and to claim the full amount. This I regard as being in strict accordance with the law.

H. C. OF A. 1916.

THE CARTELA v. THE INVERNESS-SHIRE.

Appeal allowed. Order appealed from discharged. Judgment for plaintiffs for £175 with costs of action.

Solicitors for the appellants, *Perkins & Dear.*

Solicitors for the respondent, *Ewing, Hodgman & Seagar.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF BRUNSWICK . COMPLAINANTS, } APPELLANTS;

AND

BAKER . . . . . DEFENDANT, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1916.

MELBOURNE, *June* 6, 7, 8, 9.

Barton, Isaacs and Rich JJ.

Local Government—Streets, formation of—Contribution to cost—Street set out on private property—Dedication to public—Public highway—Setting out of street—Distribution of cost, scheme of—Local Government Act 1915 (*Vict.*) (*No.* 2686), *secs.* 526, 527, 532, 537.

Sec. 526 (1) of the *Local Government Act* 1915 (Vict.) provides that "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

H. C. OF A. 1916.

BRUNSWICK CORPORATION v. BAKER.

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 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."

Held, that the words "dedicated to the public as a highway" in that sub-section include the case of a street the dedication of which has been accepted by the public so that the street has become a public highway.

Spear v. *Mayor &c. of Williamstown*, (1916) V.L.R., 96; 37 A.L.T., 170, overruled.

Held also, that a street is "set out" within the meaning of sec. 526 if it is indicated on the ground, and whether it is so indicated is a question of fact.

Metropolitan Bank Ltd. v. *Mayor &c. of Camberwell*, (1909) V.L.R., 82; 30 A.L.T., 151, approved.

Held further, that a municipal council, for the purpose of distributing the cost of constructing a street under the power conferred by sec. 526, may treat the street as divided into two equal parts by a line running along its entire length, and may apportion the cost of the work done on one side of the line among the owners of the premises fronting the street on that side.

Decision of the Supreme Court of Victoria reversed.

APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions at Brunswick on 10th March 1916 a complaint was heard whereby the Mayor, Councillors and Citizens of the City of Brunswick sought to recover from Ada Merinda Baker the sum of £16 12s. 2d., being a portion of the cost of forming, paving, levelling, draining and making good a private street known as Centennial Avenue.

To anyone looking at the ground before the work in question was done, Centennial Avenue, which ran east and west, would have appeared to be a street 50 feet wide bounded on the north by the fences of the allotments on that side and on the south by the fences of the allotments on that side. As to a strip of the street one foot in width along the north side, it was a question

in dispute at the hearing whether it had not been reserved by the original owner when he subdivided and sold the block of land on which the street was laid out and of which it formed the northern boundary, or whether that strip had been included in the street intended by him to be dedicated to the public. It was admitted by the parties that Centennial Avenue whether it was 49 feet or 50 feet wide, and whether it included the one foot reserve or not, became a public highway after 1st January 1910 and before 18th August 1913. On the latter date the Council of Brunswick resolved to construct Centennial Avenue and Fleming Street, which ran southwards from the west end of Centennial Avenue. Estimates were accordingly prepared of the work to be done and the cost of it, dividing the work and the cost into four portions, namely, the north and south halves of Centennial Avenue and the east and west halves of Fleming Street. Three schemes of distribution of the cost among the adjoining owners were also prepared, one for the work required to be done on the south side of Centennial Avenue and the east side of Fleming Street, another for that on the north side of Centennial Avenue and the third for that on the west side of Fleming Street. The defendant was the owner of land on the northern side of Centennial Avenue, and her name appeared in the scheme of distribution for the cost of the work on the north side of that street.

Among the defences taken were that Centennial Avenue, or at any rate the foot reserve, was a public highway; that neither Centennial Avenue nor the foot reserve was formed or set out on private property or at all; that the defendant's premises did not abut on Centennial Avenue and that she had not the right to use and did not commonly use it; and that the statutory requirements of the *Local Government Act* had not been complied with in respect of the preparation as regards the north side of Centennial Avenue of the estimate of costs and scheme of distribution.

The Court of Petty Sessions found the following facts:—That Centennial Avenue was a street formed or set out on private property; that the defendant was the owner of property which abutted on Centennial Avenue; that the defendant commonly used Centennial Avenue as a means of access to and drainage from her

H. C. OF A. 1916.

BRUNSWICK CORPORATION v. BAKER.

premises; that the Council had complied with the provisions of the *Local Government Act*; and that the Council had by no act of its own or authorized by it taken over the actual care and management of Centennial Avenue. The Court, however, in view of the decision of the Supreme Court in *Spear* v. *Mayor &c. of Williamstown* (1), dismissed the complaint.

An application by the complainants for an order *nisi* to review that decision having been refused by *Hodges* J. on the authority of the same case, they applied to the High Court for special leave to appeal from his decision, and special leave was granted, notice being directed to be given to the defendant.

The appeal now came on for hearing.

Other facts are stated in the judgment of the Court hereunder.

The complainants now, by special leave, appealed to the High Court.

Sir William Irvine K.C. and *Gregory*, for the appellants.

Starke (with him *Burgess*), for the respondent.

During argument reference was made to *Turner* v. *Walsh* (2); *Malvern Local Board of Health* v. *Lorimer* (3); *Kew Local Board of Health* v. *Whidycombe* (4); *Robertson* v. *Bristol Corporation* (5); *Halsbury's Laws of England*, vol. XVI., p. 60; *Mile End Vestry* v. *Whitechapel Union* (6); *Wakefield Urban Sanitary Authority* v. *Mander* (7); *Clacton Local Board* v. *Young & Sons* (8); *Derby Corporation* v. *Grudgings* (9); *Moorabbin Shire* v. *Abbott* (10); *Wake* v. *Mayor &c. of Sheffield* (11); *Metropolitan Bank Ltd.* v. *Camberwell Corporation* (12); *Goddard on Easements*, 7th ed., pp. 116, 117; *Walthamstow Local Board* v. *Staines* (13); *Rowley* v. *Tottenham Urban District Council* (14); *Folkestone Corporation* v. *Brockman* (15).

Cur. adv. vult.

June 9. The judgment of the COURT, which was read by ISAACS J., was as follows:—

(1) (1916) V.L.R., 96; 37 A.L.T., 170.
(2) 6 App. Cas., 636, at p. 639.
(3) 15 V.L.R., 25; 10 A.L.T., 246.
(4) 12 V.L.R., 347.
(5) (1900) 2 Q.B., 198.
(6) 1 Q.B.D., 680.
(7) 5 C.P.D., 248.
(8) (1895) 1 Q.B., 395.
(9) (1894) 2 Q.B., 496.
(10) 17 C.L.R., 549.
(11) 12 Q.B.D., 142.
(12) (1909) V.L.R., 21, 82; 30 A.L.T., 138, 151.
(13) (1891) 2 Ch., 606.
(14) (1914) A.C., 95; (1912) 2 Ch., 633.
(15) (1914) A.C., 338.

The first question we have to determine is whether the case of *Spear* v. *Mayor &c. of Williamstown* (1) was correctly decided. In that case it was held that the words " dedicated to the public as a highway " in sec. 526 of the *Local Government Act* 1903 referred only to the owner's " dedication " not yet accepted by the public so as to make the place a public highway. The *Local Government Act* 1915 is a consolidation Act, being a re-enactment in combined form of the Act of 1903 and several other Acts set out in the First Schedule. Its meaning must be ascertained by its own words, and its own arrangement: *Williams* v. *Permanent Trustee Co. of New South Wales* (2). If its language is clear, it speaks for itself. If the meaning of any word is ambiguous the history of the Act may be considered, but, once having ascertained the true meaning of the word, the construction of the Act is determined by a consideration of its own provisions: *Robinson* v. *Canadian Pacific Railway Co.* (3).

Having regard to the collocation in which the phrase " dedicated to the public as a highway " is found, and to the sense in which the same words are used in other parts of the Act, as contrasted with the meaning frequently attached to the word " dedicated," it cannot be disputed that there is some ambiguity. The question is not what does the phrase strictly mean apart from any context, but what does it mean in the place where it is found. The history of the legislation has importance for this purpose. The expression first found its way into this department of local authority in 1891, when Parliament passed Act No. 1243. Prior to that Statute there was in force the general *Local Government Act* 1890 (No. 1112), by which the municipal council had by sec. 405 the care and management of all public highways, the expense being corporate and defrayed out of the general municipal fund. Side by side with that, there stood a special provision in the *Health Act* 1890, which by secs. 234 and 235 declared that in respect of a street set out on private property, or set out on Crown lands or on lands belonging to public bodies, in a certain way, the adjoining owners should be liable, either directly or indirectly, to make good the street.

(1) (1916) V.L.R., 96; 37 A.L.T., 170. (2) (1906) A.C., 249, at p. 253.
(3) (1892) A.C., 487.

H. C. OF A. 1916.

BRUNSWICK CORPORATION v. BAKER.

Barton J. Isaacs J. Rich J.

But there are three points which it is highly important to observe. First, the Health Acts up to and including that of 1890 were silent as to whether those provisions applied where the street had become a public highway. Next, under the health legislation up to and including 1890 the primary power of the local authority was to notify the adjoining owners to make good the street as directed by the authority, non-compliance resulting in one of two consequences at the option of the authority—namely, a penalty not exceeding £10 a day, or the execution of the works by the local authority at the cost of the owners. The third point is that up to 25th November 1889 the local authority as constituted was styled the " Local Board of Health " under a system quite distinct from the ordinary municipal organization. The local boards of health consisted, it is true, of the members of the municipal council (sec. 15 of Act No. 782), but the charters of the two authorities were distinct, as were their jurisdictions and funds. On 25th November 1889 was passed the Act No. 1044, by which the local boards of health as then constituted were abolished (sec. 6), and their duties and powers and liabilities were vested in and imposed on the municipal councils in the name and on behalf of the municipalities. By sec. 56 the *Local Government Act* in force and any Act amending the same were incorporated in the Act No. 1044 so far as related to any forms of procedure. But the municipal councils acting under the Health Acts were still under the control of the central health authority now called the " Board of Public Health." See, for instance, secs. 28, 40 and 41. Though some simplification had been made in the constitution of the health authorities, the system was still distinct from that under the Local Government Acts, and the system included the jurisdiction over streets set out on private property.

Before referring to the next enactment it is important to regard some decisions of the Supreme Court. In 1886, in *Kew Local Board of Health* v. *Whidycombe* (1), the Full Court of Victoria expressed the opinion—*obiter*, it is true, but a very clear and decided opinion—that a street " formed and set out on private property " remained so, and, therefore, remained subject to the provisions of

(1) 12 V.L.R., 347, at p. 353.

the *Health Act*, notwithstanding it became a public street, and the Court said :—" It does not cease to be private property, merely because it has been dedicated to the use of the public by the owner. It is still a road 'set out on private property,' if the legal estate remains in the private owner, even though the public have acquired the right of using the road, and the right of passage over it, so as to make it a highway." Evidently the phrase " dedicated to the use of the public by the owner " was, as is seen by the words which follow, used in the sense of a complete and final act of dedication made irrevocable by acceptance. But the opinion was so far a dictum only.

In March 1889, in *Malvern Local Board of Health* v. *Lorimer* (1), the Full Court formally decided that the opinion expressed in *Kew Local Board of Health* v. *Whidycombe* (2) was the law. In the course of the judgment the Court dealt with an argument to the contrary. The argument was that public streets were dealt with by the *Local Government Act*, and that the streets subject to the *Health Act* were private streets only. The Court rejected that argument notwithstanding the silence of the health provisions on the point—the reason given being that, though the personnel of the local boards of health and that of the municipal councils were identical, their purposes, powers, obligations, funds and means of action were different, that this separateness would be presumedly observed, and it was not as if the whole legislation were one. The Act No. 1044, passed a few months afterwards, while making the councils the local health authorities, preserved most of the other distinctive features relied on by the Court.

In 1890 the Consolidation Acts simply repeated in combined form the various existing enactments keeping the local government system distinct from the health system. In 1891, however, a marked departure took place as to these streets. The *Local Government Act* 1891 was passed as part of the local government scheme, and as one with the *Local Government Act* 1890. By sec. 111 it repealed sec. 234 and all the active portions of sec. 235 of the *Health Act* 1890 except as regards Melbourne and Geelong (sub-sec. 16). It made new substantive provision for streets, &c., of the character

(1) 15 V.L.R., 25; 10 A.L.T., 246. (2) 12 V.L.R., 347.

H. C. OF A. 1916.

BRUNSWICK CORPORATION v. BAKER.

Barton J. Isaacs J. Rich J.

formerly the subject of the repealed provisions, and handed over the whole jurisdiction in this connection to the municipal councils as the authorities under the local government system. This necessarily obliterated all the distinctive reasons which the Court had given in *Malvern Local Board of Health* v. *Lorimer* (1) for including public streets in the corresponding repealed provisions.

It is evident that if the Legislature wished to retain such streets in the new enactment as the Court had already determined they were in the old provisions, some indication of intention to do so was necessary. We find introduced into sec. 111 of the new Act words which were not in the former Act, namely, " whether the same respectively be dedicated to the public or not." Those happen to be practically the words used by the Court in *Kew Local Board of Health* v. *Whidycombe* (2), judicially regarded in *Malvern Local Board of Health* v. *Lorimer* (1) as law. The Legislature certainly had some reason for inserting those words at the same moment as they abolished the reasons which were held to make their presence previously unnecessary. No reason has been or can be suggested for their inclusion except that the Legislature still wished, when transferring the jurisdiction, to preserve the liability of adjoining owners that existed immediately prior to the passing of Act No. 1243. Change of public officers and transference of the functions to another system is not a substantial reason for relieving private owners of all their existing public obligations in respect of roads set out on private property. On the contrary, as will be seen presently, not only does there exist a very sound reason for insisting upon those special obligations, but long standing English precedent had recognized it.

But, in the new legislation, another change was made in favour of the private owners, and one which has an important bearing on the general construction of the Act. There was no longer power to order them to do the work. The council in all cases had, henceforth, as the road authority, to determine whether it would do the work itself or not, and if it did the work whether it would charge for it. Then followed a series of sub-sections that at the present

(1) 15 V.L.R., 25; 10 A.L.T., 246. (2) 12 V.L.R., 347.

time consist of independent sections, and are more easily dealt with separately.

The meaning of the words "dedicated to the public as a highway" in the Act No. 1243, passed in 1891, must be the meaning they had in the Act of 1903—a codification, not altering those provisions—and the meaning they have in the Act of 1915—a consolidation. In 1891 they were inserted in an Act which declared (sec. 1) it should be read as one with the *Local Government Act* 1890, and that Act already contained practically identical expressions, which are found repeated in the present Statute. The portion of the present Act containing those expressions is Part XVIII. Division 1 of that part is headed "Dedication and Proclamation of Public Highways." By sec. 472 Crown lands may be proclaimed to be a public highway. But the important circumstance is that the section goes on to say: "Such land shall thereupon and thenceforth from the date of such proclamation become and be absolutely dedicated to the public as a public highway." The section plainly regarded the absolute dedication to the public as a highway as the final characteristic constituting the land a public highway. Sec. 474 declares certain Government notices of widening streets to have operated as a dedication to the public of the land referred to as a public highway. It does not go on to declare the land to be part of the highway. Evidently the "dedication" was again regarded as the seal of the public rights. Sec. 475 enables the council to order land it acquires to be a public highway, and says it shall "become and be a public highway," but adds—again as a final stroke—"and be deemed to be dedicated to the public accordingly." It is not unworthy of notice that in sec. 249 land exempted from ratability includes, by sub-sec. 2 (*j*), "Lands dedicated by the trustees of agricultural colleges as sites for agricultural colleges or experimental farms." Again "dedication" seems to be regarded as the conclusive attribute. There is reason in the assumption when the nature of the matter is considered. While it is true that dedication is strictly speaking the act of the owner, yet dedication of a public way over private land is in reality a gift. Like a gift it requires two parties to make it complete. In *Petersdorff's Abridgment*, 2nd ed., vol. v., at p. 34, under the

H. C. OF A. 1916.

BRUNSWICK CORPORATION v. BAKER.

Barton J. Isaacs J. Rich J.

title " Highways," it is correctly stated :—" A dedication is supposed to take place through a mutual agreement between the owner of the land and the public ; therefore, the consent of both these parties must be expressly or impliedly given." In truth, until the public has consented, the dedication is not absolute. In effect, it is nothing more than an offer to give and, as a dedication, is inchoate merely, but when accepted it is complete and absolute and attaches to the land. *Blackburn* J., in *Fisher* v. *Prowse* (1), appears to express this view where he says :—" It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them." In *Cababé* v. *Walton-on-Thames Urban Council* (2) Lord *Dunedin* appears to use the word " dedication " in its absolute sense as connoting the public acceptance of the offer and consequent finality. His Lordship says :—" At common law if a proprietor chooses to dedicate a highway the parish *ipso facto* comes under the burden of its repair. The road may be really useful to the proprietor only as the inception of a building scheme. It may be a white elephant to the parish, but the parish is helpless. Once let the proprietor dedicate, the burden of repair is irrevocably cast upon the inhabitants." So in *Pratt and Mackenzie on Highways*, 16th ed., at p. 176, this passage occurs :—" The common law enabled any person to dedicate a highway to the public ; and then it immediately became repairable by the inhabitants of the parish or township."

It thus appears that while the dedication or gift must come from the owner, and requires the consent or acceptance of the public, yet it is not an incorrect—and perhaps is the logically correct—use of language to speak of the completed and irrevocable legal transaction as the dedication. Lord *Kinnear* in *Folkestone Corporation* v. *Brockman* (3) uses the expression " effectually dedicated " as including the owner's dedication accepted by the public. That appears clearly to be the sense in which the Legislature used the term " dedicated " in other parts of the Statute ; and when later it

(1) 2 B. & S., 770, at p. 780. (2) (1914) A.C., 102, at p. 115.
(3) (1914) A.C., 338, at p. 348.

introduced the phrase we are considering, coinciding both with its own language and that of the Supreme Court, it is, we think, a proper conclusion to give the words in this place the same construction as they have elsewhere in the Act.

In *In re Birks* (1) *Lindley* L.J. said :—" I do not know whether it is law, or a canon of construction, but it is good sense to say that whenever in a deed, or will, or other document, you find that a word used in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where, when used in another part of the document, its meaning is not clear." There is no inconsistency in requiring private owners to repair roads which they have finally dedicated to the public. Public user may insensibly effectuate the intention of the private owner to make his land a public highway. This may work to his personal advantage, and since sec. 488 of the Act, like the common law of England, casts the care and management of public highways on the municipality, he might in some instances succeed in escaping a just responsibility by throwing it on to the public. This is pointed out forcibly by Lord *Dunedin* in the passage quoted, and, says his Lordship, that was the mischief which sec. 23 of the *Highway Act* of 1835 was intended to remedy. That section provides, in effect, that a person dedicating roads may have to bear the burden of their repair notwithstanding they have become by dedication public highways.

Lord *Tenterden*, in *R.* v. *Paddington Vestry* (2), in speaking of a similar but prior private Act, said :—" It was obviously the intention of the Legislature thereby to prevent the parish from being burthened with the repair of a road, intended not merely for public benefit, but, for a time at least, for the peculiar private benefit of the persons forming it. . . . And inasmuch as this road had been made by the owner with a view to erect buildings on each side, several of which have been in part erected, and about eight completely finished and inhabited, and a great many more in contemplation, the effect of charging the parish with the repair of this road at the present time will be, that the parish will have to repair a road not for the benefit of the public at present, but for the

(1) (1900) 1 Ch., 417, at p. 418. (2) 9 B. & C., 456, at p. 460.

H C. OF A. 1916.

BRUNSWICK CORPORATION v. BAKER.

Barton J. Isaacs J. Rich J.

private advantage of a person, so that he may have at the public expense a road to bring materials for his buildings."

It must be remembered that length of user is unimportant as long as there is user and the intention to dedicate is established; so that the public liability might be at once created (see *Tottenham Urban District Council* v. *Rowley* (1)). The English provision did not destroy the fact of dedication with the consequence of the locus becoming thereby a public highway. All that it effected was to prevent its being repairable by the parish unless certain events occurred, which included the person proposing to dedicate making it in a substantial manner and of the required width. The section declares: " then and in such case, after the said highway shall have been used by the public, and duly repaired and kept in repair . . . for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate."

Now that leads us to the consideration of sec. 537, which is put forward as the strongest section in support of the respondent's contention. It assumes that up to that point the Legislature, notwithstanding the general provision of sec. 488 casting the care and management of public highways on the council, has by a later special direction made a specific provision in the case of streets set out on private property. It then, very much as in the English precedent, provides for the cessation of the private obligation. If, says the section, the street is 33 feet wide and two circumstances concur, namely, (1) once it is formed, &c., by the council under sec. 526, and (2) dedication as a public highway whenever the dedication took place, then the street shall thenceforth be under the care and management of the council and the private owner's liability shall cease.

It is said that, if " dedication " means that the locus has become a public highway, the reference to care and management by the council would be unnecessary. It may equally well be answered that, if public care and management means constituting the locus a public highway to the exclusion of private obligations, then the reference to cessation of those obligations is equally unnecessary.

(1) (1912) 2 Ch., 633, at p. 646.

Sub-sec. 1 of sec. 537, read in conjunction with the prior sections of the Part, is a careful and comprehensive statement of the complete legal position of the land in respect of its repair as a highway. The section does not say "it shall thereupon become and be a public highway," but it says two legal circumstances shall henceforth co-exist. That section not being inconsistent with the general scheme previously outlined, it is unnecessary to refer to any other sections relied upon (for they add no further strength to the contention) except to make two observations. The first is as to the expression "right to use or commonly do use" in sec. 528, and as to the provision in sec. 536 making private rights appurtenant. These provisions are not inapplicable when the land becomes a highway. (See *Tottenham Urban District Council* v. *Rowley* (1) and *Cobb* v. *Saxby* (2).) The other is that sub-sec. 3 of sec. 526, by express reference to "public" as well as to "private" streets, considerably aids the construction at which we have arrived.

The decision on which *Hodges* J. acted, and was bound to act, being in our opinion erroneous, the appeal should succeed unless there be some other valid reason for rejecting it, upon which the respondent can rely.

Mr. *Starke* advanced two other grounds. One was that, since the work of repairing Centennial Avenue was an entire operation, the scheme of distribution of cost adopted in this case was invalid because it severed the work into parts and did not for the purpose of apportionment retain its entire character. For the purpose of apportionment Centennial Avenue was treated as divided into two equal parts by a line running along its entire length from east to west. The respondent is on the north side, and her share is fixed at £16 12s. 2d. The cost of the work to which she is asked to contribute is not mingled with the cost of any other work. She is a person liable to contribute to the cost of repairing Centennial Avenue subject to the next point relied on, all persons similarly liable are also made contributories to the cost of that repair, and the work itself is an authorized work. She got the notice required by sec. 529. The Council proceeded with at least apparent regularity to consider the adoption of the scheme, &c., as required by

(1) (1912) 2 Ch., 663; (1914) A.C., 95. (2) (1914) 3 K.B., 822.

H. C. OF A. 1916.

BRUNSWICK CORPORATION v. BAKER.

Barton J. Isaacs J. Rich J.

sec. 531, and did adopt it including the proposed scheme of distribution of cost. As to persons on the north side at least they are not asked to contribute to anything but the cost of Centennial Avenue work, and are therefore within sec. 528, sub-sec. 1. The Council in settling the scheme of distribution may, if in their judgment the circumstances equitably require it, charge the residents on one side of a street with the cost of that side, and leave the residents on the other side to bear the cost of their own side only. That is a consideration within the jurisdiction of the Council, and, that being so, sec. 532 applies and the respondent is bound and concluded by the apportionment. (See *Midland Railway Co.* v. *Watton* (1).)

We have not to decide any other point as to the south side of Centennial Avenue, and intimate no opinion one way or the other as to that.

The only point remaining is that the street was not formed or set out to the extent of 50 feet. This is a pure question of fact. The case of *Metropolitan Bank Ltd.* v. *Camberwell Corporation* (2) decides, and we think correctly, that to set out a street within the meaning of sec. 526 means to indicate it on the ground. But the Magistrates found as a fact that Centennial Avenue was a street formed or set out on private property, and that it was set out to the width of 50 feet originally, by pegs and trenches on the south side and a line of fencing on the north side. We think that there is abundant evidence to support the finding. The street is and has been for years a residential street, drained and lighted. The plans, the certificates of title and the oral evidence are ample to enable the Court to conclude that, in whomsoever the title to the soil was vested, the whole width of 50 feet was to all appearance, and was in fact, used as a street. It is admitted that at all events up to 49 feet it was a public street. It is absurd to think the other foot was not. The principle applied in such cases as *R.* v. *United Kingdom Electric Telegraph Co.* (3), *Harvey* v. *Truro Rural District Council* (4), *Offin* v. *Rochford Rural*

(1) 17 Q.B.D., 30.
(2) (1909) V.L.R., 82; 30 A.L.T., 151.
(3) 31 L.J.M.C., 166.
(4) (1903) 2 Ch., 638.

District Council (1) and *Tottenham Urban District Council* v. *Rowley* (2) is applicable here.

The appeal should be allowed.

Appeal allowed. Order appealed from discharged. Order nisi to review.

Counsel for the respondent consenting, the order *nisi* was made returnable forthwith, and was made absolute.

Order absolute to review decision of Court of Petty Sessions. Claim of complainants in that Court allowed.

Appellants to pay respondent's costs of appeal.

Solicitors for the appellants, *Eggleston & Eggleston.*

Solicitors for the respondent, *Hedderwick, Fookes & Alston.*

B. L.

(1) (1906) 1 Ch., 342.

(2) (1912) 2 Ch., 633; (1914) A.C., 95.