REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1928-1929.

[HIGH COURT OF AUSTRALIA.]

THE COUNCIL OF THE SHIRE OF WERRIBEE Appellant;
Defendant,

AND

KERR . . . . . Respondent.
Plaintiff,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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Melbourne, Oct. 29-31.

Sydney, Dec. 3.

Knox C.J., Isaacs, Higgins, Powers and Starke JJ.

Local Government—Compulsory acquisition of land—Land allegedly acquired for purpose of public highway—Real purpose to enable line of pipes permitted by council to be constructed on land by a company in belief that it was a public highway to remain—Action by owner of land to restrain council from proceeding with acquisition of land—Injunction—Local Government Act 1915 (*Vict.*) (*No.* 2686), *Part XVII., Div.* 3, *secs.* 462, 463, 467 (2), 468.

The respondent was the owner of certain land through which there had formerly been a government road. The land comprised in this road had been purchased by the respondent's predecessor in title in 1886. A company obtained the permission of the appellant, a municipal council, to run a line of pipes along the land that had been the government road, and did so run the pipes. The respondent obtained an injunction directing the company to remove the pipes. Subsequently, at the suggestion of the company, the appellant proposed compulsorily to acquire the land along which the pipes were placed for the purpose of providing a public road. The respondent opposed such action on the ground that the real purpose of the appellant in acquiring the land was not to provide a road but was to enable the company to continue the pipes in the situation in which they had been placed. In an action in the Supreme Court of Victoria by the respondent against the appellant for (*inter*

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alia) an injunction to restrain the appellant from proceeding with the acquisition of the land, the Court found for the respondent on the facts and granted the injunction. On appeal to the High Court,

Held, by *Knox* C.J., *Higgins*, *Powers* and *Starke* JJ. (*Isaacs* J. dissenting), that the respondent was entitled, on the facts proved, to the judgment pronounced in her favour and that the appeal should be dismissed.

Municipal Council of Sydney v. *Campbell*, (1925) A.C. 338, at p. 343, *per Duff* J., applied.

Decision of the Supreme Court of Victoria (*Wasley* A.-J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Ethel Jean Kerr, the respondent, brought an action in the Supreme Court of Victoria against the Council of the Shire of Werribee which was heard by *Wasley* A.-J., who delivered judgment in favour of the plaintiff on 18th September 1928. From this judgment the defendant appealed to the High Court.

The respondent was at all material times the owner of a piece of land containing about 1,000 acres situated in the Shire of Werribee and lying between the Kororoit Creek road and the Altona railway. Portion of the respondent's land was an old government road which was purchased in 1886 by the respondent's predecessor in title from the Shire of Wyndham, but was still shown as a public road on the government maps in the Lands Department and in the municipal map. The Commonwealth Oil Refineries Ltd. had certain works for refining oil situated to the north of the respondent's land. In or about 1923 the Company, being desirous of laying a line of pipes from its works to the sea for the purpose of discharging through the pipes water and other drainage matter, was granted permission by the appellant to lay such pipes along the course of the old road. Between August 1923 and March 1924 the Company caused pipes to be laid from its works to the sea, and they were laid from the Kororoit Creek road until they passed under the Altona railway through that portion of the respondent's land which comprised the old government road. On 11th March 1926 the respondent commenced an action against the Company in which she claimed (*inter alia*) injunctions directing the Company to remove the pipes and restraining it from using them. That action was heard in June 1927, when an order was made granting the injunctions

asked. On 28th October 1926, pending the trial of the said action, the Company agreed with the appellant that if the appellant would have the old road reopened as a public highway the Company would recoup the appellant any expenditure connected with the opening of the road and would complete the fence on the left side and clear the road of all surface boulders. On 25th November 1926 it was resolved by the appellant that steps should be taken to have the road declared a public highway under the provisions of the *Local Government Act* 1915 (Vict.). On 3rd May 1927 the appellant gave notice of its intention to take the land comprised in the old road under the *Local Government Act* 1915, Part XVII., Div. 3. The respondent gave notice of dissent and attended by her counsel a meeting of the appellant Council on 9th June 1927, the day fixed for hearing objection to support her objections. On 7th September 1927 a notice appeared in the *Government Gazette* published by the appellant setting forth (*inter alia*) that the appellant deemed it expedient to execute certain work for the purpose of providing a road, and that it was in the opinion of the appellant necessary and desirable that it should exercise its powers of taking land compulsorily, and that it had caused specifications, maps and plans of the work to be prepared, and that the same had been approved by the appellant. The notice also stated that the purport of the said work was for the purpose of providing a road between the Kororoit Creek road and the Altona road in the east riding of the Shire of Werribee. The notice also described the land which it was proposed compulsorily to acquire. Such land consisted wholly of the respondent's land being portion of the land comprised in the old government road and included the whole of that part of the plaintiff's land traversed by the pipe-line laid by the Commonwealth Oil Refineries Ltd., but the specifications stated that a crossing was to be provided across the railway-line. The appellant also caused a notice dated 10th September 1927 to be served on the respondent defining the land which it proposed to acquire compulsorily as being identical with the land described in the notice in the *Government Gazette* above referred to, and stating that it was for the purpose of providing a road from the Kororoit Creek road to the Altona road, and setting forth that specifications, plans, sections and elevations were deposited

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at the office of the appellant and could be inspected there. On 14th October 1927 the respondent caused a notice of her dissent to be served on the appellant setting forth the objection of the respondent to the appellant compulsorily taking the land. At its meeting on 8th December 1927 the appellant resolved and purported to order the work or undertaking to be executed according to the specifications, maps, plans, sections and elevations deposited at the appellant's office, and the compulsory acquisition of the land to be proceeded with, and resolved to transmit the case to the Minister pursuant to sec. 467 (2) of the *Local Government Act* 1915. The land over which the proposed road was intended to be constructed was bounded on both sides from the Kororoit Creek road up to the Altona railway by land owned by the respondent and was separated at its south-east end from the Altona road by such railway. No consent to any mode of access to Altona road across the railway had been given and the appellant had not taken any steps to provide means of access across the railway-line. The respondent alleged that without such access the proposed road would be a *cul-de-sac* and valueless to the public as a road, that the land over which the road was proposed to be constructed was in part swampy and in part rocky and uneven and was unsuitable for a road, and that to make the road fit to carry heavy traffic would involve great expense, and that the proposed road, if constructed according to the plans and specifications, would be unfit for general traffic. The respondent also alleged that the plans and specifications were not open for inspection for forty clear days after the publication of the notice in the *Government Gazette* as required by sec. 463 (2) of the *Local Government Act* 1915.

The respondent claimed a declaration that the purported determination of the appellant that it was expedient to execute the work of making the road and that it was necessary and desirable to compulsorily acquire the land for executing such work was unlawful and invalid, and that the purported order of the appellant directing the work to be executed in accordance with the plans and specifications was unlawful and invalid. The respondent also claimed an injunction restraining the appellant, its servants and agents, from proceeding further in the compulsory acquisition of the respondent's

land and in the making and opening of the said road, and in particular from transmitting the said purported order to the Minister under sec. 467 (2) of the *Local Government Act* 1915, on the grounds (*inter alia*) that the purported determination and order were *ultra vires* the power of the appellant under the provisions of Part XVII. of the *Local Government Act* 1915; that the respondent had not complied with the provisions of Div. 3 of Part XVII. of the said Act, and that such purported determination and order were made by the appellant not bona fide for the purpose of making such road but for the purpose of enabling the Commonwealth Oil Refineries Ltd. to maintain in position and use the drain or pipe-line which the Company had laid through the respondent's land.

Wasley A.-J., in delivering judgment, found that the appellant did not inquire whether it could obtain a level crossing, as, had it inquired, it would have been told that there was no chance of being permitted to construct a level crossing, that the appellant had no money to construct the road in a satisfactory manner having regard to the nature of the ground, and that, while that would not be a fatal objection if it really did intend to make or open the road, it was strong evidence bearing out what the surrounding circumstances seemed to bear out—that the Council did not intend to make or open the road and that all it wanted to do was to get the title to this land and so save the Commonwealth Oil Refineries Ltd. from any further bother, and that the desire to assist the Company was the moving factor right through. His Honor concluded:—"There are the reasons I have mentioned, there are various other reasons, such as the alleged poverty of the Council, that persuade me that the Council did not at any time intend to make this road, and that they were intending to acquire this property for the purpose of assisting the Commonwealth Oil Refineries Ltd. That being so, they had no right to exercise the powers under the *Local Government Act* for which they contend, and the plaintiff is entitled to the relief she claims." His Honor made the declarations and granted the injunction asked.

From this decision the defendant now appealed to the High Court.

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Owen Dixon K.C. and *Eager*, for the appellant. The learned Judge confused the reasons for the exercise by the Council of the statutory power with the exercise of the power itself. There was no evidence that the appellant was exercising its power for any purpose other than the statutory purpose of opening a road over the respondent's land. The motive for the exercise of the statutory power was immaterial. The reasons given by the learned Judge were entirely insufficient to support the conclusion that the Council was not acting in good faith. No personal dishonesty was imputed to the councillors, and the reasonableness or unreasonableness of their decision to open a road upon this site is not reviewable by the Court. The discretion to determine whether the road was necessary or desirable is by the Act vested in the Council (*Local Board of Health of City of Perth* v. *Maley* (1); *Municipal Council of Sydney* v. *Campbell* (2); *Marquess of Clanricarde* v. *Congested Districts Board for Ireland* (3)).

[ISAACS J. referred to *Jones* v. *Metropolitan Meat Industry Board* (4).]

It was not essential that a crossing over the railway should be first obtained. Upon the evidence it appeared clear that there would be no difficulty in obtaining a crossing when the time arrived.

Sir Edward Mitchell K.C. (with him *Gregory*), for the respondent. There is abundant evidence to support the finding of the Judge that the decision of the Council to make the road, and for that purpose to take the plaintiff's land, was made to relieve the Commonwealth Oil Refineries Ltd. of its difficulty in regard to the pipe-line, and that the real purpose was not the making or opening of a road. The Council had the sinister or collateral purpose of acquiring this land in order that that Company should not be compelled to remove its pipe from the respondent's land. By reason of the *Altona Railway Act* 1927 (No. 3517) and the agreement set out in the Schedule to that Act, it was impossible for the appellant ever to obtain the right to make a crossing over the Altona railway, and without that crossing the proposed road would be a *cul-de-sac*, and would be useless even if the railway were vested in the Victorian

(1) (1904) 1 C.L.R. 702.
(2) (1925) A.C. 338.
(3) (1914) 79 J.P. 481; 13 L.G.R. 415; 31 T.L.R. 120.
(4) (1925) 37 C.L.R. 252.

Railways Commissioners: the Commissioners had no power to make or to allow public highways to be made over railway lands—no such power is contained in the Railways Acts. An examination of the so-called specification of the proposed works prepared by the Council shows that in truth it is not a specification at all or such as is required by sec. 463 of the *Local Government Act* 1915. Nowhere does the alleged specification show the nature or extent of the works or undertaking.

Eager, in reply. The contention that a crossing over the railway could not be legally obtained is untenable in view of secs. 79 and 128 of the *Railways Act* 1915. The former section gives power to the Commissioners to " make in upon across under or over " railway " lands " (*inter alia*) any " roads ways . . . and other works and conveniences as they think proper " ; while sec. 128 gives power to the Commissioners to regulate public and private traffic across railways on the level thereof. The latter power would include power to regulate traffic by the provision of crossings. The specifications are sufficient, having regard to the fact that the work or undertaking of the Council is not that of making but, at present, merely of opening a road. That a road may be opened without being made is shown by sec. 347 (1) of the *Local Government Act* 1915, which distinguishes those two operations. In Victoria, in many instances municipal councils acquire land for the purpose of opening a road and do open a road long before they set about the making of the road.

Cur. adv. vult.

Dec. 3.

The following written judgments were delivered :—

KNOX C.J. The respondent brought this action to restrain the appellant from proceeding further in the compulsory acquisition of certain land of the respondent for the alleged purpose of opening a road thereon. The action was tried by *Wasley* A.-J., who found that the real purpose for which the appellant desired to acquire the land was not to open or make a road but to prevent the Commonwealth Oil Refineries Ltd. from being put to the inconvenience of removing from the land a line of pipes which had been laid there without the consent

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of the respondent. I agree with the learned trial Judge in thinking that this was the proper conclusion to draw from the evidence. There is no dispute as to the law applicable to the case. In *Municipal Council of Sydney* v. *Campbell* (1) *Duff* J., in delivering the opinion of the Judicial Committee, stated the rule thus :—" A body . . . authorized to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Courts will interfere. . . . 'Whether it does so or not is a question of fact' (2). Where the proceedings of the Council are attacked upon this ground, the party impeaching those proceedings must, of course, prove that the Council, though professing to exercise its powers for the statutory purpose, is in fact employing them in furtherance of some ulterior object." In the present case the respondent, in my opinion, was entitled on the facts proved to the judgment pronounced in her favour, and it follows that this appeal should be dismissed.

ISAACS J. In my opinion this appeal should be allowed.

As the decision stands it is an unprecedented and serious interference with municipal government as hitherto understood in Victoria. Reduced to its simplest elements the case is this :—A shire council is forbidden to carry out a specific statutory purpose—the opening of a road—on the ground that it does not intend to carry it out. This evident contradiction in terms, is obscured only by the confusion that has occurred in dealing with the facts and the law. The judgment appealed from and the arguments in support of it make clear, to my mind, that they rest on four fallacious grounds. These are (1) a misconception as to what are the relevant statutory provisions and their effect; (2) the judicial standard of interference apart from fraud; (3) the facts themselves; (4) the meaning of bad faith in this connection. Disentanglement is always a lengthier process than the combination of assumptions that produce the entanglement. I fear this necessary undertaking must occupy more time than I could wish. It will, I think, conduce to a clearer understanding of what I am about to say if I make immediate reference to the case of *Jones* v. *Metropolitan Meat Industry Board* (3). The respondent

(1) (1925) A.C., at p. 342

(2) *Marquess of Clanricarde* v. *Congested Districts Board for Ireland*, (1914) 79 J.P., at p. 481, per Lord *Loreburn*.

(3) (1925) 37 C.L.R. 252.

there had made a by-law, the validity of which was attacked. In the course of my judgment, which, by the approval of the learned Chief Justice and *Rich* J., became the decision of the Court, the distinction between various statutory powers was pointed out. At p. 262 it is shown (1) that some powers are conferred on condition of a given "purpose," as in *Marquess of Clanricarde* v. *Congested Districts Board for Ireland* (1) and *Municipal Council of Sydney* v. *Campbell* (2); (2) that other powers are independent of any "purpose," such as in *Narma* v. *Bombay Municipal Commissioner* (3) and *Jones's Case* (4) itself; (3) that "fraud" which vitiates the exercise of a statutory power is moral turpitude, and not fraud in the extended equity sense which does not involve *dolus* (see *Vatcher* v. *Paull* (5) and *Nocton* v. *Lord Ashburton* (6)). The subject of "good faith" in this connection was dealt with, as I then thought sufficiently, at pp. 264-265. One implication of that judgment was that the particular thing complained of as invalid must first be measured by the terms of the specific enactment under which it purported to be done in order to see whether it was conditioned on a stated purpose, and then, if it was so conditioned, to see whether the purpose was departed from either by honest error or dishonest design. I propose to follow that course. The one ground on which the learned trial Judge, *Wasley* A.-J., decided *cum ira* against the appellant Municipality was that its resolve to open a road was invalid because it did not intend to make or open the road but had decided to use the respondent's land, when acquired, for an improper purpose, namely, to assist the Commonwealth Oil Refineries Ltd., shortly called "C.O.R." The assumption was that the two things—the statutory purpose and a desire to assist the Company—could not coexist. How the two are mutually exclusive has not been explained. But I should observe, and it will presently be apparent, that if indignation is to find any place in the determination of this matter it could be better placed. In truth, a calm survey of the statute in its application to the pleadings, the judgment and the transactions proved, leaves, to my mind, no result open but an allowance of this appeal. Upon

(1) (1914) 79 J.P. 481; 13 L.G.R. 415; 31 T.L.R. 120.
(2) (1925) A.C. 338.
(3) (1918) L.R. 45 Ind. App. 125.
(4) (1925) 37 C.L.R. 252.
(5) (1915) A.C. 372, at p. 378.
(6) (1914) A.C. 932, at p. 952.

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the assumed application of the doctrines firmly established in *Clanricarde's Case* (1) and *Campbell's Case* (2), it has been held that this Municipality was proceeding to take the respondent's land for an unauthorized purpose and should be restricted accordingly. Reference to those cases and similar cases will show that where a public authority has been similarly restrained it has always taken some step that directly assumed to take the private land or to exercise some dominion over it or do some act which would deprive the owner of his proprietary rights. They are not cases which restrain the public authority from submitting the question to a public tribunal constituted for the purpose, or from declaring the statutory purpose itself which admittedly it has power to declare, or from taking a step not conditioned on a purpose. *Narma's Case* (3), as pointed out in *Jones's Case* (4), was an instance of the latter class. And the present case, when properly examined, is seen to be of the *Narma* class. I would refer particularly to Lord *Sumner's* words (5). His Lordship's observations are, I think, very apposite to this case. In this case the Council has no power to make any order to resume or to use land, nor has it made or threatened to make such an order. The Act itself (sec. 468) provides the only analogue to such an order. All the Council can do is to declare its statutory purpose; when it does the Act speaks for itself. As to *Campbell's Case*, it seems important to point out the gist of that decision. Apart from the initial act of *resumption*, which is impossible here, it appeared affirmatively that neither in June nor in November was there any consideration or " real decision or determination " by the Council as to the statutory purpose. In June the Council did not even purport to consider the improvement and remodelling of the area in the vicinity. In November it applied itself merely to giving a new form to an old transaction previously decided on, that is, a transaction of *resumption* and not of *purpose*. The twofold distinction between that case and the present one is apparent. The pleadings and the formal order bring this out very distinctly, when read in conjunction with the relevant

(1) (1914) 79 J.P. 481; 13 L.G.R. 415; 31 T.L.R. 120.
(2) (1925) A.C. 338.
(3) (1918) L.R. 45 Ind. App. 125.
(4) (1925) 37 C.L.R. 252.
(5) (1918) L.R. 45 Ind. App., at pp. 127-129.

statutory provisions (see sec. 467 (1) and (2)). The statement of claim (par. 5) sets up an agreement that " if the defendant *would have the old road reopened as a public highway* the said Company would recoup the defendant any expenditure connected with the opening of the road ; complete the fence on the left-hand side and clear the road of all surface boulders." Par. 6 sets out a *resolution to have the said road declared a public highway* under the provisions of the *Local Government Act* 1915. That has reference to sec. 475, which, when acted on, is the completion of the purpose. After setting out allegations intended to establish legal reasons for opposing the project and amounting to non-compliance with statutory conditions the statement of claim, in par. 14, says : " *The defendant unless restrained will proceed with the said work or undertaking* and the compulsory acquisition of the said land, *and will cause its order together with copies of the specifications, maps, plans, sections and elevations and the written objections to be forwarded to the Minister.*" Nothing could be more definitely averred than the averment that the Shire intended in fact to " proceed with the said work or undertaking," that is, to open the road as a public highway. The averment as to compulsory acquisition can have no other meaning than that, if the circumstances mentioned in sec. 468 arise, the Shire will exercise the statutory powers thereby conferred. The concluding portion of par. 14, which in legal sequence precedes the second, is an averment that the Shire will, unless restrained, obey the Act of Parliament, which is couched in imperative terms. Par. 14 of the defence admits the Shire's actual intention to carry out the work or undertaking. The formal order perpetually restrains the Shire from proceeding further (1) in the compulsory acquisition of the said land and (2) in the making and opening of the said road pursuant to the purported order aforesaid, and (3) in particular from transmitting the said purported order to the Minister of the Crown under sec. 467 (2) of the *Local Government Act* 1915. How all that is compatible with an absence of intention to proceed to open the road I fail to understand. There was not a single step in any proceeding to compulsory acquisition, except the attempt to declare a statutory purpose. Apparently on the literal meaning of the words of the formal order no matter what may be the exigencies

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of the locality, this land is for ever immune from the operation of the statute in this respect. But I think the first paragraph of the restraint should be read as controlled by the second and third paragraphs.

1. *The Act.*—The central point of the respondent's case is the alleged violation of sec. 468. There can be no other basis. One obvious answer to it is that sec. 468 had not been reached and no violation is yet possible or threatened. Another is that should it be reached, almost all the alleged departures from the Act would, if they exist, be cured by the Act itself. A third answer is that the present action is not a competent remedy. These positions will become almost self-evident.

Sec. 468 says: "(1) Upon the confirmation of such order as aforesaid, and *not before*, the council shall be authorized *to take and use*, subject to the provisions hereinafter contained, *for the purpose of such work or undertaking* all such land as is described in and by the said specifications maps plans and sections as being required for the said work or undertaking." Full compensation is, of course, provided for, including an allowance for compulsory acquisition. But no such departure is shown either on the pleadings or in the evidence. On the admitted facts it is impossible. What is complained of in this action is simply passing prior resolutions and making an order that would not themselves authorize, and were not acted upon or intended to be acted upon as themselves authorizing, any interference whatever with the respondent's land, either as to title or possession, or any action under sec. 468. The Legislature has distinctly interposed between the order and any possible interference with property, and as an indispensable condition, the quasi-judicial determination of a statutory tribunal. That tribunal has, in this case, been ignored as if non-existent. But the law cannot be ignored. If the determination of that tribunal be in any case adverse, or so far adverse that compulsory taking is not necessary, sec. 468 never comes into operation. In that case any attempt to exert compulsory authority over the land would be a pure trespass, not calling for any investigation such as we have here. The Council never at any time claimed to interfere in that way. If, however, the determination of the Minister be favourable, at

least nine-tenths of the objections raised in this case—if not all of them—would have no standing-ground. Sec. 468 (4) is perfectly plain as to that, and the case of *Stevenson* v. *Narracan Shire* (1) confirms it. This action is, in my opinion, entirely premature, to say the least, and is practically a supersession of the functions of the Minister. It certainly is so, apart from fraud. The right of an individual to challenge the legality of a public authority's conduct is stated by Lord *Cranworth* in *Mayor &c. of Liverpool* v. *Chorley Waterworks Co.* (2). Except in any proceeding at the instance of the Attorney-General, a plaintiff seeking the assistance of a Court of equity by way of injunction is bound to show, said his Lordship, "not only that the defendants are committing or intend to commit *a wrong*, but also that the *wrong, complained of, does occasion or will occasion* loss or damage to him." At the present stage the respondent cannot possibly satisfy that requirement. Even fraud will not surmount that difficulty, there being no damage actual or threatened. A *quia timet* action, such as this is, does not lie unless the plaintiff shows at least "a well-founded and reasonable apprehension of danger" (see *Attorney-General* v. *Corporation of Manchester* (3)). The admitted facts not only fail to reach that point, but they show that the Council was proceeding to submit the whole question to the statutory tribunal before attempting to exert any interference with the respondent's property. In those circumstances the mere illegality—if for the moment we assume illegality—in the Council's action cannot be a matter for individual suit. The Attorney-General alone would be entitled to sue in such a case, if any action lay. The respondent, however, by mingling matters that on the relevant legislation must be kept distinct, depends on the *quia timet* principle, and for that there is no foundation in fact or law. The scheme of the Act makes this plain. The *Local Government Act* 1915 is a delegation by the State Parliament to the inhabitants of localities called municipalities to exercise certain powers of self-government. One of the most important of these powers is the control of existing roads and the creation of new ones where the needs of the locality require them. Obviously, local

(1) (1894) 20 V.L.R. 233; 15 A.L.T. 263.
(2) (1852) 2 D. M. & G. 852, at p. 861.
(3) (1893) 2 Ch. 87, at p. 92.

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knowledge and personal acquaintance of the councillors with place and people are of the greatest importance in the exercise of this power.

The council of the municipality is elected by the inhabitants, and is the local Parliament for its purposes. A final supervisory control by the Central Government, through a Minister of the Crown, is retained in certain cases, including the present case. Certain "works and undertakings" are expressly placed within the governance of the council, and among them what are called "permanent works and undertakings" in respect of which loans may be obtained. "The making or opening of streets and roads" is a permanent work which, subject to one important restriction, is left to the discretion of the council (sec. 347). If a council resolves on "opening a road" even on private property which it contemplates purchasing by voluntary agreement, it is free to do so, and then may purchase (sec. 461). If, for instance, in the present case the Council had done everything it has done, but with the view of purchasing Mrs. Kerr's land by agreement with her, it would have been impossible, so far as I can see, to have challenged its action, for instance, by the Attorney-General on the ground set up here that there was behind the proceedings a desire to assist the C.O.R. But that goes a long way to test the judgment in this case. The Council did not intend to purchase the land voluntarily for a reason which will make itself apparent. It proceeded on the assumption that, if the road were opened at all, compulsory purchase would be necessary and, therefore, the approval of the Minister must first be obtained. Sec. 462 enables the Council to take land compulsorily for the purpose of works and undertakings, but only "subject to the provisions of this Act." The Act, sec. 463, requires in such a case what I may call a preliminary or preparatory determination on the part of the Council. The opening words of the section are: "(1) Whenever any council deems it expedient to execute any work or undertaking for the purposes whereof the exercise of any such compulsory power of taking land *will in its opinion be necessary or desirable* the council shall cause to be prepared such specifications," &c., "*as may be necessary*, showing" certain information; and, by sub-sec. 2, such specifications, &c., shall be deposited at the

office of the council for inspection, and certain notices, &c., are to be given. At that stage, nothing more than the tentative opinion of the council is contemplated, not with any definiteness as to taking land compulsory, because it may at the stage be thought either "necessary" or only "desirable." Whether either contingency is adhered to is a matter for future consideration. Advertisements are to be inserted giving opportunity for objections. By sec. 465 any person affected may deliver written objections, and may on a fixed day be heard in support of such objections. By sec. 466 the council is constituted a quasi-judicial tribunal to receive evidence on oath, to summon witnesses and to hear the objections. By sec. 467, if, after so acting, "it appears to the council expedient to proceed with the work or undertaking the council may make an order directing the work or undertaking to be executed according to the specifications," &c., "deposited as aforesaid." That is the *only* "*order*" contemplated by the statute. It may be made in circumstances showing it to be quite unnecessary to take land compulsorily. The owner, for instance, might come to some compromise making compulsory taking unnecessary.

Any recital such as we find in the present case in the order of 8th December 1927 as to compulsory taking is not part of the "order": it is informative or explanatory of the circumstance which attracts the Minister's interposition and gives him jurisdiction. The "order" is simply to proceed with the "work or undertaking." Where no compulsory taking is involved, any such order is complete and operative. Where compulsory taking is involved, the order is inchoate only and cannot be acted on unless and until the Minister sanctions the work or undertaking. In the latter case, the law does not leave it to the council to determine finally whether the work is to be executed. It requires the whole matter to be submitted *at that stage*—not to a Court of law, quite unsuited for the task, but to a Minister of the Crown, as representing the general government and likely to take a broad and disinterested view of the proposal. There are so many phases of the matter that depend on local knowledge, on skilled experience, on estimate of probable development, on balancing of probabilities of business, of residential requirements, of traffic and of public convenience, that no Court of law can possibly

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do justice to such a matter. I could not help feeling during the argument, when learned counsel were pressing upon us views as to sufficiency of specifications, of the swampy character of the lower end of the proposed road, of the extent to which passengers would be likely to use the road, of the practicability of a ford, of the the condition of the bridge, of the comparative advantages of rival routes, of the probability of the railway authorities granting a level crossing, that this Court was asked to express with all "the valour of ignorance" opinions upon what the Legislature has, in my opinion, wisely left exclusively to the statutory tribunal it has created for the purpose. The Council, says the Act, having made the order, "shall" cause it to be sent, with specifications, &c., and all the written objections, to the Minister. It is practically a rehearing. Then says the Act: "The said Minister shall consider the same respectively and shall for the purpose of such consideration have the like powers as are by the last preceding section vested in the council and may confirm the said order with or without variation or may disallow such order." That is to say, the Minister is to rehear the matter on evidence and argument as representing the larger community of the State and decide for himself whether the work or undertaking shall proceed or not, and, if to proceed, then with what variations. Until that is done any attempt to use the land is a simple trespass, and can be restrained as such. The Act says this reference to the Minister "shall" be made; the Court has said it "shall not" be made. I respectfully think, as I have said, the decision is due to a total misconception of the provisions of the Act as applied to the matters complained of. All the objections raised by Mrs. Kerr, and decided in the first instance by the Council, are placed by the Act within the jurisdiction of the statutory tribunal, and that I apprehend on recognized principles is an exclusive tribunal. The Minister is peculiarly well equipped with the means of probing all the objections. He has at his command officers and advice and potential witnesses who are specially competent to advise on public undertakings which involve, as roads do, very important public interests. He, therefore, is in the best position, and at least Parliament has thought so, to hold the balance fairly between public and private interests, and, if necessary, to adjust them to some

extent. He has the power and the means, for instance, of ascertaining the probability of the Railways Commissioners according a level crossing. If he had decided against the scheme, that would have been an end of it. If, on the contrary, he had decided in favour of it and the Council had proceeded to declare the road a highway, what would then have been the position ? Plainly, the respondent's rights, whatever they were after the Minister's decision, could have been protected by the Court, not upon guess-work but upon the most unquestionable fact. Under sec. 475 the Council could, by order, direct the land permitted to be taken by authority of sec. 468 to be a public highway. If it did so, the statutory " purpose " would at once be finally and irrevocably accomplished. If it did not do so, not only would it foolishly frustrate the very object of its action, but it would offer an almost unanswerable reason for preventing any user of the road at all (*Attorney-General* v. *Westminster City Council* (1)) as well as an almost insuperable proof of bad faith. An injunction or a mandamus would soon remedy the wrong. The use of the land is conditioned in the " purpose," namely, the opening of the road. But the resolution to " open the road " is conditioned on no purpose whatever : it is itself *the purpose*, with whatever object it is done (*Narma's Case* (2)). And it is that resolution and the order consequent thereon which, by a process of reasoning to me incomprehensible, is prevented. The Court's order, in effect, is : " You must not do a work which you desire to do because you do not intend to do it." I must abandon any attempt at the reconciliation of the various parts of that determination. But I must say it is contrary to all principle and authority, as I understand the matter, and directly opposed to the Act of Parliament.

2. *Judicial Standard of Interference.*—I have stated what, according to the Act constitutes the " purpose." It is said, somewhat elusively, that the Council had not that purpose but another purpose, namely, to benefit the C.O.R. Now, if that means that the whole proceeding was a sham, engendered in pretence and backed by perjury, a wicked scheme to compel Mrs. Kerr to part with the land, albeit for its full value, and then to hand it over to the Company dropping all notion of a road—well, I could understand it as an argument. It would be

(1) (1924) 2 Ch. 416.
(2) (1918) L.R. 45 Ind. App. 125.

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an argument, however, without a charge to that effect, without evidence to support it, without any motive to suggest it, and without any finding of the learned primary Judge accepting it. As Lord *Parmoor* said in *Clanricarde's Case* (1), "care must be taken not to introduce indirectly a charge which is disclaimed as a direct issue." As a plain and bold accusation of dishonesty it would be understandable; and the argument before us sometimes approached it so closely that, in justice to the representative body concerned, I propose to deal with it. But the real argument and charge were based on the words of *Vaughan Williams* L.J. in *London and North-Western Railway* v. *Westminster Corporation* (2): "You are acting mala fide if you are seeking to acquire land for a purpose not authorized by the Act, and in such a case it is right to restrain the persons who are misapplying the powers given by an Act." This was supplemented by a reference to Lord *Macnaghten's* judgment in the same case in 1905 (*Westminster Corporation* v. *London and North-Western Railway* (3)), especially the word "reasonably." Now, I set aside for the moment bad faith, as I understand it, namely, actual dishonesty, and reserve the term "*mala fides*" for the other Latin term "*ultra vires*" in accordance with the view expressed by Lord *Parmoor* in *Clanricarde's Case*. In that sense, the duty of the Court in approaching such a question is very distinctly expressed by the House of Lords in that case. Lord *Loreburn* L.C. laid down the law. As stated in that case (and repeated in *Campbell's Case* (4)) it is a question of fact whether an administrative body is using its powers for unauthorized purposes. He says that the administrative body must intend to act for a statutory purpose. He also says the land which they seek to take must be land which is capable of being made use of for a statutory purpose. He explains at once what he means by that, namely, that, looking at the land as a whole, "*a man might in reason think* the purchase could be utilized for any of the statutory purposes." That also is a question of fact, said his Lordship; and I may add that to go further and urge that in truth a man does not think so when he says he does, gets into the domain

(1) (1914) 79 J.P., at pp. 481-482; 13 L.G.R. 415; 31 T.L.R. 120.
(2) (1904) 1 Ch. 759, at p. 767.
(3) (1905) A.C. 426, at p. 430.
(4) (1925) A.C. 338.

of fraud. Now, the Lord Chancellor is very explicit as to what is necessary to be proved with regard to those two grounds. He must prove (1) that there was not such a purpose and (2) that the land was "*quite incapable*" of being so used. Then there is this passage (1): "The Court will not interfere with the discretion or revise the opinion of the administrative body if there was anything on which it *could in reason* come to the conclusion it reached." When a Board is set up with such compulsory powers as are possessed by the Congested Districts Board (and the same at least is to be said of the Municipality here, with the additional superintendence of the Ministerial tribunal) it is not intended that Courts of law shall do what we are invited to do, namely, dog its footsteps and peer into its minutes as if they were to be suspected of meaning more than they say or trip it up upon the ground that it has not acted judiciously or has not kept proper minutes, or upon any other ground, dishonesty apart, than that it has in fact exceeded its powers." Almost every word of that is applicable here. In that case, the Master of the Rolls did what the learned primary Judge did in the present case: he found that "the respondents were not acting bona fide in the sense in which the term had been used in the statement of claim; that is to say, that they made the final offers without reference to the purposes of the Act and without due inquiry whether the estates were suitable to those purposes" (1). It was argued, just as here, that the by-motive vitiated the taking and made it *ultra vires*, and, as seen by that reference and also more fully in the *Local Government Reports* (2), the doctrine of reasonableness was relied on and most of the relevant cases were cited as here. Their Lordships addressed their own minds to the evidence, and dealt with it in a way entirely in accordance with the generally accepted duty of an appellate Court, and quite inconsistent with the method of approach suggested in this case, namely, that this is not a rehearing, and there is a presumption that the primary judgment was correct, leaving the burden on the appellant to displace it. The doctrine of "reasonableness" as an independent ground, if it ever had any existence, I should have thought received its quietus in that case. Its only possible relevancy is this: Can it be shown

(1) (1914) 79 J.P., at p. 481.

(2) (1914) 13 L.G.R., at p. 417.

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that the public authority acted beyond all reason? That is the result of what Lord *Loreburn*, Lord *Atkinson* and Lord *Parmoor* said on the subject.

3. *The Facts.*—I have referred to the duty of the Court as an appellate tribunal in a case of this nature, and a suggested method of approach.

I think it desirable before dealing with the facts to add a few words as to the suggestion referred to. The Constitution (sec. 73) gives to the appellant the right of appeal both as to law and fact. The statute does not diminish that right. The right is to have the opinion of this Court on the facts as presented, and as it is a matter of justice between the litigants and not a controversy with the primary Judge, his decision is nothing to the point, either as to law or to fact, where this Court is in an equally good position to determine the issues. But where the primary tribunal possesses advantages not available to this Court, where, for instance, the decision involves credibility of witnesses or examination of some object, the material before the appellate Court is not as complete as before the primary Court. To that extent only, the first presumption is that he is right to that extent, and must be clearly shown to be wrong before another view is taken. It was urged that an appeal to this Court from the primary Judge of the Supreme Court is not a rehearing. That is true: no appeal from a State Court exercising State jurisdiction can ever be a rehearing. Such a course would be equivalent to investing this Court with original jurisdiction as State judicial power. (See *New Lambton Land and Coal Co.* v. *London Bank of Australia Ltd.* (1).) The old Chancery Court had rehearings either by the Judge who originally heard the cause or by the Lord Chancellor (see *Smith's Chancery Practice*, 7th ed. (1862), vol. I., pp. 714 *et seqq*). To a certain extent, when the *Judicature Act* merged jurisdictions in one Supreme Court, rehearings were applied generally. But the true effect is explained in *Quilter* v. *Mapleson* (2), confirmed in *Ponnamma* v. *Arumogam* (3) and *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board* (4). It means that the Court of appeal is authorized to make such order as ought to be made according to

(1) (1904) 1 C.L.R. 524, at p. 532.
(2) (1882) 9 Q.B.D. 672, at pp. 675-676.
(3) (1905) A.C. 383, at p. 390.
(4) (1912) A.C. 788, at p. 802.

the state of things at the time it makes its order. A true appeal is one where the appellate Court has to decide what order ought to have been made by the primary tribunal at the time the order appealed from was made. But that does not affect the duty of the appellate Court to judge for itself unhampered, so far as circumstances permit, by the prejudgments of the Court appealed from. That is what sec. 73 of the Constitution and sec. 37 of the *Judiciary Act* require, and what a litigant is entitled to demand. In *Attorney-General* v. *Sillem* (1) Lord *Westbury* L.C. said : " An appeal is the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below." The appellate Court judges for itself whether there has been an error from the materials which were before the Court below, so far as it can, and does not add to those materials the judgment under appeal. That judgment may be necessary to ascertain *what* the original materials were, but not further. I have in *Federal Commissioner of Taxation* v. *Clarke* (2) collected some of the most authoritative decisions, and, beyond referring to them, would add only the example of the House of Lords in dealing with a case of this nature.

In this case there is no obstacle whatever in the way of this Court placing its own appreciation on the evidence. The main facts are as follow :—In 1920, by agreement between the Anglo-Persian Oil Co. Ltd. and the Commonwealth Government, it was agreed that for purposes of public benefit to the people of the Commonwealth a new oil company should be locally formed in which the Commonwealth Government should have a controlling share interest. By Act No. 13 of 1920 the Commonwealth Parliament approved the agreement. That company was duly formed and incorporated under Victorian law, and is the Commonwealth Oil Refineries Ltd. (C.O.R.). In the same year, a few months later, the Victorian Parliament by Act No. 3075, after referring to the agreement and Commonwealth Act, recited that the construction on certain land therein referred to of the C.O.R.'s works would be " of public and local advantage," and gave to the C.O.R. certain rights and privileges including (1) exchange of land, (2) power under conditions to construct works and break open streets, sewers and, under the control

(1) (1864) 10 H.L.C. 704, at p. 724. (2) (1927) 40 C.L.R. 246, at pp. 262 *et seqq.*

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of any local authority, to put in pipes, with provisions as to leaks, &c., (3) power to interfere with property of other public authorities including the Railways Commissioners, with certain qualifications as to agreement or arbitration, and so on. Obviously the C.O.R. is regarded both by the Commonwealth Parliament and the State Parliament as a very important public utility. The works were erected to the north of Mrs. Kerr's holding of about 1,000 acres. It became necessary to find a pipe outlet to the sea, which was to the south of Mrs. Kerr's land. On the government maps in the Lands Department and in the municipal map there appeared what was shown to be—as is so frequently the case in enclosed holdings—a reserved government road about a chain and a half wide running in a south-easterly direction through Mrs. Kerr's land from Kororoit Road on the north to a railway-line on the east. The C.O.R. applied to the appellant Shire, in whose municipality the locus is situated, for permission to put in the necessary pipe. The permission was given. It was necessary for the C.O.R. to cut through and to blast a quantity of basaltic stone, and after obviously considerable expense the work was completed in about 1924. After reaching the boundary of Mrs. Kerr's land the excavation passed under the railway-line across to the Altona Bay road, and then along that road to the sea. It was, however, afterwards discovered that in or about 1886 a predecessor municipality had sold the site of the road to a predecessor of the respondent, and despite the public maps no road any longer existed on the pipe-line. In an action by Mrs. Kerr against the C.O.R. an injunction was, of course, obtained to remove the pipe, the Court staying its operation for a period. Obviously the C.O.R. was at the mercy of Mrs. Kerr. Any price, however it exceeded the true value of the land and that did not exceed the cost of removing the pipe and reinstating the land, plus the cost of again putting down a pipe somewhere else along roads, however devious, could be insisted on. To prevent the possibility of such injustice and manifest waste of money and energy, one way seemed open. That was to apply to the Werribee Shire to compulsorily acquire the supposed road and constitute it a lawful road, whereupon either under Act No. 3075 or by consent of the Shire the pipe could be allowed to remain. By this means public and private money

would be saved. Mrs. Kerr would get full compensation for the compulsory taking, she would no doubt get whatever damages compensatory or exemplary that were just and also her costs up to date, and justice and public convenience would be served. She would, of course, be thereby deprived of one thing—the enormous advantage of being able to dictate a price, based not on the value of what she gave but on the necessities of the Company. Why the deprivation of this power of dictation and the substitution of a fair value should arouse the indignation of any tribunal of justice is beyond my comprehension. We are not aware of all the circumstances of the trespass, but, whatever they are, they can be met in the ordinary way. On 20th October 1926 Mr. Byrne appeared before the Council in session, and this is recorded :—" Mr. Byrne appeared on behalf of the Colonial Oil Refineries regarding a road along which the Company had laid a pipe-line under the impression, according to the records in the Title's Office, that it was a public road, and after obtaining permission from the Council Mr. Byrne stated that the Company had since discovered that the road was private property, and *asked the Council to have it reopened as a public highway.* He stated that *the Company was prepared to recoup the Council any expenditure connected with the opening of the road ; to complete the fence on the left-hand side ; and to clear the road of all surface boulders* to the satisfaction of the engineer without cost to the Council." In describing the propcsal of Byrne I disregard everything said in the evidence as to the " making " of the road in the completer sense of that term. The learned Judge preferred the minutes to recollection, and I gather that referred to the " making " of the road. I take the story as told by the minutes, and such of the evidence as is not only consistent with the minutes but is obviously connoted by what is there found. The recoupment meant, of course, the money which the Council would have to pay as compensation to Mrs. Kerr. The only other recoupment would be the cost of advertisements, and perhaps solicitor's costs. Apart from that, the proposal was to do the work of fencing and clearing at the Company's direct cost. This is corroborated by several witnesses and undenied. Indeed, it is part of the respondent's case (par. 5 of the statement of claim) of her

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evidence (interrogatory 3 and answer). The Company's offer was not then accepted. The Council decided to make an inspection of the road at 11 a.m. on 8th November. Now, before going further it is necessary, having noted the position of the Company in the matter, to observe the situation of the Council. The Shire of Werribee is a comparatively poor municipality, its rate-producing capacity being incommensurate with its extent. It is in process of development, and its situation between the great centres of Melbourne and Geelong, aided by the Altona Beach railway and a desirable beach, is apparently attracting settlement in the locality with which this case is concerned. Mrs. Kerr's holding of 1,000 acres is spoken of as desirable for subdivision. One of the circumstances pressed on her behalf was that the projected road would be inconvenient for subdivision, and she suggested another road which would in fact lend itself better to that purpose, and which she desired the Municipality to make. The cost of making that road would have been about £8,000 or £9,000. It is common experience that settlement, once it begins, sometimes proceeds unexpectedly fast. Another fact of experience is that roads are an essential to rapid and assured settlement. Even as it is, Werribee Shire is ill-provided with roads. That is one of the prime facts of this case. One of the Shire councillors stated: "We have to travel sometimes three or four miles to get from one given point to another, which is not fair to the ratepayers." And in the immediate locality with which this case is concerned, it is proved that settlement is gradually, if slowly, working round from the Racecourse road to Altona. One of the local residents called as a witness for the respondent stated, as one of the objections of what he calls the Progress Association to the resumption of this road, that the Council "were not justified in putting the ratepayers to any expense in resuming or making that road, when there was *need to make other roads*." There was certainly a considerable distance away, in continuation of the Kororoit road, a bridge across the Kororoit Creek which was stressed for the respondent. But as the shire engineer says:—"That road is fast deteriorating. It is in a deplorable condition. The bridge crossing the Kororoit Creek is condemned. The Kororoit Creek road cannot continue to carry heavy traffic without being reconstructed in the

immediate future." The opinion of Cr. Hickey is that " the Kororoit Creek road is in a bad state and also the bridge." Ex-Cr. McDougall says : " If another flood similar to the last came along I am afraid then the bridge would be gone." That at present appears to be the only practicable way from the Kororoit Creek road to Altona. The estimated cost of a bridge is £4,000 or £5,000. But the Shire is poor. Cr. Maher says : " The Council has not the funds to make bridges, it has no money." Cr. Hickey says :—" The financial position of the Shire is in a very deplorable condition. The Council has not the money to metal a road." When, therefore, the proposal of Byrne was placed before the Council, that body resolved to investigate. An inspection took place, which has been the subject of derision. That sentiment I am unable to share. The councillors saw what they thought sufficient to enable them to get a general idea of the locality, and to judge of the more precise information they would get from the shire engineer. That officer made a survey and took levels and made a plan. To use his own words, he advised the Council " that a road in that position is desirable. I pointed out to them that owing to the condition brought about by the flooding of the Kororoit Creek if it were washed away, there would be no access between North Williamstown and the Geelong road. Also in the event of a new bridge being put there, some route would have to be made for traffic. I pointed out that it was the Council's duty to adopt the road if they thought my recommendation desirable." Q. : " And that presents your honest opinion ? " A. : " Yes." Later on he deposes to the practicability of the road. His instructions being merely that the road was to be " opened " he, as he says, did not add anything about " making " the road in the specifications. As is well known, thousands of roads are simply " opened " in Australia, that is, made available in their natural state to the public to pass. His plans and specifications do little more than that. They have been termed a " sham "—but why, has never been explained. Up to one ton, that is, " light traffic " as it is called, the road would be trafficable without construction. Even Mrs. Kerr's witness Symonds said : " Of course, it would carry the ordinary traffic, but it would not carry anything from the Commonwealth Oil Works without a very great amount of expense." After consideration, objections and

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statutory meetings and procedure, the Council finally, on 8th December 1927, made an order under sec. 467 (1), and directed that it be transmitted to the Minister of the Crown in accordance with sec. 467 of the Act. The reasons, as sworn to by several councillors, are shortly these:—It was thought to be desirable for detailed reasons given to open the road, both in the interests of the C.O.R. and also in the interests of the locality, and, as Cr. Galvin observed, "more particularly as we were getting it for nothing." "Land has been cut up in that locality, and we want all the roads we can get—unfortunately we have not enough money to open them." To the same effect Cr. Goatze and others. Ex-Cr. McDougall also thought it would offer facilities to thousands of holiday visitors to the beach. If the road stopped at the railway-line it would still be a highway. But it was intended, as the engineer stated in his specifications, to obtain a level crossing. Much was made of the fact that up to the present there has been no application made for a level crossing. Also it has been urged that at the Council's statutory meeting they were informed by Mrs. Kerr's agent on 10th November 1927 that some railway officers had expressed an opinion adverse to a level crossing. The learned primary Judge took this into account. He thought the Council was thereby put on inquiry. But his Honor not only erred, in my opinion, in allowing this evidence to affect his mind (it being hearsay only) but he made the grave mistake of thinking it was the Railways Commissioners who were said to have expressed the adverse opinion. The agent, Mr. Symonds, who in November 1927 stated he had made inquiries, said that the officers he interviewed were three—namely, Mr. Gilchrist, whose position was not mentioned, Mr. Colgate, construction engineer for the district, and a third, unnamed, who was an engineer for the district. They or some of them seemed to have thought the storing of carriages there on race-days was an objection. Some other reason was alluded to by Mr. Symon, but not stated. It is not surprising to me that the Council thought little of this casual inquiry of Mr. Symonds *ex parte* on representations not detailed, made of officers having no jurisdiction to grant or refuse permission or to express any official opinion on the matter. The Council might, at least, reasonably believe, as they say they did, based on their own

experience, that when at the proper time this representative municipal authority applied to the Commissioners themselves and placed the whole of the circumstances before them, there would be no refusal. I feel some doubt whether the learned primary Judge would have come to the opinion he expressed at the chance of a level crossing, if he had not misunderstood who it was that had expressed the opinion.

The respondent at the trial, apparently appreciating the weakness of this part of her case, called a witness from the Railways, the chairman of the Level Crossing Committee. All he could say was in effect that any application for a level crossing would be dealt with on public grounds, and with due regard to safety. He even admitted that not every such application came before his committee. Of course the Commissioners alone, or some one authorized by them, could give any reliable evidence on the point. The respondent utterly failed to prove—if that were relevant—that a level crossing was impossible. It is matter of the commonest knowledge that level crossings exist in numberless places. Cr. Galvin says he thought there was no difficulty to be apprehended in getting a level crossing. "Only a year ago," he said, the "Commissioners offered to open another crossing near Werribee to assist traffic." He believed from his experience there would be no objection. He gave instances. Mr. Little, the shire engineer, was of the same opinion. Cr. Goatze said:—"I think it was taken for granted there would be no objection. I had no idea, nor any fear, that there would be any objection." Cr. Hickey said: "If a deputation was appointed to go to the Railways Commissioners, in my opinion the request would be granted." He stated a very solid reason, by pointing out that there would be only six to twelve trains a day at that point, whereas a level crossing had been granted on the Geelong road where forty or fifty trains a day passed. Cr. McMurray thought it would be almost a matter of course. If a Court is permitted to form an opinion on the matter —which I doubt—I should unhesitatingly say there are the strongest reasons for anticipating the Railways Commissioners would do all things possible to assist the Shire in obtaining a practicable road and the Company in fulfilling its functions of public utility. Mr. Galvin, when asked in cross-examination whether he approached

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the matter of the road from the point of view of the Council or the C.O.R., answered very naturally, and I venture to say properly: "Both." As to the C.O.R. he said: "they are substantial ratepayers of the Shire"; "they employ a large number of men, and it" (the Company) "is partly owned by the people of Australia." The advantage to the Municipality from the presence of the Company is self-evident. The advantage of the road without cost to the Shire is equally self-evident. The marvel to me is how it could be thought that because an *ultimate* purpose of great public benefit was anticipated, there could not be the *immediate* statutory purpose of opening the road. It seems to me a transparent fallacy to regard them as mutually exclusive. I apply to those facts, which I regret to say I have in the circumstances been compelled to narrate at great length, the rule in *Clanricarde's Case* (1): "Has the Shire, in the circumstances, acted beyond the limits of reason?" I can give but one—a negative—answer.

4. *Bad Faith.*—During the argument views were presented and opinions expressed that the Council's proceedings were a sham. No such case is, in my opinion, raised on the pleadings, and for reasons already stated I think there was little more than an attempt to do what Lord *Parmoor deprecated*, namely, indirectly to introduce the element of dishonesty. To his Lordship's observation, I shall merely add a reference to the case of *Claudius Ash, Sons & Co.* v. *Invicta Manufacturing Co.* (2). Now, nowhere does the learned primary Judge find that the order of 8th December 1927 which he restrained was fraudulent. There are clear indications in his Honor's judgment that he shrank from imputing moral turpitude to the members of the Council. He adhered to the minutes rather than to "the recollections of councillors who speak as to matters outside the minutes." Imperfect "recollection" is not dishonesty. He says that "if the Council had known definitely, if it had been made clear to them in a way from which they could not escape, that there was no chance of their getting across the railway, I do not think they would have persevered with what they did." That passage

(1) (1914) 79 J.P. 481; 13 L.G.R. 415; 31 T.L.R. 120.

(2) (1911) 28 R.P.C. 252; (1912) 29 R.P.C. 465.

necessarily connotes honest adherence to the road purpose—however unreasonable it might have been. Otherwise it has no meaning. With some inconsistency, if I may be permitted without disrespect to say so, the learned Judge says that the minutes indicate that the Council's suggestion of consideration of Mrs. Kerr's alternative road was "apparently" only a pretence. Referring later to this, he observes: "It is difficult to understand how the Council could have considered they were acting honestly to Mrs. Kerr." Of course, that is not the issue, but it is not an explicit finding of fraud as to purpose. I have anxiously read the judgment, and I respectfully think that we cannot find in that extempore decision any such delimitation of issues and corresponding findings as would amount to anything more than some collateral, unreasonable, inconsiderate and uncandid conduct towards Mrs. Kerr coupled with such a resolve to assist the C.O.R. as in his Honor's opinion deprived the resolutions of the Council of the legal quality of statutory purpose. Even that is not really supported by the circumstances appearing in evidence. But it is needless to pursue it. In my opinion, so far from being fraudulent, the councillors of the Shire of Werribee have acted in the most open manner, making no secret of what form their initial impulse to consider and eventually undertake a statutory purpose. Any suggestion of dishonesty is, in my opinion, not only belated, but disproved. As a representative body they unquestionably thought they could open the road and intended to effectuate that purpose. If, as I believe, they have not been shown to have transgressed the wide limits entrusted to them by the Legislature, no Court of law has any jurisdiction to intercept them in their public duty. And certainly at the instance of no individual whose interests are not presently in danger, and never may be if the legislative course is pursued, can the Court, following the lines of precedent, intervene and prevent the functioning of the Council and the Minister. Injustice can arise only by leaving absolutely uncontrolled in the respondent's hands the power of demanding not simply the value of her property but a price measured by the Company's necessity and that would leave the Municipality without the road it desires and apparently needs.

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HIGGINS J. The Shire Council has power (subject to the provisions of the *Local Government Act* 1915 and with the consent of the Governor in Council) to take land compulsorily "*for the purpose* of executing any of the works and undertakings authorized by this Act" (sec. 462). One kind of works authorized is the opening of new streets or roads (sec. 476 (1)); and another kind of works authorized is the making of streets or roads (sec. 489). The Council carried a resolution to provide a road between the Kororoit Creek road and the Altona road and to take a strip of the plaintiff's land for that purpose; but the plaintiff objects, alleging that the purpose of the Council was not a street or road, but to enable the Commonwealth Oil Refineries Ltd. ("the Company"), an adjoining owner, to maintain in position and use a pipe-line which the Company had unlawfully laid through the plaintiff's land. If this was the real purpose of the Council, the plaintiff must succeed in her objection (*Stockton and Darlington Railway Co.* v. *Brown* (1); *Marquess of Clanricarde* v. *Congested Districts Board for Ireland* (2); *Vatcher* v. *Paull* (3); *Municipal Council of Sydney* v. *Campbell* (4)). For the Council's power to take the strip of land is not general: it is limited to the particular *purpose* stated in the Act; and if the Council's real purpose is not a road, if its purpose is to get the Company out of a difficulty (to which the Council had contributed), the plaintiff is entitled to prevent the interference with her rights of property.

The principle of these cases is in no way weakened, it is confirmed, by the case of *Narma* v. *Bombay Municipal Commissioner* (5). For here there is no power apart from the purpose—the *purpose* is vital to the power; whereas in that case it was not so. By sec. 297 of the *City of Bombay Municipal Act* 1888 the Commissioner was empowered to prescribe a line each side of any public street, and (subject to receiving the necessary authority) to prescribe from time to time a fresh line in substitution therefor, and the line so prescribed was to be called "the regular line of the street"; and any land not vested in the corporation falling within the line could be taken on behalf of the corporation, with compensation to the owner

(1) (1860) 9 H.L.C. 246.
(2) (1914) 79 J.P. 481.
(3) (1915) A.C., at p. 378.
(4) (1925) A.C. 338.
(5) (1918) L.R. 45 Ind. App. 125.

(sec. 299). That the Commissioner actually prescribed the regular line "there can be no manner of doubt" (1). The Commissioner had an ulterior object of extending the road in order to be able to raise it by an incline to the level of a necessary overbridge; but the Judicial Committee found nothing in the Act that had the effect of invalidating the action of the Commissioner on account of his *purpose* (2); and added as follows:—"Cases in which it has been held that *powers conferred only for a statutory purpose* cannot be validly exercised for a different purpose are not in point. Such an exercise of the powers is outside the Act which confers them. . . . The preservation of the line of the street is not laid down as the definite and sole object for which the power is to be exercised." There, the action of the Commissioner was done "for the benefit . . . of the corporation" (2); here, the charge is that the Council was doing its act for the benefit of an outside company.

But the burden of proof lies on the plaintiff to show that the purpose allowed by the Act was not the purpose of the Council. If the real purpose was a road, the Courts have no right, and no desire, to substitute their own judgment for the judgment of the administrative body to which the responsibility is entrusted by the Legislature. The learned Judge of first instance (*Wasley* A.-J.) considered that the plaintiff had proved her case; and there was certainly evidence on which he could come to that conclusion. The very initiation of the scheme came from the Company, not from the public. According to the Council's minutes of 28th October 1926:—"Mr. Byrne appeared on behalf of" (the Company) "regarding a road along which the Company had laid a pipe-line under the impression . . . that it was a public road, and after obtaining permission from the Council. Mr. Byrne stated that the Company had since discovered that the road was private property, and asked the Council to have it reopened as a public highway. He stated that the Company was prepared to recoup the Council any expenditure connected with the opening of the road; to complete the fence on the left-hand side; and to clear the road of all surface boulders to the satisfaction of the engineer, without cost to the Council." This

(1) (1918) L.R. 45 Ind. App., at p. 128.

(2) (1918) L.R. 45 Ind. App., at p. 129.

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led up to resolutions, which I need not detail, for a road one chain wide, running to a point on the Williamstown to Altona road. This chain road was part of a former chain-and-a-half road that had been given up, sold by Council some forty years before; and there is no evidence whatever of any change in circumstances that made the road necessary. The pipe-line, however, was within the chain. But such a road would have to pass over a railway embankment, vested in the Victorian Railways Commissioners, and used for a live railway; and no permission had been granted by, or was even sought, from the Commissioners. There was evidence also that the ground over which the proposed "road" was to pass was low and swampy, and unsuitable for a road; and that the proposed "road" could not satisfy any public need. Probably it is enough to say that there was evidence of such a character that, if the Judge who saw and heard the witnesses believed it, he was justified in his finding that the purpose was not the purpose sanctioned by the power: and why should we disturb that finding?

I cannot find in the statement of claim that the plaintiff rests her case on any non-compliance with the forms and conditions prescribed by the Act—forms and conditions designed to safeguard the public from an unwise exercise of the true powers of the Council; and I shall therefore confine my judgment to the issue raised—as to the *purpose* of the Council. But I do not want it to be supposed that we have assumed that the forms and conditions have been sufficiently followed. For instance, looking at the *Government Gazette* of 7th September 1927, I find the notice states that "*the description*" shortly of the purport of the said work or undertaking and of the said specifications, maps, plans, sections and elevations is as follows —for the purpose of providing a road between the Kororoit Creek road and the Altona road in the east riding of the Shire of Werribee. This is no short "description" of the specifications, &c. Moreover, exhibit G (the plan referred to in the *Government Gazette* and copy of specifications showing the land proposed to be acquired by the Council) sets out the "specifications" in this form:—"Specifications in connection with the acquiring by the Werribee Shire Council for road purposes of a former government road within the Parish of Truganina. (1) The position of the land to be acquired as shown

on the accompanying plan. (2) The land is to be fenced by a p. and w. fence (*if necessary*) throughout. (3) It is to be cleared of stone and generally made trafficable. (4) Low-lying parts to be formed. Culverts to be provided. (5) Crossing at railway to be provided." There are no details—there is nothing specific as to the formation of low-lying parts, as to the number, position or character of the culverts, as to the provision for crossing. But, though I do not treat such lack of details as showing non-compliance with the conditions of the Act (even if the purpose of the Council was legitimate), I regard it as a strong indication in favour of the view taken by the learned Judge in his judgment, that the Council had not the purpose of providing a road for the public at all. The more one examines the facts of this case, the more is the impression strengthened that the purpose of the Council was not to provide a road at all—a real highway for the benefit of the public—but to get a road marked on paper in order that the owner of the land should not be able to enforce his rights against a trespassing company. The Legislature did not give to municipal councils power to interfere with the private title of A for the private benefit of B.

In my opinion the appeal should be dismissed.

POWERS J. The facts of the case are fully set out in the judgment of the learned Judge of the Supreme Court of Victoria, and in the reasons for judgment just delivered in this Court.

The defendant Council, at the request and at the expense of the Commonwealth Oil Refineries Ltd., agreed with the Company to take steps under the *Local Government Act* 1915 to compulsorily acquire land on which the Commonwealth Oil Refineries had in error laid a pipe-line from its factory to the sea, on and over the respondent's land. The Company was to pay for the compulsory acquisition. The Council, under the impression that the land in question was a road, had, in 1923, consented to the Company putting down the pipe-line in question, and, I assume, felt bound to do what it could for the Company in the circumstances. In pursuance of that agreement the Council carried a resolution to provide a road between the Kororoit road and the Altona road, and to take a strip of the plaintiff's land for that purpose. That resolution was followed by

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other action by the Council, details of which are set out in the judgment of the learned Judge of the Supreme Court. The respondent, prior to the request of the Company to the Council, had commenced an action in the Supreme Court of Victoria to compel the Company to remove the pipes from her lands. The respondent (the plaintiff in the action) opposed, on several grounds, the proceedings of the Council taken with the intention of compulsorily acquiring the land, but principally on the ground that the real purpose of the defendant (the appellant Council) was not to take the land to make or open a road for traffic, but was solely to obtain a title to the land in question so that it might in that way be able to protect the Company against any further trouble or attack from the plaintiff in connection with the pipe-line which the Company had unlawfully laid down on the plaintiff's land. The learned Judge of the Supreme Court of Victoria, after considering the documentary and oral evidence submitted by the parties, held that the Council did not at any time intend to open the road in question or to make the road, and that the moving factor right through was the desire of the Council to assist the Commonwealth Oil Refineries. Later on the learned Judge said: "I make the declaration at any rate that the Council were not acting with any intention of making or opening a road and there will be an injunction." The formal judgment of the Court was as follows: (a) That the purported determination of the defendant that it was expedient to execute the work or undertaking in the pleadings referred to of opening and making a road between the Kororoit Creek road and the Altona road in the east riding of the Shire of Werribee through or over all that piece of land (describing the land), and that it was necessary and desirable to compulsorily acquire the said land for executing such work or undertaking, was unlawful and invalid; (b) that the purported order of the defendant made on the 8th day of December 1927 in the pleadings referred to directing that the said work or undertaking be executed according to the specifications, maps, plans, sections and elevations described in the notice published in the *Government Gazette* on the 7th day of September 1927 was unlawful and invalid. The order restraining the defendant from

proceeding further with the compulsory acquisition of the land and the opening of the road followed.

In this appeal the real questions to be decided are :—(1) Did the Werribee Shire Council take the steps it did for the purpose of opening or making a road for use as a road, or did it do so for a purpose not authorized by the Act under which it took the steps it did, including an attempt to compulsorily acquire the land ? (2) If the attempt to take the land as it agreed to do was not for the purpose of opening or making a road as alleged, but for an unauthorized purpose, can the Court interfere to prevent the compulsory acquisition ?

As to the first question, after fully considering the evidence submitted and contentions submitted by counsel on the hearing of the appeal, I concur with the finding of the learned Judge, but not with all his reasons for arriving at his decision. Amongst those reasons I find :—(1) The Council never intended to carry out the work of opening or making a road on the land in question as a road for traffic or public use, but intended to acquire the land at the expense of the Commonwealth Oil Refineries to oblige the Company and prevent it from being required to remove the pipe-line it had laid down on the land. (2) The inspection, which the Council passed a resolution to make, was a sham : no real inspection was made of the road ; no member of the Council went along the road to see if the swampy part could be avoided ; and it would have been useless to make a proper inspection because the only offer the Company made was to pay for the land on which the pipes were already laid, and the members of the Council who gave evidence admitted that the Council did not intend to spend the Council's money on the road. (3) The specification passed by the Council was a sham and described work which the Council, on the evidence, admittedly had no intention to carry out at its expense, and no money to use for the purpose ; and it contained particulars of expensive work which the Council knew the Company had not agreed to pay for. No Council would be likely to proceed to acquire land to open up or make the road to Altona Road as a road without seeing whether it could carry out the work ; and in this case it was impossible to do so without obtaining the consent of the Railways

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Commissioners to cross the railway-line. No attempt was made to see whether the Railways Commissioners would grant a crossing at the railway. It was not necessary to do so if the land was to be acquired, as I find it was, to secure the pipe-line for the Company; but it was absolutely necessary to obtain a crossing to enable the Council to complete the work referred to, namely, to open or make a road as a road to Altona Road.

As to the second question, it is quite clear that competent Courts can in such a case interfere even if the proceedings by the Council are regular in form. In the case of the *Municipal Council of Sydney* v. *Campbell* (1) it was held that the evidence sustained the lower Court's conclusion of fact that the applicants were exercising their powers for a purpose differing from any of those specified by the statute. In delivering the judgment of their Lordships *Duff* J. said (2):—"A body such as the Municipal Council of Sydney, authorized to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Courts will interfere. As Lord *Loreburn* said in *Marquess of Clanricarde* v. *Congested Districts Board* (3): 'Whether it does so or not is a question of fact.'" Similar views were expressed in *Marquess of Clanricarde* v. *Congested Districts Board for Ireland*; *Stockton and Darlington Railway Co.* v. *Brown* (4), and in *Jones* v. *Metropolitan Meat Industry Board* (5).

I hold that the appeal should be dismissed.

STARKE J. Under the Victorian *Local Government Act* 1915, sec. 462, the council of every municipality may within the municipal district, and with the consent of the Governor in Council in any part of Victoria, take land compulsorily for the purpose of executing any of the works and undertakings authorized by the Act. The works and undertakings authorized by the Act include the making or opening of streets and roads and the diverting, altering or increasing the width of streets and roads (sec. 347 (1)). Under these provisions the Council of the Shire of Werribee purported to take compulsorily certain land belonging to the respondent, Ethel Jean Kerr; but

(1) (1925) A.C. 338.
(2) (1925) A.C., at p. 343.
(3) (1914) 31 T.L.R. 120.
(4) (1860) 9 H.L.C. 246.
(5) (1925) 37 C.L.R. 252.

Wasley A.-J., in the Supreme Court of Victoria, held that the Council had not taken the land for the purpose of executing any of the works and undertakings authorized by the Act, and in particular had not taken the land for the purpose of making or opening any street or road. Consequently he perpetually restrained the Council of the Shire from proceeding further in the compulsory acquisition of the land.

The law is well enough settled :—" A body such as " the Council of the Shire of Werribee " authorized to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Courts will interfere. . . . ' Whether it does so or not is a question of fact ' " (*Municipal Council of Sydney* v. *Campbell* (1) ; *Stockton &c. Co.* v. *Brown* (2)). The land sought to be taken had once formed part of an old government road which was closed in 1886 under statutory powers and another road substituted in lieu thereof. This old road never seems to have been used, for it was never formed, and ran in part across swampy and boggy ground. When closed it was acquired by predecessors in title of the respondent, and ultimately, along with other property, became vested in her. Some time in 1923 the Council gave the Commonwealth Oil Refineries Ltd. permission to lay a pipe-line along the old road from its works to the sea ; apparently the Council was unaware that it had been closed, and was vested in the respondent. The respondent took legal proceedings against the Oil Company, and obtained an order restraining the use of the pipe and directing its removal. The Company, in 1926, approached the Council, and suggested that it might take steps to reopen the old road, and offered to recoup it some at least of its expenditure in so doing. The Council was nothing loth, and almost immediately resolved that steps be taken to have the closed government road declared a public highway under the provisions of the *Local Government Act*. Plans of the proposed road were prepared ; but the specifications were of the most meagre description, containing general statements such as : " It " (the land) " is to be cleared of stone and generally made trafficable," " low-lying parts to be formed," " culverts to be provided," " crossing at railway to be provided."

(1) (1925) A.C., at p. 343. (2) (1860) 9 H.L.C. 246.

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Working details are not necessary, but the learned trial Judge was of opinion that some description of the "nature and extent of the work" would have been given, if the work was really proposed and intended to be executed, so that persons affected might consider it, and lodge their objections if so advised. Again, the evidence satisfied the learned Judge that the land proposed to be taken was, as it stood, most unsuitable as a road, and that a considerable expenditure would be necessary in filling up and forming swampy and boggy ground if the land were to be used as a road. Yet, as the learned Judge found, the Council had made no provision for any such expenditure, and had no means at its disposal for such a purpose unless the Oil Company came to its assistance and recouped it some at least of the expenditure connected with the resumption of the land and clearing it of boulders. The manager of the Company had stated to the Council that it would so recoup it if the Council reopened the road, but warned it that the Company's pipe on the road should not influence the Council's decision. The learned Judge was not much impressed by this altruistic proposal, and in any case the Council took no steps to put it on a safe legal footing. Again, the learned Judge was satisfied—and it was really undisputed—that a crossing at the railway was necessary for the effective use of the land as a road, but it was admitted that the Council had taken no steps to provide such a crossing, and the evidence suggests that the crossing might, and probably would, have been refused by the responsible authorities. On these facts, and others to which the learned Judge refers, he found that the Council was not compulsorily acquiring the respondent's land for the purpose of opening or making a road, but for the purpose of securing a pipe track through the respondent's land for the benefit of the Commonwealth Oil Refineries Ltd. This finding ought not to be disturbed by this Court, and indeed the evidence adduced in the case satisfies me that it was quite right.

The appeal ought to be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *E. A. F. Croft.*

Solicitors for the respondent, *Snowden, Neave & Demaine.*

H. D. W.