

ATKIN, J. May 19, 1916.

BALDWIN'S, LIM. v. HALIFAX CORPORATION.

Negligence—Highway Authority—Construction of Road under Statutory Powers—Imperfect Drainage of Land Above Road—Heavy Rains—Consequent Flooding Below Road—"Act of God"—Misfeasance or Nonfeasance.

The Halifax Corporation obtained statutory powers, in or about 1867, for constructing a road across a hill which sloped down towards the bottom of a narrow valley traversed by a stream, on the banks of which were the mills of the plaintiffs. The greater part of the hill was covered with loose shale from the weathering of the shale which was the foundation of the hill. No precise way was laid down in the statute for constructing the road, nor were the exact provisions prescribed which should be made or maintained for dealing with water and shale. The road had to be cut deep into the side of the hill, and the natural and obvious effect of making such a road was that it acted as a catch-water for the rain water from the upper slopes, which would otherwise have flowed on to the parts of the hill below the site of the road. It also caught the loose shale carried down by the water flowing over the slopes of the hill, and it was necessary to provide for the water and shale coming from above, which would thus be intercepted by the road. For this purpose the contract and plans originally made certain provisions, which, with modifications from time to time, were carried out. On July 1, 1914, heavy rains fell, and water and vast quantities of shale flowed over the road to the valley beneath, and into the plaintiffs' mills and upon their land. At the trial of the action for damages the Judge found on the evidence that (a) insufficient provision was made for carrying off the water and shale; (b) that the defendants had not exercised reasonable care in maintaining the works intended for dealing with the water and the shale:—Held, that on the findings of fact the corporation were liable on the ground of misfeasance, and that the damage was not caused by the act of God, but could have been provided against by reasonable care and skill.

Action tried by Atkin, J.

The plaintiffs claimed damages for negligence and nuisance, alleging that their premises had been injured by the defendants having caused or allowed water, stones, and other matter to flow and be deposited thereon from the defendants' sewers, drains, and other works.

The facts and arguments appear from the judgment of the Court.

E. Tindal Atkinson, K.C., and *C. F. Lowenthal*, for the plaintiffs.

Waugh, K.C., and *Jeeves*, for the defendants.

ATKIN, J.—In this case the plaintiffs carry on business at Clark Bridge Mills, Halifax, as spinners of fingering and knitting wool and hosiery yarn. They sue the defendants, the Halifax Corporation, for damages for injury done to their goods by their premises being flooded with water on July 1, 1914, owing to the alleged negligence of the defendants. By agreement between the parties, if any injury were done to the plaintiffs' goods on that day by reason of the defendants' negligence, the damages are fixed at 600*l*.

The action was commenced before me last November at the Leeds Autumn Assizes, and after eleven days' hearing was adjourned to London, where it was heard for a further eight days. Over fifty witnesses were called; and the case has involved several issues of fact, as well as of law. The case of either side seems to me to have been admirably prepared by those responsible, and I am much indebted to them and to counsel on both sides for the most valuable assistance given to the Court. I do not think that any of the time was unnecessarily occupied. The plaintiffs' premises lie on the banks of the Hibble Brook, at the bottom of a narrow valley. On the one side, the west, are the

slopes upon which is built the greater part of the town of Halifax; on the other side, the east, lies Beacon Hill. It is a hill of varying steepness, in parts covered with grass, especially towards the lower slopes; but the greater part of the surface is covered with loose shale, the result of years of weathering processes upon the shale foundations of which the hill is formed. Deep fissures on the surface of the hill at various points shew the result of water action upon the hill. The slope of the hill is, of course, towards the brook, and in some respect towards the plaintiffs' mill; but I am not satisfied that in natural conditions the land occupied by the plaintiffs' mill had to bear more than its reasonable proportion of the water which would flow off the surface of the hill into the brook. In or about 1867 the corporation of Halifax obtained a provisional order enabling them to acquire lands compulsorily for the purpose of constructing a road across Beacon Hill, and an Act was passed confirming such provisional order. In pursuance of that Act and other pre-existing statutory authority, the corporation in 1867 and 1870 constructed this road. The provisional order enabled the corporation to take land as defined in the deposited plans to a width of forty feet. The road was made by Messrs. Chapman & Shaw, contractors, under a contract dated December 10, 1868, incorporating the annexed specifications and plans. It led upwards in a southeasterly direction from an existing road—New Bank—towards Bank Top, where it was joined by an existing road—Southowram Bank—which ran up the hill in the same direction below it. It had to be cut deeply into the side of the hill at places, and was supported on the lower or west side by a retaining wall. The natural and obvious effect of making such a road was that it acted as a catchwater for the rain water from the upper slopes, which otherwise would have flowed on to the parts of the hill below the site of the road. In the same way it served to catch the loose shale which would be carried down by the water flowing over the slopes of the hill. It was necessary, therefore, for the corporation to provide for the water and shale from above, which would thus be intercepted by the new road. The problem was complicated by the fact that the shale would tend to obstruct or block up any channels provided for carrying off the water. The provision made in the contract and plans in this respect was for a channel or catchwater, three feet wide, running along the upper or outer side of the upper wall of the road; and for large gullies or catchpits in the channel, which would hold the shale and allow the water to escape by six-inch pipes flowing from the upper part of the catchpit. The original contract plan was that these six-inch pipes ran across the road and discharged the water on the lower slopes below the road. This scheme was, however, never carried out, and the pipes were made to discharge into the eighteen-inch sewer that ran along the middle of the road. Originally the catchpits, as constructed, were five in number, all of the same size. At some date—which was left uncertain—this was altered. In place of the lowest catchpit another and a larger one was constructed at the point where the new road crossed a bridle path at Whisham Bank, and water flowing down the Whisham Bank, called Whisham Dandy, was partly diverted into it. The surface of the roadway was originally macadam. It was subsequently paved with stone setts, and tram lines laid forming part of the corporation's system of tramways. While this provision against water and shale was in existence there occurred the events of July 1, 1914, which occasioned this action. Heavy rain fell upon the slopes of Beacon Hill; water and shale flowed over Beacon Hill Road. The water poured down into the valley beneath. It ran not only along the roads which led down towards the lower levels, but at various places it passed across the road and escaped over its lower or western boundary. In particular, it fell like a torrent down the steps at Womersley Buildings at the upper part of the road, and so on to Southowram Bank below; it flowed on to the ground of Folly Hall, and thence out on to the road beneath; it flowed down Whisham Bank and Old Bank, met confluent streams at the top of Bank Bottom, and so down towards the plaintiffs' premises. It ran into the plaintiffs' premises by the main gateway opening into Bank Bottom, and by windows and

doors into the basement, where were the plaintiffs' goods, the injury to which is complained of. With the water came vast quantities of shale. The surface of the Beacon Hill Road was in fact so deep with shale that the tramway service upon it was disorganised for some hours. The drivers and conductors had to remove the shale before they could proceed, clearing a little more of the route on each journey until they could resume the full journey. Loads of shale were deposited at Bank Bottom near and on the plaintiffs' premises.

This strange happening the plaintiffs say was due to the negligence of the defendants. The negligence complained of was alleged under three heads: In the construction of the works; in the maintenance of the works; and in the provision of the general sewers system, through which the storm water caught by the road had eventually to pass. As to the construction of the works, the complaint is that insufficient provision was made for water and for shale. The catchpits were insufficient in number and size. As to the shale, free access of shale was allowed into the catchwater channel, facilitated by the steep slopes cut for the purpose of the road, and left without any attempt to guard against the fall of shale. There was no provision for catching shale before it got into the channel; there was a lack of catchpits to catch it when it got there. As to the maintenance of the works, the plaintiffs say that the defendants allowed part of the channel to be filled up, and allowed the discharge pipes of the catchpits to become obstructed. They altered the construction of the main catchpit, covering it with stones instead of a grid; so that it became ineffective to catch shale. Moreover, they (the plaintiffs) complained of the diversion of the drainage of Whisham Dandy, which formerly flowed along a separate twelve-inch pipe, which was abandoned. As to the sewers, the plaintiffs say they were of insufficient capacity to carry the storm water that must necessarily fall into them; and they further complain that the sewer from Bank Bottom has been allowed to remain of its original size, though sewers from other districts have from time to time been connected with it, some of them being of larger capacity than the Bank Bottom sewer itself. The defendants, generally speaking, traverse all the above allegations. They deny any negligence. They rely upon what was done as being authorised by the statutes in question. As far as the plaintiffs complain of omissions, they say such omissions are but nonfeasance, for which, as highway authority, they are not liable. As to the maintenance, they deny the obstruction of the discharge pipes from the catchpits; and as to the sewers, they say the flood was occasioned by a rain storm of unprecedented violence, such as could be described as an act of God, or, at any rate, of such a nature that they could not reasonably be expected to provide against it. I think the above summarises the contentions raised before me, which I have now to decide.

As to the law, I do not think there was any real dispute between the parties. The undertakers are not responsible for damage which results as the natural consequence of the construction of an undertaking authorised by statute, nor are they responsible for damages resulting as a natural consequence of the maintenance and working of such an undertaking. But construction and maintenance and working must be conducted with reasonable care and skill in pursuance of the statutory authority; and if default is made in the exercise of such reasonable care and skill, whether in the original construction or in the subsequent maintenance and working, a person injured by such default has a right of action. I have considered numerous authorities dealing with this subject, and I can find no more lucid exposition of the law than in the judgment of my brother Lush in *McClelland v. Manchester Corporation* [1912] (81 L. J. K.B. 98, 102; [1912] 1 K.B. 118, 127), whose judgment I would respectfully adopt. The same judgment deals equally effectively with the question of nonfeasance. Mr. Justice Lush said: "The meaning of nonfeasance in this connection and the reason why a highway authority are not liable for non-feasance have so often been explained that it is not necessary to go in any detail into it. A surveyor of highways not being liable at common law for merely suffering a highway to be out of repair, it was held that when the

Legislature imposed the burden of repairing highways on a local authority the latter were not liable for the breach of what had now become a statutory duty, because there was nothing in the statute to indicate that a new liability was intended to be created. If a highway authority, therefore, leaves a road alone and it gets out of repair, there is, of course, no doubt that no action can be brought, although damage ensues. But this doctrine has no application to a case where the road authority have done something, made up or altered or diverted a highway, and have omitted some precaution, which, if taken, would have made the work done safe instead of dangerous. You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was non-feasance. Once establish that the local authority did something to the road, and the case is removed from the category of non-feasance. If the work was imperfect and incomplete it becomes a case of misfeasance and not non-feasance, although damage was caused by an omission to do something that ought to have been done. The omission to take precautions to do something that ought to have been done to finish the work is precisely the same thing in its legal consequence as the commission of something that ought not to have been done, and there is no similarity in point of law between such a case and a case where the local authority have chosen to do nothing at all. It appears to me that the decision of the House of Lords in *SHOREDITCH CORPORATION v. BULL* [1904] (90 L. T. 210; 68 J. P. 415) and the principles enunciated by Lord Halsbury in that case dispose of this part of the argument. In that case Lord Halsbury said: 'I am desirous of not going beyond the facts and findings in this case for more reasons than one, and among them, conspicuously, is the reason that I think that some propositions in respect to the non-liability of the surveyor, or the local board now representing the surveyor of highways, may be pressed too far. At the same time I wish to express no difference of view from that which has been expressed before in this House. When the question is raised in a direct form it may be worth while to consider whether or not that which has been described as an act of non-feasance in several of the cases in which the proposition has been applied, I think a little too widely, may not be considered misfeasance; but it is enough for the present case to say that according to the authorities there is enough here to shew that the act which was being done was an alteration of the normal condition of the road, and if there was anything wrong either in the mode of carrying out the work or in the period of time which was allowed to elapse between the opening of the road and its becoming firm, or if in any other way the thing that was being done was negligently done, or if there was evidence for the jury that it was negligently done within any of the decisions which have been cited to us, it was an act of misfeasance for which the local or road authority under whose authority the thing was done was responsible.' "

I have to apply the above principles to the facts of this case. After a careful consideration of the evidence, I have been satisfied by the plaintiffs as to the negligence of the defendants, both as to the construction and the maintenance of the road. It is impossible to review the evidence in detail or to deal with every contention on both sides. If I were to attempt such a task, my judgment might occupy as many days as the hearing. I think I have considered every point and come to a conclusion about it, and I need only here state the more important considerations which lead me to my conclusions. In view of the amount of water that might reasonably be expected to be collected by the road, in my opinion insufficient provision was made for dealing with it in the catchpits and outlets, always remembering that the catchpits were expected to be filled or partly filled with shale. One catchpit every 160 yards was, I think, quite insufficient in view of the gradient. The provision for shale was quite inadequate. In the present storm there can be little doubt but that not only the catchpits, but many of the road gullies, were blocked in a few minutes. The amount of shale deposited on the road and brought down to the bottom of the hill was out of all proportion to that caught. The danger of the

shale was a very present one, and I have no doubt the fall of shale was increased by the steepness of some of the slopes cut; and in respect of those slopes no provision whatever of any value seems to have been made to guard against the shale. Several means of protection from shale were suggested, such as the provision of more catchpits, the channelling or pitching of the slopes, the erection of a protecting wall, and so on. I do not think it was incumbent upon the plaintiffs to suggest a complete scheme, but I am satisfied, by some or a combination of all or some of such methods, it was reasonably possible to make better and more adequate provision to keep shale out of the channel and further out of the road and the land beneath. I am, further, satisfied that the defendants have not exercised reasonable care in the maintaining of the road, including the works I have mentioned intended for dealing with the water and the shale. The upper part of the channel, above a point marked F on plan A used at the trial, almost opposite Womersley Buildings, was allowed to silt up; and one of the catchpits was allowed to become completely buried. I see no justification for this, and I have no doubt that the absence of channel and catchpit is fairly responsible for the water pouring over the road and down Womersley Buildings on the day in question. The main point, however, on this head is the allegation that the defendants negligently permitted the outlets from existing catchpits to be blocked. There was a direct conflict of testimony as to this. The evidence of the defendants' foreman, Oates, was that on the day before the storm he had tested all these outlets, and that they were free. He was admittedly wrong as to the outlet from the catchpit known throughout the trial as catchpit B. I place no reliance at all on his evidence. I accept the evidence of Mr. Williams, the plaintiffs' surveyor, that after the storm all the outlets except that from catchpit A were blocked; and I am satisfied that the obstruction was not a temporary obstruction caused by the storm itself, but of the sections of the six-inch pipe forming part of the outlet from one of the upper catchpits produced before me. I am satisfied that it had been blocked up in its condition, as produced, for a period long before the storm by a gradual process of silting up. A suggestion was made by one, at least, of the witnesses that the pipe had been artificially filled, presumably by Mr. Williams. I am quite satisfied that there is no ground whatever for this suggestion, and it was repudiated by counsel for the corporation. I think Mr. Williams' account of this pipe and the place he got it from substantially correct. I further think that the complaint of the plaintiffs as to the alteration of the catchpit A by covering it with flags instead of a grid is well founded in that the result was to help the outflow of water, but to reduce the already insufficient provision for shale. The diversion of the Whisham Dandy drainage I do not attach much importance to. It certainly increased the amount of water to be dealt with by catchpit A to some extent, but I do not think that in this respect it would be reasonable to charge the defendants with negligence. Substantially, however, I find the case of the plaintiffs on these two heads proved; and I am satisfied that the negligence of the defendants in these respects was the cause of some, at any rate, of the damage done to the plaintiffs' goods on July 1. In coming to the conclusions I have stated, I have taken into consideration the question of the existing state of knowledge at the time of the acts and omissions complained of. I have no reason to believe that at any material date the defendants' agents and their advisers might not reasonably be expected to know both what dangers were to be anticipated and the reasonable means for averting them. On the question of statutory authority as to both construction and maintenance, I do not think that the statute laid down the precise way in which the road was to be constructed, or the exact provisions to be made or maintained for dealing with water and shale. The defendants were left to exercise reasonable care and judgment in executing the authorised undertaking. I think, also, that my findings dispose of any question as to nonfeasance or misfeasance on the principles of Mr. Justice Lush's judgment cited above. If any question did arise as to this, and it could fairly be said that the defendants' negligence as to the outlets from the catchpits was nonfeasance merely, I think that the

case of *WILKINSON v. LLANDAFF AND DINAS POWIS RURAL COUNCIL* [1903] (73 L. J. Ch. 8; [1903] 2 Ch. 695) establishes that in fact these outlet pipes are vested in the defendants as sewer authority, and that the doctrine of non-liability for nonfeasance would have no application.

It is necessary to deal with the defence that the damage was caused by the act of God; so that, even if the defendants were negligent, yet the negligence was not the cause of the injury to the plaintiffs. I do not think that in a case of this kind it is strictly correct to introduce the notions connoted by the phrase "act of God." The term is appropriate where liability is sought to be imposed upon a person who, by reason of his calling or otherwise, such as that of a common carrier, has assumed an absolute liability to see that the plaintiffs' property is left free from harm. Such absolute liability may be subject to an exception in respect of damage caused by act of God, which would ordinarily be defined as such an operation of the forces of nature as reasonable foresight and ability could not foresee or reasonably provide against. But where the liability sought to be imposed arises only from negligence it becomes unnecessary to consider whether all the requirements of the above definition have been fulfilled. All that is necessary for the defendants is to negative the plaintiffs' allegation that there has been an absence of reasonable care and skill on the part of the defendants. To shew that the injury was caused by an act of God would no doubt establish the defendants' case, but it seems to me they may succeed without undertaking so heavy a burden. What I have to consider is whether the damage was caused by a storm of such magnitude that, under the circumstances, the defendants could not reasonably be expected to provide against its consequences. The substance of the defendants' case was that the rain was so heavy and unusual; that so much water fell in so short a time that no reasonable care would have guarded against it; so that, even if they had not been guilty of the acts and omissions complained of, the plaintiffs' premises would still have been flooded, and the same amount of damage done. The evidence of a number of witnesses for the defendants was given to the effect that the rain in substance all fell between about 4.50 and 5.20 on the day in question. The main rainfall was said to have lasted for about fifteen minutes. According to the rain gauge at the Belle Vue Library, about the centre of the town, 1.36 inches of rain fell between about 4 P.M. on the 1st and 10 A.M. on the 2nd, and it is clear that little or no rain fell after 5.30 P.M. on the 1st. The defendants' contention was that that amount of rain fell substantially in half an hour or less, making a rainfall at the rate of $2\frac{1}{2}$ inches to 3 inches per hour. The evidence on the part of the plaintiffs was to the effect that heavy rain fell during the whole of the afternoon—say, from about 2.30 to 5.30. I think the result of the evidence is that the rain fell continuously and heavily in the Beacon Hill district throughout the afternoon. I can have no doubt that in the Halifax district generally it varied in intensity at different times and in different places. But I am quite unable to accept the evidence of the defendants' witnesses as being a completely accurate account of what happened, even in their experience; and even if it were accurate, it is not accurate for Beacon Hill itself, as seems to be established by the fact, which I accept from the plaintiffs' witnesses, that the flooding at the plaintiffs' mill began about 4 P.M. I think the same fact disposes of the inference which I was asked to draw from the record of the Salter Hibble rain gauge, which records a very heavy fall between four and five. I cannot accept the rainfall there as proof of a similar fall on Beacon Hill.

Taking into consideration all the facts, I have come to the conclusion that the rainfall fell far short of amounting to an act of God, and was not such as could not have been provided against by reasonable care and skill; and that the damage done to the plaintiffs was caused by the negligence of the defendants in not exercising reasonable care and skill. It was contended by counsel for the plaintiffs that, even if the rainfall reached such a height that the defendants could not reasonably have provided against it, yet, inasmuch as a much smaller storm would, by reason of the defendants' negligence, have damaged the

plaintiffs' goods, the plaintiffs can recover, for the damages are agreed if any part of the injury done was due to the defendants' negligence. It becomes unnecessary to decide this point; but I think the facts warrant the application of the reasoning of the Court of Appeal in the case of NITRO-PHOSPHATE AND ODAM'S CHEMICAL MANURE Co. v. LONDON AND ST. KATHARINE DOCKS Co. [1878] (9 Ch. D. 503, at p. 527), and that the plaintiffs' contention herein is well founded.

So far I have confined myself to dealing with the plaintiffs' allegation of negligence as to the construction and maintenance of the road. I now come to deal with the allegation as to the sewers. Substantial time was occupied in a contest as to whether the defendants had been guilty of negligence in not providing sufficient sewers, and evidence was given by expert witnesses that the capacity of the sewers in the material portions of the defendants' sewer system was not sufficient to carry off the storm water that might reasonably be expected to fall on the areas they covered. Elaborate figures were given on behalf of the defendants in defence of the sewers. The main difference between the scientific witnesses was due to a difference in the formula employed for calculating the capacity as to the coefficient of friction. As I understand the argument, it appears to me impossible to convict the defendants or their technical advisers of negligence for employing a formula in common use by the most eminent engineers, which witnesses of the highest position considered to be applicable in the present case. I do not think that the invidious task of deciding which of the two formulas is correctly applied to these sewers need fall upon me. Moreover, the original calculations of the plaintiffs' witnesses were seriously damaged by the fact, unknown to them when making the calculations, that inlets existed into the gasworks from the Hibble Brook which would necessarily have caused the flooding of the gasworks if the calculations had been even approximately correct. I think the plaintiffs failed to establish any negligence on this head.

Part of the plaintiffs' complaint comprised an entirely independent matter, with which it remains to deal. At the bend in the Old Bank on the upper side of the road is a retaining wall, which holds up the ground above forming part of the Folly Hall estate. The wall and ground above are the property of the defendants. The plaintiffs claim that the retaining wall is in such a dangerous condition that there is imminent danger of its collapsing, and that, in any event, masses of earth and *débris* are likely to be deposited in and upon the plaintiffs' premises, and so cause damage. The wall in question is 150 yards from the plaintiffs' premises. It was hardly suggested that if the wall fell in ordinary weather the soil would, by the force of gravity, reach the plaintiffs' premises; but it was contended that, should the wall be brought down by a heavy rainfall, the *débris* might be worked down into the plaintiffs' yard. I think there is very little probability of the soil in any circumstances reaching the plaintiffs' premises; and if it did, I see no real probability of its doing any damage to the plaintiffs. In any case the facts fall far short of shewing such an imminent danger of irreparable loss or of damage of a substantial kind as is required to support a claim for an injunction in a case such as this. At the same time, I am quite satisfied that the wall is in a most dangerous condition, and that there is serious danger of its falling; and it may be well for the proper authorities to note this fact, for if loss of life should be occasioned to children or other persons passing on the highway the liability of those responsible may fall to be measured in other than a civil Court.

The final result is that I give judgment for the plaintiffs for the agreed amount of damages, 600*l.*, with costs. So far as the costs have been increased by the claim that the defendants have been negligent as to the sewers and as to their capacity, being the sewers mentioned in paragraph 2 of the particulars delivered by the plaintiffs dated August 12, 1915—other than the thirteenth sewer in Beacon Hill Road, the channel on the road from Beacon Hill Road to Godley Bridge, and the sewers and drains in Whisham Dandy and Whisham Bank therein referred to—the plaintiffs are not to have such costs; but the

defendants are to be paid such costs by the plaintiffs, and there is to be a set-off. So far as the costs have been increased by the claim for an injunction as to the retaining wall, I think it is right that the plaintiffs should bear their own costs; but I do not order them to pay the defendants' costs of that issue.

Judgment for plaintiffs.

Solicitors—Sheard, Breach & Wace, agents for Harold Marshall, Halifax; Sharpe, Pritchard & Co., agents for Percy Saunders, Halifax.

[*Reported by G. H. Knott, Esq., Barrister-at-Law.*]
