Torn from its context the latter part of Lord Blackburn's dictum, that the authority may be liable for omission to make reasonable use of its powers, has proved puzzling, not to say misleading. Our drainage cases place it in its proper setting. Liability arises only where the authority, by undertaking work in the exercise of its powers, comes under a duty to take reasonable care lest its work should cause damage to others. Thus, having undertaken to repair the broken wall, the East Suffolk Rivers Catchment Board was liable for the damage caused by its negligent method, though the negligence consisted partly in omitting to employ a reasonable number of men to accomplish the work by the method chosen. The obverse of this appears in the *Cawdle Fen* case, where the defendants omitted to build the wall high enough for complete safety. This omission was not negligent, because there was no duty undertaken to build a wall. Lord Blackburn did not make an omission the basis for an action for negligence unless there is some duty in existence, and such a duty will arise under an empowering statute only when the authority takes some positive step to create it.

C. W. HARRIS.

LEGAL LIABILITY OF HIGHWAY AUTHORITIES.[1]

Buckle v. Bayswater Road Board.[2]

This case is an interesting application of the rule that the statutory obligation of a public corporation to repair roads does not of itself render the authority liable to an action for damages for injury arising from the mere failure to keep the highway in repair. But this freedom from liability for what is known as non-feasance is strictly confined to highway authorities and the courts have been careful to prevent its extension. On the one hand, where (as often to-day) a highway authority has other functions and capacities, whether under the same statute or some other, the authority will not be able to claim the benefit of the non-feasance rule if the fabric it has failed to repair was constructed in the exercise of some other statutory function. On the other hand, there have been suggestions that the true test of liability for non-repair is to be found rather in the nature of the work itself than in the capacity in which the authority has acted. On this view the non-feasance rule applies to the actual highway itself, but not to artificial structures placed in or under it. In the majority of cases either test would, of course, produce the same result: for a highway authority acting as such will generally confine itself to the making of highways and will not build artificial structures thereon. In the case under discussion, however, the "artificial structure" test led McTiernan J. to one conclusion and the "juridical capacity" test led Dixon J. to the opposite. Additional interest is lent to the case by the fact that Latham C.J. agreeing with Dixon J.'s view of the law, disagreed with him in its application to the particular facts.

1. The author gratefully acknowledges the assistances he has received in writing this note from discussion with the Honours class in Constitutional Law I.
2. (1936) 57 C.L.R. 259.

In this case a road board, 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 road it dug a trench drain leading to a river. 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.

On appeal to the High Court from the Supreme Court of Western Australia, McTiernan J., as indicated above, adopted the "artificial structure" test, rendered possible in his view by the Privy Council decision in *Borough of Bathurst v. Macpherson.*[3] In this case the municipality which was also the highway authority made on a public road an open 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. The plaintiff recovered damages on the ground, in McTiernan J.'s view, that the relationship which the statute had created between the borough and the drain had cast a duty on the borough to prevent that artificial work they had created from becoming a source of danger to users of the road.[4] He agreed with the explanation of the Bathurst case given in *Municipality of Sydney v. Bourke*[5] that the defendants were liable because they had created an "artificial structure" which had caused a nuisance in the highway. The Judicial Committee had had no regard to the purpose which the drain served or the authority which built it.[6] In determining whether a thing falls into the category of an "artificial structure" or not, he continues, the criterion must be "the nature of the thing itself . . . 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."[6] Accordingly, on the basis of this reasoning, the drain was an "artificial structure" and the defendants were liable for their failure to repair.

The judgments of Latham C.J. and Dixon J. adopted the first line of reasoning referred to above—that liability will depend on the statutory power under which the authority acted. Both judges indicated, first, that the immunity from liability for non-feasance applies to highway authorities in Australia just as in England. In reference to the Bathurst case, Latham C.J. contented himself with stating that it had been the source of much legal discussion but that for the purposes of this case it was only necessary to say that the rule of liability for negligence in maintaining a drain put down under statutory drainage powers was sufficiently established.[7] He pointed out that the non-feasance rule relat-

3. (1879) 4 App. Cases 256.
4. (1936) 57 C.L.R. p. 298.
5. (1895) A.C. 449.
6. (1936) 57 C.L.R. p. 300.
7. Ibid., p. 271.

ing to highway authorities had not application in such cases, the governing consideration being the fact that the work had been done in some capacity other than that of highway authority.

Dixon J. explained the *Bathurst* case on identical grounds: he went further however, to interpret certain dicta of Lord Herschell in *Municipality of Sydney v. Bourke*,[8] to the effect that the purpose for which and the authority under which the Borough of Bathurst had constructed the drain "is not stated and is not material." Dixon J. inferred that the work was then obviously done in some capacity unstated,[9] but other than that of highway authority. He reinforced his conclusion that drainage work done by the statutory body in its capacity as highway authority would secure the benefit of the non-feasance rule by reference to English cases in which the problem had been considered.[10]

Both Latham C.J. and Dixon J. thus agreed that the important consideration in the case before them was the capacity in which the authority had acted. They pointed out that if the same body be both a highway authority and a drainage authority its liabilities in these capacities are quite distinct.[11] But though agreed on the principle the two judges differed as to its application to the particular facts before them, viz., as to whether the drain was put down in pursuance of a statute permitting road work or whether it was introduced into the road under some power, other than the power to make roads and alter them. Latham C.J. held that if it were put down for road purposes and also put down for ordinary drainage purposes, then 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; that in this case the drain did fulfil both these functions; and that for negligently failing to repair it, the board was liable to the plaintiff.[12] Dixon J., on the other hand, considered that the drain or gutter formed part of the road construction and served the purpose arising out of its character as a highway: for example, to carry off the surface water. A significant feature supporting this view was the evidence adduced by the road board itself to the effect that inspection of the drains was not continued while the road was being remade by the central authority. In Dixon J.'s view therefore the board was not liable for allowing the drain to fall into a condition of disrepair, since it placed it there originally with due care and skill.[13]

The difference of opinion on the factual question concealed a possible difference as to a point of law—namely the onus of proof. Dixon J. would place on the plaintiff the burden of proving that the drain was not made in the exercise of highway powers, while Latham C.J. would throw on the defendant authority the onus of proving that the drain had been made for highway purposes.

But on the major issue—the basis of the liability of highway authorities —both the Chief Justice and Dixon J. were agreed. Adherents of

8. (1879) 4 App. Cas. 256.
9. (1936) 57 C.L.R. pp. 289-90.
10. *E.g., Masters v. Hampshire* C.C. (1915) 84 L.J.K.B. 2194.
11. *Cf. White v. Hindley Local Board* (1875) L.R. 10 Q.B. 219.
12. (1936) 57 C.L.R. p. 273.
13. Ibid., p. 293.

McTiernan J.'s view are forced to rely on a very doubtful Privy Council decision which has been subjected to conflicting explanations. It would appear that modern English decisions support the "juridical capacity" test. A recent case of some relevance to this problem is *Newsome v. Darton Urban District Council.*[14] In this case both Greer L.J. and Slesser L.J. emphasised that the question of liability for failure to repair a road which had subsided at a place where twelve months previously the defendant corporation had filled in a trench, which they had constructed for the purpose of executing certain drainage work, depended on the capacity in which the authority acted. Greer L.J. stated the problem in such cases as follows: "When there is something that may be regarded as non-feasance by a local authority who may happen also to be a road authority, then the action will lie for that which they have done, not as a road authority, although they happen to be a road authority, but in some other capacity."[15]

There is a rather hasty tendency to describe the rule exempting highway authorities from liability for non-feasance as an historical anachronism which should be cut down in its operation wherever possible. The difficulties of proving contributory negligence against a plaintiff who alleges injury incurred through non-repair of such a structure as a drain or a highway should be taken into consideration—the rule may indeed relieve the highway from vexatious actions. As far as the condition of roads is concerned, there is always the public remedy.

It is submitted that the logic of Dixon J.'s judgment and its respect for later English authorities, combined with what would appear to be a more realistic view as to the facts in this case, will carry great weight in future cases in which highway authorities are concerned.

—T. A. PYMAN.

14. (1938) 3 All E.R. 93.
15. Ibid., p. 95.

COMMON EMPLOYMENT.

Radcliffe v. Ribble Motor Services Ltd.[1]

The doctrine of common employment had its beginning in *Priestley v. Fowler*[2] decided in 1837 and since that year has caused much trouble and injustice. Lord Abinger was afraid that if the decision was given in favour of the plaintiff, all employers would be entirely responsible to their employees for all the negligent acts of their minor servants and "inferior agents." He explained that although the master was bound to provide for the safety of the servant to the best of his ability, the servant was the best judge of the risks he was running and, if he did not wish to undertake them, he could abandon that particular employment. Thus he confused the two distinct ideas of *scienti* and *volenti*. His final justification is somewhat vague. The servant's best protection was to inform his master of the risks. If he received compensation for accidents arising out of his employment he would become careless. In

1. (1939) 1 All E.R. 637.