

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of The
Municipal Council of Sydney v. Mary Jane
Bourke, from the Supreme Court of New
South Wales ; delivered 10th May 1895.*

Present :

THE LORD CHANCELLOR.

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD MORRIS.

SIR RICHARD COUCH.

[*Delivered by the Lord Chancellor.*]

This action was brought by the Respondent, as administratrix of her deceased husband Charles Bourke, to recover damages against the Appellants in respect of their alleged negligence in allowing a portion of a certain street in Sydney, called Kent Street, to fall into disrepair, whereby the deceased man was thrown from a cart which he was driving, and killed. The sole question of law raised by the Appeal is, whether the Appellants are liable to an action at the suit of any person sustaining damage in consequence of the highways vested in them being allowed to fall into disrepair, or in other words, in consequence of the non-repair of highways by them. In the view of the majority of the Supreme Court the case was concluded in the Respondent's favour by the decision of this Board in *The Borough of Bathurst v. Macpherson* (L. R. 4 A. C. 256). Mr. Justice Windeyer

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dissented. He thought that decision did not govern the present case, and that the Appellants were entitled to judgment.

Before discussing the scope of the judgment in *The Borough of Bathurst v. Macpherson* it will be well to consider the question at issue apart from authority. It is admitted that the highway on which the disaster occurred was constructed by the Appellants in the first instance quite properly. No complaint of misfeasance is made against them. The sole charge is one of non-feasance; that when the road had fallen into a bad condition, they failed to execute the necessary repairs. If then they are liable in the present action, it must be either because that liability has been expressly imposed by some enactment, or because the legislature has imposed some duty upon them for the breach of which a right of action accrues to any person injured by it.

The Municipal Council of Sydney is the creation of statute, and such rights or duties as it possesses, or as are incumbent upon it, have been conferred or imposed by the legislature. By the 6 Vict. No. 3 it was enacted that the town of Sydney should be called a city, and the inhabitants thereof were incorporated under the name of the Mayor Aldermen Councillors and Citizens of the City of Sydney. The 82nd section of the same Act provided as follows:—

“ That it shall be lawful for the said Council and they are
 “ hereby authorised empowered and required from time to
 “ time and when and as often and in such manner as they
 “ shall think proper and necessary to order and cause the
 “ several streets roads ways . . . which now are or hereafter
 “ shall be adopted as public or common highways and each and
 “ every of them respectively to be altered widened diverted
 “ turned or extended paved flagged macadamised or otherwise
 “ constructed improved repaired or amended supported and
 “ kept in good order and condition with such materials as the
 “ said Council shall think proper.”

The Act of the 6th Vict. was repealed by the 14 Vict. No. 41, but Section 84 of the later statute re-enacted the provisions of Section 82 of the earlier Act. It has been said that this enactment required the Council as a matter of legal obligation to cause the streets to be repaired and kept in good order and condition. It may be doubted whether the duty imposed is not stated too absolutely. The Council is empowered and required from time to time when and as often and in such manner "as it shall think proper and necessary" to cause highways to be (amongst other things) repaired supported and kept in good order and condition. It is certainly open to argument that the extent and nature of the repairs to be effected were left entirely to the discretion of the Council, and that the statute did not impose any duty upon it which the law would enforce. It is unnecessary to express an opinion on the point. It cannot in their Lordships' opinion affect the question of liability now under consideration.

By the 17 Vict. No. 33 the Corporation of Sydney was dissolved, but by Section 14 of that Act, there were transferred to the Commissioners appointed thereunder the powers and authorities possessed by the Corporation and the duties imposed on it by the 14 Vict. No. 41. By the 20 Vict. No. 36 the Citizens were again incorporated, and the same powers and duties as had been vested in or imposed on the Commissioners were transferred to the new Council. So matters remained until the passing of the 43 Vict. No. 3, the statute now in force. The Acts to which reference has been made were thereby repealed. The object of the Act was stated to be, to consolidate and amend the laws relating to the Corporation of the City of Sydney. The 67th section, the first in part V. of the Act (which is headed "Powers of Council for Regulation of

“ Public Ways ”) is (so far as material) in these terms :—

“ All public ways in the City of Sydney now or hereafter formed shall be vested in the Council who shall have full power to alter widen level divert extend construct improve maintain repair and order such public ways and the footpaths thereof and to carry off any water mud or filth therefrom by means of sewers channels or drains or otherwise subject to the provisions of this Act and any by-laws made by the Council in that behalf.”

There is a marked difference between the language used in the statute and that found in the corresponding provisions of the Acts which preceded it. All public ways are vested in the Council, but as regards the repair of them the words are empowering only. Whatever ground there was for contending that under the previous statutes a legal duty to repair was imposed, is absent. The Council is no longer “ required ” to keep the roads “ in good order and condition ” (to quote the words previously used). Their Lordships agree with Mr. Justice Windeyer in thinking that the statute did not impose on the Council a legal obligation to keep the ways vested in them in good repair, unless such duty or obligation arises from the circumstance that the ways are vested in them. Mr. Justice Innes did not refer to the statutes, but expressed the opinion that the case could not be distinguished from *The Borough of Bathurst v. Macpherson*. Mr. Justice Foster called attention to the fact that under the 4th section of the 43 Vict. No. 3 all rights and liabilities existing at the commencement of the Act were to continue to be as binding on and as enforceable by the Municipal Council as if the Act had not been passed. He then referred to the 1st, the 67th, and the 80th sections of the 6 Vict., under which the original Corporation was established, to which statute he says :—“ We must look especially for the rights and liabilities transferred and continued to the present Municipal Council ” ; and after quoting

the 82nd section, he proceeds as follows :—“ These powers and liabilities appear therefore to be handed down and continued to the present Council, and must be read with the 67th section of 43 Vict. No. 3, which vests all public ways in the Council and reiterates that they shall have power to alter &c. repair and order them.”

Their Lordships find themselves quite unable to agree with the view thus expressed. In their opinion the “rights and liabilities” referred to in the 4th section of the 43 Vict. cannot be construed as including all the powers and duties possessed by the Corporation or imposed on it by the repealed statutes. The words of the 4th section are as follows :—

“ All contracts appointments and engagements made by the Municipal Council together with all rights and liabilities existing at the commencement of this Act shall be and continue to be as binding on and as enforceable in favour of the said Municipal Council as if this Act had not been passed.”

The word “liabilities” in the conjunction in which it is found cannot be regarded as synonymous with or including “duties,” or the word “rights” as equivalent to or comprising “powers and authorities.” The 43 Vict. is an Act “to consolidate and amend the laws relating to the Corporation of the City of Sydney.” But if the construction put upon the 4th section by Foster, J., were adopted, it would not be a consolidating Act at all, for it would be necessary to look back to all the repealed statutes for the purpose of ascertaining the duties or the powers or authorities of the Corporation, and to treat the provisions of those statutes as still in force, even though in the consolidating and amending statute there are enactments dealing with the same subject matter in different terms. A construction of the section which would involve such consequences is in their Lordships’ opinion quite inadmissible and opposed to sound canons of construction. Not only does the language of

section 4 not require such an interpretation, but their Lordships think it does not fairly admit of it.

Attention has already been directed to the fact that the provisions of section 82 of the 43 Vict. relating to the maintenance of highways are empowering only, and do not purport to impose a duty. The terms of the section make it manifest that this was the intention of the legislature. The Council have conferred on them in a single sentence power to alter widen divert and improve public ways as well as to "maintain and order" them. It is obvious that the alteration widening diversion or improvement are matters left absolutely to the discretion and judgment of the Council, and that there is no binding obligation enforceable by law to do any of these things. It is impossible to hold that whilst as to these matters a power only is conferred and no obligation imposed, the case is different as regards the maintenance of the highways.

There is no doubt in a certain sense a duty incumbent on the Council to see to the maintenance of the highways. It is for them to exercise the powers conferred upon them by law, for the benefit of the community. In these matters they represent the citizens and ought to have regard to their interests. For their discharge of these duties they are responsible to those whom they represent. The members of the Council are the choice of the citizens, and if they do not use their powers well they can be displaced. But if they fail to maintain in good repair the highways of the City, it is not a matter of which the Courts can take cognisance, or which can be the foundation of an action if any citizen should be thereby aggrieved.

It is asserted that because all public ways are vested in the Council, it is bound to keep them in good repair and is liable to anyone injured by their non-repair. This is said to be established

by the case of *The Borough of Bathurst v. Macpherson*. Considered apart from authority, it is difficult to see on what this contention rests. Before the 43 Vict. passed the existing ways were vested in someone, whether it were the owner of the soil over which they had been made or some other body or person. It seems clear that such persons were not merely on that account bound to keep them in repair. How then could the transfer of these ways to the Council, or the vesting of them in it, create such an obligation ?

Their Lordships pass now to a consideration of the authorities, and especially of the case of *The Borough of Bathurst v. Macpherson*. It will be necessary to examine that case with some minuteness, in order to ascertain the exact scope of the decision. It appears that the Borough of Bathurst had constructed a barrel drain under or in proximity to the highway. For what purpose and under what authority this had been done is not stated and is not material; the construction of the drain was no doubt lawful. The drain having fallen into disrepair a portion of the highway subsided into it, leaving a hole into which the Plaintiff's horse fell as he was riding along the roadway, with the result that he sustained personal injuries. The grounds of the decision are thus stated :—

“ 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. . . . 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. . . . Their Lordships are of opinion
 “ that, under these circumstances, 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 pro-
 “ tecting the public against the danger, when it arose, either by
 “ filling up the hole or fencing it. . . . 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.”

And the conclusion arrived at is thus stated
 (p. 267) :—

“ 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.”

The *ratio decidendi* was that the Defendants had caused a nuisance in the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair, and whether any person injured by the breach of such a duty could maintain an action. The case was not treated as one of mere non-feasance, and indeed it was not so. The Defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous. If any person other than the Defendants had lawfully made the drain, and the the same result had ensued, such person would undoubtedly have been liable to an action just as much as if he had dug a hole in or placed an obstruction on the highway, and his liability would have been the same whether the Municipality were or were not bound to repair the highway. The owner of land adjoining a highway has been held liable to an action if he digs a hole so close to the highway as to create a nuisance to passengers lawfully passing along it. Why should the Municipality be less liable than any other person, in respect of the same acts, merely

because the road is vested in them and certain powers or duties in relation to its repair are committed to them?

A study of other parts of the judgment in *The Borough of Bathurst v. Macpherson* renders it clear that the decision did not in any way depend on the question whether the Defendants were liable to an action in respect of the non-repair of the highway, which is the only question in the present case. The declaration in that action contained two counts; the first alleging negligence in and about the care construction and management of certain streets; the second alleging that in consequence of the Defendants negligently managing and continuing the drain along the streets and neglecting to repair it the same became and was dangerous to persons lawfully passing over and along the streets. It is pointed out in the judgment that the Supreme Court granted a rule on one 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,” it is said, “ arises as to the
 “ first count.” It was the first count alone which alleged negligence in the care and management of the road; the second count was confined to the charge of permitting the drain to become dangerous to persons using the street. Moreover their Lordships stated expressly that they did
 “ 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.”

There are no doubt certain *dicta* to be found in the course of the judgment of the case under discussion which are somewhat broader than was

necessary for its decision. Thus it is said:—
 “ In their Lordships’ opinion there is no principle
 “ upon which a distinction in this respect
 “ between nonfeasance and misfeasance can be
 “ supported,”—the respect referred to being, that
 wherever an indictment may be preferred an
 action will lie. It cannot be denied after the
 decision in *Cowley v. The Newmarket Local Board*
 in the House of Lords (L. R. A. C. 1892 p. 345)
 that such a distinction does exist, and that in
 England, whilst in a case of misfeasance in
 causing a nuisance in a highway, an action can
 be maintained, no action will lie where the only
 charge is one of non-feasance in failing to
 repair it.

Again, reliance is placed on the case of
Hartnall v. The Ryde Commissioners (4 B. & S.
 361) (which is said to have been recognised as
 sound law in subsequent cases) as establishing
 the proposition that whenever persons can be
 proceeded against by way of indictment for
 non-repair an action will lie at the suit of any
 one sustaining special damage. That case can
 certainly no longer be relied on as a sufficient
 warrant for that broad proposition. In *Cowley*
v. The Newmarket Local Board Lord Halsbury
 referring to *Hartnall v. The Ryde Commissioners*
 said:—“ Whether that case is quite consistent
 “ with the principles upon which cases of the
 “ class now before your Lordships have been
 “ decided or not it is immaterial to discuss.” In
 the same case Lord Herschell pointed out that
 in *Hartnall v. The Ryde Commissioners* the
 arguments which prevailed in *Gibson v. Mayor*
of Preston (L. R. 5 Q. B. 218) did not appear to
 have been insisted on, and he added:—“ It
 “ appears to be assumed in the judgment that if
 “ the Defendants were liable to be indicted for
 “ the non-repair of the highway as for a mis-
 “ demeanour, an action would lie by any one

“ specially aggrieved. No reasons are given for “ this conclusion, which seems to have been “ treated as a necessary consequence.” In the course of the argument before this Board in a recent case of *Municipality of Pictou v. Geldert* (L. R. A. C. 1893 p. 524) which is not without a hearing on the present case Lord Halsbury said:—“ While writing on *Cowley’s* “ case I entertained a strong doubt whether “ *Hartnall v. Ryde Commissioners* could be “ maintained.”

There can be no doubt then, that some of the *dicta* in *The Corporation of Bathurst v. Macpherson* can scarcely be supported, in view of the more complete discussion which the subject has subsequently undergone. But they do not affect the authority of that case, for the decision rests on grounds independent of them. The conclusion being arrived at that the Defendants had caused a nuisance to the highway for which they could be indicted, it cannot be doubted that it was properly decided that the action lay.

In the series of cases ending with *Cowley v. The Newmarket Local Board*, in which it has been held that an action would not lie for non-repair of a highway, the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise; the only question in controversy was whether an action could be maintained. The ground upon which it was held that it could not—even where the duty of keeping the roads in repair had been in express terms imposed by statute on a corporate body—was, that it had long been settled that though a duty to repair rested on the inhabitants, subjecting them to indictment in case of its breach, they could not

be sued, and that there was nothing to show that the legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability.

In the present case there has been no similar transfer of duty in relation to the repair of the roads. No duty or liability in respect of their repair rested on anyone prior to the Acts which committed their management and repair to the Corporation of Sydney. It is quite true therefore to say that the duty, if there be one, is original and not transferred. But if there be a duty or liability at all, it follows that it can only be because it has been imposed by an Act of the legislature. Where is it to be found? It has already been pointed out that the 67th section of the 43 Vict. No. 3, which is the only enactment now dealing with the maintenance of public ways, does not impose any duty to repair on the Council. It does not provide that they shall be liable to penal proceedings, either by indictment or otherwise, in case of non-repair, nor does it confer a right of action on any person injured thereby. It is to be observed that the legislature was alive to the necessity of so providing where it was intended that the liability should exist, for in more than one section of Part V. of the Act, of which Section 82 may be cited as an example, provision is made that any person offending against the enactment shall be liable to specified penalties, "besides being liable in any civil action for any injury sustained by anyone by reason of such default or negligence." The case of *Municipality of Pictou v. Geldert*, which has been already mentioned, is worthy of notice in this connection. The following passage, which is very relevant to the present case, occurs in the judgment:—

"It is to be observed further that the statute does not in terms impose any obligation upon the municipality to repair

“ the roads or bridges. It confers upon the Council powers
“ and authorities which extend to those objects ; but the powers
“ and authorities are conferred in precisely the same terms
“ with reference to objects with regard to which the powers
“ clearly must be discretionary and not matters of obligation.
“ In the opinion of their Lordships, it is impossible to find in
“ any of the legislative provisions the indication of an intention
“ on the part of the Legislature that a person injured by the
“ mere non-repair of a road or bridge should be entitled to sue
“ the Municipality for damages in respect thereof.”

Their Lordships, for the reasons which have been indicated, have arrived at the conclusion that the judgment of the Supreme Court cannot be supported. Whether the law is in a satisfactory state, it is not for their Lordships to say. Weighty reasons have been adduced both for and against the liability sought to be established in the present action. It is for the legislature to determine to which side the balance inclines.

Their Lordships will humbly advise Her Majesty that the Order discharging the Rule Nisi ought to be reversed, and the Rule made absolute to enter the verdict for the Defendants with costs. Their Lordships think that the Appellants should bear their own costs of this appeal.
