[HIGH COURT OF AUSTRALIA.]

ROBERT ALBERT BIRCH AND MARY AGNES BIRCH . . . . . } . APPELLANTS;
PLAINTIFFS,

AND

THE AUSTRALIAN MUTUAL PROVIDENT SOCIETY . . . . . } . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 22, 23, 24, 29.

Griffith C.J., Barton and O'Connor JJ.

Nuisance—Fixing water pipe in surface of street—Statutory obligation—Liability of owner for non-repair—Negligence—By-laws—Validity—Metropolitan Water and Sewerage Act 1880 (*N.S.W.*), (43 *Vict. No.* 32), *secs.* 34, 67-72, 116.

A person who lawfully interferes with the surface of a highway by placing in it an artificial structure in a proper manner and without negligence is not under any obligation at common law to keep the structure in repair. And, therefore, a person who, in the performance of a statutory obligation, fixes in the surface of a street a proper appliance attached to a water pipe connecting his premises with a public water supply, but remaining his own property, is not liable in an action for injuries caused by defects in that part of the surface of the street formed by the appliance arising subsequently through mere non-repair of the appliance, unless the Statute imposes upon him a duty to keep the appliance in proper repair.

The mere fact that the owner has power under the Statute to repair does not necessarily import an obligation to do so.

The *Metropolitan Water and Sewerage Act* 1880 constituted the Board of Water Supply and Sewerage, and, amongst other things, invested it with control of the water supply of Sydney. Secs. 68 to 72 gave power to private persons to connect their premises with the Board's mains by laying down pipes and other appliances in the streets, and to break up the surface of the streets for the purpose of laying down or removing the pipes, but gave them no express power to interfere with the streets for the purpose of effecting repairs in the pipes and appliances, and imposed no obligation on anyone to

keep them in repair. Under a general power to make by-laws to compel persons using water supplied by the Board to keep their pipes and appliances in proper repair, the Board made a by-law requiring the owners of premises, under a penalty, to lay down and maintain at their own expense all the pipes and apparatus upon their premises, and upon any street, lane, or land lying between their premises and the Board's mains.

Held, that the by-law should not be construed as creating a new right to interfere with streets, or a new liability as between private persons using the streets and the owners of premises, in which sense it would be *ultra vires*, but as merely imposing a liability upon owners of premises as between them and the Board, with a view to enabling the Board to properly carry out the duties imposed upon them by the Statute.

Semble, that the Statute, by authorizing private persons to lay down water connections of this kind in the street, must be taken to impliedly authorize them to interfere with the street so far as is necessary for the purpose of keeping the appliances in repair.

Midwood & Co. Ltd. v. *Manchester Corporation*, (1905) 2 K.B., 597, distinguished.

Decision of the Supreme Court: *Birch* v. *The Australian Mutual Provident Society*, (1906) 6 S.R. (N.S.W.), 155, affirmed.

APPEAL from the decision of the Supreme Court of New South Wales.

The respondents were the owners of certain houses and land in Sydney which were connected with the main pipe of the Water Supply and Sewerage Board by a private service pipe, part of which was laid beneath the surface of a street. Upon that portion of the private service pipe which passed under the footpath there was a stopcock used by the defendants in connection with the supply of water to their houses.

This stopcock, which had been attached to the waterpipe in fulfilment of the obligations imposed by sec. 67 of the Act, was enclosed in an iron box fitted with a lid, which, when closed, was flush with the surface of the pavement, and, when constructed, satisfied the requirements of the Act and by-laws in every respect, and was approved of by the Board. By some means the lid became detached and disappeared, the result being that an opening some inches in width was left in the footpath. The female appellant while walking upon the footpath at night put her foot into this opening, fell, and was injured. She and her husband

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then brought an action against the respondents as the persons responsible for the defective condition of the stopcock box.

The declaration contained four counts—(1) setting out the facts already stated, and alleging that the hole in the footpath was dangerous to passengers to the knowledge of the defendants, and that the box was wrongfully left open and unprotected, by reason of which the accident happened and the female plaintiff suffered severe physical injuries; (2) a similar count alleging negligence instead of nuisance; (3) and (4) corresponding counts by the husband claiming damages for loss of his wife's services.

The defendants pleaded not guilty, and a denial that they were possessed of or used the stopcock box and pipe in question. Issue was joined.

At the trial it appeared that the lid had been missing for some months, and it was admitted that the defendants were in possession of the premises supplied by the pipe in question, and kept them in repair and paid the water rates. Evidence was also given that, in order to properly repair the box, it would be necessary to cut away a small portion of the pavement.

The jury, in answer to questions, found specially that the accident was caused by the lid of the box having been removed, and that they were not satisfied that the injury was caused by negligence of the defendants in allowing the box to remain uncovered. They assessed the damages at £60, and by direction found a verdict for the defendants, leave being reserved to the plaintiffs to move to enter a verdict for them for the damages assessed.

A rule *nisi* was granted, but was discharged by the Full Court, consisting of *Simpson* J., *Cohen* J. and *Pring* J., on the ground that the defendants had no control over the instrument causing the injury, and could not have effected the necessary repairs without interfering in some degree with the public street, which they had no power to do: *Birch* v. *The Australian Mutual Provident Society* (1).

It was from this decision that the present appeal was brought by special leave.

On the application of *C. B. Stephen* K.C. the Metropolitan

(1) (1906) 6 S.R. (N.S.W.), 155.

Board of Water Supply and Sewerage were granted permission to intervene in the appeal, on the ground that the decision might affect the question of their liability.

L. Armstrong (*Perry* with him), for the appellants. There was an absolute duty upon the defendants to keep the box in proper repair, apart altogether from the question of negligence. The extent to which it would have been necessary to interfere with the surface of the street for the purpose of effecting repairs was so slight as to be negligible. This box and the pipe with which it was connected were put down by the defendants under secs. 67-70. Sec. 68 gives power to break up the soil for that purpose. The pipe and box remained the property of the defendants, and might have been removed by them under secs. 71 and 72, notwithstanding that the soil would have to be broken for that purpose. The latter section gives the owner of the pipe power to open or break the soil for "*any such purpose as aforesaid.*" "Aforesaid" must mean any purpose previously referred to in the Act. That would include repair, not only the purposes mentioned in secs. 67-71. A statutory power may be exercised from time to time as occasion may require: *Interpretation Act*, No. 4 of 1897. Sec. 116 provides that nothing in the *Metropolitan Water and Sewerage Act* 1880 shall be construed so as to exempt a person from any liability for nuisance. The defendants therefore have control of this pipe, have all necessary power to keep it in repair, and must be responsible for its condition. [He referred also to the amending Acts, 53 Vict. No. 16, sec. 16, and 57 Vict. No. 12, secs. 7, 8, and 9.] Even if there is not a direct liability under the Act, there is under the by-laws. These are made under sec. 34, sub-sec. 10, which empowers the Board to make by-laws, *inter alia*, for compelling persons using water supplied by the Board to keep their pipes and appliances in repair. By-law No. 37 provides that any persons using water supplied by the Board shall keep all their pipes and other appliances in a proper state of repair. The by-law is *intra vires*. It is well within the scope indicated by the power in sec. 34, sub-sec. 10, and is not unreasonable. The Court will not be critical on the question of reasonableness when the legislature has

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approved the by-laws: *Institute of Patent Agents* v. *Lockwood* (1). The power to repair alone would be sufficient to make the defendants liable on the principle of *Chapman* v. *Fylde Waterworks Company* (2). That decision turned on the fact that the only power to break up the streets was for the purposes of laying down and removing pipes. The section corresponding to sec. 72 was by its collocation in the grouping of sections restricted to those purposes. Even if the Act does not expressly give power to break up the street, it must be implied from the existence of the duty to repair. [He referred to *White* v. *Hindley Local Board* (3); and *Blackmore* v. *Mile End Vestry* (4).] On the principle which allows the owner of an easement to go upon the land of the servient tenement and break up the soil for the purpose of repair, the defendants, having a species of easement over the soil of the footpath, had an implied power to break up the soil when necessary: *Gale on Easements*, 6th ed., p. 477. Apart from the Water and Sewerage Acts, there is an express statutory duty to keep such things in a safe condition under the *Police Offences Act* 1901, No. 5, secs. 86 and 88, and from that duty the ordinary consequence at law is that the defendants are liable for injuries caused by the breach of it.

C. B. Stephen K.C. and *Scholes*, for the Board of Water Supply and Sewerage. *Chapman* v. *Fylde Waterworks Co.* (2) is no authority for the liability of the Board. There is no provision here by which the consumer can call upon the Board to lay down pipes as he can under the English *Waterworks Clauses Acts*. The defendants are owners of the pipes, may remove them, and are bound to repair them. They must therefore have the necessary power. [They referred to *Sheffield Waterworks Company* v. *Wilkinson* (5).] The Board is no more liable than the municipality, even if they have power to take up the streets and deal with the pipes. By-law 37 is clearly within the words of sec. 34, sub-sec. 10, and even if it goes beyond the express words of the power, it is in furtherance of the purpose of the Act, and is there-

(1) (1894) A.C., 347.
(2) (1894) 2 Q.B., 599.
(3) L.R. 10 Q.B., 219.
(4) 9 Q.B.D., 451.
(5) 4 C.P.D., 410.

fore valid: *Institute of Patent Agents* v. *Lockwood* (1); *Blackwood* v. *London Chartered Bank of Australia* (2).

But the Board, so far from having a duty to repair, has no power under the Act to interfere with pipes that they have not themselves laid down, even for the purpose of repair or removal. [They referred to sec. 40, sub-sec. 5, and sec. 45 of the Act 43 Vict. No. 32, and to sec. 16 of the Act 53 Vict. No. 16.] The only cases in which the Board may interfere with pipes the property of other persons are: (1) under sec. 73 they may cut off the supply in certain cases; (2) under sec. 78 they may enter premises and search for waste of water; (3) under sec. 18 of the Act 53 Vict. No. 16 they are given extended powers of cutting off the supply; and (4) under sec. 7 of 57 Vict. No. 12, they may enter and connect premises with the main if the owner fails to do so.

Sec. 74 points also to a duty on the owner of premises to repair all his pipes and apparatus right up to the point of connection with the main.

Knox K.C. (*Clive Teece* with him), for the respondents. It must not be assumed that if the Board is not liable the respondents are. There may be no person liable, as in the case of non-repair of roads under the control of a municipality: *Sydney Municipal Council* v. *Bourke* (3). *Chapman* v. *Fylde Waterworks Company* (4), if it is an authority in this case at all, points to the liability of the Board, not to that of the consumer. The respondents have not control of the service pipe and box. They were bound to put it down in accordance with the regulations of the Board. [He referred to by-laws 6, 8, 18, 20, 21, 40 and 43, sec. 47, sub-sec. 5, and secs. 68 and 71 of the Act 43 Vict. No. 32.] The Board has absolute control of it and the owner may not interfere with it without authority. The stopcock and box are really for the benefit of the Board.

Under the Statute there is neither a duty to repair nor a power to break up the streets for that purpose. If a person acting under statutory authority or obligation properly constructs a work which without such authority would constitute a nuisance

(1) (1894) A.C., 347.
(2) L.R. 5 P.C., 92.
(3) (1895) A.C., 433.
(4) (1894) 2 Q.B., 599.

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or a dangerous thing within the meaning of *Fletcher* v. *Rylands* (1), he is not liable in an action for damage sustained by another person owing to a defect subsequently appearing in the work, unless the Statute expressly or by necessary implication imposes such a liability upon him, or he is guilty of something amounting to negligence. Even authority to maintain and repair does not, in the absence of express provision, impose any liability for failure to repair. The defendants in such a case are not insurers; there must be evidence either of negligent construction or subsequent wrongful acts; *Green* v. *Chelsea Waterworks Co.* (2); *Dunn* v. *Birmingham Canal Co.* (3); *Gibraltar Sanitary Commissioners* v. *Orfila* (4); *Pictou Municipality* v. *Geldert* (5); *Sydney Municipal Council* v. *Bourke* (6); *Moore* v. *Lambeth Waterworks Co.* (7); *Rayner* v. *Australian Widows' Fund Life Assurance Society Ltd.* (8). Here there was no misfeasance. The defendants were not under any duty to inspect the pipe or to keep themselves informed as to its condition. The plaintiffs are therefore driven to rely upon the by-laws. But the by-laws cannot give power to cut up the streets if the Act itself does not; they must be confined to carrying out the duties and powers created by the Act. They cannot make the liability of owners of premises to other persons any more extensive than it is under the Act.

In *Chapman* v. *Fylde Waterworks Company* (9), the persons who laid down the pipes did so for their own profit. To make by-laws authorizing persons to go upon private property is not necessarily included in the power to make by-laws to insure repairs. Even if it is capable of being brought within those words, the construction excluding it should be adopted: *London, Brighton and South Coast Railway Co.* v. *London and South Western Railway Co.* (10).

The finding of the jury as to negligence should not be interfered with. On the evidence it was not unreasonable.

[*Knox* K.C. having cited during the argument the case of

(1) L.R. 3 H.L., 330.
(2) 10 T.L.R., 175, 259.
(3) L.R. 7 Q.B., 244; L.R. 8 Q.B., 42.
(4) 15 App. Cas., 400.
(5) (1893) A.C., 524.
(6) (1895) A.C., 433.
(7) 17 Q.B.D., 462.
(8) 24 V.L.R., 268; 20 A.L.T., 47.
(9) (1894) 2 Q.B., 599.
(10) 4 De. G. & J., 362.

Trimble v. *Hill* (1), on the question how far the decisions of the Court of Appeal in England are binding, *Griffith* C.J. pointed out that the High Court was not formally bound by such decisions.]

L. Armstrong, in reply. The cases holding that municipalities are not liable for non-feasance do not apply. This is a case of putting in the street a thing of such a nature that it may become dangerous, if allowed to get into disrepair, as in *Bathurst (Borough of)* v. *Macpherson* (2). Moreover, it is only in cases against road authorities that the principle has been applied. This is a case of active nuisance. The fact that the thing was placed in the street under statutory obligation in the first place is no excuse: *Midwood & Co. Ltd.* v. *Manchester Corporation* (3); nor is ignorance of the defect an excuse: *Humphries* v. *Cousins* (4). [He referred also to *Beven on Negligence*, 2nd ed., pp. 368, 440; *Mersey Docks and Harbour Board* v. *Gibbs* (5); *Michael and Will, Law of Gas and Water*, 4th ed., p. 249; *Dublin United Tramways Company* v. *Fitzgerald* (6).

August 29.

GRIFFITH C.J. This was an action brought by Mr. and Mrs. Birch against the defendants, claiming damages for injuries sustained by the female plaintiff in consequence of a defect in the pavement of a street fronting a house of which the defendants were alleged to be the owners, the defect being occasioned by the breaking or the disappearance of the lid of a stopcock box, which had been fixed in the pavement on the occasion of water being taken from the water main into the defendants' house.

The first count of the declaration alleged that, the lid having become detached and lost, the box was wrongfully left open and unprotected in the footpath for a long time by reason of which the female plaintiff sustained injury. There was another count alleging that the defendants negligently left the stopcock box open and unprotected. The question of negligence was negatived by the jury, so that, so far as the case depends upon negligence, there is no foundation for the claim against the defendants. The question

(1) 5 App. Cas., 342, at pp. 344, 345.
(2) 4 App. Cas., 256.
(3) (1905) 2 K.B., 597.
(4) 2 C.P.D., 239.
(5) L.R. 1 H.L., 93, at p. 110.
(6) (1903) A.C., 99.

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then is whether under the circumstances of the case the defendants committed an actionable wrong, that is to say, whether they are responsible for the fact that this lid had become detached and was not replaced or repaired, they being the persons by whom it had been put down. That depends in the first place upon the common law, and in the next place upon the Statute law. The Statute law governing the case is to be found in the *Metropolitan Water and Sewerage Act* 1880, which constitutes a Board called the Board of Water Supply and Sewerage, charged, amongst other things, with the supplying of water to the City of Sydney. The Act contains the usual provisions of such Acts. Sec. 45 provides: [His Honor read that section and also sec. 67 and continued.] The latter section therefore imposes on the owner of every tenement in the street the obligation to lay a proper pipe and proper stopcock box. [His Honor then read secs. 71 and 72 and continued.] There can be no doubt from the collocation of these sections that the purposes referred to are the laying down and taking up of the pipes. It follows, therefore, in the present case that what the defendants did in laying down the pipes was not only lawful, but was a duty imposed upon them by the Statute. In the performance of that duty they were, no doubt, bound to take reasonable care. If they laid down a defective pipe or box, and the defect was owing to their negligence, possibly an action might be brought against them for the consequences of the defect. But that is not this case. What they did was lawful, and the only complaint is that they did not afterwards do something else.

Now, unless there is a distinction to be drawn, as to the obligation to take care of an appliance of this kind, between the person who actually lays down the pipe and his successor, it would appear to follow that the liability, if any, must depend on the ownership of the house, and not upon the fact that a particular person laid down the pipe. For it would be a singular thing if with regard to any particular stopcock box in a street the question as to the extent of the obligation to repair it depended upon whether the person who laid it down had sold the house or had died since it was laid down. I apprehend, therefore, that the obligation, if any, must depend upon the ownership. But it is not necessary to pursue that question any further.

What, then, are the obligations at common law of a person who lawfully does some act interfering with a highway in such a way that there can be no complaint as to the manner in which it is done? Whatever they are at common law they remain, except so far as they are altered by express or implied provisions of the Statute. The common law on the subject is to be found, I think, laid down in two cases to which I will refer. The first is *Moore* v. *Lambeth Waterworks Company* (1). That was a case in which a claim was made for damages against the defendants in respect of a fire-plug lawfully fixed by them in a highway and which had become dangerous by reason of the highway wearing away through no fault of the person who laid it down. Lord *Esher* M.R. (2) stated the law thus:—"Now the argument for the plaintiff really amounted to this, that whoever puts into a highway that which becomes from any cause a nuisance or dangerous to persons going along the highway, is liable to make compensation if it causes injury to any person. But, to my mind, that doctrine has always been applied only where a thing has been put without authority in the highway. If something is put without authority in the highway, that of itself does not make the person putting it there liable at the hands of an individual; an obstruction in the highway will not entitle an individual to bring an action. But if something is put in a highway without authority and is left there, so that it becomes that which is generally called a nuisance, but which is really an obstruction, and if a person, lawfully using the highway, falls over it, or is otherwise injured by it, the person putting it in the highway must make compensation. But the waterworks company were certainly authorized by Act of Parliament to put this plug in the highway." In the present case the defendants were required by law to put this stopcock box in the highway. Then he went on (3): —"Now it is said that if the fire-plug had not been in the highway, the wearing down of the roadway was not sufficient to make the road so out of repair, as to render the authority having the care of it indictable. That is true. Then we must see what the liabilities of these two parties are. Now if the fire-plug had

(1) 17 Q.B.D., 462.

(2) 17 Q.B.D., 462, at p. 465.

(3) 17 Q.B.D., 462, at p. 466.

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been put down by authority before the road was dedicated to the public and adopted by them, then, as is clear from the decision in *Fisher* v. *Prowse* (1), the road authority and the surveyor must keep the road in repair with regard to that plug, and if they allow the road to come into such a condition that the road, having regard to the plug, is not safe, then they may be indicted. They must keep the road in repair having regard to it. If that is the law when the plug is put down before the road is dedicated, what is the condition of things when it is put there after the road exists, but is put there by authority of Parliament and not merely by contract, not merely by leave? And further, what is to be the condition of things if a company is compelled to put it down by Act of Parliament? It seems to me that the proper result under those circumstances is, that the road authority must take notice of the Act of Parliament, and that they must keep the road fit for the public to pass along it, having regard to that which is in the road by virtue and authority of Parliament, just the same as if it had been there before the road was made, so that the road was dedicated subject to it. The Act of Parliament has said that the plug may be in the road"—in the present case it has said that it must be in the road—"and the authorities must keep the road having regard to that which may or must be there by authority of the Act of Parliament. If that be true, the waterworks company have done all that the Statute obliged them to do, and their whole obligation was imposed by Statute, and no express liability was laid upon them by the Statute; on the contrary, a minor liability was laid upon them, and nothing is to be implied from the Act of Parliament under these circumstances.

"If either party was in the wrong, it seems to me to have been the road authority. I think that no action will lie by this plaintiff against the road authority; but it does not follow that because no action will lie against the road authority, therefore he can maintain an action against the defendants who have done no wrong. I think that he cannot maintain an action against the waterworks company under these circumstances."

That case is supported by *Green* v. *Chelsea Waterworks Co.* (2), also a case before the Court of Appeal. In that case an action was

(1) 2 B. & S., 770. (2) 10 T.L.R., 259.

brought against the defendants to recover damages for injuries sustained by the plaintiff's property by the bursting of a water main belonging to the defendants, which had been lawfully laid down. The contention for the plaintiff was that the defendants, having brought this dangerous thing, the water main, on to the the highway, were liable for anything which happened through its being there, relying upon the case of *Rylands* v. *Fletcher* (1). The Court of Appeal, consisting of *Lindley* L.J., *Kay* L.J., and *A. L. Smith* L.J., held that that doctrine was inapplicable to a company doing what they were authorized to do by Act of Parliament. The rule applies *a fortiori* to the case of persons doing what they are compelled to do by Act of Parliament. It seems to me to follow that, putting it at its highest, the liability of the defendants cannot be any greater than the liability of the road authority would be. They have interfered, it is true, with the highway, but they have only done what they were required by the law to do. The rule as to the liability of highway authorities in such cases is clearly stated in the case of *Municipality of Pictou* v. *Geldert* (2). In the judgment of the Judicial Committee this passage occurs (3):—"The law was laid down by this Board in the case of *Sanitary Commissioners of Gibraltar* v. *Orfila* (4), thus: 'In the case of mere non-feasance no claim for reparation will lie except at the instance of a person who can shew that the Statute or ordinance under which they act imposed upon the Commissioners a duty toward himself which they negligently failed to perform.' The question then is, whether any Statute has given to private persons the right of action now claimed against this municipality which does not exist at common law." That was a claim against a municipality for injuries sustained by the plaintiff owing to the road becoming dangerous. The same principle was applied in the case of *Municipal Council of Sydney* v. *Bourke* (5). In that case Lord *Herschell* L.C., delivering the opinion of the Judicial Committee, said (6):—"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

(1) L.R. 3 H.L., 330.
(2) (1893) A.C., 524.
(3) (1893) A.C., 524, at p. 527.
(4) 15 App. Cas., 400, at p. 411.
(5) (1895) A.C., 433.
(6) (1895) A.C. 433, at p. 439.

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the powers conferred upon them by law for the benefit of the community. In those 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 cognizance, 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 *Borough of Bathurst* v. *Macpherson* (1). 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 some one, 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?" Then he proceeded to discuss the case of *Borough of Bathurst* v. *Macpherson* (1), arriving at the result (2) that, quoting another passage from *Municipality of Pictou* v. *Geldert* (3): "'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.'" I am equally unable to find in this Statute any indication of intention that a person injured by the mere non-repair of a stopcock box in the street should be entitled to sue the person who owns the house for the time being, or who laid it down, for injuries sustained owing to mere non-repair.

Then the plaintiffs sought to rest their case upon a further obligation, not found in the Statute, but cast upon the defendants by the by-laws made by the Board under statutory authority.

(1) 4 App. Cas., 256.
(2) (1895) A.C. 433, at p. 445.
(3) (1893) A.C., 524.

The learned Judges of the Supreme Court attached considerable weight to that argument, but they came to the conclusion that the by-law which purports to require the owners of stopcocks to repair them was *ultra vires*. They thought, and rightly, that by-law No. 14 which provides that the owner must at his own expense lay down and maintain all the pipes and apparatus upon his premises, and upon any street, lane, or land lying between his premises and the Board's mains, was *ultra vires*, so far as it purported to confer authority on owners of premises to interfere with the street for the purpose of repairing such a stopcock or the appliances connected with it. I agree with them that unless the power to do so was conferred upon the Board by express terms they could not *ex mero motu* make a by-law which rendered such action lawful. But I cannot bring myself to doubt that under the Statute a person who lays down a pipe of this kind connecting a main pipe with his premises has an implied right under the Statute to do all that is necessary to repair it, on the same principle that a person who takes a water pipe through private land not only has the right, but is bound, to keep it in order. But the mere facultative power to do this does not create an obligation, any more than it imposes a liability for damages upon a municipality, which has undoubtedly the power to repair the roads in ordinary cases. So that I do not think the by-law is *ultra vires* on the ground that it authorizes something which would otherwise be unlawful. But I think it is quite irrelevant. The Statute authorizes the Board to make by-laws and to impose penalties for breach of them. The Board has made a by-law requiring owners of houses to keep their pipes in order and imposing a penalty for not doing so. I do not think it was the intention of the legislature to authorize the Board by by-law to create a new obligation, or to alter the common law obligations of a person who has done what the law requires. Even if there had been such a provision in the Act itself, merely imposing a penalty for default, a question would have arisen as to the application of the doctrine laid down by Lord *Cairns* in the case of *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1), and I should certainly be disposed to think that this by-law was intended, having regard to the powers conferred

(1) 2 Ex. D., 441.

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upon the Board by the Act, which it must be presumed that the Board were intending to carry out, to impose a liability upon owners of houses as between them and the Board, and not to create a new right to interfere with streets, or a new liability as between private persons using the streets and the owners of houses. I think that the by-law has really no bearing on the case.

It was contended further, however, by Mr. Armstrong, that the principles of law to which I have been referring were inapplicable to the present case because of sec. 116 of the Act, which provides that:—"Nothing in this Act shall be construed to render lawful any act matter or thing whatsoever which but for this Act would be deemed to be a nuisance nor to exempt any person from any liability prosecution or punishment to which he would have been otherwise subject in respect thereof," that is, of course, at common law. But, as I have shown, at common law no obligation is incurred by a person doing what he is compelled to do. If a person voluntarily exercising a legal right does not take proper care, other considerations may arise.

I am of opinion, therefore, that in the absence of proof of negligence this action cannot be maintained.

For these reasons I am of opinion that the appeal fails.

BARTON J. I cannot see that, except by the argument based by Mr. Armstrong on sec. 116 of the Act, there has been any serious attempt to controvert the position on which the defendants rest their case, that is, that if an obligation is imposed by Statute, a person who constructs a thing, which, apart from the Statute, would be a nuisance or a danger, is not liable for damage caused by a subsequent defect in the work imposed upon him, unless such liability is imposed by the Statute or negligence is proved. For the reasons given by the Chief Justice we need not concern ourselves about negligence. The proposition was put in another form in the case of *Municipal Council of Sydney* v. *Bourke* (1):—"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

(1) (1895) A.C., 433, at p. 435.

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."

An examination of the Statute shows that the liability insisted upon here is not expressly imposed by any enactment, nor has the legislature imposed any duty on the defendants for a breach of which a right of action accrues to the person injured by it. It is clear therefore that there are in this case important features which differentiate it from the case of *Midwood & Co. Ltd.* v. *Manchester Corporation* (1). That was a case in which the defendants were empowered by an order made under the *Electric Lighting Acts* 1882 and 1888, confirmed by Act of Parliament, to supply electrical energy in their district, and for that purpose to lay down electrical mains, but reading from the headnote, it was provided by the order "that nothing therein contained should exonerate them from any indictment, action, or other proceeding for nuisance in the event of any nuisance caused by them. One of their mains fused, and the bitumen in which the main was laid in consequence became volatilized into an imflammable gas, which accumulated for some time and then exploded, causing a fire by which the plaintiffs' goods were damaged." It was held that, "apart from any question of negligence, the defendants were liable to the plaintiffs as for a nuisance by reason of the provisions of clause 70 of the order." *Collins* M.R. said (2):— "I will deal first with what seems to me to be the first and main point, which is whether the defendants are liable as for a nuisance irrespective of negligence. It has hardly been contended, though perhaps I cannot say it has not been contended, that in this case there was in point of fact no nuisance. It cannot, I think, seriously be contended that, where the premises of an adjoining owner are blown up by an explosion brought about by the agency of the defendants' system of electric lighting, there is not a nuisance. Whether the defendants are

(1) (1905) 2 K.B., 597.

(2) (1905) 2 K.B., 597, at p. 604.

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liable in respect of it is, of course, another matter." Then, after a description of the manner in which the occurrence took place, His Lordship continued :—"Therefore, there clearly having been a nuisance caused by the defendants, the question is whether the defendants are protected by any statutory provision, for otherwise their liability is clear. The statutory enactment upon which they have to rely for protection is one which contains a provision that 'nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them.' It was ingeniously argued by the counsel for the defendants that, notwithstanding the clearness of this language, it must be read subject to what they say is the underlying right of the defendants under the order to place their electric mains where they have placed them, and to the obligation imposed upon them by the order to keep a supply of electricity in those mains: that the defendants have done nothing but what they were authorized by the order to do; and, therefore, as I understood the argument, that the words of clause 70 of the order must be rejected, because they are inconsistent with the paramount provision of the order, authorizing the defendants to put their mains where they have put them, and the obligations incident to the position of the defendants as the undertakers under the order; and that, consequently, apart from negligence, the defendants are not liable. This argument appears to me to confuse the true order of ideas. The whole of the provisions of the order must be read together, and, so reading them, their effect appears to me to be that a qualified permission only is given to the undertakers. They are permitted to lay down their mains, and send electricity along them, subject to the obligations and terms imposed upon them by the provisional order, and the regulations of the Board of Trade; but underlying the whole is a condition imposed for the protection of the public upon an undertaking of this kind, which is not yet in its final stage of development, and may involve undiscovered risks, which it would not be fair to throw upon the public. While on the one hand the privilege is conferred upon the defendants of laying down their mains and supplying the city with electricity, on the other hand their powers are fenced round with a provision

for the benefit of the public, throwing the risk of any nuisance which may be caused by the exercise of those powers upon the undertakers. Permission is given to the defendants to do the things provided for by the order, but if, in doing them, they occasion a nuisance they must bear the consequences. They are not given a *carte blanche* to create a nuisance." The matter was put in a few words by *Matthew* L.J. (1):—"The provisions of the order seem to me to come to this. A concession is granted to the undertakers, giving them the right to carry on a dangerous business, to which latent risks may be incidental that cannot be prevented by any degree of care; and, that being so, it was thought reasonable that those who are empowered to carry on that business for their profit should have to bear the inevitable loss arising from such risks."

Now, I do not think that is this case at all, nor that the provisions of sec. 116, which the Chief Justice has read, bring this case into line with *Midwood & Co. Ltd.* v. *Manchester Corporation* (2), and for the prime reason that the thing done here by the defendants, which is not complained of as having been done wrongly or defectively, or improperly in any way, was a thing which must have been lawful inasmuch as it was expressly ordered by law. It was in the doing of work not imposed upon the defendants in *Midwood & Co. Ltd.* v. *Manchester Corporation* (2), although authorized, that they caused the nuisance for which, by the terms of the Order under the Act of Parliament, they remained liable. That cannot be said in this case, nor is there anything in the case to take it out of the ordinary rule, that where under a statutory obligation a thing is done, which, but for that obligation, would be a nuisance and a danger, the fact of its subsequently developing some defect does not cast upon the owner a responsibility for a nuisance in doing what he was ordered to do, unless either such a responsibily is imposed upon him by the Statute so as to render him liable for nonfeasance, for which he would not otherwise be liable, or he has been guilty of negligence (with which we need not now deal), where the original placing of the thing was lawful. That was not the fact in the case which I have cited. Here we have a Statute

(1) (1905) 2 K.B., 597, at p. 610. (2) (1905) 2 K.B., 597.

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which gives authority to the Board, by sec. 45, to break up streets, lay down pipes, conduits, service pipes, &c., and from time to time to repair, alter or remove the same. They have not only the authority to create these things, but to repair and alter as well as to remove them. The person who constructs a service pipe with a stopcock in it is dealt with by sec. 67 which provides [His Honor read sec. 67 and continued.] There is a statutory obligation. Sec. 71 gives authority to a person who has laid down such a pipe or become proprietor of the premises to remove the pipe and, of course, the stopcock. Up to that point the purposes for which the defendants, having regard to their act in laying down the pipes, might require to take up the pavement, are the construction of the thing, which was obligatory, and the removal of it, which was permitted. I will now refer to sec. 72, which gives authority to break up the pavement between the house and the Board's pipe "for any such purpose as aforesaid." On closer examination I am unable to collect from the preceding sections referred to by "aforesaid," any purposes having reference to the defendants here except the purposes of laying down the pipe and stopcock and removing them. I find no authority therefore in the Act, nor any obligation, for the person who has constructed this thing under the pavement or in the pavement, to repair or alter it. It has been argued that there is an implied authority and obligation to repair, but I cannot find any trace of either. The complaint here is not of the doing of the thing, but of not doing something else afterwards, and the whole question of liability depends on whether by the express provisions of the Statute or by necessary inference there is any obligation laid upon the defendants to prevent a thing constructed by them from getting into such a condition as may cause injury to others using the footpath. Now, as the obligation to repair and the authority to repair this structure or thing are alike wanting under the Statute, it must be that the obligation contended for is based upon some common law reason; but I cannot find any common law reason why for mere nonfeasance the present defendants should be made liable, any more than if they were a corporation having the care, construction and maintenance of a road. The authority upon which liability for such

nonfeasance has in the past been based is *Borough of Bathurst* v. *Macpherson* (1). That is an authority which, in the light of subsequent explanations by the Privy Council, is not to be taken as affirming any liability for mere nonfeasance. The liability here not being imposed by any enactment—to quote Lord *Herschell's* words, the legislature not having imposed upon the defendants any "duty for the breach of which a right of action accrues to any person injured by it," I am unable to see that the defendants are answerable in this case.

With reference to the by-laws I think that, if they are so framed as to create an absolutely new cause of action and alter the rights of citizens *inter se*, they are probably in so far as they do so, beyond the statutory power conferred upon the Board to frame by-laws in execution of the purposes of the Statute, and, if they are capable of two constructions, one pointing to the creation of such a liability between citizens, and the other not doing so, but restricting their effect to the purpose of enabling the Board to more properly carry out their own duties, then the latter construction would more properly be adopted, for the reason that it must not be taken that the Board, in framing the by-laws, intended to exercise anything beyond their statutory powers.

I think, therefore, that the appeal fails as to the statutory powers, and I cannot see any obligation at common law for which, having regard to the verdict of the jury, the defendants can be held responsible.

I agree that the appeal should be dismissed.

O'CONNOR J. I am of the same opinion, and have very little to add.

The general principles applicable to the case are I think very plain. If an individual makes a use of the highway which is not authorized by common law, by placing his own property upon it and thereby causing a nuisance, he incurs obligations to any person injured by it, or to the public, as the case may be. In that case the rights of the person injured or of the community depend upon the common law. But if the individual is not only authorized to place his private property on the highway, but is

(1) 4 App. Cas., 256.

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compelled to do so by Statute, then you must find his obligations and liabilities in regard to the property so placed there in the Statute which gives him that authority. The statutory authority prevents the mere placing of private property in the highway from becoming thereby a nuisance; the person authorized must, however, use the statutory authority with reasonable care. If he does not he is liable. But having once exercised the authority with reasonable care, his subsequent obligations depend entirely upon the Statute. Therefore in all these cases, in order to find out the obligations owing to the public by a person who under statutory authority places his own property in the highway one must look at the provisions of the Statute. There are some cases in which the Statute imposes no obligation. There are others in which, by the very terms in which the Statute gives the authority to so use the highway, the obligation is clearly indicated. The latter position is illustrated by the case of *Midwood & Co. Ltd.* v. *Manchester Corporation* (1), a case upon which Mr. Armstrong relied as showing that, if this stopcock box became a nuisance by being out of repair, the defendants who put it there and whose property it was could not escape liability. In that case power was given to place the obstruction in the highway, with certain obligations attached to the exercise of the power. And it was expressly provided in clause 70 of the order that nothing in it should exempt the undertakers from any proceeding for nuisance in the event of any nuisance being caused by them. That is to say, that, if in the maintenance of the work, which they were authorized to place in the highway, any nuisance was caused, they would be liable, just as they would have been at common law if they had had no authority to interfere with the highway. That was what *Collins* M.R., described as a qualified permission. He said (2):—"Permission is given to the defendants to do the things provided for by the order, but if, in doing them, they occasion a nuisance, they must bear the consequences. They are not given a *carte blanche* to create a nuisance. If and so far as they can do the thing authorized without occasioning a nuisance to any one, they may lawfully do them; but, if and so far as they cause a nuisance by doing them, they are not only

(1) (1905) 2 K.B., 597.

(2) (1905) 2 K.B., 597, at p. 606.

not protected by the Act, but they are made liable by its express terms." Now, if we examine the Act giving authority to place these pipes, the property of the defendant society, in the highway, we find that there is no obligation attached to the authority requiring them to maintain them. They are authorized, and indeed compelled, to place the pipes there, and having done that with ordinary care, there is no further obligation imposed by the Act in regard to the maintenance of them while there. The claim of the plaintiffs is, as it was properly described by Mr. Knox, that the defendants are placed by the Statute in the position of guaranteeing that the structure in the highway shall not become a nuisance. Indeed it is necessary, in order to establish the plaintiffs' case apart from negligence, that they should maintain that. But looking at the Act I cannot find any such obligation. No doubt the Act confers upon the owner of the stopcock box who places it in the highway the right to repair it; although not expressly given I have no doubt that the right must follow by necessary implication from the terms of the Act because he is compelled to put the structure in the highway, and is liable to be prosecuted if it gets out of repair in such a way as to cause a waste of water. He is also permitted under sec. 72 to take up the pipe if required, and to make any disturbances of the footpath necessary for that purpose. It seems to me that there must be an implied power to disturb the footpath so far as is necessary to repair the pipes. In the case of *Sheffield Waterworks Company* v. *Wilkinson* (1) a very similar case, where there was no express provision for breaking up the soil in the street, *Bramwell* L.J., held that the power to break up the soil of the street for the purposes of doing what was required by the Act must be implied. He said (2):—"I do not find anything in the Act of Parliament to authorize the breaking up of the soil for this purpose; but it seems to me to follow as a necessary consequence from the general provisions of the Statute." I think with Mr. Armstrong that the right to put a pipe in the street is really a sort of statutory easement. That being so, the rights consequent upon that easement, to do everything necessary for repair, must follow, as laid down in *Gale on Easements*, 7th ed., p. 461, in these words:—"Thus in the

(1) 4 C.P.D., 410.

(2) 4 C.P.D., 410, at p. 421.

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case of *Pomfret* v. *Ricroft* (1), it was held, that where a party had an easement to use a pump in his neighbour's land, 'although neither the soil nor the pump itself was granted to him, yet by the grant of the use of the pump the law had given him the liberty (to enter upon the land and repair the pump); for, when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use. As, if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me.'" I, therefore, am of opinion that there must be implied from the other powers in the Statute the power on the part of the owner of the structure in the street to do everything necessary to repair it. I may say also that I agree with my learned brothers that that right exists altogether independently of the provisions of the Statute or of the provisions of sec. 34 which enable regulations to be made.

Then follows the much more difficult question, does the right to repair carry with it the obligation to repair? If it does an action will lie only where there is negligence in the carrying out of that obligation. Then if there is no negligence, whether the obligation exists or not, there is no cause of action. In order to establish a cause of action, assuming the obligation to repair, negligence must be shown. The jury have expressly found that there was no negligence. Negligence, of course, is a term of very varied application, depending altogether upon the circumstances of the particular case. For instance, if the obligation to repair this particular part of the pavement, and to fill up the hole so that it would not be dangerous to the public, is on the municipality, *primâ facie* very slight evidence that they were aware of its existence, would be necessary, and if they were aware of its existence, they would be bound to repair it. Probably very little evidence would be required if the obligation to repair were upon the Board of Water Supply and Sewerage. Their daily duties necessarily involve inspection, which would bring the condition of the structure within their knowledge. But in dealing with the case of an owner of property who owns this structure in the street, but who does not necessarily have its condition brought

(1) 1 Saund., 321.

under his notice, as he does the condition of his own premises, the position is altogether different. If the condition of this stop-cock box were brought under the notice of the society, and they failed to repair it after that notice, I think that they would be liable. In that case there would be not a mere nonfeasance but a neglect of duty. But in this case there was no evidence that the condition of the box was brought under the notice of the society and therefore there was no negligence. Nor does there seem to me to be any evidence which would justify the Court in disturbing the finding of the jury, if we were asked to do so, that there was no neglect of duty on the part of the society in not informing themselves of the condition of the fittings.

Under these circumstances I agree that the action is not maintainable, and that the appeal must fail.

Appeal dismissed with costs.

Solicitors, for the appellants, *Levy & Fulton.*

Solicitors, for the respondents, *Stephen, Jaques & Stephen.*

Solicitor, for the Board of Water Supply and Sewerage, intervening, *H. S. Williams.*

C. A. W.

Cons/Dist *Update Constructions v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251

Foll *Concrete Constructions Group Ltd v D V P Engineering Pty Ltd* (1997) 14 BCL 168

Foll *Concrete Constructions Group Ltd v D V P Engineering Pty Ltd* (1997) 14 BCL 168

Foll *Trimis v Mina* (1999) 16 BCL 288

[HIGH COURT OF AUSTRALIA.]

LIEBE . . . . . APPELLANT;
PLAINTIFF,

AND

MOLLOY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Special case submitted by arbitrator—Arbitration Act 1895 (*W.A.*), (59 *Vict. No.* 13), *secs.* 9 (*b*), 12—*Power to draw inferences of fact—Remitting incomplete award—"Extras"—Employer, architect and contractor.*