[HIGH COURT OF AUSTRALIA.]

MUNICIPAL TRAMWAYS TRUST . . APPELLANTS;
DEFENDANTS,

AND

STEPHENS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Negligence—Maintenance and repair of highway—Breach of Statutory duty—Liability for non-feasance—Municipal Tramways Trust Act 1906 (*S.A.*) (*No.* 913), *sec.* 54.

H. C. OF A. 1912.

ADELAIDE, *June* 4, 5, 6.

MELBOURNE, *June* 21.

Griffith C.J., Barton and Isaacs JJ.

By sec. 54 of the *Municipal Tramways Trust Act* 1906 (S.A.) it is provided that the Municipal Tramways Trust "shall, at its own expense at all times, keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to its satisfaction, so much of any road whereon any tramway belonging to the Trust is laid as lies between the rails of the tramway . . . and so much of the road as extends 18 inches beyond the rails on each side of such tramway."

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting), that the section imposes a positive duty on the Trust to keep in good condition and repair so much of the roadway as is mentioned in the section, notwithstanding that no direction has been given by the road authority to do the work or as to the materials with or the manner in which the work was to be done, and that an action by a member of the public lies against the Trust for injuries caused by a breach of that positive duty.

Held, also, by the Court (*Isaacs* J. doubting whether there is any liability for non-feasance), that the Trust was liable for a non-repair amounting to a breach of the statutory duty.

Decision of the Supreme Court of South Australia: *Municipal Tramways Trust* v. *Stephens*, (1911) S.A.L.R., 40, affirmed.

APPEAL from the Supreme Court of South Australia.

An action was brought in the Local Court of Adelaide, South Australia, by Arthur Stephens against the Municipal Tramways Trust claiming damages for injuries received by him in consequence of the alleged wrongful omission and neglect of the defendants to keep in good condition and repair so much of a road on which a tramway of the defendants was laid as lay between the rails of the tramway and so much of the road as extended 18 inches beyond the rails on each side of the tramway.

The action was heard before *Way* C.J., and a jury and the jury found a verdict for the plaintiff. An order *nisi* obtained by the defendants for a new trial was discharged by the Full Court: *Municipal Tramways Trust* v. *Stephens* (1).

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

The facts are sufficiently stated in the judgments hereunder.

O'Halloran and *Cleland*, for the appellants. The appellants are not liable for non-feasance within the principle laid down in *Russell* v. *The Men of Devon* (2). They are a public corporation representing public interests or they are agents of the inhabitants charged in law with the duty of repairing a portion of the highway. Though they are not an independent road authority they are a road authority in the sense of having a subordinate control over a certain portion of the highway. See *Dublin United Tramways Co. Ltd.* v. *Fitzgerald* (3). The duty of the appellants under sec. 54 of the *Municipal Tramways Trust Act* 1906 is either a duty transferred from the road authority or is a new duty to carry out which the new body was created. Such transfer or new creation did not make the new body liable for non-feasance. The intention to impose a liability for non-feasance must be clearly expressed. From the nature of their constitution the appellants are not liable for non-feasance. There is no right of action in an individual member of the public because the duty is owed to the road authority and the public at large and not to individuals or classes of individuals: *Alldred* v. *West Metropolitan Tramway Co.* (4); *Robinson* v. *Workington Corporation* (5). The language

(1) (1911) S.A.L.R., 40.
(2) 2 T.R., 667.
(3) (1903) A.C., 99, at pp. 103, 105.
(4) (1891) 2 K.B., 398.
(5) (1897) 1 Q.B., 619.

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

of the Statute might have been sufficient to impose a liability on a private corporation but is not sufficient to impose it on a public corporation: *Municipal Council of Sydney* v. *Bourke* (1). No person has a right of action in respect of a neglect of a public statutory duty unless either he is one of a class intended to be benefited by the Statute, and then only if he suffers special damage, or the Statute has used language indicating an intention to confer upon him a right of action.

[ISAACS J. referred to *Brice* on *Tramways and Light Railways*, p. 298.]

The duty was imposed by sec. 54 on the appellants in order only that the duty of the road authority to repair the roads could be more conveniently performed. The duty of the road authority being discretionary, that of the appellants is also discretionary. If there is any duty to a member of the public it does not arise until a direction has been given by the road authority, and none was given in this case. The legislature has substituted the opinion of the road authority for that of a reasonable man as the standard of reasonable repair. A special remedy has been created by sec. 100 for a breach of the Act by the appellants, and therefore this action will not lie. They also referred to *Barnett* v. *Poplar Corporation* (2); *Brocklehurst* v. *Manchester Bury, Rochdale, and Oldham Steam Tramways Co.* (3); *Cowley* v. *Newmarket Local Board* (4); *Young* v. *Davis* (5); *Clegg, Parkinson & Co.* v. *Earby Gas Co.* (6); *Johnston and Toronto Type Foundry Co.* v. *Consumers' Gas Co. of Toronto* (7); *R.* v. *Garrett* (8); *R.* v. *Croydon and Norwood Tramways Co.* (9); *Sanitary Commissioners of Gibraltar* v. *Orfila* (10).

Paris Nesbit K.C. and *F. Villeneuve-Smith*, for the respondent. [They were heard only as to the question of the effect of the words "in such manner as the road authority shall direct and to its satisfaction" in sec. 54]. The fact that the road authority has given no direction or expressed no dissatisfaction

(1) (1895) A.C., 433.
(2) (1901) 2 K.B., 319.
(3) 17 Q.B.D., 119.
(4) (1892) A.C., 345.
(5) 31 L.J., Ex., 250.
(6) (1896) 1 Q.B., 592.
(7) (1898) A.C., 447.
(8) 73 J.P., 188.
(9) 18 Q.B.D., 39.
(10) 15 App. Cas., 400.

will not relieve the appellants of liability for failure to keep in repair: *American and English Encyclopædia of Law*, 2nd ed., vol. 27, p. 96; *Doyle* v. *New York Railway Co.* (1); *Simon* v. *Metropolitan Street Railway Co.* (2). Sec. 54 imposes on the appellants an absolute duty to keep in good condition the particular part of the road: *Howitt* v. *Nottingham and District Tramways Co.* (3); *North-Eastern Railway Co.* v. *Wanless* (4).

[ISAACS J. referred to *Morris* v. *Canterbury Tramway Co. Ltd.* (5).

GRIFFITH C.J. referred to *Hertfordshire County Council* v. *Great Eastern Railway Co.* (6).]

Apart from sec. 54 there would be a right of action in the respondent at common law, and sec. 54 has not taken away that right: *Oliver* v. *North Eastern Railway Co.* (7); *Craies on Statutes*, p. 305; *Maxwell on Statutes*, 4th ed., p. 544; *Beale on Legal Interpretation*, p. 317.

Cleland, in reply. As to the American cases municipal authorities in America are held to be liable for all injuries arising from defective highways: *American and English Encyclopædia of Law*, 2nd ed., vol. 15, p. 420. He also referred to *Morris* v. *Canterbury Tramway Co. Ltd.* (5); *Oliver* v. *North Eastern Railway Co.* (7); *Brice on Tramways and Light Railways*, p. 60.

[ISAACS J. referred to *Bristol Trams and Carriage Co. Ltd.* v. *Bristol Corporation* (8); *Mayor &c. of Norwich* v. *Norwich Electric Tramways Co.* (9).]

Cur. adv. vult.

June 21.

GRIFFITH C.J. This was an action for damages for breach of an alleged statutory duty to keep in good condition and repair a part of a highway on which the appellants' rails are laid, by reason whereof a spring dray which the plaintiff was driving along the road was upset and the plaintiff was injured. The

(1) 58 N.Y. App. Div., 588.
(2) 29 Misc. (N.Y.), 126.
(3) 12 Q.B.D., 16,
(4) L.R. 7 H.L., 12, at p. 15.
(5) 10 N.Z.L.R., 524.
(6) (1909) 2 K.B., 403.
(7) L.R. 9 Q.B., 409.
(8) 25 Q.B.D., 427.
(9) 99 L.T., 133.

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Griffith C.J.

particular default complained of was that the macadamized surface of the road had been displaced or worn down at the side of one of the rails, which consequently projected to a height variously estimated at from two to six inches. The case was tried before *Way* C.J. with a jury, who found that "the tramways' undertaking" at the place in question "was not maintained in good condition and repair at the time of the accident and for at least six weeks previously, that this state of non-repair allowing the rails to project was the cause of the accident." Judgment was given for the plaintiff, and the Supreme Court discharged a rule *nisi* to enter judgment for defendants or for a new trial. The appeal is from this decision.

Various grounds were taken for the appellants, with which I will deal in order, but I will first refer to the provisions of the Statute under which the defendants are constituted.

The *Municipal Tramways Trust Act* 1906 (No. 913) constituted a Trust called the Municipal Tramways Trust, consisting of eight members, of whom two were to be appointed by the Governor in Council, and the others elected by certain specified municipal authorities having control of roads in the area of the operations of the Trust.

The Trust was required to take over certain existing tramways, and within three years from 31st December 1906 to construct a system of tramways worked by electric power from the city of Adelaide to terminal points in eleven specified localities, and the exclusive right to construct and work such tramways within a radius of ten miles from the General Post Office was conferred upon it. The necessary funds were to be advanced by the Government, and elaborate provisions were made for repayment of the advances.

For the purposes of the Act the Trust was empowered by sec. 53 (*inter alia*) (1) to break up and open the surface of any street; (12) to carry on the business of tramway proprietors and of generators of electric power or light and to sell electric power or light, but only to the Government; (13) for the purpose of stimulating or developing the traffic of any tram system to carry on the business of omnibus proprietors; (14) for the like purpose to establish or keep and maintain, and to rent, let, lease, buy,

sell, or grant licenses in respect of public parks, gardens, restaurants, rest-houses or places of entertainment to which passengers might conveniently resort. So much, as to the constitution and powers of the appellants. It is obvious from what I have said that the appellants, although in one sense a municipal corporation, are a trading corporation, and come within the principles laid down in the case of *Mersey Docks Trustees* v. *Gibbs* (1).

Before referring to the provisions of the Act imposing positive duties upon the Trust I will say a few words on the general rule of law as to the obligations of such public bodies. That rule is concisely stated by *Fletcher Moulton* L.J. in *Hertfordshire County Council* v. *Great Eastern Railway Co.* (2):—"The law as settled by the cases of *R.* v. *Inhabitants of Kent* (3); *R.* v. *Inhabitants of the Parts of Lindsey* (4); *R.* v. *Kerrison* (5), and *R.* v. *Inhabitants of the Isle of Ely* (6), practically amounts to this: that, where persons, acting under statutory authority, for their own purposes interrupt a highway by some work which renders it impossible for the public to use it, an obligation is *primâ facie* imposed upon them to construct such works as may be necessary to restore to the public the use of the highway so interrupted, and that the obligation so imposed is of a continuing nature, involving not only the construction of such works, but also their maintenance. In order to rebut the presumption that such an obligation is imposed upon them, such persons must show that the Statute under the authority of which they were acting contains some provision amounting to an exemption from such an obligation. It is not enough, in my opinion, that the Statute is silent on the point."

Another instance in which that rule had been applied is afforded by the case of *Oliver* v. *North Eastern Railway Co.* (7) in which the defendants were held responsible for their neglect to keep the surface of the roadway at a level crossing up to the level of the rails—which is exactly the complaint in the present case.

It is also a general and well known rule that a statutory power

(1) L.R. 1 H.L., 93.
(2) (1909) 2 K.B., 403, at p. 412.
(3) 13 East, 220.
(4) 14 East, 317.
(5) 3 M. & S., 526.
(6) 15 Q.B., 827.
(7) L.R. 9 Q.B., 409.

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Griffith C.J.

to execute work does not authorize the creating of a nuisance except so far as the creation of the nuisance is expressly authorized or necessarily incidental to the execution of the powers. It is on the latter ground that a distinction has sometimes been made in favour of railway authorities.

These considerations indicate the attitude of mind in which the express provisions of the Act as to the duties of the Trust are to be approached.

Sec. 54 provides that the Trust "shall, at its own expense, at all times, keep in good condition and repair, with such materials and in such manner as the road authority shall direct and to its satisfaction—(1) So much of any road whereon any tramway belonging to the Trust is laid as lies between the rails of the tramway . . . " and "(3) So much of the road as extends 18 inches beyond the rails on each side of any such tramway."

In my judgment this section at once imposes and defines the extent of the duty of the Trust with respect to the repair of roads, and supersedes the obligation which would otherwise have arisen at common law. So far from diminishing that obligation it extends it in two directions—first, in point of area which is no longer limited to the soil immediately adjoining the rails, and, secondly, in requiring them in the performance of their duty to obey the directions of the road authority. It is *primâ facie* improbable that the obligation imposed by common law would be either abrogated or reduced, and very clear words would be required to express that intention.

The appellants, however, contend that under this section no obligation to repair arises until the road authority has given specific directions on the subject, and that as none appeared to have been given in this case no breach of duty was shown. The section is a transcript of the first part of sec. 28 of the English *Tramways Act* 1870, which is printed with commas after the words "repair" "direct" and "satisfaction." In the South Australian Act the comma after "direct" is omitted. But, as we had occasion to point out in a recent Victorian case (1), it is not safe to rely on punctuation. I think, however, that as a matter of grammatical construction the words "with such materials and in

(1) See *President, &c., of the Shire of Charlton* v. *Ruse*, 14 C.L.R., p. 220.—[ED.]

such manner as the road authority shall direct and to its satisfaction" are parenthetical, in the sense that they do not diminish the effect of the positive words "shall at its own expense at all times keep in good condition and repair"—at all events in the absence of any express direction or expression of satisfaction—but that, as already said, they impose a further obligation, namely, that in the discharge of their own positive duty they are to obey the directions of the road authority in matters of detail. To hold otherwise would, in the words of Lord *Halsbury* quoted by *Way* C.J., be to confuse the mode in which the obligation is to be performed with the obligation itself: *Dublin United Tramways Co.* v. *Fitzgerald* (1). The question whether a compliance with the positive directions of the road authority would excuse the Trust, if after such compliance the road was left in a state of dangerous disrepair, is an interesting one, and may some day afford some difficulty. In the United States it appears to have been answered in the negative, and I am not aware that any Court has ever answered in the affirmative. But it does not arise in this case, and I express no opinion upon it.

The contention that the Trust are under no obligation to keep the specified part of the road in a safe condition until they have received special directions from the road authority as to the materials and manner of repair seems to me not only unsupported by authority but inconsistent with common sense. I should suppose that in the absence of specific directions a general direction should be inferred that the materials and manner were to be the same as those of and in which the adjacent portions of the roadway were constructed. Thus if the road is made of wood blocks the repair is to be with wood blocks, if of granite setts with granite setts, and if of macadam with macadam, and so on. At any rate after the lapse of years, during which, as in this case, repairs have been executed in that manner, such a direction should be inferred. Mr. *Cleland*, indeed, did not dispute so obvious a conclusion. But he contended that there must, in addition to the standing directions as to materials and manner, be a special direction in each case to make the repair. This would involve a constant daily inspection of tramrails by the road

(1) (1903) A.C., 99, at p. 105.

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Griffith C.J.

authority. It is well known that the constant inspection of railways and tramways is an imperative necessity if they are to be kept in a condition of safety. The suggestion that in addition to the duty of constant inspection which is necessarily cast upon the Trust, a similar duty should also be cast upon the road authority seems to me, with all respect, almost grotesque, especially when I remember that the most constant damage which occurs from tramways laid upon macadamised roads arises from the wearing down of the surface adjoining the rails. If express directions are wanted in any case it is for the tramway authority to ask for them.

The views which I have just expressed are supported by sec. 55, which provides that when the road authority forms any portion of the road which the Trust "is not hereby required to repair" with any other material than macadam the Trust "shall, as and when required by the road authority," and at its own expense, form with such material and maintain and keep in good condition and repair to the satisfaction of the road authority so much of the road as by the Act is directed to be kept in good condition and repair. As pointed out by the learned C.J., sec. 54 does not, as does sec. 55, say that the duty is to be discharged "as and when" directed. The latter section tacitly assumes, not only that when the surface is of macadam it is to be repaired with macadam, but also that the Trust is to discharge the ordinary duty of maintaining and keeping in good repair without any special direction.

It is further suggested that the Trust have no right to repair without express direction, but this contention is answered by the words of the first of the powers which I have quoted, and also by sec. 56, which requires the Trust "except in cases of emergency" to give three days' notice to the road authority before breaking up a road. If the filling up of a dangerous hole adjoining the tram rail is not an emergency, I do not understand the meaning of the word.

The contrary construction would lead to extraordinary consequences. If when directions are given by the road authority—*e.g.* to repair with granite setts instead of macadam—the tramway authority objects to the directed mode of execution of the

work, the question would under sec. 65 have to be settled by an engineer or other fit person appointed by the parties, and in the meantime the obligation to repair would be suspended, and persons using the road would be unprotected: *R.* v. *Garrett* (1). It is impossible that any such result could have been intended by the legislature.

In my opinion the most favourable view that can be taken of the effect of the command to obey the directions of the road authority contained in sec. 54 is that a compliance with express directions may be—I do not suggest that it is—an excuse for what would otherwise be a breach of duty. But in that view such express direction should, in my opinion, be alleged and proved by the Trust. The contention that such directions are to be assumed to have been given when a dangerous hole in the highway has been left unfilled for six weeks is not complimentary either to the road authority or to the common sense of the tribunal to which the argument is addressed.

In my opinion, therefore, sec. 54 imposed a positive duty upon the appellants for breach of which they are liable unless some other defence can be set up. This view is consistent with all the cases that have been cited, and indeed, as I understand these cases, was taken for granted by both bench and bar. I agree with the learned Chief Justice in thinking that the omission from the Act of an enactment such as that contained in sec. 55 of the *English Tramways Act* 1870 to the effect that the tramway authority shall be answerable for all damage happening through their act or default by reason of any of their works or carriages is immaterial. I doubt, indeed, whether the present case would fall within such words.

The appellants further claim the benefit of the rule that highway authorities are in general not liable for non-feasance. The nature of that rule and the reasons for it are clearly stated in the cases of *Cowley* v. *Newmarket Local Board* (2) and *Municipal Council of Sydney* v. *Bourke* (3). It is founded, not upon the nature of the act to be done, but upon the character of the authority required to do it.

(1) 73 J.P., 188; 100 L.T., 533. (2) (1892) A.C., 345.
(3) (1895) A.C., 433.

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Griffith C.J.

The appellants put this argument in different ways. They say, first, that they are in effect a highway authority *quoad hoc*. In one sense, perhaps, they are. And if so, as was pointed out in *Municipal Council of Sydney* v. *Bourke* (1), if there is a duty it can only be because it has been imposed by the legislature. I find the imposition of the duty in sec. 54. Default in performance of a positive statutory duty is none the less actionable because it may be called in one sense non-feasance. It is not every act of omission that can properly be described by that term.

Another way in which the argument was put was that the municipal authority for the district still remained the highway authority, and that sec. 54 only prescribes a new and convenient way for the discharge of their duty, so that, in effect, the Trust in repairing the portion of the road which in the words of sec. 55 the "Trust is required to repair" is only acting as agent for the road authority, and has no statutory duty in the ordinary sense of the term.

In my opinion the obligation imposed by sec. 54 is part of the price paid by the Trust for the franchise conferred upon it by the legislature. Such statutory bargains are always construed most favourably to the public.

It was also contended that since the Act prescribed a penalty not exceeding £50 for any contravention of its provisions an action will not lie at the suit of a person specially aggrieved. In such cases regard must be had, as pointed out by Lord *Cairns* in *Atkinson* v. *Newcastle Waterworks Co.* (2) to the general scope of the Act, and the nature of the statutory duty. Applying that test, I think it is clear that the ordinary rule of common law was not intended to be excluded.

In my opinion, therefore, all the defences fail, and the appeal must be dismissed.

BARTON J. In the first instance it is well to point out the extent of the liability of municipal authorities in South Australia with respect to the making and repair of roads and streets. It is defined by the *Municipal Corporations Act* 1890, sec. 125, which gives these bodies permission to do any work of the kind "as

(1) (1895) A.C., 433. (2) 2 Ex. D., 441.

they shall think proper and necessary." Clearly there is no liability here for what is called a non-feasance. But if a municipality having the sole control of a road took it upon itself to create by its direct action an obstruction or nuisance in the highway—for example, by laying a line of rails so as to project dangerously above the surface of the road, then it would be liable to an action at the suit of anyone who suffered special damage by reason of the nuisance, unless it were expressly empowered to do that very thing or something which involved the doing of it.

That was the position before the passage of the *Municipal Tramways Trust Act* 1906.

The position of bodies or individuals which, unlike road authorities, are empowered by Statute to execute works for their own profit and benefit is ascertained by numerous decisions.

In *R.* v. *Kerrison* (1), certain persons and their successors, appointed Commissioners for making the river Waveney navigable between certain points, were empowered by Statute to do that work, and to cut the soil of any persons for making any new channel, &c. Under this power and for their own profit and benefit they duly cut a channel, in the making of which they cut through a highway and rendered it impassable. Over the cut they built a bridge, over which the public using the highway passed from each side. This bridge had been from time to time repaired by the proprietors of the navigation. It was held that the proprietors, and not the county, on which they sought to throw the burden, were liable to indictment for non-repair of the bridge. The liability to repair was a condition on which the proprietors of the navigation had been granted the right to interfere with the highway.

The decision in this case rested on a number of authorities, among which may be mentioned *The King* v. *The County of Kent* (2) and *The King* v. *The Parts of Lindsey* (3). Later, in *The King* v. *The Inhabitants of the Isle of Ely* (4), a similar case, in which *Patteson* J., for the Court of King's Bench, delivered a very learned judgment, the previous authorities were reviewed, and those I have mentioned were followed. The learned Judge

(1) 3 M. & S., 526.
(2) 13 East, 220.
(3) 14 East, 317.
(4) 15 Q.B., 827.

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Barton J.

said (1):—"It appears to us that, when the Adventurers first cut the drain, and interrupted the public highway, that act, however authorized by commissions of sewers or other power vested in them, was done for their own use, benefit and convenience, and could be legal only on the condition of substituting another highway, which could be only by a bridge as convenient for the public as the old one; that the public were in truth no gainers by the change; they were by this hypothesis merely placed in the same position as before; and that the condition which was necessary to legalize the first cutting of the drain was and is a continuing one: the instant it is broken, the indefeasible rights of the public revive, and the cut becomes a nuisance."

The cases followed, as it was observed, rested, as did this one, on the principle that the authority to do the act of interference is conditional only, equally whether the condition be expressed or implied. (In *R.* v. *Inhabitants of Kent* (2), already mentioned, the condition was expressed: in *R.* v. *Inhabitants of the Parts of Lindsey* (3), it was implied by the Court). The condition in either case continues so long as the public right is interfered with.

The principle of these cases is reaffirmed in that of *Hertfordshire County Council* v. *Great Eastern Railway Company* (4), not only in the passage cited during the argument from the judgment of *Fletcher Moulton* L.J. (5), but also by Lord *Alverstone* C.J. (6), in these words:—"In those and many other cases the broad principle has been adopted that, where persons, acting under statutory authority, for their own benefit interfere with some existing public convenience, such as a highway or a ford, and are by the Statute bound to provide some substitute for the convenience so interfered with, such persons, although there is no express provision in the Statute to that effect, are, nevertheless, under the further obligation of keeping the substituted convenience in repair, as for instance in the case of the structure of a bridge erected in substitution for a public ford."

It was contended that the principle extended only to establish

(1) 15 Q.B.D., 827, at p. 844.
(2) 13 East, 220.
(3) 14 East, 317.
(4) (1909) 2 K.B., 403.
(5) (1909) 2 K.B., 403, at p. 412.
(6) (1909) 2 K.B., 403, at p. 409.

the liability of corporations or individuals to indictment in such circumstances. But that this is not so is established by the case of *Oliver* v. *North Eastern Railway Co.* (1), where a railway company had constructed their line across a highway on a level under the sanction of an Act of Parliament. The plaintiff was driving along the highway, and where the railway crossed it, the hind wheels of his dog-cart were caught in the rails by reason of their being too high above the level of the road, and the vehicle was torn in two. It was argued for the company that, they having laid down the rails, it was the duty of the surveyor of highways to see that the roadway was kept up to the level of the rails, and if this were not done the company was not responsible. This contention did not prevail; the plaintiff held the verdict he had obtained at the trial for the damage to his vehicle. *Cockburn* C.J. said (2):—"the principle of the case of *R.* v. *Kerrison* (3), and the other cases cited, clearly applies to this case"; and *Blackburn* J. said (4):—"In *R.* v. *Kerrison* (3) it was held that where persons were authorized by Statute to create what would otherwise amount to an indictable nuisance, such as making cuts across a highway, they were bound without any express enactment to put and keep up for the public a proper substitute for the old way, such as a bridge. The principle of that case is expressly in point."

It is convenient now to inquire whether the Tramways Trust is a body of the class of those held liable in the line of cases to which *R.* v. *Kerrison* (3) belongs. That is to say, does it exercise its statutory powers for benefit and profit to itself? The Treasurer is authorized to advance, and no doubt has advanced, the funds requisite for purposes of purchase, construction and maintenance, which advances the Trust is to repay in manner prescribed by the Act. Its revenues consist wholly or mainly of the charges made to the public for the use of the tramcars; by sec. 53 (12), (13) and (14) it may carry on, as it is doing, the business of tramway proprietors, and of dealers in electric power or light (selling power and light, however, only to the Government); and the business of omnibus proprietors; and may estab-

(1) L.R. 9 Q.B., 409.
(2) L.R. 9 Q.B., 409, at p. 411.
(3) 3 M. & S., 526.
(4) L.R. 9 Q.B., 409, at p. 410.

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Barton J.

lish or maintain, and let, or buy or sell, or grant licences for, certain kinds of places of recreation and refreshment for the use of passengers, &c. It seems to me to be clear that the Trust carries on its authorized operations as a business and for profit, and this is no less true whatever the ultimate destination of the profits may be. See *Mersey Docks Trustees* v. *Gibbs* (1). It is in my judgment a body under the same duty as the Navigation Company, the Conservators of the General Level of the Fens, the Railway Companies, &c., whose liability has been established in the cases cited. That, I mean, would be the duty of the Trust in the absence from the Statute of any provision expressly imposing it.

There is, however, express provision in the Act. Sec. 54 is in the same terms as sec. 28 of the English *Tramways Act* 1870. At the outset of the endeavour to arrive at the full meaning of such a provision, the question is not whether a new liability is imposed where none existed before, but whether a previously existing right has been abrogated without an equivalent being given to the public as individuals. And where the learned Chief Justice of South Australia spoke of a right being or not being "taken away" he used, I think, an accurate expression. One approaches the consideration of sec. 54 and its context with the duty to discover whether this right has in truth been taken away, or whether an equivalent for it stands in the Statute. And there is an important consequence of this position, namely, that when the question is whether a right has been taken away from the public, clear words are necessary to justify an answer in the affirmative. If the words are doubtful or ambiguous the construction against the right will not be adopted.

But so far from the words themselves being clearly against such a right I think they affirm it—indeed, they extend it, since the Trust has a duty laid upon it as to a larger width of the road than it would have to keep in order under the duty implied as a continuing condition of its statutory powers, for the implied duty would be only as to so much of the road as might be affected by its works, *e.g.* by the rails projecting above the surface dangerously. But this greater width it is to "keep in

(1) L.R. 1 H.L., 93.

good condition and repair" and "at all times." Those words are if taken by themselves an affirmance of the pre-existing duty. But it is said that the words which follow, "with such materials and in such manner as the road authority shall direct and to its satisfaction," give the section quite a different standpoint. Without laying much stress on the direction as to manner and material in this particular part of his argument, the appellant contends that as the work of keeping in good condition and repair must be done to the satisfaction of the road authority, it is to that authority and not to the public that it owes its duty. I am of opinion that the direct force of the words "shall, at its own expense, at all times keep in good condition and repair" is not to be got rid of in that fashion. The whole section appears to me to be the expression of a special form of the duty that would otherwise arise by implication, and I do not think that the legislature has done such a strange thing as to bar that implication without leaving in its place some defined right to the public to have their highway kept as it was before the Trust was authorized by Statute "to create what would otherwise amount to an indictable nuisance," namely, the breaking up of the road and the laying of rails on its broken surface.

Authority supports the view that a duty to the public remains. The question in *Howitt* v. *Nottingham and District Tramways Co. Ltd.* (1), was upon sec. 2 of the English *Tramways Act* 1870, which corresponds with sec. 54, and upon sec. 29 of the English Act, corresponding with sec. 61, of the appellants' Act. That decision was approved by the Court of Appeal in *Alldred* v. *West Metropolitan Trams Co.* (2). In *Barnett* v. *Poplar Corporation* (3), those cases were followed. There a tramway company had made a contract with the defendants, a road authority, under sec. 29 by which that authority had undertaken the repair of the portion of the road which, under sec. 28, the tramway company were bound to repair. The plaintiff was driving along the highway when his van struck against a rail of the company's tramway, projecting above the level of the street, owing to failure on the part of the defendants to keep the street in proper repair,

(1) 12 Q.B.D., 16.
(2) (1891) 2 Q.B., 398.
(3) (1901) 2 K.B., 319.

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Barton J.

as they had agreed with the tramway company to do. It was held that the liability for injuries caused to persons using the road for non-repair of this part of it had been transferred to the road authority. If there had been no duty of the company to the individual under the section there would have been no liability to be passed on to the road authority. But the case of *Dublin United Tramways Co.* v. *Fitzgerald* (1), is conclusive as to this argument. It is clear then that a duty to the individual exists since the enactment of sec. 54. Of course there is also a duty to the road authority to obey its directions as to manner and material and to repair to its satisfaction. But that does not relieve the Trust of its duty and resultant liability to the people using the highway.

But, it is further urged, "If there is any duty to the public on our part, it does not arise until we receive a direction from the road authority." Pressed on this, the appellants' counsel admitted that in sustaining their proposition they would have to go to the length of contending that they were entitled to leave the prescribed portion of the road in even dangerous disrepair for months or years until a direction came from the road authority, though in the meantime frequent injury to persons and vehicles, and even death, might occur by reason of the disrepair. That the proposition necessitated such a monstrous contention was not the fault of counsel who had to maintain it. But the necessity is enough to show that the proposition itself is utterly untenable. It is possible that the Trust might have protected itself in this case had it, before the accident, repaired the road by the direction, as to manner and material, and to the satisfaction, of the road authority, although the repairs might have been in fact utterly insufficient to prevent the accident. I say that might have been so—without saying that it would. But to maintain that in the absence of such a direction, or of any effort to obtain it, and in the absence of anything to show satisfaction on the part of the road authority, the appellants are immune as if all these things had been pleaded and proved, is to suspect the tribunal of boundless simplicity.

What, then, is a reasonable construction of sec. 54 in this

(1) (1903) A.C., 99.

regard? The part of the road described is to be kept in repair "at all times"—not merely after such intervals as may elapse between infrequent and casual visits of an inspector of the road authority. If the tramway officials are without a visit from such an inspector, they must still keep it in repair at all times; which, I will for a moment suppose, means "at all times possible within reason." They must not risk accidents by leaving the road in a dangerous state. If a direction is necessary, or if they want one, they should ask for it. They must not wait for it till disaster happens. Not only do the words "at all times" suggest this meaning, but there is more. The Trust has power, for the purposes of the Act, to break up, open, and alter the surface of any road (sec. 53 (1)), or temporarily stop traffic upon any road (2); in cases of emergency (and was not this such a case?) they are "as soon as possible after the work has been begun, or the necessity for the same has arisen," to give notice to the road authority, *i.e.*, that they are opening or breaking up any road or stopping any traffic (sec. 57). I say "are opening," &c., and not "are about to open," &c., because the notice contemplated in this section is one that may have to be given after the repair or other work has been begun—a very different thing from three days' notice under sec. 56. These two sections show that repairs can and should be begun, in some cases at once, in other cases after as little as three days' notice, according to urgency. This goes far to explain the words "at all times" in sec. 54, and to show the appellant is not to wait for directions, but must obtain them when he needs or wants them—if he can. But, indeed, if a direction of the road authority is a condition precedent to the obligation "at all times" to "keep in good condition and repair," we have almost a contradiction in terms. How can a road be kept in good condition and repair at all times, if a direction is to be waited for till any time to which the road authority may choose to defer directions—the road falling into disrepair all the while? Directions or no directions I think the Trust is to keep that road in repair "at all times." In one case the danger may be such that it must repair at once—in another it may be safe to wait days and then give three days' notice, or even more. The Trust must use judgment, and exercise the discretion of a reasonable

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Barton J.

person. But to leave dangerous ruts along the rails, causing them to project as in this case, certainly two, perhaps as much as six inches, above the road, and to leave this danger in existence for six weeks, cannot be an observance of the statutory duty.

I am clearly of opinion that the true construction of sec. 54 is not that which the appellant propounds. Its duty to repair is a continuing obligation. It is incident to this duty that it should use the materials and repair in the manner directed by the road authority—if it obtains or receives any directions—and to the reasonable satisfaction of that authority. Nevertheless it owes a duty to the public—of the same nature as, though more closely defined than, that which in the absence of express direction it would have had—to keep the described part of the road in good condition and repair. The evidence and the verdict show that it has committed a breach of that duty to the damage of the plaintiff. I would add that I think such a breach of duty inaccurately described by the term non-feasance, which is not usually applied to a breach of a distinct statutory mandate.

A few words will suffice to dispose of the contention under sec. 100. A consideration of the scope and purview of the Act shows that it is distinctly of the class of Statutes authorizing the execution of work for the unsanctioned performance of which the subject would ordinarily have a remedy if he suffered damage. Holding the view I have expressed of the meaning of sec. 54 as a distinct formulation of a duty the breach of which is actionable, I find neither in sec. 100 nor elsewhere in the Act an intention that the person injured by a breach of sec. 54 should be deprived of all remedy except such as he may obtain by a complaint under sec. 100.

For these reasons I am of opinion that the respondent should hold his verdict and that the appeal should be dismissed.

ISAACS J. read the following judgment:—With regard to the question of liability for non-feasance amounting to a breach of duty, I acquiesce with doubt in the view that the Trust are liable in such case.

My doubt arises principally from the following considerations:

—(1) Seeing that the Trust is substantially a municipal organization and whatever damages it pays are so much less for the constituent corporations, it is improbable that without some specific provision the municipalities were indirectly to be made liable for a class of liability to which the law did not expose them.

(2) No such specific provision exists; but on the contrary, sec. 66 of the general *Tramways Act* 1884 corresponding to sec. 55 of the English Act has been omitted from the *Municipal Tramways Trust Act* 1906.

(3) In that section the word "works" apparently includes the "works" of repair referred to in the concluding paragraph of sec. 11 of the Act of 1884 that paragraph being also omitted from the *Municipal Tramways Trust Act* 1906.

On the other hand, the duty whatever it may be is a distinct one, and is not affected by the historical reasons concerning surveyors of highways, except to the extent that the municipal nature of the Trust introduces it. Further, the obligation has not in any case been rested expressly on sec. 55, and there is the decision in *Barnett* v. *Poplar Corporation* (1). On the whole, therefore, though with hesitation, I think the liability exists.

But those elements creating doubt are of importance in deciding how far the new duty extends, and assist me in arriving at my conclusion on that point, which is that this appeal should be allowed.

The alleged cause of action is omission and neglect to keep in order the road as distinguished from the tramway itself. No complaint is made in respect of the rails, except that, by reason of the adjacent road material having disappeared, the rail was left higher than the varying surface of the adjacent depression. This appears very clearly from paragraph 2 of the statement of claim, the evidence of Wellington, the constable called for the respondent, and the first few lines of the judgment of *Gordon* J. The jury's finding must be understood accordingly—otherwise there is no evidence to support it. I need not therefore state the facts as to this in greater detail.

In the present case there was no direction by the road authority as to material or manner of repair, or at all, and that

(1) (1901) 2 K.B., 319.

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Isaacs J.

has been admitted throughout. *Way* C.J. says that in contradistinction to *Dublin United Tramways Co.* v. *Fitzgerald* (1):— "In the present case no such direction was given by the road authority, the District Council of Campbelltown, nor was any direction asked for by the defendant Trust." That is borne out by Mr. Goodman's evidence, which is to the effect that until after the accident in this case, no communication passed between the bodies, as to sec. 54, and as to the eastern (the relevant) part of the line, none has ever passed.

The respondent's whole case, then, depends upon whether the law imposes *an absolute unconditional duty on the Trust*, not one of reasonable care, but a duty to be observed at its peril, to keep the road between its rails and for 18 inches on each side of the outer rails in good order and condition. The direction of the learned Chief Justice to the jury in substance was, as stated by *Gordon* J., that if they found the road was out of repair owing to the negligence of the Trust it was liable. Reading both the judgments together it appears that the direction stated that an absolute statutory duty of continuous repair lay upon the Trust, and that is the decision appealed from. If that is so, it seems to me no question of negligence presents itself; it is either performance or non-performance of the required duty, whatever that may be. See *Sadler* v. *South Staffordshire and Birmingham District Steam Tramways Co.* (2). "The duty is to see the thing done" —*per FitzGibbon* L.J. in *R.* v. *Clare County Council* (3). The appellants deny any duty so absolute and unconditional, and say that the duty is simply to comply at all times with the road authority's directions, and to its satisfaction.

The respondent, however, contends that the absolute duty exists by reason of sec. 54 of the Act, and also contends that independently of any express statutory provision there exists a common law liability to repair the road as distinguished from the rails. The learned Chief Justice of South Australia disposed of the asserted common law liability very summarily. He said:— "There was no original common law obligation upon the Municipal Tramways Trust to keep the strips of the road in question

(1) (1903) A.C , 99.
(2) 23 Q.B.D., 17.
(3) (1904) 2 I.R., 569, at p. 583.

in repair." I entirely agree with him; but as the contrary view was pressed it will have to be shortly examined.

The Trust is a corporation specially created by Parliament to carry out a statutory scheme consisting in the first place of an arrangement between the Government and certain municipalities; and the powers conferred upon it, at all events so far as they relate to the line of tramway with which we are now concerned, and which, as *Way* C.J. observes, at once vested in the Trust under the Act, are imperative. See especially secs. 7, 28, 33 and 34, and note the omission from sec. 54 of the "abandonment" part of sec. 11 of the *General Tramways Act* 1884 (No. 309).

The present case falls within the category of which *The London, Brighton, and South Coast Railway Co.* v. *Truman* (1) is a type, and in what Lord *Selborne* there calls a "direct contrast" with *Metropolitan Asylum District* v. *Hill* (2), and I may add with a private company, as Lord *Halsbury* described the Dublin company. Lord *Watson*, for the Judicial Committee in *Canadian Pacific Railway* v. *Parke* (3), adverts to and acts on the distinction. Consequently the mere fact of the rails impeding traffic cannot in the absence of negligence or the omission of some legal duty constitute an unlawful obstruction.

It was urged on behalf of the respondent that there was a common law obligation by reason of the rails being above the level of the road as shown by the case of *Oliver* v. *North-Eastern Railway Co.* (4). That was cited in the case of *Neilsen* v. *Brisbane Tramways Co.* (5), recently decided by this Court, and in this respect not distinguishable from the present one; but it was held that no such common law obligation existed. And I am still of the same opinion. The respondent has misunderstood *Oliver's Case* (4). There the complaint, as charged and argued, was that the *rails* were left too high, not that the defendant was bound to raise the level of the road. The defendant urged in defence that the road authority should have brought the road up to the level of the rails, as the rails themselves were originally properly laid. But the Court held on the principle of *R.* v. *Kerrison* (6) that, as

(1) 11 App. Cas., 45.
(2) 6 App. Cas., 193.
(3) (1899) A.C., 535, at p. 547.
(4) L.R. 9 Q.B., 409.
(5) 14 C.L.R., 354.
(6) 3 M. & S., 526.

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Isaacs J.

was said by *Blackburn* J. (1), the rails were a "substitute," that is, of course, for the portion of the way formerly occupying the position of the rails the substituted portion—the rails and not the adjacent road—should have been lowered to keep pace, so to speak, with the rest of the way. The whole principle is fully explained by Lord *Alverstone* C.J. in *Hertfordshire County Council* v. *Great Eastern Railway Co.* (2), where the liability is rested wholly on the doctrine of substitution. The reference to *R.* v. *Kerrison* (3) has no other meaning. See also *Lancashire and Yorkshire Railway Co.* v. *Bury Corporation* (4). Any other view of *Oliver's Case* (5) would run counter to such cases as *Thompson* v. *Brighton Corporation* (6) and *Chapman* v. *Fylde Waterworks Co.* (7).

This leaves as the only question the true construction of sec. 54—whether there is the absolute statutory duty to repair and keep in repair at all times, at all hazards, and in all circumstances, and independently of any requirement of the road authority, or its satisfaction; or whether it is a duty to repair and keep in repair in accordance with the direction of the road authority, and to its satisfaction. In my opinion the House of Lords has already settled the question in favour of the latter view, but as there is as much difference of opinion with respect to the interpretation of the judgments in that case as there is with regard to the words of the section, it will assist to lead up to that decision by a consideration of the matter apart from authority.

Prior to the Act, the control of the roads and the power as well as the right to repair them, were exclusively vested in the road authorities. See *District Councils Act* 1887 (No. 419), secs. 272-290; and *Municipal Councils Act* 1890 (No. 497), sec. 125.

That control power and right still remain unimpaired, being specifically preserved by secs. 64 and 82 of the *Municipal Tramways Trust Act* 1906. And under such municipal powers not merely may the road authority re-make the whole road—other than the rails—but even though the work may prejudicially affect the Trust's expenditure, and though the Trust objects, it

(1) L.R. 9 Q.B., 409, at p. 410.
(2) (1909) 2 K.B., 403, at pp. 408-9.
(3) 3 M. & S., 526.
(4) 14 App. Cas., 417, at p. 421.
(5) L.R. 9 Q.B., 409.
(6) (1894) 1 Q.B., 332.
(7) (1894) 2 Q.B., 599.

may be proceeded with without resort to the arbitration powers of the *Municipal Tramways Trust Act*. This is shown by *Bristol Trams and Carriage Company Ltd.* v. *Bristol Corporation* (1). *Lindley* L.J. uses these important words (2):—"The question in this case is whether the defendants, who are the road authority, and upon whom the duty of repairing and maintaining the road in the interests of the public is imposed, are, in the exercise of their powers and the discharge of their duty to the public, subject to the restriction contended for in the interest of the tramway company."

In *Dublin United Tramways Co. Ltd.* v. *Fitzgerald* (3), Lord *Halsbury* says *the road authority* "has jurisdiction over the whole of the highway." *The Croydon Case*; *R.* v. *Croydon and Norwood Tramways Co.* (4), was relied on by the respondent.

A private Act required the Company to pave the street to the satisfaction of the Council with wood or such other paving as the Council might approve and should at all times keep it in good repair. Nothing was said about the Council's direction. The Act itself gave the direction, and the obligation to repair was unqualified. But the case is instructive, as distinguished in the *Bristol Case* (1), to show the difference between a power exercised by the Council under the *Tramways Act* controlling the Company and one exercised under the ordinary municipal Statute; and taken together these cases show that the two distinct sets of municipal powers co-exist. For this purpose the *Croydon Case* (4) is important.

The road authority here may under the *Municipal Tramways Trust Act* decide to direct the Trust to repair the road and keep it in repair. It may do so by general order, which always operates until rescinded or modified; or it may do so by a specific order limited to place or time, or varied as to locality. If such a direction is given it must, unless varied on arbitration, be obeyed, the Trust must conform to it, or otherwise be guilty of a contravention of the Act, and suffer either civilly or criminally (sec. 100), or in both ways. As the liability in either case is not for negligence but for breach of duty to "keep in repair," it is only

(1) 25 Q.B.D., 427.
(2) 25 Q.B.D., 427, at p. 447.
(3) (1903) A.C., 99, at p. 103.
(4) 18 Q.B.D., 39.

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Isaacs J.

just and reasonable and indeed practically necessary, unless the obligation of insurance is imposed, with criminal penalty attached, that the Trust should know beforehand with some degree of accuracy what work it is required to do, that is as regards the public; and equally so with regard to the Council, whose satisfaction is demanded. On the other hand, it may be that the Council may prefer to do the work itself under its general powers, and at its own expense, rather than incur the delay or trouble of a dispute and arbitration; or it may consider such a course the more just, as, for instance, if damage were done to the road by a heavy corporation steam roller; or if the road fell into bad condition through some engineering mistake of the Council itself—all of which it would be hard on the Trust to be accountable for. It would certainly be an additional hardship if the Trust were responsible for the bad condition of the road, through the misfeasance of the Council itself; but if there is the direct absolute obligation to the public which is insisted on, this would necessarily follow, because no "direction" is given which would exonerate the Trust. The position cannot be denied—that according to the respondent there exist at the same time, in respect of the same thing, *two diverse, independent, and possibly conflicting jurisdictions.* The Council under the *Bristol Case* (1), and it has the sanction of Lord *Halsbury* in the *Dublin Case* (2), may repair or remake the road as it pleases and when it pleases, regardless of the Tram Company's wishes; and the Tram Company may, because by the hypothesis it must without any direction from the Council, proceed to repair, whenever repairs, as it ultimately appears in the opinion of a jury, have become necessary. Even a direction by the Council *not* to repair would not, if the respondent be correct, suffice to exonerate the Trust; nor even a mere prohibition as to certain materials, because there is no general requirement to obey the Council's directions, positive or negative. The requirement is to obey positive instructions as to materials and manner. So we may suppose two co-ordinate bodies, neither directing the other, but in conflict as to the materials and manner in which they shall respectively, at their own individual several expenses, repair the public highway.

(1) 25 Q.B.D., 427. (2) (1903) A.C., 99.

The only control which the Council has over the Trust is to direct the latter how it is to do the work itself.

But if their natural construction be given to the words of sec. 54, this absurd result is avoided. The Council, which is entrusted with the duty and power of controlling the Trust, in the interests of the general public, of which for this purpose it is the natural and statutory guardian, may either do the work itself, or at its option give directions which must be followed if given and unappealed from. This view harmonizes all the legislation, preserves the complete control of the municipality, compels the Tramway Trust and all similar companies to repair in the first instance if so required, and avoids a conflict of duties and powers, and establishes complete justice to all. It has been said in the course of this case, that the Tram Company ought not to shelter itself behind the remissness of the District Board. That is true, but the necessity for shelter must first be shewn, and there is none unless an absolute statutory duty is created. The hardship on an individual is not sufficient to create the liability; or the injuries from similar acts of non-feasance would long ago have changed the law. The simple question is: Has Parliament laid down an absolute duty at all hazards, and under all circumstances; and *does the mere fact of the road being at any moment out of condition or repair constitute a breach of duty* involving penal and other consequences? This must be determined by a careful examination of its actual language, and not by an *a priori* conclusion that justice requires the creation of that duty, or that such must have been the object of the legislature. It should not be forgotten, however much one may sympathize with a person who has met with a severe accident, that the road is not that of the Tramway Trust. It was not constructed by the Trust, and it is under municipal charge, and the obligation put upon the Trust is an exceptional one, inserted, no doubt, in the interests of the general body of ratepayers, but, as a new statutory duty, it ought not, in my opinion, to be enlarged beyond the fair meaning of the words. The intention, giving them their fair natural meaning, is to enable the road authority to relieve itself of expense in respect of the portion of the road referred to, by compelling the Trust to do what the road authority thinks necessary. I can discern no

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Isaacs J.

special intention to expose the Trust to liability to individuals whether the road authority avails itself of its option or not. The language of the legislature, however regarded, leads me to this conclusion. There are three sections which should be looked at together. One is sec. 66, which is in these terms: "The Trust shall at all times keep all its undertaking in good repair and working order." That is a simple absolute duty, which the legislature knew how to create and how to express, when it wanted to.

Sec. 54 is the next one to be considered, and the contrast of language is remarkable. It says:—"The Trust shall, at its own expense, at all times keep in good condition and repair, with *such materials* and in *such manner* as the road authority *shall direct* and to its satisfaction," the parts of the road specified. The definition of the duty there includes every member of the sentence, and the measure of obligation is the combined effect of each portion of the definition. Every part has its meaning and value. (1) "At its own expense" would be meaningless if the duty existed independently of any direction, because there could be no pretence that anyone else could be called upon to bear the expense. A direction, however, might be thought to give room for controversy, and so this initial phrase was inserted. Then (2) "at all times" indicates that the duty to obey the direction is always and continuously existing; it is not exhausted by a single direction. Then (3) "Keep in good condition and repair" imposes the duty of first putting the road into good condition, if it is not already in good condition—see *Payne* v. *Haine* (1). But the word "maintain" which is at this point in the English Act and also in sec. 11 of the South Australian *General Tramways Act* 1884 No. 309, 47 & 48 Vict., is omitted from sec. 54 and as will be seen, designedly. So far as this omission has effect, it indicates an intention, even more distinct than in the English Act, that the original condition of the road is not to be the standard of material or manner of keeping in good condition and repair. It leaves those matters entirely uncertain, and in need of the exercise of judgment. Then (4) "with such materials and in such manner as the road authority shall direct" is both

(1) 16 M. & W., 541.

grammatically and practically an essential part of the statutory definition of the duty. With what materials is the work to be done? Is it with such as the Trust thinks suitable? No; with such as the Council shall direct. Is it in such manner as a jury may consider proper? No; such as the Council shall direct. This is a condition precedent so as to enable the Trust to proceed with the knowledge of what if properly done will or ought to satisfy the Council. In principle it is the same point as was decided in *Coombe* v. *Greene* (1) and *Hunt* v. *Bishop* (2). I did not understand any admission that absence of direction for years amounted in time to an actual direction. The very contrary was pressed. The mere fact that the Trust may have done more than their duty previously does not enlarge that duty. The last member is (5) "to its satisfaction"—this is a condition subsequent. It is vital to note that this condition is *not a mere matter of exculpation* by which the Trust may be excused from a breach of duty. *The non-fulfilment of the condition is an essential part of the breach of duty itself.* *R.* v. *Garrett* (3) demonstrates this. That is a view which appears to me not to receive its full weight in the opposite conclusion. As to this of course if directed work be not done at all no protection can be claimed, unless the Trust disputes the reasonableness of the direction, for then the satisfaction of the Council is impossible. But the non-performance of work that a jury may think necessary, is in a different situation, because the absence of direction—a condition precedent—discloses a fatal flaw in the alleged duty to perform the work The difficulty cannot be bridged by saying that a jury can say whether the Council ought in a given situation, where no direction is given, to be satisfied, because as shown by the *Croydon Case* (4) and *R.* v. *Garrett* (3), that is a function which the legislature has committed to the arbitrator. The respondent's position involves the possible conflict of opinion between the jury and the arbitrators.

Now we come to sec. 55 which strongly supports the view just presented. It contemplates the case of the municipal authority determining to have the whole road paved with some special

(1) 11 M. & W., 480.
(2) 8 Ex., 675, at p. 679.
(3) 73 J. P., 188.
(4) 18 Q.B.D., 39.

H. C. of A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Isaacs J.

material other than macadam—say wood. Still, it is assumed, it will not use the municipal funds for the whole road, but only for such part as lies outside sec. 54. In that case it may, "as and when" it will, require the Trust to pave the portion within sec. 54 with wood also, that is with "such material" and again "at its own expense" and as to this no arbitration is permissible. The Act settles that point definitely. And thereafter so long as that material is not changed, that is the material selected and directed by the Council, the case requires no further "direction"; and as the manner necessarily accompanies the original direction, it is clear that as to providing for future repair, according to this standing direction, all that the section needs to do is to prescribe, as it does, that the Trust shall "maintain and keep in good condition and repair to the satisfaction of the road authority." Here the word "maintain" is inserted, obviously for the purpose above referred to. The conclusion reached by the mere inspection of the words is helped by a consideration of what might easily happen if the opposite view prevails.

The Tramway Trust may on the assumed absolute duty proceed without a direction to put the road into a certain condition of repair which is thought good. Well, supposing the Council examining the road is satisfied, and gives no order because it is satisfied, is there still a duty, merely because no "direction" is given, to satisfy a jury also at the peril of paying damages? I cannot think so. If the Council were, after an adverse verdict, to direct the Trust to do the very thing the jury had condemned, it is conceded the Trust would be free. How can this inconsistency exist? As to sec. 53, the whole of the powers including the power in sub-sec. (1) to break up the road is governed by the words "for the purposes of this Act," and those purposes have first to be determined before that sub-section can be applied. See *per* Lord *Esher* M.R., in *Chapman* v. *Fylde Waterworks Co.* (1); and *per Kay* L J. (2); and *per* Lord *Alverstone* C J. in *Grand Junction Waterworks Co.* v. *Rodocanachi* (3). Sec. 56 is a qualification of the generality of powers previously created, and the emergency means an emergency of right or power otherwise established. It

(1) (1894) 2 Q.B., 599, at p. 605. (2) (1894) 2 Q.B., 599, at p. 607.
(3) (1904) 2 K.B., 230, at p. 238.

cannot mean that an emergency of any kind however created, and in all circumstances, creates a duty. Therefore those sections carry the matter here in debate no further. The Trust is not called upon to serve two masters, and if the duty be to act on its own responsibility, until direction, and then to alter what it has done when a direction is given, it is a highly arduous, harassing, expensive, and indefinite duty to discharge, attended with a highly perilous and indefinite liability, and one which with all respect I venture to think the legislature has not imposed. The inconsistency may still further be demonstrated. A direction may be given, and, on arbitration, the decision may be that nothing need be done. Nothing is done, and yet according to the respondent the Trust is liable if a jury differs from the arbitrator and thinks that no council could reasonably be satisfied. For my part I cannot see how on such a basis the Trust can with any security to itself or its constituent corporations carry on its functions.

This is how the matter stands apart from specific authority. As to the authorities—first in importance and as I think in definiteness is Lord *Halsbury's* lucid statement in *Dublin United Tramways Co. Ltd.* v. *Fitzgerald* (1). Throughout his Lordship's judgment the direction given by the City Corporation plays a prominent part, and this notwithstanding the section in the private Act the expansive language of which accounts for some of the wider expressions. The most important passages in the judgment of the Lord Chancellor are first that on p. 104 where he says the defendants are "directed" to act under the superintendence of the road authority, and next that on p. 105, beginning:—"I read the Statute," and ending "and if you do that your obligation is discharged." The substance of that is: the Tramway Company is not an independent road authority, that is it is under the control of the ordinary road authority, but it has a primary duty of repair, that is the Council may direct the Tramway Company to do what the Council would otherwise be bound to do, viz., to repair, and the Trust must do it, and also perform the consequential work of keeping the road in the same good condition, and if it obeys the direction its statutory obliga-

(1) (1903) A.C., 99, at p. 105.

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Isaacs J.

tion is discharged. Lord *Halsbury* is too great a master of the English language and law to mean that an absolute duty is discharged by performing a limited one.

Lord *Davey* (1) also states the duty under sec. 28 as one to keep that portion of the roadway in good condition and repair with such materials and in such manner as the road authority shall direct. Lord *Shand's* judgment is more fully reported in 87 L.T., 532, at p. 534, and 51 W.R., 321, at p. 323, and is in consonance. It is clear that what the House was called upon to determine was the duty as to "condition" as distinguished from mere structural "repair," and it was held, as I read the judgments, that the good condition in which the material was when the direction was first obeyed should be preserved and maintained, and that this really flowed from the direction itself. How it should be so preserved was a matter of engineering, and even that was simplified by the direction in fact to use sand. But it never seems to have been doubted that as to materials and manner of repair some *direction* of the road authority was necessary. It is to be observed that no British Court has ever said the obligation is absolute. On the contrary *Howitt* v. *Nottingham and District Tramways Co. Ltd.* (2) and *Alldred* v. *West Metropolitan Trams Co.* (3) state the exact opposite. In the latter case *Bowen* L.J. says (4):— "Can it be said that they have failed to do what is imposed by the Statute, viz., to keep the road in repair to the satisfaction of the road authority?" The respondent here substitutes for or adds to road authority "a jury." Lord *Esher* M.R. (5) reads the whole composite statutory definition of the duty and says:—"I do not think that the view taken as to the *primâ facie* liability of the tramway company went further than that." The point of the case is shown by the argument of Mr. *McCall* Q.C. (4) that "the tramway company are to keep the roadway in 'good condition and repair,' as well as to the satisfaction of the road authority," and therefore the duty was not transferable. The Court rejected the argument, and held as above mentioned. That case is clearly inconsistent with any notion of absolute duty, even

(1) (1903) A.C., at p. 107.
(2) 12 Q.B.D., 16.
(3) (1891) 2 Q.B., 398.
(4) (1891) 2 Q.B., 398, at p. 400.
(5) (1891) 2 Q.B., 398, at p. 401.

"*primâ facie*," to use Lord *Esher's* words. Then the opinions of Lord *Alverstone* C.J. and *Walton* J. in *R.* v. *Garrett*; *Ex parte London United Tramways* (1) are distinct that the obligation is not absolute, and that the allegation of want of satisfaction of the road authority is necessary to constitute even a *primâ facie* contravention of the statutory duty. I refer particularly to the passages in the Lord Chief Justice's judgment (2) beginning "Then section 12 provides" and ending "referred to arbitration under section 33," and at the end of p. 540 and beginning of p. 541.

The question came directly into consideration in the case of *Morris* v. *Canterbury Tramway Co. Ltd.* (3). The views of *Denniston* J. are the same as those of Lord *Halsbury* in the *Dublin Case* (4). I am tempted to quote a short but most appropriate and convincing passage from the judgment, observing first that the language of the New Zealand Act is also that of the English Act. *Denniston* J. says (5):—"Is the road to be kept in good condition and repair, *and* to the satisfaction of the local body, or is it to be in good condition and repair to the satisfaction of the local body? Grammatically, I should be inclined to refer the 'and' before the words 'to their satisfaction' to the subsidiary paragraph beginning with 'such materials' and not to the principal paragraph. I think a consideration of the rest of the section supports this. Supposing the local body required the company to repair the road on some new-fangled method, which turned out to be unsafe, could it refuse? and if the result of the compliance was to leave the road unsafe—that is, not in good condition—could the company be liable? Similar considerations, I think, apply to repairs. The Corporation must determine what is to be the relative adjustment of road to rail, and other details. Too high might be as dangerous as too low. And if the local authority itself did the work under the proviso in section 27, would the company be liable if it were improperly done?"

For sec. 27 in the last sentence I would here substitute the ordinary powers under the general Municipal Statutes, because

(1) 100 L.T., 533; 73 J.P., 188.
(2) 100 L.T., 533, at p. 540.
(3) 10 N.Z. L.R., 524.
(4) (1903) A.C., 99.
(5) 10 N.Z. L.R., 524, at p. 528.

H. C. OF A. 1912.

MUNICIPAL TRAMWAYS TRUST v. STEPHENS.

Isaacs J.

the proviso to sec. 27 is omitted here, as the Trust is as certain to obey directions as not to abandon the work altogether. That case was approved by *Williams* J. in *Dunedin City and Suburban Tramway Co.* v. *Ross* (1), where a depression similar to the one in the present case was allowed to exist, but the Council's inspector said he was satisfied. The assumption here is that the Council's expression of satisfaction would be immaterial because nothing was done to repair a palpable depression obviously dangerous. If it would, the whole argument for the respondent rests on an illusion. Some American references quoted from a text-book were relied on. The strongest apparently is a New York case of *Doyle* v. *N.Y. Railway Co.* (2). This is not procurable here, but if its effect be as stated, it is not only contrary to the British decisions I has mentioned but is also apparently opposed to the view of the final Court of Appeal. See *Conway* v. *City of Rochester* (3). If then a direction be necessary before the obligation to repair is called into activity the case for the defendant is clear, because, as already stated, there was none.

Appeal dismissed with costs.

Solicitor, for the appellants, *T. S. O'Halloran.*
Solicitor, for the respondent, *W. J. Denny.*

B. L.

(1) 13 N.Z. L.R., 366.
(2) 58 N.Y. App. Div., 588.
(3) 157 N.Y., 33, at p. 38.