[HIGH COURT OF AUSTRALIA.]

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

AND

WALDMANN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1945.

MELBOURNE, *Oct.* 22, 23;

SYDNEY, *Dec.* 3.

Latham C.J., Starke and Dixon JJ.

Local Government—Road-making—Liability of frontagers—Road formed or set out on Crown land "in such manner as to form means of . . . drainage from property adjacent"—Local Government Act 1928 (*Vic.*) (*No.* 3720), *s.* 574 (1) (*b*).*

A road was formed and set out on land of the Crown. It contained table drains which carried away surface water flowing naturally from adjacent land, but it contained no provision for the disposal of other drainage from adjacent land. The road did not form means of back access to any land fronting or abutting upon it.

Held, by *Starke* and *Dixon* JJ. (*Latham* C.J. dissenting) that, as it was not adapted to do anything more in reference to drainage coming from the land than carry away surface water which came upon the land following the natural contour lines, the road did not, within the meaning of s. 574 (1) (*b*) of the *Local Government Act* 1928 (Vic.), "form means of . . . drainage from property adjacent."

Decision of the Supreme Court of Victoria (*Lowe* J.) by majority affirmed on different grounds.

* Section 574 (1) of the *Local Government Act* 1928 (See, now, *Local Government Act* 1946 (Vic.), ss. 574, 575) provided: "In case—(*a*) Any street road lane yard or passage or other premises formed or set out on private property, or (*b*) Any street road lane or passage formed or set out on land of the Crown or of any public body in such manner as to form means of back access to or drainage from property adjacent" thereto, "or any part or parts of the same respectively is or are not formed . . . or otherwise made good to the satisfaction of the council of the municipality, such council may form . . . or otherwise make good the same or any part or parts thereof to the satisfaction of the council and may either before or after so doing recover the cost of so doing from the owners of the premises fronting adjoining or abutting upon such parts thereof as may require to be formed . . . or made good."

APPEAL from the Supreme Court of Victoria.

In an action in the Supreme Court of Victoria the municipality of the city of Camberwell sought to recover from Franz Waldmann, under s. 574 (1) (*b*) of the *Local Government Act* 1928 (Vic.), a share of the cost of making good a road which had been formed and set out on land of the Crown and upon which the defendant's premises fronted. The road, which is about a mile in length, did not form means of back access to any premises adjoining or abutting upon it, nor did it form means of drainage from the premises in respect of which the defendant was assessed.

Lowe J. held that s. 574 (1) (*b*) required the plaintiff to establish that the road formed means of back access to or drainage from " all premises which front adjoin or abut along the entire length of the road or (as the case may be) of the part comprised in the scheme," and, as this had not been established, he gave judgment for the defendant.

From this decision the plaintiff appealed to the High Court.

Coppel K.C. (with him *D. M. Campbell*), for the appellant. The original provision from which s. 574 (1) (*b*) comes was a health measure directed to cleaning up back alleys in the city. Originally there was no reference to land of the Crown, only to private property: See Act No. 310, s. 47. The reference to " back access " was then appropriate, when the provision related only to lanes to which the public had no right of access. The section first appears substantially in the form of the 1928 Act in s. 131 of *The Public Health Amendment Statute* 1883 (No. 782), on which *Sandilands* v. *Wright* (1) and *Malvern Local Board of Health* v. *Lorimer* (2) were decided. That section contained the expression " in such manner as to afford means of back access." The section first appears in local government legislation as s. 111 of the *Local Government Act* 1891: The word " back " before " access " was omitted, and " form " was substituted for " afford." That Act enacted for the first time the machinery for the road-making scheme subsequently embodied in ss. 574 *et seq.* of the *Local Government Act* 1928. This scheme was re-enacted in ss. 526 *et seq.* of the consolidating *Local Government Act* 1903 (No. 1893), in which the expression " back access " was restored —why, it is not easy to see; it served no obvious purpose. It is important to observe that the critical word in s. 574 (1) (*b*) is " adjacent." The persons upon whom liability is imposed are owners of premises " fronting adjoining or abutting " on the road, but the test of the existence of a liability is whether the road forms means

(1) (1888) 14 V.L.R. 563. (2) (1889) 15 V.L.R. 25: See p. 28.

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of back access to or drainage from property *adjacent*, which is not the same as " adjoining " or " abutting " ; it means nearby, but not necessarily contiguous (*City of Wellington* v. *Borough of Lower Hutt* (1) ; *New Plymouth Borough* v. *Taranaki Electric-Power Board* (2) ; *Cave* v. *Horsell* (3) ; *R.* v. *Strand Board of Works* (4) ; *Lightbound* v. *Higher Bebington Local Board* (5)). *Lowe* J. appears to have treated the two expressions as synonymous : This is not warranted ; there is no reason why " adjacent " should be read down by relation to the subsequent words relating to liability. [He referred to ss. 576, 579 and 580 of the Act.] This is important because it shows that the construction put on the section by *Lowe* J. offers no real solution of the difficulties inherent in the section. The words are not capable of any construction that solves all the difficulties. The court should give the words their literal meaning. For this purpose the section must now be treated as part of the law of local government relating to road-making. If that gives it a wider meaning than it would have had in its former context in the law relating to public health, it must, nevertheless, be given the wider meaning in its new context. The section does not say " all property adjacent." If the council had to prove that the road formed means of drainage from *all* property *adjacent*, it would have even a more difficult task than *Lowe* J. contemplated ; indeed, it is difficult to conceive that the section could ever be put into operation. On a literal reading of the section it would be a sufficient compliance with the condition if the road formed means of drainage from *any* adjacent property : The section should be so read. Although his decision did not turn on the point, *Lowe* J. accepted the view expressed by *Mann* C.J. in *Trotter* v. *City of Brunswick* (6) of what constitutes " means of . . . drainage." This view puts undue stress on " means " in relation to drainage, treating it as something artificial. It is sufficient if the road takes away any drainage from some adjacent property ; whether it is natural or artificial, it is " means of . . . drainage."

Spicer (with him *Adam*), for the respondent. The Act, looked at as a whole, indicates a general intention to impose a burden on adjoining owners only in circumstances in which they get a particular advantage from the work done. Section 574 (1) (*b*) should be regarded as having relation only to roads conferring special advantages on the adjoining owners ; that is to say, main thoroughfares, which are

(1) (1904) A.C. 773, at p. 775.
(2) (1933) A.C. 680, at p. 682.
(3) (1912) 3 K.B. 533, at p. 544.
(4) (1863) 4 B. & S. 526, at p. 549 [122 E.R. 556, at p. 565].
(5) (1885) 14 Q.B.D. 849 ; (1885) 16 Q.B.D. 577.
(6) (1937) Unreported.

for the benefit of the public, should be excluded. The expression " set out . . . in such manner " suggests that conscious purpose is the criterion (though on the facts of the present case, even if result is looked to, the appellant cannot succeed). This view is supported by the reference to back access. It is *back* access that is still a critical factor. This suggests that if a road is set out as a public highway, not to serve a particular purpose in relation to adjacent land, it is not so " set out . . . as to form means " &c. That is to say, to be within the section as affording back access, it must appear that the road is designed for that purpose. [He referred to *Moorabbin Shire* v. *Abbott* (1).] If that is the true view of the section in relation to back access, it is also the true view in relation to drainage : the road must be designed to take drainage from adjacent land ; the mere accident that, because of the contour of the land, surface water flows naturally on to the road is not sufficient. That is the view taken by *Mann* C.J. in *Trotter* v. *City of Brunswick* (2) and accepted by *Lowe* J. It does no violence to the words of the section ; on the contrary, it gives them their natural meaning. In this view of the section it presents none of the difficulties which arise out of the other constructions which have been suggested.

Coppel K.C. in reply.

Cur. adv. vult.

Dec. 3.

The following written judgments were delivered :—

LATHAM C.J. The *Local Government Act* 1928 (Vic.), s. 574 (1) is as follows :—

" In case—

(*a*) Any street road lane yard or passage or other premises formed or set out on private property, or

(*b*) Any street road lane or passage formed or set out on land of the Crown or of any public body in such manner as to form means of back access to or drainage from property adjacent to such street road lane or passage,

whether the same respectively is dedicated to the public as a highway or not, or any part or parts of the same respectively is or are not formed levelled drained paved flagged macadamized or otherwise made good to the satisfaction of the council of the municipality, such council may form level drain pave flag macadamize or otherwise make good the same or any part or parts thereof to the satisfaction of the council and may either before or after so doing recover the cost of

(1) (1914) 17 C.L.R. 549, at p. 560. (2) (1937) Unreported.

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so doing from the owners of the premises fronting adjoining or abutting upon such parts thereof as may require to be formed levelled drained paved flagged macadamized or made good in manner hereinafter appearing."

The corporation of the City of Camberwell sued the respondent for a share of the cost of forming, levelling, draining and macadamizing Greythorn Road, which is a road formed and set out on Crown land which had not been formed &c. to the satisfaction of the council. The council relied upon s. 574. The procedural requirements of the Act with respect to preparation of specifications, inspection and allotment of liabilities were complied with (ss. 575 *et seq.*).

Greythorn Road does not afford means of back access to any property at all. All the allotments which abut upon it have frontages only to it. When the road was formed the middle of the road was raised so that table drains were made on each side. Water runs on to the road off some of the land which fronts upon the road and in that sense the road forms means of drainage from that land. The respondent's land, however, slopes away from the road and does not drain on to the road. Thus, in the case of the respondent's land, the road does not form either means of back access to or drainage from the land. It is claimed that for this reason he is not liable to contribute to the cost of making the road.

It was held by the learned trial judge (*Lowe* J.) that s. 574 was not applicable to Greythorn Road at all because it was not the case that the road formed means of either back access to or drainage from *all* the property along the whole length of the road in respect of which the council claimed a contribution from the respondent. On this view no owner would be liable to contribute to the cost of making the road. The learned Judge pointed out that a contrary view would mean that whenever any one allotment of land in a road set out or formed on Crown land was drained by the road the owners of all the other allotments fronting, abutting or adjoining upon the road would, by reason only of the fact that one allotment was drained by the road, be liable to contribute, even though none of them were given either back access or drainage by means of the road. Thus (where the road provided no back access) the section would apply in all cases of roads formed or set out on Crown land (and not already formed to the satisfaction of the council—s. 585 (2)) unless the road for its entire length ran along the ridge of a hill or upon an embankment. The result would be that practically all roads set out on Crown land would (subject to s. 585 (2)) fall within the provisions of s. 574 so as to enable the council to make them at the expense of private persons. Such a view would really destroy, from a practical

point of view, the distinction drawn in s. 574 itself between streets &c. set out on private land and streets set out on Crown land.

This unreasonable result led the learned Judge to the conclusion that the words "property adjacent to such street" &c. in the concluding phrase of par. *b* should be construed as meaning *all* properties so adjacent and not *any* property so adjacent. It was contended by the appellant that upon this view a consequence would follow which might well be regarded as being quite as unreasonable as that which his Honour felt obliged to repudiate. That consequence is that the application of the section would be excluded if it was possible to find any single allotment "adjacent" to the road for which the road did not form means of back access or drainage. In that case *all* owners would escape liability to contribute to the cost of making the road, and that cost, if the work were to be done at all, would therefore be thrown upon the general municipal fund.

Thus either view results in consequences which may be regarded as unreasonable.

If the words are clear it is wrong to consider any consequences of their application. That aspect of the matter is the responsibility of the legislature. It may be said, however, that Parliament was dealing with a problem on lines which may, in general, work out fairly enough, but which in particular cases may involve a certain amount of hardship, the benefit received not being commensurate with the liability imposed. In some cases where streets are formed at the expense of landowners, particular landowners may receive no practical benefit at all. A landowner who has means of front access may not be interested at all in any back access to his property, but there is no doubt that if the other conditions of the section are satisfied he may be made liable. It may be that in the present case, for example, no particular injustice will be suffered as between the various owners fronting Greythorn Road if they are all required to join in paying for the making of the road in front of their premises. The making of the road, which was in very bad repair, will, one can readily suppose, be some benefit to all of them.

It may well be the case that s. 574 was in its original form intended to deal only with back lanes and passages, and to do that from a sanitary rather than from a road-making point of view. But the Court must take the words in the Act as it now finds them.

The conditions of application of the section in the case of roads &c. formed or set out on Crown land are (1) that the road is formed or set out so as to form means of (*a*) back access to, or (*b*) drainage from property adjacent to it; (2) that the road (or part thereof) made or

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intended to be made is not formed &c. to the satisfaction of the Council.

A road is " set out " when it is indicated on the ground, e.g. by survey pegs (*Brunswick Corporation* v. *Baker* (1)). " Setting out " is less than " forming." The section plainly assumes that a road may be so " set out " as to form means of back access or drainage to property. Thus if no work at all had been done in the making of the road, and no artificial means of drainage had been provided to take water off any land, but the road had simply been " set out," the section could be applied by the Council.

The section refers to the " manner " of forming or setting out. There is no reference to purpose, and I can see no reason for an inquiry into the purpose of the authority which, possibly many years ago, formed or set out the road. Greythorn Road was shown on a Crown survey in the year 1851 and was a public highway. When all the property in the neighbourhood consisted of open paddocks the purpose of the Crown or other authority which " set out " the road could at best be only a matter of speculation in relation to service by way of back access or drainage to the allotments which would become vested in separate owners as the land was subdivided and sold. In my opinion, if a road which is merely indicated on the land, or which is formed thereon, in fact forms means of back access to property or in fact receives water draining from property, it should be held that the road is set out or formed so as to form means of back access to or drainage from that property, irrespective of any consideration of the purpose of the authority which either set out or formed the road.

The property which is relevant for the purposes of par. *b* of s. 574 is property adjacent to the road &c. Those who may be made liable are, according to s. 574, not the owners of " adjacent " property, but the owners of premises fronting, adjoining or abutting, not upon the whole road, but upon " such parts thereof as may require to be formed levelled drained " &c.

This provision, however, is modified by s. 576. Sub-section 1 of that section provides that only such of the owners of premises fronting, adjoining or abutting on any road &c. as by themselves or their tenants have the right to use or commonly do use the same shall be liable to contribute to the cost of works executed under the powers contained in Div. 10 of Part XIX. of the Act—which includes s. 574. Sub-section 2 of s. 576 provides that certain owners of premises which do not actually front, adjoin or abut upon the road shall be liable to contribute. Such owners will be liable to contribute if they

(1) (1916) 21 C.L.R. 407.

by themselves or their tenants have the right of using or commonly do use the road as a means of access to or drainage from the premises, and the same is in the opinion of the Council for their advantage or benefit. It will be observed that the condition of liability of owners not fronting &c. upon the road is not that the road affords means of *back* access to or drainage from the premises, but that it forms means of *access* to or drainage from the premises.

The property which it is relevant to consider for the purposes of par. *b* of s. 574 is "property adjacent to" the road. But the persons who may be made liable according to s. 574 are the owners of premises fronting or adjoining or abutting not upon the whole road, but upon such parts of it as may require to be formed &c. The premises of an owner need not front, adjoin or abut upon the road or even be "adjacent" in order to make him liable under s. 576 (2) and, further, the road need not provide back access to his premises, but only access.

Thus the conditions set forth in pars. *a* and *b* of s. 574 do not correspond with the conditions which determine the liability of owners to make a contribution towards the cost of making roads &c. The provisions cannot be reduced to a neat system so as to establish a precise relation between the conditions which entitle the Council to act, namely (in the case of *b*) back access to or drainage from property adjacent (s. 574 (*b*)), with the conditions of liability and the benefits mentioned in s. 576 (1) and (2) in respect of the two classes of owners there specified.

The interpretation of the words "property adjacent" as meaning *all* the property adjacent in my opinion creates as many difficulties as it solves. "Adjacent" is a vague word. It may be more extensive in meaning than contiguous: "it includes places close to or near" (*Mayor of Wellington* v. *Mayor of Lower Hutt* (1)). If the Council cannot execute works under par. *b* unless the road forms means of back access to or drainage from all the property which can be said to be adjacent, then the section could not be applied when any property which could be said to be adjacent did not get back access from or drainage to the road, even though all the land abutting on the road did get such access or drainage. The section, therefore, would be applicable only in a very few cases indeed. It is not difficult to apply the section if it is understood as meaning that where there is some property adjacent to the road to which the road forms back access or drainage, the section may be applied. But, on the other view, the fact that any piece of land, though very close, did not receive back access to or drainage from the road would prevent the

(1) (1904) A.C. 773, at p. 775.

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Council utilizing the section at all. It would be necessary for the Council first to make a complete list of all lands " adjacent " to the road, and then to consider whether all of those lands had back access from or drainage to the road. The making of such a list would present many difficulties.

In my opinion if a road formed or set out on Crown land forms means of back access to or drainage from *any* property adjacent to it, it is properly described as forming a means of such access or drainage from property adjacent to it. This appears to me to be the natural meaning of the words of the section. The contrary view is really based upon a consideration of consequences. But upon either view there are consequences which may be regarded as unreasonable. Therefore there is no reason for not giving their natural meaning to the words in question.

The appeal should be allowed and judgment entered for the plaintiff for £834 11s. 11d.

STARKE J. Appeal from a judgment of the Supreme Court of Victoria which dismissed an action brought by the appellant against the respondent for part of the cost of making good Greythorn Road pursuant to the provisions of the *Local Government Act* 1928 (Vic.), Part XIX., Div. 10.

The action is based upon the provisions of s. 574 of the Act, which so far as material, provide :—

" In case—

(*a*) Any street road lane yard or passage or other premises formed or set out on private property, or

(*b*) Any street road lane or passage formed or set out on land of the Crown or of any public body in such manner as to form means of back access to or drainage from property adjacent " thereto,

" whether the same respectively is dedicated to the public as a highway or not, or any part or parts of the same respectively is or are not formed levelled drained paved flagged macadamized or otherwise made good to the satisfaction of the council of the municipality, such council may form level drain pave flag macadamize or otherwise make good the same or any part or parts thereof to the satisfaction of the council and may . . . recover the cost of so doing from the owners of the premises fronting adjoining or abutting upon such parts thereof as may require to be formed levelled drained paved flagged macadamized or made good."

The history of the section is stated to some extent in the judgment of this Court in *Brunswick Corporation* v. *Baker* (1), and an application

(1) (1916) 21 C.L.R. 407, at pp. 411-414.

of a corresponding provision in *The Public Health Amendment Statute* 1883 may be found in *Local Board of Health of South Melbourne* v. *Beavis* (1).

It is not at all clear why councils should have authority to make good streets roads lanes &c. formed or set out on private property not formed or made good to their satisfaction and be limited to making good streets, roads, lanes &c. formed or set out on land of the Crown or of any public body in such manner as to form means of back access to or drainage from property adjacent to such streets, roads, lanes &c. It was suggested that the section originally dealt with small lanes and alleyways giving back access to premises in the interests of public health. But effect must be given to the language of the section as it now stands and in the context in which it is found. As *Lowe* J. said in the Supreme Court, " The mere fact of the road being set out on land of the Crown is not enough." And he also said that it was a " condition of liability in such case that it should form means of either (*a*) back access to, or (*b*) drainage from all premises which front adjoin or abut along the entire length of the road or of the part the Council's scheme covers."

But I am unable to accept this view. The meaning assigned to the word property, as the learned judge himself said, requires that every road &c. to come within s. 574 (*b*) must in itself be capable of affording back access to or drainage from all premises lying adjacent to it, and that would happen generally, if not always, only when the road passes along the back of the premises which lie adjacent. But property adjacent to a street or road &c. formed or set out on land of the Crown is not necessarily fronting, adjoining or abutting upon it, though the street or road may be so formed or set out as to form means of back access to or drainage from the property, for instance, by means of laneways or rights of way running off the street or road. The *Beavis Case* (1) illustrates such a lay-out, though the lanes and rights of way running into the main streets in that case were formed and set out on land of the Crown. Property in s. 574 (*b*) refers to any property adjacent to a street, road &c. formed or set out on land of the Crown or of any public body. The section, I should add, confers an authority upon a council, to be used at its discretion, but imposes no duty upon a council to make good a street, road &c. not formed &c. to its satisfaction.

The critical question as it appears to me is whether Greythorn Road was formed or set out in such a manner as to form means of back access to or drainage from property adjacent to the road. That depends upon the form of construction adopted and the connection,

(1) (1886) 12 V.L.R. 63.

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if any, between the adjacent property and the road. Admittedly Greythorn Road was formed and set out on land of the Crown. It was about a mile in length and connected at right angles two other public roads known as Doncaster and Belmore Roads. Admittedly also, Greythorn Road did not form means of back access to any premises fronting or abutting upon it nor did it form means of drainage from the premises in respect of which part of the costs of making good the road to the satisfaction of the Council were charged against the respondent. At the time the road was formed and set out, the land on either side appears to have been open paddocks and even now the neighbourhood is not thickly settled. The road when formed and set out was crowned up in the centre with water tables on either side of the road. The natural fall of the adjacent land was towards the road, but not necessarily at right angles, and surface drainage followed the contour lines and the fall of the land towards the road where it was intercepted and carried off by the table drains. The section contemplates, I think, some drainage connection or some provision or means of that connection between any adjacent properties and the road. The table drain in Greythorn Road protected the road but there was no drainage connection, for instance, by means of drains or other means or any provision for such connection between any adjacent properties and the road. Rain and surface water followed the contour lines of the surrounding lands and thus found its way into the table drain.

In short, Greythorn Road was not formed in the manner necessary for the operation of s. 574.

For these reasons this appeal should be dismissed.

DIXON J. The meaning and operation which the appellant municipality seeks to place upon par. *b* of s. 574 (1) of the *Local Government Act* 1928 (Vic.) appeared to me, when I heard it, as it appeared to *Lowe* J., to be incredible. No doubt a literal application of the full content of each word of that paragraph can produce a construction wide enough to carry the meaning. But all who are familiar with the history of the distinction between the responsibility of the frontagers for ways over private land and that of the local government bodies and, later, the Country Roads Board for the highways reserved by the Crown, and who have studied the growth of the legislation, cannot but feel that no such result was ever in the contemplation of the legislature.

Starke J. places upon the provision what appears to me to be a sensible construction which explains its purpose. To " form means of . . . drainage from property " the street, road, lane or passage

on land of the Crown must be so formed or set out as to enable the occupier of the land to discharge his drainage. It is not enough that it carries away water which, owing to the natural declivity of the land, always flowed from it over the land of the Crown upon which the road is formed or set out. The road must serve the upper land as a new means of discharging its drainage. If it does no more than intercept the water naturally flowing away from the upper land, it serves the lower land by collecting and carrying away the water: it does not provide a service to the upper land; it does not give it a means of drainage within the meaning of the paragraph.

The view is substantially that adopted by *Mann* C.J. in the unreported case referred to by *Lowe* J. who said he would follow it. *Mann* C.J., however, placed more stress on purpose. It commends itself to *Starke* J. and I am prepared to accept it. I certainly am not prepared, at this late date, to give to the section an interpretation and application which would have the remarkable and hitherto undiscovered consequence of imposing upon the greater number of frontagers of the main streets and highways of the State a general liability to pay once for the cost of draining and paving them to the satisfaction of the councils of the municipalities through which they pass. The interpretation adopted by *Starke* J. confines the operation of the paragraph to special and exceptional cases, as on the form and nature of the provision it might be supposed was intended. Its practical operation would include cases where a reduced level of the roadway made it possible to discharge surface or concentrated water into its open channels or closed drains or upon its water tables; where agricultural drains were placed under part of the road which took away water from the neighbouring land; where the formation or construction of the road made it lawfully possible to discharge drains which, otherwise, had no outlet in that direction, and where the purpose of the road &c. included the providing of artificial facilities for directly receiving and taking away domestic or surface drainage.

As appears from the transcript, the road did no more than carry off drainage naturally discharged upon its site and, if it be material, drainage at that consisting of surface water.

I think that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Russell, Kennedy & Cook.*

Solicitors for the respondent, *Mullett & Langford.*

E. F. H.