Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Borough of Bathurst v. *Macpherson, from the Supreme Court of New South Wales, delivered* 11*th March* 1879.

Present:

Sir James W. Colville.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THIS is an appeal by the Defendants from a decision of the Supreme Court of New South Wales, by which a verdict for the Defendants was set aside and a new trial granted in an action brought by the Respondent, who was the Plaintiff, to recover damages under the circumstances which will be hereafter pointed out.

By an Act of the Legislature for New South Wales, No. 12 of 1867, intituled "An Act to "establish Municipalities," it was declared that the Defendants, the Municipality of Bathurst, had been legally constituted and incorporated under the provisions of the Municipalities Act of 1858 thereinbefore repealed, and that, for the purposes of the said Act of 1867, they should remain and be legally constituted and incorporated, and should be and be designated a borough.

By Section 117 of the Act, it was enacted that the Council should, within the boundaries of the Municipality, have the care, construction, and management of public roads other than the main

roads of the Colony, and of public streets, lanes, ferries, wharves, jetties, and public thoroughfares, except as thereinafter mentioned.

The Act gave powers to the Council of any Municipality to enter upon private lands under certain restrictions, to obtain materials for repairing roads, streets, &c. (Sect. 119).

The Council was empowered to make rates for, amongst other things, the repairs of the roads, &c., but such rates were not to exceed one shilling in the pound in the year upon the value of the rateable property to be assessed, as in the Act mentioned, Sect. 164; and they were also authorized to levy tolls, &c., Sect. 179.

Sections from 120 to 124 inclusive were also cited as bearing upon the question of the duties aud liabilities of the Corporation in respect of roads.

There is no dispute as to the facts, which are thus stated in the Appellant's own case:—

"The Plaintiff is a mining proprietor and commission agent, residing at Hill End, a town some distance from Bathurst. Between 2 and 3 a.m. on the morning of the 26th March 1876, the Plaintiff was riding on his way home from Bathurst down a street within the municipality of Bathurst called Durham Street, the morning being dark and showery. On arriving at that part of Durham Street which is intersected by Hope Street, the Plaintiff's horse fell into a hole and carried the Plaintiff with him, crushing the Plaintiff's leg against one side of the hole, and causing a compound fracture of his leg. This was the injury complained of."

The place where the Plaintiff was injured is in the suburbs of Bathurst, on the outskirts of the town, but within the municipality. Durham Street was originally constructed by the Defendants, and, as constructed, was a well made street, a mile and a quarter long, and 99 feet broad,

including the footpath. The roadway, exclusive of the footpath, is 75 feet wide. The end of Durham Street in which the hole was is not, and never was, kerbed or guttered, but the pathway is formed. The hole into which the Plaintiff's horse fell is an open drain, where the gutter should be, nearly perpendicular at the side of the pathway running down Durham Street to Hope Street, and emptying itself into a barrel drain underneath the latter street. The heading of the barrel drain is covered over. Fifty yards from Hope Street, at its commencement, the drain is 2 feet deep, but deepens as it spproaches Hope Street till, at the intersection of the two streets, it is 4 feet deep. The drain is 5 feet wide, and is not fenced. The hole in question was caused by the brickwork of the drain having broken away, and, not having been repaired, the rain tore away the soil and caused the earth to work "away." The barrel drain was constructed by the Appellants, and it was stated by one of the Plaintiff's witnesses that the hole had been for two years as deep as it was at the time of the accident.

The Plaintiff commenced his action against the Defendants in the Supreme Court of New South Wales, to recover damages against them for the injuries he had sustained. By the first count of his declaration he claimed damages for negligence in constructing the street, and, by the second count, for negligence in keeping and maintaining the street, and not repairing the drain, gutter, or sewer, in the said street. The Defendants pleaded to the whole of the declaration the general issue. The action came on for trial in Sydney, before the Chief Justice and a jury of four persons, on the 1st May 1877. At the trial evidence, both oral and documentary, was adduced by the Plaintiff in support of his case, and the above facts were proved.

The Defendants put in no evidence. In his summing up, the Chief Justice directed the jury that the Defendants, under their Act of Incorporation, were not liable for the result of any mere non-feasance; that if they thought fit to construct a sewer, and did the work in so negligent a manner as to bring about the accident, they were liable for that mis-feasance, but if they constructed the sewer properly in the first instance, and it became defective afterwards, they were not bound to repair it; and further, that if the defective state in which the drain was arose from the operation of the weather or wear and tear, it having been properly constructed originally, they were not liable. The jury thereupon returned a verdict for the Defendants. A rule Nisi to set aside the verdict and for a new trial was granted by the said Supreme Court (consisting of the Chief Justice, Mr. Justice Hargrave, and Sir William Manning) on the following ground only, viz.:—

"That the ruling and direction of His Honour, "the Chief Justice, that the Plaintiff could "not recover on the second count, on the ground "that the Defendants were not bound to repair "or keep in repair was erroneous."

No question therefore arises as to the first count.

On the 29th June 1877, the rule Nisi was heard before the same learned Judges, and the following order was made (the Chief Justice dissenting):—

"It is ordered that the said rule be, and the "same is hereby made absolute, and the verdict "obtained herein set aside, and a new trial be "had between the parties on all issues.

"And it is further ordered that the costs of "the said Plaintiff of, and occasioned by the "application for such new trial after taxation, be "paid by the above-named Defendants."

Against this order the appeal is brought.

The learned Chief Justice has stated his reasons very fully in support of his opinion that there were no grounds for making the rule absolute. After referring to his ruling at the trial, he adverted to the importance of the question raised. He said: "No doubt this case raises a point of "extreme importance, not only to this borough "but to all the boroughs now or hereafter incor- "porated under the same Act, viz., whether what- "ever may be the state of the municipal funds, "whatever the size of the municipalities (and "some of these municipalities are very extensive), "whatever may be the state of the streets when "they are handed over, however much it may "cost to put them in order, they are not liable "at their peril to put them in a thorough state "of repair, and to be sued by every person who "may meet with any accident, however slight, "through their neglect to repair.

"A municipality may have, as in this case, "streets extending over 70 miles, and the rates "may not return over 1,000*l.* a year (the "amount of rates that can be imposed being "limited), and yet, if the Plaintiff is right in his "contention, it is bound with these limited "means to put the whole of the streets in repair.

"I can see, if this action is decided against the "Defendants, that it will require speedy legis- "lation to prevent such bodies from being finan- "cially ruined by actions like the present.

Mr. Justice Hargrave considered that the Corporation, as the only body authorized to meddle with the roads, were bound by the Act to repair them so long as they remained by their authority open to the public.

Sir William Manning did not think it necessary to inquire broadly into the obligations of a municipality to make all repairs of streets or roads

which the general convenience of the public might demand, but confined himself to the question which the facts of the case compelled him to decide.

With regard to the particular case it is clear that the hole was caused by an artificial work, viz., the barrel drain which was constructed by the Council, and that the accident would not have occurred if that drain had not been made, or if it had been kept in repair so as to prevent the soil adjacent to the excavation made for the barrel drain from washing into it, and forming the hole in question. If the excavation for the barrel drain had not been made, the soil which was removed would have formed a support for the adjacent soil and prevented it from being washed away so as to form the hole. The brickwork which formed the wall to the drain, so long as it was in repair, supported the adjacent soil and prevented it from being washed into the excavation.

This being the state of facts, their Lordships do not think it necessary to decide whether it was the intention of the legislature to throw upon the municipality the obligation of keeping in general good repair the roads and streets placed under its management. The question upon these facts is, whether the municipality having constructed the barrel drain was not bound to keep it in a state of repair which would prevent its causing a dangerous hole to be formed in the highway. Having, under the statute, the care, construction, and management of the roads and streets, the construction of the barrel drain by the Appellants was lawful; and the care and management of the roads being vested in them, the drain was in their control, and they had full power to repair or otherwise deal with it. Their Lordships are of opinion that, under these circum-

stances, the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or at the least of protecting the public against the danger, when it arose, either by filling up the hole or fencing it. Supposing the top of the barrel drain across Hope Street had fallen in, leaving a dangerous hole in the middle of that street, it would surely have been the duty of the Appellants to take steps to prevent persons falling into the trench which they had originally dug; and there would seem to be no substantial difference in the liability between a hole which had been directly made by them, and one which is the indirect but natural consequence of the artificial work they had created and had not properly kept. In the case of Whitehouse *v.* Fellowes, 10 C.B., N.S. 713, which was an action against the trustees of a turnpike road, the Defendants had converted an open drain in the road into a covered one, the effect of which was that flood water would be thrown on the adjacent lands, unless certain catchpits which were, at the same time, made to prevent this mischief, had been properly constructed and afterwards kept in proper order. The landowner having brought an action and recovered damages for the injury arising from an overflow, it was held that the learned Judge at the trial had rightly directed the jury to find for the Plaintiff if they thought the catchpits were insufficiently constructed, or were kept in an insufficient and improper manner. In that case, the trustees were held liable for an injury which was the indirect but natural consequence of their own artificial work, which they had not taken proper means to avert.

In a recent case of White *v.* The Hindley Board of Health, L. R. 10, Q. B. 219, the facts were these:—The Plaintiff was riding along a highway, under which was a sewer, his horse trod on a grid or grating put there to drain the surface water from the road into the sewer. The grid being in a defective state, for want of repair, gave way, and the horse's leg was injured. It was held that the Defendants were liable to the Plaintiff for the damage done to the horse. The Court, in sustaining the action, assumed that the placing of the grid over the opening of the sewer was done with two objects, the one to prevent the hole from being dangerous to those using the road, and the other to prevent stones and other matters from passing into the sewer; and without saying that the Defendants (the Local Board) would be liable as surveyors of highways, the Court held that as the sewers were vested in them, they were liable "at all events in their capacity of owners of the sewers."

In the present case the barrel drain, even if the property of it did not belong to the Appellants, was not only made by the Appellants, but the sole control and management of it were, by the statute, vested in them; and in their Lordships' view these circumstances threw upon them a duty of a similar kind to that which was held to exist in the case just cited.

Their Lordships are therefore of opinion that the Appellants, by reason of the construction of the drain, and their neglect to repair it, whereby the dangerous hole was formed, which was left open and unfenced, caused a nuisance in the highway, for which they were liable to an indictment.

This being so, their Lordships are of opinion that the Corporation are also liable to an action at the suit of any person who sustained a

direct and particular damage from their breach of duty. Henley *v.* The Mayor and Burgesses of Lyme Regis, 5 Bingh. Reports, 101, S. C. in error, 3 Barn. and Ad. 77, and in the House of Lords, 8 Bligh, New Series, 609. In that case the rule was clearly laid down by Lord Tenterden. He said, "We think the obligation to repair the banks and sea-shores is one which concerns the public, in consequence of which an indictment might have been maintained against the Plaintiffs in error (*i.e.*, the Corporation, Defendants) for their general default, from whence it follows that an action on the case will lie against them for a direct and particular damage sustained by an individual, as in the case of a nuisance in a highway by a stranger digging a trench, &c., or by the act or default of a person bound to repair *ratione tenuræ*, an indictment may be sustained for the general injury to the public, and an action, on the case for a special or particular injury to an individual."

The general rule was also enunciated by the Lord Chief Baron Pollock, in the case of McKinnon *v.* Penson, 8 Exchequer Reports, 327. He said, "There is no doubt of the truth of the general rule that where an indictment can be maintained against an individual or Corporation for something done to the general damage of the public, an action on the case can be maintained for a special damage thereby done to an individual, as in the case of a nuisance in a highway by a stranger digging a trench across it, or of the default of a person bound to repair *ratione tenuræ*."

In their Lordships' opinion there is no principle upon which a distinction in this respect between non-feasance and misfeasance can be supported.

In the case above cited of Henley *v.* The Mayor of Lyme Regis, Lord Wynford, then

Chief Justice Best, with reference to the liability of the Corporation for the non-repair of the sea wall, said, "I take it to be perfectly clear that if "a public officer abuses his office, either by an "omission or commission, and the consequence is "an injury to an individual, an action may be "maintained against such public officer. The "instances of this are so numerous that it would "be a waste of time to refer to them."

It is scarcely necessary to remark that where a duty is created, for the benefit of the public, by Act of Parliament, and a specific remedy is thereby provided for a breach of the duty, it must be a question of construction whether the specific remedy was intended to be substituted for or to be provided in addition to the common law remedy by indictment for the public, or by action for an individual who sustains a special or particular injury. *See* the case of Atkinson *v.* The Newcastle Waterworks Company, 2 Law Reports, Exchequer Division, 441.

The principal objection taken by the learned Chief Justice in New South Wales, and by the learned Counsel for the Appellants here to the maintenance of the action, was founded upon the nature of the supposed obligation, viz., a liability to repair public roads, and upon the authority of the case of Russell *v.* The Men of Devon, 2 Term Reports, 667, and of some others in *pari materiâ.* In those cases the principal objection to the maintenance of the action was that the inhabitants of the county or parish, as the case might be, were not a corporation capable of being sued as such. There are no doubt *dicta* to the effect of the inconvenience that might result from the multiplicity of actions and increase of litigation, if it were held that every individual aggrieved by the non-repair of a public road might sue either the county or parish or individual members of it; but such inconvenience

was never admitted as a reason why an action should not be maintainable.

Another class of cases relied upon consists of those in which (as in McKinnon *v.* Penson, above cited, and Harris *v.* Baker, 4 Maule and Selwyn 27, Parsons *v.* The Vestry of St. Matthew, Bethnal Green, L. R. 3, C. P. 56) it was held that such an action could not be brought against a surveyor of highways appointed under the 43rd George 3, c. 59, or a vestry appointed under the Metropolis Local Management Act, 18 & 19 Vict., c. 120. But the ruling principle of all these last decisions seems to be that it was not the intention of the legislature to create by the particular statute a new liability, but merely to transfer existing powers; and, consequently, that if an action would not lie against the county or parish, or other superior body, it would not lie against the surveyor, functionary, or other creature of that statute. Without going at length through the numerous cases that have been cited on either side, their Lordships think it sufficient to say that this municipality has original and not merely transferred powers, and therefore does not fall within the class of cases referred to. It more nearly resembles the public body held liable to an action in Hartnell *v.* The Ryde Commissioners, 5 Best and Smith, 361, a decision which has been recognized as sound law in several later cases. It was there held that the statute creating the Commissioners having expressly imposed upon them the obligation of repairing the roads, they were liable not only to be indicted for a breach of that duty, but to be sued by anybody who could show that by reason of such breach of duty he had sustained particular and special damage. In their Lordships' opinion no substantial distinction can be taken between that case and the present, in

which the duty for the reasons above stated has been found to exist, though not expressly imposed by statute.

For the above reasons their Lordships are of opinion that the majority of the Judges were correct in holding that the rule for a new trial ought to be made absolute. They will therefore humbly advise Her Majesty to affirm the order of the Court below, and to dismiss the appeal. The Appellants must pay the costs of the appeal.

The question whether it was the intention of the Legislature to throw upon the municipality the obligation to keep all the roads under the care and management of the Council in a complete state of repair is, as remarked by the learned Chief Justice, one of extreme importance, not only to the borough of Bathurst, but to all the municipalities which now are, or hereafter may be incorporated by the same Act.

It will be very desirable, in their Lordships' opinion, that the attention of the legislature should be drawn to the difference of opinion which exists as to the construction of the Act, with reference to the general liability to repair, in order that they may, if they deem it expedient, set the matter of their intention at rest for the future.

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