[HIGH COURT OF AUSTRALIA.]

CITY OF MALVERN . . . . . APPELLANT;
PLAINTIFF,

AND

BATCHELDER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 16, 19; *Dec.* 23.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Local Government (Vict.)—Streets and roads—Road-making charges—Subdivision of land—Part acquired by municipality—Roads adjacent to—Cost of construction—By whom to be borne—Agreement between vendor and municipality—Construction—Whether liability imposed on vendor or transferees in favour of municipality—Local Government Act 1915 (*Vict.*) (*No.* 2686), *Part XVIII., Div.* 11.

The respondent subdivided certain land of which she was the owner into allotments for sale. The subdivision involved setting out three new streets on the land. An area of the land amounting to about seven acres was purchased by the appellant municipality for £250, and a contract comprising the following term was executed :—" (10) The land is sold subject to the express condition that all charges for road-making in respect of the streets or roads delineated and coloured brown on the plan hereto annexed " (being the three streets above mentioned) " are to be borne by the vendor her executors administrators or transferees and that the vendor her executors or administrators will at all times hereafter keep indemnified the purchaser and its transferees against all such charges and will not at any time hereafter enter into or sign or authorize to be signed any contract which shall not contain a clause binding the purchaser or purchasers from the vendor her executors or administrators of lands abutting on the said streets or roads or any of them to keep indemnified the purchaser under the contract and its transferees against all such charges." A scheme of road construction was prepared by the Malvern Council under the provisions of the *Local Government Act* 1915 (Vict.). For the private owners the rate was fixed at 31s. per foot, but included in the list of persons proposed to be made liable was the

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appellant itself as being an owner liable to pay in respect of the land acquired from the respondent. No rate per foot was stated for the appellant's liability, but it appeared that, had the frontage to the appellant's land been assessed at 31s. per foot, it would have greatly exceeded £1,000. The appellant sued the respondent to recover the sum of £1,000 under clause 10 of the contract which the appellant in fact contributed to the cost of the work. On an appeal from the order of the Supreme Court of Victoria for the rectification of clause 10 of the contract,

Held, (1) by the whole Court, that the matter was not one for rectification; but, (2) by *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that the appellant was contractually bound to the respondent to distribute the total cost of the road-making amongst the owners for the time being of all the land in the subdivision other than that owned by the appellant itself, and that clause 10 of the contract should be construed as a promise that charges under Part XVIII. of the *Local Government Act* 1915 imposed by the appellant upon the land not sold to the appellant would be borne by the respondent or her transferees, as the case may be, in their character of owners for the time being of the land charged and not otherwise, and as an indemnity by the respondent in respect of charges so imposed.

Decision of the Supreme Court of Victoria (*Irvine* C.J.) varied.

APPEAL from the Supreme Court of Victoria.

The Mayor, Councillors and Citizens of the City of Malvern brought an action against the respondent, Elizabeth Helen Batchelder, who was the owner of certain land in the City of Malvern. About the year 1920 the respondent subdivided this land into allotments for sale. The subdivision involved setting out three new streets or roads, which were named Sydare Avenue, Alvie Street and Millewa Avenue. An area of 7 acres 13 perches of the land which abutted on Sydare Avenue and Alvie Street was offered to the appellant, the City of Malvern, for drainage and ornamental purposes. After some negotiations the appellant purchased this land from the respondent for £250, and a contract in writing was executed dated 23rd July 1921. The 10th clause of this contract was as follows:— "The land is sold subject to the express condition that all charges for road-making in respect of the streets or roads delineated and coloured brown on the plan hereto annexed" (being Sydare Avenue, Alvie Street and Millewa Avenue) "are to be borne by the vendor her executors administrators or transferees and that the vendor her executors or administrators will at all times hereafter keep indemnified the purchaser and its transferees against all such charges and will not at any time hereafter enter into or sign or authorize

to be signed any contract which shall not contain a clause binding the purchaser or purchasers from the vendor her executors or administrators of lands abutting on the said streets or roads or any of them to keep indemnified the purchaser under this contract and its transferees against all such charges."

Before the contract of sale was made certain correspondence took place. It included two letters, dated 25th May 1920 and 11th June 1920. In these letters Mrs. Batchelder asked for an assurance that when the streets came to be constructed, one scheme would be adopted " so that the owners of the allotments facing the Council's portion will not be called upon to pay double rates for street-making." The reply was that " the Council will agree to the streets being constructed under one scheme provided the vendor will have a clause inserted in all contracts of sale of land in the Estate that the Council will not be called upon to pay for any street-making." On 22nd June 1920 Mrs. Batchelder, pursuant to the requirements of the *Local Government Act* 1915, gave formal notice of her intention to lay out the new streets and to subdivide the land into allotments. She lodged the plan of subdivision with the Council and requested that it should be sealed. The plan was adopted, and on 2nd October 1920 the Council duly sealed it. Sales of allotments had commenced as early as October 1920, but it was not until 2nd August 1926 that the Council passed a resolution to form the streets and to prepare a scheme of distributing the costs thereof amongst the owners of the land in the subdivision. On 4th February 1929 the Council passed another resolution fixing the rate to be paid by the frontagers. For the private owners the rate was fixed at 31s. per foot, but included in the list of persons proposed to be made liable was the Malvern City Council itself as being an owner liable to pay in respect of the land acquired from Mrs. Batchelder. No rate per foot was taken for the Council's share of the liability, but it was stated in evidence that had the frontage to the Council's land been assessed at 31s. per foot it would have greatly exceeded £1,000. The making of the roads commenced in August 1929 and was completed in January 1930. The main controversy between the parties centred round the obligations thrown upon Mrs. Batchelder by clause 10 of the contract executed on 23rd July 1921, and ultimately the Council brought this

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action in the Supreme Court alleging that Mrs. Batchelder was liable to pay to the Council such sum of £1,000 by reason of clause 10 of the contract of sale. The defendant, by her defence (par. 6), alleged mistake in clause 10 of the contract, and she counterclaimed for rectification of the document.

The action was tried by *Irvine* C.J., who ordered that the contract be rectified by inserting in place of clause 10 the following clause:—"The land is sold subject to the express condition that the Council shall not be called upon to pay for any street-making in respect of the streets or roads delineated and coloured brown on the plan hereto annexed and that the vendor her executors or administrators will at all times hereafter keep indemnified the purchaser and its transferees against all charges for making the streets or roads aforesaid imposed in respect of lands sold by the defendant before the 18th day of February 1921 and will not at any time hereafter enter into or sign or authorize to be signed any contract which shall not contain a clause binding the purchaser or purchasers from the vendor her executors or administrators of lands abutting on the said streets or roads or any of them to keep indemnified the purchaser under this contract and its transferees against all such charges."

From this decision the plaintiff now appealed to the High Court.

Wilbur Ham K.C. (with him *Braham*), for the appellant. Clause 10 of the contract imposes on the respondent a liability to pay the road-making charges apportionable to the land sold to the Council. Clause 10 is properly divisible into three parts. The first part is a general part that the vendor or her transferees will pay. The second part is the vendor's covenant to pay. The third part is an attempt to create contractual relations between the Council and sub-purchasers from the vendor. The rectification ordered by the learned Chief Justice cannot stand. The form ordered is inconsistent both with his reasons for judgment and with the pleadings. The power of rectification should be sparingly used (*Fowler* v. *Fowler* (1)). The judgment of the Chief Justice is based largely on the correspondence between the parties. The answers to

(1) (1859) 4 DeG. & J. 250; 45 E.R. 97.

requisitions dated 5th August 1921 show that the vendor was intended to be liable for the road-making charges.

[DIXON J. Would the Council, having acquired the land, be liable, under the *Local Government Act*, for the road-making charges incurred in respect of it ?]

The land would not be exempt land, but the apportionment is left to the discretion of the Council (*Local Government Act* 1928, secs. 526 (1), 532, 341 and 343). Under the English authorities an apportionment must include the urban authority (*Herne Bay Urban District Council* v. *Payne and Wood* (1)). It was therefore necessary for the Council to obtain an indemnity from the vendor, the respondent. The Council was to be protected against road-making charges, and it was to be left to the solicitors to work out the method of protection (*Wilding* v. *Sanderson* (2) ; *May* v. *Platt* (3)). Rectification should not have been ordered (*Australian Gypsum Ltd. and Australian Plaster Co.* v. *Hume Steel Ltd.* (4)). Mistake due to innocent misrepresentation is not sufficient to justify rectification. There must be fraud (*Blay* v. *Pollard and Morris* (5) ; *Austerberry* v. *Corporation of Oldham* (6)). The finding of the Chief Justice was not supported by the evidence. Even on his finding the whole claim should not have been dismissed. He should have directed inquiries as to the contracts in which the clause agreed to in clause 10 of the written contract was not inserted. His Honor was wrong in ordering rectification, but his interpretation of clause 10 was right.

Fullagar (with him *Winneke*), for the respondent. It is important to note the way the case has been pleaded. The statement of claim is incorrect. Par. 4 includes the whole of Millewa Avenue, whereas the respondent contracted only in respect of that portion of Millewa Avenue coloured brown on the plan annexed to the contract. The contract did not contemplate any such scheme as that adopted. The term " charges " in the contract means charges actually and lawfully imposed in accordance with the *Local Government Act*.

(1) (1907) 2 K.B. 130, at p. 140.
(2) (1897) 2 Ch. 534.
(3) (1900) 1 Ch. 616.
(4) (1930) 45 C.L.R. 54.
(5) (1930) 1 K.B. 628, at pp. 633-634 (per *Scrutton* L.J.), at p. 641 (per *Slesser* L.J.).
(6) (1885) 29 Ch. D. 750, at pp. 773, 774, 776, 780, 781.

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The provisions of the *Local Government Act* are widely different from the provisions of the English Act on which the case of *Herne Bay Urban District Council* v. *Payne and Wood* (1) was decided. That decision is inapplicable to the Victorian legislation. Under the *Local Government Act* road-making charges are payable to the Council. The Council cannot charge itself with those charges under the Act because the Council cannot be liable to itself.

[STARKE J. Does not the word " charges " in the contract merely mean costs ?]

Since the Council has imposed charges on itself it cannot recover those charges from the respondent, because that was never contemplated by the contract. It was never contemplated that the Council could charge itself with any arbitrary amount and recover that from the respondent. These charges have not been properly imposed in accordance with the *Local Government Act*, and it is only charges so properly imposed that clause 10 of the contract contemplates. Under the *Local Government Act* the Council should have charged the whole cost of the road-making to owners other than the Council. In the ordinary way the owners facing Sydare Avenue would have had to pay double rates for street-making. Under the scheme adopted by the Council, whereby the cost is distributed over all owners in the subdivision, this was avoided. Such a scheme has been held valid by the Full Court of Victoria (*Macgowan* v. *City of St. Kilda* (2)). The £1,000 claimed should have been apportioned amongst the owners other than the Council with an indemnity by the vendor, the respondent. Clause 10 of the contract, properly construed, does not impose on the respondent liability for all road-making charges nor for this £1,000 claimed by the Council. The first part of the clause means that the vendor is to be liable as long as she remains owner of the land, but that the liability is to shift to her transferees when and as they become owners of the land. The second part of clause 10 is an indemnity by the vendor against default on the part of her transferees. The omission of the vendor's transferees in the second part indicates that this was the object of this part of the clause. The third part of clause 10 indicates that effect was intended to be given to the word transferees in the first

(1) (1907) 2 K.B. 130. (2) (1928) V.L.R. 462; 49 A.L.T. 296.

part. It was not intended that the Council's transferees, referred to in the second part of clause 10, were to be indemnified. The land was intended for a park and was to remain in municipal ownership. The only object of clause 10 was to protect municipal funds. If the appellant's interpretation of clause 10 is correct, then no effect is given to words "or transferees" in the first part of the clause, and the second and third parts are mere surplusage and unnecessary. This is a contract capable of alternative modes of performance. In such a case one mode must be pleaded and adhered to (*Tate* v. *Wellings* (1); *Penny* v. *Porter* (2)). According to the terms of the contract the vendor is only liable for the roads coloured brown on the plan. On that plan only half of Millewa Avenue is coloured brown and yet the claim covers the whole of it. The charges sued for are not charges only in respect of roads coloured brown. The plaintiff has therefore failed to sustain its burden of proof. The statement of claim shows that the plaintiff sues for a particular £1,000. Every penny of that £1,000 is due in respect of all the roads, and there can be no appropriation as to how much of it is due only in respect of the roads coloured brown on the plan annexed to the contract. Certain of the items included in the specifications cannot be regarded as part of road-making charges and the respondent cannot be charged with them, such as the amounts charged for fencing, law costs, clerk of works, commission and contingencies.

Winneke. The order for rectification of the contract was right. The evidence does disclose a concluded agreement between the parties before the date of the written contract. This agreement is disclosed by the evidence of Mrs. Batchelder and by a series of letters commencing with that of 24th May 1920 and concluding with that of 5th April 1921. Those letters disclose an agreement to sell for £250, the road-making charges to be borne by the various owners in the subdivision under one scheme with an indemnity by the vendor against default on the part of those owners. The solicitor's instructions were to embody that agreement in a formal contract. If the written contract on its proper construction does not embody that

(1) (1790) 3 T.R. 531; 100 E.R. 716. (2) (1801) 2 East 2; 102 E.R. 268.

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agreement, then it is a true case of mutual mistake and the written contract should be rectified accordingly.

Wilbur Ham K.C., in reply. The word "charges" in clause 10 of the contract does not mean charges properly imposed in accordance with the provisions of the *Local Government Act*: it means costs. The scheme adopted by the Council is immaterial as respondent has agreed to pay costs of road-making. (See the definition of "charge" in the *Oxford Dictionary*.) There is no principle contained in the *Local Government Act* requiring an apportionment to be on a frontage basis. This land was not exempt land under the *Local Government Act*, and it was proper for the Council to charge itself. The plaintiff has sustained its burden of proof. If the respondent is liable only for roads coloured brown on the plan, then Millewa Avenue is coloured brown. It is not necessary for it to be coloured right through. The terms of the contract impose liability for road-making irrespective of all the roads being coloured brown. There is a collateral agreement that all the roads in the subdivision should be constructed under one scheme. The sum due to the Council in respect of the roads coloured brown can be apportioned. If not, inquiries should be directed as to the actual cost of those roads. Fencing and the other items charged are properly included in the costs of road-making. As to the 5 per cent charge for engineer's commission, see *New River Co.* v. *Westminster City Council* (1).

Cur adv. vult.

Dec. 23. The following written judgments were delivered :—

RICH J. I have read the judgment of my brother *Dixon* and agree with it.

STARKE J. The respondent, Elizabeth Helen Batchelder, was the owner of certain land in the City of Malvern, and about the year 1920 she subdivided this land into allotments for sale. The subdivision involved setting out three new streets or roads which were

(1) (1904) 73 L.J. K.B. 1009.

named Sydare Avenue, Alvie Street and Millewa Avenue. About seven acres of the land was offered to the appellant, the City of Malvern, for drainage and ornamental purposes. It abutted on Sydare Avenue and Alvie Street. After some negotiations the appellant purchased this land from the respondent for £250, and a contract in writing was executed dated 23rd July 1921. The 10th clause of this contract was as follows :—" The land is sold subject to the express condition that all *charges for road-making* in respect of the streets or roads delineated and coloured brown on the plan hereto annexed " (being Sydare Avenue, Alvie Street and Millewa Avenue) " are to be borne by the vendor her executors administrators or transferees and that the vendor her executors or administrators will at all times hereafter keep indemnified the purchaser and its transferees against all such charges and will not at any time hereafter enter into or sign or authorize to be signed any contract which shall not contain a clause binding the purchaser or purchasers from the vendor her executors or administrators of lands abutting on the said streets or roads or any of them to keep indemnified the purchaser under the contract and its transferees against all such charges." The phrase " charges for road-making " suggests the imposition of liability by some lawful authority. There seems no doubt, and the parties at the Bar agreed, as I understood them, that the charges contemplated by the parties were the costs of forming, levelling, draining and making good the streets depicted on the plan of subdivision of the respondent's land pursuant to the provisions contained in Part XVIII., Division 11, secs. 526-539, of the *Local Government Act* 1915. Under those sections, if streets set out on private property are not formed, paved, drained or made good to the satisfaction of the municipal council, such council may form, pave, drain and make good the same and recover the cost of so doing from the owners of the premises fronting, adjoining or abutting upon such streets. The council is required to prepare specifications, maps and plans of the work, an estimate of the cost, and a scheme of distribution setting forth the names of the persons intended to be made liable and the amounts chargeable to each. Persons interested in or affected by the work may appear before the council and object to the scheme. The council may vary the scheme or adopt it, and upon

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due adoption all persons included in the scheme are bound and concluded by it. The Council, acting in pursuance of these powers, resolved that the streets depicted on the plan of subdivision and set out on the respondent's land were not formed, paved, drained or made good to its satisfaction and prepared specifications of the works required and an estimate of the cost, and a scheme of distribution amongst the owners of the premises fronting, adjoining, or abutting upon such streets. All the streets were included in one scheme, and that course has the sanction of a decision of the Supreme Court in *Macgowan* v. *City of St. Kilda* (1). In this scheme the Council included the appellant, the City of Malvern, as an owner of the land or premises purchased by it from the respondent for £250 which fronted, adjoined and abutted on Sydare Avenue and Alvie Street. The frontage of this land is stated in the scheme of distribution to be 2,145 feet by a depth of 160 feet, and in the distribution of the costs, both estimated and actual, a sum of £1,000 is charged to the appellant. The City of Malvern in fact contributed this sum to the cost of the work carried out by it, but the amount is an arbitrary figure; the basis of apportionment, 31s. a foot, adopted as to other owners was not applied to the appellant. It is this sum of £1,000 which the appellant seeks to recover from the respondent under the provisions of clause 10 of the agreement of 23rd July 1921. The respondent insists that this sum was not lawfully imposed upon the appellant under the scheme of distribution adopted by it. As I understood the argument, the appellant was not an owner of the premises fronting, adjoining or abutting, &c., on the streets within the meaning of Part XVIII., Division 11, of the Act. The liability of the appellant depends, no doubt, upon the provisions of the Act. Land occupied for the purpose of the Crown would seem to be exempt (*Hornsey Urban Council* v. *Hennell* (2)), and so would land which is placed *extra commercium*, that is, made incapable of yielding a rent by reason of its being subjected to some public purpose (*Local Government Act* 1915, sec. 3, "Owner of . . . property," and sec. 528 (3); *Health Act* 1915, sec. 3, "Owner"; *London County Council* v. *Wandsworth Borough Council* (3); *Hampstead Corporation* v. *Midland*

(1) (1928) V.L.R. 462; 49 A.L.T. 296.

(2) (1902) 2 K.B. 73.

(3) (1903) 1 K.B. 797.

Railway Co. (1); *Herne Bay Council* v. *Payne and Wood* (2)). The purpose for which the appellant acquired the land is by no means clearly proved, but I gather that the purpose was for the construction of drains and the provision of pleasure grounds or places of public resort or recreation. See *Local Government Act* 1915, secs. 461, 347 and 651-644. Despite the argument pressed upon us that the land acquired by the appellant from the respondent was *extra commercium*, it is not, I think, necessary to decide this important point on the scanty material before us. It appears to me upon the true construction of the *Local Government Act* that a municipality is not intended to be and is not chargeable for street-making under the provisions of Part XVIII., Division 11, sec. 526 of that Act. How is a council "to recover the cost" of making a street from the municipality? Its acts are the acts of the municipality, or are deemed to be so. (See secs. 9, 320 and 526.) Again, every person intended to be liable must be given notice in writing that the specifications, estimate and scheme are open for inspection, and that any such person may appear before the council on a day named and object thereto (secs. 529-532). Provisions such as these are quite inapplicable to the municipality itself. Why should a council be notified of its scheme? Can it be intended that the council might appear as an objector to its own scheme and then decide its own objection? Further, the provisions for payment of the amounts allocated to the various owners and for interest thereon (secs. 533 and 534) are all strangely out of place as applied to the municipality itself. Finally, the *Local Government Act* 1915 does not provide as in the Act considered in the *Herne Bay Case*, that the expenses incurred in executing the works shall be apportioned on the premises fronting, adjoining or abutting on the street, but upon "persons intended to be made liable." The conclusion is, I think, clear that a municipality is not and was never intended to be covered by the phrase "owners of the premises fronting adjoining or abutting" upon the streets made or formed by it under the provisions of Part XVIII., Division 11, sec. 526, of the *Local Government Act* 1915. But this brings me to the provisions of sec. 528 (4) of the *Local Government Act* as follows: "The amount to be paid by any person towards the cost

(1) (1904) 2 K.B. 802; (1905) 1 K.B. 538. (2) (1907) 2 K.B. 130.

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of any works executed by the council of any municipality under this Division shall not unless otherwise determined by the council be increased by reason of the fact that any land fronting adjoining abutting or benefited as aforesaid is under this Act exempt from contributing to such expenditure but the due proportion of such cost which would have been chargeable to owners of such land if not so exempt shall if the council so determine be charged to the funds of such municipality." The learned counsel who argued the case did not refer us to any express provision that exempted land from contributing towards the cost of the works executed by the council, but no doubt, if the land transferred to the municipality were *extra commercium* in the sense used in the cases, then it would be exempt. And so too, in my opinion, is it exempt if the municipality is not an owner of premises fronting, adjoining or abutting upon the street formed or made by the council within the provisions of Part XVIII., Division 11, sec. 526, of the *Local Government Act* 1915. This, I think, is the true position of the appellant in relation to the land transferred to it by the respondent. Consequently, the provisions of sec. 528 (4) come into operation and the Council has not "otherwise determined" within the meaning of sec. 528 (4). A wide discretion is given by this section to the council, but the exercise of that discretion involves the performance of a public duty in which the interests of adjoining owners as well as its own are concerned. In my opinion therefore, the Council committed no breach of any obligation under its contract with the respondent because it did not determine that the whole cost of forming Sydare Avenue, Alvie Street and Millewa Avenue should be charged upon adjoining owners other than itself. The result is that the charges against the adjoining owners for the cost of forming Sydare Avenue, Alvie Street and Millewa Avenue shall not be increased by reason of the fact that the land transferred to the appellant by the respondent "is . . . exempt from contributing to such expenditure." "But the due proportion of such cost which would have been chargeable to owners of such land if not so exempt shall if the council so determine be charged to the funds of the municipality." Now the meaning of the inclusion of the appellant, the City of Malvern, in the scheme of distribution for the sum of £1,000 appears to me a determination

under this provision of sec. 528 (4), that the sum should be charged to the funds of the municipality. That is its effect and also, I think, its object. This sum of £1,000 may have been less than a due proportion of the expenditure, but the respondent can hardly complain that the sum is not large enough and other owners are bound by reason of the provisions of sec. 532 of the Act.

The application of clause 10 of the contract to this position must now be considered. All charges for road-making in respect of Sydare Avenue, Alvie Street and Millewa Avenue are to be borne by the vendor or her transferees. The alternative is thus stated because under the *Local Government Act* transferees might be expected to pay any part of the cost of forming these streets allocated to them. Is the sum of £1,000 a charge within this clause ? In my opinion it is, because it is part of the cost of the works executed by the Council and charged to its funds under and by force of the provisions of sec. 528 (4) of the Act. Neither the respondent (the vendor) nor her transferees have borne this expenditure or charge for road-making. Then follows the next clause : " the vendor " (the respondent) " will . . . keep indemnified the purchaser " (the appellant) " and its transferees against all such charges." Such an obligation is not an indemnity in its proper sense but in the context in which the word is used " indemnified " means to pay the purchaser any charges for road-making which it may incur and have not been borne by the vendor or her transferees. In my opinion therefore, the respondent has bound herself by this clause to pay the sum of £1,000 to the appellant. The effect of the succeeding clause in clause 10 is not at all clear. It provides that " the vendor . . . will not at any time hereafter enter into or sign or authorize to be signed any contract which shall not contain a clause binding the purchaser or purchasers from the vendor her executors or administrators of lands abutting on the said streets or roads or any of them to keep indemnified the purchaser under this contract and its transferees against all such charges." The obligation of a clause such as that required by clause 10 would not be enforceable by the appellant (*Austerberry* v. *Corporation of Oldham* (1)). It may have been stipulated for, so that the vendor might have

(1) (1885) 29 Ch. D., at p. 750.

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recourse to purchasers from her if for any reason they did not bear the charges apportioned amongst them under the scheme of distribution adopted by the Council under the provisions of the *Local Government Act*. But, whatever be its true meaning and effect, the stipulation does not, in my opinion, affect the obligation of the respondent to pay to the appellant the sum of £1,000 under the preceding clause.

Another matter now requires consideration. In the cost of the works executed by the Council were included several amounts which it was argued were not rightly included. They are fencing £240, law costs £30, commission for preparing specifications, plans, supervision, and collection of the sums apportioned amongst owners £581, tree planting £256. Under the Act, only the cost of forming, levelling, draining, paving, flagging, macadamizing, and otherwise making good the streets or roads can be recovered against the owners (sec. 526). It is not clear, as *Lindley* L.J. indicated in *Walthamstow Local Board* v. *Staines* (1), that incidental expenses can be added to the cost of the works (*Ballard* v. *Wandsworth Borough Council* (2); *In re Hanwell Urban District Council and F. W. Smith* (3)). In my opinion, however, it is unnecessary to consider this argument. The provisions of sec. 532 of the Act preclude it. See *Walthamstow Local Board* v. *Staines*. "Upon such adoption," that is, the adoption of the specifications, plans, sections and elevations, estimate, scheme, and other particulars furnished by the Council, "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 has 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 amount charged to the funds of the Council (sec. 528 (4)) are not, I think, within this provision, but if the abutting owners, including the respondent, are all bound by the inclusion of these expenses in the cost of the works, then it is not possible for any of them to say that the proportionate part included in the sum of £1,000 charged to the funds of the municipality are not also part of the costs of the work.

(1) (1891) 2 Ch. 606, at p. 612. (2) (1906) 95 L.T. 118.
(3) (1904) 68 J.P. 496.

Lastly must be mentioned the argument that clause 10 does not represent the real agreement between the parties. This view found favour with the learned Chief Justice of Victoria, and he directed a rectification of the clause. But, as was pointed out by this Court in *Australian Gypsum Ltd. and Australian Plaster Co.* v. *Hume Steel Ltd.* (1), written documents cannot be rectified unless there has been some pre-existing arrangement or agreement between the parties which has been inaptly expressed. In my opinion, the only complete arrangement or agreement that the parties ever concluded is found in the written contract itself. Until the solicitors settled that document the terms of the purchase, and particularly the nature of the provision now contained in clause 10, were open for discussion and negotiation. The decree for rectification cannot be supported.

Consequently in my judgment this appeal should be allowed and judgment should be entered for the appellant, the City of Malvern, for the sum of £1,000 and interest thereon, with costs here and below.

DIXON J. This is an appeal from a judgment of *Irvine* C.J. by which he dismissed the action after rectifying the contract upon which the appellant sued. The facts upon which his Honor considered a case for rectification arose were well and fully discussed upon the hearing of the appeal by the counsel who argued this question on either side, and no useful purpose would be served by examining them again. The result of the discussion was to show that the material provision of the contract was adopted by the parties' solicitors as the deliberate, if obscure, expression of their common intention, and that it was not preceded by any other agreement or communicated intention upon the subject with which it dealt, and that no mistake whether mutual or unilateral was made in framing the provision. For the purpose of carrying into effect some very general notions of the parties, their solicitors were instructed to draw and agree upon a provision which they considered appropriate. It was by no means easy to reduce their desires to a sensible and practical shape, and their solicitors, for good or ill, agreed upon a clause which had been drafted, altered and settled between them as a provision which they were prepared to advise

(1) (1930) 45 C.L.R. 54.

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their clients to accept. The fact that a Court considers the meaning which a provision bears is one which a party would not have bound himself to if he had been alive to it, is no sufficient reason for rectifying a term so agreed upon. The order for rectification cannot be supported.

The question remains whether, upon the true construction of the provision sued upon, the appellant is entitled to recover. The contract was for the sale of a parcel of land to the municipality. The respondent had lodged with the municipality for its approval a plan of subdivision of a large area of land. The plan showed three new streets, but a difficulty was created by a natural drain which took an irregular course in the vicinity of one of the streets on either side of it. The officers of the municipality were inclined to the view that a park or garden might be made with advantage which would overcome the difficulty, and, for this purpose, recommended the acquisition of some of the land which the respondent offered. It must have been evident to both parties that if the Council acquired a large area of land abutting upon one of the streets, a difficulty would arise as to the cost of road-making. The ordinary consequence of laying out streets upon private property for the purpose of selling in subdivision is that the frontagers bear the cost of street construction pursuant to the provisions of Part XVIII. of the *Local Government Act* 1915. But if part of the land upon which this charge would be imposed became the property of the Council, some part of the cost must be borne by the Council unless the whole of the cost was imposed upon the owner or owners of the remaining land. Accordingly, during the consideration of the plan of subdivision, and in the course of the negotiations for the sale, the respondent sought from the Council, and obtained, an assurance "that the whole of the streets will be constructed under one scheme, so that the owners of the allotments facing the Council's portion will not be called upon to pay double rates for street-making." A sale was agreed upon, and after some delay a contract was executed which contained the clause upon which the respondent is sued, and which must now be interpreted. It is as follows:—"The land is sold subject to the express condition that all charges for road-making in respect of the streets or roads delineated and coloured brown on

the plan hereto annexed are to be borne by the vendor her executors administrators or transferees and that the vendor her executors or administrators will at all times hereafter keep indemnified the purchaser and its transferees against all such charges and will not at any time hereafter enter into or sign or authorize to be signed any contract which shall not contain a clause binding the purchaser or purchasers from the vendor her executors or administrators of lands abutting on the said streets or roads or any of them to keep indemnified the purchaser under this contract and its transferees against all such charges." After some years had passed, the Council determined to make the streets shown upon the plan of subdivision and adopted plans, specifications and a scheme for the distribution of the cost. The streets were all included in one scheme. Excluding the land acquired by the Council, the aggregate length of the combined frontages of land abutting on the streets was 66,383 feet, and a charge was imposed at the uniform rate in the first instance of 35s. per foot. The frontage of the land acquired by the Council from the respondent was 2,145 feet, and a lump sum charge was allocated in the scheme to this land of £1,000. It is this sum of £1,000 which the municipality seeks to recover from the respondent. By a special determination pursuant to sec. 528 (4) of the *Local Government Act* 1915, the whole sum might have been thrown upon the land which does not belong to the Council. Indeed, it is not clear that such a determination would be necessary. The respondent contends that the provision in the contract contemplated a scheme by which the whole cost of the street-making should be distributed over the land other than the land sold to the Council, so that sub-purchasers from her would in their character of owners be liable to bear the charges, and that, upon the true construction of the contract, she did not undertake an immediate liability to the Council in respect of any part of the cost of street-making which the Council might choose to exclude from the amount charged upon the land of private owners. The construction of the clause is extremely difficult, but there are a number of considerations which support this view. The reference to the vendor's transferees is unintelligible without recourse to extrinsic facts. The extrinsic facts which may be looked at include the preparation, submission and approval of the plan of subdivision and

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the contents of the plan, particularly the streets shown thereon which are identical with the streets shown on the plan annexed to the contract (in spite of some doubt as to what is coloured brown). On the whole it seems permissible to include in the extrinsic facts which may be considered the undertaking or assurance given by the Council that all the streets would be included in one scheme so that the frontages opposite the land sold should not bear an exaggerated proportion. When these facts are known, it appears that the first part of the clause constitutes a promise by the vendor that the total sum charged in one scheme for the combined streets will be answered by the vendor or her transferees of subdivisional allotments; the second, a promise that she will indemnify the Council against the burden of charges which are not so answered in fact; and the third, that she will exact a stipulation upon the sale of every subdivisional allotment from the purchaser thereof to keep the Council so indemnified. It seems absurd to construe the last clause as requiring the respondent to insert in her contracts of sale of allotments a provision binding the purchasers each to indemnify the Council against the total sum charged for the entire scheme. It is evident that it means that each purchaser is to undertake to be answerable for the amount imposed on or attributed to the allotment purchased by him. The contrast in terms between the description "purchaser" in the last part of the clause with the description "transferee" in the first part does not seem to be accidental. The transferee is under a direct, although not a personal, responsibility in respect of his land by reason of the charge upon it. A purchaser is not in that position until he obtains a transfer; and, perhaps, for this reason it was considered desirable that he should promise the vendor, who retained the title to the land which would be so charged, to indemnify the Council. Inasmuch as the last part of the clause requires an indemnity from each purchaser in respect only of the amount charged on his land, it seems proper to understand the first part of the clause as promising that the total cost of the entire scheme will be borne by the vendor or her transferees in their capacity of owners of the land charged. If it is read as an undertaking by the respondent that between herself and her transferees all the charges will be met even although some or all were not imposed upon the land, the

second part of the clause is deprived of all point. The distinction between the first and second clause lies in the fact that the first is a promise that the owner for the time being of the land retained by the vendor for sale in subdivision will pay the charges imposed upon that land and the second promises to indemnify the Council against the default of that owner in so paying.

When the assurance was sought and given that all the streets would be included in one scheme, the parties proceeded upon the hypothesis that the acquisition of the land fronting the streets by the Council would throw an increased amount upon other adjoining owners. In the same way, in adopting the disputed provision of the contract, they assumed that by reason of the acquisition of the land by the Council the amount charged to the remaining adjacent owners would be increased, because so much of the cost of street-making as was appropriate to the land acquired could no longer be charged upon the owners thereof. No one supposes that the respondent was willing to incur a greater liability than would attach to the land sold to the Council, and it would be natural for her to desire that the land which she retained for sale in subdivision should be saddled with the cost of street-making. If the Council were at liberty to charge as much or as little as it thought fit of the total cost upon the land retained by her for subdivisional sale, and to recover the residue from her, she was incurring a risk of greater liability than would be hers if the land sold to the Council remained on her hands, and in any case would be unable to saddle the land sold in subdivision with it, except by a special provision in her contracts so unusual and depreciatory that it can scarcely be supposed. In spite of the difficulties which the clause presents, these considerations appear to determine the meaning which should be attributed to it. An argument founded on the use of the word "transferees" in connection with the purchaser, namely, the Council, is of insufficient weight to displace this conclusion.

For these reasons, I think, the clause should be construed as a promise that charges under or as under Part XVIII. of the *Local Government Act* 1915 imposed by the Council upon the land not sold to the Council will be borne by the respondent or her transferees, as the case may be, in their character of owners for the time being of the

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land charged and not otherwise, and as an indemnity by the respondent in respect of charges so imposed. This does not mean that the imposition must be valid and effectual, but that it shall be made *de facto*; for the object of the clause was to provide against the successful resistance of the persons included in the scheme, as well as their failure to pay.

The judgment of the Supreme Court should be discharged and, in lieu thereof, it should be ordered that the action be dismissed with costs exclusive of the costs of and occasioned by the counter-claim and par. 6 of the defence, which costs should be paid by the defendant. Costs to be set off. The respondent should have the costs of this appeal.

EVATT J. In the year 1920 the respondent, Mrs. E. H. Batchelder, owned certain lands situate between Dandenong and Waverley Roads, within the City of Malvern, a suburb of Melbourne. She decided to subdivide and sell. Through the respondent's lands there ran a watercourse known as Bruce's Creek. It was suggested that for drainage and ornamental purposes the Council should itself purchase a parcel of about seven acres, including the watercourse and certain adjacent land. Negotiations took place between the representatives of the parties, and the Council finally agreed to purchase the parcel for the sum of £250.

The subdivision planned that a roadway to be called Sydare Avenue should follow the course of the valley through which Bruce's Creek flowed, so that the land agreed to be purchased would abut upon the proposed roadway. Part of the land sold abutted also upon another proposed roadway, described in the plan as Alvie Street.

Before the contract of sale was made certain correspondence took place. It included two letters dated May 25th, 1920, and June 11th, 1920. In these letters Mrs. Batchelder asked for an assurance that when the streets came to be constructed, one scheme would be adopted " so that the owners of the allotments facing the Council's portion will not be called upon to pay double rates for street-making." The reply was that " the Council will agree to the streets being constructed under one scheme provided the vendor will have

a clause inserted in all contracts of sale of land in the estate that the Council will not be called upon to pay for any street-making."

Shortly after the receipt of the letter of June 11th, Mrs. Batchelder, on June 22nd, 1920, pursuant to the requirements of the *Local Government Act* 1915, gave formal notice of her intention to lay out the new streets and to subdivide the land into allotments. She lodged the plan of subdivision with the Council and requested that it should be sealed. The plan was adopted and, on October 2nd, 1920, the Council duly sealed it.

The main controversy between the parties centres around the obligations thrown upon Mrs. Batchelder by clause 10 of the agreement of sale, which was not formally executed until July 23rd, 1921.

Sales of the allotments had commenced as early as October 1920, but it was not until August 2nd, 1926, that the Council took the first formal step towards the work of making the three roads set out in the plan of the subdivision. It directed the preparation of a scheme of distributing the costs thereof amongst the owners of land in the subdivision.

When in 1929 the scheme of distribution was ready, the list of persons proposed to be made liable included the Malvern City Council itself. It treated itself as an owner liable to pay in respect of the land acquired from Mrs. Batchelder. But there was a departure from the general basis on which the estimated cost (£12,169) was apportioned, and the Council fixed an arbitrary figure of £1,000 as chargeable against itself.

The second resolution of the Council was not adopted until February 4th, 1929. Notices in writing were thereupon served upon all persons intended to be made liable to pay for the proposed works. The Council did not go through the form of serving any notice upon itself. The final resolution was come to on April 15th, 1929, when the scheme was adopted without variation.

The making of the roads commenced in August 1929 and was completed in January 1930. The actual cost was less than the estimated cost by about £800, and the benefit of this was apportioned amongst the owners of the land. But the Council still treated itself as liable in the sum of £1,000. It brought this action in the Supreme

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Court of Victoria alleging that Mrs. Batchelder must pay it such sum by reason of clause 10 of the contract of sale.

Mr. *Fullagar*, although not succeeding in the Supreme Court on this aspect of the case, has contended that the Council has entirely misconceived the legal situation created by clause 10 and that it had no right to assume such a liability under the scheme for the purpose of throwing it upon Mrs. Batchelder.

The learned Chief Justice rejected his contention only "after much hesitation," but decided against the Council upon the ground that, prior to the written contract of sale, the parties had made an agreement which excluded the liability now alleged, which prior agreement, by error, was not sufficiently embodied in the final contract.

At all material times the Council was aware that its only power to construct roads set out on private property was contained in Part XVIII., Division 11, of the *Local Government Act* 1915. Both the Council and Mrs. Batchelder were contracting on the footing that the provisions of Division 11 would control the situation.

The fact of the Council's purchasing land from Mrs. Batchelder with so extensive a frontage was especially calculated to create difficulties in the way of the subsequent enforcement of any scheme of distributing the costs of making the roads. The "owners of the premises fronting adjoining or abutting upon" the streets, when informed that they were "intended to be made liable," might create a number of objections. One might be that the Council was not competent under sec. 526 to lump together in one scheme of distribution the three roads proposed to be made (*Cook* v. *Ipswich Local Board of Health* (1); cf. *Macgowan* v. *City of St. Kilda* (2); *Nash* v. *Giles* (3)).

But the objection really feared was that the Council's ownership of the subject land might cause it to be burdened with a heavy expense which, for one reason or another, could not be entirely passed on to the frontagers. The other subdivision owners to be affected might create considerable trouble. All possibility of such trouble to the Council was sought to be avoided in clause 10.

(1) (1871) L.R. 6 Q.B. 451.
(2) (1928) V.L.R. 462; 49 A.L.T. 296.
(3) (1926) 96 L.J. K.B. 216.

One fact emerges from this case with great clearness. In 1920 and 1921 neither the Council nor Mrs. Batchelder nor their representatives ever contemplated that, in its own scheme of distributing, the Council would include itself as one of "the persons intended to be made liable" to pay portion of the costs of the road-making. It seems certain that it was to ensure against being forced by the owners of land to bear a portion of such costs that clause 10 was inserted.

Clause 10 is severable into three distinct stipulations. The first is as follows:—"The land is sold subject to the express condition that all charges for road-making in respect of the streets or roads delineated and coloured brown on the plan hereto annexed are to be borne by the vendor her executors administrators or transferees." The words used do not impose upon Mrs. Batchelder herself any liability to pay to the Council the costs of making the three streets delineated on the plan. What is promised by her is that "all charges for road-making in respect of the streets" are to be "borne" by "the vendor her executors administrators or transferees."

Even considered as a separate phrase, "all charges for road-making in respect of the streets" is quite different from "the costs of making the streets." The assumption made is that the streets will be constructed and that charges will be imposed upon certain persons "in respect" thereof. What persons? Clearly the "vendor," Mrs. Batchelder herself (the then owner of the greater part of the subdivision), and the persons to whom she has already sold or will sell in the future, her "transferees."

It was intended that the owners of the land in the subdivision, other than the land the subject of sale, would be burdened with the costs of making the streets under the ordinary statutory scheme of distributing such costs. An amount of money would thus be "chargeable" (to use the phrase in the first resolution of the Council) against each owner.

Mrs. Batchelder undertook that, between them, the owners of land in the subdivision would meet the charges to be imposed by the Council in respect of the three streets. The Council wished to prevent any attempt to burden it with any portion of the total costs of constructing the streets. The owners of land in the subdivision might

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complain that the Council was the owner of seven acres of land with a considerable frontage to two of the proposed streets. The contracting parties never supposed that the Council might endeavour to affix direct liability upon itself as landowner. On the contrary the Council desired to ensure that Mrs. Batchelder and the other owners of land would not object to the Council's acting under the Act so as to burden them with the total costs. It was contemplating one scheme of distributing all such costs. Each owner would bear the charges made in respect of his land, so that, in spite of the Council's own considerable frontage, the general body of householders would together pay to the Council the cost of the works. What was procured by the first part of clause 10 was an undertaking by Mrs. Batchelder that the owners of land in the subdivision would meet all the charges actually made by the Council in respect of their land.

The second stipulation in clause 10 is "that the vendor her executors or administrators will at all times hereafter keep indemnified the purchaser and its transferees against all such charges."

This is a promise by Mrs. Batchelder that when the time comes for the road-making charges to be made against the frontagers in the subdivision, the Council and its transferees will be held harmless against any attempt to fasten liability upon the Council or its transferees in respect of the land sold by Mrs. Batchelder.

What the parties had in view was that, if the Council wished to sell the subject land, it could hardly find purchasers if there was a possibility of their having to face heavy obligations under the statute. The only "charges" with which the Council's transferees could be burdened would be charges in respect of the land of which they became owners. Such charges the Council might well be compelled by the statute to make if it disposed of part or all of the subject land. Mrs. Batchelder undertook that in such event the transferees from the Council would be indemnified against loss resulting from such charges. She also undertook that she would make good any loss sustained by the Council if it failed to compel the remaining frontagers to meet the charges made on them for

road-making, or (what is substantially the same thing) if it was forced to assume liability in respect of its own land-holding.

It is implied in clause 10 that the scheme to be adopted by the Council will be a scheme distributing the total cost of road-making amongst the owners of land, excluding that which is the subject of sale. Such a scheme might not be authorized by the Act. It might be successfully challenged. Moreover, the Council might sell. In such events Mrs. Batchelder's personal liability under the first two parts of clause 10 would arise.

It was not very likely that the Council would sell, although provision was made for the contingency. The real danger was that the owners who bought from Mrs. Batchelder would object to the scheme, thus leaving the Council to face a primary liability equivalent in amount to that with which a private owner of its own seven-acre parcel would be charged.

In the third part of clause 10 Mrs. Batchelder undertakes that she "will not at any time hereafter enter into or sign or authorize to be signed any contract which shall not contain a clause binding the purchaser or purchasers from the vendor her executors or administrators of lands abutting on the said streets or roads or any of them to keep indemnified the purchaser under this contract and its transferees against all such charges."

One need not discuss to what extent, if at all, the Council could succeed in enforcing or procuring the enforcement of such clauses in contracts between Mrs. Batchelder and her sub-purchasers. The ultimate object in extracting from Mrs. Batchelder a promise to insert such clauses was to prevent any of the road-making charges from falling upon the owner of the seven acres (i.e., the Council or its transferees). The chance of the other owners challenging a scheme of distributing the total costs of making the roads between them was rendered almost negligible by her inserting such clauses. Mrs. Batchelder would be adversely affected by the success of such a challenge because by virtue of the rest of clause 10 the burden would eventually shift from the owners' shoulders to her own. In the first instance it would shift to the Council or its transferees. It was to the Council's interests that Mrs. Batchelder's obligations in respect of the road-making charges appropriate to the land sold

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should be borne by the other owners because its indemnity was further secured. But it was also to Mrs. Batchelder's interests that she should get the described undertaking from those who bought from her, and in all probability she did so.

The case now made against her by the Council is that she has broken the obligations she assumed under clause 10. It is said that the £1,000 sued for is part of the cost of road-making which the Council has borne under its own scheme of distribution and that Mrs. Batchelder is bound to pay it. Part of the statement of claim was based upon the opening stipulation of clause 10, and it was alleged that Mrs. Batchelder promised (*inter alia*) that "all charges for road-making" in respect of the streets should "be borne by" her. The actual promise was that the charges should be borne by Mrs. Batchelder *or her transferees*; so that the short answer to this part of the case is *non assumpsit*.

But the Council also says that Mrs. Batchelder broke her promise to keep it indemnified against all road-making charges, that it decided to charge itself with the sum of £1,000 and that Mrs. Batchelder must now pay that sum.

This argument assumes that, if the Council had decided to charge itself under the scheme of distribution ratably with the other owners, Mrs. Batchelder would be liable to pay it a much greater sum than £1,000. Indeed, one contention of the Council to which I have already referred is that under her contract Mrs. Batchelder might have been called upon to pay the whole of the £11,000 which it cost to make the roads.

In my opinion the true position was that, in the events which happened, the Council was contractually bound to Mrs. Batchelder to distribute the total cost of the road-making amongst the owners for the time being of all the land in the subdivision other than that owned by the Council itself. Mrs. Batchelder's primary obligation under the first part of clause 10 was merely to pay the charge made in respect of any land of which she remained owner. No breach of any such obligation has been suggested. Nor is liability based upon any default in payment on the part of any transferee from Mrs. Batchelder.

I am also of opinion that no question of indemnifying the Council under the second part of clause 10 could properly arise unless the Council was forced to assume liability in respect of the land owned by it. Such event could only happen after a scheme of distribution

throwing the total liability upon the other frontagers had been duly prepared but rendered ineffectual in whole or in part.

In the present case, however, the Council was not compelled to assume any liability for the sum of £1,000 or any part of it. It did not, as it was bound to do, distribute or attempt to distribute the whole liability amongst the remaining landowners. It was by an act of its own volition that it arbitrarily wrote down £1,000 as being chargeable against itself under the scheme. Had it done what it impliedly undertook to do, any part of the costs referable to the land it bought would have been distributed amongst the remaining owners, and would have been duly paid. For in all probability the owners would not have raised, or at any rate pressed, any objection, owing to the clauses inserted in their contracts with Mrs. Batchelder. If the Council had acted properly it would not have been a penny out of pocket.

If, after carrying out its part of the contract the Council had been unable to pass on the total costs of road-making, Mrs. Batchelder's liability would have arisen. Such actual loss by the Council on its work of road-making and its scheme of distributing the costs thereof would have justified recourse to Mrs. Batchelder's contract of indemnity. But no contract of indemnity can be enforced by a party who is the direct cause of his own loss or damage. That is the position of the Council in this case, and Mrs. Batchelder is no more liable to the Council under the second part of clause 10 than she is under the first.

Mrs. Batchelder is therefore entitled to judgment in the action.

McTiernan J. I have read the judgment of my brother *Dixon* and agree with it.

Judgment of Supreme Court discharged and, in lieu thereof, order that the action be dismissed with costs, exclusive of the costs of and occasioned by the counterclaim and par. 6 of the defence, which costs shall be paid by the defendant. Costs to be set off. Except as aforesaid appeal dismissed. The respondent to have the costs of this appeal.

Solicitors for the appellant, *Braham & Pirani.*

Solicitors for the respondent, *Gair & Brahe.*

H. D. W.