

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of The  
Mayor, &c. of Essendon and Flemington v.  
Blackwood (Chairman of the Victoria  
Racing Club), from the Supreme Court,  
Victoria; delivered 14th May 1877.*

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Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS appeal is from a judgment of the Supreme Court of Victoria, which affirmed the decision of a Court of General Sessions of the Peace, disallowing a rate, made by the Council of the Borough of Essendon and Flemington, on a racecourse vested in the Respondent, as Chairman of the Victoria Racing Club.

The description in the rate is "Trustees of Racecourse—Racecourse," and the assessment is made on a net annual value of 2,500*l.*

The racecourse is held by the Respondent under a demise from the Crown, in trust for the club, and for the purposes of "The Victoria Racing Club Act, 1871."

The question to be decided is whether the racecourse falls within the exemption from rateability contained in the 253rd section of the Colonial "Local Government Act, 1874." That section enacts, that "all land shall be rateable property" save "land the property of Her Majesty which is unoccupied or used for public purposes, land in the occupation of the Crown or the Government of Victoria,"

and land held or used under certain specified conditions to which it is not necessary to refer.

The Respondent contends that this racecourse is "the property of Her Majesty used for public purposes;" the Appellants say that at the time of making the rate it was neither the Crown's property nor used for public purposes.

The history of the racecourse and of the club is found in the preamble of "The Victoria Racing Club Act, 1871."

A grant from the Crown (21st September 1859) was made of certain lands (said to contain 301 acres) to Mr. Ligar, and four other persons, for twenty-one years, at a peppercorn rent, upon trust that it and the buildings to be erected on it should throughout the term "be set apart, maintained, and used as a public "racecourse," subject to such reasonable rules and regulations for the admission of the public; and the price to be paid for such admission as the trustees should in writing resolve on.

Power was given to the trustees to raise money to be applied in furtherance of the purposes of the grant, and to charge the admission prices with the payment of the money so raised.

The preamble further states that in 1864 the racing club was formed, and with the consent of the above trustees had "now" the control and management of the racecourse, and that the club had expended considerable sums of money in improving the course, and in erecting good and substantial buildings and fences on it, and proposed to expend further monies to a considerable amount in erecting a new grand stand and other buildings.

Such was the state of things when the Racing Club Act of 1871 was passed.

It enacts (section 3) that the club may sue and be sued in the name of the chairman, and

(section 6) that execution may issue on judgments against the chairman upon the property of the club, except the land vested in or demised to him under the Act.

Section 7 enacts that Ligar and the other lessees shall cease to have any interest under the grant of 1859, and that the land demised by it shall be vested in the chairman and his successors "in trust for the club," as if he and they were a corporation sole, for the term and upon the trusts mentioned in the grant.

The 8th section empowers Her Majesty to demise the same land and any contiguous land to the chairman and his successors for any term of years.

In pursuance of the powers conferred by this section, the Crown, by a grant of the 8th January 1872, demised the racecourse to the Respondent and his successors for the term of 99 years, at a peppercorn rent, to be held by them "in trust for the Victoria Racing Club, for the purposes of the Victoria Racing Club Act."

The 10th clause of the Act is as follows:—

"The lands by this Act vested in or authorised to be demised to the chairman shall be held by such chairman and his successors in office only for the purpose of being maintained and used for a public racecourse, under and subject to the provisions of this Act, and any byelaws to be made under and by virtue hereof, and save as herein expressly provided, shall not be used, demised, or let for building purposes, or unless with the permission in writing of the Board of Land and Works first had and obtained, for any other purpose whatsoever."

It is unnecessary to consider whether the term of 21 years granted by the original lease has merged in the larger term, for the 11th section

declares that the land so granted shall be  
 “ vested in the chairman for the purposes men-  
 “ tioned in the 10th section.”

Powers are given to the committee of the club to maintain the existing buildings on the land, and to erect such others as may in their opinion be expedient “for or in connection with  
 “ the use of the land as a public racecourse ” (section 12); also to make byelaws for the election of members to the club, and the expulsion of members, and for the management of the affairs of the club, and also for regulating all matters concerning the racecourse, “and the  
 “ admission thereto and expulsion therefrom of  
 “ members of the club and the public respec-  
 “ tively, and the charges to be paid for such  
 “ admission, and for the general management  
 “ of the racecourse, races, and race meetings ” (section 13).

It is to be observed that the Act provides for two classes of byelaws, one regulating the club, the other the racecourse.

The 24th section enables the committee to prescribe by byelaws, the tolls and charges to be levied for admission to the racecourse, and the buildings thereon, and to demand and recover them from any person coming upon the land or buildings; but it contains a very material provision in favour of members of the club, viz., that “the committee may in any such  
 “ byelaw provide that members of the club  
 “ shall be exempt, either wholly or to such  
 “ extent as such byelaw shall specify, from  
 “ the payment of all or any of such tolls or  
 “ charges.”

Provision is made that byelaws shall not be in force until a month after they have been notified to the Chief Secretary of Victoria, within which period they may be disallowed by the Governor in Council (section 14), and for

their publication in the Gazette (section 15). The Governor in Council may repeal byelaws (section 18).

Other sections provide that they shall be exhibited on the racecourse, and prescribe penalties for offences against them (sections 18-20).

Power is given to the chairman to let from year to year, or for a less time, any portions of the racecourse or the tolls demandable under the Act (section 25).

Power is also given to the chairman to borrow on the credit of the rents, profits, tolls, and other revenue of the club, 15,000*l.*, and to mortgage the revenue to secure it, and to re-borrow to that amount; the money to be applied in the permanent improvement of the land for racing purposes, or in the erection and maintenance of buildings, or for rendering the land more convenient and useful for racing purposes (sections 26, 27, 28).

Provision is made for an annual audit of the accounts of the receipts and expenditure of the club by an auditor appointed by the Board of Land and Works; and such accounts are to be open to the inspection of the public (38 and the following sections).

The 43rd section enacts that if the land shall, except with the consent of the Governor in Council, cease for 12 months to be used as a public racecourse, or be applied to any other purpose, it shall revert to Her Majesty for the benefit of the public (section 43).

To this provision, however, there is attached a condition (material to be considered with reference to the question to be now determined), that the Crown shall not be entitled to resume possession without previously paying to the chairman "In trust for the club" the value of all buildings then upon the land, to be deter-

mined in case of dispute under the Lands Clauses Consolidation Act (section 44).

It is to be noticed that the Act assumes that the club may possess real and personal property, other than the land derived from the Crown, and vests such property in the chairman and his successors, in trust for the club (section 9).

It appears from the evidence stated by the Court of Sessions that large sums have been expended by the club in erecting a grand stand, ranger's house, horse boxes, and other buildings, the grand stand alone having cost 14,000*l.* On the other hand, large profits have been derived from the race meetings, as much as 13,887*l.* having been received at one meeting, upon which there was a net profit of 4,497*l.* Large profits also have been made by fees for the use of the racecourse as training ground, and by the sale of the right to sell liquor, and for sheep depastured on the racecourse. The receipts, it is stated, go to the funds of the club.

It is also stated that "the members of the club have certain privileges, so far as the grand stand, saddling paddock, and hill are concerned, and pay 5*l.* a year."

If this racecourse, with all the above conditions, had been held under a grant from a private owner, it could not have been disputed that it would be rateable. It is exempt only, if, being Crown property, it is used for a public purpose.

In their Lordships view, it is extremely doubtful whether it can be predicated of this land that it was, at the time and for the purpose of rating, the property of Her Majesty. It was then vested in the Respondent, and his successors, for a term of 99 years, with a modified power of sub-letting. The Crown had a reversion only, and was no longer the present and immediate owner of the land. If the proposition that



the property is the Crown's be correct, it might have been affirmed with equal truth had the term been 500 years instead of 99 years.

By the interpretation clause of the Colonial "Local Government Act," the words "owner of any rateable property" are declared to mean "the person for the time being entitled to receive, or who, if the same were let to a tenant at a rack rent, would be entitled to receive the rack rent thereof;" and by the 290th section, unpaid rates, in default of payment by the occupier, may be recovered from such owner. It was conceded that if the Respondent should let the land, the tenant, as occupier, would be liable to be rated; and it seems plain that if such tenant were in default, the rates might be recovered from the Respondent as, within the meaning of the Act, the owner of the land.

Undoubtedly if a grant were made by the Crown to its own nominee, as a bare trustee for exclusively public purposes, it might properly be held that the land, within the meaning of the exemption, was still the property of the Crown.

But is that the character of the Respondent's holding?

In coming to the consideration of this question, their Lordships assent to what was suggested by Mr. Thesiger, in his able argument, that the two questions of property and public use in some degree run into each other.

It is not easy, nor is it necessary to define, generally, what is meant by the words of the exemption "the property of the Crown used for public purposes," though land used for the public service, or as a public park, may be mentioned as instances which would clearly fall within them. But it may well be doubted, whether a racecourse to be enjoyed by those only of the public who are able and willing to

pay for admission (all others being liable to be punished as trespassers—section 21) can be deemed to be so used.

Their Lordships, however, do not think it necessary to decide the appeal on this point, being of opinion that, in order to bring the case within the exemption, the Respondent ought to show that the land was used solely for public purposes, without any beneficial occupation by individuals; and this, they are of opinion, he has failed to do.

The Chief Justice of the colony took this view of the exemption in a case where the tolls of a bridge had been let for seven years to a builder, to enable him, it was said, to repay himself the cost of building it. The bridge having been found to be the property of the Queen, Stawell C. J., said: "The only question, therefore, is whether it was used for public purposes. To be deemed so, it must be purely and solely used for such purposes. Here the public had, no doubt, a right of passage over the bridge, but only on payment of a toll; so that it was not for public purposes only, it subserved a private purpose also, and was therefore rateable." (*Hanna v. Seymour Road Board*, 2 W. W. and A. B. 93).

The Respondent's trust is two-fold. He holds in trust for the club, and for the purposes of the Special Act. No doubt there is some indication in the Act that these purposes were of a public nature. The sanction of the Governor in Council required for the byelaws, and the power given to the same authority to repeal them, the audit of the accounts by an auditor appointed by Government, and the direction that the accounts shall be open to the public, tend to show that in some sense the racecourse is what it is called, "a public racecourse;" but these are not conclusive tests,



since some commercial companies of a public or *quasi* public nature have been made subject by statutes to not dissimilar conditions. But, together with the trust for these purposes, there is the trust for the club, and it is plain that there are many special privileges and profits to which the members of the club, as such, are entitled, differing in kind from any which the general public can enjoy. Nor were these privileges conferred without consideration. The members of the club had voluntarily expended large sums of their own money in buildings and other improvements before the land became vested in them, and proposed to spend further monies for the same purpose. It was, therefore, not unreasonable that they should have special privileges, and an interest in the profits to be derived from the racecourse.

Thus the 24th clause enables the committee, in framing the byelaws prescribing the tolls and charges to be taken on admission, to exempt the members of the club wholly or in part from such tolls and charges; and, although the byelaws have not been produced, it was not denied that this exemption has been made. There is nothing in the terms of the trust (if no byelaw was made to the contrary) to prevent the members of the club having access at all times to the racecourse and the buildings on it without payment; and they have, as stated in the case, certain privileges "so far as the " grand stand, saddling paddock, and hill are " concerned."

It is true the members pay an annual sum of 5*l.*; but this is obviously the subscription to the club, and in respect of it they, as members of the club, obtain privileges of an exclusive character, greatly coveted and valued by those engaged in racing pursuits, which constitute a beneficial enjoyment of the land beyond that of the general public.

Further, the club, as a club, has a pecuniary interest in the rents and profits of the racecourse.

The Act contains no express trust for the appropriation of these profits, but a trust may be implied from the 24th section that they should be applied to the maintenance of the racecourse, and the use of it for racing purposes. No provision is made for the appropriation of the surplus profits after these purposes are fulfilled, and their Lordships see no reason to suppose that they might not be properly applied to repay the monies which the club may have expended for the buildings placed upon the land. This would obviously be a benefit to its members derived from the profits of the land.

Not only so, but by the express provision of the 44th section, on the contingency of the land reverting to the Crown in case it shall cease to be used as a racecourse, the club would receive a large pecuniary benefit in being paid the value of all the buildings on the land. It is evident that the cost of these buildings might have been defrayed entirely, or in great part, out of the profits derived from the racecourse. In addition to any monies which the club, out of its own funds, may have spent on buildings, either before or after the Act, the 15,000*l.* which the Respondent was empowered to borrow on the credit of the tolls and rents, may have been expended for the same purpose. All buildings thus placed on the land were to be maintained out of the profits of the racecourse, and the money borrowed to erect them might have been wholly repaid from the same source; yet in the event of the cesser of the term, the Respondent would receive in money the full value of all those buildings.

The only trust declared of this money is "for the club." Its members, therefore, would be

absolutely entitled to it, subject to no obligation to apply it to any public purpose whatever.

The Judges below do not deny that a beneficial interest may accrue to the club in this respect; but say that as a forfeiture and consequent resumption are not to be presumed, "they are not to suppose that the value of the buildings will be received by the club." Such a contingency, however, might very possibly happen. Supposing the profits to be insufficient to maintain the racecourse, it is not likely the club would keep it open at a loss, and resumption might then take place. Besides, these provisions, coupled with those already commented upon, afford tests for determining whether or not the land was vested in the Respondent as a bare trustee, for a public purpose only.

The Respondent's counsel sought to support their contention that the use of land as a racecourse was a public purpose by referring to the 6th clause of The Victoria Land Act, 1869, which enables the Governor to reserve from sale Crown lands which, in his opinion, are required "for any public purpose whatsoever," or "for the recreation, convenience, or amusement of the people;" but a comparison of this clause with the exemption clause of the Local Government Act does not assist the Respondent. The words "for the recreation, &c. of the people" are not found in this exemption clause, and the introduction of them into the 6th clause of the Land Act, indicates that the previous words "for any public purpose" may have been used in a sense which would not include objects of this nature.

It is unnecessary to refer at length to the English decisions. In this country the exemption of Crown property rests on the omission in the Poor Law Acts of any words to bind the Crown. In Victoria the exemption is defined

and limited by express enactment. So the class of cases in England, which declared that land used for public purposes and from which the occupiers derived no individual profit was exempt from rateability, derived their authority simply from being decisions of the Courts. These decisions were swept away by the judgment of the House of Lords in the *Mersey Docks v. Cameron* (11 H.L. 443), which determined in effect that, except in the case of the Crown, a liability to be rated attached upon every occupation from which benefit is derived, although the occupation was for purposes which might be deemed to be of a public nature. Even when the above mentioned class of cases was considered to declare the law, Lord Campbell, in *R. v. Harrogate* (2 E. & B., 184), said, "You have to show that all the purposes to which the money was applied are public."

Their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court and the decision of the Court of General Sessions be reversed; and the Court of Sessions having reserved the question of the amount of the rate until the question of the liability of the Respondent to be rated had been decided by the Supreme Court, they will further advise Her Majesty to direct that the case be remitted to the Court of General Sessions, with a declaration that the Respondent is liable to be rated for the racecourse, for the purpose of that Court determining the amount of the assessment. Their Lordships think that each party should pay his own costs in the Supreme Court; and Her Majesty will therefore be further advised to direct that the costs (if any) which may have been paid by the Appellants to the Respondent, under the rule of the Supreme Court of the 4th July 1876, be repaid by the Respondent to the Appellants.

The Respondent must also pay to the Appellants the costs of the appeal to Her Majesty.