

[HIGH COURT OF AUSTRALIA.]

THE CORPORATION OF THE CITY OF }
ADELAIDE } APPELLANT;
DEFENDANT,

AGAINST

THE ATTORNEY-GENERAL FOR SOUTH }
AUSTRALIA AND OTHERS . . . } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF
SOUTH AUSTRALIA.

Municipality—Highway—Public convenience—Construction in street—Resolution declaring road a public street—Not made at request of abutting owners—Validity of resolution—No power given to construct conveniences in streets not vested in municipality—Construction in narrow street—Nuisance—Underpinning walls of adjacent buildings—Municipality not an “owner”—No power to underpin—Municipal Corporations Act 1923 (S.A.) (No. 1558), secs. 154, 158, 159 and 253—Municipal Corporations Act Amendment Act 1929 (S.A.) (No. 1911), sec. 19*—Building Act 1923 (S.A.) (No. 1600), sec. 39.*

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MELBOURNE,
Oct. 9, 12.
SYDNEY,
Dec. 10.
Rich, Starke,
Dixon, Evatt
and McTiernan
JJ.

The Corporation of Adelaide proposed to construct an underground public convenience in Gresham Place in the City of Adelaide. In November 1929 the Council of the Corporation resolved that Gresham Place be, and declared it to be, a public street pursuant to the powers contained in sec. 159 of the *Municipal Corporations Act 1923 (S.A.)*.

*The *Municipal Corporations Act 1923* provides :—“ Part IX.—Roads, Streets and Public Places.—*Division I.—Public Streets.*—153. (1) All streets which come under or are included in any of the following definitions or descriptions shall be public streets : (i.) All streets delineated and shown on the public maps or plans of the State as laid out for public purposes by the Crown : (ii.) All streets opened by the council under the power given by the Acts for

the time being in force relating to the opening of new streets or roads : (iii.) All streets conveyed or transferred to the corporation by the owners of the fee simple thereof, and accepted as public streets by the council : (iv.) All streets vested in the corporation by the Supreme Court or a Judge thereof, under the power hereinafter contained : (v.) All streets declared by the council, under the power hereinafter contained, by writing under their common seal and

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Held, that the Corporation was not entitled to construct the convenience and that an injunction had properly been granted to restrain it from constructing the same :

By *Rich, Dixon and McTiernan JJ.*, that sec. 159 of the *Municipal Corporations Act 1923* does not contain a power independent of that conferred by sec. 158, and that, as no request in writing had been made by the owners of the land abutting on such street to have it declared a public street, the resolution of the Council purporting to declare it such was invalid ; consequently, that the soil did not vest in the Municipality under sec. 154 of that Act, and that sec. 253 thereof gave no power to erect urinals in streets where the Municipality has no property in the soil ; and

By *Starke and Evatt JJ.*, that sec. 159 conferred a power independent of that given by sec. 158 and that the resolution of November 1929 was valid, that, consequently, Gresham Place was declared a public street, and that by sec. 154 the freehold thereof vested in the Corporation, but that on the evidence an excessive, unreasonable and permanent restriction upon the use of Gresham Place by the public would be occasioned by the construction of the urinal and that its construction in such place would constitute a public nuisance.

Held, also, by *Rich, Starke, Dixon and Evatt JJ.*, that sec. 39 of the *Building Act 1923* (S.A.) does not authorize the underpinning of the adjacent buildings because the Municipality was not an "owner" of the land where the work was to be done.

Decision of the Supreme Court of South Australia (*Murray C.J.*): *Attorney-General; Ex relatione Australian Mutual Provident Society v. Corporation of the City of Adelaide*, (1931) S.A.S.R. 217, affirmed.

APPEAL from the Supreme Court of South Australia.

The Attorney-General for South Australia, the Australian Mutual Provident Society, the English, Scottish and Australian Bank Ltd. and Isabella Bakewell brought an action against the Corporation of the City of Adelaide claiming a declaration that the defendant was not entitled to break, dig up or disturb Gresham

signed by the Mayor and Town Clerk, to be public streets. (2) All other streets shall be private streets. . . .

154. The fee simple of every public street in the municipality shall be vested in the corporation of such municipality. . . . *Division II.—Vesting of Streets in the Corporation.*—

157. (1) The Supreme Court, or a Judge thereof, upon the application of the corporation, and upon proof upon oath that any land within the limits of the municipality—(a) has been dedicated to the public by the owner thereof as a street ; or (b) has been formed, made, levelled, paved, or drained as a street by the corporation, and used by the public as such for five years consecutively ; may make an order vesting

the fee simple of such land in the corporation as a street. If such land is under the provisions of the Real Property Acts the Registrar-General, on being served with an office copy of such order, shall enter in the register-book the date of the said order, the date and hour of its production to him, and the name of the corporation in which the said order purports to vest the said land, and shall issue a certificate of title to such corporation in respect of the said land as a street. (2) Notice of any application under this section shall be sufficient if served upon one of several joint tenants or tenants in common, or upon the person, or one of the persons, appearing as the registered proprietor or proprietors of the

Place in the City of Adelaide or the roadway or footpaths thereof or to excavate the soil thereunder, for the purpose of constructing an underground convenience for women, nor to erect railings, gates and footways or dwarf walls round the openings to such convenience in the surface of Gresham Place; and the plaintiffs also asked for an injunction to restrain the defendant from proceeding with the construction of such convenience. Gresham Place is a thoroughfare running east and west between Gresham Street and King William Street, Adelaide. Its length on the ground is about 90 feet and its width about 23 feet 4 inches. The footpaths on each side are 6 feet wide and the roadway is 11 feet 4 inches wide.

The Attorney-General as plaintiff represented the public. The Australian Mutual Provident Society and the English, Scottish and Australian Bank are the respective owners of the land immediately abutting on the southern and northern sides of Gresham Place, and had erected buildings extending along the whole of their frontages. Isabella Bakewell was the owner at the time the action was brought of a piece of land with a building upon it on the western side of Gresham Street immediately facing Gresham Place, but, having since died, was represented in the action by her executor, William Kenneth Bakewell.

On 10th April 1929 the defendant gave notice to the Australian Mutual Provident Society and also to the English, Scottish and Australian Bank pursuant to sec. 39 of the *Building Act* 1923 (S.A.) that it intended to build an underground convenience for women under the roadway of Gresham Place within ten feet of the southern

said land. (3) Any such application may be made *ex parte* upon an affidavit by the Town Clerk that he is unable to ascertain the name of the owner of the said land, and any order obtained *ex parte* shall be advertised four times in the *Gazette*: Provided that the owner of any land in respect of which such *ex parte* order is made may, at any time within one year from the date thereof, apply to the Supreme Court, or a Judge thereof, to discharge the same on the ground that such order was improperly made, and such discharge, if granted, shall operate as if such vesting order had not been made, and may be registered in like manner as is provided by sub-section 1 hereof with respect to such vesting order. 158. (1) If any

street, court, alley, thoroughfare, or *cul de sac*, not being a public street at the time of the passing of this Act" (now, as amended by Act No. 1911 of 1929, which was assented to on the 30th October 1929, "on the twenty-third day of December eighteen hundred and ninety") "has heretofore been or is hereafter formed, made, paved, or repaired by the corporation or at the cost of the owner or owners of land abutting thereon, the council may, by writing under their common seal, and signed by the Mayor and Town Clerk, on the request in writing of the owner or owners of the land abutting on such street, court, alley, thoroughfare, or *cul de sac*, declare the same to be a public street, and thereupon the same

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and northern walls respectively of the buildings owned by these plaintiffs in King William Street and Gresham Place, a part of which intended building extended to a lower level than the foundations of the plaintiffs' buildings, and that they proposed to underpin the plaintiffs' buildings. The Australian Mutual Provident Society and the English, Scottish and Australian Bank and other owners of land in Gresham Street objected to the proposed work, but the defendant refused to abandon it, and intimated on 26th July 1929 that it intended to commence work on 29th July.

The plans showed that the intention of the defendant was to excavate the soil beneath Gresham Place for the purpose of building a room under the footpaths and roadway, the measurements of which would be 39 feet 10 inches in length, 20 feet 4 inches in width and 9 feet in height, with all necessary fittings, as a place of convenience for women. The approaches and exits to and from the room were to be by means of two stairways constructed under each footpath, the surface openings of the two eastern ones commencing at a distance of 10 feet 8½ inches from the building alignment of King William Street on the northern side of Gresham Place, and 9 feet 2½ inches on the southern side and measuring 15 feet 5 inches and 15 feet 6 inches respectively in length, and 3 feet 6 inches in width, and the surface openings of the two western ones commencing at a distance of 6 feet 9 inches from the building alignment of Gresham Street on each side of Gresham Place and measuring 12 feet 4 inches in length and 3 feet 6 inches in width.

shall become a public street, and shall thereafter be repaired by the council out of the Municipal Fund. (2) Such declaration shall be entered amongst the proceedings of the council, and in the register of public streets mentioned in section 171 and notice thereof shall be put up in some conspicuous place in or near such street, court, alley, thoroughfare, or *cul de sac*. *Division III. — Width of Streets.*—159. No street shall hereafter be set out or declared as a public street by the council unless the width of such street, to be ascertained by measuring at right angles to the course of such street from front to front of the building line on either side thereof, is forty feet at the least: Provided—(a) Existing streets may be continued if the continuation is

at least of the same width as the street so continued: (b) If any land has been dedicated to the public by the owner thereof as a street previous to the twenty-third day of December, eighteen hundred and ninety, and used by the public as such for five years, consecutively, the same may be set out or declared as a public street by the corporation if such a street has been formed, made, paved, or repaired by the corporation or at the cost of the owner or owners of land abutting on such street. . . . *Division V. — Plans and Register of Public Streets.*—170. (1) A plan, under the hand of the Mayor and Surveyor, of every public street or place which is set out, showing thereon the building line and the breadths of the carriage-way and

These openings were to be protected by wrought-iron posts and railings at the sides and at the ends remote from the entrances or exits. The passageway along the footpaths between the railings and the buildings would thus be reduced to 2 feet 6 inches.

The defendant relied on sec. 253 of the *Municipal Corporations Act* 1923 (S.A.) for its power to construct the convenience, and contended that Gresham Place was a "public street" within the meaning of the *Municipal Corporations Act* 1923, that the fee simple was vested in the defendant, and therefore it had power as owner of the soil to construct the convenience under the street if it thought proper to do so.

A certified extract from the Register of Public Streets was put in evidence to prove that Gresham Place was a public street in reliance upon *Barker v. Corporation of City of Adelaide* (1), and sec. 154 of the *Municipal Corporations Act* 1923 was relied upon as showing that the fee simple of the land on which the street was laid out was vested in the Corporation of Adelaide. To rebut the effect of this entry evidence was given of the history of Gresham Street and Gresham Place. In the original plan of the City, prepared by Colonel Light and adopted by the Colonization Commissioners, who were appointed by the King under 4 & 5 Wm. IV. c. 95, sec. 3, to carry certain parts of the Act into operation, no such streets as Gresham Street or Gresham Place appear. The land on which they lie then formed part of Town Acres 16 and 47, which were the

footways therein respectively, shall be deposited and kept at the office of the Town Clerk. (2) The Town Clerk shall, on every such deposit, cause public notice thereof to be given, in which notice shall be stated the defined breadth of the carriage-way and footways in each street or place respectively. 171. (1) A register of public streets shall be made up and kept in the Town Clerk's office. (2) Such register shall show the names, situation, extent, and width of the public streets, and the building line thereon, and the width of roadways and water-tables, and of each footway respectively with the additions or alterations made thereon from time to time. (3) Such register shall at all reasonable times be accessible to any citizen. 172. (1) The Town Clerk shall from time to time enter in the register of public streets any street

which is a public street, and every other particular which he is directed by the council to enter therein or describe thereon. (2) An extract of any such entry or description certified by the Town Clerk shall, on demand, be given by the Town Clerk to any citizen on payment of a fee of two shillings and sixpence for the use of the council." Sec. 253 provides:—"The council may—(a) provide public urinals, water-closets, privies, and like conveniences, in situations where they deem such accommodation to be required; (b) supply such conveniences with water; (c) maintain and keep the same in good order; and (d) defray the expenses thereof, and any damage occasioned to any person by the erection thereof, out of the general revenue of the corporation."

(1) (1900) S.A.L.R. 29.

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two square acres on the frontage of King William Street between North Terrace and Hindley Streets. Town Acre 16 was granted to Samuel Smith on 23rd December 1837, and Town Acre 47 was probably granted to Samuel Payne, though the grant to him was not proved. Smith sold a rectangular piece, measuring 50 feet along North Terrace and 210 feet deep on the western side of Town Acre 16, to the Bank of South Australia on 16th December 1851, and conveyed the balance to trustees for sale on 4th January 1855. The trustees sold and conveyed their estate and interest to John Bentham Neales on 22nd June 1885, and Neales sold and conveyed to Edward Stephens on 23rd June 1885 a rectangular block adjoining the piece conveyed by Smith to the Bank of South Australia, having a frontage of 50 feet to North Terrace and a depth of 193 feet 8 inches, together with a right of roadway "with or without horses and other cattle, carts and other carriages, laden or unladen, at all times hereafter, through, over, along and across a private street or road of the width of 20 feet or thereabouts formed out of part of the said section and called Gresham Street, leading from King William Street aforesaid to North Terrace" as delineated on a plan drawn in the margin of the conveyance. This roadway was the original of Gresham Street and Gresham Place, and its shape was that of the letter L, commencing at North Terrace, running South for a certain distance, and then turning east at a right angle to King William Street. After this transaction the land remaining to Neales was the north-eastern portion of the acre bounded by Gresham Street on the west and south and by King William Street and North Terrace on the east and north, measuring on the north and south sides 90 feet, and on the east and west sides 166 feet, and a piece at the southern end of the acre with a frontage of 24 feet to King William Street on the east and 110 feet to Gresham Street on the north, and embracing all the rest of the acre which had not been conveyed to the Bank of South Australia or to Edward Stephens. Neales subdivided the land so remaining to him into five blocks, which he let to various tenants, and on 17th July 1865 he applied to have the land, subject to the leases, brought under the *Real Property Act* 1861. The application contained a plan showing Gresham Street of the same shape and dimensions as the private

roadway mentioned in the conveyance to Edward Stephens, and the five blocks of land were described as abutting on Gresham Street on the west, south or north, according to their situation. In August 1865 certificates of title were issued in accordance with the plan, Gresham Street which was not brought under the Act being shown as 20 feet wide only. On 21st May 1869 Neales conveyed a rectangular block 24 feet square immediately south of the north and south portion of Gresham Street in order to link up that street with a private road running north and south which had been opened by Henry Ayres, the then owner of Town Acre 47, and Henry Ayers on 30th March 1869 conveyed the soil of that road for a width of 23 feet 6 inches and a length of 210 feet to the defendant. Gresham Street thus became a continuous thoroughfare from North Terrace to Hindley Street through parts of Town Acres 16 and 47, with an east and west connection with King William Street through part of Town Acre 16. The soil of the street for a width of 20 feet as originally laid out by Neales still continued to be vested in him, the soil of the remainder of the street extending towards Hindley Street being vested in the defendant. Neales died on 31st July 1873 without having disposed of his estate in the soil. A memorial of the probate of his will was registered in the General Registry Office, and a memorial of a conveyance by his trustees to William Bentham Neales of all lands not otherwise devised by the will was registered on 21st October 1892. The soil of Gresham Street north and south and west and east as originally laid out thus became vested in William Bentham Neales. No further transaction relating to the soil is recorded in the General Registry Office or the Lands Titles Office, and it may therefore be presumed that the last owner of the soil was William Bentham Neales, or, if he be now dead, his heirs, executors or administrators. In view of the discrepancies which existed between the dimensions of Gresham Place as described in the Register of Public Streets and the actual dimensions on the ground, the learned trial Judge considered that Gresham Place was not properly included in the Register as a "public street" within the meaning of sec. 153 of the *Municipal Corporations Act* 1923, and consequently that the soil of Gresham Place did not vest in the defendant by sec. 154 of the Act at that time. On 25th November

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1929 the Council of the Adelaide Corporation passed a resolution "That a certain street, to wit, Gresham Street—but known as Gresham Place—running east and west off King William Street, Adelaide, and laid out on Part Town Acre No. 16, be, and it is hereby declared to be, a public street, pursuant to the powers contained in sec. 159 of the *Municipal Corporations Act* 1923, and that such declaration be entered amongst the proceedings of the Council and in the Register of Public Streets." In 1869 the Corporation levelled, paved and macadamized Gresham Street (which name then included Gresham Place) either at its own cost or at the cost of the owners of the land abutting on the street, and has ever since maintained Gresham Street and Gresham Place.

The above facts are substantially taken from the judgment of *Murray C.J.*, who tried the action and held that there was no power to make the excavations in the street and leave them open, and that the placing of the convenience in so narrow a street as Gresham Place was an unreasonable interference with the rights of passage of the public, and made a declaration that the defendant was not entitled to erect the convenience and granted an injunction to restrain it from erecting the same: *Attorney-General; Ex relatione Australian Mutual Provident Society v. Corporation of the City of Adelaide* (1).

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

Cleland K.C. (with him *Ohlstrom*), for the appellant.

C. T. Hargrave (with him *N. J. Hargrave*), for the respondents. There is a preliminary objection to this appeal, as the right which the appellant claims does not give him a right of appeal. This appeal could only come under sec. 35 (1) (a) of the *Judiciary Act*, and there is nothing to indicate that the claim is within the limits prescribed. The respondents may have a right of appeal because of the damage to their property; but it does not follow that the appellant has, and there is no way of arriving at an estimate of the value of the appellant's right.

Cleland K.C. The only evidence on this point is the affidavit filed on behalf of the appellant, and this is uncontradicted and,
(1) (1931) S.A.S.R. 217.

being uncontradicted, is sufficient (*Ashton & Parsons Ltd. v. Gould* (1)). The fee simple of the street vests in the Corporation and the appellant claims the right to make use of the subsoil.

THE COURT. Even if this appeal does not fall within sec. 35 (1) (a), it is a case in which special leave should be granted.

Cleland K.C. The injunction was granted on two grounds, one, that the means of access by the subway is an interference with the right of the public to traverse the whole length of the street, and secondly, that it was an unreasonable exercise of the power. The Corporation had power to determine the question, and the matter is left by the Legislature not to the Court but to the Corporation. On the question of reasonableness, the learned Chief Justice based this part of his judgment on the consideration of whether this was a reasonable exercise of such power, but if it is within the power of the Corporation the Court will not interfere (*Mayor &c. of Westminster v. London and North-Western Railway Co.* (2)). That case shows that where, as here, the Legislature has thought fit to leave it to the local authority to construct these conveniences, no Court will interfere if it acts within its power. No nuisance can arise from this apart from its being an interference with the highway. The situation chosen was convenient. There is ample authority to show that the defendant had power to erect such a convenience in a highway which belonged to itself. The power was exercised reasonably and in a proper manner so as to do no unnecessary damage. The Corporation has not acted negligently or oppressively or so as to interfere with the right of the public to use the street. [Counsel referred to *Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works* (3); *East Fremantle Corporation v. Annois* (4); *R. v. Broad* (5); *Attorney-General v. Thames Conservators* (6); *W. H. Chaplin & Co. v. Westminster Corporation* (7); *Vanderpant v. Mayfair Hotel Co.* (8); *Barker v. Adelaide* (9); *Vernon v. Vestry of St. James, Westminster* (10); *Mayor &c. of*

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| (1) (1909) 7 C.L.R. 598, at p. 600. | (6) (1862) 1 Hem. & M. 1; 71 |
| (2) (1902) 1 Ch. 269; (1905) A.C. 426, at pp. 427, 438-439. | E.R. 1. |
| (3) (1898) 2 Ch. 603, at pp. 611, 613. | (7) (1901) 2 Ch. 329. |
| (4) (1902) A.C. 213. | (8) (1930) 1 Ch. 138. |
| (5) (1915) A.C. 1110, at p. 1122. | (9) (1900) S.A.L.R. 29. |
| | (10) (1880) 16 Ch. D. 449, at p. 472. |

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C. T. Hargrave. There was an absence of power in the appellant under the *Municipal Corporations Act* 1923. The Act does not give power to the municipality to construct conveniences in the subsoil so as to leave openings in the highway. Assuming that the power exists, then the respondents are entitled to an injunction if the exercise of the power amounts to a nuisance, or if the convenience is a nuisance as constructed or if it is a nuisance in the place where it is constructed. If the power exists, its exercise in this case was unreasonable. Gresham Place is not a public street and, therefore, is not vested in the Corporation at all. The effect of vesting the soil in the Corporation cannot give greater rights than private owners would have. That being so, it would be necessary for the Corporation to show something to enable them to make excavations in the street and leave them open. Where it was intended to give power to the Corporation to interfere with the subsoil, such power was expressly given as in secs. 226, 227, 248. This is inconsistent with the idea that the mere giving of the fee simple to the municipality would give it power to interfere with the subsoil and do this work. Though the fee simple may be vested in the municipality it cannot interfere with the subsoil unless power is expressly given, and no power is here given to leave the excavations open (*Vernon's Case* (3); *Metropolitan Asylum District v. Hill* (4); *Halsbury, Laws of England*, vol. XXI., p. 521). There is no power given to obstruct public streets (*Municipal Corporations Act* 1923, sec. 259; *Parish v. Mayor &c. of the City of London* (5); *Leyman v. Hessle Urban District Council* (6)). The right of immediate access to the highway is a private right as distinct from the right to use the highway as a member of the public, and the adjoining owners have a right to go to and on a highway from any spot (*Lyon v. Fishmongers' Co.* (7); *Berridge v. Ward* (8); *Marshall v. Ulleswater Co.* (9)). Such

(1) (1896) A.C. 434, at pp. 437-438.

(2) (1880) 14 Ch. D. 785, at p. 797.

(3) (1880) 16 Ch. D., at p. 472.

(4) (1881) 6 App. Cas. 193.

(5) (1901) 18 T.L.R. 63.

(6) (1902) 67 J.P. 56; 19 T.L.R. 73.

(7) (1876) 1 App. Cas. 662.

(8) (1860) 2 F. & F. 208; 175 E.R.

1026; (1861) 10 C.B. (N.S.) 400; 142 E.R. 507.

(9) (1871) L.R. 7 Q.B. 166, at p. 172.

right exists whether the owner of the soil is also the owner of the soil of the highway or not (*Ramuz v. Southend Local Board* (1)). Such right is not limited to a right of passage from the premises to the highway or vice versa, but includes the right of access to the walls of the premises to which there is no door or other opening (*Cobb v. Saxby* (2)). The nature of such right is totally different from the public right of passing along the highway (*Attorney-General v. Thames Conservators* (3)). There would be depreciation of the adjoining properties (*Mogg v. Bocken* (4); *Sellors v. Matlock Bath Local Board* (5)). Interference with the foundations is also possible, such as underpinning the walls, interference with the drains, trespass for the purpose of underpinning, and withdrawal of the right of support. The Corporation could only do this work in a public street, the soil of which was vested in it, and this was not (*Craies on Statute Law*, 3rd ed., p. 194; sec. 18 of Act No. 1911 of 1929 (S.A.)). Gresham Place has never become a public street, and the ownership of the street is not vested in the Corporation. This was a private street, and consequently the respondents have rights under sec. 212 of the *Municipal Corporations Act*. There is no power given in the Act which would enable the Corporation to interfere with the respondents' private rights (*Building Act* 1923 (No. 1660) (S.A.), sec. 39). The respondents can complain of an obstruction of their right of way (*Vernon's Case* (6); *Biddulph v. Vestry of St. George, Hanover Square* (7); *Southwark Case* (8)). If a power to construct such a convenience exists at all, the place in which it is proposed to put it would cause a substantial and unreasonable reduction of the passage way. Constructing the convenience in this situation makes the street an undesirable thoroughfare, and amounts, in effect, to a confiscation of the street.

Cleland K.C., in reply. As to sec. 212 of the *Municipal Corporations Act*, the result of the evidence is that Gresham Place has been

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| (1) (1892) 67 L.T. 169; 8 T.L.R. 700. | (5) (1885) 14 Q.B.D. 928. |
| (2) (1914) 3 K.B. 822. | (6) (1880) 16 Ch. D., at pp. 459, 468, |
| (3) (1862) 1 Hem. & M. 1; 71 460-461. | (7) (1863) 3 DeG. J. & S. 493; 46 |
| E.R. 1. | E.R. 726. |
| (4) (1888) 5 T.L.R. 22. | (8) (1898) 2 Ch. 603. |

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a public street dedicated to the public since 1860 and continuously used by the public since 1869 (*Rhondda Urban District Council v. Taff Vale Railway Co.* (1)).

Cur. adv. vult.

The following written judgments were delivered :—

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

STARKE J. The Council of a municipal corporation in South Australia may provide public urinals, water closets, privies and like conveniences in situations where it deems such accommodation to be required (*Municipal Corporations Act* 1923, sec. 253). The Corporation of the City of Adelaide proposed to erect public urinals and conveniences below the surface of the street in Gresham Place, Adelaide, but has been restrained from so doing by the Supreme Court of South Australia on the ground that the Corporation would thereby exceed its powers. No doubt the Corporation must keep within the limits of its authority. The discretion, however, given by sec. 253 is a very wide one, and when the Corporation resolves upon the necessity of a public convenience, and its situation, the Courts ought to show “great reluctance before they attempt to determine how, in their opinion, the discretion ought to be exercised” (*Roberts v. Hopwood* (2)). A dishonest, capricious or fantastic exercise of the discretion could not be supported, but apart from such extreme and rare cases, the Courts should not take upon themselves the functions of the Authority to which the discretion has been confided by the statute and substitute their judgments of what is prudent, necessary, expedient or reasonable, for that of the Authority (*Westminster Corporation v. London and North-Western Railway Co.* (3). Compare *Slattery v. Naylor* (4); *Widgee Shire Council v. Bonney* (5)). So far as the judgment below is based upon the view that the proposal of the Corporation to erect a public convenience in so narrow a street as Gresham Place was unreasonable, the Court

(1) (1909) A.C. 253, at p. 258.

(3) (1905) A.C. 426.

(2) (1925) A.C. 578, at p. 588.

(4) (1888) 13 App. Cas. 446.

(5) (1907) 4 C.L.R. 977.

has mistaken its jurisdiction, and exercised the powers rightly belonging to the Corporation. But a more formidable argument relied upon by the plaintiffs in the action is that based upon the decision of the House of Lords in *Mayor &c. of Tunbridge Wells v. Baird* (1). Under a very similar power to that contained in sec. 253 of the *Municipal Corporations Act* it was held that an urban authority had no power to excavate the soil and erect lavatories below the surface of a street which had vested in it under the *Public Health Act* of 1875. The distinction suggested in the present case is that the freehold in the soil of Gresham Place vested in the Corporation of the City of Adelaide by virtue of sec. 154 of the *Municipal Corporations Act* 1923. The provisions of sec. 154 and sec. 159 (b) of the Act of 1923, coupled with a resolution of the Corporation in November 1929, were relied upon in the Court below as vesting Gresham Place in the Corporation. I set out, so far as relevant, sec. 154, sec. 159, and the resolution:—"154. The fee simple of every public street in the municipality shall be vested in the corporation of such municipality." "159. No street shall hereafter be set out or declared as a public street . . . unless the width of such street . . . is forty feet at the least: Provided— . . . (b) If any land has been dedicated to the public by the owner thereof as a street previous to the twenty-third day of December, eighteen hundred and ninety, and used by the public as such for five years consecutively, the same may be set out or declared as a public street by the corporation if such a street has been formed, made, paved, or repaired by the corporation or at the cost of the owner or owners of land abutting on such street." "Resolved: That a certain street, to wit, Gresham Street—but known as Gresham Place— . . . be and it is hereby declared to be a public street, pursuant to the powers contained in section 159 of the *Municipal Corporations Act* 1923." Now, it is said that this resolution is unauthorized because there was no request in writing of the owner or owners of the land abutting on such street, pursuant to sec. 158 of the Act. That section is as follows:—"158. If any street . . . not being a public street at the time of the passing of this Act, has heretofore been or is hereafter formed . . . by the corporation or at the cost of the owner

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or owners of land abutting thereon, the council may, by writing under their common seal, . . . *on the request in writing of the owner or owners of the land abutting on such street,* . . . declare the same to be a public street. . . .”

Gresham Place was set out on private land sometime in the fifties if not before, and it has been a public highway or thoroughfare for many years. In 1869, the Corporation levelled, paved and macadamized Gresham Street (which name then included Gresham Place) either at its own cost or at the cost of the owners of land abutting on the street, and has ever since maintained and repaired Gresham Street and Gresham Place. Various changes have been made in legislation as to forming, paving and levelling streets, and they are a little difficult to follow ; but they do not seem to assist the construction of the present Act. They may be traced in the Acts of 1861, No. 16, secs. 88 *et seqq.* ; 1880, No. 190, secs. 89 *et seqq.* ; 1890, No. 497, secs. 106 *et seqq.* ; 1903, No. 833, sec. 4 ; and the present Act of 1923, No. 1558, secs. 153 *et seqq.* The consent of owners of land abutting on the street declared to be a public street was not always necessary (see Act of 1880, No. 190, sec. 91). But running through all the Acts is the prohibition against setting out or declaring public any street less than forty feet wide. It was not until 1903 that the Council was authorized to set out or declare as public such a street, and then only on three conditions, which now appear in the Act of 1923, as a proviso to the prohibition mentioned. (See sec. 159 (b), already set out.) But, though expressed as a proviso, this provision operates, I think, as an independent power and authority to the Corporation to that contained in sec. 158. It does not in so many words enlarge the powers of the Corporation under sec. 158 in the case of streets less than forty feet wide, but explicitly lays down the conditions on which a street less than forty feet wide may be set out and declared as a public street. In this view I agree with the opinion of the Court below. Gresham Place was thus declared a public street, and the freehold thereof vested in the Corporation. Another view, not presented to the Court below nor to this Court, may warrant the same conclusion. The *Municipal Corporations Act* 1880, sec. 93, provides : “The fee simple of every private road dedicated to the public and of

every street, court, alley, thoroughfare, or *cul de sac*, which shall have heretofore been, or shall hereafter be, formed, made, levelled, paved, or drained by any corporation, shall become and be lawfully vested in such corporation." It may be a question whether Gresham Place was formed or made by the Corporation within the meaning of this section: the work in 1869 appears to have been done by the Corporation but charged to the abutting owners, pursuant to the statute then in force. But there is no doubt of the dedication of Gresham Place to the public as a highway or thoroughfare. The fact that it was a public highway or thoroughfare was not in contest at the hearing below: its long and uninterrupted user by the public and the fact that it has long been maintained and repaired at the public expense raises a presumption of dedication so strong that it is practically irrebuttable. I call attention to this aspect of the case rather than base any decision upon it; because if my construction of sec. 159 (b) be erroneous, there still seems sound reason for the conclusion that the fee simple of Gresham Place is vested in the Corporation. And if this is so, the Corporation as the owner of the soil would have authority to excavate the soil and erect public conveniences below the surface of the street. The case would then be analogous to cases governed by the *Public Health (London) Act* 1891, sec. 44, under which *Westminster Corporation v. London and North-Western Railway* (1) was decided. See also *Barker v. Corporation of the City of Adelaide* (2).

The Corporation, however, proposes to underpin the walls of all or some of the relators in this action. Such an act would be a trespass, without the consent of the relators or some statutory authority. The *Building Act* 1923, No. 1600, sec. 39, was referred to. But I cannot agree that the Corporation is a building owner within the meaning of that Act. The Council of the Corporation is a supervising Authority under the Act and not a building owner.

Finally, it was contended that the provisions of sec. 253 of the *Municipal Corporations Act* 1923 do not authorize the creation of any public or private nuisance. The question depends upon the construction of the Act (*East Fremantle Corporation v. Annois* (3)).

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(1) (1905) A.C. 426.

(2) (1900) S.A.L.R. 29.

(3) (1902) A.C. 213.

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It cannot be denied, I think, that the Act authorizes the Corporation to erect public conveniences in streets vested in it but not to create any public or private nuisance (*Biddulph v. Vestry of St. George, Hanover Square* (1); *Vernon v. Vestry of St. James* (2); *Roberts v. Hopwood* (3)). A permanent obstruction erected upon a highway and which renders the way less commodious than before to the public is no doubt a public nuisance at common law. But, in the face of the statute, the mere placing of a public convenience in a highway or in a street vested in the Corporation cannot be sufficient: something more must be proved; and, in my opinion, it is necessary that the plaintiffs should establish that a nuisance has in fact and in reality been created. (Compare *Mudge v. Penge Urban District Council* (4); *Mason v. Wallasey Local Board* (5)). This is a question which the Court must determine for itself; and it cannot bind itself by the discretion or the decision of the Corporation. It is impossible, in modern times, that these public conveniences should not be provided in great cities. In the present case no suggestion is made, or at all events can be supported, that smells will proceed from the convenience: it is to be ventilated and sewered on modern lines. But, as in *Mayo v. Seaton Urban District Council* (6), it is said that it is objectionable, according to the ordinary habits of British people, to see men or women walking into and out of public conveniences. All this is merely false modesty. "It need not interfere, it ought not to interfere," as *Kekewich J.* rightly said in *Mayo's Case* (7) with the ordinary amenities of life of British people.

Other matters are more serious. They are thus stated in the judgment of the Court below (8):—"Here the work proposed involves the making of four excavations in the footways of Gresham Place to give ingress and egress by means of stairways to and from a convenience underneath the roadway. The openings will take up a space of about 27 feet by 3 feet 6 inches on each footpath, and will reduce the width of the footpaths where the excavations will be made from 6 feet to 2 feet 6 inches. They will remain permanently

(1) (1863) 33 L.J. Ch. 411; 3 DeG. J. & S. 493; 46 E.R. 726.

(2) (1880) 16 Ch. D. 449.

(3) (1925) A.C., at pp. 605-606.

(4) (1916) 80 J.P. 441, at p. 442.

(5) (1876) 58 J.P. 477.

(6) (1903) 68 J.P. 7.

(7) (1903) 68 J.P., at p. 9.

(8) (1931) S.A.S.R., at p. 230.

open, and will be provided with railings on three sides to prevent the public from falling into them. The railings of course are clearly necessary if the excavations are permissible. There can be no doubt, in my opinion, that the excavations, if made, would be a public nuisance at common law. They would take away permanently from foot-passengers the use of a substantial portion of the footpaths. They would leave insufficient room for two persons to pass each other going either in the same direction or in opposite directions. They might cause a block at both ends while people were waiting to get through. Women with children resorting to the convenience might add to the obstruction by leaving perambulators on the footpaths because they could not take them down the stairways. Vehicles using the roadway would be in danger of breaking the railings and falling into the stairways, and a menace to foot-passengers, owing to the limited space for manœuvring in an emergency, and the closeness of the openings to the kerbs." These facts cannot be disputed. The Court below found, in substance, that an excessive, unreasonable and permanent restriction upon the use of Gresham Place by the public would be thereby occasioned; and that finding is, I think, right, and cannot be disturbed. It establishes the fact that the public convenience, as the Corporation proposes to erect and use it, will, in fact, constitute a public nuisance. Consequently the Attorney-General is entitled to the injunction claimed in the action, and the relators have a special and individual interest in the public right to the use of Gresham Place, entitling them also to the injunction sought (*W. H. Chaplin & Co. v. Westminster Corporation* (1)).

It is unnecessary, in the view I take, to decide whether the individual relators were entitled to complain of a private nuisance—some interference with their private rights. As I understood the argument, their right of access from their premises to Gresham Place would be obstructed (*Fritz v. Hobson* (2)) and there would be material interference with the ordinary enjoyment of their property (*Leyman v. Hessle Urban District Council* (3)). I cannot say that the argument on the part of the relators satisfied me that any private

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(1) (1901) 2 Ch. 329.

(2) (1880) 14 Ch. D. 542.

(3) (1902) 19 T.L.R. 73.

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right of theirs would be infringed or threatened by anything the Corporation proposed to do, other than the proposed underpinning of their walls. But for the reasons already mentioned the appeal ought, in my judgment, to be dismissed.

DIXON J. The question upon this appeal is whether in virtue of sec. 253 of the *Municipal Corporations Act* 1923 (S.A.) the Council of the City of Adelaide may proceed with the construction of an underground convenience for women which it proposes to make in Gresham Place, according to plans which have been adopted. The frontagers to Gresham Place object because it is a narrow street with narrow footpaths and the work proposed is on such a scale and so designed that the footpaths will be blocked and the commodiousness of passage through the street very materially lessened, and, besides, the foundations of the walls of the buildings which front the street will be underpinned as a substitute for the support of the soil which will be withdrawn. *Murray C.J.*, who heard the action, assumed, without deciding, that the Corporation had succeeded in obtaining the fee simple of the land constituting the highway, but held (i.) that sec. 253 did not authorize an interference with public rights amounting to a nuisance such as the proposed convenience would cause, and (ii.) that having regard to the width of the street and the character and design of the proposed work, and the effect it would produce, the proposal was unreasonable and not within the scope of the power conferred. Accordingly he granted a perpetual injunction restraining the execution of the work.

I am not prepared to proceed upon the assumption which the learned Chief Justice made, because I think that upon the facts proved it appears that the soil of Gresham Place is not vested in the Municipality. The history of the street and of the title to the land upon which it was set out is recounted in his Honor's judgment, and I agree with his conclusion that the facts established that up to 25th November 1929 the legal estate in the soil underlying Gresham Place was vested in one William Bentham Neales or, if he be dead, his real representative. On that day the Council of the Corporation resolved that Gresham Place be, and declared it to be, a public street, pursuant to the powers contained in sec. 159

of the *Municipal Corporations Act* 1923. Inasmuch as the fee simple of every public street vests in the Corporation of the Municipality, the consequence of this resolution, if it be valid and effective, would be to divest the owner of and invest the Municipality with the property in the soil. I am of opinion that the resolution was invalid and ineffectual, because it was not made on the request in writing of the owners of the land abutting on Gresham Place. Sec. 153 (1) (v.) includes in the category of public streets all streets declared by the council under the power thereafter (in the Act) contained to be public streets. Sec. 158 (1) confers a conditional power to declare public streets "on the request in writing of the owner or owners of the land abutting on such street," &c. As no such request was made, the Council could not avail itself of this power, and, therefore, had recourse to sec. 159, which was relied upon as conferring an additional power. In my opinion sec. 159 does not confer an independent power. It does no more than refer to and, to some extent, restate for its particular purpose the power conferred by sec. 158. Sec. 159 forbids the setting out or declaration of a public street of less than a certain width. Then, by a proviso, it authorizes the setting out and declaration of land dedicated to the public before a date in 1890, if used by the public for five years and formed, made, paved or repaired by the corporation. The alleged power is contained in a proviso and should *prima facie* be read as doing no more than relieving or excepting from the operation of the main provision. It is in a division headed "Width of Streets," and should not be understood as doing more than dealing with that subject unless the intention to do so appears. Unlike secs. 153 (1) (v.) and 158 (1) the procedure or form for declaring a public street is not prescribed, a fact which tends to confirm the view that it is not meant as an independent power. Further, sec. 153 (1) (v.) speaks of one power "hereinafter contained," not two. The substance of the matter is strongly against construing the provision as an additional authority to declare public streets. For it is absurd to restrict the power to declare wide streets public by the requirement of the request of adjoining owners but to give a power not so restricted in the case of narrower streets. Sec. 253 is based on the English

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legislation dealt with in *Mayor &c. of Tunbridge Wells v. Baird* (1), and it is, I think, clear that it confers no power to erect urinals in streets where the municipality has no property in the soil. I am further of opinion that sec. 39 of the *Building Act* 1923 does not authorize the underpinning of the adjacent buildings which the work would involve, because the Municipality is not an "owner" of the land where the work is to be done and the building is to be constructed. See the definitions of "owner," "building owner" and "adjoining owner" in sec. 5.

I therefore think the appeal should be dismissed.

EVATT J. In my opinion the appeal should be dismissed for the reasons stated by my brother *Starke* in his judgment.

MCTIERNAN J. In the view which I take, namely, that the resolution of the appellant Council which was passed on 25th November 1929 did not validly declare Gresham Place to be a public street, it is not necessary to decide a number of other questions which were argued at the hearing of this appeal. The resolution of the Council was in these terms: "Resolved: That a certain street, to wit, Gresham Street—but known as Gresham Place—running east and west off King William Street, Adelaide, and laid out on Part Town Acre No. 16, be, and it is hereby declared to be, a public street, pursuant to the powers contained in section 159 of the *Municipal Corporations Act* 1923, and that such declaration be entered amongst the proceedings of the Council and in the Register of Public Streets." The declaration which this resolution expresses was not made on the request in writing of the owner or owners of the land abutting on Gresham Place. Sec. 158 provides that this request is a necessary condition precedent to the making of a declaration pursuant to the power contained in that section. Sec. 159 however, contains no such express provision. Therefore, if the true effect of sec. 159 be that it vests in the Council a power which is separate from and independent of the power contained in sec. 158, the absence of any request in writing from the owner or owners of land abutting on Gresham Place that it be declared a public street

would not alone be fatal to the effectiveness of the declaration to achieve the purpose which the above-mentioned resolution expresses. The question as to whether sec. 159 has this effect depends upon the construction of the Act. It will have been noticed that sec. 159 (b), under which the Council really acted, is in form merely a proviso to sec. 159. Sec. 159 is in these terms: "No street shall hereafter be set out or declared as a public street by the council unless the width of such street, to be ascertained by measuring at right angles to the course of such street from front to front of the building line on either side thereof, is forty feet at the least: Provided—(a) Existing streets may be continued if the continuation is at least of the same width as the street so continued: (b) If any land has been dedicated to the public by the owner thereof as a street previous to the twenty-third day of December, eighteen hundred and ninety, and used by the public as such for five years consecutively, the same may be set out or declared as a public street by the corporation if such a street has been formed, made, paved, or repaired by the corporation or at the cost of the owner or owners of land abutting on such street." This is the first section in Division III., which is entitled "Width of Streets." The creation of a power additional to those contained in secs. 157 and 158 does not appear to be germane to sec. 159. It will have been noticed that it does not contain any provision relating to the manner in which a parcel of land may be set out or declared as a public street. Having regard to the contents of secs. 157 and 158, this omission would be out of harmony with the plan of the legislation, if it were intended that the effect of sec. 159 (b) should be to vest an additional power in the council. It will be noticed that in secs. 157 and 158 the Legislature has expressly stated the method by which the power conferred by these sections respectively should be exercised. In fact in this case, although the declaration was not made on the request in writing of the owner or owners of land abutting on Gresham Place—a condition which sec. 158 expressly requires should be fulfilled—the provisions of that section were in other respects observed. In my opinion sec. 159 (b) is, as it is expressed to be, but a proviso on sec. 159, which is a provision relating to the width of streets and not to the declaration of public streets. Turning

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back to sec. 153, this section provides that public streets should be, *inter alia*, all streets vested in the Corporation by the Supreme Court or a Judge thereof "under the power hereinafter contained" (sec. 153 (1) (iv.)), and all streets declared by the Council "under the power hereinafter contained" by writing under their common seal and signed by the Mayor and Town Clerk, to be public streets (sec. 153 (1) (v.)). The section further provides that all other streets shall be private streets. The "power hereinafter contained" mentioned in sec. 153 (1) (iv.) is conferred by sec. 157, while that mentioned in sec. 153 (1) (v.) is conferred by sec. 158. In my opinion, therefore, sec. 159 (b) does not vest any power in the Council which is, in substance, separate from or independent of that conferred by sec. 158. In this view, in the absence of any request in writing of the owner or owners of the land abutting on Gresham Place, the declaration of Gresham Place to be a public street embodied in the resolution of 25th November 1925 is invalid. It follows that the fee simple of Gresham Place was not vested in the appellant, and that therefore the performance of the works which it proposed to execute there would be unlawful (*Mayor &c. of Tunbridge Wells v. Baird* (1)).

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *E. J. Cox & Son*.

Solicitors for the respondents, *Knox & Hargrave*.

H. D. W.