

of administrative law at present under discussion is an *ex tempore* judgment of one judge, albeit Lord Greene, in the Court of Appeal. Administrative law has been discounted by some as having no significant part in the scheme of British justice; it has certainly been neglected until recent years. Until it is realised that control of the administrator is a distinct branch of law, no coherent development of its basic concepts can take place.

Remedy

It is of some significance that the remedy sought in *Hall's Case*⁴⁸ was a declaration. In New South Wales the remedy of declaratory decree is not generally available, and a plaintiff in an administrative law case is still forced to rely on the highly technical prerogative writs or on the limited remedy of injunction. If a general judicature system is not to be introduced into New South Wales, it would at least be desirable for the possibility of making available the declaratory decree as a general remedy to be considered, perhaps by the present Law Reform Commission in the course of its examination of review of discretionary powers. Simplified rules of availability of the remedy would materially aid plaintiffs and leave the courts free to develop the grounds on which the remedy might be based.

Footnote

After the Court of Appeal decision in *Hall's Case* the Company made fresh application to the Council for the planning permission originally sought. The Council granted the permission subject to substantially similar conditions to those previously imposed. The Company proposes to appeal.

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INNOCENT PURCHASERS AND THE SALE OF GOODS ACT

*PACIFIC MOTOR AUCTIONS PTY. LTD. v. MOTOR CREDITS (HIRE FINANCE) LTD.*¹

The Sale of Goods Act in s. 26(1)² gives statutory force to the common law rule *nemo dat quod non habet*. The concluding words of the section, however, recognize an exception where "the owner of the goods is by his conduct precluded from denying the seller's authority to sell". This is, of course, the principle of estoppel and it was with this principle that the Australian Courts³ in the *Motor Credits Case* were primarily concerned. The fact that the judges in the High Court and Supreme Court⁴ were equally divided on the question bears testimony to the uncertainty surrounding this area of the law.

On appeal to the Privy Council⁵ the Judicial Committee found it un-

⁴⁸ *Supra* n. 1.

¹ (1965) A.C. 867.

² 26(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

³ High Court (McTiernan, Taylor and Owen, JJ.) (1963) 109 C.L.R. 87, and Supreme Court (Walsh, J.) 79 W.N. (N.S.W.) 684.

⁴ McTiernan and Walsh, JJ. held there was estoppel; Taylor and Owen, JJ. *contra*.

⁵ (1965) A.C. 867.

necessary to consider the question of estoppel and instead decided the case on a somewhat novel interpretation of s. 28(1) of the Sale of Goods Act.

The facts giving rise to the dispute in this case, though complicated, were basically as follows. Motordom Pty. Ltd., a dealer in motor vehicles, had a "floor plan" arrangement with a financier, Motor Credits (Hire Finance) Ltd., whereby Motordom would purchase vehicles in its own name and then approach Motor Credits and suggest that some of the vehicles should be placed on floor plan. Motor Credits, if agreeable, would pay Motordom ninety per cent of the original purchase price whereupon the general property in the vehicles passed to Motor Credits. Motordom had a right to retain the vehicles in its possession, to resell in its own name at such price as it should decide and to receive and retain the purchase money subject only to a duty to account to Motor Credits.

Motordom, being pressed for payment of a debt owing by it to Pacific Motor Auctions Pty. Ltd., entered into an arrangement whereby it sold 29 of the vehicles in its possession to Pacific in discharge of its outstanding indebtedness. Motordom retained a right to repurchase the vehicles from Pacific but this was never exercised. Of the 29 vehicles transferred, 16 had become the property of Motor Credits under the floor plan arrangement.

Motordom's authority to resell the vehicles on floor plan had been revoked by Motor Credits early on the morning of 2nd November, 1960, and it was not until after ordinary working hours on that day that the sale to Pacific took place. Pacific, although aware of the existence of the floor plan arrangement between Motor Credits and Motordom, was unaware of the particular vehicles involved therein and at the time of the forced sale had no notice of the revocation of Motordom's authority to sell. Motor Credits laid claim to the 16 vehicles which had been on floor plan, and on Pacific's refusal to hand over the vehicles, action was brought seeking an order for the return of the vehicles or their value. Pacific relied primarily upon ss. 26(1) and 28(1) of the Sale of Goods Act to justify retention of the vehicles.

Walsh, J. in the Supreme Court upheld the defence plea based on s. 26(1) and found that Motor Credits was estopped from denying that title to the vehicles had passed to Pacific. His Honour did not distinguish between apparent ownership⁶ and apparent agency.⁷ Rather he appeared to use the terms interchangeably, with the result that it is difficult to decide whether his judgment, while clearly based on a finding of apparent ownership, also included a finding of apparent agency.

In the High Court the distinction was carefully drawn, especially by Taylor, J.⁸ who came to the conclusion that the only representation that could be said to amount to one of apparent ownership was the fact of Motordom's possession of the vehicles, and this alone could never create estoppel by apparent ownership.⁹ Walsh, J., while acknowledging that mere possession of goods was insufficient to establish apparent ownership,¹⁰ had taken the view that the facts extended beyond mere possession and that a defence of apparent ownership was made out.¹¹

It would appear that Walsh, J.'s view is more in accord with recent authority. In *Lloyds and Scottish Finance Ltd. v. Williamson*¹² the Court of

⁶ That is, where some person has appeared to be the owner of property when in reality he was not.

⁷ That is, where some person has appeared to have authority to do something when in reality he has not.

⁸ (1963) 109 C.L.R. 87 at 97 and 98.

⁹ *Ibid.* at 99.

¹⁰ 79 W.N. (N.S.W.) 684 at 692.

¹¹ *Ibid.* at 697.

¹² (1965) 1 All E.R. 641.

Appeal, faced with a similar fact situation insofar as conduct amounting to a representation of apparent ownership is concerned, said:

. . . in the present case the principal did much more than merely put Peerless (that is, the dealer) in possession of the motor car. He did what he could to induce any person buying the car from Peerless to believe that Peerless were the owners of the motor car by authorizing Peerless to sell it as owners.¹³

This decision, while it may be criticized on the ground that the external factors which misled the buyer were no different than where the buyer is misled by the possession of a person who has not been expressly authorized to hold himself out as owner, is in accordance with principles regarded as settled as far back as 1877,¹⁴ and does not seem to represent any erosion of the rule that mere possession is not sufficient to raise an estoppel.¹⁵

Taylor, J.¹⁶ also rejected apparent ownership on the ground that Pacific's knowledge of the floor plan, albeit not of the actual cars involved, prevented it from claiming it had acted in the belief that Motordom was the true owner. His Honour's opinion is supported by *Lloyds' Case* where the Court of Appeal considered that a defence based on apparent ownership "may well be unavailable" if the purchaser "suspected or had grounds for suspecting"¹⁷ that the vendor was not the owner of the vehicle in question.

This dictum may herald the introduction of a doctrine of constructive notice into this field, a move which runs counter to the oft-stated rule that "as regards the extension of the equitable doctrines of constructive notice to commercial transactions the Courts have always set their faces resolutely against it",¹⁸ but seemingly will become implanted in this area of commercial law.

The defence based on the concept of apparent agency was also rejected by the majority of the High Court, who held that where a dealer is merely given possession of vehicles "a purchaser is not entitled to assume the seller has authority to deal with the vehicles otherwise than in the ordinary course of business"¹⁹ unless there be some further act by the true owner leading the purchaser to believe the seller is clothed with authority to enter into such a transaction.²⁰ Both Taylor and Owen, JJ. held there was no such further act here and that, as the sale was not in the ordinary course of business, apparent agency was not available.²¹

The statement of principle by the High Court is in accord with the views of Walsh, J., although Walsh, J., if his decision was intended to extend to a finding of apparent agency as the Privy Council suggests,²² must be taken to have considered that Motordom had been clothed with apparent authority extending beyond mere authority to sell in the ordinary course of business.

The High Court²³ also rejected the defence based upon s. 28(1)²⁴ of the

¹³ *Ibid.* at 645.

¹⁴ *Johnson v. Credit Lyonnais* (1877) C.P.D. 32 at 36.

¹⁵ *Cf. Dr. K. C. T. Sutton* (1965) 39 *A.L.J.* 233 at 234-5.

¹⁶ (1963) 109 C.L.R. 87 at 98.

¹⁷ *Lloyds and Scottish Finance Ltd. v. Williamson* (1965) 1 All E.R. 641 at 644.

¹⁸ E.g., *per Lindley, L.J. in Manchester Trust v. Furness* (1895) 2 Q.B. 539 at 545.

¹⁹ This rule of apparent agency is now codified in s. 5 Factors (Mercantile Agents) Act, 1923.

²⁰ (1963) 109 C.L.R. 87 at 103.

²¹ *Ibid.* at 97 and 102-3 since it was a forced sale outside ordinary business hours. The fact that Motor Credits had withdrawn Motordom's authority earlier on the morning of the sale was immaterial as the revocation had not been brought to Pacific Motor Auctions' notice. *Ibid.* at 99.

²² (1965) A.C. 867 at 881.

²³ (1963) 109 C.L.R. 87 at 100 and 102.

²⁴ 28(1) Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents

Sale of Goods Act on the basis that such a defence was precluded by the case of *Staffs Motor Guarantee Ltd. v. British Wagon Co. Ltd.*,²⁵ holding that s. 28(1) was only applicable where the seller retained possession as a seller and not in some other capacity.²⁶

An appeal to the Privy Council by Pacific Motor Auctions was upheld by the Judicial Committee who took the view that the words "continues in possession" in s. 28(1) merely required a continuance of physical custody irrespective of the character of that custody²⁷ and that s. 28(1) would be available to protect a subsequent purchaser's interest where the seller resold prior to the original purchaser taking physical delivery of the goods from the seller.²⁸ *Staffs' Case* was rejected as placing an "elaborate and artificial construction on the natural meaning of the words"²⁹ in the subsection but the Judicial Committee regarded as "plainly right"³⁰ the view taken in *Mitchell v. Jones*,³¹ that the words "is in possession" in the same subsection applied only to the situation where the vendor did not have possession at the time of the original sale and only obtained it at a later date.

Some inconsistencies in the judgment of the Privy Council are apparent. Lord Pearce sought to justify the overruling of *Staffs' Case* on the ground that a subsequent purchaser from the seller should not be disentitled by an unknown arrangement which substituted bailment for ownership,³² but as a learned writer points out,³³ would not a break in the vendor's physical possession (which on the authority of *Mitchell v. Jones* prevents s. 28(1) from operating) be equally unknown to the subsequent purchaser?

The Privy Council's interpretation leads to practical difficulties as well. Not only will the requirements of taking delivery in order to avoid the operation of the section cause inconvenience in business transactions, but difficult questions as to whether physical delivery has in fact been taken may arise.

The benefits resulting from the disturbance of an interpretation which had stood unchallenged for over thirty years are far from obvious, and perhaps one may be forgiven for suggesting that the Privy Council would have been better rewarded had its efforts been directed toward finding a solution to "the difficult question of estoppel".³⁴

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of title under any sale pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

²⁵ (1934) 2 K.B. 305.

²⁶ Walsh, J. did not find it necessary to decide this question.

²⁷ (1965) A.C. 867 at 888.

²⁸ *Ibid.* at 886.

²⁹ *Ibid.* at 886.

³⁰ *Ibid.* at 885.

³¹ (1905) 24 N.Z.L.R. 932.

³² (1965) A.C. 867 at 886.

³³ (1965) 39 *A.L.J.* 233 at 234.

³⁴ (1965) A.C. 867 at 882.