HIGH COURT OF AUSTRALIA

HAYNE J

PAUL JOHN RUTLEDGE PLAINTIFF

AND

STATE OF VICTORIA & ANOR DEFENDANTS

Rutledge v Victoria
[2013] HCA 60
21 November 2013
M60/2013

ORDER

Judgment for each defendant with costs.

Representation

M C O'Connor for the plaintiff (instructed by Lanham Lawyers)

K E Foley for the first defendant (instructed by Victorian Government Solicitor)

R J Sadler for the second defendant (instructed by Beck Legal)

CATCHWORDS

Rutledge v Victoria

Constitutional law (Vic) – Royal Assent – Whether Royal Assent to Bill reserved in accordance with *Australian States Constitution Act* 1907 (Imp) can be signified only under Royal Sign Manual – Whether Bill for *Constitution Act* 1975 (Vic) assented to in accordance with law.

Words and phrases – "reserved for the Signification of Her Majesty's Pleasure".

Australian States Constitution Act 1907 (Imp), s 1(1).
Colonial Laws Validity Act 1865 (Imp) (28 & 29 Vict c 63), s 6.
Victoria Constitution Act 1855 (Imp) (18 & 19 Vict c 55), Sched 1, s 60.

1 HAYNE J. The plaintiff, Paul John Rutledge, does not want, and says he is not bound, to pay rates and charges levied by the Greater Bendigo City Council in respect of land which he owned in West Bendigo and in respect of his residence in Woodvale, Victoria. The plaintiff alleges that the rates and charges levied by the Council and the steps that have been taken to enforce their payment, including the transfer of the West Bendigo land to the Council and its subsequent sale, were and are unlawful.

2 By writ of summons prepared by a solicitor and issued in this Court on 11 June 2013, the plaintiff alleges that the *Constitution Act* 1975 (Vic):

> "is ultra vires and invalid as:
>
> a) There is no evidence that the Constitution Act 1975 (Vic) was signed or assented to by Her Majesty the Queen and section 60 of the Victorian Constitution Act 1855 (Imperial) required that 'every bill so passed shall be reserved for the signification of Her Majesty's Pleasure thereon'.
>
> b) The Westminster Parliament is the only authority that could repeal the Victorian Constitution Act 1855 (Imperial).
>
> c) The Victorian Parliament had the power in 1975 to repeal parts of the Victorian Constitution Act 1855 (Imperial) but not the whole act."

3 By his writ the plaintiff further alleges that in consequence of the fact that the *Constitution Act* 1975 was not validly enacted, the *Victoria Constitution Act* 1855 (Imp)[1] remains in force, and that the creation of the Greater Bendigo City Council was not properly authorised. The essential allegation which the plaintiff makes is that the Bill for the *Constitution Act* 1975 was not validly enacted because it was not assented to by Her Majesty the Queen.

4 The writ names the State of Victoria and the Greater Bendigo City Council as defendants. Each defendant now applies for summary judgment in the action. Each defendant alleges that the plaintiff's action is bound to fail because this Court should be satisfied that Royal Assent was properly given to the Bill for the *Constitution Act* 1975 in accordance with the then applicable requirements of law. Each defendant further alleges that the plaintiff is precluded from pursuing his claim in this Court because he had earlier brought proceedings in the Supreme Court of Victoria seeking substantially the same relief as is now sought in this Court on what are said to be grounds substantially identical to those put forward in the present proceedings. The defendants point

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1 18 & 19 Vict c 55.

to the fact that the plaintiff consented to orders dismissing the proceedings in the Supreme Court and they allege that it follows that the plaintiff is now precluded from pursuing the present proceedings.

As I indicated in the course of argument, I do not consider it necessary to examine the validity of the arguments advanced by the defendants about the preclusive effect of the orders which were made by consent in the Supreme Court. Rather, it is convenient to focus only upon the question of Royal Assent to the Bill for the *Constitution Act* 1975. In his statement of claim the plaintiff refers to s 60 of the 1855 Constitution[2] as requiring that "every Bill which shall be so passed" – I interpolate "for amendment of the 1855 Constitution" – "shall be reserved for the Signification of Her Majesty's Pleasure thereon". The better view may very well be that, as the State submitted, at the times relevant to this matter the requirement for reservation for signification of the Crown's pleasure on a Bill for amendment of the 1855 Constitution was provided by s 1(1) of the *Australian States Constitution Act* 1907 (Imp). Section 1(1) of that Act provided that:

> "There shall be reserved, for the signification of His Majesty's pleasure thereon, every Bill passed by the Legislature of any State forming part of the Commonwealth of Australia which—
>
> (a) alters the constitution of the Legislature of the State or of either House thereof; or
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> (b) affects the salary of the Governor of the State; or
>
> (c) is, under any Act of the Legislature of the State passed after the passing of this Act, or under any provision contained in the Bill itself, required to be reserved;
>
> but, save as aforesaid, it shall not be necessary to so reserve any Bill passed by any such Legislature:
>
> Provided that—
>
> (a) nothing in this Act shall affect the reservation of Bills in accordance with any instructions given to the Governor of the State by His Majesty; and
>
> (b) it shall not be necessary to reserve a Bill for a temporary law which the Governor expressly declares necessary to be

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2 Set out in Sched 1 to the *Victoria Constitution Act* 1855.

assented to forthwith by reason of some public and pressing emergency; and

(c) it shall not be necessary to reserve any Bill if the Governor declares that he withholds His Majesty's assent, or if he has previously received instructions from His Majesty to assent and does assent accordingly to the Bill."

6 It may be observed at this point that the provisions of the *Australian States Constitution Act* were subsequently overtaken by the provisions of s 9 of the *Australia Acts*[3], which, so far as presently relevant, provided that:

"(2) No law or instrument shall be of any force or effect in so far as it purports to require the reservation of any Bill for an Act of a State for the signification of Her Majesty's pleasure thereon."

7 The defendants advance two separate points as complete answers to the plaintiff's allegation that the Bill for the *Constitution Act* 1975 was not assented to. First, the defendants point to the proclamation published in the *Victoria Government Gazette*[4]. The proclamation by the Governor of the State of Victoria recorded that the Bill for the *Constitution Act* 1975, which had been reserved pursuant to the provisions of the *Australian States Constitution Act* for the signification of Her Majesty's pleasure thereon, had been laid before Her Majesty in Council and that "by an Order in Council bearing date the twenty-second day of October, 1975, Her Majesty has been pleased to assent to same". By operation of s 6 of the *Colonial Laws Validity Act* 1865 (Imp)[5]:

"any Proclamation purporting to be published by Authority of the Governor in any Newspaper in the Colony to which such Law or Bill shall relate, and signifying … Her Majesty's Assent to any such reserved Bill as aforesaid, shall be *primâ facie* Evidence of such … Assent".

8 Second, and separately, there has been produced in evidence from the public records of the State a copy of a public record being an Order in Council dated 22 October 1975 recording as follows:

"Whereas the Governor of Victoria (being one of the States constituting the Commonwealth of Australia) did, on the 20th day of May 1975, reserve for the signification of Her Majesty's pleasure a Bill passed

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3 *Australia Act* 1986 (Cth); *Australia Act* 1986 (UK).

4 No 95, 19 November 1975 at 3819.

5 28 & 29 Vict c 63.

by the Legislature of the said State, which provides that it may be cited as the 'Constitution Act 1975':

> And whereas the said Bill, so reserved as aforesaid, has been laid before Her Majesty in Council, and it is expedient that it should be assented to by Her Majesty:
>
> Now, therefore, Her Majesty doth by this present Order, by and with the advice of Her Privy Council, declare Her Assent to the said Bill."

9 The plaintiff points out, correctly, that neither the Order in Council nor any other document produced in evidence in this Court records the signification of Royal Assent to the Bill for the *Constitution Act* 1975 by execution under the Royal Sign Manual. But, on any view, it seems to me that the signification of Her Majesty's assent to the Bill is constituted by the Order in Council. As I said in the course of argument, the area of discourse in which this issue arises is Imperial control over colonial legislation. Reservation of a Bill of a colonial legislature for signification of Royal Assent required the colony to reserve the Bill for signification of Royal Assent according to the advice tendered to Her Majesty, not by Her Majesty's colonial Ministers, but by her Imperial Ministers. Once it is understood, as it must be, that the Crown is, in this respect, acting on the advice of its Imperial, as distinct from its colonial, Ministers, it is evident that the practice, long established, of signification of Royal Assent by Order in Council constitutes satisfaction of the requirements of s 1(1) of the *Australian States Constitution Act*. If authority for that proposition is necessary, it is to be found in the work of Sir Henry Jenkyns, to which counsel for the State referred[6], and in Alpheus Todd's work on *Parliamentary Government in the British Colonies*[7].

10 There is, in my opinion, no substance in the plaintiff's submission that Royal Assent to a Bill reserved in accordance with the *Australian States Constitution Act* can be signified only under the Royal Sign Manual.

11 On either of the bases relied on by the defendants, it is demonstrated that the Bill for the *Constitution Act* 1975 was assented to in accordance with law.

12 It follows that the plaintiff must fail in this action. It is not necessary to consider whether, if the *Constitution Act* 1975 had not been validly enacted, any of the more particular consequences alleged by the plaintiff would have followed. Nor is it necessary to consider the questions of preclusion to which I have earlier

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6 *British Rule and Jurisdiction Beyond the Seas*, (1902) at 78.

7 2nd ed (1894) at 170-172.

referred. The central point which the plaintiff must make good to establish his claim is a point on which he must fail.

13 No question emerges in this case requiring examination of the degree of satisfaction that must be attained before entering summary judgment for a party. This is a case in which it is plain that the plaintiff must fail.

14 There should be judgment for each defendant in the action. That judgment should be with costs.