of Appeal approach is adopted there is still the question of whether the various elements of estoppel must be present before the section can operate.[42] However it is clear that the section does actually transfer a real title and many decisions require that the elements of estoppel be present. A possible explanation is that the principle, now embodied in the section, originated in mercantile convenience but as it developed had engrafted on to it the requirements of a valid estoppel.[43]

From a practical point of view the significance of the case lies in the unanimous acceptance by the High Court of the proposition that had the respondent been simply a member of the public, present at Motordom's premises during regular business hours, the appellants would have failed.

I. MALKIN

## COONEY AND OTHERS v. THE COUNCIL OF THE MUNICIPALITY OF KU-RING-GAI[1]

*Local Government—Restriction imposed on use of land—Validity of restriction as an exercise of delegated power—What constitutes 'trade or industry'—Availability of injunctions to restrain breach of restriction.*

Early in 1962 Mrs Olga Cooney applied to the Ku-ring-gai Council for permission to renovate premises on which she had been conducting a small and intermittent catering business. Thus was started a chain of events which led ultimately to the clarification of one of the most confused areas of Australian administrative law—the jurisdiction of a court to grant an injunction to restrain interference with a public right at the suit of the Attorney-General acting on behalf of the public. For by a proclamation of the sixteenth of January 1952 made pursuant to section 309 Local Government Act[2] the Ku-ring-gai Council had zoned as residential the area in which the Cooney premises were situated. This proclamation prohibited the use of any land in this area 'for the purposes of any trade, industry, manufacture, shop or place of public amusement. . . .'[3] Previously unaware of Mrs Cooney's activities, the Council now commenced proceedings to obtain an injunction restraining Mrs Cooney and two others from using the premises 'for the purpose of the trade or business of providing at cost refreshments and entertainments at social functions held therein'.[4] They were able to adopt this procedure by virtue of section 587 Local Government Act, which provides that in any case in which the Attorney-General might take proceedings at the relation of a municipal council with respect to securing the observance of a provision of the Local Government Act, that council is

[42] Goodhart, 'The nature of the Title passed by a Mercantile Agent at Common Law' (1957) 73 *Law Quarterly Review* 455.

[43] Another suggestion is that of Chamberlain J. who regards both approaches as being simply different ways of reaching the same conclusion. *General Distributors Ltd v. Paramotors Ltd* [1962] S.A.S.R. 1, 21.

[1] (1963) 37 A.L.J.R. 212. High Court of Australia: Dixon C.J., Kitto, Taylor, Menzies and Windeyer JJ.

[2] Local Government Act 1919 (N.S.W.), s. 309 as amended.

[3] *N.S.W. Government Gazette* 25 January 1952.

[4] (1963) 37 A.L.J.R. 212, 216.

deemed to represent sufficiently the interest of the public and may take proceedings in its name. This procedural step must be stressed, as it explains why the case falls within the ambit of the law governing suits at the instance of the Attorney-General to restrain interference with public rights.

The suit was brought before Jacobs J. sitting in the equitable jurisdiction of the New South Wales Supreme Court. His Honour dismissed the suit on the ground that what the defendants were engaged in was technically neither a trade nor an industry. The Full Court upheld the Council's appeal and from there Mrs Cooney and her companions appealed to the High Court of Australia.

The appeal was based on three grounds.[5] First it was argued that the proclamation was an invalid exercise of the zoning power conferred on the Council by section 309 Local Government Act. This section authorizes a municipal council (*inter alia*) to 'declare by proclamation any defined portion of an area to be a residential area'. The council is also given power to declare what activities may be carried on in such areas. The respondents had used this power in a rather ingenious way. Rather than proclaim certain areas as residential, they had proclaimed the whole municipality a residential area, relaxing prohibitions on certain activities in certain sections of the area. These sections were usually only single blocks of land, upon which a certain activity was being carried on at the time the proclamation came into force, and the proclamation did no more than authorize the continuance of the activity in that section. These sections were defined in schedules two to eighty-one of the proclamation, schedule one comprising the residue of the municipality upon which there had been placed a blanket prohibition on any kind of business activity. So the proclamation really amounted to an attempt to control the use of every piece of land in the municipality.

This was objected to for two reasons. It was argued that the proclamation went beyond the limits of the power conferred upon the Council. Dixon C.J. was of this opinion:

> To piece together various subordinate powers of a general power to create residential areas in order to give effect to some plan of municipal industrial planning may show ingenuity but it involves simply an attempt to extend power.[6]

But none of his brethren agreed with him. They concurred with Menzies J. who pointed out that the proclamation of a residential district is really no more than the starting point for the imposition of restrictions.[7] Secondly it was contended that the proclamation was invalid because it failed to define clearly any specific residential area.

[5] *Ibid.* 217. [6] *Ibid.* 215.

[7] 'A municipality requires a certain number of shops, factories, bakeries, garages, dairies . . . in convenient situations, and I regard s. 309 as conferring sufficient power to determine where such activities will be located in the municipal area rather than as being restricted to defining districts of a substantial size reserved for houses among which any trades, etc. which are not prohibited may be established anywhere.' (1963) 37 A.L.J.R. 212, 218 *per* Menzies J.

This contention was based on the allegation that owing to road widening operations the description of one of the blocks given in one of the schedules two to eight-one did not correspond with the actual measurements of that block. It was argued that because of this, the area proclaimed in schedule one, being the residue of the municipality, was incapable of exact definition. Their Honours had various answers to this. Kitto J. thought that such of the schedule as did not correspond to the actual measurements of the block automatically became part of the residue, so that the proclamation could never fail because of an inaccurate description.[8] Menzies J. was of the opinion that section 648 (2)[9] prevented the inaccuracy from proving fatal to the proclamation.[10] The Chief Justice did not find it necessary to express an opinion on the point, while Taylor and Windeyer JJ. considered that the alleged inaccuracies had not been proved.[11]

The appellants fared little better on the second ground of appeal, which was that there had been no infringement of the proclamation as their activities were neither a trade nor an industry. Although the Chief Justice accepted this contention,[12] the rest of the Court concurred in holding that the appellants' catering business did constitute a trade 'in the developed sense which, as it will be seen, is well recognised'.[13]

The final ground of appeal was that the Court had no jurisdiction to grant an injunction in this case. For although it has long been recognized that a court has power in certain circumstances to issue an injunction at the suit of the Attorney-General to restrain interference with a public right,[14] just what these circumstances are is a problem that has long perplexed the judicial mind. Vague formulations have been applied to similar fact situations with different results, so that the law of this subject resembles the apotheosis of Tennyson's wilderness of single instances.[15] This situation arose basically from a fear of extending this powerful remedy too far, a fear most commonly finding expression in the dictum 'It is not the function of a Court of Equity to prevent the commission of threatened crimes'.[16] The stronghold of this resistance is to be found in *Institute of Patent Agents v. Lockwood.*[17] In that case Lord Herschell ruled that an injunction, which if disobeyed involved a gaol penalty for the breach of a court order, should not be granted where a statutory offence was punishable summarily, as to grant it would be to defy the intention of the legislature by substituting another penalty for the penalty they had provided.[18]

[8] *Ibid.* 215-216.

[9] Local Government Act 1919 (N.S.W.), s. 648 (2) provides (*inter alia*) that an inaccurate description of a parcel of land shall not affect the validity of the proclamation containing that description.

[10] (1963) 37 A.L.J.R. 212, 219.

[11] *Ibid.* 216, 221.

[12] *Ibid.* 215.

[13] *Ibid.* 219 *per* Menzies J.

[14] *Attorney-General v. Sheffield Gas Consumer's Co.* (1853) 3 De G.M. & G. 304.

[15] Indeed one learned judge was led to remark, rather despairingly: 'There are many reported decisions on the subject, both here and in England. They are, as has more than once been pointed out, difficult to reconcile and it is not easy to extract from them any governing principle or consistent set of governing principles'; *Lake Macquarie Shire Council v. Morgan* (1948) 17 L.G.R. 22, 24 *per* Sugerman J.

[16] *Gee v. Pritchard* (1818) 2 Swanston 402, 413.

[17] [1894] A.C. 347.

[18] *Ibid.* 362.

This was the reasoning which faced Dixon A-J. in *Attorney-General (Ex rel. Lumley) v. T. S. Gill & Son Pty Ltd*,[19] a case in which the Attorney-General sought to restrain a municipal council from permitting the breach of its own building regulations. In an effort to show that there was jurisdiction in some cases, and to logically define the precise nature of this jurisdiction, His Honour reasoned that the mere fact of a statutory penalty being prescribed for some act did not derogate from the jurisdiction of equity to protect those interests it had always protected. Thus if the interest created by the statute fell within that class of interests protected by equity, equity could intervene because it was merely securing the right, not punishing the offender in a way not intended by the legislature. His Honour cited the words of Farwell L.J. in *Stevens v. Chown*.[20]

> Now, if I find that the statute enacts . . . a right of property, that at once gives rise to the jurisdiction of the Court to protect that right. If the Act goes on to provide a particular remedy for the infringement of that right of property so created, that does not exclude the jurisdiction of this Court to protect the right of property, unless that Act in terms says so.

Dixon A-J. concluded that to justify the issue of an injunction the Attorney-General must show some interest recognized in equity as proprietary 'some definite positive advantage capable of specific enjoyment' by the public.[21] He ruled that restrictions on the use of land did not give the public such an interest.[22]

Meanwhile in England, the courts realized that they faced a dilemma. For although by withholding an injunction they were not interfering with the intent of the legislature, they were, in many cases, rendering this intent ineffective. This was pointed out in *Attorney-General v. Sharp*[23] where the defendant had been fined sixty times without effect before the Attorney-General sought an injunction. Lord Hanworth M.R. cited a dictum of Buckley J. in *Attorney-General v. Ashborne Recreation Ground Co.*[24]

> If there were no remedy except the statutory remedy, a public authority might by circumstances be rendered singularly impotent although it had made by-laws.

From this he concluded that where the statutory remedy was shown to be inadequate, the Court had jurisdiction 'to give the ancillary remedy which is necessary to enforce public rights'.[25] Lawrence L.J. concurred, holding that in such cases jurisdiction could lie even though the interest at stake could not properly be regarded as proprietary.[26]

[19] [1927] V.L.R. 22.
[20] [1901] 1 Ch. 894, 905. Also *Springhead Spinning Co. v. Riley* (1868) L.R. 6 Eq. 551, 559 *per* Malins V-C. [21] [1927] V.L.R. 22, 32. [22] *Ibid.* 33.
[23] [1931] 1 Ch. 121. [24] [1903] 1 Ch. 101, 108. [25] [1931] 1 Ch. 121, 129.
[26] His Honour considered this proposition to be established by the following cases: *Attorney-General v. Oxford, Worcester and Wolverhampton Rly. Co.* (1854) 2 W.R. 330, 331 *per* Sir John Romilly M.R.; *Attorney-General v. Ely, Haddenham and Sutton Rly. Co.* (1869) L.R. 4 Ch. 194, 199 *per* Lord Hatherly L.C.; *Attorney-*

And so in their desire to implement the intention of the legislature, the English courts shifted the emphasis from the nature of the interest created by the statute to the adequacy of the statutory remedy.[27] But because this was not a conscious change, the tendency arose to equate the two, or rather to say that an inadequate statutory remedy was injurious to the public welfare, and this injury to the public gave the Attorney-General sufficient interest to maintain a suit for an injunction. This is illustrated in *Attorney-General v. Harris*[28] where Sellers L.J. said:

> It cannot, in my opinion, be anything other than a public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law.

So the problem posed for Australian judges was whether the criterion determining jurisdiction should be public interest or public injury. This problem was further complicated by the fact that both views drew their authority from the same cases.[29] The question came before the High Court in *Ramsay v. Aberfoyle Manufacturing Co. (Australia) Pty Ltd.*[30] But the High Court ruling was indecisive in that, although the Court refused to grant an injunction, no clear principle could be extracted from the decision. Latham C.J., following *Institute of Patent Agents v. Lockwood*,[31] thought that the adequacy of the statutory penalty precluded the use of an injunction.[32] McTiernan J. followed *Gill's* case, holding that restrictions on the use of land did not create a proprietary interest in the public and thus equity could not intervene.[33] However, Starke J. dissented, deciding that in view of the English cases, *Gill's* case stated the rule too narrowly, and that any illegal act of its nature likely to harm the public was sufficient basis for an injunction.[34]

This rather negative decision apparently damped the spirits of prospective litigants, as no more cases reached the High Court until *Cooney's* case.[35] But in New South Wales the courts were continually entertaining suits at the instance of local authorities for injunctions to restrain breaches of building restrictions. This is probably due to the fact that, unlike their Victorian counterparts, New South Wales local authorities

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*General v. Shrewsbury (Kingsland) Bridge Co.* (1882) 21 Ch. 752, *Attorney-General v. Ashborne Recreation Ground Co.* [1903] 1 Ch. 101, 107-108 *per* Buckley J.; *Devonport Corporation v. Tozer* [1903] 1 Ch. 759.

[27] This is illustrated by decisions since *Sharp's case e.g. Attorney-General v. Premier Line Ltd* [1932] 1 Ch. 303, 313 *per* Eve J.; *Attorney-General v. Bastow* [1957] 1 Q.B. 514; *Attorney-General v. Harris* [1961] 1 Q.B. 74.

[28] [1961] 1 Q.B. 74, 86.

[29] Cf. *Attorney-General v. Gill* [1927] V.L.R. 22, 31 *per* Dixon A-J. and *Attorney-General v. Sharp* [1931] 1 Ch. 121, 134-135 *per* Lawrence L.J.

[30] (1935) 54 C.L.R. 230. This was an appeal from the Supreme Court of Victoria on facts similar to those in *Gill's* case. The Attorney-General was subsequently added as plaintiff.

[31] [1894] A.C. 347.

[32] (1935) 54 C.L.R. 230, 240. In this case the local authority had power to demolish buildings erected in breach of its regulations.

[33] *Ibid.* 257-258.

[34] *Ibid.* 247-248.

[35] With the exception of *Lynch and Standon v. Brisbane City Council* [1962] A.L.R. 15. But here the injunction was really granted on other grounds (see Dixon C.J. at 17).

are given no power to demolish buildings erected in defiance of their restrictions, and are hence forced to rely more heavily on injunctions.

This reliance has not been in vain, as the Supreme Court has been prepared to point to its own authority and leave it at that. This authority is contained in two cases. In *Attorney-General v. Mercantile Investments Ltd*[36] which was decided before *Gill's* case, Harvey J. decided that the jurisdiction to grant an injunction rested neither on the ground of injury to property,[37] nor was it a general supplement to all Acts of Parliament.[38] Rather it lay somewhere between the two, against the commission of 'any threatened wrongful act which is a menace to the general rights of the public which are of a proprietary nature . . . or which is likely to cause injury to the members of the public. . . .'[39]

The second case is *Council of the Shire of Hornsby v. Danglade*,[40] decided after *Gill's* case but before *Ramsay v. Aberfoyle*. Harvey J., as he then was, considered *Gill's* case.

> The Full Court of Victoria seems to have drawn some distinction between what it calls mere benefits or advantages on the one hand and interests on the other. Even if I accepted that distinction and agreed that something in the nature of an interest must be found, I would be led by the considerations applied by the Victorian Full Court to a conclusion opposite to that arrived at.[41]

He concluded that a restriction placed on the use of land:

> is not merely an aesthetic benefit which is of no proprietary value in itself, but rather something in the nature of a valuable common public interest which the Attorney-General would be justified in enforcing.[42]

Given this lead, New South Wales courts have never hesitated to grant these injunctions, although since *Ramsay v. Aberfoyle* they have inevitably hesitated to state the grounds on which they do so. This is illustrated by *Warringah Shire Council v. Moore*,[43] where Nicholas C.J. in Equity merely said:

> I should follow the line of decisions of this Court in which it has been held that in a proper case an injunction may be granted for breach of one of the prohibitions contained in the Local Government Act.

This was the state of the law when Mrs Cooney took her case to the

[36] (1921) 21 S.R. (N.S.W.) 183.
[37] *Attorney-General v. Sheffield Gas Consumer's Co.* (1853) 3 De G.M. & G. 304.
[38] As Sir George Jessel M.R. had claimed in *Cooper v. Whittingham* (1880) 15 Ch. 501, 507.
[39] (1921) 21 S.R. (N.S.W.) 183, 187.
[40] (1929) 29 S.R. (N.S.W.) 118.
[41] *Ibid.* 120.
[42] *Ibid.* 121. It is also interesting to compare Dixon A-J's view of these restrictions, with the opinion expressed by Devlin J. in *Attorney-General v. Bastow*: 'When Parliament makes provision which enables local authorities to exercise powers over the use of land, that provision is plainly made with the object of conferring a right upon the public because Parliament considers that the public is entitled not to have the land used in ways which may be considered to be unhealthy and offensive': [1957] 1 Q.B. 514, 519-520.
[43] (1942) 15 L.G.R. 44, 45. Also *Lake Macquarie Shire Council v. Morgan* (1948) 17 L.G.R. 22; *Ku-ring-gai Municipal Council v. Edwards* [1957] S.R. (N.S.W.). 379; *Greater Woollongong City Council v. Jones* (1955) 1 L.G.R.A. 342; *Waverley Municipal Council v. Parker* (1960) 5 L.G.R.A. 241.

High Court, relying on *Gill's* case, and to a certain extent *Ramsay v. Aberfoyle,* to establish the proposition that the Council could not show a sufficient public interest on which to base an injunction. However Menzies J., with whom Kitto, Taylor and Windeyer JJ. concurred on this point,[44] (Dixon C.J. finding it unnecessary to express an opinion), said:[45]

> It would, I think, be contrary to the trend of authority since 1927 to accept now the limitation adopted in *Gill's Case* upon the jurisdiction of a court of equity to grant injunctions.
> . . . Whatever was the position in 1927, it is now apparent from a line of cases in New South Wales and in England that the courts have granted injunctions . . . to protect benefits or advantages . . . that could not be regarded as having any resemblance at all to proprietary rights.

His Honour pointed out that *Ramsay v. Aberfoyle* had left the question undecided, as only Starke and McTiernan JJ. had expressed an opinion on *Gill's* case. He also said that section 587 Local Government Act, which enabled a municipal council to take proceedings usually taken by the Attorney-General, must have been designed with the present type of suit in mind. Menzies J. concluded that a proper case for an injunction was made out when it was shown that some person, bound by a municipal law imposing a restriction on the use of land, had broken and would, unless restrained, continue to break that restriction, to the disadvantage of other persons living in the locality. 'The wide discretion of the court is an adequate safeguard against abuse of a salutary procedure'.[46]

M. WRIGHT

## TESTRO v. TAIT[1]

*Companies—Special Investigation—Whether inspector required to act judicially—Right of company to appear and be heard—Companies Act 1961-1963, ss. 171 (10), 222 (1) (g).*

Pursuant to section 173 (1) of the Companies Act 1961, the respondent was appointed to investigate the affairs of a group of companies which included the appellant company. An inspector under Division 4 of Part VI of the Act has power to require the attendance for examination of any officer or agent of any corporation the affairs of which are being investigated.[2] R. C. Testro was required to appear for examination. Testro was the chairman and managing director of the appellant company. Counsel for Testro and for the company asked leave to appear for the witness, and to be present for the company throughout the taking of evidence with liberty to cross-examine and adduce evidence. Counsel

[44] It is interesting to note that three of this four have at some stage practised at the N.S.W. Bar.
[45] (1963) 37 A.L.J.R. 212, 220-221.
[46] *Ibid.* 221.
[1] (1963) 37 A.L.J.R. 100. High Court of Australia; McTiernan, Kitto, Taylor, Menzies and Owen JJ.
[2] This is the combined effect of s. 173 (2) and s. 171 (3) of the Act.