acquisition of the whole of the area by the respondent was, in point of fact, unnecessary to permit the effective establishment of a sanatorium and hospital if, upon the facts, it may be said that it has been used for the purposes of the respondent as a public hospital. If, within the meaning of s. 132 (1) (d), it was so used it is nothing to the point that newly developed forms of treatment made it unnecessary in the opinion of some people for a tuberculosis sanatorium to be established in open country or that, in the present case, the appropriation of a substantial area of bushland did not, in fact, result in any benefit or advantage in the treatment by the hospital of its patients.

A medical practitioner called as a witness by the appellant testified that a sanatorium of this type does not require any greater area of land than a general hospital. This, however, was not the effect of medical evidence called on behalf of the respondent. But what is more to the point, the effect of the evidence of Dr. McCaffrey

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—who was and still is the superintendent of the hospital and who recommended the acquisition of the additional two hundred and twenty acres—was that he regarded the tract of land comprising the total area as the minimum necessary for the establishment of a hospital and sanatorium of this character and that, after the inspection in 1944 at which Dr. Hughes and the president of the hospital were present, he fixed that area as the minimum the hospital should have. And notwithstanding the fact that new forms of treatment have been devised his view at the hearing was that if he could persuade the board of the hospital to acquire more land for that purpose he would do so. Dr. McCaffrey's evidence was acceptable to the learned trial judge as was that of Dr. Hughes who, quite obviously, agreed with Dr. McCaffrey concerning the land which should be acquired and there is nothing in his evidence to suggest that what was thought to be necessary then is not necessary now. On the contrary it is clear that Dr. Hughes regarded and still regards the whole of the land as " a necessary adjunct to the hospital ".

The onus of establishing the facts necessary to support the defence which is raised rested of course upon the respondent and it may be that in attempting to discharge this onus attention was directed predominantly to the issue whether ownership of the land in question, having regard to more modern forms of treatment, has been advantageous to the hospital in carrying on its work. But as *Owen* J. observed in the Supreme Court " the derivation of benefit is not the test " (1). Although the evidence is scanty the picture as I see it is that in 1944 a project was envisaged and that the carrying on of this project required, in the view of those responsible for it, appropriation of land additionally to that already owned by the hospital. What then occurred has already been related. A further area, thought to be necessary if a hospital and sanatorium of the type referred to were to be provided, was resumed and the project commenced. The hospital, itself, was concerned with but a single piece of land devoted to one object and thought to be necessary for carrying out of that object. And nothing appears to suggest to my mind that the whole area did not remain devoted to this purpose during the whole of the relevant period. In these circumstances it is nothing to the point to say that the appellant or some other person or body considers that such an extensive area was unnecessary for the purposes which the hospital had in mind or became unnecessary as new forms of treatment were devised.

The question then is whether, upon these facts, the hospital is entitled to say, in the language of s. 132 (1) (d), that the whole of

(1) (1956) 1 L.G.R.A., at p. 23.

the land was occupied or used by it for its purpose. At the least I feel bound to say that it was so used. That it should be so used was a matter for the hospital to determine and it is unnecessary to speculate whether it was used to advantage or whether, in the opinion of some other body, the hospital used more than was necessary.

The word " used " is, of course, a word of wide import and its meaning in any particular case will depend to a great extent upon the context in which it is employed. The uses to which property of any description may be put are manifold and what will constitute " use " will depend to a great extent upon the purpose for which it has been acquired or created. Land, it may be said, is no exception and s. 132 itself shows plainly enough that the " use " of land will vary with the purpose for which it has been acquired and to which it has been devoted. It may be used for a public cemetery, for a common, for a public reserve, in connexion with a church or school and so on. Each of the forms of user referred to in the section relate to use by the owner and some of them, no doubt, contemplate a use which is synonymous with actual physical occupation and enjoyment. Others contemplate a use in a less direct form. But where an exemption is prescribed by reference to use for a purpose or purposes it is sufficient, in my opinion, if it be shown that the land in question has been wholly devoted to that purpose even though, the fulfilment of the purpose does not require the immediate physical use of every part of the land. In my opinion where a hospital acquires or sets apart, for a project which may properly be described as a purpose of a public hospital, a tract of land which it considers is the minimum requirement for its contemplated project and thereupon proceeds to carry out that project it, thereby, uses the whole of the land. How its purposes shall be fulfilled is, within reason, for it to decide and, as I have already said, it is nothing to the point to say that it has employed in the project more land than may, upon the views of others, be thought to have been necessary, or that in fact, it has derived no benefit or advantage therefrom in the fulfilment of its purposes.

For the reasons given the appeal should, in my opinion, be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *H. V. Harris Wheeler & Williams*, by *Kevin Ellis & Price.*

Solicitors for the respondent, *Rankin & Nathan*, by *Minter Simpson & Co.*

R. A. H.