[HIGH COURT OF AUSTRALIA.]

BUCKLE . . . . . APPELLANT;
PLAINTIFF,

AND

BAYSWATER ROAD BOARD . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Sept.* 24, 25.

SYDNEY, *Dec.* 15.

Latham C.J., Dixon and McTiernan JJ.

Negligence—Non-feasance—Misfeasance—Highway and drainage authority—Drain constructed in roadway—Hole in roadway caused by break in drain—Failure to repair—Liability of authority—Road Districts Act 1919-1933 (*W.A.*) (*No.* 38 *of* 1919—*No.* 6 *of* 1933), *secs.* 145, 160.

A road board in Western Australia charged with the care and management of the highway and also possessing powers of drainage constructed a suburban roadway which passed through some boggy land made wet by spring water rising on adjacent land. On each side of the travelled way it dug a trench drain leading to a river where the road at that time terminated. Later, on one side of the travelled way it laid an agricultural pipe drain. A central authority then placed a bridge over the river and remade the travelled way as a main road. The agricultural pipe drain was broken in places by servants of the central authority. The road board did not repair the drain or fill in the holes so caused. The plaintiff in crossing the road put his foot into such a hole and was injured. He sued the road board for damages.

Held:—

(1) By *Latham* C.J. and *Dixon* J., that a highway authority is not liable for damage caused by a defective condition of a road arising from a failure to exercise its powers of maintenance or repair with respect to the highway itself or anything constructed for the purposes of the highway. If, therefore, a drain placed in the road solely for the purpose of draining the roadway is broken, the omission to repair it gives no cause of action to a person passing along the highway who is injured in consequence of the omission. But the

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rule does not apply to drains or other artificial works placed there for purposes foreign to the road considered as a highway, such as sewers for drainage of adjoining land and the like, and a highway authority which is also a drainage authority is liable for failing to keep in a safe condition drains introduced into the roadway by it in its latter capacity.

Borough of Bathurst v. *Macpherson*, (1879) 4 App. Cas. 256, and *Unger* v. *Shire of Eltham*, (1902) 28 V.L.R. 322; 24 A.L.T. 96, considered.

(2) By *McTiernan* J., that the road board was not liable for any damage flowing from mere non-feasance in failing to exercise its statutory powers to repair the road under its control, but it had a duty to prevent the artificial work which it had created from becoming a source of danger on the highway, and, having failed to observe that duty, it was guilty of a misfeasance.

Borough of Bathurst v. *Macpherson*, (1879) 4 App. Cas. 256, applied.

(3) By *Latham* C.J. and *McTiernan* J. (*Dixon* J. dissenting), that the plaintiff was entitled to recover from the road board damages in respect of his injuries.

Decision of the Supreme Court of Western Australia (*Dwyer* J.) reversed.

APPEAL from the Supreme Court of Western Australia.

Harry Buckle brought an action in the Supreme Court of Western Australia against the Bayswater Road Board for damages for injuries caused by the negligence of the board in failing to repair a drain in a highway and allowing it to remain in disrepair, with the consequence that the hole became a nuisance to persons using the highway. The facts are set out in the judgments hereunder and also in the judgment of the primary judge, *Dwyer* J., which contained the following passages :—" This road was, I think, first gazetted in the year 1900. It leads from the old Guildford road to the bank of the Swan river in the Bayswater District area. As it approaches the river it falls gradually, and in this particular place it goes through or runs over land which may properly be described as boggy or water-logged. The accident happened near the corner of a street named Frinton Street which runs off Garratt Road more or less parallel to the river. As is to be expected and was expected at the time the road was constructed, the place near the particular point where the accident happened is not what you might call a thickly populated area. I think there is only one house between the intersection of Garratt Road and Frinton Street and the river. There are no houses in Frinton Street at all. Frinton Street is

unmade. I should say its chief use according to the evidence is for sanitary carts, during, we hope, the hours of darkness. Garratt Road had a constructed surface about twelve feet wide for a great deal of the way to the river but from this point ran to the river and became practically a cul-de-sac which led nowhere and where there were no residences at all. It was a little before 1928 the Bayswater Board had constructed as it is called Garratt Road in that they put down an asphalt surface of small width in the centre of the road. In order to do that satisfactorily the road being, as I have said, low-lying, water-logged and boggy, they put down in the first place open drains and later on, in place of the open drains, what would be called agricultural drains, that is, pipes not closely fitted together so that the water could flow through the junctions and drain the subsoil. It is said that these pipes were only four inches below the surface level, and that that was not enough. . . . I think they were nearer twelve inches than four. They served well until 1934, and in the view I take, their construction at inception was proper and sufficient for the then condition of Garratt Road, an outside suburban road of no particular consequence. The provision was intended and properly intended for the ordinary purposes of people who lived there. As regards the use of the agricultural drains for pure draining purposes, apart from the purposes of the road, I think that any such use was merely incidental and to be expected in that locality. There were springs in private property as well as outside private property in the neighbourhood of the road, and it was necessary that the water should be led away somewhere from these springs; and it was pointed out in the evidence that the drains could not go very deep or they would not discharge water at all; the fall was not sufficiently great. Time came in 1928 when a wood cart cutting the corner . . . seems to have broken through one of the earthenware pipes, and that was replaced by a glazed earthenware pipe instead of the original type. It was a harder pipe than the previous one, and a concrete pipe was also put at the most suitable part of the intersection leading to Frinton Street and gravel was laid over it. As I have said, having regard to the circumstances, it was a usual and quite proper construction and a sufficient one in the circumstances as they were. Before the

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end of 1934 an authority known as the Commissioner of Main Roads was constituted. One of the works which he decided to carry out was the bridging of the Swan River, and the point he chose was from the end of Garratt Road, which I have already referred to, to Grandstand Street, Belmont. He proceeded to build that bridge across the river. The work had the effect of making Garrett Street a highway rather than a by-way. That work was more or less completed by the end of 1934, but not entirely. The bridge was built at a cost of about £18,000 ; and the commissioner decided to widen or reconstruct the whole of the made surfaces of both roads mentioned." "As is well known, the commissioner carries out his road work in sections. For the Garratt Road sections he necessarily had at one time or another to pull up all the old surface which had been laid down by the board and put in another one. During the course of his work traffic was allowed to use parts of the sections from time to time, and at other times was pushed off to the side of the road. 'Road closed' notices were put up, and as regards the use of the roads I think one may say that the commissioner took fairly complete direction or control although some right of the board may still have subsisted. In this particular case of Garratt Road what happened is what happened in other places. The road centre was pulled up and the commissioner's vehicles used the sides for carrying material along Garratt Road as was necessary. The inevitable result followed of course, that is, the drain was broken by the vehicles of the road board commissioner. It is in evidence that loads of four tons were taken over the side of the road where this drain had been laid down. It is ridiculous to think that such a type of drain in that position would suffice to carry such loads : it did not carry the loads and was broken in probably a good many places. What happened the Main Road engineer called a subsiding right along the side of the road. In April 1935 the commissioner seems to have ceased work on this road for a considerable part of its length ; and here should be noted that he did undertake reconstruction of the roadway from Guildford Road right through to the bridge and past this particular place near the corner of Frinton Street. In April 1935 most of the work seems to have been completed, but not all. About one-seventh or one-eighth of the length was still remaining to be surfaced, that is

the part which constituted the approach to the bridge and where a suitable embankment had been built for a length of 240 or 250 feet. It may therefore be said, I think, that the total work is not yet complete. I have said that before April 1935 I think it is clear that the drainage works of the board have been broken by the heavy traffic which has been put over them by the commissioner in the course of his construction of Garratt Road. This accident happened about six months later, and now the question is whether during that period it was the duty of the board, and a duty which in case of failure renders them liable in damages, to repair the drain which had been broken by the motor lorry traffic of the Main Roads Commissioner during his period of control." "I have to consider in this case whether, in view of what has happened, it amounts to a breach of duty on the part of the board that they had not prior to 6th October 1935, when that accident happened, examined the drains of Garratt Road and ascertained that the drains had been broken through and constituted a danger to persons using the highway and thereupon repaired them. I may say, without referring to all the authorities which have been quoted and cited in argument, that after a good deal of consideration I have come to the conclusion that this is a case where, in the particular circumstances, the road board should not be held liable. I think it is apparent that the construction was good in the first place, and in fact was such as to be likely to be sufficient as a permanent provision except for the sudden conversion of this cul-de-sac to what practically becomes a main road. And I think, in view of that original construction having been proper and in view of the fact, which I must accept on the evidence before me, that this drain was broken by the very heavy traffic put over it during the works in connection with the reconstruction of the road by another authority altogether, and a competent statutory authority, that the board should not be held blameworthy for negligence arising from such breakage. And on the question whether they are bound to make good the nuisance, as it is called, which was really caused by and in connection with work being done by another statutory authority which had assumed control and of the progress and supposed termination of which they had no real notice, I have considered the circumstances and I have come to the conclusion that at the material time the facts in this

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case were not sufficient to affix liability to the board for the accident which unfortunately happened to the plaintiff in this proceeding." Judgment was accordingly given for the defendant.

From this decision the plaintiff appealed, *in forma pauperis*, to the High Court.

H. P. Downing K.C. and *E. F. Downing*, for the appellant. [Counsel referred to the *Public Works Act* 1902 (W.A.), sec. 91; *Public Works Act* 1927 (W.A.), secs. 85, 86, 94; *Road Districts Act* 1919-1933 (W.A.), secs. 160, 162 (1), (10), 187, 195, 196; *Traffic Act* 1930 (W.A.), sec. 50; *Main Roads Act* 1930, sec. 13.] The hole was a nuisance arising from an artificial work, and the obligation was on the board to keep it in repair—the damage was done by the vehicles of the commissioner, but this does not exculpate the board from liability (*White* v. *Hindley Local Board* (1); *Blackmore* v. *Vestry Mile End Old Town* (2); *Frencham* v. *Melbourne and Metropolitan Board of Works* (3); *Borough of Bathurst* v. *Macpherson* (4); *Cowley* v. *Newmarket Local Board* (5); *Municipality of Pictou* v. *Geldert* (6); *Municipal Council of Sydney* v. *Bourke* (7); *Unger* v. *Shire of Eltham* (8); *Woollahra Council* v. *Moody* (9); *Municipal Council of Willoughby* v. *Halstead* (10); *South Australian Railways Commissioner* v. *Barnes* (11); *Skilton* v. *Epsom and Ewell Urban District Council* (12)). In sec. 195 (1) of the *Road Districts Act* 1919-1933 "nuisance" means an ordinary common law nuisance (*Midwood & Co. Ltd.* v. *Manchester Corporation* (13); *Halsbury*, vol. 21, p. 158, par. 847). Therefore it is not necessary to contend there is an absolute duty (*Hammond* v. *Vestry of St. Pancras* (14); *Price's Patent Candle Co. Ltd.* v. *London County Council* (15); *Baldwin's Limited* v. *Halifax Corporation* (16)). Sec. 196 deals with a common law nuisance (*Bishop Auckland Local Board* v. *Bishop Auckland Iron Co.* (17)). Damage done by one authority does not relieve the

(1) (1875) L.R. 10 Q.B. 219, at p. 223.
(2) (1882) 9 Q.B.D. 451.
(3) (1911) V.L.R. 363.
(4) (1879) 4 App. Cas. 256, at pp. 265, 267.
(5) (1892) A.C. 345.
(6) (1893) A.C. 524.
(7) (1895) A.C. 433, at p. 441.
(8) (1902) 28 V.L.R. 322; 24 A.L.T. 96.
(9) (1913) 16 C.L.R. 353, at p. 361.
(10) (1916) 22 C.L.R. 352, at p. 356.
(11) (1927) 40 C.L.R. 179, at p. 186.
(12) (1936) W.N. 155.
(13) (1905) 2 K.B. 597, at pp. 603-606.
(14) (1874) L.R. 9 C.P. 316.
(15) (1908) 2 Ch. 527, at pp. 540, 544, 549.
(16) (1916) 85 L.J. K.B. 1769.
(17) (1882) 10 Q.B.D. 138.

other from liability (*Shoreditch Corporation* v. *Bull* (1); *North-Western Utilities Ltd.* v. *London Guarantee and Accident Co. Ltd.* (2)).

McDonald K.C. and *Robertson*, for the respondent. As a matter of non-feasance the board was under no liability as a highway authority for the hole in the road. As to want of care and breach of duty no evidence had been adduced. There was no duty upon the respondent as to the site of the accident, because the road was the responsibility of the Main Roads Commissioner. The complaint was that the board did nothing. By sec. 160 of the *Road Districts Act* bridges, culverts and things appurtenant thereto were vested in the board. A bridge is part of a highway (*Salmond* on *Torts*, 7th ed. (1928), p. 337; *Murphy* v. *Murray Roads Board* (3); *McClelland* v. *Manchester Corporation* (4); *Steel* v. *Dartford Local Board* (5); *Masters* v. *Hampshire County Council* (6)). When the road is treated in a normal way and it gets out of repair, it is non-feasance and there is no liability (*Clarkbarry* v. *Mayor &c. of South Melbourne* (7); *Whitehouse* v. *Fellowes* (8)). The board had no duty to use reasonable care to maintain the drain so as to prevent danger arising. A breach of duty by the board which caused the accident must be shown (*Hammond* v. *Vestry of St. Pancras* (9); *Cowley* v. *Newmarket Local Board* (10)). Sec. 160 of the *Road Districts Act* is entirely subject to the *Public Works Act*, sec. 86. By the *Main Roads Act Amendment Act* 1932, sec. 3, a special grant is made. The commissioner retained maintenance of the whole road until the embankment was set and got money for that purpose under the *Traffic Act*. There was no delegation of authority by the board to the Main Roads Commissioner.

E. F. Downing, in reply. The drain was not a necessary part of the road construction; it was constructed for taking away water and not for the purpose of the road. In remaking the road it was not thought necessary to reconstruct the drain. It was constructed

(1) (1904) 90 L.T. 210.
(2) (1936) A.C. 108.
(3) (1906) 8 W.A.L.R. 45.
(4) (1912) 1 K.B. 118, at p. 127.
(5) (1891) 60 L.J. Q.B. 256.
(6) (1915) 84 L.J. K.B. 2194, at p. 2195.
(7) (1895) 21 V.L.R. 426; 17 A.L.T. 197.
(8) (1861) 10 C.B. N.S. 765.
(9) (1874) L.R. 9 C.P. 316.
(10) (1892) A.C., at 352.

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to drain adjacent properties; it is only where the springs are that the drain commences. It is still an artificial work, which must be kept in repair by the authority putting it there.

Cur. adv. vult.

Dec. 15.

The following written judgments were delivered :—

LATHAM C.J. On 6th October 1935 the plaintiff walked along Garratt Road Bayswater for the purpose of calling upon a friend. There was no footpath and he walked along the made roadway. He walked from the roadway towards a house, and had the misfortune to put his foot in a hole in the side of the road and to break his thigh. The hole was caused by the breaking of a pipe in a drain which ran along the side of the road some feet away from the road formation. The road was constructed, originally with open drains or gutters on each side, by the defendant, the Bayswater Road Board. There is no evidence of the date of construction. At some later unstated date part of the pipe drain was laid. The rest of the pipe drain was laid in 1928. The pipe drain at the relevant place originally consisted of agricultural drain pipes, which carried water from a spring and from the boggy ground through which they passed. The particular pipe which was broken so as to bring about the hole was a glazed earthenware pipe which had been substituted for an earlier agricultural pipe which had been broken. The hole into which the plaintiff stepped was about two feet long, eight inches wide and eight inches deep and it was concealed by a growth of grass. The plaintiff sued the defendant for damages. *Dwyer* J., who tried the case, found against the plaintiff on his allegation that the drain was negligently constructed, and that finding is not now challenged. The plaintiff also alleged that the defendant wrongfully failed to keep and maintain the drain in good order, repair and condition, and allowed it to fall into decay or disrepair, or suffered to be made and kept a hole in the covering of the drain, or failed to repair such hole, or failed to fence or protect such hole, or to warn persons using the said road of the existence thereof.

The learned judge found that the drain was broken before April 1935 by heavy vehicles used by the Commissioner of Main Roads,

who had been engaged from some date in 1934 in reconstructing the roadway in Garratt Road and in building a bridge over the river at the end of the road. The bridge and its embankments were over 200 yards away from the scene of the accident to the plaintiff. The work on the road, as distinct from the bridge, was completed before April 1935. The plaintiff alleged in his pleading that the defendant knew that the drain might be broken in the course of the works which were in progress, but negligently failed to guard against or to take precautions to prevent damage to the drain or to repair or to make good such damage if it were caused by the commissioner.

Dwyer J. found that the breaking of the drain was inevitably the result of the commissioner's men using, as they necessarily used, the side of the road in the course of the works undertaken by the commissioner. The commissioner's employees put a plank over the hole when they broke the drain, and the plank, according to the evidence, remained there, so far as was known, " for a day or two."

The commissioner's engineer, some months before the accident, called the attention of the engineer of the road board to seepage of water along the course of the drain which showed that the drain had been broken somewhere on the road, but the board took no action. The commissioner's vehicles broke the drain in at least three places. But the particular hole which was the site of the accident remained undiscovered until the accident happened. It was then so overgrown with grass that there was some difficulty in finding it after the accident had taken place.

Before the Main Roads Department started work on the road an employee of the defendant regularly inspected the drain in Garratt Road, but after the reconstruction work began the inspection was discontinued, as the board considered that the whole width of the road was no longer under its control but under the control of the Commissioner of Main Roads.

The learned judge accepted this proposition and held that the defendant board could not be expected to intervene during the reconstruction and that the board was not liable for damage arising from breakage of the drain caused by a competent statutory authority which was carrying out lawfully authorized works upon the roadway.

I propose first to consider the law which is or may be applicable

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to the case and then to examine the findings of the learned judge in relation to the evidence given.

(1) The *Road Districts Act* 1919-1933, sec. 162, provides that a road board may, subject to the Act, "make, form, alter, level, grade, pave, improve, repair, maintain, light, water, cleanse, and keep in good order and condition all roads and other public places within the district, and all bridges, culverts, drains, watercourses, stockyards, and other places which are under the control of the board, and do all acts and things necessary for and incidental to the proper management thereof."

Thus the defendant board is empowered to make and maintain both roads and drains. It is both a road authority and a drainage authority. Although the powers with respect to roads and drains are conferred by the same provision and in the same words, a long course of judicial decisions has established that the responsibilities of a public authority in relation to roads and drains are very different. In this case the liability of the defendant may depend upon the answer to the question whether, in making the drain, the board was really only making or completing a road which had to be drained or whether it was making a drain not as part of a road work.

(2) A public authority having powers of care and maintenance of highways is not by reason merely of the existence of such powers liable for damage resulting from non-feasance. Mere non-repair of a road surface does not give rise to a cause of action for damages by a person injured in consequence of such non-repair (*Municipal Council of Sydney* v. *Bourke* (1); *Clarkbarry* v. *Mayor &c. of South Melbourne* (2)).

This rule finds its justification in Great Britain in the history of the common law liability of inhabitants of parishes or counties to repair roads, a liability which was transferred to local authorities by statutes. The liability was enforceable not by an action for damages but by indictment against the parish or county or against some individuals thereof for and in the name of the rest (2 *Co. Inst.* 667). Later, when surveyors of highways were appointed in England, there was a remedy against them for penalties. The inhabitants, the county, and the parish were not corporations and could not be sued. When

(1) (1895) A.C. 433.

(2) (1895) 21 V.L.R. 426; 17 A.L.T. 197.

their liability was transferred to municipal corporations it was held that the liability of the corporation was the same as that of their predecessors—it was only a transferred liability, not a liability newly created by the statute (*Municipal Council of Sydney* v. *Bourke* (1)).

There is no such history in Australia. The liabilities of municipal corporations with respect to roads in Australia were not transferred to them but were created by statute. Before statutes were passed "no duty or liability rested on anyone" in respect of their repair (*Municipal Council of Sydney* v. *Bourke* (2)). Thus the duties of an authority are to be ascertained from the terms of the statute under which it exists and acts (*Bourke's Case* (3)). My brother *Dixon* in his reasons for judgment examines the legal position closely and cites the authorities which show that, in relation to highway authorities as such, statutes conferring a power, but not imposing a duty, to repair roads are interpreted as not creating any liability for non-feasance. Thus the rule of non-liability for non-feasance in the case of a highway authority must be regarded as fully established.

(3) But if a municipal corporation digs a hole in a highway and simply leaves it there as a trap to the public it is liable for injury caused thereby (*Municipal Council of Sydney* v. *Bourke* (4)). This is misfeasance and not mere non-feasance.

The Judicial Committee of the Privy Council has on three occasions stated that this principle applies to the case of a municipal corporation constructing a drain in or about a road and then allowing the drain to fall into disrepair so that a dangerous hole is caused in the highway by reason of which a person lawfully using the highway suffers damage.

In *Borough of Bathurst* v. *Macpherson* (5) it was said :—"Having, under the statute, the care, construction, and management of the roads and streets, the construction of the barrel drain by the appellants was lawful; and the care and management of the roads being vested in them, the drain was in their control, and they had full power to repair or otherwise deal with it. Their Lordships are of opinion that, under these circumstances, the duty was cast upon

(1) (1895) A.C., at pp. 443, 444.
(2) (1895) A.C., at p. 444.
(3) (1895) A.C., at p. 436.
(4) (1895) A.C., at p. 441.
(5) (1879) 4 App. Cas., at p. 265.

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them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger, when it arose, either by filling up the hole or fencing it."

In *Municipality of Pictou* v. *Geldert* (1) there is a restatement of this rule in the following terms: "The ground of the decision" (in the *Bathurst Case* (2)) "was that the municipality having, under the powers conferred upon them, constructed a drain which, unless kept in proper condition, would cause a nuisance to the highway, were bound to keep this artificial work in such a condition that no nuisance should be caused, and that if owing to their failure to do this the highway subsided and a nuisance was created, they were as much liable for a misfeasance as if they had by their direct act made the hole in the road which constituted a nuisance to the highway."

In *Municipal Council of Sydney* v. *Bourke* (3) it is said, also with reference to the *Bathurst Case* (2):—"The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous. If any person other than the defendants had lawfully made the drain, and the same result had ensued, such person would undoubtedly have been liable to an action just as much as if he had dug a hole in or placed an obstruction on the highway, and his liability would have been the same whether the municipality were or were not bound to repair the highway." These decisions, correctly understood, are not inconsistent with the principle of non-liability for non-feasance to which reference has been made. They leave untouched the proposition that mere non-repair of anything that is part of a road is not a ground of liability. Thus in *Municipality of Pictou* v. *Geldert* (4) there was no liability for injury caused by a defect in a bridge which was part of a highway when that defect was due, not to any fault in original construction, but to failure to repair it. But when a municipal corporation introduces into a road

(1) (1893) A.C., at p. 531.
(2) (1879) 4 App. Cas. 256.
(3) (1895) A.C., at p. 441.
(4) (1893) A.C. 524.

a drain or other artificial structure which is not shown to be part of the road and then allows it to become a nuisance, the municipality is liable, on the authorities cited, for injury caused thereby.

(4) The *Bathurst Case* (1) has been a source of much legal discussion and many attempts have been made to explain it away, although the actual decision, as based upon nuisance, apart altogether from negligence, was expressly approved in *Municipal Council of Sydney* v. *Bourke* (2). Thus Lord *Alverstone* C.J. in *Lambert* v. *Lowestoft Corporation* (3) seeks to treat the *Bathurst Case* (1) as one of negligence, not of nuisance, and in effect treats as dicta the observations of Lord *Herschell* in *Bourke's Case* (2) in which he explained the reasons for the decision in that case and the distinction between it and the *Bathurst Case* (1). In *Lambert's Case* (4) it was held that in the absence of negligence a local sanitary authority was not liable for damage caused by defects due to non-repair which had developed in a sewer running under a highway.

For the purposes of the present case it is sufficient to state that there does not appear to be any doubt that when a public authority, having a right to place a drain under a road, is guilty of negligence in maintaining the drain, the authority is liable for damages for resulting injury, subject always to the rule that if the drain is shown to be simply a part of the road construction, the non-feasance rule applies. I agree with the comments of my brother *Dixon* upon the case of *Unger* v. *Shire of Eltham* (5).

(5) The non-feasance rule, however, applies only in the case of highway authorities and not in the case of other authorities which have power to interfere with roads—such as water, drainage, and tramway authorities.

If a public authority is empowered to construct and maintain drains and, having constructed a drain under that power, whether in a road or elsewhere, fails to keep it in proper repair, and that failure amounts to negligence, a person who is injured in consequence of such negligence has a right of action for damages against the public authority. Examples of the application of this rule in this court

(1) (1879) 4 App. Cas. 256.
(2) (1895) A.C., at p. 443.
(3) (1901) 1 K.B. 590, at p. 595.
(4) (1901) 1 K.B. 590.
(5) (1902) 28 V.L.R. 322; 24 A.L.T. 96.

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may be found in *Essendon Corporation* v. *McSweeney* (1) and *Willoughby Municipal Council* v. *Halstead* (2)—both cases of drains, though with no complications arising from the fact that the municipal corporations were also highway authorities.

The statutory provisions under which the work in question is done are, as already stated, the governing consideration. In the present case the *Road Districts Act*, sec. 162, provides that a road board " may make . . . repair, maintain . . . drains." It may be urged that such a provision is merely permissive and that the words are not apt to impose a duty either to make or to repair. It is true that, under such a provision, there is no duty to make a drain, but, if the power is exercised and a drain is made, there is then a duty to the public to keep it in proper repair so that it will not be dangerous to the public. This appears from the case of *Chapman* v. *Fylde Waterworks Co.* (3), where the statute simply conferred power to lay down, repair and maintain (*inter alia*) pipes and other works necessary for supplying water. It was contended that the words used in the enactment were permissive, not imperative. *Smith* L.J. said :—" I do not think that contention can be maintained. Assuming that the Act does not impose any obligation on the company to lay down this apparatus, when the Act says that the company may lay it down and repair it, the meaning is that, if they do lay it down in the street, they must use due care in laying it down and keeping it in repair so that the safety of the public is not endangered " (4).

The same body may be both a highway authority and a drainage authority. Its liabilities in these two capacities are quite distinct: *White* v. *Hindley Local Board* (5); *Thompson* v. *Mayor &c. of Brighton* (6)—cases which are set forth in my brother *Dixon's* judgment. The former case is, in my opinion, particularly important. The local board were surveyors of the highway and also the sewer authority. A grid was placed in the highway over an opening in a sewer which was under the board's control. The grid was defective and a horse's leg was injured. It was held that the board was liable

(1) (1914) 17 C.L.R. 524.
(2) (1916) 22 C.L.R. 352.
(3) (1894) 2 Q.B. 599.
(4) (1894) 2 Q.B., at p. 608.
(5) (1875) L.R. 10 Q.B. 219.
(6) (1894) 1 Q.B. 332.

for damages. *Blackburn* J. says :—" Now the placing of this grid over the opening from the road into the sewer evidently was done with two objects, the one to prevent the hole from being dangerous, the other, that while allowing the water to flow from the road into the sewer, the grating might prevent the stone and other matters from passing through ; one purpose was, therefore a road purpose, the other a sewer purpose. And the grid being there for both purposes, the defendants have at least a joint liability with themselves as surveyors in their capacity of owners of the sewers. . . . The local board here are under the same obligation, as proprietors of the sewers, to keep these grids in due order, being put down for a purpose common to the highway and sewers. It appears that the grid in question had been left in a dangerous condition for six months. The defendants, therefore, are liable, at all events in their capacity of owners of the sewers " (1).

Thus, in the present case, if the drain pipe was put down both for road purposes and for drainage purposes apart from any considerations affecting the road, the defendant would be liable for damage resulting from proved negligence.

(6) There can be no doubt in this case that the hole in the drain was a nuisance in the highway and that, if there was a duty to repair, there was a negligent failure to perform that duty. The defendant board was informed that the drain was broken and did nothing to repair it or to protect the public from the resulting danger.

In order to determine the applicability of the legal principles which have been stated, it is necessary to ascertain whether the drain was put down merely as part of road work or whether it was a separate artificial structure introduced into a road under a power other than the power to make roads and alter them &c. Upon this point I have the misfortune of differing from my brother *Dixon*.

The findings of the learned judge which touch this question are as follows :—

" It was a little before 1928 the Bayswater Board had constructed, as it is called, Garratt Road, in that they put down an asphalt surface of small width in the centre of the road. In order to do that satisfactorily, the road being, as I have said, low-lying,

(1) (1875) L.R. 10 Q.B., at pp. 223, 224.

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water-logged and boggy, they put down in the first place open drains, and later on, in place of the open drains, what would be called agricultural drains, that is, pipes not closely fitted together so that the water could flow through the junctions and drain the sub-soil. . . . As regards the use of the agricultural drains for pure draining purposes, apart from the purposes of the road, I think that any such use was merely incidental and to be expected in that locality. There were springs in private property as well as outside private property in the neighbourhood of the road, and it was necessary that the water should be led away somewhere from these springs." I have not found any evidence as to the date of the construction of the road.

These findings do not mean, in my opinion, that the pipe drain was put down exclusively for road purposes. They concede that the drain was necessary and was provided to lead water away from the springs which flowed in the vicinity though this purpose is regarded by the learned judge as the less important purpose. The reference to the utilisation in fact of the drain for " pure draining purposes " shows that the learned judge considered that the drain was in fact used for both road purposes and other drainage purposes.

Whatever construction may be put upon the findings mentioned, the evidence does not show that the drain was either constructed or used only for road purposes. The drain in question is an underground pipe drain, not an open gutter. It was constructed (except at particular places where occasionally repairs were made) with porous earthenware pipes, being what is commonly known as an agricultural drain. It was therefore obviously not a drain constructed for the purpose of immediately taking away surface water which flowed from the surface of the asphalt road originally constructed by the council. It is clear that an open gutter would have served that purpose much better than an agricultural drain buried beneath the soil. The drain was made as an agricultural drain because springs were constantly discharging water which made the ground boggy in the road area and in adjoining private properties. There is no evidence that the drain was made at the time when the road was constructed. Indeed the evidence shows that open gutters were first provided. There is no direct evidence as to the purpose

for which the pipe drain was made, but a number of witnesses made statements as to their opinions on this subject.

In February 1935 Mr. E. W. Godfrey, an engineer of the Main Road Department who was in charge of the construction of the bridge and approaches including about 250 feet of Garratt Road, examined the northern portion of Garratt Road. He said :—" I found a spring existed in the vicinity. Earthenware pipes had been put down to lead the water away, but they had been broken and the passage of water blocked." Mr. Godfrey called the attention of defendant board's engineer to the condition of the drain and the board's engineer said that he would look into the matter. Nothing was in fact done to mend the drain or to protect the hole. Mr. Godfrey also gave evidence, which was not contested, that " none of the work of the Main Road Department concerned this piping or drain." Thus at the time when the road was being reconstructed and being brought up to date it had not occurred to anyone that the reparation and re-institution of this obviously broken drain was required in the interests of the road.

Mr. Godfrey further said :—" The pipe drain was for the purpose of taking surface waters off the road and spring water also to the river. . . . The spring I have mentioned rises to the surface in a private allotment and flows to Garratt Road. The drain under discussion, on the north-east side, is wholly constructed to take away the spring water in my opinion and not for road surface drainage. The whole area is boggy. I think as a matter of road construction drains on both sides are necessary." As I have already said, the drains which would be necessary to take off surface waters from a road would presumably be open gutters at the side of the road. There is no evidence that there is any pipe drain on the south-west side of the road.

Mr. Timms, the secretary of the defendant board, does not give the evidence which might have been expected, namely, that the drain was made at the same time as and with the road, and for the purpose of protecting the road structure. He gives no evidence that the drain was part of the road construction. He said :—" The pipe line which has been spoken of was laid as to part in 1928 and as to the remaining part before that date. I don't know the exact

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date. Before those pipes were laid there was an open drain on each side of Garratt Road. These were cut about ten feet from the frontages and about fourteen feet out from the constructed surface. These were for the purpose of keeping water from the foundations of the constructed road." The last-mentioned sentence plainly refers to the open gutters and not to the pipe drain. Thus the road was constructed by the board at some unspecified date, but before, possibly years before, the pipe drain was laid. Referring again to the pipe drain Mr. Timms explained that the agricultural pipes were not laid close and were unglazed so as to allow water and moisture to come into them and that " this drain, among its other purposes, was to drain off the spring water." He also said : " I believe that a couple of private properties do join up with the drain pipes." Finally it may be observed that the broken drain was not dealt with until January 1936 although the work of making the new road had been completed in April 1935. It was not suggested at any time by the council to the commission that the repair of the drain was a necessary part of making the road.

In my opinion the proper conclusion to draw from this evidence was that the drain was not constructed exclusively, if at all, for road purposes. There is no evidence that the structure of the road was in any way affected by underground water in such a way as to threaten its stability. It is true that the secretary of the defendant board now says that the original open gutters (not the pipe drain) were for the purpose of keeping water from the foundations of the constructed road. But even this opinion, apparently not the opinion of an engineer but of a clerical executive officer, is not supported by any other evidence and the witness did not profess to have any knowledge of the circumstances of the original construction of the drain. Possibly there are still gutters on each side of the road as well as the reconstructed pipe drain on one side.

(7) Thus, in my opinion, the evidence establishes that the drain, even if it were put down for road purposes (as to which there is no direct evidence), was also put down for ordinary drainage purposes —for draining water coming from springs. It was the duty of the defendant to keep it in proper order so as to prevent it from becoming a danger to the public (see cases cited under 3, 4, 5, above). The

defendant negligently failed to carry out this duty. As soon as the Commissioner of Main Roads began work on the road the defendant simply abandoned the system of regulation and inspection which had previously been in operation.

Any proper inspection would have shown at once that the drain was broken, and, if conducted with any reasonable degree of care, inspection would have resulted in the discovery of the hole which was responsible for the injury to the plaintiff. In fact the defendant's engineer was expressly informed that the drain was broken somewhere though his attention was not called to this particular break. The hole was allowed to exist for at least six months after the commissioner had ceased work upon the road. The defendant believed and acted under the belief that while the road was being reconstructed it had no duties with respect to the road or that it could safely leave the performance of its duties to the commissioner. This belief was mistaken and cannot protect the defendant from liability.

The commissioner was concerned only with the road, not with the drain. His use, in connection with the road construction work, of the sides of the road did not in any way exclude the board from control of the drain, which remained under the management of the board. The area appropriated for road purposes was not placed under the control of the commissioner under the *Main Roads Act* 1930, secs. 13 and 15, and it was not declared a Government road under sec. 86 of the *Public Works Act* 1902. Thus the road area itself remained under the care, control and management of the board under sec. 160 of the *Road Districts Act*. The arrangement between the road board and the Minister by which the commissioner did the work of making a new road did not decrease the responsibilities of the defendant. The defendant trusted to the commissioner to discharge these responsibilities. They were not in fact discharged, and the defendant, accordingly, is liable for the damage caused to the plaintiff.

The judgment of the Supreme Court should therefore be set aside and judgment should be entered for the plaintiff with costs of the action and a direction should be given that the case be remitted to the Supreme Court for the assessment of damages in such manner as may seem to be proper.

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The appeal should be allowed. The appellant was allowed to proceed *in forma pauperis* and there should be no order as to the costs of the appeal except for outpocket expenses of himself and his legal advisers and an allowance for the time spent in connection with the appeal by the staff of his legal advisers.

DIXON J. The matter at issue in this appeal is the liability of a road board to a pedestrian who sustained injuries through a fall on a roadway owing to putting his foot in a hole caused by the breaking of an earthenware pipe.

The road where the accident took place lies in the district of the Bayswater Road Board which is the defendant in the action and the respondent in the appeal. It is called Garratt Road. Until recently it was a blind street ending on the north or right bank of the Swan River to which it ran from the Old Guildford Road, a distance of six or seven hundred yards. The fall of the land is towards the river, but it is gradual and the road runs through places that are low-lying and boggy. There are some springs in adjoining land. The locality is not populous and the dwellings straggle out and practically cease before half the distance to the river is traversed. Where the last house but one stands on the north side an unmade road, called Frinton Street, runs off at right angles. It contains no houses and bears no regular traffic. Garratt Road is a chain road but only a width of about twelve feet in the centre had been constructed by the road board. On each side of the road, about fourteen feet from the constructed surface, open drains were cut leading to the river. The purpose, according to the secretary of the road board, was to keep water from the foundations of the constructed road. About seven or eight years ago parts of the open drain on the north-east side were converted into an agricultural drain composed of porous earthenware pipes, nine inches in diameter, laid with spaces between them. The agricultural drain passed the mouth of Frinton Street. In 1931 it was found that it had been broken at that point and the road board substituted at the crossing some cement piping with glazed earthenware pipes at the ends nine inches in diameter. They were covered with soil, perhaps twelve inches deep. Garratt Road remained in this condition until 1934 when,

under the authority given to him by sec. 94 of the *Public Works Act* 1902-1933 (W.A.), the Minister of Works erected a bridge across the Swan River at the end of Garratt Road. The work was done by the Commissioner of Main Roads, who, when so desired by the Minister, constructs works (sec. 19 (*a*) of the *Main Roads Act* 1930-1932). The erection of the bridge made Garratt Road a main artery of traffic and the work to be done by the commissioner included the construction in that street of a roadway with a bituminous surface eighteen feet wide. The work was completed in April 1935, except that the embanked approach to the bridge, about 250 feet in length, was left unsurfaced so that it might completely settle. While the Commissioner of Main Roads was making the centre of Garratt Road, the traffic was turned on to the unmade north-eastern side and necessarily passed over the agricultural drain. The traffic consisted of, or at any rate included, the commissioner's trucks carrying as much as four tons of sand, rubble or stone. In consequence the greater number of the pipes was broken. At Frinton Street the commissioner's truck smashed in the top of the glazed earthenware pipe. It lay next to the cement pipes in a position about eight feet further on than the produced fence alignment of the western side of that street. The pipe was two feet long. By 6th October 1935, when the plaintiff put his foot in the hole and fell, there was a cavity there of almost that length and about eight inches wide and eight or more inches deep. It was more or less hidden by grass which grew luxuriantly at the sides of the bitumen way. The bottom of the pipe was unbroken, but it contained roots of grass and debris.

The Commissioner of Main Roads had not done any work in connection with the bridge or road for some five months before the accident. But, at the end of July, the road board had concurred in an arrangement suggested by or on behalf of the Minister of Works, that, until the embankments had assumed their permanent sets Garratt Road should be maintained by the commissioner out of moneys allocated to the board and its neighbour on the other side of the river by the Minister from a fund arising under the *Traffic Act* 1919-1935 (See sec. 13 (2) (*c*)) and left by the board in the hands of the commissioner. The defendant board says that it regarded

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the road as under the commissioner's care. Whether for that reason, or because it saw no need to do so, it did not interfere with Garratt Road. The soil of roads is vested in the Crown (sec. 85 of the *Public Works Act* 1902-1933 (W.A.)) but subject thereto the road, the materials thereof and all things appurtenant thereto vest in the road board. The board, which has full powers of construction and maintenance, is given the care, control and management of the road (sec. 160 of the *Road Districts Act* 1919-1933 (W.A.)). But this is subject to the *Public Works Act* 1902-1933 (W.A.), sec. 86 (1) of which authorizes the Minister to construct or repair any road within any part of the State. The result of these provisions, probably, is that whilst a road is in the hands of the Minister, or the commissioner acting on his behalf, the road board is relieved of responsibility and is not liable for any defective condition of the highway attributable to operations conducted upon it (See *Horsfield* v. *Cana Rural Municipality* (1)).

The board contends that at the time of the accident the road should be considered as still under construction or as under repair by the Minister. But, for reasons which will afterwards appear in this judgment, I think this question has little importance in the application of the principles upon which the road board's civil liability for the condition of the road depends.

No want of proper care was imputed to the plaintiff. It was conceded that the cause of his fall was the hole in the grass-grown highway and no allegation was made that negligence on his part contributed to the misfortune. The question is whether the road board is under a civil liability to the plaintiff for the particular damage thus sustained by him in consequence of the state or condition of the road. The duty of a road authority towards individual members of the public exercising the common right of passage over the highway has no similarity or even analogy to the duty or duties of occupiers of property to safeguard those who lawfully come upon the premises they occupy from dangers arising from their character or condition. The principles upon which the road authority's liability, or absence of liability, depends have nothing to do with the ownership or occupation of property or the

(1) (1925) 2 D.L.R. 874, at pp. 875, 878, 879.

relation between an owner or occupier and persons whose presence he may solicit or suffer.

A highway is devoted to public use and its use is an advantage enjoyed as of common right. The public right is independent of the ownership of the soil, which might be vested in the frontagers or in other persons not in the least concerned in the state of the way. In order that the public right may be enjoyed to best advantage, road authorities are established and armed with powers in relation to the highways. For that purpose a legal authority is given to them to construct, maintain and repair roads and to keep them free of obstruction and in an orderly condition. But the existence of such powers gives rise to no civil liability for the consequences of the defective state of a road. Even where a parish was liable to indictment for failure to repair a highway, no action would lie against it for the recovery of damages sustained by an individual as a result of the disrepair of the road, and this notwithstanding the general rule that particular damage arising from a public nuisance is actionable. It is well settled that no civil liability is incurred by a road authority by reason of any neglect on its part to construct, repair or maintain a road or other highway. Such a liability may, of course, be imposed by statute. But to do so a legislative intention must appear to impose an absolute, as distinguished from a discretionary, duty of repair and to confer a correlative private right (Cf. *City of Vancouver* v. *McPhalen* (1)).

No civil liability arises from the incorporated character of the road authority, or from the fact that it is expressly made liable to be sued (*Gibson* v. *Mayor of Preston* (2)). Nor is its responsibility affected by statutory provisions vesting the soil of the highway in it, or placing the highway under its management and control (*Cowley* v. *Newmarket Local Board* (3) ; *Municipal Council of Sydney* v. *Bourke* (4)).

The purpose of giving the road authority property in and control over the road is to enable it to execute its powers in relation to the highway, not to impose upon it new duties analogous to those of an occupier of property. The body remains a public authority

(1) (1911) 45 S.C.R. (Can.) 194.
(2) (1870) L.R. 5 Q.B. 218.
(3) (1892) A.C. 345.
(4) (1895) A.C. 433.

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charged with an administrative responsibility. It must decide upon what road work it will expend the funds available for the purpose, what are the needs of the various streets and how it will meet them. A failure to act, to whatever it may be ascribed, cannot give a cause of action. No civil liability arises from an omission on its part to construct a road, to maintain a road which it has constructed, to repair a road which it has allowed to fall into disrepair, or to exercise any other power belonging to it as a highway authority. It is not surprising that attempts to escape the application of this doctrine should be made and renewed from time to time on behalf of persons suffering personal injury through the defective condition of public highways. Striking illustrations are to be found in the facts of some of the cases in which such attempts have been defeated. In *Cowley* v. *Newmarket Local Board* (1) the road authority had failed to reconstruct a dangerous footpath and had, on the contrary, spread its surface. A ramp existed across the footpath into an adjoining owner's premises. It fell to a depth of eighteen inches below the path, which was retained by a low wall. Thus pedestrians were confronted with a sheer drop in the footway of a foot and a half. The road authority gravelled the footpath for its whole width and otherwise left the danger. The House of Lords, affirming the Court of Appeal (2) and *Denman* J. (3), decided that a pedestrian who fell into the trap by dark had no cause of action against the road authority.

In *Maguire* v. *Liverpool Corporation* (4), the road authority constructed a crossing of slabs of stone. As the result of water and traffic a hole five inches deep and nine inches wide was formed in the crossing and this was left unrepaired. The Court of Appeal held that the authority was under no civil liability for injury caused by the dangerous crossing.

In *Moul* v. *Thomas Tilling Ltd. and Croydon Corporation* (5) the road authority had made a street of wood blocks, a surface which might under the influence of water swell and bulge and so become dangerous. This in fact happened and the authority neglected

(1) (1892) A.C. 345.
(2) (1890) 7 T.L.R. 29.
(3) (1890) 6 T.L.R. 321.
(4) (1905) 1 K.B. 767.
(5) (1918) 119 L.T. 318; 34 T.L.R. 473.

either to fence off the area affected or to set it right. Again it was decided that it incurred no liability for damages suffered in consequence of the dangerous condition of the surface.

In *Sheppard* v. *Glossop Corporation* (1) Sheppard on a dark night fell down a stone retaining wall into a road upon which he thought he was walking. In fact he had taken a road which branched from it and ran above it, and then he had taken a course which led him to the edge of the wall, where he fell. At the point where the roads branched a light had been maintained by the borough, but from motives of economy it had been put out early on the night when Sheppard missed his way. The failure of the borough to maintain the accustomed light involved them in no liability to Sheppard. *Scrutton* L.J. said: "It is left to their discretion to light or not to light: therefore they need not light at all; if for a time they light they may discontinue either wholly or partially in point of time or in point of space, and the mere discontinuance is no breach of duty" (2).

But 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. It is, of course, a civil wrong to cause particular damage by obstructing a highway, or by making it unsafe or dangerous. Interferences with a highway which in themselves would be unlawful in a stranger are as a rule authorized acts when done by a road authority. But a road authority in doing them must take due care for the safety of those using the highway and is not protected if it creates dangers which reasonable care and skill could avoid. Because the road is under its control, it necessarily has an opportunity denied to others for causing obstructions and dangers in highways. But when it does so, the road authority is liable, not, I think, under any special measure of duty which belongs to it, but upon ordinary principles. These principles include the rule that to render the highway unsafe is to commit a nuisance, and that to execute authorized works without due care and skill for the safety of others leaves an action to anyone who suffers a

(1) (1921) 3 K.B. 132. (2) (1921) 3 K.B., at p. 145.

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consequential injury. It is evident that even if what otherwise might be an obstruction or danger is created on the highway, it may be made relatively harmless by the use of some additional precaution, such as guarding or lighting. If the precaution is discontinued, consequences may ensue which up to that time had been intercepted. For these consequences the road authority will be liable in damages. But it will be liable not on the ground that it failed to exercise its powers so as to prevent them, but on the ground that it was the active agent in causing an unnecessary danger in the highway. This is well illustrated by observations made in the course of the judgments in *Sheppard* v. *Glossop Corporation* (1). Immediately after saying, in the passage I have already quoted, that to discontinue lighting was no breach of duty, *Scrutton* L.J. said: "That is, of course, subject to this; that if they place an obstruction in the highway they must by lighting or warning, or by watchmen or fences or other reasonable means, guard against the danger they have themselves created" (2). *Bankes* L.J. said: "I think it will be found that wherever a plaintiff has succeeded in establishing a liability it has been not for merely omitting to light a part of the district but for making it dangerous unless it is sufficiently lighted, and then leaving it unlighted" (3).

The improper nature of the original act of the road authority must always be the foundation of the complaint against it. Cases in which but for continual subsequent safeguards the work actively done by the road authority would make the highway dangerous must be distinguished from the very different class of case in which the operations of the road authority put the highway in a condition perfectly proper and safe, but liable in the course of time through wear and tear and deterioration to become unsafe. Whenever an artificial road surface is provided, neglect to maintain it is likely to result in its destruction by wear and weather. Its last condition may be expected to be worse than its first. But these considerations do not throw upon the road authority which fails to maintain a road any civil liability for the consequences, although at the time of construction they might have been foreseen. If, judged according

(1) (1921) 3 K.B. 132. (2) (1921) 3 K.B., at p. 145.
(3) (1921) 3 K.B., at p. 140.

to the standards of the time and the circumstances then prevailing, the design and execution of the work were not improper or unsafe, the development of a defective or dangerous condition of the highway is to be attributed to the failure to maintain or repair, which involves no civil liability for particular damage. It cannot be regarded as a dangerous condition " caused by," because necessarily resulting from, the original construction of the roadway. Illustrations will be found in two of the cases I have already cited.

In *Maguire* v. *Liverpool Corporation* (1) the paving stones were exposed to the action of water and traffic in such a way that the resultant condition of the surface could scarcely have been unforseen. Yet counsel's contention that the road authority was liable for the consequences of the mode of construction failed (2).

In *Moul* v. *Thomas Tilling Ltd. and Croydon Corporation* (3) the plaintiff relied upon the known tendency of wood blocks to expand under the influence of water and form a danger in the roadway. He contended that upon using them it became incumbent upon the defendant road authority to take measures to avert injury when this happened. The court held, however, that, wood blocking being a usual method of construction, no duty of subsequent action was incurred by the defendant road authority.

In *Short* v. *Corporation of Hammersmith* (4) the highway authority used on a sloping footway gravel siftings which tended to slip down with traffic. They incurred no responsibility for a hole or depression thus formed in the path.

I shall give some further examples in order to show more clearly the operation of this principle which, perhaps, is the determining consideration in the present appeal.

In *Holloway* v. *Birmingham Corporation* (5) pitch or tar, owing to hot weather, oozed up between wood blocks which had been laid upon it some time before. The mode of construction imposed upon the road authority no obligation to deal with the condition of the surface thus occasioned.

In *Masters* v. *Hampshire County Council* (6) the road authority cut small drains eight inches to a foot deep in the earth at the side of a road,

(1) (1905) 1 K.B. 767.
(2) (1905) 1 K.B., at pp. 779, 780, 781.
(3) (1918) 119 L.T. 318.
(4) (1910) 104 L.T. 70.
(5) (1905) 69 J.P. 358.
(6) (1915) 84 L.J. K.B. 2194.

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running at right angles to it. The purpose was to deliver the surface water into pipes running under the roadway. Grass was allowed to grow over and hide them with the result that they became a danger. As it was a normal method of draining roads, by adopting it the road authority did not bring upon itself any obligation to prevent the grass hiding the drains and thus creating a danger to pedestrians.

To these illustrations of the principle that no duty lies upon a road authority to take active measures to avert dangers which because of a neglect to maintain it naturally result from a mode of dealing with the highway originally adopted, if it was proper at the time it was done, a reference should be added to a decision of a Divisional Court no report of which is available but which seems to be close to the present appeal. It appears from *Beven* on *Negligence*, 4th ed. (1928), vol. I., p. 390, *Pratt* on *Highways*, 18th ed. (1932), p. 412, and *English and Empire Digest*, vol. 26, p. 402, that in *Andrews* v. *Merton and Morden Urban District Council* (1) the highway authority was held free of liability for injuries sustained by a pedestrian through the decayed condition of timber forming a footpath which, however, had been constructed originally in a proper manner.

On the other hand, if the construction was improper or negligent, it is no answer that the dangerous condition arose not immediately but as a consequence, proximate even if indirect, of the mode of construction adopted. This is the ground of the decision in *Woollahra Council* v. *Moody* (2).

So far I have dealt with the liability of a road authority only, that is, an authority exercising powers for the construction, maintenance, repair and control of highways. A marked distinction exists between the position of such an authority in relation to the defective condition of a road, street, bridge, footpath, or other place over which there is a public right of passage and the position of a water, sewerage, gas and other like authority in relation to the defective condition of any parts of its undertaking, which, under statutory authority, it maintains in a highway so as to form part of roadway or pathway used by the public. The liability of such a body depends, of course, ultimately on the effect of the statute under which it acts.

(1) (1921) 56 L. Jo. 466; 11 L.J.C.C. 3. (2) (1913) 16 C.L.R. 353.

But if its powers of interference with the roadway extend to maintenance and repair of the object it has placed there, then, as a rule, it will be liable for the consequences if that object is negligently allowed to fall into disrepair. The reason for this liability in the case of such a body may be found in its ownership or control of the structure in the highway, or in the implications discoverable in the statute. In *Frencham* v. *Melbourne and Metropolitan Board of Works* (1), where a sewerage authority was held liable for failure to repair a sewer covering in a street, *Cussen* J. said :—" I think the cases decided as to municipal corporations " (i.e., road authorities), " which from time to time alter or are empowered to alter the highway, have no application. There, when they have finished their work on the highway, it is still the highway, and that is the highway a member of the public is entitled to use. The position is entirely different when for its own purposes another body not the general road authority is permitted to construct a structure, and to have portion of that structure representing for the time being the surface of the road." The distinction rests on the difference in the nature of functions and does not depend on the separate identity of the bodies that perform them. Water supply and other services are often conducted by the same corporation as constitutes the road authority. When that is so, the body incurs or may incur a civil responsibility for the condition of so much of the road surface as it provides as water authority which it does not incur for the general surface provided by it as road authority. The decided cases steadily maintain the distinction, but a failure to bear it sufficiently in mind in applying them can lead to much confusion. For instance, *White* v. *Hindley Local Board* (2), which was relied upon by the plaintiff, contrasted the position of the local board as surveyor of highways with its position as sewer authority. In its capacity as owner of the sewers, it was held liable for an accident caused by a horse thrusting its foot through a grid two bars of which had been left broken for over six months. The grid or grating was one of a series placed at intervals along the road for the purpose of conveying surface water off the paved portion of the road into a sewer running

(1) (1911) V.L.R. 363, at p. 370 ; 33 A.L.T. 30, at p. 33.
(2) (1875) L.R. 10 Q.B. 219.

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under it. The court conceded that, as highway authority, the local board would not be liable for non-repair of the grid, but decided that as the board had two capacities and as one of the purposes of the grid was to keep the hole over the sewer from being dangerous, it was under an obligation as proprietor of the sewers to keep the grids in due order. In the same way, in *Blackmore* v. *Vestry of Mile End Old Town* (1), the liability of the vestry for the slippery and dangerous condition of a worn iron flap to a water box was placed exclusively upon the ground that they had put it in the highway as water authority. "The defendants did not lay this iron plate in their capacity as surveyors of the highway, but in that other capacity of theirs which gave them power to water the streets, and it is in that capacity that they are liable in this action" (per *Brett* L.J. (2)).

A remarkable example of the distinction is supplied by *Thompson* v. *Mayor &c. of Brighton* (3). The defendant was both the road authority and the sewerage authority. The road had been worn down round a cover of a manhole belonging to a sewer. The manhole cover was in itself in good order, but, owing to its projection from the worn surface of the road, was a source of danger which in fact caused the injury complained of. The Court of Appeal decided that the cause of the accident was the failure of the defendant as road authority to keep up the level of the road and for such a failure there was no civil liability. *Davey* L.J. said:—"What was the cause of the accident? It appears to me . . . that there can only be one answer—it was the default of the corporation to keep the road in repair" (4).

In *Skilton* v. *Epsom and Ewell Urban District Council* (5) the decision turned upon the capacity in which the defendant corporation had acted in fixing traffic studs in the roadway. One of the studs put down to guide traffic had worked loose and ultimately was thrown up out of the roadway and hit the plaintiff. *Slesser* L.J. said: "The question is not, in my opinion, whether the body which is sought to be made liable for non-reparation is or is not the same

(1) (1882) 9 Q.B.D. 451.
(2) (1882) 9 Q.B.D., at p. 453.
(3) (1894) 1 Q.B. 332.
(4) (1894) 1 Q.B., at p. 343.
(5) (1936) 154 L.T. 700; now also reported, (1937) 1 K.B. 112.

body as that which is responsible for the maintenance of the road, but whether the particular alleged nuisance or injury which they have permitted is one which they have done in their capacity as repairers of the road or in their capacity in carrying out the obligations or the powers of some quite different statute" (1). The Court of Appeal decided that the studs were inserted for the purpose of traffic control under the road traffic legislation and not in the exercise of any powers for the maintenance of highways. Accordingly the defendant corporation was liable for the consequences of its neglect to keep the stud fixed in position.

The decision of this court in *South Australian Railways Commissioner* v. *Barnes* (2), so far as it does not depend on special statutory provisions, falls into this category.

The actual decision in the much explained *Borough of Bathurst* v. *Macpherson* (3) seems now to have found a sound justification under the same head. The municipality, which was also the highway authority, made on a public road an open brick drain five feet in width and reaching a depth of four feet where it ran into a covered barrel drain. The bricks of the drain broke away and the rain tore away the soil and left a hole into which the plaintiff's horse fell. It is apparent that the drain served some other purpose than merely taking the surface water of the road. Indeed the first ground relied upon in the judgment of the Board delivered by Sir *Barnes Peacock* is that the case resembles *White* v. *Hindley Local Board* (4). Referring to that case, his Lordship says: "Without saying that the defendants" (the local board) "would be liable as surveyors of highways, the court held that as the sewers were vested in them, they were liable 'at all events in their capacity of owners of the sewers'" (5). He then proceeds: "In the present case the barrel drain, even if the property of it did not belong to the appellants, was not only made by the appellants, but the sole control and management of it were by the statute vested in them; and in their Lordships' view these circumstances threw upon them a duty of a similar kind to that which was held to exist in the case cited."

(1) (1936) 154 L.T., at p. 704.
(2) (1927) 40 C.L.R. 179.
(3) (1879) 4 App. Cas. 256.
(4) (1875) L.R. 10 Q.B. 219.
(5) (1879) 4 App. Cas., at p. 266.

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In *Skilton* v. *Epsom and Ewell Urban District Council* (1), *Borough of Bathurst* v. *Macpherson* (2) is dealt with as deciding the liability of a body performing functions besides those of road authority. *Slesser* L.J. says of it: "There one authority had a duty under one specific Act, namely, the local Act of the Dominion from which the appeal was brought, to construct a street and maintain it, and also they were responsible for the drains, gutters or sewers" (3). *Romer* L.J. said: "There the municipality of Bathurst were held liable for something that they had done on the highway which was properly done at the time it was done, but by reason of neglect on their part had got into such a state that it occasioned a nuisance to the highway. They were held liable although they happened also to be the highway authority" (4).

Again it is said that, in *Andrews* v. *Merton and Morden Urban District Council* (5) already mentioned, the case of the borough was distinguished on the ground that it applied only to something, such as a ditch, which was not portion of the highway, but introduced so as to adjoin it in such a position that, unless kept in repair, it would damage the highway (*Pratt, Highways*, 18th ed. (1932), p. 412).

It is true that, in the course of his explanation of the *Bathurst Case* (2) in *Municipality of Sydney* v. *Bourke* (6), Lord *Herschell* L.C., after stating that "the borough of Bathurst had constructed a barrel drain under or in proximity to the highway," proceeds to say: "For what purpose and under what authority this had been done is not stated, and is not material; the construction of the drain was no doubt lawful." But the very remark implies that it was not done in its capacity of highway authority.

Few decisions have proved the source of so much error as *Borough of Bathurst* v. *Macpherson* (2). In Canada and in Australia it led to a complete departure from principle. In England it was responsible for the erroneous decision in *Kent* v. *Worthing Local Board* (7). Rehabilitation was a slow process but one which seemed complete (Cf. *Municipality of Pictou* v. *Geldert* (8); *Thompson* v.

(1) (1936) 154 L.T. 700; now also reported, (1937) 1 K.B. 112.
(2) (1879) 4 App. Cas. 256.
(3) (1936) 154 L.T., at p. 704.
(4) (1936) 154 L.T., at p. 705.
(5) (1921) 56 L. Jo. 406.
(6) (1895) A.C., at p. 440.
(7) (1882) L.R. 10 Q.B.D. 462.
(8) (1893) A.C. 524.

Mayor &c. of Brighton (1); *Municipality of Sydney* v. *Bourke* (2); *Clarkbarry* v. *Mayor &c. of South Melbourne* (3)). Dicta it contains are declared to be "broader than was necessary for its decision" and a case which it pronounced sound law has since been overruled (See *Municipality of Pictou* v. *Geldert* (4)). The explanation given by Lord *Hobhouse* (4) of the *Bathurst Case* (5) has itself been qualified by adding negligence as a necessary condition of liability (*Lambert* v. *Lowestoft Corporation* (6)). Another explanation also has been given of the case in *Moore* v. *Lambeth Waterworks Co.* (7). A case with such a history cannot be regarded as providing a safe link in any chain of legal reasoning.

In *Unger* v. *Shire of Eltham* (8) a road authority was held liable for damage sustained through a hole in a broken culvert over a drain across a country road. There was no negligence in the original construction, but the jury found negligence in allowing the culvert to become rotten and unfit for traffic, and in allowing the hole to remain in the culvert without repair and without giving notice to persons using the road. The ground upon which the court held the defendant shire liable was that it had made a drain across the highway which, unless covered, would be a nuisance and a duty was thus imposed upon it to maintain the covering. The question was decided upon a special case which contained no statement of the nature or purpose of the drain, but it may be suspected that its sole purpose was to carry off surface water from the inner guttering of a hillside road, and that it formed an ordinary incident in the construction of a mountain road. If this were so, the decision was, in my opinion, incorrect. On the other hand, if the defendant had made the drain, not as road authority but for some other purpose, as, for instance, a drainage scheme foreign to road construction, the decision might be supported. It is a mistake to suppose that simply because a thing such as a covered drain or gutter is of such a nature that it will, when it falls into disrepair or dilapidation, cause a dangerous condition of the highway, it is incumbent on the road authority

(1) (1894) 1 Q.B,. at p. 340.
(2) (1895) A.C. 433.
(3) (1895) 21 V.L.R. 426; 17 A.L.T. 197.
(4) (1893) A.C., at p. 531.
(5) (1879) 4 App. Cas. 256.
(6) (1901) 1 K.B. 590.
(7) (1886) 17 Q.B.D. 462.
(8) (1902) 28 V.L.R. 322; 24 A.L.T. 96.

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which put it there to take active measures to prevent or remove that condition. If the drain or gutter forms part of the road construction and is put there to serve a purpose arising out of its character as a highway, as for example to carry off the surface water, or to drain off seepage and protect the road base, the road authority incurs no civil responsibility by allowing it to fall into a condition of danger, unless in the first instance it acted improperly in placing it there. If the road authority showed a want of care or skill or took an unreasonable course in the adoption of such an expedient or in the design or execution of the work, neither lapse of time nor the use in the interval of some additional precaution which while it was practised had prevented any ill consequences ensuing would relieve the road authority of civil responsibility for damage ultimately caused by the work. But, given due care and skill and proper regard for the public safety in the first instance, the road authority does not lose its immunity from liability for damage arising from its failure to uphold, maintain and repair because the work that it has done for highway purposes may, or even probably will, under the influence of wear and tear and the stresses of use, give rise to a defective or dangerous condition. To speak of the resulting state of the road as a nuisance in the highway may be correct enough. There is, of course, always a risk in applying the word to the physical thing instead of to the act or omission constituting the wrong of nuisance. But, apart from that, the question is not whether a nuisance has been caused. A highway authority might be indictable for a nuisance arising from its failure to repair. But it was not liable for the particular damage which an individual suffered from the indictable nuisance. When the highway authority acts in that capacity the question is whether, by the negligent exercise of its statutory powers or otherwise without statutory justification, it has been the active agency in causing the nuisance. It is for this reason that I expressed the view that it was of little importance in the present case whether the road at the time of the accident should be considered as still under construction or as under repair by the Minister. For, on the one hand, if the drain had been put in Garratt Road, not for road purposes, but for some foreign purpose, as, for example, if it had been a sewer, it would remain under the control

and responsibility of the authority which put it there whether road board or some other authority and would not be part of the subject matter which the Minister might construct or repair under sec. 86 (1) of the *Public Works Act* 1902-1933 (W.A.) considered alone. On the other hand, if the drain formed part of the road construction undertaken for road purposes, the road board's liability depends upon the propriety of its original act, and the subsequent failure to repair amounts only to a step in causation. To whichever authority the care of the road belonged for the time being, the result would be the same. The causation would be complete.

But on the facts of the case it is, in my opinion, established that the drain was made for roadway purposes and that when the open drain was made originally, when later part of it was converted to an agricultural drain, and when, in 1931, the glazed earthenware pipe was put in, the road board exercised its powers as a highway authority with due care and skill and without negligence in the design or the execution of the work.

Dwyer J., who heard the action, after saying that the road board constructed Garratt Road by putting down an asphalt surface of small width in the centre, went on :—" In order to do that satisfactorily, the road being . . . low-lying, water-logged and boggy, they put down in the first place open drains, and later on, in place of the open drains what would be called agricultural drains, that is, pipes not closely fitted together so that the water could flow through the junctions and drain the subsoil." He also said :—" As regards the use of the agricultural drains for pure draining purposes apart from the purposes of the road, I think that any such use was merely incidental and to be expected in that locality. There were springs in private property as well as outside private property in the neighbourhood of the road, and it was necessary that the water should be led away somewhere from these springs."

Apart from his Honour's findings the evidence itself appears to me to establish that the drains were regarded as necessary to protect the road from water and carry it away and that they served no other purpose. In my opinion the evidence establishes quite clearly that the purpose of the drain was to take away the water which made the soil of the road boggy. A spring or springs existed in the vicinity.

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The water from that source as well as ordinary surface water found its way to the roadway, which was low-lying. The place is described as an "area swampy in type, the soil black sandy loam." Before the porous pipes were laid in 1928 there was an open drain on each side of Garratt Road fourteen feet from the edge of the twelve-foot travelled way and ten feet from the frontage line. The secretary of the board said:—"These were for the purpose of keeping water from the foundations of the constructed road. There is spring water in the vicinity." The south side of the roadway as well as the north was boggy. But attention seems to have been chiefly directed at the trial to seepage from a spring on the northern side of the road beginning at a point about five hundred feet from Old Guildford Road. The spring rose thereabouts on a block of land near, if not adjoining the roadway.

The earthenware pipes put down in 1928 were porous and laid with spaces as an agricultural drain. This means, of course, that their purpose was to drain off water from the soil in which they were laid. They were laid along the road from the vicinity of the spring so as to lead away the water seeping from it.

The witnesses are not agreed that the agricultural pipe drain ran continuously up to Frinton Street. Two say that there was an interval of open drain, and two that the pipe drain was carried without a break up to Frinton Street. But, however this may be, it remains true that it was an agricultural drain operating to receive and take away the water which otherwise would be retained in the soil of the roadway. There was no pipe or other artificial connection between it and any adjoining block of land. The drainage it received from private land was of seepage water, that is, water soaking on to the roadway in no defined channel.

In the early part of 1935, that is, after the accident, a new pipe drain was put down along the north side of Garratt Road from near the spring to Frinton Street. It was not, it seems, of porous earthenware, and was socketed, but every joint was left open with metal packing. To this new drain there were connections with drains from three or four adjoining blocks. This was not so with the old drain, but even if it had been, it would not follow that the drain took a new character, a character other than part of the road construction.

For, in the first place, the purpose of the drains on the private blocks may have been to concentrate the water which would otherwise find its way into the soil of the road and lead it into the road drain. In the next place, I do not think that something formed in the highway by a road authority in the course of road construction or maintenance, and for that purpose, falls outside the principle which makes the authority responsible only for improper construction, merely because it is allowed to serve some quite incidental purpose beyond those for which it was adopted and causing no alteration of its design or operation. The necessity of a drain along Garratt Road to protect the made surface in the centre is acknowledged by all the witnesses, and, as I read the evidence, none of them ventures to suggest that the drain in existence at the time of the accident had any other purpose.

Some evidence was given as to the part which surface water, as distinguished from seepage, played in making it necessary to have a drain on each side of the centre way. The distinction does not seem to me to be of any importance. The main roads engineer, who was called by the plaintiff, said: "The pipe drain was for the purpose of taking surface water off the road and spring water also to the river." This refers to the agricultural drain. He also gave the following evidence in which the drain to which he first refers is probably that made in 1935:—"The drain on the north-east under discussion is wholly constructed to take away the spring water in my opinion and not for road surface drainage. The whole area is boggy. I think as a matter of road construction drains on both sides are necessary." He remarked: "I thought the seepage might be dangerous in causing subsidence." I think he meant dangerous to the base of the made road, but the notes are not clear. The view of the secretary to the road board was that the purpose was partly to take away the water from the spring, that is, the water which otherwise would come thence by seepage into the road and cause a bog. The foreman said the drain could not go very deep at Frinton Street; it had to lead water to the river, mostly from the spring. Water was always lying on the road in its vicinity where the drain began. After the agricultural drain had been damaged by

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the diverted trucks the water seeped through into swampy patches along the line of the drain.

The distinction between spring water and surface water does not seem to me to be of any importance, because the source whence the water got on to the road cannot affect the question. The point that matters is that to construct a road through boggy land the water, whencesoever it came, must be drained off. The agricultural drain in question had no other purpose than to drain the otherwise boggy land upon which the centre road construction was done. Indeed it is not too much to say that from its nature it could serve no other purpose. It lay in the soil of the highway with intervals between its porous pipes and with no drain communicating with it.

It is, perhaps, proper to add that, although I have thus dealt with the evidence establishing affirmatively that the drain was constructed and maintained by the defendant board in its character of highway authority, the burden of proving this fact does not, in my opinion, lie upon it. That the drain was constructed or maintained in some other capacity is a necessary part of the plaintiff's case, because, otherwise, the duty of repair which the plaintiff says was not fulfilled has no existence. It is hardly necessary to say that I think that the evidence of such a fact is completely absent. Nothing but negligence in the original construction of the drain can, in my opinion, give the plaintiff a cause of action.

Dwyer J. held that there was no negligence on the part of the board in the design or execution of the work. His Honour found that the construction of the drains at the inception was usual and quite proper and sufficient in the circumstances prevailing. Indeed he could not, I think, have held otherwise without departing from accepted standards. It is quite plain that the drains would have caused no trouble but for the diversion of the commissioner's trucks on to the unmade portion of the road.

In my opinion the plaintiff has no cause of action against the road board. The decision of *Dwyer* J. was right and the appeal should be dismissed.

McTIERNAN J. The appellant was injured by stepping into a hole while walking along a road in the district for which the respondent is the road and local-government authority.

The respondent had under its statutory powers introduced into the road a pipe drain. The drain was laid about twelve inches under the surface near the side of the made portion of the road. It was shown that the construction of this work was proper. The circumstances in which the drain was broken by vehicles belonging to the Commissioner of Main Roads are fully stated in the other judgments. The road material subsided into the broken drain, thus forming a dangerous cavity with its opening in the surface of the road. The accident happened some five months after the drain was broken and then the hole was overgrown with grass.

The question on this appeal is whether the appellant can bring an action against the respondent for the damage sustained by him.

The respondent is a corporate body constituted under the *Road Districts Act* 1919-1933. Its character as a road authority is marked by sec. 145, which provides that " every board shall, subject to this Act, have power to provide and set out roads within its district," and by sec. 160, whereby the roads and the things appurtenant to them are vested in it and committed to its care, control and management. The respondent's powers to make and maintain roads, drains and other works and services within its district are defined in common by sec. 162 (1) in language which is permissive and not imperative.

The respondent is not the transferee of powers, duties and liabilities once belonging to an unincorporated body which at common law enjoyed an immunity from civil liability for damage suffered in consequence of a mere neglect to make or repair the roads. Such powers, duties and liabilities as the respondent has in relation to the maintenance and repair of the road are original and to be found in the above-named Act. The appellant would not have been injured if the respondent had repaired the road. But in order to establish that the respondent is liable in damages for mere non-feasance it is necessary to show that the legislature used language indicating its intention that this liability should be imposed on it. The duty assigned to the respondent to repair the road was discretionary and upon the true construction of the whole Act it is impossible to imply any legislative intention to impose a civil liability for mere

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non-feasance (See *Atkinson* v. *Newcastle Waterworks Co.* (1); *Cowley* v. *Newmarket Local Board* (2); *Municipality of Pictou* v. *Geldert* (3); *Municipal Council of Sydney* v. *Bourke* (4)).

This immunity is limited to the respondent's failure to perform its statutory duties. It does not cover any act or omission in breach of a common law duty. In the much discussed case of *Borough of Bathurst* v. *Macpherson* (5) the Judicial Committee did not consider it necessary to determine whether the Act under which the borough carried out its functions did upon its true construction impose a civil liability on the borough for mere neglect to maintain the roads which were placed under its care and management. In that case the borough had lawfully in the exercise of its statutory powers and with due care and skill constructed in the road a brick drain which becoming defective caused a hole to open in the road. The drain was in their control and they had full power to repair it or to deal with it so as to eliminate the danger which it caused to exist on the road. The conclusion which their Lordships reached was that in these circumstances "the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger, when it arose, either by filling up the hole or fencing it" (6). By the relationship which the statute had created between the borough and the drain a duty was cast on the borough to prevent that artificial work which they had constructed from becoming a source of danger to users of the road. This was quite a different duty from the borough's duty to repair the road along which the drain was constructed. In illustrating this duty their Lordships gave an instance which exhibits no substantial difference from the facts in the present case: "Supposing the top of the barrel drain across Hope Street had fallen in, leaving a dangerous hole in the middle of that street, it would surely have been the duty of the appellants to take steps to prevent persons falling into the trench which they had originally dug; and there would seem to be no substantial difference in the liability between

(1) (1877) 2 Ex. D. 441.
(2) (1892) A.C. 345.
(3) (1893) A.C. 524.
(4) (1895) A.C. 433.
(5) (1879) 4 App. Cas. 256.
(6) (1879) 4 App. Cas., at p. 265.

a hole which had been directly made by them, and one which is the indirect but natural consequence of the artificial work they had created and had not properly kept " (1). For the purpose of explaining the *ratio decidendi* of the judgment, the Judicial Committee in *Bourke's Case* (2) made the following statement of the material facts in the earlier case :—" It appears that the borough of Bathurst had constructed a barrel drain under or in proximity to the highway. For what purpose and under what authority this had been done is not stated, and is not material; the construction of the drain was no doubt lawful. The drain having fallen into disrepair, a portion of the highway subsided into it, leaving a hole into which the plaintiff's horse fell as he was riding along the roadway, with the result that he sustained personal injuries." After reviewing the grounds of the decision their Lordships continued :—" The *ratio decidendi* was that the defendants had caused a nuisance in the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair, and whether any person injured by the breach of such a duty could maintain an action. The case was not treated as one of mere non-feasance, and indeed it was not so. The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous. If any person other than the defendants had lawfully made the drain, and the same result had ensued, such person would undoubtedly have been liable to an action just as much as if he had dug a hole in or placed an obstruction on the highway, and his liability would have been the same whether the municipality were or were not bound to repair the highway. The owner of land adjoining a highway has been held liable to an action if he digs a hole so close to the highway as to create a nuisance to passengers lawfully passing along it. Why should the municipality be less liable than any other person, in respect of the same acts, merely because the road is vested in them and certain powers or duties in relation to its repair are committed to them ? A study of other parts of the judgment in *Borough of Bathurst* v. *Macpherson* (3) renders it clear that the decision did not in any way depend on the question whether the defendants were liable to an action in

(1) (1879) 4 App. Cas., at pp. 265, 266. (2) (1895) A.C., at p. 440.
(3) (1879) 4 App. Cas. 256.

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respect of the non-repair of the highway, which is the only question in the present case " (1). It is true that some of the dicta were disapproved but no doubt is left that the *ratio decidendi* of the case is sound.

The drain which the respondent introduced into the road did *in situ* become a source of danger and the appellant was injured by it. Like the appellant in the above-named case, the respondent had the care, management and control of the road in which the drain was laid and it had the power to remove the broken drain and either to replace it or to fill up the trench along which it had conducted the drain. If the drain is an artificial work and not part of the road, it follows that the accident was not occasioned by mere non-feasance and the case is governed by the *ratio decidendi* of the *Bathurst Case* (2). If on the other hand the drain is part of the road the default on the part of the respondent to repair it so as to render the road safe for the public is a non-feasance for which the respondent is not liable in damages although the non-feasance occasioned the injury suffered by the appellant (*Municipal Council of Sydney* v. *Bourke* (3)). The term " artificial work " is not defined in either the *Bathurst Case* (2) or *Bourke's Case* (3). In applying it to an open brick drain constructed near the highway the Judicial Committee had no regard to the purpose which it served or the authority which built it. " For what purpose and under what authority this had been done is not stated, and is not material " (*Bourke's Case* (4)). The criterion for determining whether anything placed in the road is an artificial work must be the nature of the thing itself. It seems clear that the term should not be applied to a road or a section or a layer of road or its foundation made of artificial materials or of both artificial and natural materials (Cf. *Moul* v. *Thomas Tilling Ltd. and Croydon Corporation* (5)). The expression, as I understand it, denotes a structure which is appurtenant or subservient to a road but not a component part of the road fabric. The earthenware pipe ran underneath the surface of the road but was not a part of the road or of its foundations and in my opinion had the character of an artificial work.

Without discussing the extent to which the Commissioner of Main Roads excluded the respondent from the care, management and control of the road while the work of reconstruction was going

(1) (1895) A.C., at p. 441.
(2) (1879) 4 App. Cas. 256.
(3) (1895) A.C. 433.
(4) (1895) A.C., at p. 440.
(5) (1918) 119 L.T. 318.

on, it appears that those operations ceased five months before the accident. After that date the commissioner was engaged in reconstructing another part of the road at a considerable distance from the scene of the accident. There was nothing to indicate that he regarded himself as still in control of the section. It is I think clear that from May onwards that area was within the care of the respondent and that there was no obstacle whatever to its taking steps to safeguard the public from the danger occasioned by the collapse of its artificial work. Of that collapse the respondent knew or should have known, for it was brought to its knowledge that as a result of the operations of the commissioner breakages had occurred in the drain. But no steps were taken, no inspection was made.

It may be observed that in *Shoreditch Corporation* v. *Bull* (1) Lord *Halsbury* made adverse comment on the fact that in some cases the principle that highway authorities were immune from liability for mere non-feasance had been applied where the facts really amounted to misfeasance. Compare, too, *Dawson & Co.* v. *Bingley Urban Council* (2).

In my opinion the appeal should be allowed and the case remitted to the Supreme Court for the assessment of damages.

Appeal allowed. Judgment of Supreme Court set aside. Judgment to be entered for plaintiff with costs of action. Case remitted to Supreme Court for assessment of damages in such manner as the Supreme Court may direct. The District Registrar to determine (1) *the actual outpocket expenses of appellant in connection with the appeal*; (2) *the actual outpocket expenses of appellant's legal advisers in connection with the appeal*; (3) *a proper allowance for the time spent in connection with the appeal by the staff of appellant's legal advisers. Respondent to pay to appellant the sums fixed under* 1 *and to appellant's solicitors the sums fixed under* 2 *and* 3.

Solicitors for the appellant, *Downing & Downing.*
Solicitors for the respondent, *Goold & Robertson.*

(1) (1904) 90 L.T. 210.

(2) (1911) 2 K.B. 149.