[HIGH COURT OF AUSTRALIA.]

ROSENBLUM AND ANOTHER . . . APPELLANTS; PLAINTIFFS,

AND

THE COUNCIL OF THE CITY OF BRISBANE RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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MELBOURNE, *Oct.* 21, 22; SYDNEY, *Dec.* 23.

Dixon C.J., McTiernan, Williams Webb and Kitto JJ.

Local Government (Q.)—Brisbane City Council—Prohibition on use of land for purpose other than residential purpose—Exception confined to use for purpose for which land "was used" at date of coming into force of ordinance—Test of use—Not limited to physical activities observable on land on day in question—Lease by trustees—Acceptance of rent in respect of period not expired on day in question—Whether land used by trustees on day—Brisbane City Council Ordinances, Chap. 35.

Chapter 35 of the Brisbane City Council Ordinances provides by cl. 2 that no person shall use any land (whether having a building thereon or not) or use or erect any building or part of a building on any land within the city for any purpose other than residential purposes and by cl. 5 that "nothing herein contained shall prevent the use of any land or building or part of a building for the purpose for which such land or building or part of a building was used at the date of the coming into force of this chapter . . .". The chapter came into force on 3rd December 1955.

Held that cl. 5, in referring to the purpose for which land etc. "was used" on a given day, called for an inquiry, not limited to the physical activities which might have been observed on the land or in the building on that day, but taking account of any course of user which might fairly be regarded as having been current on that day. Most forms of user of land or buildings involve not continuous activity but recurring activities. Whether an interruption of activity puts an end to the user must always be a question of fact and in resolving the question the circumstances of each case must be considered as a whole.

Schwerzerhof v. *Wilkins* (1898) 1 Q.B. 640, discussed and distinguished.

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Trustees of premises had accepted a payment by way of rent in respect of a period which had not expired on 3rd December 1955.

Held, that having thus parted with the use of the premises the trustees could not be regarded as using them for any purpose.

Commissioners of Taxation v. *Trustees of St. Mark's Glebe* (1902) A.C. 416, at p. 421, applied.

Held, further, on the facts, that the premises in question in the case were not used for any purpose at the date of coming into operation of the chapter.

Decision of the Supreme Court of Queensland (*Stanley* J.), affirmed.

APPEAL from the Supreme Court of Queensland.

Lawrence Rosenblum and Maxims Proprietary Limited commenced an action in the Supreme Court of Queensland on 3rd February 1956 against the Brisbane City Council. The statement of claim was as follows:—1. The defendant is a body corporate incorporated under and pursuant to *The City of Brisbane Acts* 1924 *to* 1954 (Q.). 2. Pursuant to an agreement in writing dated 19th September 1955 entered into between the first plaintiff as trustee for and on behalf of a company proposed to be formed under the name of "Maxims Pty. Ltd." of the one part and the registered proprietors of certain land situated at No. 19 Bayview Terrace, Clayfield, Brisbane, Queensland, being the land more particularly described as resubdivisions 3/4 and subdivision 7 of resubdivisions 1/2 and 15/21 of subdivisions 25/27 of portion 81 County of Stanley Parish of Toombul, of the other part the first plaintiff became the lessee and occupier of the said land and the buildings thereon for the purpose hereinafter referred to in par. 4 hereof as "the said purpose" for a period of ten years as from 1st October 1955 and continued as such lessee and occupier until on or about 18th June 1956. 3. On and for some time prior to 3rd December 1955 the said land and buildings thereon were used for a purpose other than residential purposes namely the purpose of commerce and business, and in particular for the carrying on of the business of conducting a social club and of catering for and accommodating social functions and wedding and other receptions and entertainments of a like kind and of the conducting of the affairs of the Young Men's Hebrew Association (Qld.) Limited a company duly incorporated and registered in Queensland under the provisions of *The Companies Acts* 1931 *to* 1953. 4. The first plaintiff at all material times intended and still intends that the said land and buildings be used for a purpose other than residential purposes namely the purpose (hereinafter called "the said purpose") of commerce and business and

in particular for the carrying on of the business of catering for and accommodating social functions and wedding and other receptions and entertainments of a like kind and permitting the use of the said land and buildings for the conduct of the affairs of the said Young Men's Hebrew Association (Qld.) Limited. 5. The first plaintiff at all material times intended to form a company to be known as Maxims Pty. Ltd. to the intent that such company when incorporated and registered should thereafter enter into occupation of the said land and buildings and use the said land and buildings for " the said purpose " and in particular to carry on the said business. 6. The first plaintiff for and on behalf of the said proposed company in or about September 1955 and prior to 3rd December 1955 made application in writing to the defendant for its approval and permission to the using of the said land and buildings for " the said purpose ". 7. The defendant, by letter dated 15th December 1955, refused to grant the said approval or permission so applied for. 8. The said refusal was made in purported reliance by the defendant upon the provisions of Chap. 35 of the ordinances made under and pursuant to the said *The City of Brisbane Acts* 1924 *to* 1954. 9. Pursuant to such intention as aforesaid the first plaintiff caused the said proposed company to be incorporated and registered in Queensland under the provisions of the said *The Companies Acts* 1931 *to* 1953 under the name of Maxims Pty. Ltd. and such company is the above-named second plaintiff. 10. On or about 18th June 1956 the said registered proprietors of the said land granted to the second plaintiff a lease in registerable form of the said land and the buildings thereon to be used by it *inter alia* for " the said purpose " for a period of ten years as from 1st October 1956. 11. Pursuant to such lease the second plaintiff entered into occupation of the said land and buildings and has at all times since continued as the lessee and occupier thereof and has used the same for " the said purpose " and intends to continue to use the same for " the said purpose ". 12. The plaintiffs for the better use of the said land and buildings for " the said purpose " and for the better carrying on of their business and in particular in order to comply with the requirements of *The Cafe Regulations of* 1955 made under and pursuant to *The Health Acts* 1937 *to* 1949 have expended large sums of money in and about repairs and improvements to and installations in and upon the said land and buildings. 13. By reason of the said repairs and improvements to and the said installations in and upon the said land and buildings the same comply with the provisions of *The Cafe Regulations of* 1955. 14. The defendant threatened and still threatens to prevent the plaintiffs

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and each of them from using the said land and buildings for " the said purpose ". 15. The plaintiffs say that by reason of the matters hereinbefore set out the provisions of cl. 5 of the said Chap. 35 exclude the application to the said land and buildings and the use thereof for " the said purpose " of the prohibition contained in cl. 2 of the said Chap. 35 and that the defendant has no lawful authority under the said Chap. 35 or otherwise to prevent the plaintiffs or either of them from using the said land and buildings for " the said purpose ". And the plaintiffs claim :—(a) A declaration that the purpose for which the land known as No. 19 Bayview Terrace, Clayfield, Brisbane, more particularly described as resubdivisions 3/4 and subdivision 7 of resubdivisions 1/2 and 15/21 of subdivision 25/27 of portion 81 situate in the County of Stanley Parish of Toombul, and the buildings thereon, were used at the date of the coming into force of the defendant Brisbane City Council's Ordinance Chap. 35, namely 3rd December 1955, was a purpose other than residential purposes, namely the purpose of commerce and business and in particular for the carrying on of the business of conducting a social club, and of catering for and accommodating social functions and wedding and other receptions and entertainments of a like kind and of the conducting of the affairs of the Young Men's Hebrew Association (Qld.) Limited. (b) A declaration that nothing contained in the said Chap. 35 may prevent the use of the said land and buildings by the plaintiffs or either of them for the purpose of commerce or business and in particular for the carrying on of the business of catering for and accommodating social functions and wedding and other receptions and entertainments of a like kind and permitting thereon the conduct of the affairs of the said Young Men's Hebrew Association (Qld.) Limited. (c) A declaration that the defendant has no power under the said Chap. 35 to prevent the use by the plaintiffs or either of them of the said land and buildings for the purpose described in par. (b) hereof. (d) A declaration that subject to compliance with *The Cafe Regulations of* 1955 the plaintiffs and each of them may use the said land and buildings for the purpose described in par. (b) hereof. (e) A declaration that the defendant's refusal dated 15th December 1956 purporting to be made under its alleged powers contained in the said Chap. 35, to approve of the use by the plaintiffs or either of them of the said site for the purpose described in par. (b) hereof is not authorised by the said Chap. 35 and is unlawful. (f) An injunction restraining the defendant from applying or attempting to apply the said Chap. 35 to the said land and buildings so as to prevent or attempt to prevent the plaintiffs or either of them

from using the said land and/or buildings for the purpose described in par. (b) hereof.

By its defence the defendant denied that the premises in question were used on 3rd December 1955 for the said purpose referred to in the statement of claim and counter-claimed for certain declarations and an injunction restraining the plaintiffs from using the said premises for any purpose other than residential purposes.

The action was heard before *Stanley* J. who, in a written judgment delivered on 1st May 1957, ordered that there be judgment for the defendant on the claim and on the counterclaim for the injunction sought.

From this decision the plaintiffs appealed to the High Court.

C. G. Wanstall Q.C. (with him *L. L. Draney*), for the appellants. The fact that the Young Men's Hebrew Association did not distribute its profits among its members is not a ground for distinguishing it from a commercial venture. [He referred to *In re Duty on Estate of Incorporated Council of Law Reporting for England and Wales* (1); *Moon* v. *London County Council* (2); *Thorn* v. *Madden* (3).] It is conceded that there were no operations going on on the premises at the date of the ordinance. But, it is submitted, that that is not relevant to the question whether the premises were being used at the time. For example, there can be use of a silent factory. Here the owners had let the premises to a tenant or at least a licensee, for use as a catering and reception lounge. He had entered into possession of the premises so designed and equipped and had paid rent. He had consulted an architect and had taken steps necessary to commence working the premises as such a lounge. Therefore he was at the material time using the land and building for a catering lounge. This case is indistinguishable in principle from *Schwerzerhof* v. *Wilkins* (4); see also *Mitchell Brothers, Ltd.* v. *Inland Revenue* (5). The question under the ordinance is whether the premises were catering lounge premises on 2nd December 1955, and not whether the business of catering was being carried on there at that time. User arises when an owner lets premises for a particular purpose. In the present case the owners had let the premises to Mr. Rosenblum for use as a catering lounge. Such a letting constituted a use by the owner of the premises as a catering lounge even if the tenant did not actively engage in the business of catering. The

(1) (1888) 22 Q.B.D. 279, at pp. 293, 294.
(2) (1931) A.C. 151, at pp. 158, 159, 161, 162, 167, 171, 172.
(3) (1925) Ch. 847, at pp. 851, 852.
(4) (1898) 1 Q.B. 640.
(5) (1930) S.C. 531, at pp. 536, 540, 542.

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English rating cases are useful in this way: the test is beneficial occupation and beneficial occupation means "use"; at least "use" in the sense in which this ordinance refers to it and in order to determine the rate the character of the use must be identified. Therefore you have questions, e.g., as to whether the correct rate to apply to a particular building is the rate of a factory or whether it should be the rate of a warehouse because it is merely being used to store the machinery that is in it. So, it is always necessary to identify a use and a use of a particular character, and to that extent these cases are useful. [He referred to *London County Council* v. *Hackney Borough Council* (1); *Overseers of Bootle* v. *Liverpool Warehousing Co.* (2); *R.* v. *Melladew* (3); *Borwick* v. *Southwark Corporation* (4); *Barnard* v. *Gorlin* (5); *Council of the City of Newcastle* v. *Royal Newcastle Hospital* (6); *Gage* v. *Wren* (7).] *Commissioners of Taxation* v. *Trustees of St. Mark's Glebe* (8) is to be distinguished from the present case because there the question was who was using the land as land.

D. I. Menzies Q.C. (with him *J. D. McGill*), for the respondent. The question at issue in the court below was one of fact whether the premises were used as a commercial catering establishment on 2nd December 1955. There was a conflict of evidence. This Court should not review the findings of fact below. [He referred to *Paterson* v. *Paterson* (9).] Alternatively, on the material before the court below, the findings were correct. Use by a tenant is not use by a landlord. [He referred to *Barnard* v. *Gorlin* (5); *Commissioners of Taxation* v. *Trustees of St. Mark's Glebe* (10).] The test of use under cl. 5 is what was happening within the boundaries of the premises on the material date. This is emphasised by *Moon* v. *London County Council* (11). In *Schwerzerhof* v. *Wilkins* (12) the use treated as protected was the use of the owner. That case depended on its own facts. Likewise the rating cases depended on their own facts.

C. G. Wanstall Q.C., in reply.

Cur. adv. vult.

(1) (1928) 2 K.B. 588, at pp. 596, 597.
(2) (1901) 85 L.T. 45.
(3) (1907) 1 K.B. 192, at pp. 203, 204.
(4) (1909) 1 K.B. 78, at pp. 82, 83.
(5) (1955) 95 C.L.R. 35.
(6) (1957) 96 C.L.R. 493.
(7) (1902) 87 L.T. 271, at p. 273.
(8) (1902) A.C. 416.
(9) (1953) 89 C.L.R. 212.
(10) (1902) A.C. 416, at p. 421.
(11) (1931) A.C. 151.
(12) (1898) 1 Q.B. 640.

THE COURT delivered the following written judgment :—

This is an appeal from a judgment of the Supreme Court of Queensland (*Stanley* J.) in an action between the appellants as plaintiffs and the respondent council as defendant. The purpose of the action was to obtain a decision as to whether an ordinance of the council, made under *The City of Brisbane Acts* 1924 *to* 1954 (Q.), applied to certain premises known as 19 Bayview Terrace, Clayfield, in the City of Brisbane, so as to forbid the use of the premises for any purpose other than residential purposes. *Stanley* J. held that it did. He dismissed a claim by the plaintiffs for declarations which would have established that the ordinance did not prevent their use of the premises for purposes of commerce or business and in particular for the carrying on of the business of catering for and accommodating social functions wedding and other receptions, and entertainments of a like kind, and the conduct of the affairs of a company called the Young Men's Hebrew Association (Qld.) Limited. His Honour upheld a counterclaim by the council for a declaration that the use of the premises by the plaintiffs or either of them for the purpose of a catering establishment for wedding, social and kindred functions was contrary to the ordinance and unlawful, and granted an injunction against such use.

The ordinance, which forms Chap. 35 of the council's ordinances, came into force on 3rd December 1955, replacing an earlier ordinance, similarly numbered, which this Court considered in *Vitosh* v. *Brisbane City Council* (1). It provides generally, by cl. 2, that no person shall use any land (whether having a building thereon or not) or use or erect any building or part of a building on any land, within the city, for any purpose other than residential purposes. This prohibition is to apply except as thereafter provided in the ordinance. Clause 5 makes an excepting provision : " Nothing herein contained ", it says, " shall prevent the use of any land or building or part of a building for the purpose for which such land or building or part of a building was used at the date of the coming into force of this chapter, or for such other purpose as the board may permit ".

The validity of the ordinance has not been challenged. The only question in the case is whether the premises mentioned in the writ were, on 3rd December 1955, used for the purposes for which the plaintiffs desire to use them, namely the purposes of a catering establishment. On that question the learned trial judge received a considerable body of evidence, oral and documentary, and in a

(1) (1955) 93 C.L.R. 622.

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judgment containing a detailed examination of the case he reached the conclusion that the premises were not so used.

The premises referred to consist of a block of land in a suburban area and a building which originally was a private dwelling house. The registered proprietor in fee simple is the Young Men's Hebrew Association (Qld.) Limited, which will be referred to in this judgment as the association. That company acquired the property in 1951 for use as a clubhouse, and financed extensive alterations by borrowing about £5,000 the repayment of which it secured on the property by a debenture subject to an existing first mortgage. In the ensuing years the association sought, as the learned judge put it, " to develop a centre for Jewish community life through the medium of a non-profit-making limited liability company functioning as what is ordinarily understood as a club ". It suffered from financial difficulties from the beginning, but at first a considerable amount of activity went on upon the premises. Social functions of various kinds were arranged, and private functions were catered for. In 1953 the premises were much used for these purposes and for the purposes of the association itself; but then a decline set in. By May 1954, when the association had only forty members and the overdraft stood at £1,113, concern was being felt as to whether the property could be carried on with a due regard for the interests of the debenture holders. Few functions were being held in the premises. On 4th October 1954 a general meeting of the association brought itself to agree to the hiring of the premises for non-Jewish functions, though it had rejected a similar proposal a month before. The new policy produced no improvement. There was a wedding reception in November, a dinner for the Xavier Society in December, another wedding reception early in 1955, and a Younger Set function for the Xavier Society in February 1955. What functions took place between February and August 1955 the learned judge had difficulty in ascertaining. One witness spoke of several high teas, an arts group review, a ball, a dinner and hospital committee function. But the financial position was deteriorating, and ultimately, on 14th July 1955, a general meeting of the association resolved that the premises be handed to the trustees for the debenture-holders for disposal, the association continuing in possession until such time as the disposal should be completed. Between that time and the date which is here material, 3rd December 1955, only one function took place, so far as the evidence enabled the learned judge to find. That was a cocktail party given by a hospital committee on 27th October, and the payment in respect of it was made to the trustees for the debenture-holders. The association itself made no physical

use of the premises at all after August. The president and secretary paid no attention to them, and they lay unused, neglected, dirty and unkempt. On 8th November, an electricity accounts collector found the doors locked and the grounds in a state of disorder and neglect. He called again on 29th November, the account being still unpaid, removed the fuses from the fascia board of the house, and inserted a piece of cardboard to interrupt the supply of current. Six months later he returned. His piece of cardboard was still intact and where he had left it. A Mrs. Smith was said by the plaintiffs to have lived in the premises as caretaker until the following June; but the learned judge found that she was not living there, though she may have visited the premises sometimes during the day, and that it was impossible for anyone to use the premises at night at any time after 29th November.

When the property fell into the hands of the trustees in July 1955, the trustees, combining with their concern for the financial interests of the debenture holders a continuing hope that the objects of the association might still be served to some extent, decided that the best course would be to find someone who would carry on the catering section of the establishment and leave some, though a restricted, use of the premises for the club activities of the association. Accordingly they refused offers to buy the property and opened negotiations with the appellant Rosenblum with a view to his conducting the catering section and running a room for wedding breakfasts and other social functions.

On 9th September, Rosenblum put before the trustees a proposal in writing. It was in the form of a letter signed " L. Rosenblum, on behalf of Maxims Pty. Ltd." ; but the appellant company had not yet been incorporated and there was no company in existence for which Rosenblum had authority to write. The letter expressed a wish on the part of " the undersigned " to acquire a lease of the premises for ten years at a rental of £25 a week, with an option of renewal for five years at a rental to be " subject to review when due ". Terms of the suggested lease were outlined, but only in the form of rough heads. No particular use of the premises was provided for, though there was an incidental mention of " the intended use of the property " and Rosenblum said in evidence that this was a use as a catering lounge run as a commercial proposition.

On 19th September 1955 the chairman of the trustees wrote to " L. Rosenblum Esq. representing Maxims Pty. Ltd.", stating that " in general principle " the application to lease the property had been approved by the board of trustees, subject to a number of conditions which he set out. The lease was to commence from 1st

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October 1955. A provision that the trustees or their assigns or nominees should have the right to use the premises on Sundays, subject to payment for cleaning, light, power and gas, reflected the thought in the minds of the trustees that some use of the premises for the club purposes of the association might prove to be possible. The letter was expressed to be a rough draft only, " binding the parties until the proper and formal legal documents shall be drawn and signed " ; and it concluded by saying, " Your endorsement at the foot of each page of this letter shall be taken as an acceptance by you acting in full authority for Maxims Pty. Limited." On each page Rosenblum wrote " We confirm. L. Rosenblum for Maxims Pty. Ltd." ; and he paid the trustees the equivalent of three months' rent in advance.

Rosenblum next consulted an architect, and had a sketch prepared for modernising the front of the building. On 5th October, signing his name " for Maxims Pty. Ltd.", he made an application to the council for permission to use the site " for the purpose of a catering establishment for weddings, social functions etc." In the form by which the application was made he described the association as the occupier, and gave " social club " as the nature and use of the building. In a covering letter he explained that it was intended to establish a first class catering organisation to provide for receptions of all types. The council refused the application. Nothing occurred on the premises until well into 1956. In May of that year the appellant company was incorporated, and certain alterations to the premises were effected at a cost of more than £2,750.

It seems clear that Rosenblum's intention, from September onwards, was that the appellant company, when formed, should use the premises, under his own management, for what he described in his evidence as " anything you can classify in the sphere of the activities of a catering lounge ". The premises were locked up and neglected (except for the one isolated occasion of the cocktail party in October), but the equipment in the building was never removed. In fact, the letter of 19th September on which Rosenblum endorsed his assent provided for use of the piano, refrigerator, stoves, floor coverings and electrical fittings.

On these facts the appellants submit that *Stanley* J. ought to have found that on 3rd December 1955 the premises were used for the purposes of a catering lounge, notwithstanding that there was no physical activity upon them at that date. The case, they contend, is analogous to *Schwerzerhof* v. *Wilkins* (1). In that case, premises equipped with an underground bakehouse had been let

(1) (1898) 1 Q.B. 640.

to a baker and used by him as a baker's premises for sixteen years. The tenancy came to an end, and the owner advertised the property for letting as a baker's premises. He used the interregnum to effect repairs to the underground bakehouse and the oven in it. A new tenant was found after an interval of four months, and he at once commenced to use the bakehouse as such. But on a day during the course of the four months, and just after the repairs had been completed, an Act had come into operation which provided that a place underground should not be used as a bakehouse unless it was so used at the commencement of the Act. The matter came before a Divisional Court on a case stated by a magistrate who had held that the place was not used as a bakehouse on the material date. The court recognised that the question under the Act was in a sense one of degree and therefore of fact, but it held that in law there was no interruption of the use of the place as a bakehouse. This necessarily meant that the expression " used as a bakehouse ", in the Act under consideration, had a meaning not confined to the actual carrying on of baking operations and activities incidental thereto, but extending to the owner's conduct in treating it as a bakehouse and in particular in trying to let it as a bakehouse after having put it into repair for baking purposes.

The appellants submit that the present case is indistinguishable in principle. They accept the position that the premises here in question were, on 3rd December, to all appearances unused; but they say that the intention and desire of all concerned were the same as they had been in the active days of 1953. The activity had ceased because there was a dearth of customers, and because without revenue from the commercial side of the venture the club's activities for which the association had been formed could not be financed. But a lessee had been found in the person of Rosenblum; the premises stood equipped for use; and a resumption of the old activities waited only upon the effecting of Rosenblum's improvements and the inauguration of his new enterprise. The old purposes for which the premises had been used had therefore not been abandoned. The premises were still, in a real sense, devoted to those purposes and being used for those purposes.

It is not difficult to agree that the use of premises for a given purpose is not necessarily interrupted whenever activities for that purpose are temporarily stopped. When such an ordinance as is here in question refers to the purpose for which land or a building " was used " on a given day, it calls for an inquiry, not limited to the physical activities which might have been observed on the land or in the building on that day, but taking account of any course of

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user which may fairly be regarded as having been current on that day. Most forms of user of land or buildings involve not continuous activity but recurring activities. There is no inaccuracy in describing a grocer's shop as being used as such on every day of the period in which the grocer has his business there, notwithstanding that on Sundays and holidays it is locked up and no activity of any sort occurs. Whether an interruption of activity puts an end to the user must always be a question of fact, and in resolving the question in each case that arises the circumstances of that case must necessarily be considered as a whole.

In the present case the question may be approached by asking whether it is possible to point to anyone who was using the premises as a catering lounge on 3rd December 1955. The answer must be that it is not. Clearly the association was not. Its former use of the premises for the purposes of a Jewish club, assisted by the raising of revenue by means of catering activities, had diminished over a long period and finally ceased altogether, and the association had given up hope of again being able itself to use the premises. Equally clearly, the trustees for the debenture-holders were not using the premises as a catering lounge. Having had the premises thrown onto their hands by the association, they had agreed with Rosenblum, whether by a binding contract or not, to give him an opportunity to float a company and set up a new enterprise, not for the purpose of advancing the idea of a Jewish club, but in order to make profits for the new company's own benefit. The trustees had accepted a payment by way of rent in respect of a period which had not yet expired, and having thus parted with the use of the premises they could not be regarded as using them for any purpose : cf. *Commissioners of Taxation* v. *Trustees of St. Mark's Glebe* (1). Thirdly, Rosenblum was not using the premises as a catering lounge, for though he had paid three months' rent he had not entered into possession or taken any overt step concerning them, except that he had had a sketch prepared. As to this sketch, *Stanley* J. took the view that as the building had not been measured up the preparation of the sketch was only a step towards interesting persons in the proposed company or in starting a user through a company to be incorporated and was not itself a user of the premises. Clearly his Honour was right. There is no reason to doubt that Rosenblum was genuinely considering ways and means of using the premises for the purposes of a catering establishment, but it would be impossible to make a finding that he had already commenced to use them for those purposes. His acceptance of the terms offered by the

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

trustees and the payment he had made had merely gained him a period of time in which to float his company, to alter the building, and to make the staffing and other arrangements without which the intended future use could not be commenced. Finally, the premises were certainly not being used by the appellant company, for it was not as yet in existence.

So things stood on 3rd December. A former user had come to an end months before. Hopes for a similar, though not identical, user had persisted in the minds of some and were still alive in the mind of Rosenblum. But the conclusion is simply not open that the premises were the subject of any current use. They were, in plain fact, unused for any purpose whatever.

The decision of *Stanley* J. was correct, and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Neil O'Sullivan & Rowell.*
Solicitor for the respondent, *E. F. Kenny.*

R. D. B.