[HIGH COURT OF AUSTRALIA.]

GORRINGE . . . . . APPELLANT;
PLAINTIFF,

AND

THE TRANSPORT COMMISSION (TAS.) . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *March* 21.

SYDNEY, *April* 26.

Latham C.J., Dixon and Fullagar JJ.

Highways—Negligence—Injury to user of highway—Liability of highway authority—Non-feasance—Misfeasance—Failure to maintain—Collapse of culvert—Subsidence of roadway—Roads and Jetties Act 1935-1945 (*Tas.*) (26 *Geo. V. No.* 82—9 *Geo. VI. No.* 27), *s.* 8.

Section 8 of the *Roads and Jetties Act* 1935-1945 (Tas.), which provides "(1) All State highways and subsidiary roads shall be vested in His Majesty and shall be under the control and direction of the Transport Commission. (2) Except as otherwise provided, the Transport Commission shall cause all State highways and subsidiary roads to be maintained as it shall direct", confers authority upon the Commission to maintain highways and roads as it shall determine but does not impose upon it any duty enforceable by action to do so.

The plaintiff's motor-truck was driven into a large hole upon a State highway, caused by the collapse of a culvert through which ran a natural watercourse, under such circumstances that the driver had no opportunity of avoiding it. As a result the driver was killed and the motor-truck, its trailer and freight were destroyed. It was shown that, prior to the accident, there had been an appreciable depression on the surface of the road above the culvert which had repeatedly been filled in by the defendant's employees, and that this filling had been blown or washed away from time to time. In an action for damages for negligence against the Transport Commission the trial judge, holding that the defendant incurred no liability for non-feasance, and that there was no evidence of misfeasance, directed a verdict for the defendant. An application for a new trial having been dismissed by the Full Court, the plaintiff appealed to the High Court.

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Held that the trial judge had correctly directed the jury to find a verdict for the defendant.

McClelland v. *Manchester Corporation*, (1912) 1 K.B. 118, explained and distinguished.

Decision of the Supreme Court of Tasmania (Full Court) affirmed.

APPEAL from the Supreme Court of Tasmania.

A motor-truck and trailer, the property of the plaintiff, Donald Gorringe, were being driven along a State highway between Hamilton and Ouse in Tasmania at about 3 a.m. on 5th August 1947, the weather being stormy and heavy rain falling. At a position just beyond a curve, a natural watercourse ran under the road through a culvert. The culvert and the road above it had fallen in, leaving a large hole in the middle of the road about fourteen feet by six feet, with a depth of about nine feet, filled with water to a depth of about six feet. Water was banked up on the upstream side since the culvert was not then capable of taking the flow of the stream. The driver of the motor-truck, one Byron Hart, having no opportunity of taking action to the contrary drove the motor-truck into the hole, where, shortly afterwards, the motor-truck caught fire, the driver being killed and the motor-truck, trailer and freight destroyed. The plaintiff brought an action for negligence in the Supreme Court of Tasmania against the Transport Commission, the highway authority, to recover damages for the loss of his motor-truck, trailer and goods carried, and moneys paid as workers' compensation to the widow of Byron Hart. It was shown that, for a considerable time prior to the accident, there had been an appreciable depression in the surface of the road above the culvert. This depression was well-known to persons using the road, and, as the traffic wore away the surface, employees of the Transport Commission repeatedly placed further filling on the surface, which was either blown or washed away from time to time. Upon the action coming on for hearing before a judge and jury, the trial judge (*Clark* J.), holding that the defendant incurred no liability for non-feasance, and that there was no evidence of any misfeasance on the part of the defendant, directed a verdict for the defendant. The Full Court (*Morris* C.J. and *Hutchins* J.) dismissed an application for a new trial, whereupon the plaintiff appealed to the High Court.

H. S. Baker (with him *R. C. Wright*), for the appellant. The evidence as to the acts done by the respondent would have justified the jury in finding that they were the direct cause of the collapse of the road. The practice of the respondent's employees of filling

the depression with loose material caused the road to become a quagmire from which the water seeped through the road, thus causing it to disintegrate; this is misfeasance. *Wilson* v. *Kingston-upon-Thames Corporation* (1) is distinguishable because in that case, which was tried without a jury, the trial judge found that the repairs were not negligently done. [He referred to *Victoria Corporation* v. *Patterson* (2).] The complete inadequacy of what was done by the respondent was in the particular circumstances an act of misfeasance in itself which would justify a finding of negligence: *Johnston* v. *Shire of Marong* (3); *Edgar* v. *Shire of Seymour* (4); *McClelland* v. *Manchester Corporation* (5); *Drake* v. *Bedfordshire County Council* (6); *Stoddart* v. *Ashburton County* (7).

[*Fullagar* J. referred to *Taylor* v. *Commissioner for Main Roads* (8).]

Section 8 (2) of the *Roads and Jetties Act* 1935-1945 (Tas.) imposes upon the respondent an absolute duty to maintain. The mandatory words of that sub-section are not qualified by the final words "as it shall direct": *Municipal Tramways Trust* v. *Stephens* (9). There is a clear legislative intention to impose an absolute duty within the meaning of *Buckle* v. *Bayswater Road Board* (10).

The *Acting Solicitor-General of Tasmania* (*M. P. Crisp*), for the respondent. The theory as to the effect of the quagmire was not raised in the Supreme Court. There is no evidence to support it and in any event the Court will not accept such an argument raised for the first time in this Court. [He referred to the *Supreme Court Civil Procedure Act*, 1932, s. 50 and *Donohoe* v. *Smith* (11)]. Section 8 (2) of the *Roads and Jetties Act* 1935-1945 when read with the definition of "maintenance" in s. 3 imposes no absolute duty. *Municipal Tramways Trust* v. *Stephens* (12) is distinguishable because, firstly, it was not a case relating to a highway authority, and, secondly, this is not a case of interrupting a highway and failing to restore it; see per *Griffith* C.J. (13). The words "as it shall direct" simply mean "as it shall from time to time see fit"; cf. *Piesse Elements of Drafting* (1946), p. 41. [He referred to *Hartnall* v. *Ryde Commissioners* (14); *Woodward* v. *Orara Shire*

(1) (1948) 2 All E.R. 780; (1949) 1 All E.R. 679.
(2) (1899) A.C. 615, at p. 620.
(3) (1913) 19 A.L.R. 247.
(4) (1922) 28 A.L.R. 128.
(5) (1912) 1 K.B. 118.
(6) (1944) K.B. 620.
(7) (1926) N.Z.L.R. 399, at p. 405.
(8) (1946) 46 S.R. (N.S.W.) 117; 63 W.N. 23.
(9) (1912) 15 C.L.R. 104, at p. 110.
(10) (1936) 57 C.L.R. 259.
(11) (1948) 48 S.R. (N.S.W.) 236; 65 W.N. 51.
(12) (1912) 15 C.L.R. 104.
(13) (1912) 15 C.L.R., at p. 109.
(14) (1863) 4 B. & S. 361 [122 E.R. 494].

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Council (1); *Mersey Docks & Harbour Board Trustees* v. *Gibbs* (2); *Municipality of Pictou* v. *Geldert* (3); *Municipal Council of Sydney* v. *Bourke* (4); *Aiken* v. *Kingborough Corporation* (5).] On the question of causation, the evidence is that the culvert was always sufficient to take the water. The collapse of the culvert had not occurred at any significant length of time before the accident. The accident would have happened whether gravel was thrown into the depression or not; *Short* v. *Corporation of Hammersmith* (6) and *Wilson* v. *Kingston-upon-Thames Corporation* (7) illustrate this submission. The dictum of *Lush J.* in *McClelland* v. *Manchester Corporation* (8) cannot be relied upon by the appellant; it was corrected by *Lush* J. himself in *Moul* v. *Thomas Tilling Ltd.* (9). Failure to inspect and discover the source of danger is not a head of misfeasance; per *Dixon* J. in *Buckle* v. *Bayswater Road Board* (10).

R. C. Wright, in reply. In *Young* v. *Davis* (11) s. 6 of the *Highway Act* 1835 (Imp.) was held to impose a statutory duty to maintain. The depression over the culvert was overt evidence that something was wrong below and it was for the jury to decide what inference was to be drawn therefrom. The dictum in *McClelland* v. *Manchester Corporation* (12) has been accepted as sound in *Baldwins Ltd.* v. *Halifax Corporation* (13); *Stoddart* v. *Ashburton County* (14); *Skilton* v. *Epsom and Ewell Urban District Council* (15), and *Charlesworth* on *Negligence*, 2nd ed. (1947), pp. 149-150. *McClelland* v. *Manchester Corporation* (12) makes a clear distinction between effecting repairs incompletely and without proper care on the one hand and not effecting repairs at all on the other hand. [He referred to *Meeling* v. *Vestry of St. Mary, Newington* (16); *Shoreditch Corporation* v. *Bull* (17); *Newsome* v. *Darton Urban District Council* (18).]

Cur. adv. vult.

(1) (1948) 49 S.R. (N.S.W.) 63; 65 W.N. 278.
(2) (1865) L.R. 1 H.L. 93.
(3) (1893) A.C. 524.
(4) (1895) A.C. 433.
(5) (1938) 33 Tas.L.R. 73.
(6) (1910) 104 L.T. 70.
(7) (1948) 2 All E.R. 780; (1949) 1 All E.R. 679.
(8) (1912) 1 K.B., at p. 127.
(9) (1918) 88 L.J. (K.B.) 505, at p. 508.
(10) (1936) 57 C.L.R., at p. 282.
(11) (1863) 2 H. & C. 197 [159 E.R. 82].
(12) (1912) 1 K.B. 118.
(13) (1916) 85 L.J. (K.B.) 1769, at p. 1771.
(14) (1926) N.Z.L.R., at p. 405.
(15) (1937) 1 K.B., at p. 124.
(16) (1893) 10 T.L.R. 54.
(17) (1904) 90 L.T. 210.
(18) (1938) 1 All E.R. 79.

The following written judgments were delivered:—

LATHAM C.J. At about 3 a.m. on 5th August 1947 one Byron Hart and a companion were driving a motor truck with a trailer along a public highway between Hamilton and Ouse in Tasmania. It was a stormy night and heavy rain was falling. At a place just beyond a curve in the road a natural water course ran under through a culvert. The culvert and the road above it had fallen in, leaving a large hole in the middle of the road about fourteen feet by six feet and nine feet deep. The water was banked up on the upstream side and was about six feet deep in the hole. The culvert was not in its then condition capable of taking the flow of the stream. The driver had no opportunity of avoiding the hole and the truck went into it and caught fire. The driver and his companion were killed and the truck and trailer and the loading were destroyed. The owner of the truck, Donald Gorringe, sued the Transport Commission, which was the road authority, for damages for negligence, claiming in respect of the loss of the truck and its trailer, the loss of the goods carried by the truck and compensation for £1,000 paid as workers' compensation to Hart's widow.

The action was tried before *Clark* J. and a jury. The learned judge directed the jury that the commission as a highway authority was not liable for non-feasance, that the hole in the road was due to the fact that the commission had not exercised the power which it possessed to repair the road, that such a failure to exercise a power was non-feasance, that there was no evidence of misfeasance; and the jury, in accordance with the direction of the learned judge, found for the defendant. The Full Court dismissed an application for a new trial and the plaintiff appeals to this Court.

The evidence showed that the culvert was constructed many years ago, about 1840 or 1850—long before the Transport Commission came into existence. The Transport Commission was constituted in 1939 in accordance with the provisions of the *Transport Act* 1938. Thus the commission was not responsible for the construction of the culvert, but it was not suggested that the culvert had not originally been properly constructed. The culvert was about fifty-two feet long, about six feet wide and the wooden decking was supported at each side on masonry. The culvert was between two and three feet deep. The road filling above the culvert was about twelve feet in depth. After the accident it was seen that some of the wood in the decking was rotten and decayed and had fallen in.

The evidence for the plaintiff was directed to showing that the culvert was in an obviously dangerous condition which the defendant

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commission had neglected to remedy and it was contended that the failure of the commission to keep the culvert in repair was a breach of duty to the plaintiff which caused the damage of which he complained. There was evidence for the plaintiff to the effect that for a considerable period—one witness said four years—there had been a dip in the road where it went over the culvert. The dip was at times five or six inches in depth and extended for a distance stated by one witness to be fifteen or sixteen feet along the road and extending right across the road. The evidence for the plaintiff was that the depression was well-known to persons who used the road, and that, as traffic wore away the surface, employees of the commission repeatedly placed further filling on the surface which was either blown away or washed away from time to time.

The plaintiff's case was put in two ways. In the first place it was contended that the commission was under an absolute duty to keep the culvert in repair : it was not kept in repair, and consequently the plaintiff suffered damage for which he had a right of action. Under the existing applicable legislation, the *Roads and Jetties Act*, 1944, s. 4, which repealed, *inter alia*, s. 8 of the *Roads and Jetties Act*, 1935, the following provision was enacted in substitution for the prior s. 8 :—" (1) All State highways and subsidiary roads shall be vested in His Majesty, and shall be under the control and direction of the Transport Commission. (2) Except as otherwise provided, the Transport Commission shall cause all State highways and subsidiary roads to be maintained as it shall direct."

The commission in relation to the road in question is a highway authority only. It has no other functions or powers, for example, in respect of drainage. The culvert was plainly part of the road. It was constructed simply for the purpose of carrying the road over the natural stream which existed before the road was made. The plaintiff did not challenge the general proposition that a highway authority is not liable for mere non-feasance but is liable for misfeasance or malfeasance (*Buckle* v. *Bayswater Road Board* (1)) where the leading authorities are considered. It is argued, however, that s. 8 (2) imposed an absolute obligation upon the commission to maintain all State highways, and that therefore the commission does not enjoy the immunity from responsibility for the consequences of non-feasance which the law gives to highway authorities. In my opinion this argument should not be accepted. In the first place, one would expect much clearer language if Parliament intended to alter in relation to the Transport Commission a well-

(1) (1936) 57 C.L.R. 259.

established legal principle of such great importance. In the second place, the argument for the plaintiff goes too far. Section 8 (2) provides that the Transport Commission shall cause highways to be "maintained." In the principal Act, the *Roads and Jetties Act*, 1935, s. 3, the following provision appears:—"'Maintenance,' in relation to a road, means the reconstruction, improving, widening, diverting, altering, or repairing thereof." It would be quite unreasonable to construe s. 8 (2) of the *Roads and Jetties Act*, 1944 as imposing an imperative absolute duty upon the commission to reconstruct, to improve, to widen, to divert, to alter and to repair all State highways and subsidiary roads. Thirdly, full effect can be given to s. 8 (2) by regarding it as prescribing the authority which is to do the work of maintenance. It was so held by the Full Court of Victoria upon an indistinguishable provision in *Edgar* v. *Shire of Seymour* (1). Finally, I call attention to the fact that s. 8 (2) provides that, except as otherwise provided, the Transport Commission shall cause highways and roads to be maintained "as it shall direct." The latter words show that it intended to confer upon the commission authority to maintain roads in such measure, degree and manner as the commission shall determine. The section creates a power. It does not impose a duty. Accordingly I agree with the learned trial judge and the Full Court that the relevant statutes do not show any intention to alter the law with respect to non-feasance in its application to the Transport Commission as a highway authority.

In the second place, the plaintiff contended that in the present case there was misfeasance because the commission did not simply leave the road alone; it did repair the surface of the road, and it is contended that there was negligence in the repairs so effected. In *East Suffolk Rivers Catchment Board* v. *Kent* (2), Lord *Romer* stated the law in the following manner: "Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. If in the exercise of their discretion they embark upon an execution of the power, the only duty they owe to any member of the public is not thereby to add to the damages that he would have suffered had they done nothing." Thus the commission was not bound to repair the road, but if it did repair the road it was under a duty to repair it without negligence. If the commission repaired the road negligently in such a way as to create a danger or to add to danger and damage was thereby caused to

(1) (1922) A.L.R. 128.

(2) (1941) A.C. 74, at p. 102.

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persons lawfully using the highway the commission became liable for that damage.

In the Supreme Court and in this Court it was argued that the dip in the road demonstrated the need for radical repair of the culvert and that the commission only made superficial repairs on the road surface from time to time. This course of action, it was said, was more than non-feasance and amounted to misfeasance. But the very statement of the argument shows that such a complaint is a complaint that the commission failed to exercise in full measure the power to repair the road which it possessed. Such a failure is only non-feasance.

The plaintiff strongly relied upon what was said by *Lush* J., in *McClelland* v. *Manchester Corporation* (1):—"You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was non-feasance. Once establish that the local authority did something to the road, and the case is removed from the category of non-feasance. If the work was imperfect and incomplete it becomes a case of misfeasance and not non-feasance, although damage was caused by an omission to do something that ought to have been done." In the statement quoted, *Lush* J., was referring to the facts of the particular case which was before the court, where the evidence showed (2) that a road authority had made and lighted two streets in such a way as to lead anyone to suppose that there was a continuous thoroughfare, whereas in fact there was an unfenced ravine running across the end of one of the streets. The apparent continuity of the lighting constituted a grave danger and was created by the corporation itself. Accordingly there was more than mere non-feasance. There was the negligent exercise of a power. The words "Once establish that the local authority did something to the road and the case is removed from the category of non-feasance" ought not to be read as purporting to state a general principle that if a highway authority once does anything at all to a road, then the authority becomes liable for damage arising from the non-repair of the road, whether or not that which the authority did had any relation to the resulting damage. Reference may be made to the comment in *Sheppard* v. *Glossop Corporation* (3) upon the quoted statement. But the following statements by *Lush* J., in *McClelland's Case* (4) are recognized as an accurate statement of the law:—"It is, I think, clear law that when a local authority undertakes and performs a

(1) (1912) 1 K.B. 118, at p. 127.
(2) (1912) 1 K.B., at p. 120.
(3) (1921) 3 K.B. 132.
(4) (1912) 1 K.B., at pp. 129, 133.

duty, whether they are bound by statute to do so or whether they have an option to perform it or leave it unperformed, however it arises, they are bound to exercise proper and reasonable care in its performance, and that there is no difference in this respect between a public body and a private individual who does an act which if carelessly done may cause injury to others . . . if a duty is undertaken and improperly performed, and actual damage is occasioned thereby, the person injured has, as I have already stated, a perfectly good cause of action."

In this Court the argument for the plaintiff was therefore principally based upon a contention that the defendant commission actually, actively, and negligently created a dangerous condition of the culvert which was the cause of the accident to the truck. It was argued that the filling which was placed from time to time in the dip over the culvert became wet and muddy and that this was the cause of the decay of the culvert because it weakened and disintegrated the twelve feet of road construction above the culvert and brought about the decay of the wooden decking of the culvert. But there was no evidence whatever which could justify a jury in finding that renewal and levelling of the road surface from time to time above the culvert had any effect in weakening the twelve feet of earth over the culvert or that it in any way contributed to the decay of the timber of the culvert.

The case is, as held by *Clark* J., and the Full Court, a case of non-feasance by a highway authority, and the learned trial judge acted rightly in directing a verdict for the defendant. The appeal should be dismissed with costs.

DIXON J. The question for determination in this appeal is whether the plaintiff in an action against a highway authority for damages caused by the condition of a highway under its care and management was entitled to have his case submitted for the consideration of the jury. The plaintiff asserted that the defendant was under a statutory duty to cause the highway to be maintained but he also placed his case upon an allegation that the defendant had been guilty of negligence in the actual maintenance of the highway. The Transport Commission is the defendant because the road in question, the Lyell highway, is a State highway. State highways are under the control of the commission. The plaintiff appellant was a carrier of goods. In the course of his business his employees drove his motor trucks laden with goods over the Lyell highway. In the early hours of the morning of a wet night in August 1947 one of his trucks plunged into a cavity that had

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appeared in the road and it burst into flames. The driver was killed and the truck and the trailer attached to it and the load were destroyed. The plaintiff paid workers' compensation to the driver's widow and he seeks in the action to recover the amount he so paid and the value of the truck and the trailer and of the goods destroyed. The place where the disaster occurred is about a mile short of Ouse on the journey from Hobart. At that place the road goes over a natural water course. A culvert had been placed over the stream, which was ordinarily a small one, and above that the road had been built up with filling to a height of twelve feet above the surface of the decking. At the surface, the road was about twenty-one feet wide. To a distance of about three feet from the edge of the embankment on each side the surface was macadamized. The walls of the culvert were of masonry. Across it six-inch timbering was placed upon the masonry and transverse decking was placed upon the timber. The filling rested upon this construction in direct contact with the wooden decking. The width of the culvert was six feet five inches and its length fifty-two feet nine inches. Its depth from the decking to ground level was two to three feet. The form of construction had been practised for a very long time but the culvert was rebuilt in 1928.

It appears from the evidence that on the night when the accident happened the stream had banked up, and as the result of the action of water the road had caved in at the centre leaving on each side two shoulders of embankment. Investigation afterwards showed that decking was missing in two places separated by about ten feet ten inches. On the up-stream side there was about eleven feet of decking missing. The upper end of the space left was slightly outside the vertical line of the corresponding edge of the main travelled portion of the road. The hole on the down-stream side was considerable, but it was less in size, perhaps six feet long. There was evidence that the whole of the decking perpendicularly under the travelled surface of the road was either broken or missing. There was also evidence that the surface of the decking was decayed where it had been in contact with the filling. As might be expected rabbits had been seen in the culvert and it was suggested that they had burrowed in the bank.

The plaintiff in his statement of claim said that the culvert caused the water flowing in the water course to bank up against the highway over the culvert and, the water undermining the highway in its then burrowed and decayed condition, the culvert collapsed so as to be dangerous to those using the highway. Everything points to the water having caused the washaway from beneath so to speak and

having let down the surface as opposed to flowing over the road and cutting down the embankment. The washaway into which the plaintiff's truck plunged could not have occurred very long before the accident, but for what time the undermining of the bank had proceeded and when the decking had broken or disintegrated is another matter. Periodical inspections of the culvert were made, so it was said, but of course little could be seen from the outside.

For a long period, four years according to some evidence, a depression existed on the surface of the road above the culvert. It was variously described by drivers of vehicles familiar with the road. One said it was at times five to six inches deep and fifteen to sixteen feet long; another four inches deep and two to three feet long; another six inches deep and four or five feet long; another two to three inches deep and two feet long for the full width of the road. This may have represented on the surface a falling in of the culvert beneath. On the other hand evidence for the defence put forward the view that this could not be so because if that were the cause there would inevitably be a cracking at the surface with a definite break and step down where the subsidence had taken place.

On the argument of this appeal much importance was given by the plaintiff to the steps taken by the highway authority to repair the road where the depression existed. There was evidence that the patrolman, whose attention was called to the depression on at least one occasion, repeatedly filled it up with materials from the side of the road consisting of loose gravel or binding. In the course of a few weeks the depression again appeared. One witness said the filling put into the hole worked out or blew off the road or otherwise disappeared. Another said it was filled with clay and mud. This witness said that he complained about sections of the road. His complaint was as to the stuff they put in the holes which made the road dangerous: the effect of it in winter was to make a quagmire and the road slippery and in summer, dust.

On the foregoing facts *Clark* J. withdrew the case from the jury and directed them to find for the defendant. He did so on the ground that the defendant owed no duty to the plaintiff to maintain the highway and was not shown to be guilty of any negligent misfeasance. Before us the plaintiff appellant put his case in three ways. He contended first that the defendant commission was under an absolute duty to maintain the highway in a proper condition. Secondly he said that the defendant commission, by its servant, had dealt with the defect in the roadway, of which the depression was the symptom and which in fact consisted of a

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collapsed culvert and a bank supported dangerously, and had provided a usable roadway by an inadequate remedy, viz. filling the depression. This amounted to misfeasance. Thirdly he said that the repeated use of the materials to fill the depression was calculated to keep the surface in a wet and muddy condition the water from which would sink down and thus make the bank more liable to disintegrate. The defendant therefore actively contributed to the breakdown of the bank. I shall deal with these contentions in order.

The first contention depends upon the statute law of Tasmania governing the powers and duties of the Transport Commission with reference to State highways. The Transport Commission was established by the *Transport Act* 1938. An earlier statute (the *State Highways Maintenance Act* 1929) had authorized the Governor in Council to declare roads to be State highways. It had vested State highways in the Crown and placed them under the control of the Minister. It had enacted that the Minister should cause all State highways to be maintained as he might direct. This statute was repeated by the *Roads and Jetties Act* 1935. Part II of the latter Act dealt with State highways. Among other things it dealt with a trust fund that had been established by the former Act for their upkeep. By s. 9 it repeated the provision vesting them in the Crown and placing them under the control and direction of the Minister. By the same section it again provided that the Minister should cause all State highways to be maintained as he might direct. When three years later the Transport Commission was set up by the *Transport Act* 1938, that Act charged the commission with the administration of the *Roads and Jetties Act* 1935 and authorized the commission to exercise the powers which the latter Act conferred on the Minister (s. 9 (1) VII (*c*) and s. 10 (1) III). The *Transport Act* also provided that all works authorized or directed by the commission to be effected under or for the purposes of the *Roads and Jetties Act* should be constructed, carried out and effected by the Director of Public Works: s. 37. Finally, by the *Roads and Jetties Act* 1944, s. 8 of the *Roads and Jetties Act* 1935 was replaced. The new s. 8 pursued the policy embodied in the *Transport Act*. It provided that State highways should be vested in the Crown but that they should be under the control and direction of the Transport Commission. By sub-s. (2) it enacted that except as otherwise provided the Transport Commission should cause all State highways and subsidiary roads to be maintained as it should direct. The plaintiff appellant claims that this provision imposes a duty to maintain State highways with a correlative right in a

person injured by a defect in the highway to complain of the failure in the duty.

In my opinion that is not the effect of s. 8 (2) and so to interpret it would be contrary to the principle upon which provisions imposing upon highway authorities a duty of repair have been construed. At common law highway authorities have never been subject to a private right of action for neglect to maintain or repair highways under their control notwithstanding the existence of a general duty to repair and maintain. They have been liable only for negligence in the course of the exercise of their powers or the performance of their duties with reference to the maintenance and reparation of highways. Statutes directing such authorities to maintain and repair roads, streets and bridges prima facie are not to be understood as conferring private rights of action in derogation from this principle. " It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such a corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shown that the legislature has used language indicating an intention that this liability shall be imposed " (*Municipality of Pictou* v. *Geldert* (1); see further *Gibson* v. *Mayor of Preston* (2); *Maguire* v. *Liverpool Corporation* (3). Section 8 (2) places the responsibility for the repair of State highways and subsidiary roads upon the commission and authorizes it to give directions accordingly, directions which under s. 37 would doubtless be carried out by the Director of Public Works. But it does no more.

It is said that this view of s. 8 (2) is opposed to that taken by the majority of the Court in *Municipal Tramways Trust* v. *Stephens* (4) of a statutory provision framed in much the same way. The provision, however, related to the obligation not of a highway authority but of a tramway authority. The presumption in the case of such a body is that it will incur a civil responsibility for a negligent failure to repair and maintain in a condition of safety the rails and surface of its tramway. There was, therefore, no difficulty in construing such a provision as imposing a statutory liability for a failure to repair, if the language admitted of the construction. I am bound to say, however, that the discussion of the provision contained in the dissenting judgment of *Isaacs* J., would make me hesitate to apply the case to any statute but that upon which it

(1) (1893) A.C. 524, at p. 527.
(2) (1870) L.R. 5 Q.B. 218, per *Hannen* J., at p. 222.
(3) (1905) 1 K.B. 767, per *Vaughan Williams* L.J., at pp. 787, 788; per *Romer* L.J., at pp. 790, 791.
(4) (1912) 15 C.L.R., at pp. 110, 111, 118.

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was decided. The form of the provision was by no means the same as s. 8 (2) because the " directions " were to come from the road authority to the tramway authority. What the Court had to decide, therefore, was the somewhat different question whether in the absence of directions a liability to repair arose.

The second ground upon which the plaintiff's appeal was supported amounts to an assertion that there was more than a failure upon the part of the defendant Transport Commission to maintain or repair the culvert and the superincumbent filling or embankment and surface constituting the highway; that the commission entered upon or undertook the exercise of its powers or fulfilment of its general duty to remedy the dangerous or improper condition of the highway at that place and negligently performed the function by doing no more than repeatedly placing gravel or the like in the depression in the travelled surface. The basis of the contention is to be found in a passage often cited which occurs in the judgment of *Lush* J., in *McClelland* v. *Manchester Corporation* (1). His Lordship, having said that if a highway authority leaves a road alone and it gets out of repair, no action can be brought, although damage ensues, proceeded as follows :—" But this doctrine has no application to a case where the road authority have done something, made up or altered or diverted a highway, and have omitted some precaution, which, if taken, would have made the work done safe instead of dangerous. You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was non-feasance. Once establish that the local authority did something to the road, and the case is removed from the category of non-feasance. If the work was imperfect and incomplete it becomes a case of misfeasance and not non-feasance, although damage was caused by an omission to do something that ought to have been done. The omission to take precautions to do something that ought to have been done to finish the work is precisely the same thing in its legal consequence as the commission of something that ought not to have been done, and there is no similarity in point of law between such a case and a case where the local authority have chosen to do nothing at all." This passage is of course to be read with the facts of the case which when considered with the findings of the jury showed that, a road ending dangerously in a ravine having been dedicated to the public, it was taken over by the corporation and made up, paved, kerbed, sewered and furnished with side walks. But the ravine was not fenced in and apparently

(1) (1912) 1 K.B., at p. 127.

the place was not properly lit. The jury found that the road as made up and constructed was a danger to persons using it and the ravine was a hidden trap to them. They further found that in opening the road to the public after making it up and in maintaining it proper care was not taken to warn the public of the danger. The case has been discussed a good deal and it is necessary to read with it the observations made upon it in *Sheppard* v. *Glossop Corporation* (1). But whatever may be the correct view of the decision clearly the case contemplated by *Lush* J., in his statement of principle was that of an entire piece of work, namely, the preparation for the use of traffic of an unmade road set out in such a way that it would be dangerous for traffic to use unless the preparation was completed with fencing and perhaps lighting. It has no application to the facts of the present case. Here what was left undone and what was done are not only severable, they are in my opinion unconnected. The caving in of the road so as to form the pit into which the truck fell was caused by the action of water from beneath, rendered possible, as the jury might find, by the decay and failure of the decking of the culvert and perhaps by some additional weakening of the bank. The repairs effected by filling in the depression concerned only the running surface of the road. The question whether it is possible that any consequential effect was produced upon the stability of the bank by moisture which the filling of the depression retained is the subject of the third contention and that question is yet to be dealt with. But plainly enough the placing of the gravel, &c., in the depression was not in the least directed to the security of the embankment or the condition or sufficiency of the culvert or the safety of that part of the roadway. It was directed only to the levelling of the travelled surface. Even if the proper inference for the patrolman or the engineer to draw from the existence of the depression was that a collapse of part of the culvert had occurred, it would still be true that the patrolman on behalf of the commission took no positive or active step in the matter. The levelling of the surface was not in any way connected with it. To fill in the depression with earth or gravel did not mean that traffic could pass over the culvert while without the filling it could not. With or without it the road was passable. It meant only a more level surface. I do not say that the result would have been different had it been otherwise. But it cannot be said that the commission's employees did anything that would amount to

(1) (1921) 3 K.B., per *Bankes* L.J., at pp. 140-142, and *Scrutton* L.J., at pp. 147, 148.

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throwing an unsafe road open to traffic afresh or providing a place for traffic not otherwise available that was unsafe.

In my opinion there is no evidence fit to be submitted to a jury of facts which would support this ground urged in support of the appeal.

The third ground put forward on behalf of the plaintiff appellant is that on the evidence it was open to the jury to infer that by repeatedly placing gravel, earth, &c. in the depression there had been a concentration of moisture at that point which had contributed to the weakening of the bank or filling so that it was more likely to collapse when support from beneath was withdrawn by the disappearance of portion of the decking of the culvert and by the influence of water. Having regard to the manner in which the case was presented below it is doubtful whether this contention is now open to the appellant. But, however that may be, I do not think that it is a case which the evidence supports. The foundation upon which the case is built is the suggestion that if the embankment or filling were dry it would or would be likely to hold together, having been once consolidated, notwithstanding that it lost the support in part of the decking of the culvert. It would form something in the nature of an arch, it was said. On the other hand, if the filling became moist there would be little or no friction between the particles of earth of which it was composed and it would tend to collapse. It may be conceded that the jury could adopt so much of the theory upon which the contention depends. But the theory then goes on to attribute a moistening or wetting of part of the embankment to the process of filling up the depression with gravel and clay. It is of course evident that unless a substantial portion of the upper part of the embankment twelve feet high was moistened its collapse could not be explained in this way, whether as a decisive cause or a contributing factor. There is, I think, no evidence that any substantial part of the bank was made wet or moist independently of the action of the banked-up water of the stream and the rain. There is some evidence that the earth and gravel in the depression was wet and muddy in wet weather and retained moisture and it was possible for the jury to treat the description of a quagmire as applying to it. But it would be unreasonable to treat the presence of the earth and gravel in the depression as a reason for supposing that moisture seeped therefrom into the substance of the bank so as really to weaken it and make it more likely to collapse.

In my opinion this ground urged in support of the appeal also fails. The appeal should be dismissed with costs.

FULLAGAR J. The essential facts of this case have already been stated. They present very striking features in the shape of the huge extent of the chasm in the road and in the tragic consequences which resulted from its existence. I agree that the plaintiff cannot succeed, but I wish to add one or two brief observations, firstly with regard to the general principles applicable, and secondly with regard to the strongest way in which I think that the plaintiff's case could be put.

1. The general principle, which is sometimes stated compendiously by saying that a highway authority is not liable for mere non-feasance, seems to have been reached in England by a series of five steps. Four of these are mentioned by Lord *Herschell* in *Cowley* v. *Newmarket Local Board* (1) and they are represented by the cases of *Russell* v. *Men of Devon* (2); *M'Kinnon* v. *Penson* (3); *Young* v. *Davis* (4) and *Gibson* v. *Mayor of Preston* (5). I think that the fifth step had really been finally taken only two years before Lord *Herschell* spoke and that Lord *Herschell* was making it irrevocable.

The ground of the decision in *Russell* v. *Men of Devon* (2) (in which the plaintiff sued in respect of damage to his wagon caused by a bridge, which was repairable by the county, being out of repair) may, I think, be fairly stated as being that the county was not a corporation and that there was "no corporation fund out of which satisfaction is to be made" (per Lord *Kenyon* (6)). I do not think that any other ground whatever can be collected from Lord *Kenyon's* judgment.

In *M'Kinnon* v. *Penson* (3) the claim was again for damage suffered through the condition of a bridge which the inhabitants of the County of Cardigan were alleged to have permitted to become ruinous. The defendant was the surveyor of county bridges under the statute, 43 Geo. 3, c. 59, the fourth section of which provided that the county might be sued in the name of the surveyor. It was argued that the procedural difficulties which had proved fatal in *Russell* v. *Men of Devon* (2) were now overcome. The statute does not seem to have purported to impose any duty or to have given to anybody other than the county the care and management of the road. It was held in the Exchequer and in the Exchequer Chamber that the statute created no new liability which

(1) (1892) A.C. 345, at p. 353.
(2) (1788) 2 T.R. 667 [100 E.R. 359].
(3) (1853) 8 Ex. 319 [155 E.R. 1369]; (1854) 9 Ex. 609 [156 E.R. 260].
(4) (1863) 2 H. & C. 197 [159 E.R. 82].
(5) (1870) L.R. 5 Q.B. 218.
(6) (1788) 2 T.R., at p. 673 [100 E.R. at p. 362].

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had not existed before at common law, although it was conceded that there was no case in which independently of the section an action would lie against the county for any cause whatever at common law.

In *Young* v. *Davis* (1) the plaintiff relied on s. 6 of 5 and 6 Will. 4, c. 50, which required a parish to appoint a surveyor of highways "which surveyor shall repair and keep in repair the several highways in the said parish." At this stage, therefore, there was not only a person who could be sued but a specific duty cast upon that person by statute. The action was held not to be maintainable. The statutory duty was enforceable, but not by action for damages. The case of *Couch* v. *Steel* (2) was distinguished on the ground that the duty in that case was imposed for the benefit of a limited class, whereas the duty imposed by 5 and 6 Will. 4, c. 50, was imposed "for the benefit of the public at large." It is to be noted that *Channell* B. said (3): "This is not a case in which a surveyor of highways has done any act which of itself has caused injury to the plaintiff. If, personally or by his servants, he had put a heap of stones in the road and left them there at night without being sufficiently protected, that would be an omission to do something to render harmless an act which he had affirmatively done." It was, the learned Baron proceeded, "a mere case of omission to repair a road." It is also, I think, worthy of note that the liability which Mr. Young asserted was a personal liability in the surveyor, and *Pollock* C.B. (4) was impressed by the probable difficulty, if the action were allowed, of "finding persons willing to discharge the duties of the surveyor of highways," and the passage which follows suggests that further inconvenience would arise from the fact that juries in those days were sympathetic towards plaintiffs.

In *Gibson* v. *Mayor of Preston* (5) yet another statute, the *Public Health Act*, 1848 (11 & 12 Vict. c. 63) came under consideration. The plaintiff was stronger here in that he had a corporation with corporate funds, in which was vested every highway in its district, and which was given the "management and control" of every such highway. On the other hand, no express statutory duty to "repair and keep in repair," such as had been imposed on the surveyor by 5 and 6 Will. 4, c. 50, was imposed on the corporation. The duty alleged by the declaration was a duty "to repair." It was again held that the action could not be maintained. Apart

(1) (1862) 7 H. & N. 760 [158 E.R. 675]; (1863) 2 H. & C. 197 [159 E.R. 82].
(2) (1854) 3 E. & B. 402 [118 E.R. 1193].
(3) (1862) 7 H. & N., at pp. 775, 776 [158 E.R., at p. 681.].
(4) (1862) 7 H. & N., at p. 772 [158 E.R., at p. 680].
(5) (1870) L.R. 5 Q.B. 218.

from statute, there was no duty to repair enforceable by action, and the legislature had not clearly indicated an intention that a remedy by action was to be available against its new creature, the incorporated Local Board of Health.

The four cases which I have been reviewing have been considered on numerous occasions. The word " non-feasance " does not seem to occur in any of them. Sir *Harrison Moore* in an article (1) pointed out that the distinction between misfeasance and non-feasance was a matter of great moment in the early development of case and *assumpsit* and in other historical connections. But the earliest occasion in the category of cases now under consideration on which I have noticed the word " non-feasance " used is in *Parsons* v. *Vestry of St. Matthew, Bethnal Green* (2), where *Willes* J. said (3): " No action will lie against them for a mere non-feasance," and, referring to the position of turnpike trustees, added, " They have been held liable for misfeasance, but never for mere non-repair." One cannot help regarding this as a somewhat curious revival in a new context of a technical distinction which had in most respects lost most of its original importance. To speak of non-feasance and misfeasance in this connection is, of course, conveniently descriptive of a common legal situation. But " many times *compendia sunt dispendia*," and it can hardly be doubted that in certain cases the argument that the defendant has been guilty of no more than non-feasance has been put as if it were an affirmative defence—as if it were open to a highway authority to say: " I admit that I have been guilty of a breach of a legal duty which is prima facie enforceable by action, but my fault was that I omitted to do something and that excuses me." Such an argument was in substance put in *McClelland* v. *Manchester Corporation* (4). It failed in that case, but I am by no means sure that it has not in substance succeeded in two or three of the reported cases. The danger of misunderstanding was likely, of course, to increase in proportion as a strict system of pleading requiring precise formulation of duty and breach became less and less strict.

I think that the " tetralogy " of cases which I have been considering finally established two principles of law. These are (1) that at common law no person or persons, corporate or unincorporate, is or are subject to any duty enforceable by action to repair or keep in repair any highway of which, whether at common law or by statute, he or they or it has or have the management and

(1) 50 L.Q.R., at p. 278.
(2) (1867) L.R. 3 C.P. 56.
(3) (1867) L.R. 3 C.P., at p. 60.
(4) (1912) 1 K.B. 118.

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control, and (2) that if a duty to repair or keep in repair a highway or highways is imposed by statute on any such person or persons, that duty is not enforceable by action unless the statute makes it clear by express provision or necessary implication that the duty is to be enforceable by action at the suit of a person injured by its breach. With regard to the first rule, it may well be said that it would have been entirely out of character if the common law had imposed a positive duty to repair enforceable by action for damages. With regard to the second, the distinction drawn in *Young* v. *Davis* (1) between *Couch* v. *Steel* (2) and the case there before the court demands a moment's consideration. In each case the statute said that a person in the position of the defendant " shall " do a specified thing. The distinction actually taken was that in the one case the duty was imposed for the benefit of a class of persons of which the plaintiff was a member, whereas in the other the duty was imposed for the benefit of the public at large. A further and perhaps more practical distinction suggests itself. In *Couch* v. *Steel* (2) the statutes (7 & 8 Vict., c. 112 and 13 & 14 Vict., c. 93) required the keeping on board ship of " a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages " in accordance with a scale to be issued by the Board of Trade and published in the London *Gazette*. What was required to be done was a specific ascertainable thing, and the master of the ship could do that thing or refrain from doing it. In *Young* v. *Davis* (1) the duty was " to repair and keep in repair," a duty which by its very nature involved considerations of degree and discretion such that it would be very unlikely that the legislature would intend to impose an absolute duty subject to the sanction of a civil action. It is indeed not surprising that the courts in the early highway cases were influenced by the probability of a " multitude of actions," whereas in *Couch* v. *Steel* (2) the court expressly said that no such deterrent consideration arose.

But after *Gibson* v. *Mayor of Preston* (3) there remained, I think, a fifth step which need not necessarily have been taken but which was in fact taken. Although negligence was mentioned in the declaration in *M'Kinnon* v. *Penson* (4) nothing was, I think, decided except that there was no duty to repair enforceable by action. By this time it had become a common form of statutory enactment to provide that an authority should have the " care and management " or " care and control " or " control and manage-

(1) (1863) 2 H. & C. 197 [159 E.R. 82].
(2) (1854) 3 E. & B. 402 [118 E.R. 1193].
(3) (1870) L.R. 5 Q.B. 218.
(4) (1854) 9 Ex. 609 [156 E.R. 260].

ment " of its highways. Now a duty to repair enforceable by action for damages for omission to repair is one thing. A duty to exercise care in control and management enforceable by action for damages for negligent omission to remove a danger known to exist is another thing. The first rule, which I regard as having been established by the first four steps, does not of itself exclude liability for negligence in control and management. Negligence can be a characteristic of an omission as well as of an act, and the first rule, as I have stated it, is quite consistent with the existence of a duty to take reasonable care that a highway shall be in a reasonably safe condition. Taking the facts of the present case as a starting point, let it be supposed that the defendant knew of the existence of the chasm, fourteen feet across, interrupting its road, that it did nothing either by way of warning or by way of repair, and that a night or two later another lorry crashed into the chasm with similar consequences. It would clearly be open to a jury to find that there had been negligence in the " management and control " of the highway. A plaintiff need not allege a duty to keep in repair: he could allege a duty to exercise reasonable care in the management and control of the highway. Or suppose, going back to the accident which is the subject of the present case, that any reasonable inspection of the embankment at the place of the accident would have disclosed a dangerous condition of the road for some time before the accident, and that the defendant made inspections but failed to discover the dangerous condition, or, having discovered it, decided, with full knowledge of the probable consequences, to do nothing. Would it be possible in either case for a person in the position of the plaintiff in the present case, or the widow of the driver of the lorry, to recover damages from the defendant?

Both these questions must, in my opinion, be answered in the negative on the basis of the law as it has stood since 1890. It is, I think, very curious that this is so. It is to be remembered that the law of negligence was undergoing considerable development in the last quarter of the last century. *Heaven* v. *Pender* (1) was decided in 1883. Before 1890 support for an affirmative answer, at least in the former of the two supposed cases, would have been found in *Borough of Bathurst* v. *Macpherson* (2). This case might have been thought in effect to have preferred *Hartnall* v. *Ryde Commissioners* (3) to *Parsons* v. *Vestry of St. Matthew, Bethnal*

(1) (1883) 11 Q.B.D. 502.
(2) (1879) 4 App. Cas. 256.
(3) (1863) 4 B. & S. 361 [122 E.R. 494].

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Green (1). But in 1890 the Privy Council decided the case of *Sanitary Commissioners of Gibraltar* v. *Orfila* (2). The Sanitary Commissioners, despite their somewhat misleading name, were an incorporated highway authority. They were sued for negligence in the management and control of a road, which wound round the side of a mountain, and which had collapsed after heavy rain, doing serious damage to a property lying below the road. At the trial of the action negligence was found against them. The Judicial Committee was of opinion that there was no evidence of negligence, but the actual ground of the decision against the plaintiff was that, as there was no misfeasance, they would not be liable even if there were negligence in management and control. When the House of Lords decided *Cowley* v. *Newmarket Local Board* (3) in which again negligence in management and control was alleged, the two highest tribunals seem to have finally clinched the matter, although the Privy Council was called upon to decide substantially the same point in *Municipality of Pictou* v. *Geldert* (4) and *Municipal Council of Sydney* v. *Bourke* (5). By 1895 it seems to have been beyond question that a highway authority, if it did anything, must do it carefully, but, if it did nothing, could be indifferent to the consequences of its inaction. The theorem that there was no duty to repair enforceable by action acquired a corollary. There was no duty enforceable by action to be careful in control and management. It is only in such circumstances as are described by *Dixon* J., in *Buckle* v. *Bayswater Road Board* (6) that a highway authority can be made liable. *Dixon* J. said (7): "While a road authority owes to the members of the public using a highway no duty to undertake active measures whether of maintenance, repair, construction or lighting in order to safeguard them from its condition, on the other hand it possesses no immunity from liability for civil wrong." If it does exercise its powers, it must exercise them with reasonable care. If it constructs a road negligently or repairs a road negligently, it will be liable to one who suffers damage through its negligence. If it was "the active agent in causing an unnecessary danger in the highway," it will be liable to one who suffers damage through that danger. These things are, as it is said, misfeasance.

I should perhaps add that I have used the word "negligence" above as meaning a failure to exercise reasonable care. This is, I think, its only proper sense. It is the sense in which it was used by Lord *Watson* in *Sanitary Commissioners of Gilbraltar* v. *Orfila* (8);

(1) (1867) L.R. 3 C.P. 56.
(2) (1890) 15 App. Cas. 400.
(3) (1892) A.C. 345.
(4) (1893) A.C. 524.
(5) (1895) A.C. 433.
(6) (1936) 57 C.L.R. 259.
(7) (1936) 57 C.L.R., at p. 283.
(8) (1890) 15 App. Cas., at p. 413.

cf. *Butler* v. *Fife Coal Co. Ltd.* (1) (per Lord *Kinnear*). In *Thomas* v. *Quartermaine* (2), *Bowen* L.J. used the term as meaning what I would respectfully think it preferable to call "actionable negligence"; cf. *Heaven* v. *Pender* (3) (per *Brett* M.R.). Negligence may or may not be actionable. It is actionable if, but not unless, there is a legal duty to take reasonable care.

It would seem to be the accepted view today that the rules apply only to highway authorities (*Buckle* v. *Bayswater Road Board* (4)). They do not apply to sanitary or drainage or tramway or other such authorities. It not seldom happens that the same authority is (as in *Buckle* v. *Bayswater Road Board* (5)) both a highway authority and a drainage authority, and the somewhat unreal question whether it failed to do something in its capacity of highway authority or in its capacity of drainage authority may be the whole question on which a plaintiff's right to recover damages depends.

It would also seem to be the accepted view today that the rules apply even to a highway authority only in respect of the actual roadway itself and such artificial structures in and about the roadway as can fairly be considered "part of the road" or "made for road purposes" or "made for roadway purposes" in *Buckle* v. *Bayswater Road Board* (6). Bridges, drains and culverts, which are essential parts or accessories of a roadway, are generally considered as falling within the purview of the rules.

2. It is impossible to maintain that the statute in this case imposes a duty enforceable by action to repair or keep in repair. Since *Young* v. *Davis* (7) it has been established law, I think, that much more than a mere direction that the authority "shall repair" or "shall repair and keep in repair" must appear before it will be inferred that the legislature intended to give a remedy by action for damages. But in any case I doubt whether the statute in question here means any more than that the defendant shall execute repairs as and when and in such manner as it thinks fit.

The contention that the placing of material in the depressions which are said to have appeared from time to time in the surface of the roadway above the culvert was a proximate cause of the collapse of the road, cannot, in my opinion, be sustained. Whether this contention was or is open to the plaintiff on the pleadings or in view of the conduct of the case below, I do not think that there is any evidence whatever to support it.

(1) (1912) A.C. 149, at p. 159.
(2) (1887) 18 Q.B.D. 685, at p. 694.
(3) (1883) 11 Q.B.D., at p. 507.
(4) (1936) 57 C.L.R., per *Latham* C.J., at p. 271; per *Dixon* J., at pp. 286-289.
(5) (1936) 57 C.L.R. 259.
(6) (1936) 57 C.L.R. 259, at pp. 271, 274, 276; per *Latham* C.J., at p. 266; per *Dixon* J., at p. 293.
(7) (1863) 2 H. & C. 197 [159 E.R. 82].

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The remaining contention of the plaintiff demands, I think, more consideration. It may perhaps be put most strongly in the following way. The depressions which appeared in the surface of the roadway were in fact caused by the collapse in two places of the decking over the culvert twelve feet below the surface. The inevitable consequence of the collapse of the decking was a serious weakening of the earth "filling" between the decking and the surface of the road. There was thenceforth grave danger that that filling would collapse if any abnormal pressure were put upon it, and such abnormal pressure could clearly be expected to be put upon it at any time when a substantial body of water came down the watercourse—an event certain to happen sooner or later. This diagnosis and prognosis would have been made by any reasonably competent civil engineer. If the defendant did nothing to remedy the state of affairs, there would be only "non-feasance," and the defendant could not be made liable. But it did do something. It filled up the depressions in the road surface. It saw something which called for action in the way of repairs, and it proceeded to execute repairs. The repairs which it executed were inappropriate and inadequate, because it failed to appreciate what should have been clear to it. There was a "feasance," and it was a negligent "feasance," and therefore a "misfeasance" and actionable.

I do not myself think that it provides any answer to such an argument to say that the filling of the depressions was not itself a proximate cause of the collapse of the roadway, or to say that the filling itself was not done negligently (cf. *McClelland* v. *Manchester Corporation* (1)). And, if I thought that there was evidence to support every link in the above chain of reasoning which needed evidence to support it, I should at least hesitate long before holding that it was not open to a jury to find for the plaintiff. Nor would I regard the case of *Wilson* v. *Kingston-upon-Thames Corporation* (2) as having any real bearing on the present case. But (although I am inclined to think that it was open to the jury to infer that the depressions were caused by the collapse of the decking) I think that the chain really breaks down at the point where it alleges that the depressions in the road surface ought to have been recognized as symptoms of decay lower down. I do not consider that there is really any evidence of negligence in any respect on the part of the defendant or any of its officers or servants. So far as the evidence goes, the normal effect of heavy traffic was quite sufficient to account for the depressions, and the placing of filling in the depressions a

(1) (1912) 1 K.B. 118.

(2) (1948) 2 All E.R. 780; (1949) 1 All E.R. 679.

natural and adequate way of dealing with the only situation which could be expected to be apparent to reasonably competent and careful men.

I think the conclusion is unavoidable that *Clark* J. was right in directing the jury to find for the defendant. In my opinion, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Crisp and Wright.*
Solicitor for the respondent: *I. B. Postle.*

J. T. R.