REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[PRIVY COUNCIL.]

COUNCIL OF THE CITY OF NEWCASTLE . APPELLANT ;
PLAINTIFF,

AND

ROYAL NEWCASTLE HOSPITAL . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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1959.
Feb. 12, 16, 17;
Mar. 19.

Viscount Simonds, Lord Cohen, Lord Somervell of Harrow and Lord Denning.

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 conducting a chest hospital for the treatment of tuberculosis 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 steep gullies, was heavily timbered and substantially in its wild natural condition. On the remaining thirty-six acres stood the buildings of the chest 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 remaining eighteen and one-half acres beyond the fence was marked off by white posts. The two hundred and ninety-one acres had been acquired by the hospital for the purposes of the chest hospital, to keep the atmosphere clear and unpolluted, to prevent building upon the land so as to bar the approach of factories and houses, to provide quiet and serene surroundings for the patients and to give room for the expansion of the activities of the hospital. A local council sought to levy rates upon the two hundred

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and ninety-one acres and the hospital claimed exemption under s. 132 (1) (d) of the *Local Government Act* 1919.

Held, that the acreage in question was " used " by the hospital within the meaning of s. 132 (1) (d).

An owner can use land by keeping it in its virgin state for his own special purposes.

Doubted whether the acreage was " occupied " by the hospital within the meaning of s. 132 (1) (d).

Decision of the High Court of Australia (1957) 96 C.L.R. 493 affirmed.

APPEAL from the High Court of Australia.

This was an appeal by special leave from the decision of the High Court: *Council of the City of Newcastle* v. *Royal Newcastle Hospital* (1).

B. J. M. MacKenna Q.C. and *Peter Oliver*, for the appellant.

G. Wallace Q.C. and *J. G. Le Quesne*, for the respondent.

Their Lordships took time to consider the advice which they would tender to Her Majesty.

LORD DENNING delivered the judgment of their Lordships as follows:—

In the city of Newcastle, New South Wales, there is a hospital called the Royal Newcastle Hospital, which receives patients suffering from tuberculosis. It has about one hundred beds. It is set in grounds laid out with lawns and gardens. Those grounds cover seventeen and one-half acres and are enclosed with a ring fence. Outside the fence the hospital owns eighteen and one-half acres of rough ground marked off by five white posts. Beyond that rough ground the hospital owns two hundred and ninety-one acres of land which is still in its virgin state. Those two hundred and ninety-one acres are traversed by ridges and gullies, which are heavily timbered, with a good deal of underwood. The gullies are steep and rough, some of them so steep that they are impassable. There is very little flat land. There are a few bush tracks, one of which is well defined: but there is no evidence sufficient to establish that it is used by patients or by the nursing staff. There is, in short, no physical use of the two hundred and ninety-one acres by the hospital. It is just vacant land.

The city council claim that the hospital is liable to pay rates on those two hundred and ninety-one acres for the years 1946 to 1952 inclusive. It does not seek to make the hospital, liable on

(1) (1957) 96 C.L.R. 493.

either the seventeen and one-half acres or the eighteen and one-half acres, but only on the two hundred and ninety-one acres. The sum claimed is £4,001 9s. 8d.

At the hearing of the action, *Richardson* J. held that the two hundred and ninety-one acres were exempt from rates (1). His decision was affirmed by a majority of the Supreme Court of New South Wales (*Roper* C.J. in Eq. and *Maguire* J., *Owen* J. dissenting) (2), and their decision was in turn affirmed by a majority of the High Court of Australia (*Williams*, *Webb* and *Taylor* JJ., *Fullagar* and *Kitto* JJ. dissenting) (3).

It should be noticed at the outset that rates are levied in New South Wales, not on the occupiers, as in England, but on the owners: and they are calculated, not by reference to the annual value, as in England, but by reference to the unimproved capital value: and all land, occupied or unoccupied, is subject to the payment of rates unless it can be brought within one of the statutory exceptions. English rating decisions are, therefore, not of much help.

The Royal Newcastle Hospital is undoubtedly liable to pay rates on these two hundred and ninety-one acres, unless the land comes within s. 132 (1) (d) of the *Local Government Act*, 1919, which exempts "land which belongs to any public hospital, public benevolent institution, or public charity, and is used or occupied by the hospital, institution or charity, as the case may be for the purposes thereof."

The hospital acquired the land in a series of parcels from 1926 to 1946, namely, ninety-two acres in 1926, four acres in 1934, and two hundred and twenty acres in 1946. There is no doubt that the hospital acquired all the land for the purposes of the hospital. Indeed, when the latest portion of it (two hundred and twenty acres) was compulsorily acquired in 1946, the Government *Gazette* expressly stated that it was "resumed for the purposes of the Newcastle Hospital." According to the evidence these purposes were to keep the atmosphere clear and unpolluted: to prevent building upon the land and so act as a barrier against the approach of factories and houses: to provide quiet and serene surroundings for the patients: and to give room to expand the activities of the hospital. The land was undoubtedly *acquired and owned* for those purposes. But was it *used* or *occupied* for those purposes? That is the question.

Their Lordships are of opinion that it was *used* for those purposes. Mr. *MacKenna* submitted that an owner of land could not be said

(1) (1955) 20 L.G.R. 95.
(2) (1956) 1 L.G.R.A. 21.
(3) (1957) 96 C.L.R. 493.

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to use the land by leaving it unused : and that was all that had been done here. Their Lordships cannot accept this view. An owner can use land by keeping it in its virgin state for his own special purposes. An owner of a powder magazine or a rifle range uses the land he had acquired nearby for the purpose of ensuring safety even though he never sets foot on it. The owner of an island uses it for the purposes of a bird sanctuary even though he does nothing on it, except prevent people building there or disturbing the birds. In the same way this hospital gets, and purposely gets, fresh air, peace and quiet, which are no mean advantages to it and its patients. True it is that the hospital would get the same advantages if the land were owned by the Crown or by a trust which had determined to keep it in a natural state, or by an owner who was under a restrictive covenant not to build on the land. But the advantages then would be fortuitous or at any rate outside the control of the hospital. Here they are intended, and that makes all the difference.

In these circumstances it is unnecessary for their Lordships to consider whether the two hundred and ninety-one acres were " occupied " by the hospital : but in view of the argument submitted to them, their Lordships would say a few words on it. The hospital was undoubtedly in legal possession of the two hundred and ninety-one acres ; for the simple reason that, where no one else is in possession, possession follows title. But legal possession is not the same as occupation. Occupation is matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering : see *Pollock and Wright* on *Possession in the Common Law* (1888) pp. 12, 13. There must be something actually done on the land, not necessarily on the whole, but on part in respect of the whole. No one would describe a bombed site or an empty unlocked house as " occupied " by anyone : but everyone would say that a farmer " occupies " the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another. Their Lordships have some doubt whether these two hundred and ninety-one acres were " occupied " by the hospital, because they were not fenced in or enclosed in any way, and it is difficult to say they were so much linked with the hospital grounds as to form part of an entire whole. But it is unnecessary to come to a conclusion on the point.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs.

Solicitors for the appellant, *Kimbers*.
Solicitors for the respondent, *Light & Fulton*.

R. A. H.