[HIGH COURT OF AUSTRALIA.]

THE MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF CAMBERWELL . } APPELLANT;
PLAINTIFF,

AND

WOOLF . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 26, 27.

SYDNEY, *Nov.* 21.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Local Government—Street-making—Liability of frontager—Adoption of scheme—Conditional adoption—Invalidity of adoption—Unconditional adoption necessary—Local Government Act 1915 (*Vict.*) (*No.* 2686), *secs.* 531, 532—*Local Government Act* 1928 (*Vict.*) (*No.* 3720), *secs.* 579, 580.

In purported exercise of the powers to make and repair streets conferred by Div. 10 of Part XIX. of the *Local Government Act* 1928, a municipal council passed the following resolution: "That the plans estimate and scheme of distribution of cost of the construction" of certain streets "be adopted without variation and that tenders be called for the work, provided that if the tenders are not materially lower than the estimate the matter will be reconsidered . . . with a view to some other form of construction." The work was subsequently completed, and the council brought an action against the respondent to recover the proportion of the cost attributed to him.

Held, that the resolution did not amount to a final and definitive resolution to carry out the proposed work and adopt the estimate and scheme of distribution and so fix the liability of the owners interested; that, in the circumstances, the council did not comply with the provisions of sec. 579 of the *Local Government Act* 1928, and that apart from a valid adoption of the scheme the respondent was not bound or concluded or liable to pay his proportion of the cost of construction.

Decision of the Supreme Court of Victoria (Full Court): *City of Camberwell* v. *Woolf*, (1932) V.L.R. 399, affirmed.

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APPEAL from the Supreme Court of Victoria.

The respondent, Joseph Woolf, was the owner of certain premises fronting, adjoining and abutting on two private streets, namely, Quantock Street and Alta Street, in the municipality of Camberwell. The appellant, The Mayor, Councillors and Citizens of the City of Camberwell brought an action against the respondent in which it sought to recover sums amounting to £761 8s. 5d. and interest thereon, being the proportion of the cost attributed by the appellant to the respondent for concreting the surface of (*inter alia*) Quantock Street and Alta Street.

Pursuant to the powers conferred by sec. 527 of the *Local Government Act* 1915 (sec. 575 of the *Local Government Act* 1928) the appellant caused to be prepared such specifications, maps, plans, sections and elevations as it deemed 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 were the owners respectively and the amounts chargeable to each with regard to the levelling, draining, paving, flagging, macadamizing or otherwise making good to the satisfaction of the Council certain streets including Quantock Street and Alta Street formed or set out on private property within the municipality. Pursuant to sec. 529 of the *Local Government Act* 1915 (sec. 577 of the *Local Government Act* 1928) notices were sent to the respondent informing him (*inter alia*) of the estimated amount of his liability. On 11th March 1929 the appellant passed the following resolution after objections by various property owners had been heard :—" That the plans estimate and scheme of distribution of cost for the construction of Hassett Avenue, Alta Street, Maysia Street, Cooba Street, Catherine Street, Quantock Street, Griotte Street, Dorothea Street and Elphin Grove in one group be adopted without variation and that tenders be called for the work, provided that if the tenders are not materially lower than the estimate the matter will be reconsidered by the Public Works Committee with a view to the adoption of some other form of construction."

On 15th April 1929 the Council passed a resolution a minute of which was in the following form :—" On resuming Council the

Mayor (Councillor Mackay) submitted the following recommendation:—Tenders:—Contract No. 706 Hassett Avenue Group, Construction. (*a*) That the tender of R. T. Millar—Amount £14,673 5s. 6d. be accepted. (*b*) That Mr. H. W. D. Anderson (on behalf of the property owners of these streets) be informed that the Council has accepted a tender for the work, which, it is anticipated, will reduce the cost per foot frontage by about 4s. to 5s. Moved by Councillor Willison, seconded by Councillor Howie: That the recommendation be adopted. Carried." The work was completed in accordance with the specifications, maps, plans, sections and elevations prepared for the Council. There appeared in the estimate and scheme of distribution of the cost of forming, paving, macadamizing, &c., the Hassett Avenue group an item: "Plans, supervision and contingencies £1,457 4s. 5d." The work for which this charge was made was done by the Council's own surveyor and engineer.

The only defence relevant to this appeal which was raised was that the requirements of sec. 527 of the *Local Government Act* 1915 (sec. 575 of the 1928 Act) had not been complied with.

Macfarlan J., who tried the action, held that the addition of the words in the proviso to the resolution did not affect the unequivocal character of the earlier part of the resolution.

On appeal the Full Court (*Cussen* A.C.J. and *Lowe* J., *Mann* J. dissenting) reversed this decision, and held that the resolution of 11th March 1929, not being clear and unequivocal, there had been no adoption of the specifications, maps, plans, sections, elevations, estimate, scheme and other particulars within the meaning of sec. 531 of the *Local Government Act* 1915 (sec. 579 of the *Local Government Act* 1928): *City of Camberwell* v. *Woolf* (1).

From that decision the Council now appealed to the High Court.

Wilbur Ham K.C. (with him *A. L. Read*), for the appellant. The Council has a right either before or after the making of the road to recover the cost from the adjoining owners (*Local Government Act* 1928, sec. 574 (1)). This was originally a provision in the *Health Act* 1890. Subsequently, the Legislature provided a kind of statutory estoppel now contained in sec. 580 of the 1928 Act, which provides

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that upon the adoption of the scheme every person upon whom notice has been served and whose name is included in such scheme is finally bound to contribute to the cost of the work. This provision was considered in *Sandringham Corporation* v. *Rayment* (1). The High Court there held that this statutory estoppel operated only against the persons who got a proper notice. In the present case the Camberwell Council did not rest only on this section but proved the steps taken as well. *Rayment's Case* did not lay down that a meticulous following of every provision in the *Local Government Act* was a condition precedent to recovering the money. The Council adopted the scheme and called for tenders on the one day. If in one separate motion the Council had adopted the scheme and if in another resolution it had called for tenders, no one would have said that the adoption was bad, but the Full Court said that because the resolution to call for tenders was included in the adoption resolution, the latter was bad. Had there been a resolution for the adoption of the scheme alone, the Full Court would not have decided against the Council. Even if the word " and " were substituted for the words " provided that " in the resolution, the Full Court's decision would have been otherwise. It is said that the resolution was not a final adoption of the scheme because it contained a term which might subsequently destroy it. The Full Court said that the adoption should be definitive of the person's rights, and that if there was any doubt as to any person's rights the resolution was not sufficiently final. But all that the adoption does is to operate as a statutory estoppel and fix the proportion in which the frontagers will have to contribute but does not fix their liability. There is no need to give notice of any adjournment to ratepayers under sec. 577. Even if a person gets notice he may not be present at the time of adoption. Sec. 579 (2) provides for varying the specifications, &c. The Council was a lay body, and the substance of the matter is more important than a very careful analysis of the verbal provisions. The proviso in the resolution really added nothing to it. The mere adoption of the scheme does not impose any liability to pay anything and does not impose any obligation. On 15th April the Council approved of a tender which was substantially lower than the sum

(1) (1928) 40 C.L.R. 510, at p. 537.

provided in the resolution, and that amounted to an adoption of the scheme. As a matter of substance there was an adoption of this scheme and, that being so, the provisions of sec. 580 apply which provides that a person on whom notice has been served shall be taken to have admitted that all procedural steps have been taken. The statute only speaks of adoption, and there is no occasion to read the words final and unequivocal into it. The Act is directory only. If the adoption of 11th March was not an adoption by reason of the proviso, the resolution of 15th April was an adoption sufficient for the purposes of the Act, or else there was an adoption by reason of the resolution of both these dates. It is not necessary that the resolution should be come to in the presence of the ratepayers. In any case an adoption under sec. 579 was not necessary because the Council could recover after the work had been done without any adoption. The adoption provisions are directory only and are not a condition precedent to recovery (*Reade* v. *Mayor, &c., of St. Kilda* (1); *Dignan* v. *Australian Steamships Pty. Ltd.* (2)).

Hogan (with him *Campbell*), for the respondent. The meaning of the word "adopt" does not mean that the Council merely decides to act upon the scheme drawn up. Upon the adoption of the scheme about £20,000 in charges are immediately imposed on the ratepayers (*Re Sneesby and Ades and Bowes' Contract* (3); *Myers* v. *Witham* (4)). Under sec. 579 (1) (*b*) this adoption should take place in the presence of the objectors. The purpose of the notice is to give the ratepayers an opportunity of attending and objecting. If the objector attends in the first place, he is entitled to know what has been done. The scheme must either be adopted or not, though it may not be carried out. These provisions were introduced in the *Local Government Act* 1891 (*Brunswick Corporation* v. *Baker* (5)). It is only upon the adoption of the scheme that the liability is imposed on the ratepayers (*Dunn* v. *Shire of Braybrook* (6); *Moorabbin Shire* v. *Abbott* (7)). The only conclusion to be drawn

(1) (1888) 14 V.L.R. 829, at p. 834; 10 A.L.T. 97, at p. 98.
(2) (1931) 45 C.L.R. 188, at pp. 201, 206, 207.
(3) (1919) V.L.R. 497, at p. 506; 41 A.L.T. 28, at p. 31.
(4) (1924) V.L.R. 470; 46 A.L.T. 65.
(5) (1916) 21 C.L.R. 407.
(6) (1928) V.L.R. 454.
(7) (1913) V.L.R. 337; 35 A.L.T. 31; (1914) 17 C.L.R. 549.

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from these provisions is that an adoption of the scheme is a condition precedent following on which there is the right to make the charges. The Council cannot be said to have taken that course here. The whole of these provisions relating to the steps to be taken as a condition precedent are to be taken for the protection of the frontagers. On the adoption of the scheme the amount immediately becomes a charge on the land under sec. 580 and becomes payable forthwith under sec. 581. If the Council wanted to treat the matter as an adjournment, it should have fixed some specific time. Neither the resolution of 11th March nor that of 15th April was an adoption of the specifications. The Council cannot adopt part of a scheme. There are four reasons why the purported adoption of the scheme is bad: (1) The respondent had no right to use the street in question and was not a frontager because he had no right to use it (*Property Exchange Limited* v. *Wandsworth Board of Works* (1)); (2) the charge for supervision by its own employees made by the Council vitiates the adoption; (3) the whole scheme is bad because there is no resolution by the Council authorizing this work to be done, because no plans were authorized to be prepared but only for part of the scheme; and (4) the respondent was not given an opportunity to be heard at the time and date named in the notice. As to the charges for supervision, since the hearing before the Full Court the *Local Government Act* 1932 has been passed dealing with the right of the Council to charge for supervision fees. At the time of the decision of the Supreme Court this was an improper charge. Under sec. 574 the only charges that can be imposed on ratepayers are charges for street-making, and this does not include money paid to their own engineer. The inclusion of charges for supervision by the Council's engineer invalidates the whole scheme. It is relevant to decide what the charge for supervision was for, because, if it was for supervision and plans prepared by the engineer in the Council's time, it invalidates the whole scheme. No extra expense was incurred by the Council (*Ballard* v. *Wandsworth Borough Council* (2); *Metropolitan Water Board* v. *Westminster City Council* (3); *The Queen* v. *Marsham* (4)).

(1) (1902) 2 K.B. 61.
(2) (1906) 95 L.T. (N.S.) 118.
(3) (1905) 70 J.P. 52.
(4) (1892) 1 Q.B. 371.

[STARKE J. referred to *Walthamstow Local Board* v. *Staines* (1).]

The Council is not entitled to make a profit out of the engineer's supervision, and the respondent should have been allowed to investigate this item of supervision. There is no resolution by the Council to prepare plans, &c., for this scheme.

Wilbur Ham K.C., in reply. Under sec. 580 the respondent is estopped from raising any of these objections and the only thing that would take him out of the estoppel would be a failure to give him notice under the section. The respondent was entitled to the use of the road adjoining his property (*Transfer of Land Act* 1928, sec. 212; *Brunswick Corporation* v. *Baker* (2)). The cost to the Council for providing officers should be allowed to the Council. Evidence as to the amount which was charged for supervision was excluded because it was not raised on the pleadings.

Cur. adv. vult.

The following written judgments were delivered:— Nov. 21.

GAVAN DUFFY C.J. AND DIXON J. In the intended exercise of the power conferred by the provisions now contained in Div. 10 of Part XIX. of the *Local Government Act* 1928, the Council of the City of Camberwell undertook the construction of certain streets set out on private property. If a street so set out, whether dedicated to the public as a highway or not, has not been made to the satisfaction of the Municipal Council, these provisions enable the Council to construct the street and recover from the owners of the premises adjoining such parts as require making the cost of doing so in the manner stated in the enactment (sec. 574 (1)). Such specifications, maps, plans, sections and elevations as appear necessary must be prepared together with an estimate of the cost and a scheme of distribution setting forth the names of the persons intended to be made liable (sec. 575 (1)). Notice must be given to every such person that these documents have been prepared and are open for inspection. It must state the estimated amount of his liability and inform him that upon a specified date the Council will proceed

(1) (1891) 2 Ch. 606.

(2) (1916) 21 C.L.R. 407.

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to consider the scheme and his liability and that he may appear and raise objections, but that in default of his doing so, the scheme will be adopted and every such person will be considered as having admitted compliance by the Council with the statutory requirements and their respective liabilities as appearing in the scheme and will be in all respects finally bound and concluded thereby (sec. 577). Upon the date so fixed or on any date to which the consideration of the matter may be adjourned the Council, (*a*) if no person objects, may adopt the specifications, maps, plans, sections, elevations, estimate, scheme and other particulars, (*b*) if any person objects to them or any of them, shall thereupon or at some future time inquire into the matter in the presence of such person if he attends, and, after hearing the objections (if any) then made, if it appears to the Council expedient so to do, may adopt the proposal.

Before doing so, it may add names to the scheme or vary the proposal, giving notice to all persons affected (sec. 579). Upon such adoption every person upon whom notice has been served and whose name is included is considered as having admitted that the Council has complied with the requirements of the Act and also his liability to contribute to the work in the proportion adopted by the Council, and is finally bound and concluded by all such matters (sec. 580). Every person so liable must pay to the Council, either in instalments or in full forthwith, the amount so apportioned to him (secs. 581, 582). If the works cost less than the estimate, the Council must return or abate a ratable amount of the sum so apportioned, and, if they cost more, it shall apportion and may recover the excess (sec. 584).

The name of the respondent was included in the scheme as an adjoining owner and, notwithstanding his objection, was retained therein. He refused, however, to pay the amount apportioned to him and an action to recover it was brought in the name of the Municipality. *Macfarlan* J., who tried the action, gave judgment for the plaintiff although he expressed some doubt whether the Council had duly adopted the scheme. Upon appeal, the Full Court of the Supreme Court of Victoria, by a majority (*Cussen* A.C.J. and *Lowe* J., *Mann* J. dissenting), reversed this judgment upon the ground that no final and unequivocal adoption of the scheme by

the Council had taken place. Judgment was entered in the action for the defendant, the respondent upon this appeal (1).

The question whether the plans, estimate and scheme of distribution as prepared should be adopted was considered by the Council on 11th March 1929. Many objections were made to the proposal, and these included objections founded on the costly nature of the construction specified, viz., concrete. After objectors had been heard, the motion first proposed was that the matter should be referred back to the Public Works Committee of the Council with a view of considering whether the estimated cost of the work could not be reduced by a modification of the specifications. But an amendment was carried, put as the substantive motion and resolved upon. This resolution was: that the plans estimate and scheme of distribution of cost for the construction of the streets be adopted without variation and that tenders be called for the work, provided that if the tenders are not materially lower than the estimate the matter will be reconsidered by the Public Works Committee with a view to the adoption of some other form of construction.

Tenders for a large part, but not the whole, of the work were obtained. Having regard to the amount of one of these tenders, it appeared probable that if it was accepted and the remainder of the work was executed by the Council itself, the costs would be under the estimate by a considerable sum. Acting apparently upon this view the Council on 15th April 1929 resolved that the tender be accepted and that a named objector (on behalf of the owners of the adjoining streets) be informed that the Council had accepted a tender for the work which it was anticipated would reduce the cost per foot frontage by about 4s. or 5s.

We are unable to discover in the resolution of the Council of 11th March or in that of 15th April 1929, or in both together, any sufficient adoption of the scheme to satisfy the provisions contained in secs. 579, 580 and 581. The estimate formed an essential part of the proposal because the scheme of distribution depended upon it. The preliminary part of the resolution of 11th March 1929 is expressed as an adoption of the estimate, but the proviso requires a reconsideration of the matter by the Public Works Committee unless the estimate

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materially exceeds the tenders. The purpose of the reconsideration is the adoption of some other method of construction. No doubt the resolution was framed in a laudable endeavour to compose differences in a compromise between extreme courses. But the Council was called upon by the statutory provision to decide whether it would accept or vary or reject the scheme and estimate put before it. Unfortunately the terms of the resolution reflect the opposing intentions or desires which it sought to harmonize. When it is considered as a whole, its sense is not to do any one of these things definitively. It adopts the scheme only if the estimate turns out to be wrong, and, if the estimate turns out to be right, the scheme is to be reconsidered. The proviso does much more than express a reservation of power which the Council would in any case possess. Sec. 579 (2) confers a power of varying a scheme before adoption. But a power of variation after adoption is not given by the statute. Sec. 584 provides for subsequent adjustments in the charge apportioned to each owner arising from a difference between the estimate and the actual cost of the works when executed. But this necessarily presupposes that the estimate has been adopted; that it has been accepted by the Council and not disowned. It in no way relieves the Council from deciding upon an estimate.

The proceedings on 15th April might conceivably have supplied a conclusive adoption following, as they did, upon the inconclusive and provisional or tentative approval of the scheme on 11th March, if the resolution of 15th April 1929 had covered the whole work and had adopted a new total sum and if the consideration of the matter had on 11th March been adjourned to that date. But neither of these conditions was fulfilled. Sec. 579 (1) begins "Upon the date so fixed" (i.e., by the notice) "or on any date to which the consideration of the matter may be adjourned," and we think these words apply to the "future date" mentioned in sec. 579 (1) (*b*). It was suggested on behalf of the appellant that exact compliance with the provisions of sec. 579 was not necessary in order that an intended adoption should be effectual. Upon the question what adherence to the requirements of the section is needed for a valid adoption, it is not desirable to go beyond the facts of the present

case. But it must be remembered that one of the very purposes of the adoption is to make immaterial any prior failure to comply with the directions of the statute. This consideration tends against construing the provisions which prescribe the mode of adoption as being themselves directory. It is enough, however, to say that the Council must express or clearly imply a definitive intention to accept or adhere to a proposal ascertained from documents, and that it must do so upon the date fixed by the notice or upon some date to which the consideration of the matter has been adjourned by the Council. It follows that in the present case there was not an adoption. It was said that an adoption was not a condition of liability but that, apart from the provisions contained in secs. 579, 580 and 581, a frontager might be made liable if the provisions contained in secs. 574, 575, 576, 577, 578 and 584 were satisfied. We do not agree with this interpretation of the enactment. In our opinion sec. 581 is essential to the ascertainment of the liability and the apportionment to which it refers is that mentioned in sec. 580. Further, the words "in manner hereinafter appearing" at the end of sec. 574 (1) refer, we think, to the procedure for imposing liability stated in the ensuing sections. Any doubt upon their meaning is dispelled by a consideration of sec. 111 of Act No. 1243.

The appeal should be dismissed.

RICH J. In an action brought by the plaintiffs (appellants) to recover from the defendant (respondent) his proportion of the cost of constructing certain street improvements carried out by the appellants under Div. 10, Part XIX., of the *Local Government Act* 1928 judgment was given for the plaintiffs. On appeal to the Full Court of the Supreme Court of Victoria that judgment was reversed (1). The main question in all the Courts has been whether the Council complied with the provisions of sec. 579 of the Act and validly adopted the specifications for the proposed work. On the date fixed, 11th March 1929, the Council proceeded to consider the matter of the proposed work and the specifications, maps, plans, sections, elevations, estimate and scheme, and the liability of the owners

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interested in respect thereof (sec. 577). Certain owners attended the meeting and raised objections (sec. 578). Ultimately the following resolution was passed: "That the plans estimate and scheme of distribution of cost for the construction of Hassett Avenue, Alta Street, Maysia Street, Cooba Street, Catherine Street, Quantock Street, Griotte Street, Dorothea Street and Elphin Grove in one group be adopted without variation and that tenders be called for the work, provided that if the tenders are not materially lower than the estimate the matter will be reconsidered by the Public Works Committee with a view to the adoption of some other form of construction."

The first part of the resolution ending with the words "adopted without variation" is absolute and definite enough, but the latter part of the resolution provides in a certain event for the reconsideration of the matter with a view to the adoption of some other form of construction. The matter to be reconsidered is that mentioned in secs. 577, 578, 579—the proposed work and the specifications, estimate and scheme in which the respective liabilities of the frontagers appear. Read as a whole, the resolution is provisional and conditional. At best it is an adoption subject to a defeasance, and not a final and definite resolution to carry out the proposed work and adopt the estimate and scheme of distribution and so fix the liability of the owners interested. Reliance cannot be placed on the resolutions of the Council at the meeting of 15th April 1929. This meeting was not an adjournment of the previous meeting of 11th March as is required by secs. 578 and 579, and the work for which a tender was accepted was for portion only of the proposed work. In the circumstances the Council did not comply with the provisions of the statute, and apart from a valid adoption of the scheme the respondent is not bound or concluded or liable to pay his proportion of the cost of construction (secs. 580, 581).

The appeal should be dismissed.

STARKE J. This action was brought by the City of Camberwell against Joseph Woolf to recover the cost of forming and making good certain streets or roads within that City. It is based upon the

provisions of the *Local Government Act* 1915, secs. 526 *et seqq.*, consolidated in the Act of 1928, secs. 574 *et seqq.* The substantial defences to the action were that the City had not observed the conditions of the Act, and that Woolf was not a person liable under it.

Under the Act, in case any street or road formed or set out on private property is not formed or made good to the satisfaction of the Council of the Municipality, then the Council may form or make good the street or road and recover the cost of so doing from the owners of premises fronting, adjoining or abutting on such street or road as by themselves or their tenants have the right to use or commonly do use the same. The Council is required to prepare specifications, plans and an estimate of the cost of the works to be executed, and a scheme of distribution setting forth the names of the persons intended to be made liable, the land of which they are owners, and the amounts chargeable to them. The Council is also required to serve notices upon the persons intended to be made liable, setting forth that the specifications, plans and estimate are open for inspection and the estimated amount of each person's liability, and naming a day on which the Council will consider such specifications, plans and estimate. Upon the day named, or upon any day to which the consideration of the matter is adjourned, any person interested in or affected by the proposed work may appear before the Council and state his objections, and the Council then may add the name of any person to such scheme or make variations in it, giving notice to every person affected by such addition or variation before adopting the scheme, or, if it appears expedient to the Council so to do, may adopt the specifications, plans, estimate, scheme and other particulars. Upon adoption, every person on 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 the 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.

In the present case, a group of streets called the Hassett Avenue and group, and set out on private lands within the Municipality

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of Camberwell were not formed and made good to the satisfaction of the Council (see *Macgowan* v. *City of St. Kilda* (1)). So the Council prepared specifications and plans and an estimate of the works which it proposed to execute for the purpose of forming and making good the same, and notified the owners of premises intended to be made liable for the cost of executing the works, and intimated that the Council would consider the scheme on 11th March 1929. Among the persons whose names were included in the list of owners intended to be made liable was Joseph Woolf. A number of persons attended before the Council on the day appointed to consider the scheme, and objected to it, mainly on the ground of its estimated cost. Woolf also attended, but he departed before the Council dealt with the scheme. The other objectors were heard, and ultimately the Council passed the following resolution: "That the plans estimate and scheme of distribution of cost for the construction of Hassett Avenue, Alta Street, Maysia Street, Cooba Street, Catherine Street, Quantock Street, Griotte Street, Dorothea Street and Elphin Grove in one group be adopted without variation and that tenders be called for the work, provided that if the tenders are not materially lower than the estimate the matter will be reconsidered by the Public Works Committee with a view to the adoption of some other form of construction." On the part of Woolf it is said that this resolution is not an effective adoption of the scheme pursuant to the *Local Government Act*, because it is not determinate, fixed and final. The City in the first place contends that its adoption of the scheme is not a condition of its right to recover the moneys sued for. In my opinion, this contention is untenable; the Act only authorizes the Council to form and make good streets and roads and to recover the cost from owners, in the manner appearing in the Act, and it can only comply with the Act by first preparing and adopting a scheme and distributing the cost amongst the adjoining owners (*Moorabbin Shire* v. *Abbott* (2); *Sandringham Corporation* v. *Rayment* (3)). So the effectiveness of the Council's resolution as an adoption of the scheme must be considered.

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

(2) (1913) V.L.R. 337; 35 A.L.T. 31; (1914) 17 C.L.R. 549.

(3) (1928) 40 C.L.R. 510.

Adopt is not a technical word. Any corporate act of the Council taking up and approving the scheme will suffice. But I agree with the learned Judges of the Supreme Court that the act of adoption must be clear and precise, and, as suggested in argument, determinate, fixed and final. The present resolution, in itself, clearly, did not adopt the scheme: "the matter" (that is, the adoption of the scheme, not tenders for the work) was to be "reconsidered" if tenders for the work were "not materially lower than the estimate." The subsequent acts of the Council, however, raise some doubt in my mind. Early in April 1929, it called for tenders for the work; on 15th April, the tender of one Millar was accepted, and on the same day a contract was entered into between the Council and Millar for the execution of the work. The Council resolved to, and did, notify a representative of the objecting owners that it had accepted a tender for the work which it anticipated would reduce the cost per foot frontage by about 4s. or 5s. The Council, however, supplied the contractor with material and itself executed part of the works, such as concreting the footpaths, planting trees, &c. The actual cost of the whole works, including plans, supervision, &c., was ascertained, and on 3rd March 1930 the Council apportioned it amongst the owners of premises fronting, adjoining or abutting on the roads or streets constituting the Hassett group, and adopted this final distribution of cost. The intention of the Council to adopt its original scheme is, in substance, clear, and it did in fact carry out and execute the works provided for in that scheme, partly through its contractor, and partly itself. But does this intention, coupled with the acts mentioned, constitute an adoption of the scheme within the meaning of the Act? On consideration, I think it does not, because persons interested in or affected by the works were not afforded an opportunity of considering and formulating their objections (if any) to the lower estimate for the works brought about by the Council's resolving to execute part of the works itself and part by contract, the Council supplying the contractor with materials and labour. The Act itself gives persons interested in or affected by the proposed works a right of appearance and objection before any scheme is adopted, and the course pursued by the Council

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in the present instance deprived them of that right. Some stress was laid in argument upon the fact that the further consideration of the scheme was not formally adjourned at the meeting of 11th March 1929, but that, I think, would not have been of any real importance if the persons affected had been heard or been given an opportunity of being heard.

It is not necessary to consider the other defences raised by Woolf to the action, and I express no opinion upon them.

The result is that, in my judgment, the appeal should be dismissed.

EVATT J. In my opinion, the judgment of *Lowe* J. (1) is correct and it should be affirmed. I agree with the reasons stated in the opinion of my brother *Starke*.

MCTIERNAN J. The respondent was sued by the appellant Council in an action tried before *Macfarlan* J., in which it sought to recover under sec. 526 of the *Local Government Act* 1915 (now sec. 574 of the *Local Government Act* 1928), the amount which it claimed was chargeable to the respondent as the owner of premises abutting upon or adjoining two streets respectively on which work was executed by the Council in the intended exercise of its powers under Div. 10 of Part XIX. of the Act. The respondent disputed his liability on a number of grounds. These were overruled by the learned Judge, who held that the Council was entitled to recover the amount which was claimed from the appellant. On appeal from his Honor's decision the Full Court of Victoria confined the argument to the question whether the Council had adopted the specifications, maps, plans, section, elevation, estimate, scheme and other particulars pursuant to sec. 579 of the *Local Government Act* 1928. In view of the provisions of sec. 580 of that Act, the objection that there was no such adoption goes to the root of the appellant's claim. The Full Court, by a majority (*Cussen* A.C.J. and *Lowe* J., *Mann* J. dissenting), held that there was no adoption (2). As that decision was sufficient to determine the appeal, the Full Court did not hear argument on the other grounds

(1) (1932) V.L.R., at pp. 404, *et seqq.* (2) (1932) V.L.R. 399.

taken by Mr. *Hogan* on behalf of Mr. Woolf, and judgment was ordered to be entered for the defendant in the action. In my opinion that judgment should stand. I agree in the opinion of the majority of the Full Court of Victoria that an adoption under sec. 579 was not made by the Council. The appellant relied upon the amendment to the motion which was moved and carried at its meeting on 11th March 1929, as an adoption upon the completion of which the liability of the respondent to contribute to the works arose. The amendment and the motion upon which it was moved are contained in exhibit O. Alternatively it relies upon exhibit Q, which is a minute of the business done by the Council at its meeting on 15th April 1929, as the record of action on the part of the Council, by which, it is submitted, the inchoate adoption of 11th March was perfected.

I agree entirely with *Lowe* J., with whom *Cussen* A.C.J. concurred, in his construction of the amendment of 11th March. When the resolution in question was passed, it was quite uncertain, owing to the terms of the resolution itself, whether the work would be executed according to the plans which the Council was considering, or whether the sum which the Council was considering as an estimate was the estimated cost of the work upon which the liability of the owners should be based, or whether the amount of their liability would or would not equal the sums set opposite their names respectively in the scheme of distribution. Secs. 580 and 581 of the *Local Government Act* 1928, in my opinion, predicate that, upon the passage of the resolution of a council for the adoption of the plans, specifications and the other things mentioned in sec. 579 (1) (*a*), the amounts in which the "owners" become liable to contribute are thereby determined. Upon the passage of the resolution in question in this case, leaving aside the liability to adjustment under sec. 584 (3), no "owner" knew what was the sum in which he should be considered as having admitted liability or which he became liable forthwith to pay. The amendment of 11th March was of a temporizing rather than a definitive character.

There are two answers to the contention that the defects in the resolution of 11th March 1929, were cured by the resolution of

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15th April, accepting R. T. Millar's tender: (1) The tender was for a part of the work only, and (2) "the consideration of the matter" contained in the resolution of 11th March was not adjourned to 15th April (sec. 578).

The Council has failed to prove an adoption within sec. 580, and its action should fail (*Sandringham Corporation* v. *Rayment* (1); see also *Dunn* v. *Shire of Braybrook* (2)).

The appeal should be dismissed and the judgment of the Full Court affirmed.

Appeal dismissed with costs.

Solicitors for the appellant, *Percy J. Russell & Kennedy.*
Solicitor for the respondent, *J. Woolf.*

H. D. W.

(1) (1928) 40 C.L.R. 510.

(2) (1928) V.L.R. 454.