[HIGH COURT OF AUSTRALIA.]

THE PRESIDENT, COUNCILLORS AND RATEPAYERS OF THE SHIRE OF HEIDELBERG . . . . . Appellant;
Complainant,

AND

GREEN . . . . . Respondent.
Defendant,

H. C. of A. 1926.

MELBOURNE, *Feb.* 19; *Mar.* 18.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Local Government—Footpath—Kerbing, flagging, paving or asphalting—Liability of owner of adjoining land to pay half the expense—Local Government Act 1915 (*Vict.*) (*No.* 2686), *sec.* 540.

Sec. 540 of the *Local Government Act* 1915 (Vict.) provides that "(1) The council of any municipality in such manner as the council thinks fit may cause to be kerbed flagged paved or asphalted the whole or from time to time any portion of the footway or pathway in front of any house or ground along any street or private street within the municipal district. (2) Half the amount of the expense thereof in respect of any portion of such footway or pathway not previously kerbed flagged paved or asphalted by the council shall be borne and paid by the owner of such house or land."

Held, by *Knox* C.J., *Isaacs*, *Higgins* and *Gavan Duffy* JJ., that the council cannot recover under the section in respect of any given area, whether such area be the whole or a portion of the footway in front of the particular premises, unless the area in respect of which the claim is made has not previously been either kerbed or flagged or paved or asphalted by the council.

A municipal council asphalted the footway in front of the respondent's premises which had previously been paved by the council but not asphalted.

Held, by *Knox* C.J., *Isaacs*, *Higgins*, *Gavan Duffy* and *Starke* JJ., that the council was not entitled under the section to recover from the respondent half the cost of such asphalting.

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SHIRE OF HEIDELBERG v. GREEN.

Decision of the Supreme Court of Victoria (*Weigall* A.J.): *Shire of Heidelberg* v. *Green*, (1926) V.L.R. 11; 47 A.L.T. 103, affirmed.

APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions at Heidelberg a complaint was heard whereby the President, Councillors and Ratepayers of the Shire of Heidelberg sought to recover from George H. Green the sum of £9 8s. 7d., being one-half of the amount of the expense in respect of asphalting the footway in front of certain land owned by the defendant in the Shire. The Court found that the footway in question had in fact been paved by the Council in 1905, but that it had not been asphalted prior to the occasion in 1924 in respect of which the complaint was brought; and it held that the intention of the Legislature expressed in sec. 540 of the *Local Government Act* 1915 (Vict.) was that if a footpath had once been kerbed, flagged, paved or asphalted, that was an end of the abutting owners' liability. The Court therefore dismissed the complaint. An order *nisi* to review this decision was discharged by *Weigall* A.J.: *Shire of Heidelberg* v. *Green* (1).

From that decision the complainant now, by special leave, appealed to the High Court.

Lowe (with him *Eager*), for the appellant. The meaning of sec. 540 of the *Local Government Act* 1915 (Vict.) is that, when a footpath has not been kerbed before, the council may recover half the expense of kerbing; when it has not been flagged before, the council may recover half the expense of flagging; and similarly as to paving and asphalting. It does not mean that if any one of the operations of kerbing, flagging, paving or asphalting has been carried out, the council cannot recover half the expense of thereafter carrying out any other one of those operations.

Owen Dixon K.C. (with him *Robert Menzies*), for the respondent. The section means that when any portion of a footpath has been dealt with by either kerbing or flagging or paving or asphalting it, the council cannot recover half the expense of thereafter kerbing or flagging or paving or asphalting that portion.

(1) (1926) V.L.R. 11; 47 A.L.T. 103.

Eager, in reply, referred to sec. 27 (1) of the *Acts Interpretation Act* 1915 (Vict.).

Cur. adv. vult.

The following written judgments were delivered :—

KNOX C.J., ISAACS J. AND GAVAN DUFFY J. This is an appeal by special leave from an order of *Weigall* A.J. discharging an order nisi to review the decision of a Court of Petty Sessions in a case in which the appellant claimed to recover from the respondent the sum of £9 8s. 7d., money alleged to be payable to the appellant as one-half of the expense of asphalting the footway in front of land owned by the respondent in the Shire. The claim was founded on sec. 540 of the *Local Government Act* 1915, which, so far as relevant, is in the words following :—" (1) The council of any municipality in such manner as the council thinks fit may cause to be kerbed flagged paved or asphalted the whole or from time to time any portion of the footway or pathway in front of any house or ground along any street or private street within the municipal district. (2) Half the amount of the expense thereof in respect of any portion of such footway or pathway not previously kerbed flagged paved or asphalted by the council shall be borne and paid by the owner of such house or land." The Court of Petty Sessions found as a fact that the portion of the footway in respect of which the claim was made had previously, in the year 1905, been paved by the Council, and that by reason of this fact the respondent was not liable, and dismissed the claim. An order nisi to review this decision was obtained in the Supreme Court, but was subsequently discharged by *Weigall* A.J., and the appellant now appeals to this Court.

In our opinion the learned Judge was clearly right in discharging the order nisi. The finding of fact that the portion of the footway in respect of which the claim is made had been previously paved by the Council is not now challenged. That finding concludes the matter : for by sec. 540 (2) of the Act the right to recover from the owner a contribution to the expense of kerbing, flagging, paving or asphalting any portion of the footway in front of his premises is given only " in respect of any portion of the footway not previously kerbed flagged paved or asphalted by the council." If, as in this case, the council asphalts a portion of the footway in front of the premises

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which it has previously kerbed or flagged or paved, the sub-section confers no right to recover a contribution to the expenses of the second operation on that portion which had been previously dealt with. An illustration will serve to make our meaning clear. Suppose that the footway in front of the premises is 100 feet long and 10 feet broad, and that no portion of it has been either kerbed, flagged, paved or asphalted by the council. The council may, if it choose, kerb, flag, pave or asphalt the whole or any portion of the footway. If the council elect to deal at one operation with the whole 1,000 square feet of surface by kerbing, flagging, paving or asphalting, or partly by one of these methods and partly by another, it is clear that under sub-sec. 2 half the total cost of the operation can be recovered from the owner, because no portion of the area has been previously kerbed, flagged, paved or asphalted by the council. If the council elect to do kerbing only, say one foot wide, then for the 100 square feet occupied by the kerbing one-half the cost may be recovered from the owner. But that does not disentitle the council subsequently to flag or pave or asphalt the rest of the footpath, and to charge one-half the cost to the owner. Similarly, if the council elect in the first instance to flag or pave or asphalt a strip, say 3 feet wide or 300 square feet in all, without kerbing, flagging, paving or asphalting any portion of the remaining 700 square feet it can recover from the owner half the cost of the operation, but it cannot, in our opinion, at any subsequent time maintain a claim under sec. 540 (2) in respect of that area of 300 square feet, for it is impossible to assert that that area has not been previously kerbed, flagged, paved or asphalted by the council, though it can recover half the cost of any of these operations subsequently performed on any portion of the remaining 700 square feet which has not before that time been dealt with by the council in any of the methods specified. In order to recover under the section in respect of any given area, whether such area be the whole or a portion of the footway in front of the premises, the council must prove that the area in respect of which the claim is made has not been previously either kerbed or flagged or paved or asphalted by the council. The words of the sub-section seem to us clear and unambiguous.

In our opinion the appeal should be dismissed.

HIGGINS J. If the true construction of sec. 540 is that found by the Magistrates, then the result is, in my opinion, clear—that if the council has once kerbed a footpath it cannot in after years asphalt it, or flag or pave it, recovering half the expense from the owner. For when the kerbing edge has been put to the footpath, the footpath is "kerbed"; and should the council want to asphalt it, the owner can allege and prove that it (the footpath, not a portion of it) has been "previously kerbed." When the section speaks of a "portion" of the footpath "not previously kerbed," it can mean nothing but a portion as measured along the *length* of the path; it cannot mean a portion measured by the *depth*. This result will tend to make councils hesitate about kerbing—the simple and inexpensive process of putting stones, &c., at the edge of the path so as to keep the earth in, to "curb" it. As a town develops, it is of course common to kerb first and flag or pave or asphalt afterwards. Paving or asphalting is brought in as an improvement on the earlier kerbing; and the lawyer who appeared for the Council very naturally urged that for the Court to say that if once the footpath were kerbed defendant could never afterwards be charged for asphalting would be obviously absurd. But we are thrown back on the words of the section. Substantially, it provides that half the expenses of kerbing, flagging, paving or asphalting, in respect of any portion of such footpath not previously kerbed, flagged, paved or asphalted shall be borne by the owner of the land which the operation fronts. Grammatically the words *may* mean that if any one of the processes has taken place before, the half of the expenses may not be recovered. The distributive sense for which the Council contends—that the owner must pay for kerbing if no kerbing before, must pay for flagging if no flagging before, must pay for asphalting if no asphalting before—is not favoured by anything in the context, apart from the probabilities of the case *a priori*. So the rule is applicable that, if the words of the Act would fairly admit of a meaning which does not impose the alleged burden on the owner, that meaning should be accepted. For this reason I concur with my learned colleagues that the appeal should be dismissed.

We have not been referred to anything bearing on the point in the history of the section.

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STARKE J. I agree that upon the facts of this case the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Fink, Best & Miller.*

Solicitors for the respondent, *Maddock, Jamieson & Lonie.*

B.L.

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION FOR SOUTH AUSTRALIA; EX PARTE HOOPER.

H. C. OF A. 1925-1926.

MELBOURNE, *Oct.* 20, 1925; *Mar.* 22, 1926.

KNOX C.J., ISAACS AND RICH JJ.

Income Tax—Assessment—Amended assessment—Alteration not increasing liability—Right of taxpayer to object—Income Tax Assessment Act 1922-1924 (*No.* 37 *of* 1922—*No.* 51 *of* 1924), *secs.* 37, 50.

A taxpayer who had objected to his assessment for Federal income tax and whose objection was disallowed by the Commissioner did not, within the time limited by sec. 50 (4) of the *Income Tax Assessment Act* 1922-1924, request the Commissioner to treat his objection as an appeal. Subsequently the Commissioner gave the taxpayer notice that the assessment had been amended by allowing certain deductions, and the effect of the amendment was that the amount of tax payable was reduced. The notice, by mistake, contained a statement that the taxpayer might, within forty-two days, lodge an objection to the assessment and, if he were dissatisfied with the decision of the Commissioner thereon, might within thirty days after the service of the notice request the Commissioner to treat his objection as an appeal.

Held, that the amended assessment was not an "assessment" within the meaning of sec. 50 (1), and that, as its effect was not to impose any fresh liability or increase any existing liability, the taxpayer had, under sec. 37 (1), no right to object to it.