Judgment of the Lords of the Judicial Committee of the Privy Council on the ex parte Appeal of the Muncipality of Pictou v. *Geldert from the Supreme Court of Nova Scotia; delivered 3rd August* 1893.

Present:

THE LORD CHANCELLOR.
LORD WATSON.
LORD HALSBURY.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The Plaintiff in this case resides within the Municipality of Pictou, and he sues the Corporation for neglect of its duty to repair a bridge, whereby severe injuries were caused to the Plaintiff. His allegations are that the Defendants were in possession and had the management and control of the public highway over the bridge in question, and were liable and bound to maintain repair and keep in repair the said highway and bridge and the approaches thereto; and that the Defendants negligently improperly and wrongfully suffered the said highway bridge and approaches to become out of repair and dangerous to persons passing. The Judge who tried the cause, and on appeal the majority of the Supreme Court, have found in favour of the Plaintiff.

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It is not denied that the approach to the bridge was out of repair, or that severe injury was caused to the Plaintiff thereby. The Defendants relied on several grounds of defence, some of which have not been raised again before their Lordships. Two have been argued at length, one that the highway in question is one of the great roads of the province, and the other that before the Plaintiff was injured it had come under the provisions of the Bridge Act; and in either case it is contended that the place was removed from the control and cognizance of the municipality. Their Lordships desire to pronounce no opinion on those points, because they think the case should be decided upon a broader and more general question, viz., the question whether the statutes by which the powers and duties of the Defendants are regulated have imposed upon them a liability to repair and made them liable in damages for mere non-feasance at the suit of a private person.

This question does not appear to have been discussed at the trial, probably for the reason that it is governed by some decisions in the colony. But in the Court of Appeal it is treated at length by Mr. Justice Weatherbe, who dissented from the judgment of the rest of the Court. And that learned Judge refers to both the novelty and the importance of the question in terms which show how desirable it is to have an authoritative decision upon it. He says:—"Previous to the passage of the "General Act 'Of County Incorporations' in "1879, no attempt was made to charge a County "with liability for negligence for non-repair "of a road or bridge. Since the passage of "that Act such suits and claims have become "frequent and are of a character which must "soon call for special enactment, because now "the Municipal Corporations are in this condi-

" tion that if by law they are to be held liable " for non-repair of roads and bridges, not having " and not being able to obtain the money to " keep them in repair, the liability of Counties " for damages is likely to become an intolerable " burden in communities where, as is the case in " many parts of the Province, the population " is sparse, and road and bridge making and " maintaining difficult." It is unfortunate that the Respondent does not appear in this case, but the Appellants' Counsel have endeavoured to supply the omission by a very full reference to the statutes and decisions bearing on the question.

By the common law of England, which is also that of Nova Scotia, public bodies charged with the duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were nevertheless not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair.

This was first held in a case in which the inhabitants of a county were sued, and as they were not a Corporation there was a technical difficulty in suing them; but that the decision did not rest on this technical difficulty alone, but on the substantial ground of non-liability, was subsequently decided when the difficulty had been removed by enabling a public officer to sue and be sued on behalf of the county. And the same conclusion has been arrived at where the obligation to repair has been transferred to Corporations.

The latest English case is that of *Cowley* v. *The Newmarket Local Board* decided in the House of Lords (Appeal Cases 1892, p. 345). It must now be taken as settled law that a transfer to a public Corporation of the obligation

to repair does not of itself render such Corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed.

The law was laid down by this Board in the case of *The Sanitary Commissioners of Gibraltar* v. *Orfila*, thus: "In the case of mere "non-feasance no claim for reparation will lie "except at the instance of a person who can "show that the statute or ordinance under which "they act imposed upon the Commissioners a "duty towards himself which they negligently "failed to perform." (L. R. 15, App. Ca., 411.)

The question then is, whether any statute has given to private persons the right of action now claimed against this municipality which does not exist at common law.

Now the Defendants were incorporated by a general law passed for incorporating the inhabitants of every county and district in the province, among them the county of Pictou. The law was passed in 1879, and with some amendments now forms Cap. 56 of the Revised Statutes of 1885. It is known as "the County Incorporations Act." Prior to that Act the law as to highways appears to have been the common law, modified by an Act passed in the year 1761. It was thereby provided that the grand juries for the several counties should elect annually two surveyors of highways for each town in the county. The duties of the surveyors were to enforce and regulate the labour which the inhabitants were bound to supply for highways and bridges, and the limits of which were fixed by the Act.

By Section 79 of the County Incorporations Act the Municipal Councils are directed to appoint a sufficient number of overseers of highways, road surveyors, and other officers. And by

Section 82 it is enacted that the powers and authority of a Municipal Council shall extend to a number of objects stated in 13 sub-sections. So far as regards the present question the objects are as follows :—

In Sub-section (1). The laying out of new roads, and the making maintaining or improving of any new or existing road, or stopping up altering or diverting the same.

In Sub-section (2). The appropriating of road or bridge money granted by the Legislature, and to provide for raising and appropriating such sums of money as the county or district council shall from time to time consider necessary to make maintain repair alter or improve any roads bridges or streets, to be raised in rates in the nature of county rates; provided that no greater sum than $1,000 for such purposes be raised and assigned in any one year in any one municipality without the consent of the Governor in Council.

In Sub-section (3). The collecting and enforcing the performance of statute and highway labour.

In Sub-section (4). The appointment of superintendents of roads, with such powers as regards the roads and bridges and the expenditure of provincial and municipality money and statute labour therein as the Council shall see fit to confer, and the erection preservation and repair of any new or existing bridge; with various other matters.

The first observation that occurs on these provisions of law is that under the Act of 1761 the liability to maintain roads and bridges lay upon the inhabitants, and that this liability is preserved by the County Incorporations Act, which contemplates the enforcement of statute and highway labour.

It is to be observed further that the statute does not in terms impose any obligation upon the municipality to repair the roads or bridges.

It confers upon the Council powers and authorities which extend to those objects, but the powers and authorities are conferred in precisely the same terms with reference to objects with regard to which the powers clearly must be discretionary and not matters of obligation.

In the opinion of their Lordships it is impossible to find in any of the legislative provisions the indication of an intention on the part of the Legislature that a person injured by the mere non-repair of a road or bridge should be entitled to sue the municipality for damages in respect thereof.

It remains to look at the decisions which the Colonial Courts have passed on the point. The first is in the case of *Walker* v. *The City of Halifax*, decided in the year 1883, and reported in the Nova Scotia Reports, Vol. 16, p. 371. The Plaintiff sued the city for not removing lumps of ice and snow which had formed in the streets. In delivering judgment Thompson J. referred to the great differences of opinion which had prevailed both in England and the United States, both on the main question of liability and on the proper interpretation of the case of *Russell* v. *The Men of Devon* (2 T. R. 667). He thought the Nova Scotian Court should hold themselves bound by the views of this Committee in the *Bathurst* case (L. R. 4, App. Ca. 256). Those views appeared to him to be that the difficulty in the case of *The Men of Devon* was merely technical; that wherever an indictment will lie for default of duty, a person specially injured by the same default may sue for damages; and that if the statute incorporating the municipal body creates a new liability, it creates a liability to be sued in a private action. In the case of *Halifax*, he considered that on their incorporation in the year 1841 the City took over powers then vested in Commissioners for enforcing statute and highway labour; that in 1853 they received power to

appoint superintendents whose duty it should be to repair; and that the possession of these powers made them liable to the Plaintiff.

In the next year was decided the case of *McQuarrie* v. *The Municipality of St. Mary's* (17 Nova Scotia Reports, p. 493). The Plaintiff sued on the ground of negligence in permitting a bridge to be out of repair. The judgment of the Court was delivered by the same learned Judge. He said that the only distinction between this and the *Halifax* case was that St. Mary's was incorporated by the County Incorporations Act instead of by private charter. He considered that as the care of roads was vested in the corporation, with power to raise money, to direct expenditure, and to make by-laws, they received new and original, and not merely transferred, powers; and so were subject to new liabilities, among them the liability to be sued in private actions. He was also at pains to show that in the *Bathurst* case the leading considerations were that the inhabitants were liable at common law to repair; that the care of repairs was vested in the corporation when formed, and that it received original and new powers. These views have apparently been accepted in the Colony till the present case arose.

Their Lordships' remarks have already answered the reasoning in the *St. Mary's* case upon the County Incorporations Act. Nobody can contend, and it seems that nobody ever has contended, that by the common law or the Act of 1761, the inhabitants or their surveyor could be sued for mere non-feasance in a private action. If nothing can be found in the County Incorporations Act to fix that liability upon the corporations thereby formed it does not exist. But further it appears to their Lordships that the *Bathurst* case has not been correctly interpreted in the Nova Scotian decisions. Whatever general

views are stated in that case, must, as in all cases, be taken with reference to the facts. And it is clear to their Lordships that the governing fact in the *Bathurst* case is that the conduct complained of was not in the view of the Committee non-feasance but mis-feasance. In delivering the judgment of the Committee Sir Barnes Peacock expressly says that they do not decide whether the Legislature threw upon the municipality the obligation of keeping in good repair the works it took over. The ground of the decision 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 mis-feasance as if they had by their direct act made the hole in the road which constituted a nuisance to the highway.

The case therefore differs from that before their Lordships where the only charge that can be made against the Defendants is that they failed to repair the approach to the bridge.

The result is that in their Lordships' opinion this appeal should prevail, and the judgments below should be discharged and the action should be dismissed. But as regards costs, considering the state of decisions in the colony, the general nature of the question and the importance of a decision to Municipal Corporations, their Lordships think it reasonable that the parties should bear their own costs here and below.

They will humbly advise Her Majesty accordingly.