

Appl  
Poananga v  
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[1985] 2  
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(1951) 83  
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## AUSTRALIA.

Refd to *Binse v Williams* (Gov of HM Prison Barwon) & *Van Groningen* [1998] 1 VR 381

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Risk (Larrakia  
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Wykanak v  
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(1998) 100  
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Hurstville CC  
(2000) 105  
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[HIGH COURT OF AUSTRALIA.]

THOMPSON AND OTHERS  
PLAINTIFFS

APPELLANTS :

AND

THE COUNCIL OF THE MUNICIPALITY }  
OF RANDWICK . . . . . } RESPONDENT.  
DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

*Resumption and acquisition of land—Resumption under statutory power—Municipal council—Town-planning—Closing of “unnecessary” road—Opening of new road—“Improvement and embellishment of area”—Acquisition of more land than necessary—Proposed resale of excess land at profit to reduce cost of scheme—Improper purpose—Damage to owners—Injunction—Local Government Act 1919-1948 (N.S.W.) (No. 41 of 1919—No. 44 of 1948), ss. 235, 321 (d), 322, 532, 535, 536—Public Roads Act 1902-1937 (No. 95 of 1902—No. 35 of 1937), s. 20 (2) (a).*

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SYDNEY,

Aug. 4, 8;

Sept. 9.

Williams,  
Webb and  
Kitto J.J.

Section 321 (d) of the *Local Government Act 1919-1948* (N.S.W.) provides that "subject to the provisions of this Act, the council may control and regulate and may undertake the improvement and embellishment of the area."

*Held* (1) that the word "improvement" in sub-s. (d) of s. 321 is used to denote utilitarian betterments and "embellishment" to denote beautification of the area. The improvement or embellishment must at least be some physical improvement or embellishment of the area; and

(2) that the word "and" in the expression "improvement and embellishment" is used disjunctively.

Section 322 of the Act provides that the council may purchase or resume, as elsewhere in the Act provided, any land, and may thereupon do all or any of certain specified things, including (d) close any existing public road through such land, and (h) sell or lease the whole or any portion of such land, in one or more lots, as elsewhere in the Act provided.

*Held* that the operation of s. 322 is to confer powers which might be exercised with respect to land when purchased or resumed for a purpose



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authorized elsewhere in the Act, and not to confer a power to purchase or resume independently of purpose nor to enumerate purposes for which purposes or resumptions may be made.

Section 532 of the Act provides that "the council may acquire land within or outside the area," that is, by s. 4, city, municipality or shire, "for any purpose of the Act by lease, purchase, appropriation or resumption in accordance with this Part."

*Held*, that the section does not confer a power to purchase or resume independently of purpose, nor does it enumerate purposes for which purchases or resumptions are to be made. The operation of the section is to confer powers which may be exercised with respect to land purchased or resumed for a purpose authorized elsewhere in the Act.

Section 535 of the Act authorizes a council, where it proposes to acquire land for any purpose, also to acquire other land adjoining or in the vicinity.

*Held*, that s. 535 only confers a power to acquire land adjoining or in the vicinity of land authorized to be acquired by s. 532 whenever the acquisition of such adjoining or proximate land is reasonably incidental to the carrying out of the purpose for which the land was authorized to be acquired under that section.

A council applied under s. 536 of the Act for the resumption of certain vacant land within its municipality for the purpose of the improvement and embellishment of the area (s. 321 (d)). The land consisted of sand dunes sloping steeply from a road on the west of the area to a road on the east of the area which was on a cliff-top overlooking the ocean. Those roads were made, as were roads on the northern and southern boundaries. Two roads intersected the area from east to west, and, except for a small section of one of them, they were unmade and traversable only with great difficulty. The council, by resolution, adopted a plan, recommended to it by its engineer, by which, on the resumption, the whole area would be re-planned and re-subdivided in such a way that the unmade part of one, and the whole of the other, of the intersecting roads would be closed as public roads; an entirely new road running approximately north and south would be dedicated and constructed; and a pathway would be dedicated and constructed, upon land resumed from the frontages of three lots, affording pedestrian access only to those lots from the next road and the made portion of one of the intersecting roads. The resumed portions of the intersecting roads would be resold for use as building lots. The council adopted a report by its engineer in which he specifically referred to the resale value of portions of the resumed land, and then and subsequently referred to the element of profit on the resale of those portions and on the sale of the land acquired from the closing of the intersecting roads. An alternative plan submitted by certain objecting owners was rejected by the council and they thereupon sought an injunction to restrain the council from proceeding further with its application for resumption.



Held that an injunction should be granted because :—

- (1) in attempting to resume more land than was required to construct the road the council was not acting in good faith, but, in deciding upon the proposed resumptions, it was actuated substantially by the purpose of profit-making by sale of the land not so required ; and
- (2) the council proposed only to resubdivide and sell the land not required for the new road and pathway and not to do any work thereon, and its resumption was therefore not for the purpose of the undertaking by the council of the improvement and embellishment of the area within the meaning of s. 321 (d).

Decision of the Supreme Court of New South Wales (*Roper* C.J. in Eq.) :  
*Thompson v. Council of the Municipality of Randwick*, (1949) 50 S.R. (N.S.W.) 133 ; 67 W.N. 58, reversed.

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APPEAL from the Supreme Court of New South Wales.

In a suit brought by them by way of statement of claim in the equitable jurisdiction of the Supreme Court of New South Wales against the Council of the Municipality of Randwick eight plaintiffs sought injunctions to restrain that Council from providing a proposed new road, and from proceeding to resume certain lands for and in the vicinity of that proposed road and the closing of certain streets.

The re-amended statement of claim was substantially as follows :—

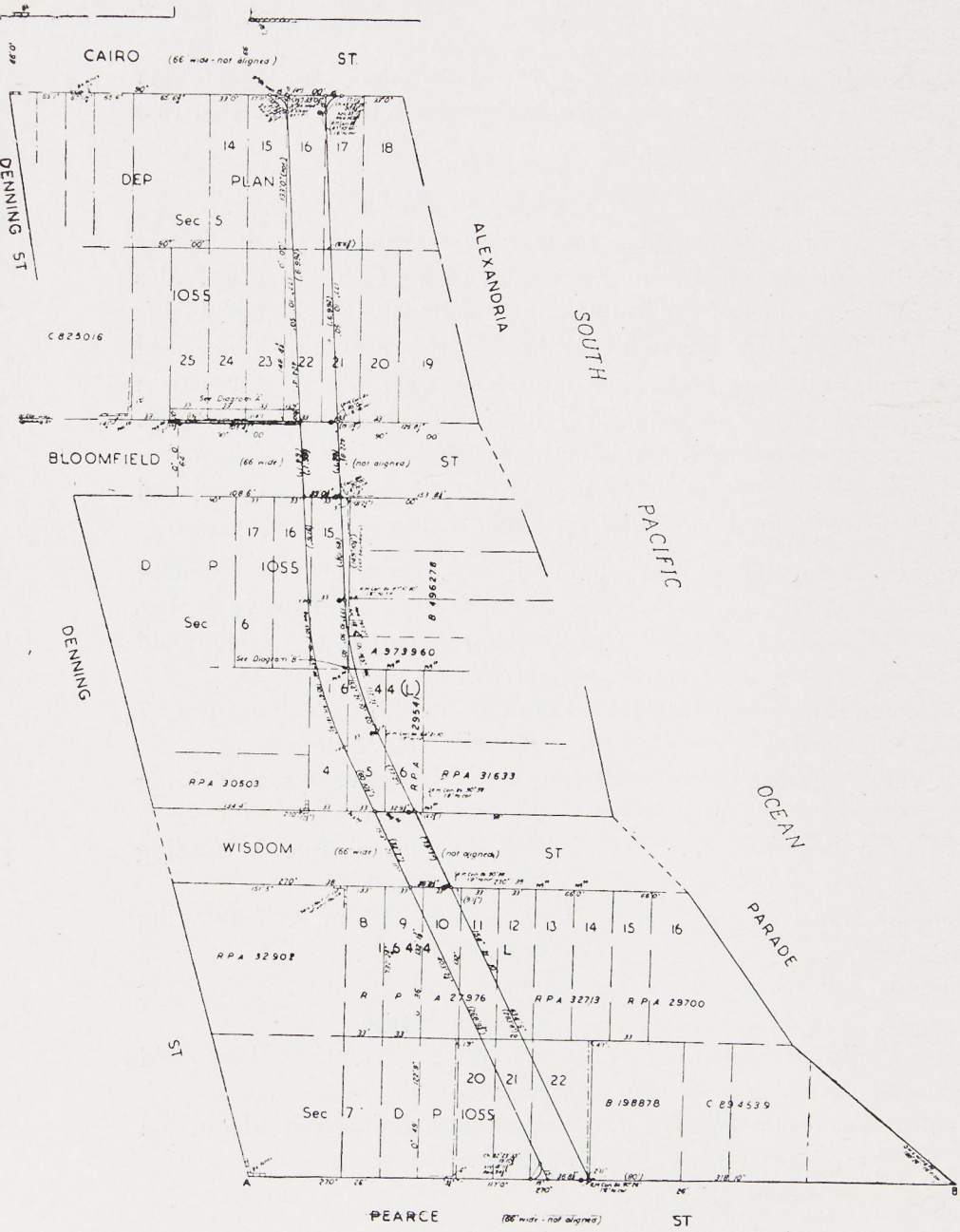
- 1. The plaintiffs were the respective owners of the lands described opposite their names hereunder as follows :—

George Stanley Thompson	..	Lot 18 in s. 5 fronting Cairo Street ; and lots 19 to 23 inclusive in that section fronting Bloomfield Street.
Kathleen Elizabeth Staunton		Lots 20 to 23 inclusive in s. 7 fronting Pearce Street.
Ranville Ashmead Popplewell		Lots 4 to 6 inclusive in s. 6 fronting Wisdom Street.
Elizabeth Beer	.. ..	Lots 8, 11 and 12 in s. 7 fronting Wisdom Street.
Thomas Reuel Brackenbury		Lots 13 and 14 in s. 7 fronting Wisdom Street.
Claude Leslie Porter	.. ..	Lots 15 and 16 in s. 7 fronting Wisdom Street.
Jane Emily Blackwell	..	Lot 15 in s. 6 fronting Bloomfield Street.
James Alexander Tunnie	..	Lot 24 in s. 5 fronting Bloomfield Street.

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Each of those lots was shown on deposited plan 1055 and was within the Municipality of Randwick, in the State of New South Wales.

2. The defendant was proceeding with a scheme for providing a new public road from Cairo Street to Pearce Street. A plan of the proposed new road had been lodged with the State Department of Lands and a copy of that plan as contained in a schedule to the statement of claim was as follows :—





3. To provide the proposed road the defendant claiming to act pursuant to the provisions of ss. 532 and 536 inclusive of the *Local Government Act* 1919, as amended, had resolved and intended to acquire by way of resumption for and in the vicinity of the proposed road: lot 16 and part of lot 17 in s. 5 fronting Cairo Street; lots 15, 16 and 17 in s. 6 fronting Bloomfield Street; part of lot 21, lot 22 and part of lots 23, 24 and 25 in s. 5 fronting Bloomfield Street; lots 4, 5 and 6 in s. 6 and lots 8 to 16 inclusive in s. 7 fronting Wisdom Street; lots 20, 21 and 22 and part of lot 23 in s. 7 fronting Pearce Street; and certain other lands in s. 6 fronting Alexandria Parade. Each of these lots was shown on deposited plan 1055 and was within the Municipality of Randwick.

4. To provide the proposed road the defendant claiming that there existed a doubt as to whether Bloomfield Street and Wisdom Street were public roads notwithstanding that they had been used for a long time past as such was taking action to have those streets dedicated as public roads pursuant to s. 224 of the *Local Government Act* 1919, as amended, and threatened and intended upon the dedication being effected to have Wisdom Street and a substantial portion of Bloomfield Street closed pursuant to the *Public Roads Act* 1902.

5. It was not part of the scheme to provide a new road that Alexandria Parade should be closed but the Parade would be retained and would later form part of the marine drive which the Cumberland County Council had planned to follow the foreshores from Sydney Harbour to Botany Bay.

6. Each of the plaintiffs charged it as the fact that the proposed road was wholly unnecessary and unreasonable and was in excess and an abuse of the powers conferred on the defendant and that by providing such road irreparable loss and damage would be caused by the defendant to each of the plaintiffs.

7. Each of the plaintiffs charged that the proposed closure of Wisdom Street and Bloomfield Street would unnecessarily and unreasonably deprive and restrict the access of the several owners having their frontages to those streets and that the proposed closure of those streets was in excess and an abuse of the powers conferred upon the defendant and that by such proposed closure irreparable loss and damage would be caused by the defendant to each of the plaintiffs.

8. Each of the plaintiffs further charged it as the fact that the proposed resumption of the whole of lots, 4, 16 and 17 of s. 6, lots 8 to 16 inclusive of s. 7 and lots 21, 22 and 23 of s. 7 was unnecessary and unreasonable for the purpose of providing the proposed road and that by the proposed resumption of lots 19 and 20 of s. 5, part

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of each of lots 21 to 24 inclusive of s. 5, lots 4, 5, 16 and 17 of s. 6, transfer No. 973960 in s. 6, lots 8 and 9 and 11 to 16 inclusive and lots 20, 21 and 22 and part of lot 23 of s. 7 was unnecessary and unreasonable for the purpose of providing the proposed road and that the proposed resumption of the said lots and land or any part thereof was in excess and an abuse of the powers conferred upon the defendant and that by such proposed resumption of the said lots and land or any part thereof irreparable loss and damage would be caused by the defendant to the respective proprietors thereof.

9. The plaintiffs feared that unless restrained by an injunction the defendant would proceed with the scheme to close Bloomfield Street and Wisdom Street and provide a new public road and would close such streets and provide such new public road and that the plaintiffs and each of them would suffer irreparable loss and damage thereby.

The plaintiffs prayed, *inter alia*, that the defendant be restrained by injunction from (a) providing such new public road, and (b) proceeding with the resumption and its application for the resumption of the lands described in par. 3 of the statement of claim and also from proceeding with the closing and its application for the closing of the streets referred to in par. 3.

In its statement of defence the defendant did not admit the ownership by any of the plaintiffs of any of the said lots or land as claimed. In answer to pars. 2 to 5 inclusive of the statement of claim the defendant said that the facts were as follow :— The Works Committee of the defendant on 12th March 1946, duly considered a report of the defendant's engineer dealing with the proposed opening of a new road from Cairo Street to Pearce Street and the re-planning of the area. The report was accompanied by a plan, signed by the engineer, showing the proposed new road and showing the re-planning of the area. The Works Committee recommended that the proposed plan appeared to be the only solution of a difficult re-planning of the area, and that recommendation was duly adopted by the defendant by a resolution duly passed by the defendant at a duly convened meeting held on 19th March 1946. At a duly convened meeting of the defendant held on 16th December 1947, the defendant duly resolved that "those portions of land known as Wisdom Street and Bloomfield Street between Denning Street and Alexandria Parade and which were left in subdivision of private land before the commencement of the *Local Government Act* 1906 be acquired and dedicated as public roads and that all necessary notices in connection therewith be given." At a duly convened



meeting of the defendant held on 20th January 1948, a report of the town clerk as follows :—

“ Alexandria Parade, Cairo Street, Denning Street and Pearce Street Area. I have conferred with Officers of the Lands Department concerning the resumption of land in this area and I am now advised that only land which may be resumed by the Department is that actually utilized for road purposes. In view of the Council’s plan for the re-designing of the area which included subdividing the land uniformly to the new road, it will now be necessary for the council to pass a further resolution approving of the resumption of the part and whole allotments shown on the attached schedule for the purpose of the improvement and embellishment of the area.

As this resumption will be effected by the Local Government Department a resolution will also be necessary to the effect that Council undertakes :—

(1) To forward to the Department of Local Government the sum required to be deposited on account of the resumption and,

(2) To recoup the Department for any expenditure incurred (in excess of the amount of the deposit) on account of compensation for the land and interest and all necessary charges and expenses incidental to the resumption.

As the proposal was prepared prior to the Town Planning Act Council may now feel that it can deal with any aspect of Town Planning particularly if it refers to Dr. Thompson’s land having a frontage to Alexandria Parade and Mrs. G. H. de Lorenzo’s cottage with a frontage to Cairo Street without the necessity of a resumption. The absence of both these areas will considerably lessen the cost” was duly considered and duly adopted by the defendant and the defendant duly resolved, *inter alia*, that the land of the plaintiff Thompson having a frontage to Alexandria Parade and of Mrs. de Lorenzo having a frontage to Cairo Street be excluded from the resumption application. The schedule contained particulars of the lots set forth in par. 8 of the statement of claim and also particulars of two lots having frontage to Cairo Street, two lots having frontage to Bloomfield Street, and two lots having frontage to Wisdom Street. The defendant published in the *Government Gazette* and a newspaper respectively bearing date 5th March 1948, a notice of intent to take over the lands comprising the roads known as Wisdom Street and Bloomfield Street and also caused copies of that notice to be placed on notice boards erected in those streets. On 30th April 1948, the defendant caused to be duly posted, *inter alia*, to each of the plaintiffs a notice of its intention

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to resume certain land, including the land owned by the addressee, for the improvement and embellishment of the area and requiring the addressee to inform the town clerk by statutory declaration within fourteen days after the receipt of the notice whether the addressee was or was not a member of the Forces, or a female dependant of a member of the Forces as defined by reg. 5 of the *National Security (War Service) Regulations*, and intimating that the notice should be accepted as formal advice of the defendant's intention to make an application under ss. 532 and 536 of the *Local Government Act* 1919, as amended, for the approval of the Governor to the acquisition of the land by way of resumption. The defendant published in the *Government Gazette* dated 14th May 1948, a notice that Wisdom Street and Bloomfield Street were public roads within the meaning of the *Local Government Act*. In pursuance of the resolution passed by it on 20th January 1948, an application under the seal of the defendant was duly made by it on 9th August 1948, for the approval of the Governor to the defendant acquiring by way of resumption certain land for the purpose of the improvement and embellishment of the area which land included certain land belonging to and owned by the respective plaintiffs. The defendant said that due and proper consideration was given by it to the proposed providing of the new road, the proposed resumption of land for the proposed providing of the new road, the proposed closing of Wisdom Street and Bloomfield Street, the improvement and embellishment of the area, and the relevant resolutions passed by the defendant were duly passed by it in accordance with the provisions of the *Local Government Act* and the ordinances made thereunder and not otherwise. The defendant denied the allegations contained in pars. 6 to 9 inclusive of the statement of claim and said, as regards pars. 6 and 8 that, on the contrary, the facts were that for the purpose of the improvement and embellishment of the area it was proper, advisable and reasonable to provide and construct the proposed road; that in order to carry out such improvement and embellishment in accordance with the provisions of the Act the defendant must apply and in fact had applied to the Governor through the Minister for Local Government and it must make provision to the satisfaction of the Governor for the payment of compensation for the land to be resumed together with interest and all necessary charges and expenses incidental to the resumption; and that the Governor might authorize the resumption and upon it being so authorized the resumption should be deemed to be for the purpose of carrying out an authorized work within the meaning of the *Public Works*



*Act* 1912, which *Act* provided for payment of compensation to the owners of the land resumed. In answer to the statement of claim generally, the defendant said that it was empowered by the *Local Government Act* to do all necessary things and to take all necessary steps to carry into effect the construction of the proposed new road, the closing of Wisdom Street and Bloomfield Street, the improvement and embellishment of the area and the re-planning of the area ; that it was empowered by the provisions of the *Local Government Act* (if authorized by the Governor) to carry into effect the proposed resumption of land ; and that by the provisions of the *Public Works Act* 1912 every estate and interest, if any, of the plaintiffs in any of the lands so resumed was thereby converted into a claim for compensation in pursuance of the provisions of that *Act*. The defendant therefore submitted that by reason of the *Local Government Act* and the *Public Works Act* the sole remedy of all or any of the plaintiffs was a right to compensation as provided by the *Public Works Act*, and, further, that the plaintiffs did not have any equity entitling them or any of them to proceed against the defendant in the equitable jurisdiction of the Court and that the proper remedy (if any) of the plaintiffs or any of them was at law.

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Issue was joined.

At the hearing of the suit an objection taken on behalf of the defendant that each plaintiff had, if any, a separate cause of action against the defendant and those separate causes of action should not be joined in the same suit (*Cyclone Pty. Ltd. v. Stewarts & Lloyds Ltd.* (1) ; *Equity Act* 1901 (N.S.W.), s. 25, was overruled by *Roper* C.J. in Eq. on the ground that the matter, being one of practice, was within the discretion of the Court and having regard to the lateness of the application and that if separate suits had been started by all of the plaintiffs it would have been almost inevitable that an order for the consolidation of the hearing of the suits would have been made, again under the inherent jurisdiction of the Court, the matter should be allowed to proceed as framed.

The evidence showed, *inter alia*, that the lots of land in question were part of an area in Coogee, a suburb within the municipality of Randwick, which area was bounded on the east by Alexandria Parade, on the west by Denning Street, on the north by Cairo Street, and on the south by Pearce Street. Some houses had been built in this area, but all the lots of land which the defendant proposed to resume were vacant lots. Between Cairo Street and Pearce Street, and running parallel to those streets, were two other

(1) (1916) 16 S.R. (N.S.W.) 629 ; 33 W.N. 101.



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streets extending from Denning Street to Alexandria Parade, namely, Bloomfield Street and Wisdom Street.

Alexandria Street was on the top of a cliff and to the east of it lay the ocean. Denning Street was on a ridge and the area of land consisted of sand dunes sloping steeply on a down grade from Denning Street to Alexandria Parade. Bloomfield Street and Wisdom Street were what might be called "paper" streets, as they were, except for a small section of Bloomfield Street, unmade and traversable only with great difficulty. Some of the lots of land which had frontages to those streets had no practicable vehicular access and the difficulty of obtaining access had resulted in many lots in the area being left vacant, although the surrounding areas were substantially built upon. Under the defendant's scheme Wisdom Street and a considerable part of Bloomfield Street would be closed as public roads, and an entirely new road, running from Cairo Street to Pearce Street in a direction roughly parallel with Alexandria Parade, would be dedicated and constructed. Also, part of the area affected would be re-subdivided into lots, having frontages to the new road, and a short strip of land twelve feet wide, resumed from the frontages of lots 23, 24 and 25 in s. 5, would be dedicated as a pathway affording pedestrian access only to the users of those lots from either the new road or that portion of Bloomfield Street which would be retained as a public road.

If that scheme were carried out, access would be provided to all the building lots in the area, and the new road, which followed the contours of the land, would be reasonably level. The re-subdivision involved was designed partly to provide a use for remnants of lots through which the new road was designed to pass, and partly to re-design the arrangement of lots so that the lots would have frontage to the new road instead of being side on to it. The re-subdivision as planned involved the use of Wisdom Street and the closed portion of Bloomfield Street as building lots.

Particulars furnished by the plaintiffs of the alleged excess and abuse of power on the part of the defendant were: "(1) it" (the defendant) "did not really intend to use the land proposed to be resumed for a statutory purpose; (2) such land is not capable of being so used; (3) such land is not being resumed for the ostensible purpose resolved upon by the council; (4) the land other than that required for the making of the proposed road is threatened to be resumed for the purpose of recouping the council in respect of the cost of making the proposed road by the resale of such land at a profit and the council's exercise of such power as it has with regard



to the closure of Bloomfield and Wisdom Streets is subservient to such purpose.”

*Roper* C.J. in Eq. dismissed the suit (*Thompson v. Council of the Municipality of Randwick* (1)).

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From that decision the plaintiffs appealed to the High Court.

Further facts and the relevant statutory provisions appear in the judgment hereunder.

*A. F. Rath*, for the appellants. The respondent council had an ulterior purpose, namely the making of a profit by resale. Its sole purpose in resuming land for the access path in the closed portions of Bloomfield Street, was that it would thereby be able to provide an extra allotment for resale out of the closed portion of that street. The respondent proposed to construct the new road through the lands of the appellants Popplewell and Staunton and to sell the simple residues of those lands without any subdivision. The appellant Porter's land was not required for the new road and the respondent had no purpose for its resumption except to resell it (*Municipal Council of Sydney v. Campbell* (2)). In its resolution for resumption for the purpose of improvement and embellishment of the area, the respondent applied itself merely to giving a new form to an old transaction previously decided on, that is, a transaction of resumption not of purpose. On 18th March 1947 the respondent resolved to close the existing roads, and to build a new road. At that stage the project was a road-making one only. When informed by the Department of Lands that it was proposing to resume more land than was permissible under s. 8 of the *Public Roads Act* 1902, it was resolved, without any further consideration of the matter, to make a new application under s. 321 (d) of the *Local Government Act* 1919, as amended, for the purpose of the improvement and embellishment of the area. There was thus no consideration of that purpose by the respondent (*Municipal Council of Sydney v. Campbell* (2)). The resumption of part of the lands proposed to be resumed was wholly unnecessary for the purpose of improvement and embellishment of the area. Even if “improvement and embellishment” were the real purpose of the respondent, it could have been effected in exactly the same manner, without the resumption of the residues of the lands of the appellants Popplewell and Staunton, and in

(1) (1949) 50 S.R. (N.S.W.) 133; 67 W.N. 58.

(2) (1925) A.C. 338.



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substantially the same manner without the resumption of the appellant Porter's land. The word "and" in the phrase "improvement and embellishment" is conjunctive, and there was not any evidence that the respondent's project would be or could be an embellishment, though evidence was given on behalf of the appellants that it would not be so. Where it was possible to give access by constructing the existing roads in an existing subdivision, as was the case here, it was not a purpose of improvement and embellishment to propose to make a new road, close the existing roads, and re-subdivide, with the object of giving access—which was the only object here. All the powers in s. 321 are narrow, and that suggests that s. 321 (d) should not be given a wide interpretation. The express power in s. 235 to provide roads negatives any implication of a road-making power in s. 321 (d). The power of the respondent in s. 535 of the *Local Government Act* to "acquire other land adjoining or in the vicinity" extends only to the acquisition of lands reasonably necessary for the respondent's purpose, or, at the most, to the acquisition of lands having some real connection with the respondent's purpose. The only purpose behind the resumption of some of the subject lands was to defray part of the cost of the new road from the expected profit from resale and that was not a sufficient connection. The power in s. 535 should be contrasted with the specific power discussed in *Criterion Theatres Ltd. v. Sydney Municipal Council* (1). *Municipal Council of Sydney v. Campbell* (2) is authority for the proposition that the purpose of improvement involves the retention of control over the lands resumed for that purpose. The principles enunciated by Lord Macnaghten in *Westminster Corporation v. London and North Western Railway Co.* (3) show that the principle of *Thompson v. Council of the Municipality of Randwick* (4) was of general application with the result that powers of resumption must be exercised reasonably, in the sense of without negligence. Support for the first three propositions is to be found in *Gard v. Commissioners of Sewers of the City of London* (5); *J. L. Denman & Co. Ltd. v. Westminster Corporation* (6); *Fernley v. Limehouse Board of Works* (7); and *Werribee Council v. Kerr* (8). A council should consider the wishes of the persons proposed to be affected; no such consideration was given by the respondent (*J. L. Denman & Co. Ltd. v. Westminster Corporation* (6)).

(1) (1925) 35 C.L.R. 555.

(2) (1925) A.C. 338.

(3) (1905) A.C. 426, at p. 430.

(4) (1944) 44 S.R. (N.S.W.) 455; 61 W.N. 253; 15 L.G.R. 149.

(5) (1885) 28 Ch. D. 486.

(6) (1906) 1 Ch. 464.

(7) (1899) 68 L.J. (Ch.) 344.

(8) (1928) 42 C.L.R. 1.



*M. F. Hardie* K.C. (with him *M. H. Byers*), for the respondent. The conclusions of fact drawn by the trial judge were justified on the evidence and should not be interfered with on appeal. There was ample evidence to show that the substantial motive for the proposed resumption was the improvement and embellishment of the area : *Local Government Act* 1919, as amended, s. 321 (d). A council has power to resume for that purpose (*Lynch v. Ku-ring-gai Municipal Council* (1)). When applying for the resumption of land a council is entitled to consider the question of cost. *Municipal Council of Sydney v. Campbell* (2) is only applicable where profit on resale was the only or the only substantial purpose for the proposed resumption. The acts and proposals of the respondent were well within the powers conferred upon it by ss. 321 (a), (b), (d), 322, 477, 532-536 of the *Local Government Act* 1919, as amended. The word "and" occurring in s. 321 (d) is disjunctive. "Embellishment" means beautification. An area may be beautified by re-arranging land blocks so as to give them frontage to a new road. The constructing of a new road is a beautification of the area. Embellishment is not confined to the immediate alteration of some physical feature of the land.

*A. F. Rath*, in reply. Even if the word "and" is used in some parts of s. 321 in a disjunctive sense, its use in s. 321 (d) shows points of contrast with its use elsewhere in that section. To read it disjunctively in s. 321 (d) requires the implied repetition of the words "of the area" after the word "improvement," whereas in s. 321 (b) the express repetition of the word "of" itself suggests a disjunctive construction. Section 322 is not a section conferring powers and authorizing resumption for the purpose of exercising those powers. It was not drafted in the form used in the Act for "power" sections, such as s. 235, where the power is first conferred, and the provisions for resumption follow.

*Cur. adv. vult.*

THE COURT delivered the following written judgment :—This is an appeal by the plaintiffs from a decree of the Supreme Court of New South Wales in Equity (*Roper* C. J. in Eq.) dismissing with costs a suit brought by them to obtain injunctions restraining the defendant Council from resuming certain lands which they own in the Municipality of Randwick for the purposes of a scheme resolved upon by the Council on 20th January 1948. The Council has

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(1) (1947) 16 L.G.R. 144 ; (1948) 17  
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(2) (1925) A.C. 338.



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applied to the Governor through the Minister under the provisions of ss. 532 and 536 of the *Local Government Act* 1919 as amended to have these lands resumed for the purposes of this scheme. The lands in question comprise a number of lots shown on an old plan of subdivision situated in an area in Coogee which is bounded on the north by Cairo Street, on the south by Pearce Street, on the east by Alexandria Parade, and on the west by Denning Street. The scheme provides for the construction of a new road running north and south midway between and parallel to Denning Street and Alexandria Parade. It also provides for the closing of the eastern end of Bloomfield Street and the whole of Wisdom Street. These two streets, which run east and west from Alexandria Parade to Denning Street between Cairo Street and Pearce Street, are not made roads but are two of the streets each sixty-six feet wide shown on the plan of subdivision of which the plaintiffs' lands form part. Alexandria Parade is also not yet constructed but the Council hopes that this will be done as part of a plan for building a marine drive along the ocean front. The Council proposes to substitute the new road for the portion of Bloomfield Street proposed to be closed and for Wisdom Street. The scheme provides for the re-subdivision of a number of allotments in the old subdivision to conform to this alteration of roads. As part of the scheme it is proposed to create four new lots in the portion of Bloomfield Street to be closed and four new lots in Wisdom Street; all these lots having frontages of thirty-three feet to the new road.

The Council does not propose to resume the whole of lots 23, 24 and 25 of s. 5 of the old plan of sub-division, but only to resume a twelve feet strip on their southern front along which a path will be constructed to give pedestrians access to these lots from the portion of Bloomfield Street which is not to be closed. This strip is to be resumed from these lots instead of being reserved from the portion of Bloomfield Street to be closed, so that there will be room for two new lots on the western end of this portion of Bloomfield Street. There is already a house on lot 24 owned by the plaintiff Tunnie, and the result of the scheme, if put into operation, will be that Tunnie, instead of having a house with a frontage to a sixty-six feet road will be left with a house having pedestrian access only along a twelve feet path and looking into the backyards of the houses to be built on two of the new lots in Bloomfield Street. The same fate awaits the owners of lots 23 and 25, at present vacant lands, if and when they decide to build on their allotments. Lots 4, 5 and 6 of s. 6 of the old plan of subdivision are owned by the plaintiff Popplewell. Only parts of these lots are required for the new road



and the residues are capable of being amalgamated into two lots, one on each side of the new road, each having an extensive frontage to the new road. Lots 20, 21 and 22 and part of lot 23 of s. 7, owned by the plaintiff Staunton, are in a similar position. The plaintiff Beer owns lots 11 and 12 of s. 7 only parts of which are required for the new road, and the residues are capable of being amalgamated into one lot having an extensive frontage to the new road. The plaintiff Porter owns two lots 15 and 16 of s. 7, lot 15 fronting Wisdom Street and lot 16 Alexandria Parade. Lot 15 will not have any frontage to a road after Wisdom Street is closed, but these lots can be combined and made into two lots fronting Alexandria Parade. In between lots 11 and 12 owned by Beer and lots 15 and 16 owned by Porter are lots 13 and 14 of s. 7 owned by the plaintiff Brackenbury. They will lose their frontages when Wisdom Street is closed, and so it is proposed to add lot 13 to the rear of the residues of Beer's lots 11 and 12 and to add lot 14 to the rear of Porter's lots 15 and 16. Lot 8 owned by Beer will also lose its frontage to Wisdom Street and it is proposed to add this lot to the rear of the residues of lots 9 and 10. Another block of land affected by the scheme is that owned by one Blair fronting Alexandria Parade and Wisdom Street. None of his land is required for the new road or for amalgamation with other lots and it will still retain its frontage to Alexandria Parade, but the Council proposes to resume the whole block and divide it into two lots fronting Alexandria Parade.

The origin of the scheme was a report to the town clerk by the council engineer dated 14th June 1945 recommending the closing of Wisdom Street and part of Bloomfield Street, and the construction of the new road. Certain advantages of access were claimed for the new road over the access which would be provided if Bloomfield Street and Wisdom Street were constructed. It was pointed out that the main disadvantage of the new road was its narrow width and its proximity to parallel streets. The estimated cost of constructing the new road including construction and resumptions less the sale of the surplus lots was £10,516 as against £6,850 the estimated cost of construction of the balance of Cairo Street, Bloomfield Street and Wisdom Street. At a meeting of the Works Committee of the Council held on 18th October 1945, it was recommended that the engineer's plan be adopted and that all necessary steps be taken to acquire all the land in the area as part of a town-planning scheme. At a meeting of the Council held on 6th November 1945 it was resolved that the matter be referred back

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to the Works Committee, and the engineer be instructed to prepare final plans for the proper town planning of the area.

The engineer made a further report to the Works Committee of the Council on 12th March 1946. He estimated the cost of the new road at £8,220 as against £7,950 the estimated cost of constructing Bloomfield and Wisdom Streets. But he pointed out that, if the lands of the plaintiffs and of the other owners in the area were resumed, the excess on the resale of the resumed lands over the cost of their resumption would be £2,046 and this would reduce the estimated cost of the new road to £6,174, so that, with the assistance of these profits made from the resumptions, the new proposal would be the cheaper method by about £1,776. He claimed in the report that the new road would provide better access than Bloomfield Street and Wisdom Street and would be cheaper to maintain. The Works Committee of the Council recommended that the proposed plan appeared to be the only solution of a difficult re-planning of the area and that the scheme submitted should be adopted and it was adopted at a meeting of the Council held on 19th March 1946.

On 20th March 1947 the Council applied to the Minister under the provisions of the *Public Roads Act* 1902 to have the land included in the scheme resumed for public roads and to have Bloomfield Street and Wisdom Street closed as no longer required as a means of access in the area affected by the resumption. The proposed action under the *Public Roads Act*, however, met with difficulties. It was found that Bloomfield Street and Wisdom Street had not been dedicated as roads under the *Local Government Act* and this had to be done before they could be closed. It was also found that, as the Council had decided to resume more land than was required for the new road, the resumptions could not be made under the *Public Roads Act*. It was therefore decided to proceed under the *Local Government Act*.

At a meeting of the Council held on 20th January 1948, the town clerk reported that he had been advised by officers of the Lands Department that the only land which might be resumed by the Department was that actually utilized for road purposes and that "in view of Council's plan for the re-designing of the area which includes subdividing the land uniformly to the new road, it will now be necessary for Council to pass a further resolution approving of the resumption of the part and whole allotments shown on the attached scheme for the purpose of the improvement and embellishment of the area." The report went on to recommend that the lands of the plaintiff Thompson with a frontage to Alexandria Parade, and Mrs. G. H. de Lorenzo's cottage with a frontage to



Cairo Street, should be excluded from the resumption as the absence of both these areas would considerably lessen the cost. The Council resolved to adopt the town clerk's report and to exclude these properties from the resumption application.

The resumption application, which is dated 9th August, 1948, states that the Council makes application under ss. 532 and 536 of the *Local Government Act* 1919, as amended, for the approval of His Excellency the Governor to the Council acquiring by way of resumption for the purpose of the improvement and embellishment of the area—s. 321 (d)—the land within the area briefly described in the schedule thereunder and more particularly in the accompanying certified plan.

Section 532 of the *Local Government Act*, which is included in Part XXV headed "Acquisition of Land," provides that the Council may acquire land within or outside the area for any purpose of this Act by lease, purchase, appropriation or resumption in accordance with this Part. Section 4 of the Act provides that in this Part unless inconsistent with the context or subject matter, "Area" or "local government area" means city, municipality or shire.

The provisions of the Act relied upon as specifying purposes for which the proposed resumptions may be made are ss. 235, 321 (d), 322 and 535. Section 235 provides that the Council may provide any public road, and that any land required for the purpose of this section may be acquired in any mode authorized by this Act. This section cannot support the whole of the proposed resumptions, because the only land which could be resumed for the purpose of the new road under s. 235 would be the land required for the construction of the road. Section 322 provides that the Council may purchase or resume, as elsewhere in the Act provided, any land, and may thereupon do all or any of certain specified things, including (d) close any existing public road through such land, and (h) sell or lease the whole or any portion of such land, in one or more lots, as elsewhere in the Act provided. In our opinion this section does not confer a power to purchase or resume independently of purpose, nor does it enumerate purposes for which purchases or resumptions may be made. Its operation is to confer powers which may be exercised with respect to land when purchased or resumed for a purpose authorized elsewhere in the Act. Section 535 authorizes a council, where it proposes to acquire land for any purpose, also to acquire other land adjoining or in the vicinity. The language of s. 535 is in terms very wide. But the section can only operate where the

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council proposes to acquire land for any purpose. It is therefore not an independent but an incidental power and this indicates that some limits must be placed on its meaning. It does no more, we think, than confer a power to acquire land adjoining or in the vicinity of land authorized to be acquired by s. 532 whenever the acquisition of such adjoining or proximate land is reasonably incidental to the carrying out of the purpose for which the land is authorized to be acquired under that section. In the present case it is clear that the lands proposed to be resumed exceed what is required to construct the new road, and there is no evidence that it is reasonably incidental to any purpose under s. 235 of the Act that this excess should be acquired under s. 535. The scheme must therefore be supported, if at all, by the provisions of s. 321 (d), and indeed it was on this sub-section that the Council relied in passing the resolution of 20th January 1948 and making the application to the Governor under s. 536.

Section 321 (d) provides that, subject to the provisions of this Act, the council may control and regulate and may undertake the improvement and embellishment of the area. It was contended for the appellants that the word "and" in s. 321 (d) must be read conjunctively and not disjunctively and that nothing could be an improvement which was not an embellishment of the area. But the word "and" is used disjunctively in the preceding paragraphs of s. 321, and we are not prepared to hold that it is not used in the same sense in par. (d). We consider that in the collocation of words this sub-section contains, improvement is used rather to denote utilitarian betterments and embellishment to denote beautification of the area. But we also consider that the improvement or embellishment must at least be some physical improvement or embellishment of the area. Section 321 (d) contains two powers: (1) power to control and regulate the improvement and embellishment of the area; this power does not authorize the doing of any act or any work by the council itself, but only the control and regulation of work done by others; (2) power to undertake the improvement and embellishment of the area; this power authorizes the council itself to undertake work which can be said to be an improvement or embellishment of the area and provides a purpose for which the council may acquire the land on which the work is to be done. In the present case the only work the Council proposes to do is to construct the new road and path. It proposes to resume far more land than is required for this purpose. It does not propose to do any work upon the balance of the land. It only proposes to sell this balance. It was contended that it was necessary to



resume this balance because this was the only way in which the Council could re-subdivide the land into new allotments of suitable size and having suitable frontages to the new road or to the existing roads other than the roads to be closed. The answer to this contention is that this is not an undertaking by the Council of the improvement or embellishment of the area. It is not the doing of any work by the Council on the lands not required for the new road and pathway. The Council does not itself propose to erect any buildings or other amenities on these lands. It merely proposes to re-subdivide and sell them. If the Council wishes to compel the owners to amalgamate the residues of their lands into lots appropriate to the new frontages it seems to us, as at present advised, that the Council may be able to do so under its power to control and regulate the improvement of the area by only allowing buildings to be erected on these residues after they have been amalgamated. If this be not so, we have not been referred to any other power which would authorize the resumption of land for this purpose and, in the words of *Bowen L.J.* in *Gard v. Commissioners of Sewers of the City of London* (1), the Council "must shew that on the fair construction of the Act of Parliament they had the right to take the whole of the land when really they only wanted a small part." We have not overlooked the fact that some of the lots owned by the plaintiffs, for instance the lots owned by Brackenbury and one of the lots owned by Beer and Porter, will have no frontages to any road if Wisdom Street is closed. But we know of no power which makes it a purpose of this Act within the meaning of s. 532 for a council to resume a number of lots fronting a street shown on a plan of subdivision so as to be able to apply under the *Public Roads Act* to close that street as unnecessary and to be in a position to take advantage of s. 20 (2) (a) of that Act.

In *Westminster Corporation v. London and North Western Railway Co.* (2), Lord Macnaghten said: "It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first." In our opinion, for the reasons already stated, the *Local Government Act* does not authorize the defendant Council to implement the scheme approved of at the meeting of 20th January 1948. If it does, we are of opinion that the Council, in attempting to resume more land than is required to construct the road, is not acting in good faith.

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(1) (1885) 28 Ch. D., at p. 510.

(2) (1905) A.C., at p. 430.



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By that we do not mean that the Council is acting dishonestly. All that we mean is that the Council is not exercising its powers for the purposes for which they were granted but for what is in law an ulterior purpose. It is not necessary that this ulterior purpose should be the sole purpose. The Council, no doubt, believes that the new road will have advantages over Bloomfield Street and Wisdom Street from the point of view of access and upkeep. But the evidence establishes that one purpose at least of the Council in attempting to acquire the land not required to construct the new road is to appropriate the betterments arising from its construction. In *Municipal Council of Sydney v. Campbell* (1), this was the sole purpose. But in our opinion it is still an abuse of the Council's powers if such a purpose is a substantial purpose in the sense that no attempt would have been made to resume this land if it had not been desired to reduce the cost of the new road by the profit arising from its re-sale. The most conclusive evidence of this purpose appears to be an attempt to resume the strip of land at the southern frontages of lots 23, 24 and 25 of s. 5. There is, as far as we can see, no other explanation of this part of the scheme than that the Council wishes to make as big a profit as possible out of the closing of Bloomfield Street and the purchase and re-sale of portion of the land comprised therein, however ruinous the result may be to the owners of these lots, and particularly to the plaintiff Tunnies, who has built on his lot. There is no doubt that the scheme will depreciate the value of these lots and that there would be no profit but only a loss on their re-sale and so they are not included in the resumptions. Then lots 19 and 20 belonging to Dr. Thompson are amongst the lands finally excluded from the scheme although they are to lose their frontages to Bloomfield Street. The town clerk reported that this would help to lessen the expense of the scheme and these lots must only have been excluded because it was considered that without these frontages the lots would not be likely to show a profit on a re-sale. Further, assuming that it is within the power conferred on the Council by s. 321 (d) to resume the residues of the lots through which the new road will pass so as to amalgamate them into new lots with frontages conforming to the new road, in determining whether the power was really exercised for this purpose or for the collateral purpose of making a profit, it is highly significant that the owners of these residues were not given an opportunity of agreeing to reform these lots so as to comply with the scheme before an attempt was made to expropriate them (*J. L. Denman &*

(1) (1925) A.C. 338.



*Co. Ltd. v. Westminster Corporation*.(1)). Equally significant is the inclusion of Blair's land in the scheme. It would seem that the only purpose in resuming this land is to make a profit out of its re-sale unless the purpose is to acquire the rights under the *Public Roads Act* of an adjoining owner, in relation to Wisdom Street, which is an equally unauthorized purpose.

Upon consideration of the scheme as a whole, the conclusion seems irresistible that, with respect to so much of the land included in the scheme as is not required for the new road, profit-making by sale is a substantial purpose actuating the Council in deciding upon the proposed resumptions.

The case is not one in which the Council can be allowed to proceed with some of the resumptions while being restrained from proceeding with others. If it cannot proceed with them all, it has no scheme in relation to any of them. It is therefore unnecessary to differentiate, for the purpose of granting relief, between the lands of some of the plaintiffs and the lands of others.

For these reasons we are of opinion that the appeal should be allowed and that the plaintiffs are entitled to an injunction restraining the defendant from acquiring or attempting to acquire the lands of the respective plaintiffs by resumption pursuant to its resolution of 20th January 1948 and its application of 9th August 1948 under s. 536 of the *Local Government Act* 1919 as amended.

*Appeal allowed. Decree of the Supreme Court of New South Wales in Equity set aside. Order that the respondent, its servants and agents, be restrained from acquiring or attempting to acquire the lands of the respective plaintiffs by resumption pursuant to its resolution of 20th January 1948 and its application of 9th August 1948 under s. 536 of the Local Government Act 1919, as amended.*

*Order the respondent to pay the costs of the appellants of this appeal and of the proceedings in the Supreme Court.*

Solicitors for the appellants, *McMaster, Holland & Co.*  
Solicitors for the respondent, *McFadden & McFadden.*

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(1) (1906) 1 Ch., at p. 478.

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