[HIGH COURT OF AUSTRALIA.]

THE COUNCIL OF THE MUNICIPALITY OF KOGARAH AND OTHERS . . DEFENDANTS, } APPELLANTS;

AND

THE COUNCIL OF THE MUNICIPALITY OF ROCKDALE . . . . . PLAINTIFF, } RESPONDENT.

Appl *Tea Tree Gully, City of v Minister for Local Government* (1997) 69 SASR 525

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Mar.* 29, 30; *May* 6.

Knox C.J., Isaacs, Higgins, Powers and Rich JJ.

Local Government—Destruction of night-soil—Control by council of municipality—Sanitary depot established in municipality by council of another municipality—Approval by Minister of Health or Board of Health—Withdrawal of consent by council—Nuisance—Suit by council to restrain—Local Government Act 1919 (*N.S.W.*) (*No.* 41 *of* 1919), *secs.* 84, 279, 282, 283, 288, 506, 530, 587, 654—*Local Government Ordinance* 1921-1924, *No.* 44 (*N.S.W.*), *clauses* 10, 19, 23, 30, 31.

In 1912 the Board of Health of New South Wales approved of an area of land within one municipality as a site for use by the council of another municipality as a depot for the disposal and destruction of night-soil. The land was thereafter used by the council of the latter municipality for the disposal of night-soil by burial. In April 1926 the council of the former municipality passed a resolution prohibiting the use within its area of any land for the purpose of the disposal or destruction of night-soil by burial, and notice of this resolution was given to the council of the latter municipality, and, that council having refused to discontinue the use of the depot, the council of the former municipality brought a suit in equity in the Supreme Court of New South Wales against the council of the latter municipality, alleging (*inter alia*) that the depot was a menace to the health of the locality and a nuisance to residents in the former municipality, and claiming an injunction to restrain the council of the latter municipality from using the land for the purpose of

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the disposal or destruction of night-soil. An injunction was granted limited to the disposal or destruction of night-soil by burial. On appeal to the High Court,

Held, that the injunction was properly granted :—

By *Knox* C.J. and *Rich* J., on the ground that secs. 282 and 530 of the *Local Government Act* 1919 (N.S.W.) conferred on the council of a municipality complete power to prohibit within its area the disposal and destruction of night-soil; that that power was not restricted by the provision in sec. 283 empowering a council to provide a sanitary depot outside its area; that the provision in sec. 283 requiring the approval of the Minister for the site of such a sanitary depot did no more than give the Minister a power of veto: and therefore that no power was given to the council of one municipality to establish or carry on a sanitary depot in the area of another council without the consent of that other council.

By *Isaacs* and *Powers* JJ., on the ground that the suit was one to abate a public nuisance; and that, the depot being a nuisance (as was found), the council of the former municipality was entitled, under sec. 587, to enforce the abatement of the nuisance by suit.

By *Higgins* J., on both grounds.

Decision of the Supreme Court of New South Wales (*Long Innes* J.): *Municipal Council of Rockdale* v. *Municipal Council of Kogarah*, (1926) 26 S.R. (N.S.W.) 552, affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in its equitable jurisdiction by the Council of the Municipality of Rockdale against the Council of the Municipality of Kogarah, John Ernest Fretus and John Joseph Hannon, in which the statement of claim was as follows :—

1. The plaintiff is the Council of the Municipality of Rockdale a local government area duly constituted as such under the laws in force in the State of New South Wales in that behalf.

2. The defendant municipal Council is a municipal council similarly constituted in respect of a local government area adjoining the municipality of the plaintiff Council.

3. The defendants John Ernest Fretus and John Joseph Hannon are carrying on business under the firm name of Hannon & Fretus as sanitary contractors and have been so carrying on business since 1st January 1922.

4. Prior to the happening of the events hereinafter stated the defendant Council had and used a certain area of land situated

within the plaintiff Council's area as a sanitary depot for the disposal and destruction of night-soil and other depot rubbish.

5. Under and by virtue of the powers conferred upon the plaintiff Council by the laws in force in the State of New South Wales in that behalf the said plaintiff Council on 23rd April 1926 by resolution duly made prohibited the use within the area of the said Municipality of Rockdale of any land or premises whatsoever for the purpose of the disposal or destruction of night-soil by burial and the plaintiff Council further directed that this prohibition was to come into force and be effective as from Friday 30th April 1926.

6. The defendant Council and the defendant John Ernest Fretus were duly informed in writing of the said prohibition so directed by the plaintiff Council.

7. The defendants John Ernest Fretus and John Joseph Hannon in their capacity as sanitary contractors are engaged by the defendant Council to remove and dispose of all night-soil in the Municipality of Kogarah and for such purpose the defendants John Ernest Fretus and John Joseph Hannon employ a number of vehicles, horses and men and a quantity of plant.

8. Notwithstanding the order so made as aforesaid by the plaintiff Council the defendant Council and the defendants John Ernest Fretus and John Joseph Hannon either themselves or by their servants or agents have continued to use the said area of land within the Municipality of Rockdale for the purpose of digging and constructing trenches therein and burying and otherwise disposing of night-soil from the Municipality of Kogarah and the defendant Council threatens and intends to continue so to use the said area of land.

9. The said area of land by reason of its long and continued use by the defendant Council for the purpose of the disposal and burial of night-soil has been reduced to a filthy and insanitary condition, the whole area of the ground is in a highly offensive state and such as to be a menace to the health of the locality and a nuisance to the residents in the plaintiff Council's municipality generally.

10. The plaintiff Council fears that the defendant Council and the defendants John Ernest Fretus and John Joseph Hannon the defendant Council's sanitary contractors will continue unless

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restrained by the order and injunction of this Honorable Court to use the said or other land within the Municipality of Rockdale as a sanitary depot in defiance of the prohibition of such user duly enacted by the plaintiff Council and in such a manner as to cause a nuisance to the locality generally.

The plaintiff claimed (*inter alia*) (1) that the defendants and each and all of them and their and each of their servants and agents be restrained by the order and injunction of this Honorable Court from using any land or premises within the area of the Municipality of Rockdale for the purpose of the disposal or destruction of night-soil.

In the statements of defence of the defendants, by par. 2 it was contended that the resolution of 23rd April 1926 was illegal and *ultra vires* the plaintiff Council and was null and void; by par. 3 it was alleged that, under and by virtue of the powers conferred upon the Board of Health by the laws in force in that behalf, the Board of Health on 4th June 1912 approved of the area of land mentioned in par. 4 of the statement of claim for use by the defendant Council as a night-soil depot for the disposal and destruction of night-soil and other rubbish, that such approval had never been varied, rescinded or withdrawn and was still of full force and effect, and that the situation of the night-soil depot had at all relevant times been approved by the Minister of Health, and it was submitted that the plaintiff had no power under the circumstances by resolution or otherwise to prohibit or otherwise interfere with the user by the defendant Council of the area of land; and by par. 5 it was denied that the area of land by reason of its use had been reduced to a filthy or insanitary condition, and it was also denied that the area of land or any portion of it was in a highly offensive state or was offensive at all or was such as to be a menace to the health of the residents in plaintiff Council's municipality or at all.

On motion by the plaintiff, *Long Innes* J. granted an injunction until the hearing of the suit or further order. Subsequently, on motion by the defendant for suspension of the injunction, which by consent of the parties was turned into a motion for a decree, *Long Innes* J. made a decree whereby he ordered that the defendants

and each and all of them be perpetually restrained from "using any land or premises within the area of the Municipality of Rockdale for the purpose of the disposal or destruction of night-soil by burial": *Municipal Council of Rockdale* v. *Municipal Council of Kogarah* (1).

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

Other material facts are stated in the judgments hereunder.

Maughan K.C. (with him *J. A. Ferguson*), for the appellants. The Board of Health having given its approval of the depot under sec. 74 of the *Local Government Act* 1906 (N.S.W.), as amended by sec. 9 of the *Local Government* (*Amending*) *Act* 1908 (N.S.W.), the respondent Council had no authority to interfere. The *Public Health* (*Amendment*) *Act* 1915 (N.S.W.) shows that the dominant authority in matters relating to the removal and disposal of night-soil is the Department of Public Health (sec. 3; Schedule, Part I.). Sec. 9 of the *Local Government Act* 1919 (N.S.W.) preserves the rights and liabilities of municipal councils acquired and incurred before that Act. Sec. 283 (3) gives a right to a municipal council to have a depot for the destruction of night-soil in the area of another municipality without the consent of the other municipality. The general power given by sec. 530 to prohibit does not control the specific power given by sec. 283 (3). The resolution of the respondent Council purports to prohibit the disposal of night-soil in the only way that under clause 10 of the Ordinance No. 44 it can in the circumstances be disposed of, namely, by burial. There are many things a council can do outside its area, but wherever the consent of another council is to be given special provision is made (see secs. 241, 289 (*g*), 446, 506). No specific power is given in the Local Government Acts whereby a council may by resolution prohibit generally the doing of particular acts within the municipal area, nor is there any specific provision for the enforcement of a resolution. The Legislature contemplated that where a depot had been approved the council in whose area the depot was should apply to the Board of Health or the Minister to rescind the approval.

Loxton K.C. (with him *E. W. Street*), for the respondent. Sec. 84 of the *Local Government Act* 1919 gives to the council of a municipality

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a general power of local government within its area with general control of the working and business of its local government, and under sec. 279 the council may do all things necessary for the promotion and preservation of public health. The effect of sec. 283 is that without the approval of the Minister of Health a council may not establish a sanitary depot outside its area, but the section does not take away the right of the council in whose area the depot is to exercise its power of local government by prohibiting the use of the depot for the destruction of night-soil. Under the Public Health Acts the administration of the Acts is left generally to the municipalities in their several areas and the Board of Health is not empowered to act unless a council has failed to do particular acts or has done them badly. [Counsel referred to the *Public Health Act* 1902 (N.S.W.), secs. 17, 24, 25, 64, 65, 71, 72, 79, 94, 95, 109.]

Maughan K.C., in reply.

Cur. adv. vult.

May 6.

The following written judgments were delivered :—

KNOX C.J. AND RICH J. The question raised by this appeal is whether on the true construction of the *Local Government Act* 1919 the council of a municipality is entitled to use land within the local government area of another municipality for the purpose of a sanitary depot for the disposal and destruction of night-soil without the consent or against the will of the council of that other municipality. The facts on which this question arises may be shortly stated as follows, namely :—In the year 1912 the Board of Health approved of the area of land in question, which is within the Municipality of Rockdale, as a site for use by the Municipality of Kogarah as a depot for the disposal and destruction of night-soil, and that approval has never been withdrawn. This land was adjacent to land used by the respondent for similar purposes. Apparently, until the year 1922 no objection was raised by the respondent to the use of the land by the appellant, but in that year the respondent gave notice to the appellant that it intended to prohibit the continuance of the use of the land as a sanitary depot. In November 1923 notice was again given to the same effect but no further action was taken until 8th March 1926,

when notice was given that the respondent intended at its meeting of 8th April to prohibit the use of the land for the disposal of depot-rubbish including night-soil. On 22nd April 1926 the respondent passed a resolution in the words following, namely:—"That this Council hereby prohibits the use, within the area of the Municipality of Rockdale, of any land or premises whatsoever for the purpose of the disposal or destruction of night-soil by burial. This prohibition is to come into force and be effective as from Friday the 30th day of April 1926." Notice of this resolution was given to the appellant on the following day. On 22nd April 1926 the respondent ceased to bury night-soil on the land adjacent to that used by the appellant. The appellant having refused to discontinue the use of the depot, the respondent in May 1926 instituted proceedings in equity for an injunction to restrain the appellant from using any land or premises in the Municipality of Rockdale for the purpose of the disposal or destruction of night-soil.

The statement of claim contained an allegation that the depot used by the appellant was a menace to the health of the locality and a nuisance to residents in the Municipality of Rockdale, but *Long Innes* J. held, and we agree, that the suit was not based on nuisance as such, but was instituted under sec. 587 of the Act to enforce or secure the observance of the provisions of the Act. The learned Judge was of opinion that on the true construction of the Act of 1919, as amended by the Act of 1922, the respondent was entrusted by the Legislature with the power of controlling and regulating the removal and disposal of all depot-rubbish within its own area and with the power of prohibiting the use of any premises within its area for those purposes, and that the continued use by the appellant of the site in question was therefore unauthorized and illegal. Being further of opinion that the depot as carried on by the appellant constituted a serious public nuisance, considerable in degree, he granted an injunction in the terms of the resolution set out above restraining the appellant from using any land in the Municipality of Rockdale for the disposal or destruction of night-soil by burial. It is from this order that this appeal is brought. No question was raised before this Court as to the frame of the suit, or as to the power of the Supreme Court in Equity to grant the

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injunction, if the construction put upon the Act by the learned Judge was correct.

Sec. 282 of the Act of 1919, so far as relevant, is in the words following, namely: "The council may control and regulate the keeping on premises and the removal, disposal, and destruction of all depot-rubbish (2) . . . (*a*) 'depot-rubbish' shall . . . include night-soil." Sec. 283 provides that a council may provide, maintain, manage, control and regulate sanitary depots for the disposal and destruction of depot-rubbish, that any such depot may be within or outside its area, and that the situation of any such depot shall be subject to the approval of the Minister of Health. Under the Local Government Acts in force in 1912—the Act of 1906 and the amending Act of 1908—the council of a municipality was authorized to collect, remove and dispose of night-soil within or outside its area subject to the approval of the site of the depot by the Board of Health. It was under this provision that the approval of the Board of Health was obtained to the site of the depot used by the appellant. By sec. 530 of the Act of 1919 it is provided that any power given by the Act to regulate shall be deemed to confer power to license, prevent or prohibit. By sec. 84 of that Act it is provided that for the purposes and subject to the provisions of the Act each council shall be charged with the local government of its area. By sec. 279 it is provided that for the purposes and subject to the provisions of the Act the council may do all things necessary from time to time for the promotion and preservation of public health and convenience.

Reading the words of secs. 282 and 530 according to their natural meaning, they confer on the council of any area complete power to prohibit within its area the removal, disposal or destruction of night-soil—a course which may well be, and in this case apparently is, necessary for the preservation of public health within the area (see sec. 279). It is contended, however, that the provisions of sec. 283 require that the words of secs. 282 and 530 should be given a restricted meaning, because by sec. 283 a council is empowered to provide a sanitary depot outside its area. This provision does not expressly authorize a council to establish a sanitary depot in the area of another council without its consent and, in our opinion, no reason has been advanced for construing the section as conferring

such a power. Having regard to the duties imposed on a council by secs. 84 and 279 of the Act and to the power of control and regulation, extending to prohibition, conferred by secs. 282 and 530, we find ourselves unable to place that construction on the words of sec. 283. To do so would be to deprive the council charged with the local government of an area of the power effectively to control or regulate the disposal or destruction of night-soil or to preserve the public health within its area. In our opinion this provision of sec. 283 should be read as subject to and not as overriding the other provisions of the Act to which we have referred.

The appellant relied also on the fact that the Board of Health had approved of the site of the depot. It was said that the effect of the Public Health Acts was to make the Board, and subsequently the Minister, the paramount authority on the matter and that the fact that the Board had approved of the site was conclusive. We do not agree. No doubt the approval of the Board under the earlier Acts and of the Minister under the existing Act is a condition precedent to the exercise by a council of the power to establish a sanitary depot outside its own area, but in our opinion this provision does no more than confer on the Board—or the Minister—a power of veto. Reference was made to several provisions of the Public Health Acts in support of this argument, but we cannot agree that any of these provisions justifies a departure from the plain meaning of the words used in the section of the *Local Government Act* to which we have referred.

In our opinion the decree of the Supreme Court is correct and this appeal should be dismissed.

ISAACS J. I think it my duty, before stating my opinion on the law of this case, to refer to the general situation of councils finding themselves embroiled in such controversies as the present. The *Local Government Act* 1919, as appears from its long title and from a general conspectus of the Act as a whole, is an effort by the Legislature of New South Wales to place local government on a more satisfactory footing than it occupied before. It recognizes distinct areas for local self-government, and to that extent confers independence of action. But it also recognizes that each area is a part of

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the State, and the primary independence of areas had in some circumstances—such as public health—to be impinged upon by broad national considerations. The Minister represents the State for this purpose. It is perfectly plain in many cases, and this is one of them, that Courts cannot meet the public requirements of controversies between councils representing whole communities. We may and must determine the strict legal rights of parties if brought forward in manner sanctioned by law. But adjustments depending on considerations other than purely legal are outside the province of a Court, and yet may be absolutely necessary in the urgent interests of public health.

I have been much exercised as to whether sec. 654 of the *Local Government Act* is not intended to be the only way of settling disputes between councils. Obviously, where one council says its area is so situated physically that, unless it has access to a neighbouring area for a sanitary depot, a pestilence may occur to the general danger, and therefore uses the power under sec. 283, and where the council of the other area says it objects to the concentration of objectionable matter in its territory, a very acute question of what is best on the whole in the public interest arises. That, by sec. 654, the Minister, aided by such advice as he desires, may adjust on equitable terms. He may adjust it quickly, cheaply, equitably and finally. Here, for a reason I shall mention, I think that, even if that section be the sole remedy in other circumstances, a question I leave entirely open, it is not so in this case. But I cannot refrain from deploring the waste of public money, effort and time in legal proceedings, ending, whichever way this decision might go, in the manifest necessity, according to the facts now appearing, of resorting eventually to the Minister if serious injury to the public health of one or other of both of these municipalities is to be averted.

Dealing with the legal aspect of the case before us, the salient facts are these:—The Kogarah Municipality was for many years lawfully possessed of a sanitary depot within the Rockdale Municipality, where it received night-soil from the Kogarah Municipality and there buried it. The sanitary depot had been lawfully established with the approval of the Board of Health in 1912, and the approval has never been withdrawn. On 1st April 1926 the

Rockdale Council informed the Kogarah Council of its intention to insist on the discontinuance of all burial of night-soil within its area, and of its intention to pass a resolution to that effect. On 23rd April 1926 the Rockdale Council passed a resolution prohibiting the use within its municipality of any land or premises whatsoever for the purpose of the disposal or destruction of night-soil by burial. The Kogarah Council, though notified, refused to desist, and thereupon, on 10th May, a suit was instituted for an injunction to prevent, not merely the burial of the night-soil, but the use of premises for the purpose of disposal or destruction of night-soil, that is, by any means. The statement of claim is also as wide. It alleges by pars. 4 to 8 the existence of the depot, the prohibition, the notification and the continued use and threatened future use of the depot for night-soil. By par. 9 it is alleged : " The said area of land by reason of its long and continued use by the defendant Council for the purpose of the disposal and burial of night-soil has been reduced to a filthy and insanitary condition, the whole area of the ground is in a highly offensive state and such as to be a menace to the health of the locality and a nuisance to the residents in the plaintiff Council's Municipality generally." Par. 9 is an allegation of facts which in law constitute a public nuisance.

The defence contested the power of the Rockdale Council to prohibit the Kogarah Council by resolution and notice. The point of that contention is that by the Act of 1908, and now by sec. 283 of the Act of 1919, a council has express power to establish a depot outside its own area as well as within that area, provided the situation had the approval of the Board of Health, or has now the approval of the Minister of Health. That being established in this case, the existence of the depot was, up to April 1926, lawful. Then, as by sec. 577 the Ordinance No. 44 has the force of law, reg. 10 requiring night-soil to be buried—unless the Board of Health approves of emptying into the open sea or some other method—there was not only a right but a duty to bury the night-soil at the depot. The defence also categorically denied par. 9.

The learned primary Judge, *Long Innes* J., found as a fact that the depot " does constitute a public nuisance which is considerable in degree," and " that there has of late years been a considerable

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development of land for settlement purposes in the neighbourhood of the depot, and that the continued maintenance and user of the depot in its present condition and for the purposes for which it is now used will arrest or impede to a substantial degree the development and settlement of the land adjacent thereto," though he finds that "there has been no negligence in the mode in which the depot has been carried on and the nuisance, by smell and otherwise, . . . is not greater than such as is inevitable in the case of a sanitary depot of this nature." In other words, there is a considerable public nuisance which can never be lessened as long as the depot is continued as a burial place for night-soil. If other expedients within the ordinance be resorted to, there may be no nuisance. The learned Judge said the "public nuisance" aspect was immaterial for two reasons. The first was that the plaintiff was suing not for public nuisance, but under sec. 587; the second was that in the absence of the Attorney-General the suit was not properly constituted. Dealing then with the case apart from public nuisance, the learned primary Judge thought the consent and continued consent of the Rockdale Council to the presence of the depot in its area was a statutory condition of legality, and therefore, as that consent had been withdrawn so far as burial was concerned, it was unlawful for the Kogarah Council to maintain a depot in Rockdale for the burial of night-soil. The injunction is framed accordingly.

With great respect to the learned primary Judge, who has stated his conclusions of fact and law with great clearness and care, I am unable to take the same view of the Act. Apart from the question of public nuisance, I see no element of illegality in anything the Kogarah Council has done. Sec. 283 is distinct that by sub-sec. 3 "any such depot may be within or outside the area." "Outside the area" does not mean "outside every area in New South Wales." Outside the council's area may be inside a neighbouring council's area. The Legislature, if it had left sub-sec. 3 unqualified, would have made the authority of a council to establish a depot in a neighbouring council's area as large as the power to establish it in its own and free from the necessity of any prior consent. But that would not have freed the council owning the depot in another area from obeying the regulations made by ordinances, or from obeying

the lawful controlling directions of the local council in respect of sanitation. Proprietorship is one thing; governmental power is another. And the Legislature did express what it desired as to the qualification of sub-sec. 3. In sub-sec. 4 it enacted: "The situation of any such depot shall be subject to the approval of the Minister of Health." I am unable to add to those words "and of the local council," which the Legislature has not seen fit to enact. To add them is practically to nullify the section. Therefore, so far the depot is lawfully situated. As to the burial of the night-soil brought there, since the ordinance is law and commands the burial, then, in the absence of any legislative overpowering provision, burial is lawful and compulsory and the suit should fail. Is there any such legislative overriding provision? None was referred to in argument, and if none existed the appeal should be allowed. But, in my opinion, there is such a provision, and it is applicable to this case. It is quite true that in the argument before us the whole stress of the respondent was placed on the right of the Rockdale Council to withhold its consent to the burial of night-soil irrespective of public nuisance. But par. 9 and its denial in the defence raised a very distinct issue of public nuisance. The evidence shows that this issue was fought strenuously. The claim was to repress the depot altogether, and on two grounds, the second of which was public nuisance. The learned trial Judge, after inspection, came to the conclusion that there was a public nuisance. No relevant issue of fact remains unexplored. It is a mere question of applying the law to the facts as fully contested and ascertained.

I find in sec. 288 of the Act an overriding provision. It says: (1) "The council" (that is here the Council of Rockdale) "may prevent the creation of public nuisances and may abate or require the abatement of public nuisances." The next sub-section is all-important. It declares: "(2) Nothing elsewhere contained in this Act shall be construed to impair the powers given by this section." The third sub-section is material to show that the two previous sub-sections are statutory directions. It says: "(3) Nothing in this Act shall be construed to impair any power of abating nuisances at common law." I read sec. 288 as placing the repression by the council of public nuisances in a dominant situation so far as statutory

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authority extends. To sec. 288, sec. 283 must bend. Whatever power is contained in sec. 283 in favour of an outside council is subordinate to the power of the council of the area, if there be a public nuisance. It is quite clear that the Council did require the abatement of this public nuisance.

The only remaining question is whether the suit is properly brought by the Council. Sec. 587 says : " In any case in which the Attorney-General might take proceedings on the relation or on behalf or for the benefit of the council for or with respect to *enforcing or securing the observance of any provision made by or under this Act*, the council shall be deemed to represent sufficiently the interests of the public and may take the proceedings in its own name." Under sec. 288 the council is empowered to " require the abatement " of a public nuisance. It seems to me that, if the requirement is made and disobeyed, an action by the council is competent under sec. 587 for the purpose of " enforcing " or securing the observance of the provision referred to. For this reason and this alone, there having been no adjudication under sec. 654, the appeal should, in my opinion, be dismissed and the order as made, which is limited to burial, confirmed.

HIGGINS J. It is not contended for the appellant that the plaintiff, the Municipality of Rockdale, is not entitled to relief in this action if its theory as to the meaning of secs. 282 and 283 of the *Local Government Act* 1919 is correct. Assuming, then, that the Supreme Court of New South Wales could give to the plaintiff the relief sought, I am of opinion that this theory, accepted by the learned Judge of first instance (*Long Innes* J.), is substantially right. By sec. 282 it is enacted, as to the area of each council, that " the council may *control* and *regulate* the *keeping on premises* and the removal, disposal, and destruction of *all* depot-rubbish." Depot-rubbish includes " any kind of rubbish which in the interests of public health or convenience it is . . . desirable to remove to a sanitary depot or elsewhere for sanitary disposal or destruction, and in particular shall include night-soil." By sec. 283 it is enacted that " (1) The council may *provide*, maintain, manage, control, and regulate—(*a*) sanitary depots. . . . (2) The council may receive at

any such depot and dispose of or destroy any depot-rubbish, *whether the depot-rubbish* is brought *to the depot by the council or any other council*. . . . (3) Any such depot may be within or outside the area. (4) The situation of any such depot shall be *subject to the approval* of the Minister of Health."

So far, it is clear, therefore, that all night-soil within the Rockdale area is under the control and regulation of the Rockdale Council, even if it has been brought to a depot in the Rockdale area by the Kogarah Council. The responsibility for any night-soil on any premises in the Rockdale area rests primarily on the Rockdale Council. But it is clear also that the Kogarah Council has, up to the point of removal for deposit, a similar responsibility as to Kogarah night-soil; and that sec. 283 (3) gives authority to the Kogarah Council to provide sanitary depots, even outside the Kogarah area; but the situation of the depot in each case, whether within or outside the area, is "subject to the approval" of the Minister of Health. By sec. 284 all depot-rubbish received at any depot of "the council" shall be the property of the council.

The question is, does the *approval* of the Minister of Health as to the site of a depot which is outside the Kogarah Municipality's area give authority to the Kogarah Council, without anything further, to use that site? I think not. "Approval" is not the same thing as authority; it is here a condition without which the authority cannot exist. If there were a section enabling two adjoining municipalities to arrange for the upkeep of the boundary road "subject to the approval" of the Minister of Public Works, the approval of the Minister, if given, would not make the arrangement binding, but it is a condition without which it would not be binding. That the two municipalities should agree is essential; the power of the Minister is practically, as *Long Innes* J. says, a power of veto. So here, the Council of Kogarah has power to "provide" a sanitary depot within or without its area, with the approval of the Minister as to the site; but if the council is empowered to "provide" such a depot, the meaning is not that it is enabled, merely because the Minister approves of a certain site, to seize that site and use it as a depot. It is admitted that the consent of the landowner must be obtained; and yet no reference is made to the landowner's consent

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in these sections; and, in my opinion, the consent of the Rockdale Council, which has the control and management of the keeping of all night-soil on any premises within the area, is also implied. When a public body is empowered to "provide" drinking troughs for horses, it is not thereby empowered to seize any timber that may be suitable, and make it up into troughs without paying for it. The power to "provide" points to the conferring on the donee of the power a new capacity for expenditure of the ratepayer's money; but it does not make an act lawful as against outsiders that would be unlawful otherwise.

But the ordinances have to be considered—Ordinance 44, which has been made by the Governor in Council as under sec. 303 for carrying Part X. of the Act into effect. It is not contended by either party that any part of this ordinance is invalid. Under this ordinance, clause 9, "the council shall for every scavenging district" (fixed and defined by the council under sec. 283 (5) (*a*)) "provide *a general depot* or a septic tank for the disposal of night-soil: Provided that the *approval* of the Board of Health to the site thereof *shall be obtained beforehand*." Clause 10: "All night-soil brought to any depot, other than a septic tank, shall be disposed of at such depot in one of the following ways—(*a*) By emptying into trenches not more than 24 inches wide and not more than 24 inches nor less than 10 inches deep, or of such depth as is approved by the Board of Health" &c. "(*b*) By emptying into the open sea, if the Board of Health approves in writing. (*c*) By any other method of which the Board of Health approves in writing: Provided that the Board of Health may at any time withdraw any approval given by it *under this clause*." Clause 19 (1): "The council may sell or otherwise dispose of night-soil, after reception at the depot. All persons removing such night-soil shall comply as to time and method of removal with the conditions laid down in clause 30 (1) of this ordinance. (2) Night-soil removed under this clause shall not be used in such a way as to cause a nuisance." Clause 23: "The council shall provide for the removal and disposal of night-soil in every scavenging district within the municipality." Clause 24: "All night-soil shall (except where otherwise lawfully provided) be deposited at the night-soil depot and shall be there disposed of as hereinbefore

provided in this ordinance." Clause 30 states how "the servants or contractors with the council" shall remove and treat the pans, and "where air-tight pans of a pattern or description *which has been approved by the Board of Health* are used, *the council may authorize*" the removal of night-soil to be carried out at any hour of the day, but otherwise removal shall not be effected except during the hours after 10 p.m. and before 5 a.m. Clause 31: "*Except as hereinbefore provided, a person shall not spill, empty, or deposit any night-soil elsewhere than at the appointed depot.*"

The "appointed depot" is therefore the depot appointed or provided by the council of the area where it is situated; and no night-soil can be deposited except at that depot. The provision of sec. 283 of the Act, that the depot which each council may provide may be within *or outside* the area, becomes consistent with the exclusive control and regulation to which the council of the area where the depot is situated is entitled, only when the latter council gives its consent to the site and the use thereof; but not otherwise. The "approval" of the Board of Health as to the site is not operative as an authority for the use of the site; it is a condition precedent to the giving of the authority, as in clause 30 (1) of the ordinance.

I have not, in coming to this conclusion, omitted to consider the argument which is based by the appellant on sec. 506 of the Act. Under this section where a council has works for the supply of water, gas, electricity, &c., the council may supply water, gas, electricity, &c., to any place situated outside its area; and it is expressly provided that in that case the consent of the council of that outside area must be obtained; and the first mentioned council is not to levy rates in the outside area, but to make agreements (with individuals) for payment of charges. It is argued, that the express provision for consent of the outside council in this case shows that consent is not necessary, by implication, in the case of sanitary depots. But the position is totally different. The supplying council has not any such monopoly as to water, gas, electricity, &c., as it has with reference to the leaving night-soil on premises; and, as to the supply of water, gas, electricity, &c., the Legislature had to make it clear that in expanding the capacity of the supplying council it did not intend that the capacity should be utilized so as to contract

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with individuals as to breaking up the roads, &c., without the consent of the council of the area in which the individuals resided. In any case, the argument, though fairly used, is not nearly sufficient to outweigh the effect of the provisions for exclusive regulation of sanitary depots.

The position then is, that the Council of Rockdale has power to control and regulate the keeping of all night-soil on any premises (within its area) and its removal, disposal and destruction; that it has power to provide, maintain, manage and control all sanitary depots (within its area), and to dispose of it whether it come from Rockdale Council or from any other council; and that there is no power for any other council or person to deposit any night-soil on the Rockdale area without the consent of the Rockdale Council. There is another provision which involves that the Kogarah Council can provide a sanitary depot, either within the Kogarah area or outside it. The only way to reconcile these provisions is by treating the power of the Kogarah Council as being dependent on the consent not only of the owner of the land but on the consent of the Rockdale Council, which has the sole responsibility for the Rockdale area. The Council of Rockdale has to frame a consistent scheme as to night-soil for all its area, and it could not do so if the adjoining councils could compel it to accept foreign night-soil in any place and in any quantity. It is our duty to construe this Act so that where two constructions are fairly open to us we do not accept that construction which involves injustice or absurdity. Perhaps we cannot strictly apply the rule (*Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (1)) laid down so often, and in particular by the Judicial Committee of the Privy Council in *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (2), that "it must . . . be shown that the Legislature have authorized the thing to be done at all events, and irrespective of its possible interference with *existing rights*." The same principle is necessarily applicable where the Legislature puts the sole responsibility for sanitary depots for a whole area on the public body of that area, and then enables another public body to "provide" something outside as well as within its own area—it must be a provision made by arrangement with the council which has the responsibility.

(1) (1894) A.C. 508, at p. 516.

(2) (1882) 7 App. Cas. 178, at p. 189.

My opinion is, therefore, that on the true interpretation of the Act and ordinance the Kogarah Council has no right to continue the depositing of its night-soil on this land within the area of the Rockdale Council without the consent of the latter Council. That consent was withdrawn by the resolution of the Rockdale Council by its resolution of 22nd April 1926, communicated to the Kogarah Council on 23rd April; for it prohibited the use (by the Rockdale Council itself as well as by the Kogarah Council) within the area of Rockdale of any premises for the purpose of the disposal or destruction of night-soil by burial, as from 30th April 1926. This prohibition is confined to burial, but it is not suggested that any other mode of treating the night-soil was adopted or proposed.

But it is my duty to say respectfully that I cannot concur with the other grounds on which the learned Judge has based his order. I cannot concur with the view that the plaintiff is suing, not to restrain a public nuisance, but suing under sec. 587 of the Act to enforce or secure the observance of the provisions made by that Act. The statement of claim, which is expressly recited in the order, is expressly based on public nuisance. In par. 9 it is stated that by the defendant's use of the ground the place is "a menace to the health of the locality and a *nuisance* to the residents in the plaintiff council's municipality generally"; and according to par. 10 the plaintiff fears that the use will continue, unless restrained by injunction, "in such a manner as to cause a *nuisance* to the locality generally." I take the action as framed to be an action to stop a nuisance which is not justified by the provisions of the Act, which is even forbidden by the provisions of the Act, the consent of the Rockdale Council having been withdrawn. It is true that the Attorney-General has usually to be the plaintiff in actions to restrain a public nuisance; but here there is statutory authority for the Council to sue—"the council shall be deemed *to represent sufficiently the interests of the public* and may take the proceedings in its own name." If sec. 587 does not refer to actions for public nuisances and grievances of an analogous nature, I do not know to what it can refer; I do not know of any practice which confers on the Attorney-General the function of acting generally as knight-errant on behalf of distressed

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local authorities for the purpose of enforcing or securing the provisions of such an Act.

But I think that the order should be affirmed, and the appeal dismissed.

POWERS J. concurred in the judgment of *Isaacs* J.

Appeal dismissed with costs.

Solicitors for the appellants, *Salwey & Primrose.*

Solicitors for the respondent, *Morgan & Morgan.*

B. L.

[HIGH COURT OF AUSTRALIA.]

McQUADE . . . . . APPELLANT;
DEFENDANT,

AND

MORGAN AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 11, 20; *May* 6.

Knox C.J., Isaacs, Higgins, and Rich JJ.

Deed of Appointment—Construction—Gift of income after appointor's death—Gift over on appointee charging his interest—Charge given and released before appointor's death—Determination of interest—Forfeiture.

The donee of a power of appointment appointed, by a deed-poll, that the trustees should after her death hold the property appointed upon trust for her four children for their maintenance during their minority and after their respectively attaining twenty-one to pay them the whole of the income in equal shares. It was then declared that "in case any of the said children . . . shall become bankrupt or do or suffer any act or thing whereby the