H. C. OF A. 1935. JURY v. COMMISSIONER FOR RAILWAYS (N.S.W.).

since it was not imposed by law, if deceased were an invitee, licensee or trespasser, it follows that the attack on the summing-up in the action fails, and that the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellant, *C. Jollie Smith & Co.*

Solicitor for the respondent, *F. W. Bretnall*, Solicitor for Transport.

J. B.

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[HIGH COURT OF AUSTRALIA.]

THE COUNCIL OF THE TOWN OF SOUTHPORT APPELLANT;

AND

THE CORPORATION OF THE TRUSTEES OF THE ORDER OF THE SISTERS OF MERCY IN QUEENSLAND . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1935. BRISBANE, *July* 5, 8, 9, 11. Rich, Dixon and McTiernan JJ.

*Local Government—Rates—Exemption—Exclusive user for a public school—Convent and school—Land vested in corporation under or in pursuance of any statute for the purpose of public charities—Local Authorities Act* 1902-1932 (*Q.*) (2 *Edw. VII. No.* 19—23 *Geo. V. No.* 27), *sec.* 216 (*iii.*), (*vi.*)—*Religious Educational and Charitable Institutions Act* 1861 (*Q.*) (25 *Vict. No.* 19), *sec.* 1.

The Corporation of the Order of the Sisters of Mercy was the registered proprietor under the *Real Property Act* 1861 (Q.) of certain land held in trust for the purposes of the Order. On the land there were two buildings connected by a covered way, one building being fitted as a schoolroom, the other containing classrooms, dining room, dormitory, chapel and cells or bedrooms for the nuns of the Order. On these premises a day and boarding school was conducted by the nuns. Twelve Sisters of the Order resided on the premises, and were

engaged mainly in teaching. The objects of the order were the spiritual perfection of the nuns, the education of poor girls, the visitation of the sick and the protection of poor women of good character. The Council of the Town of Southport rated this land under the *Local Authorities Acts* (Q.).

*Held* that the land was not used exclusively for a public school within the meaning of par. vi. of sec. 216 of the *Local Authorities Act* 1902-1932, as the premises were used both as a convent and a school, and the conventual life of the nuns was not a mere incident of the school.

*Held*, further, that the land vested in the corporation by means of a memorandum of transfer and registration under the *Real Property Act* 1861, and was not vested under or in pursuance to any statute within the meaning of par. iii. of sec. 216 of the *Local Authorities Act* and was not exempt from rating.

Decision of the Supreme Court of Queensland (Full Court): *Corporation of the Trustees of the Order of the Sisters of Mercy in Queensland* v. *Council of the Town of Southport*, (1935) Q.S.R. 95, reversed.

APPEAL from the Supreme Court of Queensland.

Certain lands at Southport were vested under the *Real Property Act* 1861 (Q.) in the Corporation of the Trustees of the Order of the Sisters of Mercy in Queensland. On these lands there was a convent and a school conducted by the nuns of the Order. The Southport Town Council rated the lands, and the corporation commenced an action in the Supreme Court of Queensland claiming that the land was not ratable, being exempt from rates under sec. 216 of the *Local Authorities Act* 1902-1932 (Q.). The action was heard by *Hart* A.J., who decided that the land was not ratable. From this decision the council appealed to the Full Court. The Full Court decided that the lands were not ratable: *Corporation of the Trustees of the Order of the Sisters of Mercy in Queensland* v. *Council of the Town of Southport* (1).

From that decision the council, pursuant to special leave, appealed to the High Court on the grounds:—

(1) That certain of the findings of the judgment of *Hart* A.J. and the judgment of the Full Court were contrary to law.

(2) That upon the evidence the appeal should have been allowed and that the judgment of the action should have been directed by the Full Court to be entered for the appellant.

Further facts appear in the judgments hereunder.

(1) (1935) Q.S.R. 95.

H. C. OF A. 1935.

SOUTHPORT CORPORATION v. CORPORATION OF THE TRUSTEES OF THE ORDER OF THE SISTERS OF MERCY IN QUEENSLAND.

*A. D. Graham* (with him *M. D. Graham*), for the appellant. Of the several grounds taken in the Court of first instance two only remain for the decision of this Court—the first, whether the lands are used exclusively for a public school under par. vi. of sec. 216 of the *Local Authorities Act* 1902-1932, the other whether the land is vested in the respondents under or in pursuance of any statute for the purposes of public charities, within the meaning of par. iii. of that section. On the first question: there was not any exclusive user as a school, because the premises are also used for (*a*) a convent, (*b*) a residence, (*c*) a place of private worship, (*d*) a sanatorium or rest home, and (*e*) as subserving private interests. The words employed, "exclusively used," are stronger than were deemed necessary in earlier cases to signify a sole user (*Mayor &c. of Essenden* v. *Blackwood* (1); *Queensland National Association* v. *Booroodabin Divisional Board* (2)), and indicate the necessity for a complete exclusiveness of the user relied upon. The Courts have been always astute to discover extraneous users defeating an exempted user (*Hadfield* v. *Mayor &c. of Liverpool* (3); *Shaw* v. *Halifax Corporation* (4); *Nunawading Shire* v. *Adult Deaf and Dumb Society of Victoria* (5)), and most particularly so when the extraneous user was by residence (*President, Councillors and Ratepayers of the Shire of Ferntree Gully* v. *Johnston* (6); *Kelly* v. *Municipal Council of Sydney* (7); *Municipality of North Sydney* v. *Goddard* (8); *Ex parte Taylor* (9); *Duhig* v. *City of South Brisbane* (10); *Showers* v. *Assessment Committee of Chelmsford Union* (11)). The building was the scene of the spiritual life of the religious community, and was governed solely by the Rule of the Order of the Sisters of Mercy. The user of the building by the Sisters as nuns was a duty enforced by their vocation and should not be treated as negligible, notwithstanding the judgment of the majority of the Full Court of New Zealand in *Peters* v. *Mayor &c. of Cambridge* (12), which judgment is directly opposed to the judgment of *Chubb* J. in *Duhig* v. *City of South Brisbane* (10). The undisputed evidence establishes also a

(1) (1877) 2 App. Cas. 574.
(2) (1892) 4 Q.L.J. 151.
(3) (1899) 80 L.T. 566.
(4) (1915) 2 K.B. 170.
(5) (1921) 29 C.L.R. 98.
(6) (1909) V.L.R. 113; 30 A.L.T. 194.
(7) (1920) 28 C.L.R. 203, at pp. 207, 208.
(8) (1909) 9 S.R. (N.S.W.) 732; 26 W.N. (N.S.W.) 137.
(9) (1868) 7 S.C.R. (N.S.W.) 407.
(10) (1921) Q.S.R. 133.
(11) (1891) 1 Q.B. 339.
(12) (1926) N.Z.L.R. 849.

substantial user for private worship, and as a sanatorium or rest home, and that the nuns enjoyed a particular benefit from their use of the lands in the opportunities afforded to them for the proper performance of their spiritual duties and in the provision for each of them under the Rule of the Order of a life-long home. The land thus subserves their private purposes and therefore could not be used exclusively as a school (*President, Councillors and Ratepayers of the Shire of Ferntree Gully* v. *Johnston* (1) ). Moreover, the number of resident nuns was wholly in excess of the number of resident teachers required for the school as a boarding school.

The school is not a public school. It lacks most of the characteristics referred to by *Fry* L.J. in *Blake* v. *Mayor &c. of City of London* (2), having neither a perpetual foundation nor management by a public body, and is a school conducted by private persons—for nuns are essentially private persons—for profit. (Cf. *Dilworth* v. *Commissioner of Stamps* ; *Dilworth* v. *Commissioner for Land and Income Tax* (3).) The question of actual gain is not an essential part of the use of the land for profit (*R.* v. *Sterry* (4) ; *R.* v. *Agar* (5) ; *R.* v. *Inhabitants of St. Giles, York* (6) ; *Brighton College* v. *Marriott* (7) ). The character of a school as private or public depends upon the true object of the school (*Girls' Public Day School Trust* v. *Ereaut* (8), per Lord *Macmillan*). The only avowed object of respondent's school is to be found in its prospectus, which clearly indicates it to be a private boarding school, commercial school, and music school intended to be carried on for gain. The inspection of the school by Government inspectors is purely voluntary, and the Sisters expressly denied the existence of any State right of control, and no institution can fairly claim to be a public institution unless it is subject to some form of public control (*Meaney* v. *Waratah Municipal Council* (9) ). [Counsel also referred to *Cardinal Vaughan Memorial School Trustees* v. *Ryall* (10) and *Birkenhead School Ltd.* v. *Dring* (11).] On the question of vesting, respondent's

(1) (1909) V.L.R. 113 ; 30 A.L.T. 194.
(2) (1887) 19 Q.B.D. 79, at p. 82.
(3) (1899) A.C. 99, at p. 108.
(4) (1840) 12 A. & E. 84, at p. 90 ; 113 E.R. 743, at p. 745.
(5) (1811) 14 East 256 ; 104 E.R. 599.
(6) (1832) 3 B. & Ad. 573 ; 110 E.R. 208.
(7) (1926) A.C. 192, at p. 202.
(8) (1931) A.C. 12, at p. 35.
(9) (1923) 40 W.N. (N.S.W.) 106.
(10) (1920) 7 Tax Cas. 611.
(11) (1926) 11 Tax Cas. 273.

H. C. OF A. 1935.

SOUTHPORT CORPORATION v. CORPORATION OF THE TRUSTEES OF THE ORDER OF THE SISTERS OF MERCY IN QUEENSLAND.

claim is that the land is vested in it under the *Religious Educational and Charitable Institutions Act* 1861, and also under the *Real Property Acts* 1861 and 1877. The first-mentioned Act is purely an enabling Act, while the *Real Property Acts* are conveyancing statutes only. None of the Acts mentioned could or has conferred any title whatsoever upon the respondent—vesting being done in its case by assurance only. The only case which would come within the purview of the section would be where the actual title to the land is created by the statute, or possibly by an Order in Council made thereunder, and where the land, the donor and the purpose of the trust are all designated by such Act or Order in Council. In the present case no trusts appear on the face of the certificates of title for the land.

*Macrossan* (with him *Macgroarty*), for the respondent. The school admittedly carried on by the respondent is a public school. It is open to all the public, with no restrictions as to religious belief, and affords a free education to a large number of the public. It is subject to inspection by Government inspectors, and is recognized as a school suitable for the training experience of pupil teachers seeking admission to the public service. It is not carried on for private profit, and the body conducting the school has obtained the recognition of the State by its registration under the *Religious Educational and Charitable Institutions Act* 1861. No particular characteristics can be claimed to be an essential of the existence of a public school (*Girls' Public Day School Trust* v. *Ereaut* (1) ), and the present case is indistinguishable from *Duhig* v. *City of South Brisbane* (2) and *Cardinal Vaughan Memorial School Trustees* v. *Ryall* (3). The school also fulfils the conditions prescribed by *Lopes* L.J. in *Blake* v. *Mayor &c. of City of London* (4), in that a sufficiently large number of the public receive education there, either gratuitously or to a great extent gratuitously. The trusts upon which the school property is held need not appear upon the title, but may be established *aliunde* (*Roman Catholic Archbishop of Perth* v. *Perth Road Board* (5) ). The school as now conducted would come within the

(1) (1931) A.C. 12.
(2) (1921) Q.S.R. 133.
(3) (1920) 7 Tax Cas. 611.
(4) (1887) 19 Q.B.D. 79.
(5) (1933) 49 C.L.R. 37, at p. 43.

definition of a public institution (*Royal Masonic Institution for Boys (Trustees)* v. *Parkes* (1)). As to exclusive user, here the predominant user was for a school. The evidence shows that the building was built for a school, and the presence of the nuns is only an incidental part of the carrying out of the work of the school. Intentions of the persons using the land are irrelevant, user alone being the determining factor under the sub-section relied upon. The question for the Court's consideration is the secular occupations of the persons occupying the land, and the religious life of the Sisters does not affect the position (*Peters* v. *Mayor &c. of Cambridge* (2)). An incidental or subordinate user will not defeat an exemption granted to a dominant or functional user (*Roman Catholic Archbishop of Sydney* v. *Metropolitan Water, Sewerage and Drainage Board* (3), per *Higgins* J.). [Counsel also cited *City of Christchurch City Corporation* v. *Christ's College* (4); *Mayor &c. of Christchurch* v. *Boland* (5); *Franklin County* v. *Wesley Training College Board* (6); *O'Farrell* v. *Council of the Municipality of Bathurst* (7); *Leicester County Council* v. *Assessment Committee of Parish of Leicester* (8); *Whatmore* v. *Council of the Municipality of St. Peters* (9); *Municipal Council of Sydney* v. *Prince Alfred Hospital* (10).] As to the vesting of the land under sec. 216 (iii.), the land is presently vested in the respondent, i.e., held by it under the provisions of the *Real Property Acts* (see per *Shand* J. in *Brisbane City Council* v. *Sir Alfred Cowley* (11)), and under sec. 1 of the *Religious Educational and Charitable Institutions Act* 1861, is held for the use and purposes of the respondent institution as defined by the Rule of the Order. Those purposes are public charitable purposes (*Cocks* v. *Manners* (12); *In re Delaney*; *Conoley* v. *Quick* (13)). With respect to the alleged user as a sanatorium, the user proved was for Christmas holidays only, and the land would under that head, if ratable at all, only be ratable for the period of such holidays. The user of the premises is severable both as to the time of occupation and the respective parts of the land occupied for separate purposes.

(1) (1912) 3 K.B. 212.
(2) (1926) N.Z.L.R., at p. 854.
(3) (1928) 40 C.L.R. 472, at p. 479.
(4) (1920) N.Z.L.R. 662.
(5) (1910) 30 N.Z.L.R. 57.
(6) (1926) N.Z.L.R. 512.
(7) (1923) 40 W.N. (N.S.W.) 78.
(8) (1898) 78 L.T. 463.
(9) (1926) 43 W.N. (N.S.W.) 184.
(10) (1934) 51 W.N. (N.S.W.) 145.
(11) (1919) Q.S.R. 86, at p. 95.
(12) (1871) L.R. 12 Eq. 574.
(13) (1902) 2 Ch. 642.

H. C. OF A. 1935.

SOUTHPORT CORPORATION v. CORPORATION OF THE TRUSTEES OF THE ORDER OF THE SISTERS OF MERCY IN QUEENSLAND.

Here the dominant feature of the user, both as to time and place, was the user as a public school.

*A. D. Graham*, in reply. The dominant user was as a convent. The whole premises owe their origin to the existence of the religious body, and the school is the outward expression of the performance of the duties created by the Rule of that body, under which Rule the whole institution is at all times governed. In *Brisbane City Council* v. *Sir Alfred Cowley* (1) the title was held under a nomination of trustees which declared the trust and is thus distinguishable, if indeed good law, from the present case. In both *Duhig* v. *City of South Brisbane* (2) and *Royal Masonic Institution for Boys (Trustees)* v. *Parkes* (3) strong reliance was placed on the fact that a Government grant was being made to the school and institution, a factor which is wanting in the present case.

*Cur. adv. vult.*

July 11.

The following written judgments were delivered :—

RICH AND DIXON JJ. In this appeal the question is whether certain premises in the town of Southport occupied by the Order of the Sisters of Mercy are exempt from rating. Two exemptions are relied upon of those contained in sec. 216 of the *Local Authorities Act* 1902-1934. The first we shall consider is an exemption of land used exclusively for a public school (par. vi.). The premises consist of a substantial area of land upon which buildings have been erected, and a tennis court and other places of exercise have been made. There are two buildings connected by a covered way. The smaller of these is fitted as a school room or rooms and is a one storey building. It is used as an infants' school. The larger building consists of two storeys. The ground floor contains a class room and a dining room for the use of pupils, and music rooms. It also contains a chapel, sacristy, a refectory, a parlour and a kitchen. The upper storey contains a dormitory for pupils and some cells or bedrooms, and a community room for the use of nuns. Upon these

(1) (1919) Q.S.R., at p. 95. (2) (1921) Q.S.R. 133.
(3) (1912) 3 K.B. 212.

premises a school has for many years been conducted by the Sisters of Mercy. It consists of an infants' school and a primary school for girls. It is attended by about one hundred and fifty scholars of whom some sixteen to twenty are boarders. A large percentage of the day scholars are received without fee, and the fees charged to the boarders are lower than would be necessary to defray the cost of their education and board. Twelve Sisters including a Sister Superior of the Order reside in the larger building. Three maids are employed at a wage. The Sisters of the Order carry on the teaching. The school is called "Star of the Sea Convent School Southport."

The Order of the Sisters of Mercy is a religious society or congregation of the Roman Catholic Faith. They are governed by the rules of their Order. The vows of the Order include a vow of poverty and a vow of obedience. The Sisters of the Order are enjoined, besides attending particularly to their own perfection, which is the principal end of all religious institutes, also to have in view what is the peculiar characteristic of the congregation, which is the most assiduous application to the education of poor girls, the visitation of the sick, and the protection of poor women of good character. The rules of the Order elaborately set out the duties of the members and impose upon them the performance of religious duties, which explains the mode in which the upper floor of the building now in question is appointed. Members of the Order live in a community and according to Rule.

Of the three subsidiary purposes of the Order, viz., the education of poor girls, visitation of the sick and the protection of poor women, in Queensland the first, the education of poor girls, has assumed the greatest prominence. In practice at Southport the Sisters of Mercy do not neglect the visitation of the sick where occasion calls for it, but it is not permitted to interfere with their chief work, that of teaching. Throughout the school year each of the twelve Sisters ordinarily residing upon the premises takes some part in the conduct of the school and the teaching or care of the pupils. But it is evident that, according to the usual practice in ordinary schools, so many as twelve would not be necessary to conduct such an establishment if it were a secular school. During the school holidays Sisters, who reside at other convents or convent schools, are sent to reside in

H. C. OF A. 1935.

SOUTHPORT CORPORATION v. CORPORATION OF THE TRUSTEES OF THE ORDER OF THE SISTERS OF MERCY IN QUEENSLAND.

Rich J. Dixon J.

the community at Southport, which is a seaside resort. They are sent for change and refreshment. The scholars attend a weekly service in the chapel, and those who are boarders use it also for prayer and meditation. In this way it forms an important part of the school as well as serving the purposes of the Sisters of the Order. Occasionally strangers attend services at the chapel, probably by invitation. Both in the school prospectus and in letters from the Sister-in-Charge, the Institution is called a convent, the Star of the Sea Convent of Mercy.

Upon the terms of the exemption, two questions arise. Is the land used exclusively for a school ?. If so, is that school a public school ? The considerations relied on to show that the school is a public school within the meaning of the exemption have not been included in the above statement, which is directed rather to the first question. The great difficulty of sustaining the claim to the exemption lies in the requirement that the use of the premises for a school shall be exclusive. The Order of the Sisters of Mercy is active in teaching. It was because a school was considered necessary at Southport that the Order there established itself. Without a school, or the need of a school, there would have been no convent. But it is a religious order of a conventual character. Large as the school necessarily looms in the use of the land, the residence of the Sisters upon the land cannot be referred to the use of the land as a school without doing some violence to the true conception of their vocation. The communal and religious life which forms a necessary part of the life of the members of the Order cannot be conducted except at some defined place. The Sisters of the Order are not in the position of teachers who dwell at a school for the convenient discharge of their duties as teachers. They dwell together because they have devoted their entire existence to the purposes of an Order, the members of which live in a community. The school is indistinguishable from the convent and the convent from the school, because they form an entirety in the work and life of the Sisters. The number of the Sisters dwelling together, the appearance of other Sisters during the school holidays, the chapel, the sacristy, and the cells are all the consequence of the nature of the life of the Order. The land supplies the place upon which the entire institution is conducted.

If it had not been for the unfortunately framed exemption, no one would, we think, have regarded the institution as a school to the exclusion of a convent, nor, on the other side, would it have been represented as a convent divisible from the school. The land is used for a single and indivisible institution, the dominant activity of which is the conduct of a school. But the conclusion that the use of the land for a school is not exclusive cannot be avoided, except by regarding the conventual life of the nuns as a mere incident of the school. To so regard it appears to us plainly to be an error.

For these reasons the claim to the exemption as land used exclusively for a school fails.

The second exemption relied upon under sec. 216 (iii.) is "land vested in or for the time being placed under the management or control of any person or corporation under or in pursuance of any statute for the purposes of public charities."

The land has been vested in the respondent corporation by transfer. The respondent corporation was constituted by letters patent pursuant to the *Religious Educational and Charitable Institutions Act* 1861. By sec. 1 of that Act the persons erected into a corporation are "capable to receive purchase acquire and possess to them and their successors so called or appointed to and for the uses and purposes of the said corporation and of the religious or secular institution by which such person or persons and their successors shall be . . called or appointed in accordance with the rights laws rules or usages of the community or institution to which" he or they "belong." It is said that the land is vested in the corporation in pursuance of this statute for the purposes of the Order which is a public charity. The plain answer is that the statute gives corporate existence and capacity to receive and hold the land for such purposes, but does no more. The land is not vested under or in pursuance of the statute; it vests by assurance, that is by transfer and registration.

The result is that the appeal must be allowed. The order of the Full Court and the judgment of *Hart* A.J. must be discharged. In lieu thereof the action must be dismissed.

The appeal was brought to this Court by special leave, and was permitted only upon terms. The order of the Court granting special leave has not been correctly drawn up. The terms

H. C. OF A. 1935.

SOUTHPORT CORPORATION v. CORPORATION OF THE TRUSTEES OF THE ORDER OF THE SISTERS OF MERCY IN QUEENSLAND.

were that the costs of the appeal should abide the order of the Court, not of the application for special leave. We would be disposed to order that the appellant pay the costs of the appeal, but in all the circumstances of the case, including the difficulty of the exemptions and the differences of opinion which they have evoked, we think justice will be best served by ordering that the parties abide their own costs of the proceedings in this Court and the Supreme Court.

McTIERNAN J. The claim for exemption which raises the more difficult question is that the subject land is used for a public school. But in order to sustain the claim for exemption upon that ground it must be established that the land is used exclusively for a public school. The land is occupied by a set of buildings containing all the appointments of a convent and a girl's school. I cannot escape from the conclusion that the use to which the land is put is not solely that of a school, but is that of a convent which comprises a school. No doubt the school presents the appearance of dominating the use of the land, but the use of the land as a convent is not insignificant or inconsiderable, and fulfils part of the purposes of the Order which occupies the land. It must be remembered that the exemption is rigid, requiring as it does that no other use should be made of the land than that of a public school. Everything which is done on the land must therefore arise in the course of carrying on a public school and be strictly incidental to that exact purpose. To treat the convent as an incident in the organization of the school is to invert the order of ideas. It is not a mere teachers' residence attached to the school. It is not to the point to say that, but for the need of the school, there would be no convent at Southport. Once the need of a school led to the Sisters of Mercy coming to Southport, the establishment of the school was necessarily accompanied by the establishment of a convent. All this case is concerned with is the nature of the use of the land, and the dual use, in my opinion, makes it impossible to say that the land is not used for any purpose but that of a school. The existence of two active purposes is inconsistent with the exclusive use of the land for a

public school. This view which the Court is constrained to adopt makes it unnecessary to examine the difficult question of what constitutes a public school within the meaning of sec. 216 of the *Local Authorities Act* 1902-1934.

I agree that the claim for exemption founded on par. iii. of sec. 216 also fails for the reasons contained in the joint judgment of *Rich* and *Dixon* JJ.

The appeal should be allowed. I agree with the order as to costs, which will be read by *Rich* J.

*Appeal allowed. Judgment of Full Court set aside and judgment of Hart A.J. discharged and in lieu thereof action dismissed.*

Solicitor for the appellant, *J. T. B. Price*, for *K. B. Price*, Southport.

Solicitors for the respondent, *Bergin, Papi & Finn.*

B. J. J.