Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of The Corporation of the City of Victoria v. *Patterson and The Corporation of the City of Victoria* v. *Lang, from the Supreme Court of British Columbia; delivered the 9th June* 1898.

Present at the hearing:

THE LORD CHANCELLOR.
LORD WATSON.
LORD MACNAGHTEN.
LORD MORRIS.
LORD DAVEY.

[*Delivered by The Lord Chancellor.*]

THESE are two actions, one brought by Marion R. Patterson, the widow, and the administratrix of the goods of one James T. Patterson, deceased, against the Corporation of the City of Victoria, by reason of an accident that happened on the 26th of May 1896; the second action is by Martha Maria Lang, the widow, and administratrix of the estate and effects of John Lang, deceased.

Dealing first with the case of Patterson, the nature of the accident was that while a tramcar was passing over a bridge alleged to be under the care and control of the Defendant Corporation the bridge broke down, and the husband of the Plaintiff, and other persons, were drowned. This is an action brought to recover damages in respect of the injury the Plaintiff and her family sustained by the loss of her husband.

The first question that arises upon this record is, what was the cause of the accident which led to this calamity? Upon that question, subject to what their Lordships have to say hereafter in

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respect to the different classes of evidence upon which that question depends, it arose by reason of the breaking down of the bridge from its internal defects, coupled with the fact of the tramcar running over it at a point where, from natural decay, or other circumstances, to which their Lordships will have to call attention later, the bridge had become incapable of sustaining the weight to which it was subjected.

The question then arises, whether whoever is responsible for the condition of the bridge was guilty of any act of negligence, either by way of omission, or commission, which led to the accident? Some controversy has been raised at their Lordships' Bar with reference to the sufficiency of the evidence to establish the responsibility of any one. It is enough to say, in dealing with that part of the question, that there was evidence on both sides as to the condition of the bridge, and as to the circumstances under which the accident arose. Their Lordships do not regard it of very great importance to consider the particular portions of the evidence. The Jury had before them the question of whether or not the proximate cause of the accident was the decay of the particular beam pointed out in the evidence; and whether or not the Jury were accurate in their decision that the proximate cause of the accident was the decay, and the injury to that particular beam, it is immaterial to consider, because there was evidence from which the Jury might fairly and properly arrive at that conclusion. They have arrived at it, and there is clearly no ground upon which that decision ought to be reviewed. It must be taken therefore that there was evidence to justify the Jury in the conclusion at which they arrived.

The next question which arises is, who is responsible for the condition of that beam, which,

for the rest of this judgment, is to be assumed to be satisfactorily ascertained to be the cause of the breaking of the beam at that point.

One question might have arisen in this case, a seriously important question, namely, whether, if the original construction of the bridge was such, and the pressure placed upon it by the tramway company was so great that, under any circumstances, independently of any decay, or misuse of the beam, to which their Lordships have referred, the weight placed upon it would have caused the destruction of the bridge. It might have been a very serious question whether or not the responsibility for passing that weight over the bridge at that point might not have rested upon those by whose act that unusual and extraordinarily heavy weight was passed over, without casting any responsibility on those whose duty it was to maintain and repair the bridge.

Their Lordships are of opinion that no such question arises in this case, because the conduct of the trial was such that that question was never submitted to the jury, and was never raised in point of argument; and, if it had been, a totally different series of testimony and witnesses might have been properly called to determine that question. It would be almost beyond doubt that if such a question as that had been raised, evidence of a different character would have been produced: Persons sought to be incriminated by the imputation to them of negligently passing over that weight would probably have been called to show that weights of a similar character had been repeatedly passed over the bridge. And indeed some evidence appears in one of the cases which will be referred to hereafter to show that evidence of that sort was available. But it is enough to say, upon

that part of the case, that when parties go before a jury to determine particular issues, and when, by their conduct, whatever the state of their pleadings may be, they leave aside one question altogether, and do not direct their adversary's attention to a point of fact which may be answered by evidence on the other side, it is too late after the verdict to raise that question again. And upon the barest principles of justice it would be improper to allow any such thing to be done, because it would be taking their adversaries by surprise; it would be raising new questions after the tribunal before whom such questions are properly decided had decided the case, when the opportunity of raising and deciding them has passed by. It is abundantly clear in the course of the trial here that no such question as that was ever presented to the Jury; and it is, their Lordships think, the experience of every one familiar with causes tried before a jury, that no more inflexible rule has ever obtained in the Courts than that you shall not raise a question after a trial which has not been raised at the time, which question, if it had been raised, could have been answered by evidence on the other side.

The question, therefore, which their Lordships have to decide, must be considered to be independent of any such question as that. That question, if it is raised again, as it may be, would be a question to be determined quite irrespective of anything their Lordships have said in this judgment. The question here is to be determined upon the issues raised and argued, and decided before that jury.

The question that was raised is whether or not the persons, whoever they were (as to which more will be said hereafter), were responsible for the state of the bridge, and the condition to which the bridge was then reduced. The Jury

have answered certain questions put to them by the learned judge who tried the cause, and it would appear from the evidence that the Corporation (as to the responsibility of which more will be said hereafter, with reference to the legal position the Corporation occupied) undoubtedly, from the year 1892 (this accident having happened in the year 1896), had the care, and conduct, and management of this bridge; that one of their officers, paid by them, and authorised by them, went to the bridge, and bored certain holes in the beam, and it is alleged, and found by the Jury that this was the place at which the accident was caused, and that the boring was the proximate cause of the calamity which followed. It is unnecessary to go into detail upon the particular evidence given by the person so called; it is enough to say that there is certainly ground for the verdict of the Jury that the proceedings then taken materially weakened the beam, which afterwards broke. There was the evidence upon the cogency, or force of which their Lordships have not to pronounce any opinion, that the boring of holes and leaving them so as to collect water, was calculated to rot this beam; that for a period of four years this beam was left in that condition, collecting water, and if the evidence is to be believed, diffusing a state of rottenness all through the beam. That act was done by an officer of the Corporation, upon their direction, and paid for by them. That would, under ordinary circumstances, be ample evidence to justify the verdict which was ultimately found against the Corporation.

But it is objected that although the Corporation were, in fact, so far as a corporation can be, by its officers, and persons in their employment, in physical possession of the bridge, yet the nature of the legislation in British Columbia is such that the bridge, although in possession of the

same persons who were corporators, and professing to occupy the position of corporators, was not in point of law in possession of the Corporation, but in possession of persons who were wrongly pretending to be the Corporation, and that, therefore, so far as that abstract legal creature the Corporation was concerned, the acts done were *ultra vires* and indeed they were not corporate acts within the legal capacity of the Corporation to commit.

That question depends upon the British Columbian Legislation, and the British Columbian Legislation, their Lordships assume now, by the admission of both parties, is of this character: that the roads and bridges are vested in the Dominion, or in the Province, it is immaterial which, but in the Constitution of the Province they are left to be adopted or not by the particular municipalities which are from time to time created in the Province. That, so far as the evidence is concerned, appears to have been the condition in which this bridge was at the time of the accident: that it was a bridge which at one time had belonged to, and been in the possession, and under the legal control of one set of authorities. It is alleged on the part of the Plaintiff that it was adopted, and taken over by the municipality, and they became responsible for the maintenance of it, and, if negligence was committed in the charge of it, responsible for the damages such as are claimed in this action.

The question which appears to be sought to be argued before their Lordships is this: that as the general Act of Parliament, the Municipal Act, 1892 (55 Vict. c. 33), appears to assume that when the municipalities have got possession of, and have adopted, either the roads or the bridges, it simply gives them the power to make bye-laws, a bye-law actually vesting the bridge in the Corporation was a necessary preliminary to

treating their acts as corporate acts, and inasmuch as there was no bye-law in evidence which, so to speak, vested the bridge in them, the Corporation had not become the responsible authority.

Now there are two modes in which that matter can be treated. The first of them is this: that the Act of Parliament which gives the power, as it is said, to act by bye-law, nowhere prescribes any particular form of adoption; and, so far as their Lordships have heard, there is no general Act of Parliament which provides that when a municipality is adopting a road or a bridge it has to go through any particular form, but the nature of the general Statute referred to above is that when the municipality has adopted a bridge, the bridge so adopted comes under the jurisdiction of the municipality, and the municipality then is empowered to do the ordinary works which a municipality in other parts of the world does, make bye-laws for the regulation of powers that it possesses so as to bind outside persons, and to inflict penalties for any nuisance committed on the highway, or for any injury done to the bridges, and so forth. Their Lordships are of opinion that there is nothing in that Statute which prescribes any particular form of adoption. When the question arises whether a bridge or a road has been adopted, or not, it must be treated like any other question which involves the necessity of proof of the authority to assume a jurisdiction. If the Statute has not prescribed any form, any appropriate form which the municipality chooses to adopt for the purpose of investing itself with that authority would be sufficient.

Their Lordships find as a matter of legal inference from the facts found by the Jury that the Appellant Corporation, from and after the year 1892, competently assumed, under the provisions of the Municipal Act, the maintenance, repair, and control of the Point Ellice Bridge, in the

interests of the community. It is, indeed, to be remarked that since this accident has taken place, that which purports to be a bye-law of this same Corporation, which is now setting up their inability to act in a corporate capacity at all in respect of this bridge has been passed by them, and which purports to be, "Regulations for "the working of street railways on and across "the wooden pile bridge at or near point Ellice, "in the City of Victoria, and for controlling "the vehicular traffic on and across the said "bridge." It recites that, "Whereas it is "deemed necessary and requisite for the pro- "tection of the persons and property of the "public that the regulations hereinafter con- "tained shall be made. Therefore the Municipal "Council of the Corporation of the City of "Victoria enacts as follows: (1.) No car weighing "with its passengers more than eight and one "half tons shall be allowed to be on, or to cross "the wooden pile bridge over the waters of the "Victoria Arm at or near point Ellice in the "City of Victoria, and no such car shall be "permitted or suffered to contain, or to carry "over the said bridge more than thirty pas- "sengers at any one time."

Their Lordships certainly, in the face of that regulation purporting to be passed by this Corporation, are somewhat surprised that the Appellant Corporation, appearing here should argue that these acts which they are doing, purporting to regulate the traffic over this bridge, and purporting to exercise the authority of the Municipal Council in that respect given—that every one of those acts which they have done hitherto, and which they have done after the transaction into which their Lordships are now enquiring, were acts which they had no authority to do, and that they, as a corporation, are not persons acting at all, although they are purporting

to act, with the authority, and under the sanction of the law, which only gives them the power to do it if they are a corporation in possession of, and holding the authority over this bridge. However, of course, if they can succeed in establishing that proposition it would be true to say that whatever might be the responsibility of the individuals who have been so acting without authority, and purporting both to raise money by rates, and purporting to sell some of the actual property in the bridge, whatever might be the individual liability of each of the persons doing or concurring in such illegal procedure, if it were illegal, the Corporation, *quâ* corporation, would not be responsible, although the individual persons (corporators) might be in their individual capacity.

But their Lordships are entirely unable to accept any such proposition as having been made out here. Their Lordships are of opinion that the General Act, prescribing no particular form of adoption, is satisfied by what was done; that the fact that the Corporation has taken into its hands and is now managing this bridge is ample to satisfy the Statute. There is another proposition by which the same result would be arrived at. It is not denied that the Corporation officers in the name of the Corporation have been managing this bridge, and taking care of it, and repairing it, and, as it is said, selling the materials of it, ever since the year 1892. If this question of there being no adoption were to be relied upon in the face of the fact that for this period of years the municipality has been apparently conducting these operations, and exercising this authority, it would have been obviously a necessary part of the evidence put in on the part of the Corporation to negative whatever was necessary to establish the authority to take possession of this bridge. Any tribunal would be probably guilty of very

gross omission to do its duty if it did not assume from that condition of things that all these things were legally done. No Court ought to assume illegality; and where there is an amount of such action as there is here, taking possession and dealing with this matter by acts of ownership only consistent with the Corporation being the legal authority, it certainly ought to have been put before the Court and Jury that, if such a question was to be raised, the burden of proof was upon those persons who sought to show that their acts were illegal and not justified by the course of law and administration in which they were then engaged. It is not necessary to rest their Lordships' decision upon that view, because the construction which their Lordships place upon the General Act and upon what has been done in respect of that General Act, is enough, for the decision of this case; but it is important to point out to the parties that where that condition of things which has been described exists, it would be for the Corporation itself to show that that, which was *primâ facie* their act, was not their act, by every species of evidence by which their authority could be negatived.

It is enough, therefore, to say that on either of these grounds it would be impossible to maintain that this was not an act within the power of the Corporation to do, and their Lordships are of opinion that there was ample evidence that it did do the acts for which responsibility is insisted on against them.

The other case, which has been argued almost together with it, though argued in one sense separately, differs only in one trifling respect, and that simply means that one of the witnesses called in the second case differs in his evidence from the evidence he gave on the first occasion. But that is a matter wholly immaterial. In each case the witness was before the Jury. It was

for the Jury to consider, and, if his evidence was at all different, it was for the Jury to weigh and value the amount of credit, or discredit that they would attach to the second version of his evidence by reason of the variation in that evidence from when he first gave it. But the Jury have decided the question precisely almost in terms in the same way, and therefore the second case must follow the fate of the first.

Their Lordships are therefore of opinion that none of the points that have been made on the part of the Appellant Corporation are sustainable, and they will humbly recommend to Her Majesty that both these Appeals should be dismissed with costs.