CASE NOTES

MEERE v. CITY OF SANDRINGHAM[1]

Evidence – Estoppel by Record – Res Judicata – Judgment in Rem

Pursuant to powers conferred by the Local Government Act 1946[2] to execute schemes for the construction of private streets at the expense of the owners of fronting premises (provided that the street has not been previously constructed under the Act 'or any corresponding previous enactment'[3]) a municipal council prepared in 1948 a scheme to include a certain S Street. Some work had been done on S Street prior to 1891, and an objection[4] that the application of Part XIX, Division 10 thereto was accordingly precluded was upheld and the scheme quashed by a stipendary magistrate. The decision was not appealed from, but in 1952 the Victorian Supreme Court defined[5] 'any corresponding previous enactment' in s. 575 as any corresponding enactment before the Local Government Act 1891.[6] As the work on S Street had been done before 1891 it followed that the quashing of the scheme on the above ground was wrong.

In 1954 the council included S Street in another scheme.[7] Objectors contended,[8] and a magistrate held, quashing the scheme, that the 1948 decision established, by a judgment *in rem*, the status of S Street and that the council was thus estopped from contending that it was a street which may be lawfully made under the relevant parts of the

[1] [1956] V.L.R. 638. Supreme Court of Victoria; Lowe, Gavan Duffy and Dean JJ.
[2] Part XIX, Division 10 or Part XLII.
[3] Local Government Act 1946, s. 575.
[4] Local Government Act 1946, s. 578: '. . . (3) . . . the council shall refer all objections made to the scheme pursuant to this section to the nearest or most convenient court of petty sessions consisting of a police magistrate sitting alone . . . (4) The court after hearing representations of the council and of all owners who have objected as aforesaid and who wish to be heard, shall consider the objections made as aforesaid to the scheme and may uphold any such objection in whole or in part or overrule any such objection and shall approve the scheme with or without modification or alteration or quash the scheme accordingly . . . (5) The court may if it thinks fit hear any person, as well as the council and objectors, who may be affected by the determination of the court and may direct notices to be sent to any such person informing him accordingly . . .'
[5] *Coy v. City of Sandringham* [1952] V.L.R. 459.
[6] *Ibid.*, 468-469, *per* Smith J. '. . . There is little difference between the form of the provisions in the 1891 Act and their form in the present Act. But when the 1891 provisions were enacted they were a new departure and differed widely from any legislation which had previously been in force. And an examination of the relevant provisions makes it clear, in my opinion, that none of the legislation earlier than section 111 of the 1891 Act answers the description "corresponding previous enactment" in relation to division 10 of part XIX of the 1946 Act.' See also *per* Martin J., *ibid.*, 465.
[7] Local Government Act 1946, s. 587 (5) (as amended by s. 22 (1) of the Local Government Act 1949): 'Notwithstanding that a scheme for the construction of a private street . . . (a) after being prepared is not adopted by the council; (b) after being adopted by the council is quashed by the court; or (c) is abandoned in whole or in part pursuant to this section or any corresponding previous enactment – the council may subject to this division prepare adopt and, when finally settled, execute another scheme for the construction of such street.'
[8] *Supra*, n. 4.

Act. The council obtained an order *nisi* to review this decision on the following material grounds:

(a) The 1948 decision was made without jurisdiction and was thus ineffective to create an estoppel.
(b) There was insufficient evidence to create an estoppel, the court record of the 1948 decision being inadmissible as evidence in the 1954 hearing.
(c) Section 587 (5)[9] of the Local Government Act 1946 operated to exclude the doctrine of estoppel in relation to part XIX of the Act.

Smith J. referred the matter to the Full Court which discharged the order *nisi*, Lowe and Gavan Duffy JJ. holding that the magistrate had rightly quashed the 1954 scheme.[10]

Wakefield Corporation v. Cooke,[11] in which the facts and legislation under review were not materially distinguishable from those in the present case, was unanimously treated as authority against contention (a) *supra*. The House of Lords in that case held that the determination by a court of summary jurisdiction that a street was a highway repairable by the inhabitants at large was a judgment *in rem* and conclusive as to the status of the street, and the question whether it was so repairable was *res judicata* in any future proceeding. Whether or not the order made by the inferior court is conclusive of the nature of the street is dependent on whether or not the nature of the street is a substantive issue which the justices have jurisdiction to determine.[12] The council alleged that the only decision committed to the magistrate by section 578 (4) is to approve or quash the scheme, and that any matters determined whilst reaching this decision are merely ancillary and not final. Gavan Duffy J. observed that the quashing or approving is to be done according to the finding that there is or is not a valid objection to the scheme; the court is given a clear jurisdiction to decide whether an objection is valid or not; the magistrate held the objection valid in the present case because the street had been made previously.

Gavan Duffy J. (with whom the other members of the court concurred) alone expressed a reasoned opinion on contention (b) *supra* that the magistrate's formal order of 1948, which contained a decision not found in the minute, should not have been received in evidence before the second magistrate and that therefore there was insufficient evidence of such order to support a plea of *res judicata*. Without deciding whether the Court of Petty Sessions was in this context a court of record, Gavan Duffy J. admitted the documents, holding

[9] *Supra*, n. 7.
[10] Dean J. dissented.
[11] [1904] A.C. 31.
[12] Local Government Act 1946, s. 578 (4). *Supra*, n. 4.

that if it was not, the question as to what order the magistrate made is simply one of fact and may be settled by proof appropriate to the determination of a question of fact,[13] and that, considered in this light, there was adequate evidence on which a finding of *res judicata* could be based. If the magistrate's court was a court of record the formal order put in evidence was conclusive of the decision reached.

Their Honours did not distinguish clearly between *res judicata* and issue estoppel but treated their decision as being based on *res judicata*. It is suggested that issue estoppel would have been a more appropriate classification of the final result. The council sought to found a fresh case on a different set of facts in respect of which one ingredient or issue had been necessarily declared by the prior order. This issue could not again be called in question.[14] If this is so there is *a fortiori* no difficulty in admitting the disputed evidence since, the estoppel being limited to this one finalized issue, any material will be recognized which assists in pinpointing it and exposing the reasons leading to its finalization. Dean J. admitted[15] that the magistrate's reasons for his decision were of great assistance. In a true case of *res judicata* only the actual court record, i.e. the pleadings (or cause of action) and final judgment, may be used.[16]

The argument that section 587 (5) of the Local Government Act 1946[17] precluded a plea of estoppel appealed only to Dean J., who considered that that section removed the obstacles of susceptibility to objections and possible quashing by a court from the path of a second scheme conceived after the failure of the first to eventuate for any of the reasons enumerated in the section. His Honour's primary reason for so holding was that it is improbable that Parliament intended that a prior order quashing a scheme should have no effect upon future action by the council and yet prevent a court from approving a scheme validly adopted by the council. The section requires that the order of the court shall not operate as a barrier to the preparation, adoption and execution of another scheme. If a plea of *res judicata* were to succeed, the order quashing the earlier scheme would, in the opinion of Dean J., operate in this manner.

This may have been an attempt, by means of liberal statutory interpretation, to obviate the quaint, albeit logically correct result

[13] *Dyson v. Wood* (1824) 3 B. & C. 449; *In re May* (1885) 28 Ch. D. 516.

[14] For an explanation of the distinction: *Blair v. Curran* (1939) 62 C.L.R. 464, 531, *per* Dixon J.; Fullagar, 'Legal Terminology'. *supra* p. 1, p. 7.

[15] [1956] V.L.R. 638, 647.

[16] *Jackson v. Goldsmith* (1950) 81 C.L.R. 446, 447. *Cf. Weston v. Ray* [1946] V.L.R. 373, where the court failed to make this distinction. The reason for admitting a wider range of evidentiary material to prove issue estoppel than that allowed to prove a plea of *res judicata* is better explained, it is submitted, in terms of the functions of each doctrine than in terms of the 'best evidence' rule as stated by Gavan Duffy J. [1956] V.L.R. 638, 646.

[17] *Supra*, n. 7.

achieved by the majority decision, but it was, it is submitted, effectively answered by the other judges. Section 587 (5) allows another (*i.e.* a different) scheme to be prepared and proceeded with as the Act requires, notwithstanding the ousting of the old one, and is not, as Dean J. implies, a device whereby a scheme, once vitiated, may be resurrected with impunity and take effect without question. The new scheme would be subject to the same dangers as the old; like objections might be lodged and considered and, if they were valid, the scheme quashed. Further, a contrary argument, as Lowe J. observed,[18] rids the words 'subject to this division' in section 587 (5) of much of their true meaning.

The case is a clear example of the bizarre results of which the law is capable when all its proffered facilities are unused; notwithstanding that a decision had subsequently been proved wrong in law, it was allowed to operate as a judgment *in rem* to preclude a later contrary contention. Had the council exercised its right of appeal from the erroneous decision of the magistrate in 1948, its powers under Part XIX of the Local Government Act 1946 would have been recognized.[19] And yet the arguments expressed in the maxims *interest reipublicae ut sit finis litium* and *nemo debet bis vexari pro eadam causa* lack appeal in justifying the result. The practical justification for the decision is seen, however, by imagining the situation had the 1948 order been treated as a mere judgment *in personam* binding only the parties to it. The parties would then be exempt from the street-making expenses whereas the other residents of the street who were not parties, and (unless the doctrine of privity may be invoked) the successors in title to the parties, would enjoy no immunity and be compelled to pay greatly increased dues.[20]

[18] [1956] V.L.R. 638, 658.

[19] *Coy v. City of Sandringham* [1952] V.L.R. 459.

[20] *Semble* nothing but the council's altruism could prevent this, as by section 580 (1) of the Local Government Act 1946—'When the scheme is finally settled the council shall serve on every owner of premises fronting on the street to be constructed notice in writing: (a) requiring payment of the sum for which he is liable under the scheme as finally settled, showing separately (1) the amount which by the scheme is to be recovered from such owner as his share in the cost of the scheme . . .'

An even more curious and less easily justifiable result was reached in *In re Waring. Westminster Bank v. Burton Butler* [1948] Ch. 221. Two tax-free annuitants had equal benefits under a will. In answer to a trustee summons (to which for the purely adventitious reason that she was in an enemy-occupied country one of the annuitants could not be made a party), Farwell J. held ([1942] Ch. 309) that a wartime statute applied to reduce the amount of the annuity payable. This decision was not appealed from, but was later disapproved by the House of Lords in *Berkeley v. Berkeley* ([1946] A.C. 555), and in view of this decision and the amendment of the statute it was sought to have the annuities paid in full. Jenkins J. held that the annuitant who was a party to the decision of Farwell J. was bound to receive the reduced payment, estoppel applying (although, unlike the magistrate's decision in *Meere's* case, the judgment was only *in personam*.) The other annuitant was not so bound, and was entitled to claim retrospectively the full amount of the annuity.

However, the perpetuation, through the logic of a strictly applied procedural law, of an acknowledged error in substantive law does not produce a happy result; to say that it is reprehensible may be doing an injustice to the law; to say that it is jurisprudentially satisfactory would be to acknowledge that the law was doing an injustice to the community, which is entitled to expect that justice will not be 'falsely true'.

R. C. TADGELL

UNIVERSAL GUARANTEE PTY. LTD. v. CARLYLE[1]

Contract – Hire Purchase – Enforceability of Minimum Hiring Clause

The defendant C had signed one of the plaintiff company's printed forms offering to enter a hire-purchase agreement for a refrigerator. Clause 11 of the document stated that on determination of the hiring the company would be entitled to retain all sums paid by the hirer and to 'recover all damages for breach of agreement and also as compensation for the depreciation of goods, the sum, if any, by which the sums previously paid by [the hirer] . . . hereunder, shall be less than that sum, which, together with the value of the goods at the time of such determination . . . and the moneys paid by [the hirer] . . . hereunder, amount to the purchase price of the goods', the 'purchase price' and the 'value' of the goods to be ascertained in accordance with the 1936 Hire-Purchase Agreements Act.[2] The company signed the acceptance form as provided, but by mistake there was also sent to C an inappropriate document purporting to notify acceptance, which, although it agreed with the original form in most details, purported in clause 11 to entitle the company on determination to recover, in all, up to seventy-five per cent of the purchase price.

When C fell into arrears, the company repossessed the refrigerator and sued for moneys allegedly payable as compensation under clause 11 in the original document. At first instance, the stipendiary magistrate upheld the defendant's contentions that the second document constituted the true agreement and that clause 11 therein was a penalty; therefore he dismissed the company's claim. The plaintiff obtained an order to review and in the subsequent hearing argued that it was the first document that constituted the true agreement, which contention Sholl J. upheld. His Honour further held that clause 11 of that document was fully enforceable since it was not a

[1] [1957] V.R. 68. Supreme Court of Victoria; Sholl J.

[2] Although this clause *prima facie* repeats the formula in the Hire-Purchase Agreements Act 1936, s. 4, and apparently is assumed to do so by court and counsel in this case, the clause in fact permits a double deduction for the amount of hire already paid by the hirer – through the company's inadvertance rather than generosity, it seems. This does not affect the result of the case.