[HIGH COURT OF AUSTRALIA.]

BAIADA . . . . . APPELLANT;
PLAINTIFF,

AND

BAULKHAM HILLS SHIRE COUNCIL AND ANOTHER . . . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1951.

SYDNEY, *Nov.* 16.

Dixon, McTiernan, Williams, Fullagar and Kitto JJ.

Resumption of Land—Statutory power—"Purposes" of statute—Necessity—"Improvement and embellishment of the area"—Notification in the Government Gazette—Conclusiveness—Statute—Operation—Local Government Act 1919-1950 (*N.S.W.*) (*No.* 41 *of* 1919—*No.* 9 *of* 1950), *ss.* 321 (*d*), 532, 536—*Local Government (Amendment) Act* 1951 (*N.S.W.*) (*No.* 18 *of* 1951).

Unless a resumption of land by a council is in truth for a purpose or purposes of the *Local Government Act* 1919-1950, within the meaning of s. 532 of that Act, the publication in the Government *Gazette* of a notification that the land has been resumed is not conclusive.

Motor Wheel & Tyre Co. Ltd. v. *Commissioner for Railways*, (1950) 50 S.R. (N.S.W.) 205; 67 W.N. 166, referred to.

Decision of the Supreme Court of New South Wales (*Roper* C.J. in Eq.), reversed.

APPEAL from the Supreme Court of New South Wales.

Celestino Baiada, by way of statement of claim dated 3rd August 1948, brought a suit in the equitable jurisdiction of the Supreme Court of New South Wales against the Council of the Shire of Baulkham Hills and the Minister for Public Works, in which he claimed an injunction, declarations and orders in respect of certain land.

The amended statement of claim was substantially as follows :—

1. The plaintiff is now and has at all material times been the registered proprietor for an estate in fee simple of all that piece or parcel of land situate in the Shire of Baulkham Hills, having an area of 175 acres 1 rood 22 perches, and being the whole of the land comprised in certificate of title, vol. 1113, fol. 160.

2. The defendant the Council of the Shire of Baulkham Hills is now and has at all material times been duly incorporated under the provisions of the *Local Government Act* 1919-1946 (N.S.W.) and is liable to be sued in its said corporate name.

3. By a resolution duly carried at a duly convened meeting of the defendant Council it was resolved and determined that formal application be made under seal in accordance with the provisions of ss. 532 and 536 of the *Local Government Act* 1919, as amended, for the approval of His Excellency the Governor to the defendant Council acquiring by way of resumption for the purpose of the improvement and embellishment of the area the land described in par. 1 and the defendant Council duly notified the plaintiff accordingly.

4. By a notification under the *Local Government Act* 1919-1946 and the *Public Works Act* 1912 (N.S.W.) published in Government *Gazette* No. 128 of 7th November 1947, it was thereby notified and declared that the land referred to in par. 1 was thereby resumed under Div. 1 of Part V. of the *Public Works Act* 1912, for the purpose of the improvement and embellishment of the area and the said land was thereby vested in the defendant Council.

5. The plaintiff charged that the facts were that prior to that resolution being carried as aforesaid or at any other material time the said land was not required by the defendant Council for the improvement and embellishment of the area but for other and different purposes.

6. The plaintiff further charged that the facts were that that resolution was not based upon or preceded by any real or effective exercise by the defendant Council of its discretion to resume the land and that the defendant Council came to its determination without full and proper inquiry and information enabling it properly to determine the necessity of resuming the land of the plaintiff.

7. The plaintiff further charged that the fact was that prior to the passing of that resolution and at all material times the defendant Council had not the intention to use the land for the improvement and embellishment of the area but intended to subdivide the land and resell it.

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8. The plaintiff requested the defendant Council to refrain from carrying out its intention to resume the land, but the defendant Council proceeded with and completed the resumption despite such requests.

9. By reason of those wrongful acts of the defendant Council and the defendant the Minister for Public Works the plaintiff has sustained and will continue to sustain serious loss and damage.

The plaintiff claimed, *inter alia*, (i) a declaration that the purported resumption of the land by the defendant Minister for Public Works on the advice of the defendant Council was void and of no effect; (ii) an injunction restraining the defendants from mortgaging, selling, charging, or dealing in any way with the land; (iii) a declaration that the defendant Council held the land in trust for the plaintiff; (iv) an order to the defendant Council to do all such acts as might be necessary to re-transfer the land to the plaintiff; and (v) an inquiry as to the damage sustained by the plaintiff, and an order to the defendant Council to pay the amount of such damage when so ascertained to the plaintiff.

The defendant Council, under its common seal, (1) did not admit (a) that the resolution or the effect thereof was correctly or sufficiently set forth in par. 3 of the statement of claim; (b) that the notification or the effect thereof was correctly or sufficiently set forth in par. 4; and (c) that prior to the resolution being carried as alleged, or at any other material time, the land was not required by the Council for the improvement and embellishment of the area, or that it was required for other and different purposes; and denied the allegations made in pars. 6 and 9 of the statement of claim; (2) in answer to par. 7, admitted that prior to the passing of the resolution and at all material times the Council intended to subdivide the land and resell it because the Council deemed it expedient to acquire and sell the land in the interests of its area and because it desired to plan new roads and a new subdivision in such area and thereafter to sell the land in lots but except as to that the Council denied that at the times mentioned it had not the intention to use the land for the improvement and embellishment of the area but intended to subdivide the land and resell it; (3) in answer to the statement of claim, repeated the admission made as in (2) above and submitted that such action constituted or would constitute the improvement and embellishment of its area within the meaning of s. 321 of the *Local Government Act* 1919, or, alternatively, that such intention and such conduct constituted purposes for which the land might lawfully be resumed under the terms of the Act and validate the resumption notwith-

standing that by the terms of the resolution the purposes of the Council were expressed to be for the improvement and embellishment of its area; (4) submitted that the plaintiff had not disclosed any equity entitling him to proceed against the Council in the equitable jurisdiction of the Court, and that his proper remedy, if any, was at law, and the Council craved the same benefit from that defence as if it had pleaded or demurred to the statement of claim; and (5) in further answer to the statement of claim, said that the plaintiff had been guilty of laches and acquiescence and delay and by reason thereof was not entitled to the relief claimed.

Upon the matter coming on for hearing on 16th April 1951, the judge upheld a demurrer *ore tenus* on behalf of the defendant Council to the statement of claim. His Honour said he did not feel disposed, on his then present feeling, to review his decision in *Motor Wheel & Tyre Co. Ltd.* v. *Commissioner for Railways* (1); and in *Howarth* v. *McMahon* (2).

The suit was dismissed.

From that decision the plaintiff appealed to the High Court.

A. R. Taylor K.C. (with him *D. S. Hicks*), for the appellant. The decision in this case followed the decisions of the judge of first instance in *Motor Wheel & Tyre Co. Ltd.* v. *Commissioner for Railways* (1); and *Howarth* v. *McMahon* (2). At the time of his decision in this case the High Court had not dealt with the appeal against the decision in *Howarth* v. *McMahon* (2); and the judge was not disposed to reconsider his previous decisions. *Motor Wheel & Tyre Co. Ltd.* v. *Commissioner for Railways* (1) dealt with a resumption which was effected solely under the provisions of the *Public Works Act* 1912, as amended, but *Howarth* v. *McMahon* (3) dealt with a resumption under the *Local Government Act* 1919-1948 and the *Public Works Act* 1912. The decisions in those cases were based upon the dicta in *Criterion Theatres Ltd.* v. *Sydney Municipal Council* (4); but the power to resume in that case was not conditioned upon the existence of a purpose. It was a power to resume all lands required for the opening of new public ways, &c., and all lands of which those so required formed part. The effect of the decision was merely that the specification *qua* the residue of the land of a purpose which was not legitimate could not operate to invalidate the acquisition of one portion of a parcel of land, another portion of which was required

(1) (1950) 50 S.R. (N.S.W.) 205; 67 W.N. 166.
(2) (1950) 51 S.R. (N.S.W.) 73; 68 W.N. 25.
(3) (1951) 82 C.L.R. 442; (1950) 51 S.R. (N.S.W.) 73; 68 W.N. 25.
(4) (1925) 35 C.L.R. 555; 7 L.G.R. 72.

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for the purpose of widening &c. public ways, and the dicta referred to by the judge below cannot have any application to the legislation now under consideration: see *Minister for Public Works and Local Government* v. *Duggan* (1). Where a power is "purposive" in character (a) it must be exercised for that purpose, and (b) if exercised for some extraneous purpose only it is not exercised at all. The matters which this Court considered to be decided in *Municipal Council of Sydney* v. *Campbell* (2) are shown in *Werribee Shire Council* v. *Kerr* (3), cf. *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (4). The matter at issue in this case is concluded by *Howarth* v. *McMahon* (5). The only relevant power which a council has under the *Local Government Act* to acquire or hold land is s. 532, which authorizes a council to acquire land for any purpose of the Act. The power to acquire may be exercised either by agreement or compulsory purchase. What may be so acquired is land when it is desired to acquire it for a legitimate purpose, that is, a purpose of the Act. Section 536 merely provides the machinery for the exercise of the power of acquisition by resumption and it is clear that s. 536 (1) refers to a case "where the council proposes to acquire land" *for any purpose of the Act*, because it is only in such cases that land may be acquired by a council. Consequently, the resumption which is authorized by s. 536 is a resumption for any purpose of the Act and it is such a purpose which is deemed by s. 536 (6) to be an authorized work within the meaning of the *Public Works Act*. A purported resumption pursuant to the *Local Government Act* and the *Public Works Act* is not effective if it be made (i) for a stated purpose whereas the council has not any purpose at all, (ii) for a stated purpose whereas the council has some other purpose in contemplation, or (iii) for some public purpose which is not a legitimate purpose, that is to say, a purpose of the *Local Government Act*. Quite apart from any question of resumption, the Council's power to acquire land by agreement is restricted by s. 532, and it is clear that if the Council purported to obtain a title by conveyance of land for some purpose which was not legitimate that title would be voidable: see *Carington* v. *Wycombe Railway* (6). A similar, but independent, submission is that the power under s. 42 of the *Public Works Act* is again itself defined expressly by reference to purpose. *Howarth* v. *McMahon* (5) is an authority for the proposi-

(1) (1951) 83 C.L.R. 424; 18 L.G.R. 60.
(2) (1925) A.C. 338.
(3) (1928) 42 C.L.R. 1, at pp. 8, 30, 31.
(4) (1939) 61 C.L.R. 735, at pp. 759, 760; (1940) A.C. 838; 63 C.L.R. 338.
(5) (1951) 82 C.L.R. 442; 18 L.G.R. 43.
(6) (1868) 3 Ch. App. 377.

tion that the expression "public purpose" in the concluding portion of s. 42 must be taken to be a purpose of the *Local Government Act*. A resumption of land for the purpose of the *Local Government Act* is to be deemed to be a resumption for the purpose of carrying out an authorized work, and it is only for such a purpose that the power under s. 42 of the *Public Works Act* can be exercised. That was expressly provided by the opening words of s. 42, and the power of resumption may be exercised only for that purpose, that is to say, a purpose which is in fact a purpose of the *Local Government Act*.

L. C. Badham K.C. (with him *R. C. Cook* and *P. S. Smyth King*), for the respondents. The Court cannot go behind the notification in the *Gazette* of the fact of resumption. Upon the gazettal of that notification the resumption was effected, therefore its validity cannot now be questioned. The purpose for which the land was resumed was clearly an authorized purpose under s. 321 (d) of the *Local Government Act*. The word "undertake" in the introductory part of that section should be noted. As to whether or not the Governor formed the necessary opinion under s. 39 of the *Public Works Act* cannot be canvassed. In *Motor Wheel & Tyre Co. Ltd.* v. *Commissioner for Railways* (1), which was followed by *Howarth* v. *McMahon* (2), the notification, on its face, did not comply with the formal requisites of s. 42 of the *Public Works Act*—it was not for an authorized purpose. The judgment in *Howarth* v. *McMahon* (3) only applies to cases where a wrong purpose or no purpose is expressed in the notification; otherwise the legislature makes it clear that the matter is concluded when the notice is published in the *Gazette*. This is in the nature of a demurrer. The facts stated preclude the appellant from succeeding. Those facts provide a complete answer in law. Irrespective of the real purpose of the Council the notification terminated the matter.

A. R. Taylor K.C., in reply.

The judgment of the Court was delivered by:—

DIXON J. This is an appeal from a decree of the Chief Judge in Equity by which he allowed a demurrer *ore tenus* to a statement of claim and dismissed the suit. The object of the suit was to attack

(1) (1950) 50 S.R. (N.S.W.) 205; 67 W.N. 166.
(2) (1950) 51 S.R. (N.S.W.) 73; 68 W.N. 25.
(3) (1951) 82 C.L.R. 442; 18 L.G.R. 43.

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the validity of a resumption. The resumption had been made under s. 532 of the *Local Government Act* and s. 536, as s. 536 stood before Act No. 18 of 1951 came into force. Under s. 532 the Council may acquire land within or outside the area for any purpose of the Act by lease, purchase, appropriation, or resumption in accordance with the Part, that is, Part XXV. The purpose of the Act for which it was purported to make the resumption was that stated in s. 321 (d). That provision says that, subject to the provisions of the Act, the council may control and regulate, and may undertake the improvement and embellishment of the area. Assuming that the statement of claim correctly sets out the notice, the notice did not use the full words "for the purpose of undertaking the improvement and embellishment" but omitted the word "undertaking". The purpose was expressed to be simply for the improvement and embellishment of the area. But the defect in the form of the notice the Chief Judge in Equity did not think material.

The ground upon which the demurrer was allowed was that once the proceedings for resumption had reached a conclusion under s. 536, the gazetted notification precluded an investigation of the purposes which really actuated the Council. In the statement of claim pars. 5, 6 and 7 negative the existence in fact of the requisite purpose expressed by s. 321 (d). The allegations of fact there stated, if true, amount to a denial of the existence of that purpose.

In upholding the demurrer on this ground the learned Chief Judge in Equity applied the decisions he had given in *Motor Wheel & Tyre Co. Ltd.* v. *Commissioner for Railways* (1) and *Howarth* v. *McMahon* (2). These decisions were influenced by dicta by *Isaacs* J. and *Rich* J. in *Criterion Theatres Ltd.* v. *Sydney Municipal Council* (3). His Honour's decision in the present case was more particularly based on the case of *Howarth* v. *McMahon* (2), an appeal in which was pending in this Court and, indeed, was actually being argued at the time. The decision eventually given in this Court in *Howarth* v. *McMahon* is now reported (4). In that decision the case of *Criterion Theatres Ltd.* v. *Sydney Municipal Council* (3) is mentioned and comments are made upon the dicta of *Isaacs* and *Rich* JJ. Then follows a passage which is as follows:—"The decision of *Roper* C.J. in Eq. in *Motor Wheel & Tyre Co. Ltd.* v.

(1) (1950) 50 S.R. (N.S.W.) 205; 67 W.N. 166.
(2) (1950) 51 S.R. (N.S.W.) 73; 68 W.N. 25.
(3) (1925) 35 C.L.R. 555; 7 L.G.R. 72.
(4) (1951) 82 C.L.R. 442, at pp. 449, 450; 18 L.G.R. 43, at pp. 47, 48.

Commissioner for Railways (1) turns entirely on the *Public Works Act*, 1912. His Honour, in the course of his reasons, rejected a contention that s. 34 (2) of the *Government Railways Act* 1912-1950 was the source of the power there in question. Having done so, his Honour placed the case entirely under Part V. of the *Public Works Act*, 1912. Having found that the notice of acquisition complied with the requirements of s. 42 of that Act, his Honour then decided that s. 43 accomplished the vesting of the land notwithstanding that upon the facts behind the acquisition he was of opinion that the works contemplated did not in truth form an authorized work within the meaning of s. 42. The distinction between the present case and *Motor Wheel & Tyre Co. Ltd.* v. *Commissioner for Railways* (1), as will be seen, lies in the fact that in the latter case the whole question came within ss. 42 and 43 of the *Public Works Act*. In the present case the *Public Works Act*, 1912 does not apply unless and until it is, so to speak, drawn in by a proper use of the *Local Government Act*. For the reasons already given, the *Public Works Act* is not drawn in by the *Local Government Act* unless the conditions stated by s. 532 are fulfilled and here they are not fulfilled. It is therefore not proper in the present case to express any opinion about the correctness of the conclusion that in a case exclusively under Part V. of the *Public Works Act* the facts behind the notice of acquisition are not examinable." (2).

A little earlier in the reasons the Court had expressed the opinion that, upon the proper interpretation of the *Local Government Act* the operation of the provisions of Div. 1, Part V., of the *Public Works Act* in regard to resumption depends entirely on the substantive power under the *Local Government Act* becoming exercisable. The Court proceeded to say that that means, when the power is sought in s. 532, it is an indispensable condition that the resumption shall be for a purpose of the Act. At a point in the judgment later than the passage quoted above, the Court said that whatever might be the position under other Acts, under the *Local Government Act* the cardinal provision is s. 532 and that makes the existence of the requisite purpose essential. " Thus the inquiry is remitted to the question whether the purported resumption of the land of the defendant-respondent was for a purpose within the power of the municipality." These passages amount to a very definite expression of opinion that unless the resumption is in truth for the purposes of the Act within the

(1) (1950) 50 S.R. (N.S.W.) 205; 67 W.N. 166.

(2) (1951) 82 C.L.R., at pp. 449, 450; 18 L.G.R., at pp. 47, 48.

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meaning of s. 532 the publication in the *Gazette* is not conclusive. To that opinion we adhere. Indeed we have already repeated it and given effect to it in the case of *Minister for Public Works and Local Government* v. *Duggan* (1). The judgment of the learned Chief Judge in Equity was based on a view which gave a wider application to his Honour's decision in *Motor Wheel & Tyre Co. Ltd.* v. *Commissioner of Railways* (2) and also upon what his Honour had said with reference to that case in *Howarth* v. *McMahon* (3) before it came to this Court. What has been decided in this Court displaces the view so expressed by his Honour and it follows that, apart from what has been suggested as to the application of the new Act, No. 18 of 1951, the decision below cannot stand and the demurrer should have been overruled. The suggestion made as to Act No. 18 of 1951 is that it has a retrospective operation and governs this case. If it had a retrospective operation we are far from saying that it would cause us to reach a different conclusion in this case. But we are clearly of opinion that it has not got a retrospective operation.

For these reasons the appeal should be allowed with costs, the decree below should be set aside so far as it upholds the demurrer and dismisses the suit with costs and refers the taxation of costs to the Master. In lieu thereof the demurrer *ore tenus* should be overruled with costs and the cause remitted to the Supreme Court in Equity to be dealt with according to law consistently with this judgment.

Order accordingly.

Solicitors for the appellant, *Roscoe W. G. Hoyle & Co.*

Solicitor for the respondent Council, *H. W. Shepherd*, Parramatta, by *Greenwell & York.*

Solicitor for the respondent Minister, *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.

(1) (1951) 83 C.L.R. 424; 18 L.G.R. 60.
(2) (1950) 50 S.R. (N.S.W.) 205; 67 W.N. 166.
(3) (1950) 51 S.R. (N.S.W.), at p. 75; 68 W.N., at p. 26.