1911

*May 2.
*Nov. 6.

THE CITY OF VANCOUVER (DEFENDANT) ..... APPELLANT;

AND

WILLIAM A. McPHALEN (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Municipal corporation—Highways—Nuisance—Repair of sidewalks—Statutory duty — Negligence — Nonfeasance—Personal injury—Civil liability—Right of action—Construction of statute—"Vancouver City Charter"—64 V. c. 54, s. 219 (B.C.).

Where a municipal corporation is guilty of negligent default by nonfeasance of the statutory duty imposed upon it to keep its highways in good repair, and adequate means have been provided by statute for the purpose of enabling it to perform its obligations in that respect (*v.g.*, 64 Vict. ch. 54 [B.C.]), persons suffering injuries in consequence of such omission, may maintain civil actions against the corporation to recover compensation in damages, although no such right of action has been expressly provided for by statute, unless something in the statute itself or in the circumstances in which it was enacted justifies the inference that no such right of action was to be conferred—*Coe* v. *Wise* (5 B. & S. 440; L.R. 1 Q.B. 711) and *Mersey Docks Trustees* v. *Gibbs* (L.R. 1 H.L. 93) applied. *Municipality of Pictou* v. *Geldert* ([1893] A.C. 524); *Municipal Council of Sydney* v. *Bourke* ([1895] A.C. 433); *Sanitary Commissioners of Gibraltar* v. *Orfila* (15 App. Cas. 400); *Cowley* v. *Newmarket Local Board* ([1892] A.C. 345); *Campbell* v. *City of Saint John* (26 Can. S.C.R. 1); and *City of Montreal* v. *Mulcair* (28 Can. S.C.R. 458) distinguished.

Judgment appealed from (15 B.C. Rep. 367) affirmed.

Per Fitzpatrick C.J. and Duff J.—The common law obligation under which the inhabitants of parishes, in England, through which highways passed were responsible for their repair has no application in the Province of British Columbia.

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*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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APPEAL from the judgment of the Court of Appeal for British Columbia (1), which, on an equal division of opinion among the judges, sustained the verdict entered at the trial in favour of the plaintiff.

The circumstances of the case and the questions in issue on this appeal are stated in the judgments now reported.

W. A. MacDonald K.C. and *Travers Lewis K.C.* for the appellant.

Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—I agree that this appeal should be dismissed with costs for the reasons stated by Mr. Justice Duff.

DAVIES J.—The substantial question raised upon this appeal is as to the liability of the Municipality of Vancouver for nonfeasance in neglecting to repair a sidewalk in that city in consequence of which the appellant sustained injuries. The determination of that question must, of course, depend upon the construction of the charter of the city and the intention of the legislature as evidenced in that charter as a whole with regard to the duties and liabilities imposed upon the corporation. The statute or charter here in question, "Vancouver Incorporation Act," B.C. Statutes 1900, ch. 54, sec. 219, expressly imposes upon the city corporation the duty (*inter alia*) of keeping its highways in repair. It says

> every such public street, road, square, land, bridge and highway shall be kept in repair by the corporation.

(1) 15 B.C. Rep. 367.

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It is not contended by the appellant that for a neglect of this statutory duty amounting to a nuisance an indictment would not lie, but that a civil action by an injured person for damages has not been given and will not lie. As I understand the argument it is that, in the absence of clear and express language in the charter making the corporation liable in civil actions for special damages sustained by individuals in consequence of the corporation's breach of duty in failing to keep the streets in repair, no action will lie.

I am not able to accept that argument. I have examined all the leading cases and authorities cited by the appellant and have reached the conclusion that express language creating civil liability for damages caused by the failure to perform a duty expressly imposed by statute upon a municipal corporation is not necessary. It is sufficient if a legislative intention to create such liability may fairly be inferred from the statute as a whole. If the duty imposed is one transferred from a body or authority on or with whom it previously rested and which body or authority was not itself liable in civil actions for nonfeasance, then very clear, if not express, language would be required to be shewn in the statute imposing this additional liability upon the transferee corporation.

In all cases it must, in the last resort, be a question of the intention of the legislature to be gathered from the whole statute. If the duties imposed are discretionary or permissible merely, and not absolute, or if absolute, adequate means are not given to carry them out, then very clear language must be used to found civil liability upon. But where the duty imposed upon a corporation with respect to its streets

and highways is absolute in its terms and is created and imposed in the charter calling the corporation into existence accompanied with provisions giving the corporation ample powers to fulfil the duties imposed and is not a duty merely transferred from a pre-existing authority or body in itself not liable for civil damages for neglect of such duty, then it does seem to me the courts may fairly infer a legislative intention to make the corporation liable civilly for neglect of such duty.

Now, in the statute in question I find everything, in my opinion, necessary to justify the drawing of such an inference. The absolute duty to keep the streets in repair is imposed upon the corporation, provisions are inserted giving adequate means to enable the corporation to discharge its duty. The duty is one created by the statute and not one transferred from any pre-existing body or authority not in itself civilly liable for its neglect. The nature of the duty itself affecting every inhabitant using the streets is one which I cannot imagine the legislature intended should be neglected, with civil immunity from damages, by the corporation and without remedy by one of the public specially damnified.

Unless, therefore, bound by the decided cases otherwise to determine I would hold the corporation in this case liable. My colleagues, Duff and Anglin JJ., have, in their reasons for judgment, collated and reviewed all the more important cases bearing upon the point at issue, including that of *Cowley* v. *Newmarket Local Board*(1), decided in the House of Lords, and those decided by the Privy Council of *Municipality of Pictou* v. *Geldert*(2); *Sanitary Commissioners of*

(1) [1892] A.C. 345. (2) [1893] A.C. 524.

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Gibraltar v. *Orfila*(1) (in 1890), and *Borough of Bathurst* v. *McPherson*(2) (in 1878), and have done it so fully and satisfactorily that I feel it quite unnecessary for me to go over the same ground.

Properly read, with reference to the facts with which the courts were then dealing, these decisions will not be found at variance with the law as I have endeavoured to state it, though no doubt there are dicta of many distinguished judges which apparently are so. Amongst these are observations of Chief Justice Strong in *Campbell* v. *City of St. John*(3), at page 4. These, however, must be held to have reference to the particular facts relating to the charter of the city with which he was there dealing. That charter does not appear to have imposed any absolute duty upon the Municipality of St. John to keep the streets of the city in repair and in the absence of any such provision or of any language from which a liability for civil damages for misfeasance could be implied, the decision in that case cannot be held to be a binding authority, in such a case as we have now before us, where the duty to keep the streets in repair is expressly imposed upon the Municipality of Vancouver.

If, however, the controlling distinctions I have mentioned between duties permissive or discretionary and duty absolute, on the one hand, and between newly created duties with powers and authorities annexed to them sufficient for their discharge and duties transferred from pre-existing bodies or authorities not civilly liable for their neglect on the other, are kept in mind, it will serve to explain much that otherwise would seem conflicting and perhaps justify the

(1) 15 App. Cas. 400, at p. 411. (2) 4 App. Cas. 256.
(3) 26 Can. S.C.R. 1.

caution so frequently repeated of late years in the highest courts that language used in delivering reasons for judgments, however broad, must be read and understood with reference only to the facts with which the court was then dealing.

I concur in dismissing the appeal.

IDINGTON J.—The appellant is a municipal corporation created by a charter which defines its powers and duties. Amongst such duties is enacted the following provision:—

> Every public street, road, square, lane, bridge and highway shall be kept in repair by the corporation.

The question is raised whether or not an action will lie against the corporation upon this enactment at the suit of any one having suffered damages by reason of the non-observance of the duty thus imposed. It is well, therefore, in order to appreciate the scope of this legislation to observe some other provisions in the charter. Section 125, sub-section 52, gives the corporation wide powers for

> opening, making, preserving, improving, repairing, widening, altering, diverting, stopping up and putting down drains, sewers, watercourses, roads, streets, squares, alleys, lanes or other public communications within the jurisdiction of the council, and for entering upon, breaking up, taking or using, etc.

The corporation is empowered, by sub-section 48 of same section, to remove all nuisances, by sub-section 77, to compel removal of snow and remove it, by sub-sections 81 to 97, to regulate in every way the width, grade, mode of construction and use of streets, and by section 185, it is empowered to prevent and abate public nuisances. Section 133 empowers, in a very wide way, the opening, extending and widening of streets, etc. Section 134 empowers the construc-

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tion of local improvements, including streets, by means of levying a local or frontage rate, and enacts that, when done, the work

> shall thereafter be kept in a good and sufficient state of repair at the expense of the corporation.

The corporation is, by section 57, empowered to levy, for all the necessary expenses of the city, up to one-and-one-third cents in the dollar, besides all rates for schools, interest and sinking funds.

It is abundantly clear that possessed of such very extensive powers which enable the corporation to limit the extent of street to be constructed and nature of construction in such manner as to keep expenditure within its powers of taxation, there can be no excuse for non-repair.

It is evident that the limit of taxation is such as to empower any necessary levy for such purposes. It is equally evident that no other body than the corporation has any power in the premises and that no other power exists having authority to meddle with the subjects of construction or repair of the streets or highways.

There does not appear in the charter, so far as I can find, any penalty or special power given in any way to enforce this duty imposed in such absolute terms upon appellant.

By reason of defective construction or non-repair, the sidewalk in question, built by appellant two years previous to the accident, had become "wobbly," as one witness expressed it, for some time prior to the accident, though one of the street foremen or superintendents of appellant had occasion to travel over it daily.

Two years only having expired since construction, I should be inclined to infer, without much hesitation,

that it never had been properly constructed, and the jury may well have so concluded.

It is contended, however, that it was the neglect of this duty to repair, that constituted the issue tried in fact, and that, being a mere nonfeasance, no action would lie.

The usual great array of authority displayed in cases like this, distinguishing between nonfeasance and misfeasance, has been presented.

I cannot say that I can reconcile all these cases or indeed that the mass of them deserve any attempt to do so. I do not propose to do so.

The first question raised is whether or not, inasmuch as this statute gives no special remedy for the neglect of the duty it imposes, the respondent is one of the persons for whose benefit it was enacted; and next, if so: Is he entitled to an action for damages resulting from the neglect of such duty ?

Common sense would say there ought not to be any difficulty in such questions as are thus presented. But the development of our English law has proceeded in such a way that these questions are by no means free from difficulty. One is not surprised, therefore, to find the division of opinion in the court below.

In *Couch* v. *Steel*(1), Lord Campbell, at page 411, said:—

> The general rule is that "where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages;" (Com. Dig., "Action on the Case," [A]). The Statute of Westminster, 2 (1 Stat. 13 Edw. 1), ch. 50, gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute. See 2 Inst. 486. And in Com. Dig., "Action upon Statute" (F), it is laid down that "in every case where

(1) 3 E. & B. 402.

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a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

One cannot help wishing that this statement of the law had remained unchallenged. But it has not, and the only guide now left seems to be that laid down by Lord Cairns in *Atkinson* v. *Newcastle Waterworks Co.*(1), at page 448, adopted by the Court of Appeal in *Groves* v. *Wimborne*(2). We must look, we are told, at

the general scope of the Act and the nature of the statutory duty.

It may be said that this was merely spoken of the difficulties arising from there being in the statute a special remedy such as penalty or other like provision. I agree that is so. But I observe that is just the feature of the judgment in *Couch* v. *Steel*(3), that was challenged, and it has been said such has been the challenge that it no longer stands as an authority.

I am not prepared to assent to that in the sense that in every case or way the law was incorrectly laid down. I think no one can challenge the law as stated there, provided the statute to which it is applied is of the character that applying Lord Cairn's rule or suggestions to it one can found an action thereon.

But I go further and say that Lord Cairn's suggestions may well be applied to ascertain if we can found an action in a given case upon a given statute.

Now I, using such test, come back to the point of difficulty in the law as to this statute.

Can it be said that the persons it was to benefit are those who have to travel over the roads it binds appellant to repair ?

(1) 2 Ex. D. 441. (2) (1898) 2 Q.B. 402.
(3) 3 E. & B. 402.

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I have come to the conclusion they are, notwithstanding the innumerable dicta to which appeal may be made in a contrary sense. Although such a wealth of dicta exists, there is, I venture to say, no decided authority to the contrary construing such an imperative and direct statute as this freed from entanglement such as existed in those giving rise to said dicta.

We have, moreover, the principle that must govern applied to the decision of analogous cases in such a way that I see no difficulty in the existence of such weighty dicta.

Before passing to the consideration of these cases, I must notice the argument for appellant founded upon numerous English cases, decided upon a variety of English statutes, designed to secure due repair of highways.

I have referred to every one of the cases cited by counsel and numerous others, and, where analyzed and the grounds of the reasons given traced, we find the history to be this, or nearly this.

Beginning with *Russell* v. *The Men of Devon*(1) we find the law to be that no action would lie at common law against the inhabitants; not, as sometimes said, because unincorporated, but because the only remedy recognized by law was the indictment.

As surveyors of highways, or other like authority, were appointed, or corporations created in substitution for other parochial authority, they were one and all found not liable to be sued for damages, though they might have neglected the duty of repair more or less directly cast upon them by statute. But why so ? Simply because the statute which imposed the duty of repair sometimes limited the resources given to pay

(1) 2 T.R. 667.

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for repair, sometimes permitted a discretion or exercise of some judgment, as limit of duty, sometimes merely gave the power without imposing duty, sometimes expressly defined the limit of liability to be that of the inhabitants and when transferred to counties or other corporate bodies had been defined to be that of its predecessor in duty; and when traced out their respective duties were bounded thus by the common law liability of the inhabitants.

Sometimes, as in the case of *Maguire* v. *Corporation of Liverpool*(1), with that city's peculiar and diverse origins of corporate source of existence and responsibility; and the case of *Cowley* v. *Newmarket Local Board*(2), by reason of the "Public Health Act, 1875," having reached a state of development of municipal statute law that appeared to bear more directly on the corporate authority and responsibility, the courts were slightly troubled to reconcile the enactment of duties with this mode of construction.

But, I repeat, these and all such cases, however admittedly interesting and instructive as a study of the history of the law and its method of growth in England, are all beside the question raised here.

Of course, we find the adoption, as in the last named case, of the rule I have referred to as that given by Lord Cairns, to consider the scope and purview of the statute.

The English cases, so far as bearing directly upon highways, being thus disposed of, we have *Municipality of Pictou* v. *Geldert*(3), pressed upon us; as arising in this country. But it turns upon the same kind of history with a difference in names though

(1) 1905) 1 K.B. 767. (2) [1892] A.C. 345.
(3) [1893] A.C. 524.

identical in principle and result with these English cases. The *Orfila Case*(1) is only another variation of the application of the same principles. Nor can I read *Municipal Council of Sydney* v. *Bourke*(2) as at all helpful when I pay heed to the reasons given, founded upon a construction of a statute that leaves it very unlike this simple, yet comprehensive and imperative, statute before us, freed from what I, for want of a better expression, have called entanglements, so apparent in the other statutes (giving rise to like inquiries), and their history and expression.

Hartnall v. *Ryde Commissioners*(3) is a very notable case. It gave the courts a great deal of trouble to fritter it away. But that it seemed good law to Willes J. in the case of *Parsons* v. *Vestry of St. Matthew, Bethnal Green*(4), where it was by him merely distinguished from others, by reason of the slight difference in the statute on which it rested, entitles it to respectful consideration.

Our statute is still more advanced, if I may say so, and I will cherish the belief that if he had to interpret it he would have no difficulty in reaching the conclusion that it can, without disastrous results, be interpreted as it has been below.

I am the more encouraged to this by finding that it was Blackburn J., who with Crompton J. constituted the court that decided the *Hartnall Case*(3).

It is on great authority, that of Blackburn J., and the principle he laid down for the construction of such a statute in the case of *The Mersey Docks Trustees* v. *Gibbs*(5), at page 104, where he laid down the law to the effect

(1) 15 App. Cas. 400.
(2) [1895] A.C. 433.
(3) 4 B. & S. 361.
(4) L.R. 3 C.P. 56.
(5) L.R. 1 H.L. 93.

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that in every case the liability of a body created by a statute must be determined upon a true interpretation of the statutes under which it is created,

that the Chief Justice in the court below proceeded, and in which Mr. Justice Galliher concurred.

In this rule, Lord Watson, speaking for the Judicial Committee of the Privy Council, in the case of *Sanitary Commissioners of Gibraltar* v. *Orfila*(1), concurred. That was a case arising out of an accidental falling of an overhanging road, for which it was claimed those in charge were liable.

We have thus, I say, Blackburn J., whose rule of construction is thus adopted, holding with Crompton J. the corporate body liable for damages arising from non-repair, as a proper construction of a statute, much less directly leading to liability than this one now in question; for there was in the statute in question an entirely different remedy given by way of indictment, and no right of civil action expressly given. We find that countenanced, as set forth above, by so great a lawyer as Willes J.

In this case the statute itself is not cumbered with any such statutory remedy as there, to raise doubts of the statute's meaning in this regard. We find in the *Mersey Docks Case*(2), the House of Lords adopting and applying the rule laid down by Blackburn J. when applied under a statute no wider and no narrower than this now in question.

Surely under such authority and in the absence of express binding authority the interpretation put upon this Act was correct.

I desire, however, to call attention to a case that to my mind is an express decision of the Court of

(1) 15 App. Cas. 400. (2) L.R. 1 H.L. 93.

Appeal in England, upon a similar statute relative to sewers involving also and only the question of omission instead of commission. I refer to the case of *Baron* v. *Portslade Urban Council*(1), upon section 19 of the "Public Health Act, 1875," which reads as follows:—

> 19. Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied.

The action was brought because by reason of this duty having been neglected, damages were suffered and they were assessed at £75.

The nonfeasance rule was invoked in argument, but ignored in the judgment which was delivered by Lord Halsbury, concurred in by A. L. Smith and Vaughan Williams L.JJ. and the appeal dismissed.

It was also urged there that section 299 of that Act had furnished a remedy and thus precluded the action from lying on the statute.

I submit the principle upon which the appellate court proceeded is applicable here, unless we can discover something in principle different in statutes dealing with highways from those dealing with sewers, or I may add, docks, in founding an action by those compelled to suffer from omission of duty relative to either one or the other on occasions where the public body, bound to a duty by statute, have neglected their duty.

The sooner the distinction between nonfeasance and misfeasance as applicable to actions on a statute of which the plain language indicates it can be as grossly violated by an omission to do something, as

(1) [1900] 2 Q.B. 588.

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by doing a wrongful act forbidden by it, is discarded, the better. And I would do it without resorting to metaphysical subleties the ordinary mind cannot follow easily.

The distinction can and does find a proper field of operation in some statutes, but not in this class, so far as I can see.

I have, out of respect to counsel, considered the St. John and Montreal cases decided by this court, but must say there is nothing decided there binding us here.

I think the appeal should be dismissed with costs.

DUFF J.—The plaintiff while walking on a sidewalk, constructed by the Corporation of the City of Vancouver on a public highway within the municipal boundaries, tripped over a loose plank and in consequence suffered serious personal injuries. It was left to the jury by the learned trial judge to say whether or not the state of the highway was due to the negligent failure of the municipality to keep the sidewalk in repair and whether the condition of the sidewalk was the cause of the injuries suffered by the plaintiff; and these questions they decided against the corporation.

The statute in which the corporate powers and duties of the municipality (1900 B.C., ch. 54), are declared, imposes upon the municipality the duty of keeping highways in repair; and the controversy on this appeal turns upon the question whether this enactment confers a right to reparation upon an individual suffering a personal injury in such circumstances as those giving rise to this action, or whether, on the other hand, the enactment is, as the

appellant municipality contends, declarative of a right which is only capable of being vindicated in proceedings instituted in the public behalf.

It is not denied, of course, in form, that this is a question which must ultimately turn upon the view one takes concerning the intention of the legislature as ascertained from the statute. The controversy is rather as to the effect of certain decisions (and certain dicta of very eminent judges) touching the responsibility of municipal corporations deriving their powers from other statutes passed by other legislatures in respect of negligent default in the matter of the repair of highways and as to the degree in which those decisions and dicta ought to be considered as regulating the construction of the special statute by which the appellant corporation is governed.

It is a general rule that where a duty rests upon an individual or a corporation of such a character that an indictment would lie for default in performing it, an action also will lie at the suit of a person who by reason of such default suffers some peculiar harm beyond the rest of His Majesty's subjects: *Mayor of Lyme Regis* v. *Henley*(1); *Sutton* v. *Johnstone*(2); *Ferguson* v. *The Earl of Kinnoull*(3); *McKinnon* v. *Penson*(4); *Hartnall* v. *Ryde Commissioners*(5); *Coe* v. *Wise*(6); *Maguire* v. *Liverpool Corporation*(7). Where, nevertheless, the duty arises out of statute the rule cannot be thus absolutely stated. The Statute of Westminster (1 Stat. W. 13 Edw. I.),

(1) 3 B. & Ad. 77, at p. 93; 2 C. & F. 331, at p. 354.
(2) 1 T.R. 493.
(3) 9 Cl. & F. 251, at pp. 279, 283, 310.
(4) 8 Ex. 319, at p. 327.
(5) 4 B. & S. 361, at p. 367.
(6) 5 B. & S. 440, at p. 464.
(7) (1905) 1 K.B. 767, at pp. 782 and 785.

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ch. 50, does indeed profess in terms to give a remedy by action on the case to all who are aggrieved by the neglect of any duty created by Act of Parliament. The effect of this statute, however, as stated in Comyn's Digest ("Action upon Statute" (F), is that

> in every case where a statute enacts or prohibits a thing for the *benefit of a person* he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the law.

Obviously, this leaves it to be determined in each case whether the alleged duty has or has not been created "for the benefit" of the person aggrieved; which, of course (if the duty be a public duty), is only another way of stating the question whether the enactment does or does not evince an intention on part of the legislature that a private remedy by action shall be available to a person suffering a special injury from the wrongful omission to observe its provisions.

There was at one time a disposition on the part of some very eminent judges to hold that public bodies charged with duties to be performed by them as trustees on behalf of, or for the benefit of the public, were not, in their trust or corporate character, answerable for the negligent acts or defaults of their servants; on the principle — which has been broadly applied in the United States in such cases — that such bodies, in discharging their public duties, act as agents or instrumentalities of government, and as such are not answerable for the torts of their servants. See the speech of Lord Wensleydale in *The Mersey Docks Trustees* v. *Gibbs*(1), at pages 124, 125; and Lord Cottenham's judgment in *Duncan* v. *Findlater*(2). This view concerning the responsibility of municipal

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

(2) 6 Cl. & F. 894.

and other bodies for negligence or default in the performance of the public duties imposed by statute was definitely rejected in a series of cases which culminated in the decision of the House of Lords in *The Mersey Docks Trustees* v. *Gibbs*(1). There Lord Blackburn (then Blackburn J.) delivering the unanimous opinion of the judges, while adopting (p. 118) Lord Campbell's observation in the *Southampton and Itchin Floating Bridge and Roads Co.* v. *Local Board of Health of Southampton*(2), that

> in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created,

stated the proper rule of construction to be this:—

> in the absence of something to shew a contrary intention, the legislature intends that the body, the creature of statute, shall have the same duties and its funds shall be rendered subject to the same liabilities as the general law would impose upon a private person doing the same things.

The canon of construction thus enunciated met with the approval of the House of Lords; and it is from the standpoint here indicated that, since the date of that decision, the courts have examined claims preferred against municipal bodies created by modern statutes and based upon an alleged violation of duties said to arise out of the provisions of such statutes. The question in each case is, of course, as already mentioned, in the last resort a question of the intention of the legislature to be collected from the enactment as a whole interpreted in the light of such circumstances as may properly be considered, and according to the canons of construction properly applicable. There are, however, I think, some well ascer-

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

(2) 8 E. & B. 801.

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tained principles upon which the courts have acted in such cases. It might be stated broadly, I think, with the support of the great weight of authority, that the breach (by way of omission or nonfeasance) by a municipal body of a legal duty created by statute, gives rise to an action at the suit of an aggrieved individual where, (*a*) the default is of such a character as to be indictable, (*b*) the grievance suffered involves damages peculiar to the individual, (*c*) the damage suffered is within the mischief contemplated by the statute, and (*d*) where there is no specific provision excluding the remedy of action and the provisions of the statute as a whole, taken by themselves or read in the light of the history of the legislation, do not justify an inference that the legislature intended to exclude that remedy. In other words, I think the effect of the actual decisions is that where there is a legal duty having attached to it the sanction of indictment which has been created by statute and conditions (*b*) and (*c*) are present, then in general it rests with those who deny the remedy by action to point to something in the statute itself or in the circumstances in which it was passed indicating an intention to exclude the remedy. I think that is established by a series of decisions of high authority; but there are dicta of very eminent judges (I shall be obliged to refer to them more particularly) which appear to conflict with this proposition and it will be sufficient to take a narrower ground, which is quite broad enough for the purposes of this case, and is, I conceive, demonstrably conformable both to the authorities and to most of the dicta referred to. The ground upon which I think the liability of the corporation may be put consistently with every relevant

decision and with almost if not quite all the dicta I have seen, is this: where a municipal corporation acting under powers conferred by the statute creating it, constructs a work for use of the public, and invites the public to use it, the corporation having the ownership of and full authority to control the work, and to regulate the use of it by the public; and the statute creating the corporation in express terms imposes upon it the legal duty and at the same time gives it full authority to take all the necessary measures to prevent that work becoming a danger to the public making use of it in the exercise of their right, and owing to the unreasonable neglect of the corporation to perform this duty the work does become a public nuisance, then, in order to resist successfully a claim for reparation by one of the public who has suffered a personal injury in consequence of the existence of the nuisance, (while properly using the work in the exercise of the public right,) the corporation must shew something in the statute indicating an intention on the part of the legislature that the remedy by action shall not be available in such circumstances.

There is a large number of authorities in support of the proposition that as a general rule a municipal corporation is, apart from express enactment, under a legal obligation to make such arrangements as may be necessary to prevent the works which are under its care becoming a nuisance, and that, *primâ facie,* persons suffering a special injury from the failure of the corporation to fulfil this obligation, have a right of action against it: *Re Islington Market Bill*(1), at page 519; *White* v. *Hindley Local Board*(2);

(1) 3 Cl. & F. 513.

(2) L.R. 10 Q.B. 219.

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Blakemore v. *Vestry of Mile End Old Town*(1); *Corporation Bathurst* v. *McPherson*(2). We are, however, dealing with a case where the duty is created by express statutory enactment and as that relieves us from some of the difficulties which, in point of interpretation, have sometimes presented themselves, it will, perhaps, tend to simplify matters if we limit our attention to cases of a similar nature. In *Coe* v. *Wise* (3), the Court of Queen's Bench and the Exchequer Chamber had to consider the responsibility of drainage commissioners who had Parliamentary authority to make a cut and sluice and were required expressly by the statute from which they derived that authority to maintain the works when made. In the Court of Queen's Bench, Blackburn J., after quoting the section in which this duty was declared, said, at pp. 464 and 465:—

> Nothing has been pointed out in the argument, and I have not myself discovered anything to qualify this enactment, which certainly seems to me to cast upon the Drainage Commissioners the duty to maintain this sluice. The common law gives a right of action against those neglecting a duty cast upon them to those who, in consequence sustain damage. I entirely assent to the position that if the Legislature have shewn an intention to prohibit this right of action in the present case that will effectually prevent it, and I agree that such an intention need not be shewn in express words if it can be collected from the whole Act, but I think that the onus lies on the defendants to shew that it was intended to prevent the right of action, and not on the plaintiff to shew that it was intended to give it.

The majority of the judges in the Court of Queen's Bench having taken the view that there was no right of action, their decision was reversed in the Exchequer Chamber where it was held, following *Mersey*

(1) 9 Q.B.D. 451.
(2) 4 App. Cas. 256.
(3) 5 B. & S. 440; L.R. 1 Q.B. 711.

Docks Trustees v. *Gibbs*(1), that the action lay; and in delivering judgment the court (Erle C.J., Willes J. and Channell and Pigott BB.) after referring to that authority said, at page 720:—

> And we further hold that the action is maintained for the reasons stated by Blackburn J. in this case in the court below.

In *Meek* v. *The Whitechapel Board of Works*(2), Lord Penzance, then Wilde B., held the defendants answerable in an action for a nuisance arising from their neglect of their statutory duty (sections 68 and 69 "Metropolis Local Management Act") to cause the sewers within their district to be kept clean. In *Baron* v. *Portslade Urban Council*(3), the Court of Appeal had to consider section 19 of the "Public Health Act of 1875," which required the local authority in whom sewers should be vested to maintain them so that they should

> not be a nuisance and to see that they are properly cleaned and emptied (p. 591).

The council was held liable to an action at the suit of a person specially damnified by a nuisance arising from neglect of this duty. In none of these cases was there anything in the enactment pointing to the intention to give a right of action beyond the provision creating the duty; and in each case reparation was awarded to a member of the public suffering special injury from a mischief which was one of the character the legislature intended to prevent, and which, of course, was attributable to neglect of the duty prescribed. In *Maguire* v. *Liverpool Corporation*(4), at page 782, Vaughan Williams L.J. said:—

(1) L.R. 1 H.L. 97, at p. 110.
(2) 2 F. & F. 144.
(3) [1900] 2 Q.B. 588.
(4) [1905] 1 K.B. 767.

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Are we to treat the liability which is imposed upon the corporation as a liability coming within the rule, where statutory duties are laid upon public bodies by statute, that in the case of any one suffering damage by reason of the neglect of such public body to perform the duties which are thrown upon it by the statute, an action will lie by the individual member of the public who sustains particular injury by reason of that neglect of duty.

The appellant corporation does not dispute the authority of these decisions or controvert the reasoning of Lord Blackburn in *Coe* v. *Wise*(1), at all events in so far as that reasoning applies generally to the responsibility of a public body for a nonfeasance giving rise physically to such a state of things as constitutes an indictable nuisance. The contention upon which the appeal is founded, as I have already indicated, is this: that according to the settled law of England the duty of maintaining a highway in a state of repair, where it is cast upon a municipal body, is (as regards the legal sanctions attached to it,) *sui generis,* and the fact that such a duty is imposed expressly or impliedly by an Act of Parliament does not, *ipso jure,* give a remedy by action for failure to perform that duty and, moreover, is not, in itself, to be taken to indicate an intention on the part of the legislature that the remedy by action shall be available, and that such remedy is not available unless the legislature has in some other way clearly indicated an intention that it should be so. It is, of course, contended that no such intention can properly be implied from the provisions of the Act we have to consider. Before referring to the authorities upon which this contention rests it will be convenient to note broadly the character of the powers conferred upon the corporation of Vancouver touching the management and

(1) 5 B. & S. 440.

control of streets. The highways in the municipality are (section 217) vested in the corporation; and by the same section it is provided that these highways "shall not be interfered with" without the permission of the city engineer in writing. The council of the municipality, under section 125, has very full powers over highways and the public rights in respect of them. It may pass by-laws —, by sub-section 52, for

> opening, making, preserving, improving, repairing, widening, altering, diverting, stopping up * * * roads * * * and other public communications;

by sub-section 82,

> To regulate the width of new streets and roads, and for preventing the laying out or construction of streets and lanes unless in conformity with existing streets, etc., without the consent of the council first obtained;

for regulating plans level with surface inclination and material of the pavement, roadway, sidewalk of streets and roads (sub-section 83); for regulating roads, streets, bridges and driving and riding thereon (sub-section 84); for dealing with nuisances, including

> any structure or erection of any kind whatsoever * * * or any other matter or thing in or upon any * * * street or road.

And finally, by section 219:—

> Every * * * public street, road, square, land bridge and highway shall be kept in repair by the corporation.

The decisions on which the appellants mainly rely are *Municipality of Pictou* v. *Geldert*(1), and *Municipal Council of Sidney* v. *Bourke*(2); *Sanitary Commissioners of Gibraltar* v. *Orfila*(3), in the Privy Council, *Cowley* v. *Newmarket Local Board*(4), in

(1) [1893] A.C. 524.
(2) [1895] A.C. 433.
(3) 15 App. Cas. 400.
(4) [1892] A.C. 345.

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the House of Lords, and *Campbell* v. *City of St. John* (1), and *City of Montreal* v. *Mulcair* (2). Of these decisions the first in order of time is *Cowley* v. *The Newmarket Local Board* (3). That decision turned upon the effect of sections 144 and 149 of the "Public Health Act," which declared that the urban authority should have and be subject to all the powers, duties and liabilities of surveyors of highways, and should from time to time level, alter and repair the highways as occasion should require. It was held that an action could not be maintained by a person who in passing along a highway was injured by reason of its dangerous condition due to the negligent default of the Board to keep it in repair. The actual ground of the decision is thus stated by Lord Herschell (who took part in it) in delivering the judgment of the Privy Council in *Municipal Council of Sydney* v. *Bourke* (4), at pages 443 and 444:—

> In a series of cases ending with *Cowley* v. *Newmarket Local Board* (3), in which it has been held that an action would lie for non-repair of a highway the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise; the only question in controversy was whether an action could be maintained. The ground upon which it was held that it could not — even where the duty of keeping the roads in repair had been in express terms imposed by statute on a corporate body — was, that it had long been settled that though a duty to repair rested on the inhabitants subjecting them to indictment in case of its breach, they could not be sued, and that there was nothing to shew that the legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability.

In *Maguire* v. *The Corporation of Liverpool* (5), in applying the decision in *Cowley* v. *The Newmarket*

(1) 26 Can. S.C.R. 1.
(2) 28 Can. S.C.R. 458.
(3) [1892] A.C. 345.
(4) [1895] A.C. 433.
(5) [1905] 1 K.B. 767.

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Local Board(1), Vaughan Williams L.J. thus discusses it at pages 784 and 785:—

That statutory obligation having been created, how is it that by the decision in *Cowley* v. *Newmarket Local Board*(1), escape is made from the general proposition that where a statutory duty is created of such a nature that indictment would lie, or a remedy by criminal law be good for neglect to perform the statutory duty, an action will lie at the suit of a subject sustaining particular injury — I say, how is it that that undoubted general principle is escaped from in the decision in *Cowley* v. *Newmarket Local Board*(1)? According to my understanding of the judgments, both of Lord Halsbury and Lord Herschell, it is really escaped from by going back to what is the liability which is thrown upon the inhabitants of the parish in respect of liability to repair roads, and the limitation of procedure for neglect to perform that duty to procedure by the Crown. I arrive at the conclusion that this Act of 1846 was really mainly passed for purposes of convenience of remedy, and convenience of performing the duties in respect of a large aggregate of houses and streets such as one finds in the case of the Town of Liverpool. The object of the legislation merely being that sort of convenience, the object of the Act is that and that alone. It was not intended to alter the liability of those upon whom for convenience the carrying out of this work was thrown, but to leave it exactly as it was in cases where the obligation to repair was thrown upon the inhabitants of the parish.

At page 787, he states the principle to be deduced from this and other cases following it in these words:

I think that, having regard to the legislation that has taken place and to the various decisions which have been given, we ought, in construing this Act of Parliament, to start with a *primâ facie* presumption that in the transfer of the common law obligation to repair lying upon the inhabitants of the parish at large and on other bodies for the purpose of the public convenience, *primâ facie* it must be assumed that the legislature did not by such a transfer intend to impose any greater duty or any greater obligation upon the persons or bodies to whom the obligation was transferred than that which would have existed before the transfer.

To the same effect is the judgment of Romer L.J., at page 790:—

Furthermore, I think that certain other principles are now established with reference to the Acts of Parliament which create new

(1) [1892] A.C. 345.

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bodies, with duties and obligations cast upon them to do the repairs of highways in lieu of the inhabitants of the parish. Modern authorities shew that the question whether in such cases the liability to an action for damages for non-repair is thrown upon the new body created by the Act of Parliament such as I have mentioned, and such as those of 1830 and 1846 in the present case, is one to be gathered from the wording of the special Act. And it was pointed out in the case of *Municipality of Pictou* v. *Geldert*(1), at page 527, by Lord Hobhouse, who delivered the judgment of the Privy Council in that case, that "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 nonfeasance. In order to establish such liability it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed." I need not go through these modern authorities in detail. I think the result of them, and in particular of the case of *Cowley* v. *Newmarket Local Board*(2), is accurately summed up by Mathew J., as he then was, in the case of *Saunders* v. *Holborn District Board of Works*(3), at page 68, where he says: "The result of these decisions is plain — it is that in order to establish that a public body of this description is liable to an action for default in performing a duty imposed by statute it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed, and unless such an intention on the part of the legislature is clearly disclosed, no action will lie." As I have said, those observations appear to me to accurately sum up the authorities, treating the observations of Mathew J. as being confined, as I think they were intended to be, to the question of the construction of such Acts of Parliament as those that I have been referring to.

It is obvious that the decisions in *Cowley* v. *The Newmarket Local Board*(2), and cognate cases, are regarded by these learned judges as creating an exception to the general rule and it is quite plain that the Corporation of Vancouver cannot claim exemption from the operation of that rule upon any such grounds as those upon which these decisions rest. Vancouver was incorporated by an Act of the legislature in 1886 (49 Vict. ch. 32 [B.C.]), and sections 217 and 218 of the present Act are reproductions of sections 213 and 214 of that Act. It is clear enough that, at the pass-

(1) [1893] A.C. 524. (2) [1892] A.C. 345.
(3) (1895) 1 Q.B. 64.

ing of the Act of 1886, the locality affected by it was not within the limits of an incorporated municipality, as the Chief Justice states in the court below. Mr. Lewis directed our attention to the preamble of the Act; but I do not understand it to be suggested that the Town of Granville there referred to was an incorporated municipality. The inference from the form of the preamble itself would be that it was not; and if there were any foundation for such a suggestion it would unquestionably have been put forward in the court below and we should have been furnished with positive information on the point.

There can, I think, be little doubt that the common law rule under which the inhabitants of parishes through which highways passed were responsible for their repair was never introduced into British Columbia. By proclamation of Governor Douglas, on the 19th November, 1858, issued under the authority of an order-in-council of 2nd February, 1858, passed pursuant to chapter 99 of 21 & 22 Vict., it was ordained that "the civil laws of England as the same existed" on the 19th November, 1858,

> and so far as the same are not from local circumstances inapplicable to the Colony of British Columbia are and will remain in full force in the colony till such time as they shall be altered

according to law. The local circumstances of the colony are pictured in the published correspondence between the Colonial Office and Governor Douglas in the years 1858 (the year in which the colony was established) to 1861, which correspondence has been a good deal considered in the last few years in the course of judicial proceedings in British Columbia. The colony owed its establishment to the influx of population due to the discovery of gold in the interior;

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and the correspondence makes it clear that one important duty of the detachment of engineers which was early sent out, under the command of Colonel Moody, was the construction of roads and trails. The Government — of necessity — assumed the maintenance of these highways. The same necessity, (arising partly out of the physical character of the country and partly out of the fact that great stretches of uninhabited territory had to be traversed in passing from one settlement or centre of population to another,) explains the fact that down to the present time the duty of constructing and maintaining roads and other highways outside the limits of municipalities has always been assumed and carried out by the Government of the colony or that of the province. The common law rule has never been acted upon and was, in 1858, and still is, "from local circumstances inapplicable." There is, therefore, no presumption arising from the state of affairs at the passing of the Act which can bring this case within the reasoning upon which the decision in *Cowley* v. *The Newmarket Local Board*(1) proceeded. Lord Herschell suggested, in his judgment in that case, that there was another ground upon which the decision might stand, and that suggestion it is hardly necessary to say requires the most careful consideration. I will return to it after discussing the other decisions upon which the counsel for the corporation more particularly rely. The next in order of date is *Municipality of Pictou* v. *Geldert*(2). The statute under consideration in that case was the "County Incorporation Act," a statute of the Province of Nova Scotia, passed in 1879. Lord Hobhouse in delivering the judgment of the Privy Council

(1) [1892] A.C. 345. (2) [1893] A.C. 524.

points out first that the common law of Nova Scotia was the same as that of England in imposing upon the inhabitants the legal duty of maintaining highways while not subjecting them to liability in an action for non-observance of that duty. Of the statute in question he observes (page 529) :—

> The first observation that occurs on these provisions of law is, that under the Act of 1761, the liability to maintain road and bridges lay upon the inhabitants, and that this liability is preserved by the "County Incorporation 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.

These observations (which seem to give the gist of the decision) have no application to the statute before us. In *Municipal Council of Sydney* v. *Bourke*(1) the statute which the Privy Council had to examine contained no provision expressly imposing upon the municipal authority the duty to keep the highway in repair; and the effect of Lord Herschell's judgment is that that authority was charged with no duty in respect of such repair which the courts could take cognizance of. This is manifest from two paragraphs, on page 439 of the report, which I quote:—

> Attention has already been directed to the fact that the provisions of section 82 of the 43 Vict., relating to the maintenance of highways, are empowering only, and do not purport to impose a duty. The terms of the section make it manifest that this was the intention of the legislature. The council have conferred on them in a single sentence power to alter, widen, divert, and improve public ways, as well as to "maintain and order" them. It is obvious that the alteration, widening, diversion or improvement are matters left

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

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absolutely to the discretion and judgment of the council, and that there is no binding obligation enforceable by law to do any of these things. It is impossible to hold that whilst as to these matters a power only is conferred and no obligation imposed, the case is different as regards the maintenance of the highways.

There is no doubt, in a certain sense, a duty incumbent on the council to see to the maintenance of the highways. It is for them to exercise the powers conferred upon them by law for the benefit of the community. In these matters they represent the citizens, and ought to have regard to their interests. For their discharge of these duties they are responsible to those whom they represent. The members of the council are the choice of the citizens, and if they do not use their powers well they can be displaced. But if they fail to maintain in good repair the highways of the city, it is not a matter of which the courts can take cognizance, or which can be the foundation of an action if any citizen should be thereby aggrieved.

Here again it is obvious that the reasoning of the Judicial Committee cannot be resorted to as governing the determination of the question before us.

Lastly, the ratio of the decision of the Privy Council in *Sanitary Commissioners of Gibraltar* v. *Orfila* (1), in so far as it affects the question under discussion is stated, at pages 412 and 413 of the report, in the following passage of Lord Watson's judgment:—

The only duty laid upon them with respect to retaining walls is to maintain and repair them for the safety of passengers and ordinary traffic. And, lastly, it is expressly provided that, in executing the order, they must conform to any rules and regulations which the Governor may think fit to make.

Their Lordships are, in that state of the facts, unable to resist the conclusion that the Government, in so far as regards the maintenance of retaining walls belonging to it remains in reality the principal, the commissioners being merely a body through whom its administration may be conveniently carried on. They do not think that it was the intention of the Crown, in giving the sanitary body administrative powers subject to the control of the Governor, to impose upon it any liability, which did not exist before, in respect of original defects in the structure of the retaining wall which supported the Castle Road.

It is not argued that the Corporation of Vancouver can escape on the ground thus stated; and it is

(1) 15 App. Cas. 400.

plain that the actual decision cannot afford any support to the appellant's contention. Some stress is laid, however, upon Lord Watson's language at page 411 in the following sentence:—

> But in the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the commissioners a duty toward himself which they negligently failed to perform.

It is impossible to contend that by this language Lord Watson meant to convey that "the duty towards himself" must be declared in express words; the remainder of the passage, in which he quotes Lord Blackburn's canon in *The Mersey Docks Trustees* v. *Gibbs* (1) as authoritative, shews that he intended to express no such idea. The passage means, I think, nothing more than this, that an intention to impute such a duty must be discoverable in the statute. I am not overlooking Mr. Macdonald's reference to the passage in the judgment of Matthew J., in *Saunders* v. *Holborn District Board of Works*(2), at page 68. The observations on which Mr. Macdonald relies must be taken, I think, to be confined as Romer L.J. points out in *Maguire* v. *Corporation of Liverpool*(3), at page 790, to Acts of Parliament such as those under discussion: viz., Acts which create new bodies with duties cast upon them to repair highways in lieu of the inhabitants of the parish.

It remains to consider the observations of Lord Herschell in *Cowley* v. *Newmarket Local Board*(4), at page 352, in which he suggests that the case falls within the scope of a remark of James L.J. in *Glossop* v. *Heston and Isleworth Local Board*(5). With

(1) L.R. 1 H.L. 93.
(2) [1895] 1 Q.B. 64.
(3) (1905) 1 K.B. 767.
(4) [1892] A.C. 345.
(5) 12 Ch. D. 102, at p. 109.

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the greatest possible respect for even a passing suggestion of Lord Herschell, I am constrained to think that there is no parallel between the statutory duty to provide a sufficient number of sewers for a given district, imposed by section 15 of the "Public Health Act" (which was the case to which the attention of James L.J. was directed), and a statutory duty to keep a highway, or if you like, an existing system of sewers, from becoming a nuisance. The first may to so great a degree rest in the discretion of the authority charged with it, that it would be difficult for a court of law to take cognizance of it at all; and in fact, since the decision in *Cowley* v. *Newmarket Board*(1), it has been held that the sole remedy for non-performance of the duty imposed by the enactment in question was provided by the enactment itself and was an appeal to the Local Government Board. The difference between the two classes of cases was pointed out by Kennedy L.J., in *Dawson* v. *Bingley Urban District Council*(2), at page 311; and earlier, by Lord Halsbury, in *Baron* v. *Portslade Urban District Council*(3), at page 590, in these words:—

> There seems to be a wide difference between the obligation or duty to construct a new system of drainage and the obligation on the local authority to use sewers that are vested in them in a proper and reasonable manner.

That observation appears to indicate the distinction between the case referred to by Lord Herschell and the present case.

The statute which this court had before it, in *Campbell* v. *City of St. John*(4), contained no pro-

(1) [1892] A.C. 345.
(2) 27 Times L.R. 308.
(3) [1900] 2 Q.B. 588.
(4) 26 Can. S.C.R. 1.

vision expressly imposing any duty upon the municipality in respect of repair of highways, and, having regard to the passages already quoted from Lord Herschell's judgment in *Sydney* v. *Bourke*(1), it is doubtful whether any duty, the breach of which could be the subject of an indictment, could be held to be implied. A decision that such a statute does not give a right of action for a special injury arising from non-repair, cannot, I think, properly be held to be conclusive of the interpretation to be placed upon a provision in another statute expressly imposing such a duty.

For these reasons I think the appeal should fail.

ANGLIN J.—The question which confronts us in this case is whether the corporation of the City of Vancouver, which is required by a mandatory provision of its statutory charter to keep in repair highways within its limits, is or is not liable to pay damages at the suit of a person injured while lawfully using one of such highways owing to its being in a state of disrepair.

Although there was some evidence upon which this case might have been presented as one of misfeasance — defective original construction — that aspect of it was not submitted to the jury by the learned trial judge. No exception was taken to his charge on this, or any other ground. In the provincial Court of Appeal the case was apparently treated by all the judges as purely one of nonfeasance, two of them expressing the opinion that the question of misfeasance was not open to the plaintiff. Under these circumstances the respondent should not be allowed

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

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now to invoke the ground of misfeasance in support of his judgment.

If it were necessary in an action based on non-fulfilment of a statutory duty to make out a case of actual or imputed notice of the existence of conditions amounting to a breach sufficient to sustain a charge of negligence, the judgment for the plaintiff could not, I think, be successfully attacked on the ground that evidence of facts warranting an inference of such notice is lacking.

The real question, however, presented for our determination is whether the general rule that a person, for whose benefit as an individual, or as a member of a class, a statute is enacted, shall have a personal remedy for a breach of it which causes him injury (per Farwell and Kennedy L.JJ., in *Dawson* v. *Bingley Urban District Council*(1), has no application to statutes imposing duties on public bodies representing the public, or whether the application of this rule to these public bodies is excluded only where circumstances exist which shew that Parliament did not intend to impose upon them such a liability. The latter is, in my opinion, the correct view.

An analysis of the comparatively numerous English authorities of the class of which *Cowley* v. *The Newmarket Local Board*(2), is perhaps the leading example, makes it tolerably clear — notwithstanding some broader judicial statements, probably made inadvertently, which lend colour to the opposite view — that the real ground upon which many English municipal bodies charged by statutes with highway repair have been held not liable to travellers for injuries sus-

(1) 27 Times L.R. 308. (2) [1892] A.C. 345.

tained by them in consequence of failure to discharge that duty, was that, in enacting the various statutes imposing the obligation of repairing highways on these municipal corporations, Parliament intended merely to transfer to them an existing duty which rested on the inhabitants without changing the nature or the extent of the liability to be incurred upon failure to discharge it: *Municipal Council of Sydney* v. *Bourke*(1), at pages 443-444. A recent instance of exemption on this ground of an English municipal corporation from civil liability is furnished by the decision of the English Court of Appeal in *Maguire* v. *Corporation of Liverpool*(2). In many of the English cases the statutes dealt with will, upon examination, be found to be merely empowering or permissive; and several of them have for that reason been held not to impose a duty on the corporation. By other statutes the character and extent of the repairs required to be made is left to the discretion of the municipal body. In *Campbell* v. *City of Saint John*(3), there appears not to have been any such statutory duty to repair as we have in this case. In no case that I have found where the statute either in express terms or by necessary implication imposed on the municipal corporation an absolute duty to repair has it been held not civilly liable, unless the duty could be properly regarded as having been merely transferred to it, without change in its nature or incidents, from individuals or another body not subject to civil liability for its non-performance. Upon this ground the application of the general rule above stated has frequently been excluded. No doubt in certain statutes Parlia-

(1) [1895] A.C. 433. (2) [1905] 1 K.B. 767.
(3) 26 Can. S.C.R. 1.

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ment has otherwise indicated its intention that the imposition of a statutory duty shall not entail civil liability to a person injured in consequence of a breach of it. But in the absence of some sufficient ground enabling the Court to say that the legislature intended to exempt the body upon which a statutory duty is imposed from civil liability to a person, who is within the class for whose benefit such duty was created and who has been injured by its non-fulfilment, the general rule should, in my opinion, be applied and the injured person should be accorded his remedy in damages.

I find nothing in the statute now before us which suggests that the legislature did not intend that the present defendants should be civilly liable to any lawful traveller who may sustain injury on their highways owing to their having been negligently allowed to be in a state of disrepair. The duty to repair is created in mandatory and imperative language. There is nothing in the record to indicate that the duty thus imposed was transferred to the defendants from any other body — nothing to shew that there was any pre-existing common law obligation to repair lying upon the inhabitants of the territory incorporated as the City of Vancouver. The learned Chief Justice of the provincial Court of Appeal, speaking no doubt with full knowledge both of the local history of Vancouver and of the municipal legislation, public and private, in British Columbia, says:

> Before the incorporation of the defendant the locality now included within its limits was not organized, nor was it within the limits of any organized district. The Act, therefore, did not transfer common law powers and liabilities from the inhabitants of a district to an incorporated body, but the powers granted and liabilities imposed were original.

In this statement Mr. Justice Galliher concurs. The dissenting judges do not question it. There being nothing in the record to cast the slightest doubt upon it, we would not be justified in assuming it to be inaccurate. The statutory duty of the defendants to repair highways should, therefore, be treated as "original and not transferred."

In the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing. *Mersey Docks and Harbour* v. *Gibbs* (1); *Sanitary Commissioners of Gibraltar* v. *Orfila* (2).

For these reasons I am of the opinion that the defendants were rightly held liable and that their appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. H. Hay.*

Solicitors for the respondent: *Taylor, Hulme & Innes.*

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(1) L.R. 1 H.L. 93, at pp. 97, 110. (2) 15 App. Cas. 400, 412.