1914

*Nov. 10.
*Nov. 30.

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

AND

MARY TOBIN (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Municipality—Misfeasance.

The corporation of Halifax in laying a concrete sidewalk broke up a portion of the asphalt sidewalk of a crossing street and replaced it with earth and ashes. The rain washed away the filling and T. was injured by stepping into the excavation.

Held, affirming the judgment appealed from (47 N.S. Rep. 498), that the corporation was guilty of misfeasance and a verdict in favour of T. should stand.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), maintaining a verdict at the trial in favour of the plaintiff.

In May, 1911, the Halifax City Corporation laid a concrete sidewalk on Granville Street. In doing so the grade was lowered, and on Salter, a steep street crossing Granville, the asphalt sidewalk was cut away in order to make a level junction. The part so cut away was filled in with earth and ashes which in the fall was washed out by the rain. In October the plaintiff, walking up Salter Street, stepped into the hole made by the rain and fell on the concrete, receiving serious injury. In an action against the city

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

(1) 47 N.S. Rep. 498.

she obtained a verdict for $2,000, which the full court sustained. The city appealed to the Supreme Court of Canada.

F. H. Bell K.C. for the appellant. The city is liable for misfeasance only. *Municipality of Picton* v. *Geldert*(1).

In this case it was only the usual wear of the sidewalk that caused the depression. See *City of St. John* v. *Campbell*(2); *Cullen* v. *Town of Glace Bay*(3); *Maguire* v. *Liverpool Corporation*(4).

Newcombe K.C. and *J. B. Henney* for the respondent refer to *Corporation of Shoreditch* v. *Bull*(5); *City of Vancouver* v. *McPhelan*(6); *Dawson & Co.* v. *Bingley Urban District Council*(7).

THE CHIEF JUSTICE.—This appeal should be dismissed with costs. The accident was due entirely to the faulty construction of the connection between the concrete sidewalk on Granville Street with the asphalt sidewalk on Salter Street. It is a case of failure on the part of the municipality to take due care in the exercise of its powers.

The appellant urges that there is no misfeasance, and that for nonfeasance there is no statutory liability. I express no opinion as to whether or not under the statute there is a liability for nonfeasance.

In my judgment this is not a naked question of law, but one of mixed fact and law. I am quite satis-

(1) [1893] A.C. 524.
(2) 26 Can. S.C.R. 1.
(3) 46 N.S. Rep. 215.
(4) [1905] 1 K.B. 767.
(5) 90 L.T. 210.
(6) 45 Can. S.C.R. 194, at p. 227.
(7) [1911] 2 K.B. 149.

1914

CITY OF HALIFAX v. TOBIN.

The Chief Justice.

fied that the accident was directly attributable, as found below, to the fact that the municipality having undertaken to make repairs to the sidewalk left it in an unsafe condition and that for the consequences to the plaintiff the municipality is liable.

DAVIES J.—The question in this case is reduced to a very narrow one. Mr. Bell admits that in laying Granville Street sidewalk of concrete, the city engineer broke up the asphalt sidewalk of Salter Street, which is a street crossing Granville Street at right angles and is very steep. In the doing of this work, the engineer left a gap or space of a few feet wide between the two sidewalks which it was their duty to fill up properly.

The jury have found that in the discharge of that duty the city officials were guilty of negligence and that such negligence consisted in not "properly finishing the work." If this finding can be construed as a finding that the material used "clay and ashes" in filling up the hole between the sidewalks was improper material, then, I think, the judgment was right and the appeal should be dismissed.

Mr. Bell admits that the duty of filling up that hole so caused lay upon the city. If that is so, they were clearly obliged to do so with proper materials. If the clay and ashes they put in were improper filling and the accident was caused by this improper material being washed out, it would clearly be a case of misfeasance, not nonfeasance.

I had some doubt on the question of the real meaning of the finding of the jury, but conclude their answer must have reference to the material used being

improper; because apart from the material used the evidence was that the work was properly done.

I base my judgment, therefore, upon the ground that the city officials in building their sidewalk on Granville Street created a condition which cast on them a duty to fill up a gap or space made by them between the two sidewalks, the concrete one on Granville Street and the asphalt one on Salter Street, that they accepted that duty and attempted to discharge it, but used improper material. As a result of such negligence, a hole was made by the rain in this connecting space between the sidewalks into which plaintiff stumbled and was injured.

I would dismiss the appeal with costs.

IDINGTON J.—I have not found it necessary to fully consider the effect of the Statute of Limitations which may possibly, when read in light of the authorities applicable thereto, dispense with any need for observing the distinction between misfeasance and nonfeasance so much pressed upon us. I, therefore, pass no opinion thereon.

I think the reasons assigned in the court below amply justify the judgment appealed from herein and that this appeal should be dismissed with costs.

DUFF J.—The jury was entitled to find that the appellant corporation in the exercise of their powers in relation to streets changed the physical condition of the place in question and without justification left it in such state that it was, or at any moment was likely to become without notice to the public using it a dangerous nuisance; and if that was their view there was negligence constituting "misfeasance" within the meaning of the rule governing the responsibility of

1914

CITY OF HALIFAX v. TOBIN.

Duff J.

municipalities for the condition of highways within their boundaries. On this ground I think the verdict and judgment can be supported.

The appeal should be dismissed with costs.

BRODEUR J.—This is an appeal from the Supreme Court of Nova Scotia *in banco* confirming the judgment of Mr. Justice Longley awarding $2,000 damages to the respondent.

It was an action for damages for negligence causing personal injury to the respondent, who fell on a sidewalk of the defendant municipality.

Some months previous to the accident some reconstruction and repairs had been made to the sidewalk where the accident occurred. A space of about two feet in that sidewalk had been filled with earth which could, according to reliable evidence, be removed by rain. The plaintiff-respondent, in stepping into the hole which had formed itself at that place, fell upon the pavement and broke her knee-cap.

The main point raised by the appellant corporation is that the accident was a nonfeasance on the part of the corporation and that under the common law it could not be held responsible.

The jury found, however, that the negligence had been established.

The jury could reasonably find this verdict, for the material used could be easily washed out and it constituted an act of misfeasance. I do not see any reason why this judgment of the Court of Appeal, which maintained the verdict, should be disturbed.

Appeal dismissed with costs.

Solicitor for the appellant: *F. H. Bell.*
Solicitor for the respondent: *W. H. Fulton.*