THE GRUNDNORMS OF RESUMPTION

Resumption, compulsory acquisition, compulsory purchase, expropriation, eminent domain, condemnation, public works—call it what you may, every system of law possesses rules whereby the government can take the land of private persons. A unilateral decision may be made by the government to take land against the wishes of the landowner, who then finds himself dispossessed of his land. In Australia he generally receives a reasonable sum of money as compensation for the loss of his land but in jurisdictions where widespread land reform is deemed necessary the private owner may find that the compensation is, in his view, barely adequate.[1] There may be an overriding emphasis on economic development at the expense of private rights of land ownership. Australia does not have the problem which afflicts many underdeveloped nations which require drastic agrarian reform of land use. The nation's modern history is irretrievably linked with the pioneer settler who opened up vast grazing areas for sheep and cattle and for other farming purposes. His occupation of the land and his title to that land were respected by the law. His usage of the land has been efficient. But as the years have passed and the cities have expanded, the range of government services has increased; the government has had to take back some of the land granted to private persons for the construction of roads, railways, reservoirs, government offices, naval bases, electricity power lines, national parks —the list is endless. About a hundred purposes are listed in the Second Schedule to the Acquisition of Land Act 1967 (Queensland). In that State land may be taken for such purposes as gymnasiums, parking of vehicles, racecourses and swimming pools. The power of the government to take land for a wide range of purposes is almost unlimited.

What then are the grundnorms of resumption? Kelsen tells us that the rules which form the legal system are derived from some basic norm, a normative order regulating human conduct in a specific

1 See e.g. Quisumbing, *Compensation in Land Reform Cases: A Comparative Public Study (India, the Philippines and Puerto Rico),* (1969) 44 Philippine L.J. 1; Dunning, *Law and Economic Development in Africa: The Law of Eminent Domain,* (1968) 68 COLUMBIA L. REV. 1286.

way.[2] Social behaviour and outlook determines these primary norms (grundnorms). They are the initial hypotheses from which all other propositions stem. They are created by the spirit of the people. The purpose of this article is to establish whether there are any grundnorms which are generally accepted in Australia and form the foundation on which legislation and adjulication are based in the law of resumption.

Unrestricted sovereignty

In resumption there are four grundnorms which appear to be tacitly assumed by both the legislature and by the courts. The first theory is that of 'unrestricted sovereignty'. That is to say each government has the right to govern. To carry out its function of governing it has the right to take land for that purpose. The citizens accept that the government must do its job and that it must have power to take privately owned land. The theory is reflected in Barton J.'s judgment in *Commonwealth v. New South Wales*[3] where the validity of the Wheat Acquisition Act 1914 (New South Wales) was being challenged. He said:

> The power of the State to expropriate real property by Statute is in these days never questioned . . . If the property is taken without compensation, that is to say, if it is confiscated, the question which arises is constitutional only in the political and not in the legal sense. In other words a Statute passed by a Sovereign Parliament is equally within the legal rights of the Legislatures whether it nakedly confiscates property or takes it upon terms of payment more or less.[4]

Adherents to the concept of unrestricted sovereignty would probably belong to the positivist school of jurisprudence.

Attempts to challenge statutes which give the executive power to take land are rare. A brave, but unsuccessful, attempt was made in *Thakur Jagannath v. United Provinces.*[5] The grantee's successor in title contended that the United Provinces Tenancy Act 1939 was ultra vires the legislature of that Indian jurisdiction. The successor in title was the direct descendant of a grant of land from the Governor-General after the Indian mutiny of 1857. His contention was based on the idea that it was not open to the legislature to interfere with

2 GENERAL THEORY OF LAW AND STATE (1946).
3 (1915) 20 C.L.R. 54.
4 Id. at p. 77.
5 [1946] A.C. 327.

the grant. In the Privy Council Lord Wright gave polite consideration to the contention and remarked:

> It is many centuries since the courst were invited to hold that an Act of Parliament was ultra vires or invalid in law on the ground that it infringed the prerogative of the Crown. So startling a claim as that made in the present case cannot be upheld. That broad and general principle is sufficient to dispose of the claim. No court can annul the enactment of a legislative body acting within the legitimate scope of its sovereign competence.[6]

The appellant could not adduce any authority that the Crown cannot deprive itself of its legislative authority by the mere fact that in the exercise of its prerogative it makes a grant of land within the territory over which such legislative authority exists.[7]

Attempts by landowners to escape from the embrace of statutes which adversely affect their interests in land generally fail if they are based on an attempt to question the validity of state legislation (even if they are not without hope if it raises questions of Federal-State constitutional jurisdiction[8]). In *Midland Railway Co. v. Western Australia*[9] a contract was made in 1886 between the Crown and the railway company's predecessor in title that the latter should build 250 miles of railway in return for 12,000 acres of land. Gold, silver and precious metals were reserved to the Crown. The railway was built and the land granted in accordance with the terms of the contract. The Petroleum Act 1936 (Western Australia) was then enacted which provided for the reservation to the Crown of all petroleum in all lands of the State. The railway company did not seek to contend that the legislature did not have the necessary power to enact such legislation but argued that the contract implied that the grant would be exempt from such Acts. Lord Cohen said that the true construction of the contract imposed on the Crown no more than an irrevocable obligation to grant the land without the further obligation to ensure that the legislature would not at any time during the currency of the contract alter the prescribed form of grant. The grant did not exempt the company from the provisions of such Acts and by its terms exposed the company to the risk of such Acts.

All the introductory textbooks of law tell us that there are two sources of law: legislation or judicial decision. In resumption, the

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6 Id. at p. 335.
7 See North Charterland Exploration Co. v. R. [1931] 1 Ch. 169.
8 See Brown, LAND ACQUISITION (1972), p. 73.
9 [1956] 3 All E.R. 272.

courts regard legislation as the primary source of law. The common law is only relevant in so far as it seeks to elucidate the legislative provisions, or provide answers where the legislation is silent on the particular point at issue. There has to be a starting-point and every practitioner when faced with a problem arising out of resumption immediately consults the relevant statutory provisions. Yet behind the statutes lie certain grundnorms which were established before the enactment of the statute and which influence the interpretation of the statutes. Two such basic ideas were brought by the early settlers: first, that the government could only take land for essential public purposes, and secondly, that when it did it paid a fair sum by way of compensation to the dispossessed owner. Litigation has principally ensued, not on the basic right of the government to take land in general, but on its right to take particular land for a particular purpose. By and large the statutes reflect the limitation imposed upon them and instead of enacting legislation to take land for any purpose they have restricted its power to taking land for public purposes. Many attempts have been made to define these purposes and there have been attempts to list what these purposes are. When there have been attempts to curb the amount of compensation, such has been the degree of difficutly that has ensued that the legislature has been obliged as political necessity to amend the legislation. For example, the Closer Settlement Acts in New South Wales restricted the amount of compensation which could be awarded and caused a sense of grievance to dispossessed landowners who lost their land at the end of the Second World War. The law was amended. So strong is the concept of the underlying belief in the concept that a person who loses his land in consequence of government necessity should be paid a just sum of money, that it is inconceivable as a general proposition in a democratic society where the political executive has to account periodically to the electorate.[10]

Restricted sovereignty

This leads therefore to the concept of the second theory which might be termed that of 'restricted sovereignty'. This suggests that

10 The American term 'eminent domain' in its narrow sense is the power of a government to take from persons under its jurisdiction things and property in things. It is an inherent power of sovereignty enjoyed by federal and state governments. But it is an interesting comment that there are hardly any American cases which deal with the existence or nature of this inherent power. See Stoebuck, *Condemnation of Riparian Rights,* (1970) 30 LOUISIANA L. REV. 394.

whatever may be the theoretical position in pure law, the legislature is as a matter of practical politics unable to enact legislation which deprives the owner of his land for non-public purposes and without payment of just compensation. The theory is, of course, true in respect of the Commonwealth. Section 51 (xxxi) of the Commonwealth Constitution enables the Parliament to enact legislation to make laws for the acquisition of land on just terms from any State or from any person for any purpose in respect of which the Parliament has power to make laws. The section has been the subject of considerable litigation.[11] It is a restriction upon the legislature; it is not a directive to the executive or the judiciary as in the case of the United States Constitution.[12] It requires that the legislature enact legislation which provides just terms. In accordance with the practice in most English-speaking nations, the High Court has tended to equate just terms with the market value of the land.[13] On the occasions when market value has not provided an adequate sum the Court has developed the concept of special value to the owner.[14]

The majority of appeal cases on resumption have tended to find their way to the High Court and not to the Privy Council. The two most recent Privy Council cases to be reported are *Midland Railway Co. v. Western Australia*[15] and *Pye v. Minister for Lands.*[16] The High Court co-ordinates the common law; it gives a consistent interpretation to all the State legislation. It does not approach a case on the Lands Acquisition Act 1955 (Commonwealth) in one frame of mind and then adopt different basic ideas when called upon to interpret the Public Works Act 1912 (New South Wales). For example, in *Jones v. Commonwealth*[17] the High Court ruled that a notice of acquisition made under the Lands Acquisition Act 1955 (Commonwealth) should show the public purposes for which the land is acquired. It is impossible to believe that it will not follow a consistent line in respect of other acquistion Acts. Again, in *Rosenbaum v. Minister*

11 See Johnston, Fear & Kingham Co. v. Commonwealth (1943) 67 C.L.R. 314; Real Estate Institute v. Blair (1946) 73 C.L.R. 213; Tunnock v. Victoria (1951) 84 C.L.R. 42.

12 Commonwealth v. New South Wales (1923) 33 C.L.R. 1.

13 See Spencer v. Commonwealth (1907) 5 C.L.R. 418.

14 See Turner v. Minister of Public Instruction (1956) 95 C.L.R. 245; cf. Morrow, *Eminent Domain: The Problem of Damages where Land has been Adapted to a Special Use,* (1957) 37 Boston Univ. L. Rev. 495.

15 See note 8.

16 [1954] 1 W.L.R. 1410.

17 (1963) 109 C.L.R. 475.

for Public Works[18] the Court held that upon the true construction of the Public Works Act 1912 (New South Wales) each person having any estate or interest in the land has a separate and independent claim to compensation for the value of the interest which is taken from him by the acquisition of the land under the Act. The decision was reached in respect of particular legislation, yet it is again impossible to believe that the Court would come to a different conclusion say in respect of the Lands Compensation Act 1958 (Victoria).[19] The formula for valuation elaborated in *Turner v. Minister of Public Instruction*[20] has been applied elsewhere although it was a decision reached in respect of New South Wales legislation.[21]

The point is that the Lands Acquisition Act 1955 (Commonwealth), the principal legislation governing the compulsory acquisition of land in respect of the Commonwealth, was enacted against a background of constitutional guidance. State legislation was enacted without this control or guidance but the judicial interpretation of each resumption Act reflects acceptance of it. The whole tenor of, say, the Public Authorities' Land Acquisition Act 1949 (Tasmania) is to achieve a balance between the need for local authorities to take land and the need to protect the position of the dispossessed landowner. The Commonwealth Constitution gives expression to a grundnorm to which the states do not need to give express recognition. It is a canon of construction of the statutes.

This approach is reflected in the accepted view that where land is compulsorily acquired, the owner is entitled to payment of compensation in the absence of statutory provision.[22] Both the House of Lords[23] and the Privy Council[24] have expressed similar views on this matter.

Proponents of the theory of restricted sovereign power, who would probably be adherents of the naturalist school of jurisprudence, would argue that the power to enact legislation nationalising all land without payment of compensation would be impossible in a country with a comparatively high standard of living and education in the world

18 (1965) 114 C.L.R. 424.
19 Applied in Hill v. Commissioner of Highways [1966] S.A.S.R. 316.
20 (1956) 95 C.L.R. 245.
21 See e.g. Robson v. Minister of Education [1964] S.A.S.R. 308.
22 London etc. Railway Co. v. Evans [1893] 1 Ch. 16, BOWEN L.J. at p. 28.
23 Central Control Board v. Cannon Brewery Co. Ltd. [1919] A.C. 744; Belfast Corporation v. O. D. Cars Ltd. [1960] A.C. 490.
24 Commissioner of Public Works (Cape Colony) v. Logan [1903] A.C. 355; Inglewood Pulp etc. Co. v. New Brunswick Electric Power Commission [1928] A.C. 492.

community such as Australia. Nationalisation of industry or business might be politically possible, but the community as a whole would not tolerate or permit nationalisation of land, regardless of whatever constitutional impediments there might be. Proponents of the unrestricted sovereignty concept would point to nations where there has been wholesale land reform for agrarian purposes and would say that the power of the legislature is unrestricted.

Compulsory purchase

The third theory is to disregard questions of sovereignty and to place resumption in the category of the law of contract. That is to say the landowner is a seller and the Crown or other emanation of it is the buyer. They are free to negotiate the terms of the contract on all such questions as the date of completion, the transfer of title deeds and the purchase price. The only term which the parties cannot settle is the basic term that the seller must sell and the buyer must buy. The theory is dear to the hearts of the English judges in the last century.[25] It was the reason for terming the subject 'compulsory purchase', a term which seems to continue unquestioned in law reports and journals for the purposes of indexing. Resumption is to imply an enforced sale. This was Blackstone's concept of the subject.[26] Indeed it has been argued that so strong is the concept that it influenced the United States to an appreciable extent.[27] The Lands Clauses Act 1845 dented the concept to some extent but this was regarded as an Act designed to improve the procedure and to assist both parties in making the contract. It may be doubtful whether Kelsen would have classified it as a grundnorm, but it is convenient to treat it as such for the purpose of this examination.

Some of the jargon used in the statutes has connotations with the law of contract. The Lands Resumption Act 1957 (Tasmania) refers to a notice to treat. This conjures up the notion that the owner is in a position to negotiate all the terms of a contract to purchase his land. This is not so. The notice to treat informs the owner that his land is to be taken but that he may negotiate the purchase price. The

25 Marquis of Salisbury v. Great Northern Railway Co. (1852) 117 E.R. 1503; Tiverton, etc. Railway Co. v. Loosemore (1884) 9 App. Cas. 480.

26 *Commentaries I* (1829) 139; see Constable, *The Expropriation of Land for Public Purposes,* (1901) 13 JUR. REV. 164.

27 See Lenhoff, *Development of the Concept of Eminent Domain,* (1942) 42 COL. L. REV. 596; Klein, *Judicial Response to Human Disruption,* (1968) J. URBAN L. 1 (refers to myopic preoccupation with contractual concepts in regarding expropriation as an enforced sale).

enforced seller is of course aware that if the buyer does not agree to his price, the dispute will go to the court to settle the contract price.

As a modification of the theory it is possible to find judges who refer to the subject as a quasi-contract.[28] But a more realistic approach has been adopted in recent years. In *Kirkness v. John Hudson & Co. Ltd.*[29] the House of Lords refused to categorise an acquisition as a sale. In *Birmingham Corporation v. West Midland Baptist (Trust) Association,*[30] where the House of Lords obliterated certain cherished notions about the date on which compensation is to be assessed, there was no talk of the acquisition being categorised as a contract.

The Australian courts have never classified the subject as a compulsory purchase. But in one area of law there are traces of the concept. Section 26(a) of the Income Tax and Social Services Contribution Assessment Act 1936 (Commonwealth) provides that if property be acquired for the purpose of profit-making, by dealing with it by sale, as distinct from the purpose of retaining it as income producing capital asset, then a surplus received when the profit is realized is regarded as income and not as capital. As such it is liable to income tax. In *Coburg Investment Co. Pty. Ltd. v. Commissioner of Taxation*[31] Windeyer J. classified resumption as a 'sale' for the purpose of the section. He did not think that it was relevant whether the 'sale' was voluntary or compulsory. The fact was that the land was 'sold' to the acquiring authority. The principal difference is that the land was bought at a time of the buyer's choosing and not sold at a time of the seller's choosing. The seller's motive at the time of buying the land may have been imprecise. It is likely that he would have kept his options open. He might intend to sell at a profit at a later date or he may have intended to develop it himself for his own purposes. He has a difficult duty to discharge the onus of proof that he did not intend to make a profit. The section is primarily concerned with the motive at the time of purchase, but one wonders if sufficient consideration has been given to the question of the 'sale'. The case is indicative of a recurring problem which all taxation matters stress—the difficulty of drawing boundary lines. Whilst the case has been

28 Simpsons Motor Sales (London) Ltd. v. Hendon Corporation [1964] A.C. 1088, per Lord Evershed at p. 1125.
29 [1955] A.C. 696.
30 [1970] A.C. 874.
31 (1960) 104 C.L.R. 650.

criticised[32] it has been followed in *Craddock v. Federal Commissioner of Taxation.*[33]

The term resumption has its origin in the law of contract. In common with all colonial territories the original Crown grants made provision for the grantor to resume a certain portion of the land should it be required at a later date for certain public purposes such as roads and railways. The Crown grant is a contract.[34] A contractual obligation is implied that the Crown, the grantor, will not disturb or authorise the disturbance of the grantee in his occupation.[35] But the grants contain express clauses providing for resumption. The reservation clauses were the normal means of acquiring land for public purposes. In the course of time it became apparent that the clauses, farsighted though they were, were not sufficient for certain schemes such as a reservoir or a school where the whole of the grantee's land was needed. Legislative power was needed which overrode the terms of the contract. Whilst the reservation clauses have retained a measure of importance,[36] they are not the usual means of acquiring land in the 1970's. The legislative provisions in the different States make no reference to the concept of the law of contract. They are designed to enable the executive to take land as it is needed according to the government's conception of need. Whilst a number of statutes do give a right to the landowner to state his views prior to a final decision being made to take the land, this right to be heard under the audi alteram partem rule of natural justice cannot be likened to the preliminary negotiations that precede the formation of a contract.

Re-taking Crown land

Nevertheless the term resumption has stuck in most States in Australia and has been applied in a general fashion to refer to all forms of land-taking by government or its agencies. The term is reflected in the fourth theory, namely, that the government is doing nothing but taking back land which it owned prior to the grant; moreover it was implied at the time of the grant that the Crown might need to take it back and enact legislation to enable the Crown to do this. To the early settlers it would have seemed a curious idea that the Crown

32 See Walters and Myers, *Aspects of Section 26(a) of the Income Tax Assessment Act,* (1971) 8 MELB. UNIV. L. REV. 276, 289.

33 (1969) 69 A.T.C. 4108.

34 O'Keefe v. Williams (1910) 11 C.L.R. 171, 190.

35 Id. at p. 193.

36 See R. A. McCartney Manufacturing Pty. Ltd. v. Minister [1968] 1 N.S.W.R. 358.

might have seen fit to do this. With the express reservation clauses in their grants they might perhaps be forgiven for thinking that the government had no power to dispossess them entirely. As has already been shown such a notion is fallacious.[37] A grantee took a risk that the grantor might enact such Acts. The grantor is in a position to resume 'his' land by virtue of statutory authority.

The theory that the Crown has an inalienable right to resume occupation of land which it formerly owned and to which a grantee has in effect merely the rights of a tenant at will is another aspect of the concept of unrestricted sovereignty. Nevertheless it is convenient for the purpose of this analysis to treat it as distinct and separate justification for the exercise of the power to take privately-owned land.

Any doubts that may have arisen over the Crown's right to expropriate the entire land mass of the continent of Australia at the time of the first settlement and in the years immediately following were dispelled in *Milirrpum v. Nabalco Pty. Ltd.*[38] A contention that certain Aborigines had a native communal title to land which survived the advent of the settler was rejected. We learn from Blackburn J.'s celebrated judgment that throughout the history of the settlement of Australia any consciousness of a native land problem inspired a policy of protection and preservation, without provision for the recognition of any communal title to land. The relationship of the native claims to the land under the system of social rules and customs was not recognizable as a property right in the land. No principle of law has emerged which gives communal native title a right which may only be extinguished by express enactment; extinguishment may be implied. The school of thought which adheres to the unrestricted sovereignty of the legislature can point to this case as evidence. The case has, however, aroused interest in the political as well as the legal arena.[39] It is not impossible to foresee that a political formula may be found to assuage the misgivings which the decision has aroused.

Role of statutes and precedent

Each of the four theories has an element of truth in it. None offers a complete explanation. But if one was to ask the average practitioner about the nature of the law of resumption he would probably refer to it as a statutory subject on which there are a number of judicial decisions. The statute is the undercoat of paint and the precedent is

37 See note 8.
38 (1971) 17 F.L.R. 141.
39 See (1971) 45 A.L.J. 333, 773.

the gloss finish. He would probably liken it to company law; that is to say the basic law is to be found in the statute which enables the government or its agency to take the land and in the statute which governs the procedure to be followed in securing possession and paying the compensation. In some jurisdictions the power is contained in one statute and the procedure in another. In other jurisdictions the power and the procedure are contained in the same Act. New South Wales combines the worst of both worlds. The Public Works Act 1912, a cumbersome statute, grants power to the Minister for Public Works to resume land and also provides for the procedure to be followed.

Conversely it is possible to argue that the resumption Acts[40] are a mere gloss and the common law the undercoat. Many of the provisions are dependent upon common law concepts. For example, section 20 of the Acquisition of Land Act 1967 of Queensland permits the award of compensation in respect of lands injuriously affected. The expression 'injurious affection' is not defined in the Act and is a technical term of the common law which has evolved through a long series of English and Australian cases.[41] Each State statute would make little sense without the well-defined concepts of the common law which may precede it in point of time[42] The statute may not even give expression to the basic idea that the dispossessed owner should be paid a sum of money which will compensate him adequately for the loss of his land. Indeed only section 25(a) of the Land Acquisition Act 1969 of South Australia spells it out precisely. In other jurisdictions it is either an implied term of the statute or a common law

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40 Lands Acquisition Act 1955 (Commonwealth); Public Works Act 1912 (New South Wales); Acquisition of Land Act 1967 (Queensland); Land Acquisition Act 1969 (South Australia); Lands Resumption Act 1957 (Tasmania); Public Authorities' Land Acquisition Act 1949 (Tasmania); Lands Compensation Act 1958 (Victoria); Public Works Act 1902 (Western Australia).

41 Notably Cowper Essex v. Acton Local Board (1889) 14 App. Cas. 153; Sisters of Charity of Rockingham v. R. [1922] 2 A.C. 315; Edwards v. Minister of Transport [1964] 2 Q.B. 134; Minister of Works v. Antonio [1966] S.A.S.R. 54; Grace Brothers Pty. Ltd. v. Minister of State for the Army (1945) 45 S.R. (N.S.W.) 206; Cohen v. Commissioner for Main Roads (1968) 15 L.G.R.A. 423; but see now Commonwealth v. Morison (1972) 46 A.L.J.R. 453 for further elucidation on the judicial interpretation of the expression.

42 The expression 'injurious affection' is used in the Land Acquisition Act 1969 (South Australia) but is not defined; its meaning is dependent upon the common law. However, in Rugby Joint Water Board v. Shaw-Fox [1972] 2 W.L.R. 757 at p. 763 Lord Pearson said that the principle of enhancement, which was described as a 'common law principle', could not "be that, because compulsory acquisition and compensation for it are entirely creations of statute".

doctrine which has been grafted into the statute. Perhaps the courts do not need to be given such legislative guidance. Yet there are occasions when a strict interpretation of the legislative provisions necessitates a cavalier approach by the courts. To justify such action the judges fall back on equity and declare that equity demands a particular answer which is not provided in the statute. Take, for example, *Ex parte Minister for Education*[43] where the resumption occurred in the midst of complex transactions involving the subdivision of the subject land. In consequence there was a wide range of persons who had an interest in the resumed land. Helsham J. found that, strictly speaking, the Act required that each claimant should recommence proceedings and claim compensation for the particular interest to which he was entitled, and that the constructing authority should cause a valuation to be made of each of those interests. Instead of making the order he took advantage of the convenient procedure afforded by way of a declaratory decree under section 10 of the Equity Act 1901 (N.S.W.) to enable all necessary parties to be joined and questions of title determined as between them. He then exercised his good sense and distributed the compensation money between the different claimants instead of ordering them to begin all over again. Again in *March v. Frankston City*[44] Barber J. had to deal with a situation where there was a failure to comply with the provisions of a notice within the prescribed time and felt justified in allowing an extension of time in the absence of a statutory power to do so. The statutes would render an injustice to landowners if they were invariably given a literal interpretation. The role of equity may also be illustrated by *Simpson Motor Sales (London) Ltd. v. Mendon Corporation*[45] where there were delays in effecting the compulsory purchase order. The House of Lords held that a court might in its equitable jurisdiction interfere with the enforcement by an acquiring authority of their legal rights where it could be shown that there had been on the part of the authority something in the nature of bad faith, some abuse of their powers, and/or some alteration in the owner's position which was unfair in the circumstances. To succeed under this head of equity it must be shown that to permit the acquiring authority to continue to enforce its rights under the original compul-

43 (1970) 91 W.N. (N.S.W.) 624.

44 [1969] V.R. 350.

45 See note 28; cf. Lord Sinmon's dissenting judgment in Rugby Joint Water Board v. Shaw-Fox [1972] 2 W.L.R. 757 at pp. 769-770—it is a canon of interpretation that injustice is to be avoided in compulsory acquisition.

sory purchase order would in some real sense be against good conscience.

The true position at the present time is that resumption is a mixture of legislation and case law. To remove all the legislation would raise a nice question whether the prerogative powers of the Crown to expropriate land would re-emerge. They were safely buried by the House of Lords in *Attorney-General v. De Keyser's Royal Hotel Ltd.*[46] If the statutes which replaced the prerogative powers were repealed would the prerogative power to take land in times of emergency revert to the Crown? In the present state of the law it is an impractical and theoretical question. No modern state can dispense with the power of resumption: for example, the federal government in the United States expropriates 1.4 millions of acres of land per annum.[47]

Unity of Australian resumption law

No one has yet decided whether Australian law is a unity or a disunity of nine jurisdictions. That is to say should one speak only of Victorian law, Commonwealth law or Australian Capital Territory law? In resumption, different legislation exists in each jurisdiction, although the Northern and Capital State Territories share the Lands Acquisition Act 1955.[48] The fact is that judges and practitioners treat it as a unity. When a problem arises in one State which has been resolved in another State the courts are in fact guided by the decision of the other State court, provided the decision does not conflict with the statutory provisions. For example, in examining a few aspects of the Public Works Act 1902 (Western Australia) a practitioner did not hesitate to cite cases which had been decided in other Australian jurisdictions to illustrate the operation of this museum piece of Edwardian verbosity.[49] Barber J. in *March v. Frankston City*[50] discussed a number of cases determined in other Supreme Courts. But one can exaggerate the tendency. In *Treasure v. Minister for Works*[51] Hale J. did not feel obliged to be guided by the New South Wales

46 [1920] A.C. 508.

47 Klein, see note 27; the State Government of Western Australia does not publish the number of acres resumed annually—see Appendix.

48 Northern Territory (Administration) Act 1955 (Commonwealth); Australian Capital Territory and Jervis Bay (Lands Acquisition) Act 1955 (Commonwealth).

49 Downing, *Some Aspects of Compensation,* (1966) 7 UNIV. WEST. AUST. L. REV. 352.

50 See note 44.

51 [1967] W.A.R. 32.

rules governing the award of costs in resumption cases. He was of course dealing with a different legislative provision and this fact alone explains why he did not follow the New South Wales decisions interpreting the Public Works Act 1912 of that state. Nevertheless one can sense from the judgment the independence of a judge in a State Supreme Court in arriving at his own conclusions. The High Court does exercise a unifying influence. As previously indicated it is doubtful if anyone would seriously argue that the rule in *Rosenbaum v. Minister for Public Works*[52] in relation to the valuation of separate interests in resumed land does not apply throughout Australia although the decision was reached in respect of the Public Works Act 1912 of New South Wales. That Act, in common with other resumption Acts, left the position obscure and the High Court gave the Act a precision of meaning which it previously lacked. In short, it is possible to speak meaningfully of the law of resumption of Australia. Despite the presence of different statutes of varying quality, length and vintage, Australian resumption law retains a unity.

Pure justice impossible

The problem of resumption is not susceptible of a right solution. It is a distasteful process. The best that can be hoped for is that the owner will receive a sum of money which satisfies him and at the same time is not unduly exorbitant. A number of the resumption statutes need re-modelling both in respect of drafting and in improvement of procedure. But no statute can alter the fact that governments must expropriate privately-owned land from time to time to carry out their functions. The overall responsibility for ensuring the government exercises its powers fairly lies jointly with the courts and with Parliament.[53]

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52 See note 18.
53 See Appendix.
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Appendix

No systematic examination of resumption is conducted annually either in the Legislative Assembly or in the Legislative Council. From time to time individual members ask questions of a general or a particular nature. Some of the fragmentary answers given to questions were:—

(i) The land purchased or resumed by the Government, excluding resumption by local authorities or the Lands Department, were:

Financial year	Parcels of land resumed or purchased	Claims and purchases completed	Total expenditure involved $
1956-57	1,443	925	983,880
1957-58	1,600	1,068	1,037,440
1958-59	1,527	1,051	1,147,126
1959-60	1,322	1,051	1,210,586
1960-61	929	793	2,095,476
1961-62	1,016	671	1,482,112
1962-63	737	627	2,891,866
1963-64	1,133	745	4,019,408
1964-65	739	635	4,298,722

[(1965) 170 Parl Deb. (W.A.) 961]

(ii) There is power under many Statutes, including Acts ratifying agreements, for the compulsory resumption of land mostly making applicable the provisions of the Public Works Act. No list of the relevant Statutes, sections, regulations, and by-laws is separately kept or readily available. In order to give a detailed answer to the question on the governing legislation there would be involved a perusal of all the Statutes in force in order to see whether the Statute itself confers such power or enables the making of regulations or by-laws for the purpose, in which event the latter would have to be perused in order to ascertain whether such power has been so conferred. Staff is not available for this purpose.

[(1968) 179 Parl. Deb. 396]

(iii) $10,404,400 has been spent in purchasing or acquiring land for roads and freeways since the inception of the Metropolitan Region Planning Authority.

[(1971) 192 Parl. Deb. 57]

(iv) The Main Roads Department has spent the following amounts in purchasing or resuming land for controlled-access roads:

Financial year	$
1966-67	1,772,079
1967-68	1,412,626
1968-69	1,520,641
1969-70	1,665,072
1970-71	2,112,368
Total	8,482,786

[(1971) 192 Parl. Deb. 56]

(v) The total amount of money paid to land owners for land purchased or resumed for town planning during the period 1960-1969 was $11,809,089.

[(1970) 186 Parl. Deb. 3395]