[HIGH COURT OF AUSTRALIA.]

THE MINISTER FOR PUBLIC WORKS AND LOCAL GOVERNMENT (N.S.W.) AND THE COUNCIL OF THE MUNICIPALITY OF KOGARAH. Defendants, } Appellants;

AND

DUGGAN AND OTHERS . . . . Respondents.
Plaintiffs,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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Sydney, *May* 3, 4, 7; *June* 8.

Dixon, Williams and Kitto JJ.

Resumption and Acquisition of Land—Resumption under statutory power—Local Government—Council—Town-planning—"Improvement and embellishment of the area"—Parks—New roads—Acquisition of more land than necessary—Surplus land—Proposed re-sale at profit to reduce cost of new road—Improper purpose—Damage to owners—Injunction—Local Government Act 1919-1948 (*N.S.W.*) (*No.* 41 *of* 1919—*No.* 44 *of* 1948), *ss.* 121, 235, 321 (a) (b) (d), 322, 348 (1), 477, 496, 496A, 518A, 532, 535, 536.

An application was made by a council under s. 536 of the *Local Government Act* 1919-1948 (N.S.W.) to the Minister for Public Works and Local Government for the resumption of certain land within its municipality for the purpose of the improvement and embellishment of the area (s. 321 (d)). The Council proposed to construct a park and a new road on the site of certain mangrove swamps to be reclaimed and on the foreshores of Oatley Bay to be acquired, principally, by resumption. Lands so acquired and known to be in excess of the actual requirement were to be re-subdivided and re-sold for building lots and the proceeds applied towards the cost of the scheme.

[Editor's Note.—By Act No. 46 of 1951 assented to on 10th December 1951, the Local Government Act was amended by omitting ss. 321, 322 and 535 and inserting a new s. 321. By the same Act an amendment was made to s. 532. The effect of these amendments is to confer on councils power which the High Court in this case has held they did not possess prior to the date of the amendment. By s. 2 (2) Act No. 46 of 1951 has a limited retrospective operation.]

Held that the Council was not empowered by the Act to acquire land in excess of the actual requirement, in order that upon re-subdividing that land, the Council might re-sell it and apply the proceeds towards the cost of the scheme.

Thompson v. *Council of the Municipality of Randwick*, (1950) 81 C.L.R. 87; 17 L.G.R. 256, applied.

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

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, thirteen plaintiffs, namely, Herbert James Alfred Duggan, Ellen Willhelmine Newton, married woman, Ethel May Cranston, widow, Andrew Meuburn Vincent, Percy Harold Blackman, George James Page, Roy Hector Gingold, John Kucirek, George William Halls, Albert Arthur George Connor, John Tomlyn, Norman Leslie Clark and Alan John Grainger, sought injunctions against the Council of the Municipality of Kogarah and the Minister for Public Works and Local Government to restrain them and each of them from resuming or attempting to resume or from taking any further steps to effect a resumption or resumptions of such part of certain residual lands as belonged to the respective plaintiffs.

The statement of claim, as amended, was substantially as follows :—

1. The defendant Council of the Municipality of Kogarah had resolved to acquire by resumption certain land within its area for the ostensible purpose of undertaking the improvement and embellishment of the area within the meaning of s. 321 (d) of the *Local Government Act* 1919, as amended.

2. In furtherance of that purpose that defendant had applied under s. 536 of the Act to the Governor.

3. That defendant proposed that part of the said land when resumed, such part being referred to as "the residual lands", should be re-subdivided and sold by it without any physical improvement or embellishment of the area thereby.

4. The plaintiffs were severally the owners of portions of land which formed part of the residual lands.

5. The plaintiffs charged and said the facts were that the defendant Council did not at any material time and did not now intend to use the residual lands for a statutory purpose ; that the residual lands were not capable of being so used ; that the residual lands were not being resumed for the ostensible purpose resolved

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upon by the defendant Council; and that the residual lands were threatened to be resumed for the purpose of recouping the defendant Council in respect of the cost of making certain improvements and/or embellishments resolved upon by it by the re-sale of those residual lands at a profit.

6. The plaintiffs charged and said the fact was that the resumption of the residual lands was in excess and an abuse of the powers conferred upon the defendant Council and that by such resumption irreparable loss and damage would be caused by that defendant to each of the plaintiffs.

7. The plaintiffs feared that unless restrained by an injunction of the Court the defendants would proceed with the application to resume the residual lands and that the plaintiffs and each of them would suffer irreparable loss and damage thereby.

The plaintiffs prayed, *inter alia*, for the injunctions mentioned above.

The plaintiffs served upon each of the defendants a notice of motion for an interlocutory injunction restraining each of the defendants from taking any further steps to effect a resumption or resumptions of land belonging to any of the plaintiffs the resumption of which was threatened in connection with what was called "The Oatley Bay Improvement Scheme".

In an affidavit Ernest Alexander Duggan deposed that he was the honorary secretary of the Oatley Bay Resumption Protest Committee, a voluntary organization of ratepayers and owners of land on the foreshores and in the vicinity of Oatley Bay, George's River, Hurstville, and that all the plaintiffs were members of the committee. He annexed a report dated 18th March 1948, addressed to the town clerk by Albert Henry Brewer, the defendant Council's engineer, which, so far as material, was in the following terms:—"Oatley Bay Reclamation and Improvement. A scheme for the resumption of the foreshores and reclamation of the mangrove swamps in the N.E. and N.W. arms of Oatley Bay was adopted by the Council in 1936. The scheme did not include drainage, as it was hoped that such work would be carried out by the Public Works Department as part of the relief work then in progress. . . . A start was made on the acquisition of land for the original scheme, but little progress has been made due to the shortage of funds. Council is now in a position to proceed with the acquisition but it is felt that the scheme requires revision and extension to provide for the connecting road between Connels Point Road and Oatley, and to ensure the best use being made of the more or less waste land surrounding the area. Plans showing the revision are submitted.

New Road.—The proposed new road runs from Connels Point Road, opposite Kyle Parade, across the N.E. Arm, through the partly built-on area at the foot of Waitara Parade and West Crescent, across the N.W. Arm and then up the valley between Frederick and Kitchener Streets to join Frederick Street opposite Louisa Street. Its length is about one mile. To travel from Oatley to Connels Point now requires a three-mile journey. It also provides a link in the desirable marine drive along George's River from Tom Ugly's Point to Oatley.

Use of 'Dead Ground'. The properties facing Connels Point Road and Homedale Crescent have very big depths and practically without exception the rear portion of the lots is unused. If a road were put through as shown on the plans, this dead ground could be subdivided for residential sites. The improved value should cover the cost of resumption and road construction. A considerable improvement in the area and the new park would result. The area between Halstead Street, Rickard Road and Greenacre Road requires replanning. A sketch showing a suitable layout is submitted. This can be treated as a separate matter except as it affects the outlet of the proposed new road along the eastern side of the park.

The land fronting Whitfield Parade and East Crescent also has a big depth and could be similarly treated, although conditions are not favourable at the northern end. . . . It is recommended that the revised scheme be adopted and steps be taken to acquire the land."

At its meeting held on 1st April 1946, the defendant Council resolved that the scheme outlined in the engineer's report be adopted and that the town clerk be authorized to negotiate with the various owners concerned for the acquisition of the required portions of their respective holdings.

A report, dated 23rd September 1946, by the town clerk, relating, *inter alia*, to the subject scheme received by the Council at its meeting held on 8th October 1946, contained the following paragraph: "In arriving at a conclusion in regard to the matter the fact that the Oatley Bay Scheme will provide many lots for sale to offset at least part of the cost should not be overlooked."

The Council again authorized the town clerk to negotiate with owners of the areas that would be required at prices not exceeding those shown in the Valuer-General's list.

The whole area envisaged by the subject scheme comprised 119 acres, of which 85 acres were to be used for recreation areas and park lands; 17 acres were to be used for a link and scenic

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roads; and 17 acres fronting one of the new roads were to be replanned, re-subdivided and sold as residential sites subject to restrictive covenants imposed by the Council to ensure a proper standard of development.

On 17th February 1947, the defendant Council resolved, in connection with improvement schemes—Renown Park and Reclamation of the North-East and North-West Arms of Oatley Bay—"that steps be taken to acquire the lands required in connection with both schemes and that the following procedure be adopted:—(a) each owner to be advised by letter of the Council's intention to acquire his land or a portion thereof, and an offer made to purchase same at the Valuer-General's estimated cost of acquisition, the Council to pay all legal costs. Such letters to contain an intimation that if any owner is desirous of securing an allotment in the area—after its improvement and resubdivision—the Council will place to his credit the value (as determined by the Valuer-General) of his land or the part thereof to be taken and later allow him to choose a lot in the resubdivided area and any difference between his credit and the value of the lot chosen (this value also to be determined by the Valuer-General) to be adjusted in cash either way; (b) in all cases where the Council's offer is not acceptable to the owner, such owner to be given the prescribed notice under the *Re-establishment and Employment Act*, 1945, and notified that Council intends to make application for the Governor's approval to the acquisition of his land by the process of resumption; (c) in all cases where necessary, application be made for the approval of the Attorney-General to acquire land from 'Members of the Forces' by resumption; and (d) that in all cases where the owner is not prepared to accept the price offered, the Town Clerk be authorized to take the necessary steps under Council's seal for the resumption of the land".

By applications dated 8th April and 25th August 1948, respectively, the town clerk, on behalf of the Council, applied under s. 536 of the *Local Government Act* to the Minister for Local Government for the acquisition by resumption of certain land, including land severally owned by the plaintiffs, situate on the foreshores and in the vicinity of Oatley Bay for the stated purpose of "the improvement and embellishment of the area" under s. 321 (d). That purpose included the proposed (i) construction of a new road; (ii) provision of parks and recreational grounds, and (iii) resubdivision and sale of residual lands not required for the proposed new road or parks and recreational grounds. The Council proposed after the resumption to re-subdivide and sell part of the lands

proposed to be resumed including, *inter alia*, the said land of the plaintiffs respectively. The said land of the plaintiffs was included in the lands referred to in the engineer's report dated 18th March 1946, set out above, in the paragraph headed "Use of 'dead' ground".

In reply to representations made on behalf of, *inter alia*, the plaintiffs, the Minister for Local Government, by letter dated 7th September 1950, said that the purpose of the scheme was to retain for public enjoyment, in its natural state, the affected parts of the George's River foreshores; to provide recreational facilities on those parts capable of such development and to construct a scenic road as a means of communication to the scenic attractions of the locality. The areas in the vicinity of that part of the George's River were seriously deficient in facilities for public recreation and it was considered that the overall benefits to be derived from implementation of the proposal outweighed any objections to the scheme. The Minister further said that while he regretted the disturbance of the present ownership of the properties affected by the scheme, he considered, nevertheless, he would not be justified in disregarding the decision of the Council which was appointed by the electors of the municipality to exercise its power, including that of resumption, conferred on it by the *Local Government Act*, and he had decided to recommend the proposal for the approval of the Governor, a notification of which approval would, it was expected, appear in the Government *Gazette* in the near future.

A request on behalf of the plaintiffs for an undertaking by the Council that it would not proceed with its applications to the Minister pending the filing on their behalf of a statement of claim for an injunction—a copy of which letter had been forwarded to the Minister—not having been complied with, the plaintiffs, by motion made *ex parte* on 20th September 1950, obtained from the Court an injunction up to 22nd September 1950, on the usual terms, restraining the defendants, namely, the Council and the Minister, their servants and agents, from taking any further steps to effect the said resumption or resumptions.

The injunction was continued from time to time until it came on to be further heard on 4th December 1950.

A disputing appearance was entered on behalf of the Minister on 27th September 1950.

At its meeting held on 25th September 1950, the defendant Council resolved that further information be forwarded to the Minister for Works and Local Government under seal, with reference

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to the resolution passed by the Council at its meeting held on 17th February 1947, to make application under ss. 532 and 536 of the *Local Government Act* 1919, as amended, for the approval of the Governor to the Council acquiring by way of resumption for the purpose of " the improvement and embellishment of the area (s. 321) " of certain land within the municipality and more particularly described in the schedule attached to an application submitted to the Minister. " The purpose ' the improvement and embellishment of the area (s. 321) ' as expressed in such resolution and in the application submitted to the Minister was intended by the Council to mean and include the following purpose and powers which the Council is authorized under the Local Government Act 1919, as amended, to undertake and exercise, namely :—

(a) the planning of new roads and subdivisions vide section 321 (a) of the Local Government Act 1919 ;

(b) the re-arrangement of parcels of land, vide section 321 (b) of the Local Government Act 1919 ;

(c) the improvement and embellishment of the area, vide section 321 (d) of the Local Government Act 1919 ;

(d) the provision, control and management by the said Council for public health, recreation, convenience and enjoyment, vide section 348 (1) of the Local Government Act 1919 ;

(e) the resumption of land under and for the purpose of section 477 of the Local Government Act 1919 ; and

(f) the resumption of land under and for the purposes of section 535 of the Local Government Act 1919."

The plaintiffs' solicitors, by letter dated 27th October 1950, informed the Minister that interviews with officers of his Department subsequent to the granting of the interim injunction had disclosed that the publication in the *Gazette* of the resumption notices was not imminent as was at first thought ; therefore there was not any purpose in seeking to restrain him, and that if the Minister was disputing the claim merely as a matter of principle, the plaintiffs should not be required to pay his costs in testing, in these proceedings, abstract questions and principles of law. The minister stated that he had a real interest in the action and was concerned to know the limits of the resumption power conferred by the Act ; therefore he did not consent to being dismissed from the suit and was not prepared to pay the costs in any event.

Affidavits by the plaintiffs showed that each had received from the town clerk a letter dated 10th March 1947, which, *mutatis mutandis*, was in the following terms :—" Some ten years ago the Council raised a loan for expenditure on the reclamation of the

North East and North West arms of Oatley Bay, but before the work was commenced the War eventuated and the project was consequently deferred. The Council is now in a position to proceed with the proposal and has approved of the amplification of the original scheme to provide for roadways connecting South Hurstville and Connels Point with Oatley, the improvement of extensive public reserves and the resubdivision into home sites of residual lands.

The first step in the implementation of the scheme is the acquisition of the required land and in this connection it will be necessary for the Council to acquire the part of your land coloured red on the attached plan. The Valuer-General's estimated cost of the acquisition of this area is ' £115 0s. 0d.' and Council hereby offers to purchase same from you at this figure and to pay all legal costs of transfer.

Acceptance of this offer will entitle you (if you so desire) to priority in the purchase of an allotment in the area to be resubdivided at the Valuer-General's valuation. It must be realized, however, that the acquisition of such a large area of land involved, its improvement and the resubdivision of the residue will take considerable time—possibly from three to five years—before the home sites can be offered for sale.

If, however, you are not prepared to accept the Council's offer of purchase, then you will later be served with the prescribed notice under the *Re-Establishment and Employment Act* 1945, and in due course Council will proceed to acquire the land by the process of resumption.

Awaiting your reply,"

None of the plaintiffs accepted the offer so made and each deposed by affidavit that he or she respectively had not been approached by or on behalf of the Council with any suggestion that he or she, as the case might be, should co-operate with the Council to re-subdivide that part of his or her land not required for the proposed new road and park to the new road proposed to be constructed by the Council or to amalgamate such residue with the residual land of adjoining owners; that apart from the Council's offer to purchase portion of his or her land for the sum stated the Council had not consulted his or her wishes or views as regards any part of its alleged improvement scheme or the proposed resumptions at all; that the unimproved and improved capital valuations of the particular allotment of land concerned were as shown; that improvements of the nature indicated had been erected or effected on the said allotment; that there was nothing

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in the physical shape or contours of the residual land comprised in the said allotment which would hinder or create any difficulties in connection with its use as a building site; that if the proposed resumption were effected the deponent would be prejudiced in the manner indicated; and that the deponent could not see any purpose, except the purpose of defraying the whole or part of the cost of the new road, in the proposed resumption of that part of the deponent's land included by the Council for re-sale, and no improvement or embellishment of the municipality would be effected by placing such land under Council ownership.

Several of the deponents deposed that at meetings attended by them they had heard the then mayor say, *inter alia*, that the Council intended to re-subdivide and re-sell the residual lands at a profit to finance the making of the proposed new roadways, and that the Council would be unable to carry the scheme into effect without the profits from the re-sale of the residual land. They had not at any time heard the mayor, or any other member or representative of the Council, state that the Council proposed to carry out any works of any sort on the residual lands or to effect any physical alteration thereto. One deponent stated that the town clerk had informed him upon inquiry that there were many miles of new roadways proposed to be made for which the re-sale of the residual land at a profit was necessary in order to defray the cost thereof. Another deponent deposed that the engineer had made a similar statement.

A town-planner, who was also a licensed surveyor, deposed, *inter alia*, that the defendant Council had acquired sufficient land in the subject locality to design a scheme which it preferred, and the odd blocks not required would give the variation recommended by town-planners to avoid monotony and suit individual requirements. There was sufficient area in practically all residual land to enable one lot fronting the existing road and one lot fronting the new road to be created without either lot being less than the Council's minimum area.

The town clerk said in cross-examination that, apart from the resolution made at the meeting held on 25th September 1950, the only resolution for resumption made by the Council was the resolution made by it at its meeting held on 17th February 1947, and that no resolution was ever passed by Council to resume in the following terms: "the whole or any part of the land for the purpose of the improvement and embellishment of the area" and, further, that the applications dated 8th April and 25th August 1948, respectively, lodged by him with the Minister for

Local Government, were applications for the resumption of land for the improvement and embellishment of the area pursuant to s. 321 (d) of the Act, his authority therefor being the said resolution of 17th February 1947; the Council's adoption of the scheme generally through the various reports that had been submitted from time to time to the Council; and ordinary general practice.

The engineer said in evidence that some work would be done on the residual land to "make them better from a re-sale point of view".

Roper C.J. in Eq. said the case was indistinguishable in principle from the decision in *Thompson* v. *Council of the Municipality of Randwick* (1) and consequently the plaintiffs were entitled to succeed. His Honour granted an injunction restraining the defendants from taking any further steps pursuant to the resolutions passed by the Council and the applications made by it to the Minister to effect a resumption or resumptions of land belonging to the plaintiffs or any of them the resumption of which was threatened in connection with what was called "The Oatley Bay Improvement Scheme".

From that decision each of the defendants appealed to the High Court. The appeals were consolidated.

R. Else-Mitchell (with him *A. F. Mason*), for the appellants. The scheme proposed was an elaboration of earlier schemes which had been planned in 1936 and which had as their primary object the improvement of the area and the construction of new roads including a link road. The re-subdivision and replanning was desirable, if not necessary, in view of the character of the neighbourhood and the irregular character of the old subdivisions. The scheme proposed thus involved a substantial and material improvement in the whole area and the land of each plaintiff proposed to be resumed was to be used in every case in three ways:—(a) part was to be used for public recreation and park lands; (b) part was to be used for the new roads; and (c) part was to be re-subdivided and sold subject to appropriate building covenants. The residue of each plaintiff was left to him and in each case represented appropriately sized suburban blocks having an average depth of 150 feet. Such a scheme in its entire character falls within the *Local Government Act* and is authorized, despite the fact that re-sale for profit of some part of the land was contemplated. The decision in *Thompson* v. *Council of the Municipality of Randwick* (1) is inapplicable and should be overruled, as it was decided without

(1) (1950) 81 C.L.R. 87; 17 L.G.R. 256.

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reference to important sections of the Act and their history. Reliance is placed in this case upon the following provisions of the Act—ss. 235, 322, 476, 477, 496, 496A, 518, 518A, 532, 535, 536. These provisions support the acquisition and their scope, in some instances, can only be properly determined by looking at their history and the form in which they appeared in the *Local Government Act* as it was passed in 1919. A distinction is to be drawn between the powers under the *Local Government Act* and the powers which have been considered in English decisions, particularly where the operation of special Acts and acquisitions by commercial undertakings have been in issue. There are widely different methods by which compulsory acquisition may take place in England: *Halsbury's Laws of England*, 2nd ed., vol. 6, pp. 184 et seq. Commercial undertakings had wide powers in England under statute: in New South Wales they have never had that power and acquisitions in New South Wales have always been by or under ministerial authority, in respect of which the Minister for Public Works, as the recommending authority to the Executive Council, has had a discretion to refuse to implement the proposed acquisition. In consequence of the position of commercial undertakings in England a distinction has grown up there between (a) powers exercisable under special Acts and by *ad hoc* bodies; and (b) powers of local governing bodies under general Acts. In illustration of (a) the following cases, which decided that more land cannot be taken than was necessary, related to special statutes and *ad hoc* bodies constituted for special or limited purposes: *Gard* v. *Commissioners of Sewers of the City of London* (1); *Lynch* v. *Commissioners of Sewers of the City of London* (2); *Carington* v. *Wycombe Railway* (3); and *J. L. Denman & Co. Ltd.* v. *Westminster Corporation* (4); see also *Halsbury's Laws of England*, 2nd ed., vol. 6, p. 28, pars. 28, 29. In illustration of (b) the following cases in effect decide that a greater liberality is to be afforded to local governing bodies under general statutes and that the test of purpose is to be much wider—*Galloway* v. *Mayor and Commonalty of London* (5); *Rolls* v. *London School Board* (6); and *Quinton* v. *Bristol Corporation* (7). The decisions in *Clanricarde* v. *Congested Districts Board for Ireland* (8) and *Municipal Council of Sydney* v. *Campbell* (9) are in reality only illustrations of the principle that

(1) (1885) 28 Ch. D. 486, at pp. 505, 506, 510.
(2) (1886) 32 Ch. D. 72, at pp. 85, 86.
(3) (1868) L.R. 3 Ch. 377, at p. 385.
(4) (1906) 1 Ch. 464, at p. 476.
(5) (1866) L.R. 1 H.L. 34, at pp. 43, 48, 49, 61, 62.
(6) (1884) 27 Ch. D. 639, at pp. 642, 643.
(7) (1874) L.R. 17 Eq. 524, at p. 533.
(8) (1914) 79 J.P. 481; 31 T.L.R. 120.
(9) (1925) A.C. 338; 7 L.G.R. 69.

an *ad hoc* body cannot acquire for purposes which a person prejudicially affected can prove to be outside a purposive power because the power is co-extensive with the purpose. On the other hand, any power, object, or function of a statutory body will be construed as one of the purposes for which it is constituted (*Wilkinson* v. *Hull Railway and Dock Co.* (1)). In summary the principle of the English cases is that a special or *ad hoc* body established for special or limited purposes cannot under a power to resume land take more land than is proved to be necessary. This distinction is recognized in *Halsbury's Laws of England*, 2nd ed., vol. 6, p. 31, par. 29. The *Local Government Act* establishes democratic subordinate legislative bodies with wide general powers not limited to purpose. Section 84 charges a council with the local government of its area. The powers so conferred include ss. 477, 535 and 322. Those sections confer powers which are independent of purpose. This can be deduced from—(a) the history of the sections and comparable provisions in previous Acts ; (b) other provisions of the *Local Government Act* 1919 ; and (c) the character of the Act as an amending and not merely a consolidating Act. The history of those provisions is as follows : *Section* 477. Prior to 1905 the local governing authorities had no power to resume land. By the *Local Government* (*Shires*) *Act* 1905, s. 15, a power of resumption was conferred upon shire councils. This power was a power to apply through the Governor (s. 16). The *Local Government Extension Act* 1906 extended those provisions of the *Local Government* (*Shires*) *Act* 1905 to municipalities (s. 36)—these were the resumption provisions. The *Local Government Act* 1906 was a consolidating Act which repealed the earlier Acts and made provision for acquisition in s. 129 and s. 130. These provisions were substantially identical with ss. 15 and 16 of the *Local Government* (*Shires*) *Act* 1905, and took the form of a power to resume for a purpose and machinery for resumption. The *Local Government Act* 1919 substantially reproduced ss. 129 and 130 of the 1906 Act in ss. 532 and 536 respectively. The powers in ss. 535 and 477 must therefore be regarded as new and additional. *Howarth* v. *McMahon* (2) was a decision on s. 477, but the resumption there was a fraud on the power as the Council never intended to carry out the declared purpose. That decision is not questioned.

Section 535. The *Sydney Corporation* (*Amending*) *Act* 1900, s. 26, gave power to resume land required for limited purposes. This section was consolidated in s. 197 of the *Sydney Corporation*

(1) (1882) 20 Ch. D. 323, at pp. 333, 339, 340.

(2) (1951) 82 C.L.R. 442 ; 18 L.G.R. 43.

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Act 1902. The *Sydney Corporation Amendment Act* 1905 provided for resumption with the approval of the Governor for limited purposes (s. 16). The *Sydney Corporation Amendment Act* 1906 repealed s. 197 of the *Sydney Corporation Act* 1902 and by s. 3 amended s. 16 of the 1905 Act by including for the first time a power to resume all lands of which those required for the limited purpose formed part. The various Acts, including the *Sydney Corporation* (*Dwelling Houses*) *Act* 1912 and the *Sydney Corporation* (*Amendment*) *Act* 1924, both of which amended s. 16 of the 1905 Act, were consolidated in the *Sydney Corporation Act* 1932, s. 246.

Section 322. The comparable provision prior to 1919 was s. 22 of the *Sydney Corporation Amendment Act* 1905, which gave power in respect of any land purchased or resumed to do any of the following things therein set out. The *Local Government Act* 1919 altered the language by providing that the Council may purchase or resume and may thereupon do the following things therein set out. Some importance must be conceded to the change of language. Compared with other provisions of the Act s. 477 is unrelated to any particular purpose. It occurs in Part XXIII. headed "Miscellaneous Powers", all of which are purposes or functions. The distinction between Part XXIII. "Miscellaneous Powers" and Part XXIV. "Ancillary Powers" and Part XXV. "Acquisition" should be noted. It should also be noted that the "Miscellaneous Powers" are matters comparable to those dealt with in Parts XX-XXII. inclusive, but by their nature are not of sufficient scope to warrant inclusion as a separate Part. Other provisions of the *Local Government Act* refer to resumption or acquisition apart from or in addition to s. 532, namely, ss. 235 (2), 238 (1), 261, 262 (2), (6), 322,342 O (a), 365, 384, 398B, 417A, 418 (5), 477, 478, 492 (1) (a), 514B and 535. The general nature of the *Local Government Act* 1919, as appears by the long title, is an Act to make better provision for the government of areas and to extend the powers and functions of local governing bodies. Some effect must be given to these provisions purporting to extend powers and the Act should not be treated as a mere consolidation. Parliament has obviously intended to amend the law in these respects and its wishes should not be nullified by judicial construction (*Bismag Ltd.* v. *Amblins* (*Chemists*) *Ltd.* (1)). The wide powers which were thus conferred by the *Local Government Act* 1919 were subject to the limitations—(a) that the Governor must approve the acquisition and the Council must provide the funds (s. 536); (b) that the land once acquired could be disposed

(1) (1940) Ch. 667, at pp. 678, 679.

of only with the Governor's approval (s. 518 since amended); and (c) that any fraudulent exercise of power would in any case be open to review by the Courts. The character of the powers conferred by ss. 477, 535 and 322 as powers distinct from purpose is supported by the following decisions:—*Narma* v. *Bombay Municipal Commissioner* (1); *Jones* v. *Metropolitan Meat Industry Board* (2) and *Werribee Council* v. *Kerr* (3). Municipal and public bodies may have a power of recoupment by statute, as in s. 85 of the *Public Health Act* 1925 (Eng.). The right of recoupment may be implied: *Halsbury's Laws of England*, 2nd ed., vol. 6, p. 31, pars. 28, 29. Sections 535 and 477 were clearly intended to give a right to recoupment under the *Local Government Act*. *Criterion Theatres Ltd.* v. *Sydney Municipal Council* (4) is a clear authority in favour of recoupment under the provisions of the *Sydney Corporation Act*, which authorized the resumption of lands and "all lands of which those lands formed part". This is the same in substance as s. 535 of the *Local Government Act*. The power in s. 532 of the *Local Government Act* to acquire land by purchase is identical with the power to acquire compulsorily. The power should not be construed to affect titles to land acquired by negotiation, but a restrictive interpretation of the power to resume could hardly have any other effect. The validity of purchases must, therefore, be justifiable under other provisions such as ss. 477 and 322. The doctrine of limited powers conferred on public authorities as set out in *Westminster Corporation* v. *London and North Western Railway Co.* (5) and cited by this Court in *Thompson* v. *Municipal Council of Randwick* (6), is subject to some limitation. The doctrine of reasonableness, which that decision purports to lay down, must be regarded as misconceived because unreasonableness *per se* is not a test of validity or power (*Williams* v. *Melbourne Corporation* (7)). The requirement for by-laws to be reasonable must be regarded as a branch of the same doctrine as was referred to in *Westminster Corporation* v. *London and North Western Railway Co.* (8). The only question for inquiry is whether the act done or the by-law made is in reality an exercise of power: cf. *Brunswick Corporation* v. *Stewart* (9). Summarized the submissions are that s. 532 is the basis of all acquisitions, voluntary or compulsory. The purpose it requires is to be found in the

(1) (1918) 45 Ind. App. 125.
(2) (1925) 37 C.L.R. 252, at pp. 262-264.
(3) (1928) 42 C.L.R. 1, at pp. 8-10, 30, 31.
(4) (1925) 35 C.L.R. 535; 7 L.G.R. 72.
(5) (1905) A.C. 426, at p. 430.
(6) (1950) 81 C.L.R., at p. 105; 17 L.G.R., at p. 267.
(7) (1933) 49 C.L.R. 142.
(8) (1905) A.C. 426.
(9) (1941) 65 C.L.R. 88.

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provisions of ss. 477 and 322. Acquisition is itself the purpose, but is subject to the safeguards—(a) that the Governor-in-Council must approve and Council must provide the funds; and (b) that the Courts can set aside any exercise which is a fraud on the power or which is not in the interests of the area or not for a genuine local government object. The power to acquire for purposes, e.g., parks, roads &c., taken with the wide powers to acquire, implies a right of recoupment. The power conferred by s. 535 expressly gives power to acquire adjoining lands, that is, lands physically contiguous. Sections 496, 496A and 518A authorize the sale of land for housing purposes. The substantial purpose of the scheme, in the light of its history, was not the re-sale of the parcels to be acquired.

A. F. Rath, for the respondents. The evidence for the appellants discloses that the appellant Council's plans are "embryonic". There is then no sufficient plan, in the sense that there is not any plan or decision of the Council referable to a purpose of the *Local Government Act* 1919. The purposes in that Act are not trust powers; there is nothing in the Act that requires a council to devote resumed land to the purpose for which it is ostensibly acquired. A council's scheme must be sufficiently advanced to enable the court to say that it falls within a purpose of the Act; if it is not so advanced, the court will declare the proposed acquisition *ultra vires*. The case law clearly establishes the doctrine of *ultra vires* in the exercise of local government powers, in the sense that where the power is to be exercised for a purpose, not only must that purpose exist, but also it must exist in respect of the whole of the land affected by the exercise of power. The case of *Municipal Council of Sydney* v. *Campbell* (1) is inconsistent with any power of recoupment in an Act framed on the lines of the *Sydney Corporation Act* 1932. Apart from s. 477 of the *Local Government Act* 1919-1948, the acquisition powers in both Acts are in essence the same, and are similarly expressed. There is not any real difference between s. 322 of the *Local Government Act* and s. 254 of the *Sydney Corporation Act* as it existed at the time of *Campbell's Case* (2). Section 42 of the *Public Works Act* 1912, read with s. 536 of the *Local Government Act*, shows that the purpose of the resumption must be expressed, and must be in the nature of an "authorized work". The *Public Works Act* lays down rigid conditions for an "authorized work"; and in the same way a scheme of resumption under the *Local Government Act* must

(1) (1925) A.C. 338; 7 L.G.R. 69. (2) (1925) A.C. 338; 7 L.G.R. 69.

rigidly conform with an expressed purpose in the Act. Section 477 of the *Local Government Act* occurs amid various " purpose " sections, some of which are very limited in their scope. The section should be read as if the words " as elsewhere provided in this Act " occurred immediately after the word " resume ". This would bring it in line with s. 322 and would involve reference to s. 532. The word " land " in s. 477 is vague; it is not clear whether " land " where secondly occurring in the section is co-extensive with the word " land " where firstly occurring. The real effect of s. 477 is that it is restrictive in operation; it means that even if the proposed acquisition is for a purpose of the Act, the Council must consider also its expediency in the interests of the area. The principles relevant to the construction of the section are set out in *Maxwell* on *Interpretation of Statutes*, 9th ed. (1946), p. 236. An acquisition must be " for ", that is, reasonably referable to, a purpose of the Act (see s. 532), but to determine whether it is so referable the Court must consider the nature of the purpose and the circumstances of the case. Some of the purposes of the Act are powers to " regulate "; normally an acquisition would not be " for " such a purpose. The Act also contains powers to do things on land already vested in the Council; here again an acquisition would not normally be " for " the purpose of exercising such powers. In every case the test is: Is the acquisition " for " the purpose, for example, a power to erect and sell houses (s. 496) does not necessarily involve acquisition: on its true construction it may not permit acquisition at all, or it may permit acquisition where in the particular case acquisition is reasonably incidental to the purpose. On the other hand, a power to " provide " would more commonly, but not always, permit acquisition. But it is significant that in a very important instance—the provision of roads—the Act expressly provides for acquisition (ss. 235 (2), 238). It is arguable that the powers of resumption and purchase in the Act are not co-extensive; cf. in s. 22 " for the purposes " with " for any purpose " in s. 532. A purpose may be valid where a resumption is not. It may be that in any case of purchase, title vests in the Council, whereas in the case of resumption the title vests only if the resumption is for a purpose expressed in the Act. Again, it is arguable that a voluntary acquisition may be " for ", or reasonably referable to, a particular purpose where a compulsory acquisition would not be so. The power in s. 246 of the *Sydney Corporation Act* 1932 to resume " all lands of which those required for such purposes form part " was held to be independent of purpose (*Criterion Theatres Ltd.* v. *Municipal Council*

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of Sydney (1)). The words " form part " indicate a limit to the provision, though it may be a difficult question to construe them. Section 535 of the *Local Government Act* 1919 does not contain any such limiting provision on the extent of the land that may be taken under it. The words " in the vicinity " in s. 535 show that its scope, and probably its object, are different from the provisions of the *Sydney Corporation Act*. Section 535 was probably inserted in the Act for more abundant caution, in that a power to resume for a purpose might not include a power to resume land merely incidental to the purpose, because of the extraordinary nature of the power: see *Gard* v. *Commissioners of Sewers of the City of London* (2); and *J. L. Denman & Co. Ltd.* v. *Westminster Corporation* (3). Section 535, in providing for " incidental " resumption, emphasizes the necessity for the purpose referred to in s. 532. Thus it is not true that s. 535 is meaningless unless it implies a power of recoupment. The Act contains separate and elaborate financial provisions, and in particular s. 121 provides for defraying the expenses of works and services. The *Local Government (Town and Country Planning) Amendment Act* 1945 may give councils wider powers of acquisition, and the present proposal might be a proper " scheme " under that Act, but that Act has not been used or relied on in the present case. *Galloway* v. *Mayor and Commonalty of London* (4) shows that a court will imply a power of recoupment in favour of a local government body only in a clear case. That case was really not a case of implication at all, for the Act in question gave power to resume specific land, and expressly indicated that some of the land might be used to defray the cost of the works.

R. Else-Mitchell, in reply. The Governor-in-Council, in deciding whether or not to approve the proposed resumption, had other evidence than the application of the Council; the area had been inspected by a departmental planning officer in conjunction with the Council's engineer. The Minister and the Governor therefore propose to exercise an independent discretion. The allegation that the scheme was embryonic does not affect its validity or the Council's power to resume land for the purpose of that scheme (*Lynch* v. *Ku-ring-gai Municipal Council* (5)). Lack of detail is accordingly not a ground for holding a scheme to be outside power if the main purpose is within power; the main purpose in this

(1) (1925) 35 C.L.R. 555; 7 L.G.R. 72.
(2) (1885) 28 Ch. D., at pp. 496, 497, 507-509, 511, 512.
(3) (1906) 1 Ch., at pp. 476, 478.
(4) (1866) L.R. 1 H.L. 34.
(5) (1947) 16 L.G.R. 144; (1948) 17 L.G.R. 14.

case was public recreation and improvement which was established as far back as 1936. *Galloway* v. *Mayor and Commonalty of London* (1) was not an isolated decision; the principle there formulated was applied in other cases in England (*Rolls* v. *London School Board* (2) and *Quinton* v. *Bristol Corporation* (3); and in New Zealand (*Wellington City Corporation* v. *Dealy* (4)). The last-mentioned decision upheld the acquisition under a New Zealand Act similar to the *Local Government Act* not only of lands adjoining the lands required for road widening but also the lands belonging to a different owner lying behind those lands. Section 192 of the New Zealand Act is similar to s. 535 of the *Local Government Act* 1919. Sections of this character are common in local government legislation: for example, s. 592 of the *Local Government Act* 1928 (Vict.), which authorizes the acquisition of neighbouring land. Provisions in such legislation authorizing the acquisition of "adjacent", "adjoining", "neighbouring", lands or "lands of which the lands required form part" at least authorize recoupment of the cost of a public work to be carried out and authorize re-sale of frontages to the new public work to reduce the cost. The provisions of the *Public Health Act* 1925 (Eng.), s. 83, which authorize recoupment are in less specific and narrower terms than the provisions relied upon. Recoupment is not denied by s. 121 of the *Local Government Act* and that section does not provide an equitable method of recoupment because the rate must be imposed on the whole municipality or a ward, or shire or riding: cf. ss. 118-120. The *Sydney Corporation Act* did not confer wider powers than the *Local Government Act*. The powers in s. 246 of the *Sydney Corporation Act* are related to purpose in the same way as s. 532 of the *Local Government Act*. A purpose in relation to roads is expressed in ss. 75 and 76 of the *Sydney Corporation Act*, but those sections confer a separate power of taking land for road purposes in precisely the same way as ss. 235 and 238 of the *Local Government Act*. The distinction between *Municipal Council of Sydney* v. *Campbell* (5) and *Criterion Theatres Ltd.* v. *Municipal Council of Sydney* (6) is that the former case related to improvement and remodelling under the *Sydney Corporation Act* and the whole purpose was held to be tainted by original lack of good faith in the passing of the first resolution for acquisition. The *Criterion Theatres Case* (7) related to the widening of a road and carried with it expressly the right to acquire additional lands.

(1) (1866) L.R. 1 H.L. 34.
(2) (1884) 27 Ch. D. 639.
(3) (1874) L.R. 17 Eq. 524.
(4) (1929) N.Z.L.R. 352.
(5) (1925) A.C. 338; 7 L.G.R. 69.
(6) (1925) 35 C.L.R. 555; 7 L.G.R. 72.
(7) (1925) 35 C.L.R. 555; 7 L.G.R. 72.

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The authority of that case on this question is not affected by the decision in *Howarth* v. *McMahon* (1). The provisions of the *Local Government Act* relating to trade activities are not in point (see s. 110) and no general power to carry on trading activities outside the area is conferred. Such power exists in limited cases such as electricity undertakings (ss. 418 (4), 506). The *Local Government* (*Town and Country Planning*) *Amendment Act* 1945, does not confer any extensive power to resume (s. 342G (3) (u) and s. 342O (a) are only incidental to a scheme. A council has power to undertake reclamation work, which was a major feature of the scheme (s. 494A). The scheme in its entirety was a reasonable and proper one. It was not tentative and it was bona fide. Re-sale was an incidental and not a major feature of the scheme, as in *Thompson* v. *Municipal Council of Randwick* (2) and that decision is not applicable.

Cur. adv. vult.

June 8.

The Court delivered the following written judgment :—

This is a consolidated appeal by the defendants from a decree of the Supreme Court of New South Wales in Equity made on 7th December 1950 by *Roper* C.J. in Eq. restraining each of them from taking any further steps pursuant to resolutions passed by the defendant Council and the applications made by it to the defendant Minister to effect a resumption or resumptions of land belonging to the plaintiffs or any of them the resumptions of which are threatened in connection with what is called the Oatley Bay Improvement Scheme. The resolutions in question were passed by the defendant Council on 1st April 1946 and 17th February 1947. The first resolution was to the effect that the engineer's special report on the Oatley Bay Reclamation and Improvement Scheme be adopted and that the Town Clerk be authorized to negotiate with the various owners concerned for the acquisition of the required portions of their respective holdings. The second resolution was to the effect that steps be taken to acquire the lands required for the scheme and that the following procedure be adopted : (a) Each owner to be advised by letter of the Council's intention to acquire his land or a portion thereof, and an offer made to purchase same at the Valuer-General's estimated cost of acquisition, the Council to pay all legal costs. Such letters to contain an intimation that if any owner is desirous of securing an allotment in the area—after its improvement and re-subdivision—the Council will place to his

(1) (1951) 82 C.L.R. 442 ; 18 L.G.R. 43.

(2) (1950) 81 C.L.R. 87 ; 17 L.G.R. 256.

credit the value (as determined by the Valuer-General) of his land or the part thereof to be taken and later allow him to choose a lot in the re-subdivided area and any difference between his credit and the value of the lot chosen (this value also to be determined by the Valuer-General) to be adjusted in cash either way; (b) In all cases where the Council's offer is not acceptable to the owner, such owner be given the prescribed notice under the *Re-establishment and Employment Act*, 1945, and notified that Council intends to make application for the Governor's approval to the acquisition of his land by the process of resumption; (c) In all cases where necessary application be made for the approval of the Attorney-General to acquire land from "Members of the Forces" by resumption; and (d) That in all cases where the owner is not prepared to accept the price offered, the Town Clerk be authorized (1) to make application, under the Council's seal, for the Governor's approval to the resumption of the required area; (2) to deposit with the resuming Department the estimated cost of resumption; and (3) to give Council's undertaking also under seal, to recoup the Department for any expenditure incurred in excess of the amount of such deposit.

The engineer's report referred to in the resolutions of the Council was a report dated 18th March 1946 and related to the resumption of the foreshores and reclamation of the mangrove swamps in the North West and North-East arms of Oatley Bay. Most of the reclaimed land is to be made into a park. It also referred to proposals for a new road joining Connel's Point and Oatley to form part of a proposed marine drive from Tom Ugly's Point to Oatley. It stated that "the proposed new road runs from Connel's Point Road opposite Kyle Parade, across the N.E. Arm, through the partly built on area at the foot of Waitara Parade and West Crescent, across the N.W. arm and then up the valley between Frederick and Kitchener Streets to join Frederick Street opposite Louisa Street." After claiming certain advantages for this road, the report proceeded to discuss what was called the "Use of dead ground". It stated that "The properties facing Connel's Point Road and Homedale Crescent have very big depths and practically without exception the rear portion of the lots is unused. If a road were put through as shown on the plans, this dead ground could be subdivided for residential sites. The improved value should cover the cost of resumption and road construction. A considerable improvement in the area and the new park would result. The area between Halstead Street, Rickard Road and Greenacre Road requires replanning. A sketch showing a suitable layout is

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submitted. This can be treated as a separate matter except as it affects the outlet of the proposed new road along the eastern side of the park. The land fronting Whitfield Parade and East Crescent also has a big depth and could be similarly treated, although conditions are not as favourable at the northern end. The contours of the land fronting the N.W. Arm do not lend themselves to any similar treatment."

On 8th April 1948 the Council applied to the defendant Minister under s. 536 of the *Local Government Act* 1919 as amended for the acquisition by resumption for the purpose of the improvement and embellishment of the area under s. 321 of the Act of the lands of those owners required for the scheme who were unwilling to sell voluntarily.

The statement of claim in the suit was issued on 21st September 1950. On 25th September 1950 the defendant Council passed a resolution which stated, *inter alia*, that the purpose "the improvement and embellishment of the area (s. 321)" as expressed in the resolution of 17th February 1947 and in the application submitted to the Minister was intended by the Council to mean and include the following purposes and powers which the Council is authorized under the Local Government Act 1919 to undertake and exercise, namely: (a) the planning of new roads and subdivisions, vide s. 321 (a) of the *Local Government Act* 1919; (b) the re-arrangement of parcels of land vide s. 321 (b) of the *Local Government Act* 1919; (c) the improvement and embellishment of the area vide s. 321 (d) of the *Local Government Act* 1919; (d) the provision, control and management by the said Council of grounds for public health, recreation, convenience and enjoyment vide 348 (1) of the *Local Government Act* 1919; (e) the resumption of land under and for the purpose of s. 477 of the *Local Government Act* 1919; and (f) the resumption of land under and for the purposes of s. 535 of the *Local Government Act* 1919.

The total area proposed to be reclaimed or acquired voluntarily or by resumption comprises 119 acres, of which 85 acres are to be used for park lands, 17 acres for new roads and 17 acres for re-sale. The plaintiffs do not object to the proposed resumption of so much of their land as is required for the new road and park lands, but they do object to the resumption of so much of their land as is not required for these purposes. This land is conveniently referred to in the statement of claim and in the judgment of *Roper* C.J. in Eq. as the residual lands. In the course of his judgment his Honour said "The plans put before the Council show, I think, quite clearly that, although if the Council effect

these resumptions it would no doubt effect some re-subdivision of the residual lands before submitting them for sale, at the same time if they were left in the hands of the plaintiffs, the plaintiffs could, without having to co-operate with other persons effect subdivision of their lands so as to give them frontages to the proposed new road, and could sell them in that form of sub-division. The resolutions I think of the Council, and in particular the reports upon which they are based, the report of the engineer and the report of the Town Clerk, indicate, I think, that the question of re-sale of residual lands was a matter of importance to the Council, and that the proposed profit on the re-sale which the engineer has suggested would cover the cost of the resumption and of the road-making was a material and vital consideration in the Council in approving of the resumption of the residual lands of the plaintiffs. It was put that that conclusion did not necessarily follow at this stage because one could not find that the plan of the Council had reached a stage of maturity under which it was a matter of any certainty that the roads in question would be built, and if they were not built, then it was suggested that the whole of the resumed land would be used for park lands, and that would be a proper purpose either under the provisions of the Act dealing with improvement and embellishment of the municipality or under some other provisions of the Act. I think there are two answers to that argument, one being that if the proposal of the Council is so ill-defined at the present time that the resumption might be effected for purposes which are proper or for purposes which are improper, then the proposal to resume is improper at the present time. The other one is that it is, in my opinion, clear from the resolution of the Council that the Council did propose and does propose to re-subdivide and re-sell the residual lands referred to in this case. In making offers to each of the plaintiffs, and in the resolution of the Council authorizing the offers, it is put to the plaintiffs that they would have a right to acquire one of the blocks on the re-subdivision of the area. In that set of circumstances it appears to me that this case is only distinguishable from *Thompson* v. *Randwick Municipal Council* (1) in that it is somewhat considerably stronger ".

We agree with respect with these remarks of his Honour. Before us no serious attempt was made to distinguish the present case on the facts from the recent decision of this Court in *Thompson* v. *Randwick Municipal Council* (1). It was not disputed that it was a substantial purpose of the resumption of the residual lands

(1) (1950) 81 C.L.R. 87; 17 L.G.R. 256.

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to make a profit out of their re-sale, and that no attempt would have been made to resume these lands if it had not been the desire of the defendant Council to reduce the cost of the construction of the new road in this way. The resolution of the defendant Council of 25th September 1950 passed after the issue of the statement of claim and soon after the delivery of judgment in *Thompson* v. *Randwick Municipal Council* (1) was not passed after any further reconsideration of the scheme by the Council and adds nothing to its validity. It was evidently passed after legal advice had been obtained and was intended to support the arguments which have been addressed to us. The object of the appeal really is to persuade the Court that in *Thompson* v. *Randwick Municipal Council* (1) there were important sections of the *Local Government Act* and other considerations to which insufficient weight had been given and that the case was wrongly decided and should not be followed.

Section 532, which appears in Part XXV. of the *Local Government Act* 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". It was admitted that this section is the basis of all acquisitions of land voluntarily or compulsorily by local governing bodies. But it was submitted that ss. 477 and 322 confer powers of acquisition on Councils which are in themselves "purposes of this Act" within the meaning of s. 532 and that if a Council bona fide resolves to exercise these powers the acquisition of the intended lands is a purpose within the meaning of s. 532 and that the only restriction on carrying out this purpose is that the Governor-in-Council must approve and the Council must provide the necessary funds. It was contended that the jurisdiction of the Courts to interfere is restricted to cases where the exercise of the power of acquisition conferred by these sections is not bona fide or where, in the case of s. 477, it is clear that the acquisition could not be in the interests of the area or, in the case of s. 322, it is clear that the acquisition could not be for one of the purposes defined in pars. (a) to (h) of that section. It is true that s. 477 is not referred to in the judgment of this Court in *Thompson* v. *Randwick Municipal Council* (1). But it was certainly not overlooked when the Court was considering its opinion. In the more recent case of *Howarth* v. *McMahon* (2) the meaning of the section was carefully considered by this Court and the opinion was

(1) (1950) 81 C.L.R. 87; 17 L.G.R. 256.

(2) (1951) 82 C.L.R. 442; 18 L.G.R. 43.

there expressed that "the vagueness of the expressions employed in this provision affords no warrant for giving it a more generous scope than s. 532. On the contrary it suggests that it is an incidental power depending upon specific powers the exercise of which calls for the acquisition of land. No machinery is supplied outside Part XXV. for acquiring land when s. 477 is invoked".

On the argument of the present appeal the previous history of these sections and of the origin of the powers of local governing bodies to resume land were fully explored. But we do not think that this history throws any real light on the meaning of these sections in the structure of the present Act. Section 477 appears to have been imported from South Africa and had no previous history in Australia. Section 322 appears to be derived from s. 22 of the *Sydney Corporation Amendment Act* 1905, which gave power to the Municipal Council of Sydney in respect of any land purchased or resumed by the Council under the authority of the Act to do most of the things included in s. 322. Some importance, it was submitted, must be conceded to the alteration of language in s. 322, which provides that the Council may purchase or resume, as elsewhere in this Act provided, any land, and may thereupon do all or any of the things therein described. But the words "as elsewhere in this Act provided" and the word "thereupon" in s. 322 appear to us to confine the operation of the section, like s. 22 of the *Sydney Corporation Amendment Act*, to the doing of things upon land purchased or resumed for some purpose elsewhere provided in the *Local Government Act*. We see no reason whatever for reconsidering the meaning placed upon this section in *Thompson* v. *Randwick Municipal Council* (1), where it is said: "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".

We were also referred to ss. 496, 496A and 518A of the Act and it was submitted that these sections authorize the acquisition of land for housing purposes. It may well be that s. 496 does so, but there is no evidence that the defendant Council proposes to acquire the residual lands of the plaintiffs for such a purpose. The evidence is all to the contrary, for it is part of the present scheme that any owner who agrees to sell his land to the Council shall have the option of purchasing a lot in the new sub-division. These sections are not mentioned in any resolution of the Council,

(1) (1950) 81 C.L.R., at p. 103; 17 L.G.R., at p. 266.

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not even in the resolution of 25th September 1950, or in the report of the engineer, and cannot assist the defendants.

The crucial question on the appeal is whether the *Local Government Act* authorizes a Council to acquire land with a view to re-sale at a profit so as to recoup itself for the expenditure or part of the expenditure on some authorized work. Section 321 (d) of the Act was construed by this Court in *Thompson* v. *Randwick Municipal Council* (1) to mean that the undertaking of the improvement and embellishment of the area involves at least some physical improvement or 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 " (2). From that construction we see no reason to depart. The physical work which the Council proposes to undertake in the present case is the reclamation of the swamp area, the making of the park lands and the construction of the new road. The resumption of the land necessary for these purposes is authorized by ss. 235 and 321 (d) of the Act. The Council does not propose to do any work on the residual lands. It merely proposes to re-subdivide and sell them. The acquisition of land for this purpose is not authorized by s. 321 (d) of the Act. But it was contended that ss. 477 and 535 are clearly intended to give a right to recoupment. As we have already said, it was contended that the powers of acquisition referred to in these sections are in themselves independent purposes within the meaning of s. 532 of the Act. We have already rejected that contention in *Thompson* v. *Randwick Municipal Council* (1) and *Howarth* v. *McMahon* (3).

The only purposes within the meaning of s. 532 that emerge in the present case are the purpose of constructing the new road and the purpose of undertaking the improvement and embellishment of the area within the meaning of s. 321 (d). And we are not prepared to hold that either s. 477 or s. 535 confers a right to acquire land for the purpose of recoupment as incidental to these or any other express purposes. Section 477 in terms authorizes the Council to purchase or resume land within or outside the area. It may do so in any case where the Council deems it expedient to acquire, hold, sell or let such land in the interests of the area. It must always be in the interests of the area considered as a whole to acquire land if by so doing it can be re-sold at a profit and the

(1) (1950) 81 C.L.R. 87; 17 L.G.R. 256.
(2) (1950) 81 C.L.R., at p. 104; 17 L.G.R., at p. 267.
(3) (1951) 82 C.L.R. 442; 18 L.G.R. 43.

profit applied as part of the revenue of the Council. If s. 477 authorizes recoupment a Council could embark on a plan of acquiring land anywhere in New South Wales which it thought it could re-sell at a profit. The consent of the Minister would only be required where the acquisition was by compulsion. Section 535 provides that " Where the council proposes to acquire land for any purpose it may also acquire other land adjoining or in the vicinity ". If this section authorizes recoupment, the power of acquisition for this purpose would be almost as wide as under s. 477 because s. 531 (1) (c) provides that in respect of any area Part XXV. shall apply to land within or outside the area. The case of *Criterion Theatres Ltd.* v. *Sydney Municipal Council* (1) was strongly relied upon by the appellants. The legislation there in question and in particular s. 16 of the *Sydney Corporation Amendment Act* 1905 as amended provided that " the Council may from time to time with the approval of the Governor . . . purchase or resume all lands required for the opening of new public ways or the widening, enlarging, or extending of public ways in the city, and all lands of which those required for such purposes form part, . . . and any land required for carrying out improvements in or remodelling any portion of the said city ". The only work which the Municipal Council of Sydney proposed to do was to widen Park Street. It had not considered the question of carrying out improvements in or remodelling any portion of the city. Part only of the lands fronting Park Street were required to widen the street. But the Council resolved to resume that part of these lands required to widen Park Street for that purpose and the remainder of these lands for carrying out improvements and remodelling that portion of the city in the vicinity of that public way. And the whole of the lands were resumed. It was held that even if the second portion of the resolution was ineffectual the resumption was nevertheless effective because part of the lands was required to widen Park Street and this authorized the resumption of all the lands of which the lands required for this purpose formed part. There is, in our opinion, no real resemblance between s. 16 of the *Sydney Corporation* (*Amendment*) *Act* and ss. 477 and 535 of the *Local Government Act*, because the latter sections are not, like the former section, limited to any specific land.

The question when the whole of a person's lands may be acquired although part only is required for some undertaking so that the residue may be resold at a profit has frequently arisen in England. English legislation often specifies the lands that may be resumed

(1) (1925) 35 C.L.R. 555; 7 L.G.R. 72.

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for the statutory purpose. Even so, if the land is resumed for the benefit of a body trading for private gain, such as a railway company, the body may usually be restrained from resuming more of the land so specified than is actually required for the particular work. Public bodies usually may resume the whole of such lands although parts only are required for the particular purpose with a view to re-selling the residue at a profit. But these are all cases where the public body is on the face of the statute authorized to acquire the whole of the land and then empowered to re-sell the surplus land. In *Galloway's Case* (1), where the English decisions are reviewed, Lord *Cranworth* L.C. said: "In the *Model Act* all the lands and buildings authorized to be taken compulsorily are enumerated or referred to in a schedule to the Act. In later Acts the practice has been to have them all described in a book called the book of reference, deposited with the clerk of the peace accompanied by a map or ground plant" (2). The difference between sections authorizing the acquisition of specific land and wide sections like s. 477 and s. 535 of the *Local Government Act* is discussed in the judgment of *Kay* J. (as he then was) in *Gard* v. *Commissioners of Sewers of the City of London* (3) and on appeal by *Baggally* L.J., *Kay* J. said:—"Now there is a very wide distinction between this and the case of *Galloway* v. *Mayor and Commonalty of London* (4). In that case the lands which were to be taken were all put in a schedule to the Act; they were actually defined by boundaries and quantities, and the words of the Act were that they might take all those lands, which not only showed the extent to which they were to go, but placed a limit within the four corners of the Act upon the quantity of land which they were to take. There is nothing of that kind in this statute. It contains no schedule. There is no limit whatever upon the lands which are to be taken, save such as is comprised in the words which I have read, and that makes an enormous difference between the two cases". An example of a section in England which impliedly authorizes the acquisition of land for the purposes of recoupment is to be found (according to the text writers, Lord *Macmillan's Local Government Law and Administration in England and Wales*, 1934, vol. 2, p. 42; *Halsbury's Laws of England*, 2nd ed., vol. 6, p. 31) in s. 83 of the *Public Health Act* 1925, which provides that for removing doubts it is declared that the purposes mentioned in s. 154 of the *Public Health Act* 1875 (which relates

(1) (1866) L.R. 1 H.L. 34.
(2) (1866) L.R. 1 H.L., at pp. 45, 46.
(3) (1885) 28 Ch. D. 486, at pp. 496, 497, 509.
(4) (1866) L.R. 1 H.L. 34.

to the purchase of premises for the widening, opening, enlarging or otherwise improving any street or for the making of any street) include the improvement and development of frontages or of lands abutting on or adjacent to any street. This section includes an express reference to the improvement and development of frontages or of lands abutting on or adjacent to any street which indicates that such frontages or lands can be purchased for this purpose and is limited to lands which would be likely to benefit from the work done.

The fact that in s. 477 there is no limit by reference to their situation upon the lands which may be acquired is in itself a very strong reason for rejecting the contention that the section enables a council to acquire lands compulsorily for purposes of recoupment only. In s. 535 there is a limitation to land adjoining or in the vicinity, but that is so wide and vague a description that the same reason against such an interpretation remains applicable. Lands could be acquired which did not benefit in any way from the particular expenditure simply because the local governing body saw the opportunity of re-selling them at a profit. In *Perpetual Executors and Trustees' Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (*Thomas's Case*) (1) this Court had recently to consider, not for the first time, the circumstances in which it will reverse one of its own decisions. It was pointed out that this Court is not bound by its own previous decisions so as absolutely to preclude reconsideration of a principle approved and applied in a previous case. But the exceptions to the rule are exceptions which should be allowed only with great caution and in a clear case. In the present case we can see no reason whatever for departing from the construction placed upon the various sections of the *Local Government Act* considered in *Thompson* v. *Randwick Municipal Council* (2) and *Howarth* v. *McMahon* (3). There is nothing in ss. 477 or 535 to indicate that Parliament intended that local governing bodies should be authorized to acquire land for purely financial reasons. Section 121 of the Act provides a well-recognized means by which such a body can recoup itself for special expenditure which benefits a particular portion of its area. The submission that the facts that such a body must obtain the approval of the Governor-in-Council and provide the necessary funds before it can resume land indicates that these are the safeguards intended by the Act against the resumption of land for an

(1) (1949) 77 C.L.R. 493.
(2) (1950) 81 C.L.R. 87; 17 L.G.R. 256.
(3) (1951) 82 C.L.R. 442; 18 L.G.R. 43.

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unlawful purpose cannot be accepted. The submission is quite inconsistent with the decision of the Privy Council in *Municipal Council of Sydney* v. *Campbell* (1) as this Court pointed out in *Criterion Theatres Ltd.* v. *Sydney Municipal Council* (2). It is clearly a judicial function to determine what is a purpose within the meaning of s. 532 of the Act.

The appeals should be dismissed with costs.

Appeals dismissed with costs.

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

Solicitor for the appellant Council, *H. R. Seabrook & Co.*

Solicitors for the respondents, *McMaster, Holland & Co.*

J. B.

(1) (1925) A.C. 338; 7 L.G.R. 69.

(2) (1925) 35 C.L.R. 555; 7 L.G.R. 72.