is so fixed these elements are extraneous to the rent itself. See, for instance, *Cox* v. *Harper* (1).

Besides the straining of the words which would be necessary to include such elements, it is clear that repairs, which connote improvements, and rates and taxes, which depend to some extent upon them, cannot be the subject of simple addition to rent for unimproved land.

Then a further contention was raised, that in arriving at the immediate result of unimproved value of the leasehold, these elements should be borne in mind. Rates and taxes, so far as the possessor for such a term would be liable in respect of unimproved land, should be taken into account as already mentioned. Repairs are *ex vi termini* outside the ambit of the problem.

So far it comes to this: that the net value of the leasehold as already described is, in the ordinary course of things, the amount to be deducted from the total unimproved value of the land for the purpose of relieving the freeholder *pro tanto* of taxable liability, and of charging the lessee with it.

When we say "the ordinary course of things," we mean that the legislature, regarding the matter from a business aspect, recognizes that rent is ordinarily fixed upon what are sometimes conveniently called "usual conditions," or, at all events, upon terms and conditions which may fairly be regarded as compensation for the interest granted to the tenant.

In *Hampshire* v. *Wickens* (2) *Jessel* M.R., adopting *Davidson's Precedents* on this point, enumerates "usual covenants," which include payment of taxes except those expressly payable by the landlord and also repairs.

We do not say that only those technically "usual covenants" are to be included as equivalent for rent within the intention of the legislature, because the proviso, which makes allowance for special circumstances, states expressly to what obligations they are to apply, and we have no power to extend them.

If the tenant is under the "onerous conditions" (in other words the burdensome obligations) enumerated, the Commissioner's powers of allowance arise. If those stated conditions exist, they may or may not give the landlord a larger share of the land than

(1) (1910) 1 Ch., 480.

(2) 7 Ch. D., 555, at p. 561.

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Isaacs J. Gavan Duffy J. Rich J.

is represented by the actual rent reserved. The Commissioner, then, is under an obligation to consider the circumstances, and if he finds that in his opinion the landlord does or will receive a larger share of the land than is represented by the rent, or a more valuable piece of land than he has let, then the Commissioner is to estimate the capital value of the additional value, and add it to the capitalized value of the rent already deductible. *Pro tanto* that increases the taxable liability of the lessor by reducing that of the lessee.

But the Commissioner is not left at large as to the nature of the onerous obligation to be so considered. It is not every obligation which in fact enures to the landlord's benefit, that he is to consider, but only those obligations enumerated.

And a covenant to repair is not in our opinion within those terms.

The questions should be answered in the negative.

Questions answered in the negative.

Solicitors, for the appellant, *Nunn, Smith & Jeffreson.*

Solicitor, for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE PRESIDENT &c. OF THE SHIRE OF MOORABBIN . . . . Defendants, } Appellants;

AND

ABBOTT . . . . . Plaintiff, Respondent.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 26.

Griffith C.J., Isaacs, Gavan Duffy, and Powers JJ.

Local Government—Streets on private land—Formation by municipal council—Recovery of cost from adjoining owners—Scheme adopted by council—How far binding—Local Government Act 1903 (*Vict.*) (*No.* 1893), *secs.* 526-532.*

* Secs. 526 to 532 of the *Local Government Act* 1903, so far as material, provide as follows:—

526. "(1) In case (*a*) Any street lane yard or passage or other premises formed or set out on private property, . . . whether the same respectively is dedicated to the public as a highway or not, or any part or parts of the same respectively is or are not formed . . . . or otherwise made good to the satisfaction of the council of the municipality, such council may form . . . . or otherwise make good the same or any part or parts thereof to their satisfaction and may either before or after so doing recover the cost of so doing from the owners of the premises fronting adjoining or abutting upon such parts thereof as may require to be formed . . . . or made good in manner hereinafter appearing."

527. "(1) The council shall cause to be prepared—(*a*) Such specifications maps plans . . . . as they may deem necessary; (*b*) An estimate of the cost and a scheme of distribution setting forth the names of the persons intended to be made liable, and approximately the sizes of the pieces of land of which they are the owners respectively and the amounts chargeable to each."

528. "(1) Only such of the owners of premises fronting adjoining or abutting on any street lane or passage as by themselves or their tenants have the right to use or commonly do use the same shall be liable to pay any portion of the cost of any works executed by the council of any municipality under the powers contained in this Division with respect to such street lane or passage. (2) The owner of premises which do not actually front adjoin or abut upon any street lane or passage shall be liable to contribute to the cost of works executed by the council of the municipality with respect to such street lane or passage if such owner by

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The adoption by the council of a municipality, under sec. 532 of the *Local Government Act* 1903 (Vict.), of a scheme for apportioning the cost of making a street is binding only upon such of the persons whose names are included in the scheme as, being owners of premises fronting, adjoining or abutting on the street, have the right to use or commonly do use the street.

The council of a municipality desiring to form a street set out on private property served the notice required by sec. 529 of the Act on the plaintiff, who was the owner of land abutting on the street but who had not the right to use, and did not commonly use, the street. The plaintiff by letter objected to the scheme and to his name being included in it, but did not attend at the meeting of the council mentioned in the notice. The scheme was adopted and the plaintiff's name was included in it.

Held, that the plaintiff was not bound by the adoption of the scheme, and was not liable to contribute to the cost of constructing the street.

Decision of the Supreme Court: *Abbott* v. *President &c. of the Shire of Moorabbin*, (1913) V.L.R., 337; 35 A.L.T., 31, affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by David Abbott, as executor and trustee of the estate of R. K. Bancroft, deceased, against the President, Councillors and Ratepayers of the Shire of

himself or his tenants has the right of using or commonly does use such street lane or passage as a means of access to or drainage from such premises and the same is in the opinion of the council for his advantage or benefit. (3) Any person shall be liable as owner under this section who would be liable as an owner either under the provisions of any Act for the time being in force relating to local government or to the public health."

529. "The council shall cause to be served on every such person intended to be made liable notice in writing setting forth: (*a*) That such specifications maps plans . . . . estimate scheme and other particulars . . . . are open for inspection and the estimated amount of such person's liability; (*b*) That on a date therein mentioned . . . . the council will proceed to consider such specifications maps plans . . . . estimate scheme and other particulars and the liability of such person in respect thereof; (*c*) That any such person may appear on such date before such council to raise objections thereto; (*d*) That in default of any such person so objecting the same will be adopted and all such persons will be considered as having admitted that the council have complied with all the requirements of this Act and also their respective liabilities as appearing by the said scheme and will be in all respects then finally bound and concluded thereby."

530. "Any person interested in or affected by the proposed work may appear before the council on such date . . . . and object to such specifications maps plans . . . . estimate scheme or other particulars or any of them."

531. "(1) Upon the date so fixed . . . . the council may (*a*) If no person so objects adopt the said specifications maps plans . . . . estimate scheme and other particulars."

532. "Upon such adoption every person upon whom notice has been served and whose name is included in such scheme as adopted shall be considered as having admitted that the council have complied with all the requirements of this Act and also his liability to contribute to the work in the proportion adopted by the council and be finally bound and concluded by all the matters aforesaid."

Moorabbin, by which the plaintiff claimed a declaration that the defendants were not entitled under Part XIII. of the *Local Government Act* 1903, or otherwise, to a charge upon certain land of which the plaintiff was the registered proprietor in respect of the cost of making certain streets by the Council of the defendant municipality under the provisions of Division 2 of Part XVIII. of the Act; an order for the cancellation of a certain certificate signed by the municipal clerk of the defendants, and issued under sec. 341 of the Act; and an injunction to restrain the Council of the defendant municipality from making or enforcing against the plaintiff, or against the land in question, any claim in respect of the charges for the making of the streets and interest, and from issuing any certificate under sec. 341 wherein claim is made for the amount of such charges and interest. At the hearing *Hodges* J., with the consent of the parties, made the following reference to the Full Court:—

"1. The plaintiff is the owner within the meaning of the *Local Government Act* 1903, Part XVIII., Division 2, of certain land and premises at Sandringham which abut on Seaview Street and Royal Avenue and situate in the Shire of Moorabbin, such land and premises being particularly described in" certain certificates of title.

"2. The said street and avenue were on 17th August 1905 streets set out on private property. The plaintiff had not then any right to use by way of easement, dedication or otherwise and did not commonly use the said streets or either of them by himself or his tenants, and the learned Judge found as a fact that the said street and avenue were not public highways before these proceedings.

"3. The defendants on the said 17th August 1905 duly served upon the plaintiff a notice pursuant to secs. 529, 530, 531 and 532 of the *Local Government Act* 1903, which notice was put in in evidence and marked Exhibit C.

"4. The plaintiff on 2nd September 1905 wrote to the defendants a letter (which was received by the defendants prior to the meeting mentioned in par. 5), which letter was put in in evidence and marked Exhibit D.

"5. The defendants on 4th September 1905 duly held a

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meeting at which a resolution was duly passed for the adoption of certain plans referred to in the said notice of 17th August 1905, no one appearing at such meeting either in person or by a solicitor or agent to object to the specifications, maps, plans, sections and elevations, scheme and other particulars, and the liability of the persons served with the notice prescribed by sec. 529 of the said Act; and subsequently the streets referred to in the said plans were duly made and constructed by the defendants.

"6. The defendants on 1st December 1905 served upon the plaintiff a notice stating (*inter alia*) that the defendants intended at a meeting to be held on 18th December 1905 to make a special improvement rate for the purpose of carrying out the works referred to in the said plans, which notice was put in in evidence and marked Exhibit E.

"7. The plaintiff on 4th December 1905 wrote to the defendants a letter which was received by the defendants prior to the meeting mentioned in par. 8, which letter was put in in evidence and marked Exhibit F.

"8. The defendants on the said 18th December 1905 duly held a meeting at which a special improvement charge was duly made in accordance with the said notice on 1st December 1905 and in pursuance of Part XXXVI. of the said Act, no one appearing at such meeting either in person or by a solicitor or agent to object thereto.

"9. The plaintiff did not appear personally, or by his solicitor or agent, at either of the said meetings of the defendants.

"10. It is agreed that the Full Court is to be at liberty to refer to the said notices and letters, and to any other documents and evidence put in on the trial, and also the facts set forth in the admission of facts made by the parties herein, and the documents referred to in the admission of documents made by the parties herein, and to draw inferences of fact.

"The question for the determination of the Full Court is whether under the circumstances above referred to, assuming that the plaintiff is not otherwise liable to contribute to the cost of forming the said Seaview Street and Royal Avenue, he nevertheless became so liable by virtue of the service upon him of the said notices, or of either of them."

Exhibit C, omitting formal parts, was as follows:—

"To Mr. David Abbott, Chancery Lane, Melbourne.

"Notice is hereby given that—

"1. The specifications, maps, plans, sections and elevations of the works intended to be carried out by the Council in Royal Avenue and Seaview Street and the estimate of the cost and scheme of distribution respectively, required by sub-sec. 1 (*a*) and (*b*) of sec. 527 of the *Local Government Act* 1903, have been prepared in accordance with the provisions of the said section and are open for inspection at the office of the Council, South Brighton, during office hours, and will be so available for the inspection of all persons interested in or affected by the work therein mentioned until 4th September 1905.

"2. The estimated amount of your liability is £29 7s. 5d.

"3. The Council will proceed to consider the said specifications, maps, plans, sections and elevations, estimate, scheme and other particulars of your liability in respect thereof, on Monday, 4th September 1905.

"4. You will be at liberty to appear personally, or by your solicitor or agent, before the Council, upon the said 4th September 1905, at 5.30 p.m., to raise objections to the said specifications, maps, plans, sections and elevations, estimate, scheme, and other particulars of your liability.

"5. In default of your objecting to the specifications, maps, plans, sections and elevations, estimate, scheme, and other particulars of your liability or any of them, the same will be adopted and you will be considered as having admitted that the Council have complied with all the requirements of the Act, and also your liability as appearing by the said scheme, and you will be in all respects therein finally bound and concluded thereby."

Exhibit D, omitting formal parts, was as follows:—

"In connection with the notice given by you under the *Local Government Act* 1903 in reference to the above streets we are instructed by our Mr. David Abbott, as executor of the will of the late Richard Kelsall Bancroft, to state in objection thereto:—

"1. Your notice is addressed to 'Mr. David Abbott, Chancery Lane, Melbourne,' whereas Mr. Abbott has no personal interest in the property, but is merely the executor of the will of the late

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Richard Kelsall Bancroft, and is so described in the certificate of title to the land.

"2. Under the will of the late R. K. Bancroft his widow is the tenant for life, and under the definition of the word 'owner' contained in the *Local Government Act* 1903 the executor is in no way responsible.

"3. The said land, although abutting upon Sea View Street, does not possess any legal right to use the street, and such street is not commonly used by the owner or his tenants, and by reason of sec. 528, sub-sec. 1, of the *Local Government Act* 1903 there is no liability for any part of the cost of the work referred to.

"4. The said David Abbott does not admit that your Council has complied with all the requirements of the Act, and disputes the scheme referred to in your notice."

Exhibit E, omitting formal parts, was as follows :—

"Notice to Owners that Council intends to make a Special Improvement Charge.

"Notice is hereby given that in order to carry out the undermentioned works the Council of the Shire of Moorabbin intend, at a meeting of the Council to be held on Monday, 18th December 1905, to make a special improvement charge for the purpose of carrying out the said works.

"The locality of the property in respect to which the charge is intended to be made is Royal Avenue, Sea View Street, Sims, Tennyson, Ocean, Wave, Station, Service, Deakin Streets, Sandringham Road, Sandringham.

"A statement of the proposed charge, together with the specifications, maps, plans and elevations of the said works and the estimate of cost and scheme of distribution required by sec. 662 of the *Local Government Act* 1903, has been prepared in accordance with the provisions of the said section, and has been deposited for inspection at the Shire Hall, South Brighton, during office hours, until 18th December 1905."

Exhibit F, omitting formal parts, was as follows :—

"Our Mr. Abbott has to-day received notice of the Council's intention to make special improvement charge, and a similar notice received by Mr. George Moir has also been handed to us by him, as you are now aware that both properties belong to the

above estate. We have to refer you to the objections previously made by us and not yet dealt with by your Council, and we disclaim all liability for the road-making cost and give you notice that no charge must be imposed upon this property for such purposes."

The Full Court held, in answer to the question, that the plaintiff was not liable to the defendants: *Abbott* v. *President &c. of the Shire of Moorabbin* (1).

From this decision the defendants now by special leave appealed to the High Court.

Hayes, for the appellants.

A. H. Davis and *Owen Dixon*, for the respondent, were not called upon.

GRIFFITH C.J. Notwithstanding the able argument of Mr. *Hayes* and the dissenting view of *Hood* J., I confess that I cannot feel any difficulty in coming to a conclusion as to the true interpretation of this Act. The question arises upon the provisions of the *Local Government Act* 1903 for making the owners of land benefited by the formation of new streets contribute towards the cost of formation. The scheme is contained in a group of sections, beginning with sec. 526, and being Division 11 of Part XVIII. of the Act, which is headed "Making, &c., streets, lanes, &c., at cost of certain owners." Sec. 526 provides that "(1) In case—(*a*) Any street lane yard or passage or other premises formed or set out on private property, . . . whether the same respectively is dedicated to the public as a highway or not, . . . is . . . not formed . . . to the satisfaction of the council of the municipality, such council may form . . . the same . . . to their satisfaction and may either before or after so doing recover the cost of so doing from the owners of the premises fronting adjoining or abutting upon such parts thereof as may require to be formed . . ." I will refer next to sec. 528, which provides that "(1) Only such of the owners of premises fronting adjoining or abutting on any street lane or passage as by themselves or

(1) (1913) V.L.R., 337; 35 A.L.T., 31.

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their tenants have the right to use or commonly do use the same shall be liable to pay any portion of the cost of any works executed by the council of any municipality under the powers contained in this Division with respect to such street lane or passage. (2) The owner of premises which do not actually front adjoin or abut upon any street lane or passage shall be liable to contribute to the cost of works executed by the council of the municipality with respect to such street lane or passage if such owner by himself or his tenants has the right of using or commonly does use such street lane or passage as a means of access to or drainage from such premises and the same is in the opinion of the council for his advantage or benefit. (3) Any person shall be liable as owner under this section who would be liable as an owner either under the provisions of any Act for the time being in force relating to local government or to public health."

An illustration of the effect of sub-sec. 3 is that under the Health Acts an agent in receipt of the rents of land is liable as owner.

The effect, therefore, of sec. 528 is to qualify the class of owners mentioned in sec. 526 in three respects: first, it limits the class to such owners of land fronting, adjoining or abutting on the particular street, &c., as commonly use it, or have a right to use it; secondly, it enlarges the class by including certain owners of premises which do not front, adjoin or abut on the street; and, thirdly, it includes another class of persons. Those owners only who come within sec. 528 are struck by sec. 526.

I will next refer to sec. 527, which provides that the council shall cause to be prepared such specifications, maps, plans, &c., as they think necessary, and an estimate of the cost and a scheme of distribution setting forth the names of "the persons intended to be made liable," and approximately the sizes of the pieces of land "of which they are the owners respectively," and the amounts chargeable to each. That provision certainly suggests that the council is limited in selecting the names of the persons intended to be made liable or persons who are the owners of the land, particulars of which are to be set forth in the notices. The council has the power to include certain persons owning land not fronting the street, but are precluded from including

persons who have no right to use, and do not commonly use, the street. I think that sec. 527, on a fair construction, entitles the council to select, but limits the selection to such persons within the class as they think ought to be charged.

In the present case the respondent was the owner of land fronting two streets, but had not either by himself or his tenants any right to use and did not commonly use them at the time when the proceedings were taken. He did not, therefore, fall within the class described in sec. 528.

Sec. 529 requires notices to be served on "every such person intended to be made liable." The reference is to sec. 527. The notice is to set out that the specifications, &c., have been prepared and are open for inspection; that the council will on a named day proceed to consider, amongst other things, "the liability of such person in respect thereof;" that he may appear and object; that in default of objection the scheme will be adopted and "all such persons will be considered as having admitted that the council have complied with all the requirements of this Act and also their respective liabilities as appearing by the said scheme and will be in all respects then finally bound and concluded thereby." Such a notice was served upon the respondent, and he at once informed the Council that he was not an owner liable within the meaning of sec. 528, because neither he nor his tenants had a right to use or did commonly use either of the streets. The Council disregarded his objection, and he paid no further heed to their notice. They proceeded to adopt the scheme, and thereupon came into operation sec. 532, which provides that "Upon such adoption every person upon whom notice has been served and whose name is included in such scheme as adopted shall be considered as having admitted that the council have complied with all the requirements of this Act and also his liability to contribute to the work in the proportion adopted by the council and be finally bound and concluded by all the matters aforesaid." The section does not say that the person shall be taken to have admitted his liability to contribute to the work in the abstract, but to contribute to the work "in the proportion adopted by the council." In my judgment that provision must be limited to persons upon whom the council had the right to

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serve the notice. If the words had been "to contribute to the work *and* in proportion" &c., of course we should be bound to give effect to them. But the legislature has not said so, and it would seem very strange if the legislature, after first rigidly limiting the class of persons over whom the council had any authority, should then, by language which at best is ambiguous, give the council authority over other persons not within the class if they did not object. The result in such a view would be that a person who under sec. 528 is not liable, would be made liable, if the council thought he ought to be liable. If the section means that, the council can inquire into the facts. It may be that the street so far from being a benefit to the person sought to be charged is injurious to him, that he has never used it and has no right to use it. But if the council think that he has used it, contrary to fact, or that he has the right to use it, contrary to law, he is to be bound, and the exception contained in sec. 528 would be nugatory. That construction is so improbable that if the words are open to another meaning we should adopt it. So far from the words being capable of more than one meaning, I have come to the conclusion, after hearing the arguments, that the plain meaning of the Act is that, in order that a person may be made liable, he must come within the class of persons from whom, under sec. 528, the council have the right to select, and all that is conclusive is the council's apportionment of liability between persons who fall within that class.

I think, therefore, that the opinion of the majority of the Supreme Court is right, and that the appeal fails.

ISAACS J. I quite agree with what has been said by the learned Chief Justice, and my difficulty is to see any real doubt as to the construction of these provisions. Division 11 of Part XVIII. is headed with words which are a part of the Act, for sec. 1 divides the Act into Parts and Divisions. The heading is "Making, &c., streets, lanes, &c., at cost of *certain owners*." That is a very good key to the meaning of the whole Division. The idea which runs through this Division is that in the case of streets, lanes, yards and passages which are on private property or are in fact a means of back access to, or of drainage from,

property adjacent to them, they may get into such a condition as to be a public danger because they are not properly formed, drained, paved, or otherwise made good. Then there are two alternative methods provided by this Division of removing that danger. One is under sec. 526. The council may do the work and may require the owners of premises which front, adjoin or abut upon those pieces of land to pay for doing it. For a moment I pass over the intermediate sections and point to alternative methods. That is provided by secs. 537 and 538. Sec. 537 provides that if any street, lane, &c., 33 feet wide at least is once formed, levelled, &c., or made good and has been dedicated to the public, then it shall thenceforth be under the care and management of the council, "and such owners shall cease to be under the liability imposed by this Division with respect thereto." Sec. 538 provides as to streets, &c., less than 33 feet wide or not dedicated to the public, that the council may repair them, &c., at the expense of the owners of the premises fronting, adjoining or abutting. So that the owners of land, according to its nature, have two methods of meeting their liability. We are only concerned with the first, and I only mention the second because it throws light upon the first. In sec. 526 the description of owners of premises fronting, adjoining or abutting on a street, though it indicates the persons upon whom this liability may justly be cast, is not a complete description. Sec. 527 enables the council to prepare specifications, plans, &c., and an estimate of the cost and a scheme of distribution setting forth the names of "the persons intended to be made liable." The persons whose names are to be set forth are to be "the owners." Besides them other persons may be interested in or affected by the work, and they, by sub-sec. 2, have power to inspect the specifications, plans, &c., and the estimate. It is contended that the words "persons intended to be made liable" may be wider than "owners."

But then comes sec. 528, which is almost a proviso upon sec. 526, and by sub-sec. 1 of it the legislature in effect say: "Although we have just used very large words in sec. 526 to indicate the persons who are to be liable for the cost of the works it must be remembered that, in the first place, only such of those persons we have mentioned as have the right to use the street or com-