HOURIGAN *v.* THE BENDIGO TRAMWAYS COMPANY LIMITED.

F.C. 1890. August 12, 13, October 1.

*Negligence—Tramway Company—Non-repair of roadway—Liability—Nuisance—"Tramway"—Tramways Act* 1890 (*No.* 1148), *ss.* 3, 5, 13, 37, *Schedule 4., Clauses* 1, 2, 4, 5.

A private company to whom authority to construct a tramway upon a public highway had been delegated by a municipal council duly authorized in that behalf has the obligation imposed upon it by the *Tramways Act* 1890, when it has constructed the tramway upon the highway in accordance with the required specifications, of keeping in repair that portion of the highway in which the rails are packed, in accordance with those specifications.

Hood, J., dissenting.

SPECIAL CASE for the opinion of the Supreme Court reserved by the learned Judge of the County Court at Bendigo in an action by the plaintiff against the defendants for injuries caused to the former by reason of the non-repair of the roadway in and under which the defendants' tramway ran.

The findings of fact in the action were that—

1. The accident occurred through the body responsible for the maintenance of the road, in relation to the tram rails, negligently omitting to keep the road adjoining the rails up to the level of the rails.

2. The plaintiff was not guilty of contributory negligence.

3. Damages were assessed contingently at 8*l.*

The learned judge upon these findings reserved the question whether the defendants were liable.

*Cussen* for the plaintiff—By sec. 3 of the *Tramways Act* the schedule is made a part of the Act. Clause 5 of Exhibit C—the Order in Council—contains the specifications of the tramway: these provide for length of sleepers, width of line, ballasting, gauge levels, and maintenance of line. It is admitted that the defendants were legal transferrees and assignees of the tramway. If they did not comply with the specifications, the effect would be to deprive them of their authority to enter upon the road. In *Oliver* v. *N. E. Railway Company* (*a*) authority was given to defendants to do the act complained of.

(*a*) L.R. 9 Q.B. 409.

F.C.
1896
HOURIGAN v. THE BENDIGO TRAMWAYS COMPANY LIMITED.

[MADDEN, C.J., referred to *Metropolitan Asylum* v. *Hill* (*b*) and *Bossence* v. *Shire of Kilmore* (*c*).]

Both the municipality and the tramway company may be liable. Here it is something more than contract. The Court considered this question of contract as affecting liability in *Jenkins* v. *Mayor of Melbourne* (*d*).

*Helm* v. *Munro & Co. Limited* (*e*) was relied upon in the Court below to show that we had no right to sue.

[MADDEN, C.J. The principle of *Geddis* v. *Bann Reservoir* (*f*) seems to apply to this case.]

It was never intended that the road should be allowed to get into a bad state of repair. It is the duty of the defendants to keep the way in a good condition: *Rex* v. *Kerrison* (*g*). The duty of keeping the road in repair is a condition continuing so long as the public rights are interfered with: *Rex* v. *Ely* (*h*). *per* Patterson, J.

(He was stopped.)

*Box* for the defendants—The tramway lines were properly constructed, and were in proper condition at the time of the accident. The accident arose from want of repair of the road.

[A'BECKETT, J. For the purposes of this case it is as if the defect in the road was between the tram rails.]

There is no duty upon the defendants to repair the road apart from the tramway. Under our system, at first, councils alone had power to construct tramways. Later on they were allowed to delegate their powers in this respect to corporations or to private persons. Sec. 5 of the *Tramways Act* 1890 simply makes the delegates responsible for the carrying out of the duties, etc., which by the Order in Council were imposed on the councils. Exhibit E refers merely to questions of contract *inter se*, and cannot be called in aid of actions of this nature. One of those responsibilities is to keep the highway in repair, but merely as between the council and the Tramway Company.

(*b*) 6 App. Cas. 193.
(*c*) 9 V.L.R. L. 35.
(*d*) 16 V.L.R. 182.
(*e*) 16 V.L.R. 591.
(*f*) 3 App. Cas. 430.
(*g*) 3 M. & S. 526.
(*h*) 15 Q.B. 827, 843.



F.C.
1896
HOURIGAN v. THE BENDIGO TRAMWAYS COMPANY LIMITED.

All we have to do is to keep the tramway in good and substantial repair to the satisfaction of the officer: clause 15. *Moore* v. *Lambeth Waterworks Company* (*i*) is a similar case to the present.

[MADDEN, C.J., referred to *Clarkbarry* v. *South Melbourne* (*k*).]

In *Thompson* v. *Mayor of Brighton* (*l*) the only breach of duty which could be imputed to the defendants was for non-repair. According to that case if the local body had laid down the tramway it would not have been liable. The municipality has not given to the Tramway Company the power to deal with the whole of the road. The intention of the Order in Council is to give the right to lay a tramway, and when that is properly laid the defendants have done all they are required to do. Sec. 55 of the *English Tramways Act*, 33 and 34 Vict., c. 78, is the same as clause 21 of the Schedule to our Act: *Alldred* v. *West Metropolitan Trams Company* (*m*). Assuming that clause 15 is absolute between the defendants and the municipal corporation, that is matter of contract, of which the present plaintiff cannot take advantage. If the defendants have a legal right to place their tramway on the road, unless responsibility be thrown upon them by the Legislature they are not liable.

*Cussen* in reply—*Oliver's Case* (*n*) is not distinguishable from this case. Unless it is overruled this case is concluded by it. There it is assumed that the tramway is lawfully constructed.

[HOOD, J. There was a right to put down the tramway, but when it was put down it was a nuisance—the rails were too high.]

The obligation is a continuing one. The decisions as to public bodies who do not construct these works for their own advantage do not apply: *R.* v. *Kent* (*o*).

With regard to *Moore* v. *Lambeth Waterworks* (*p*) and *Thompson* v. *Brighton, Mayor of* (*q*) these cases depend upon

(*i*) 17 Q.B.D. 462.
(*k*) 21 V.L.R. 426.
(*l*) [1894] 1 Q.B. 332.
(*m*) [1891] 2 Q.B. 398.
(*n*) L.R. 9 Q.B. 409.
(*o*) 13 East. 220.
(*p*) 17 Q.B.D. 462.
(*q*) [1894] 1 Q.B. 332.

their own acts and upon their own particular circumstances. Here there is no express provision which relieves the defendants from liability. The tramway was constructed for private benefit. As to the meaning of "tramway," see, per Campbell, L.C., *Swansea Wales Railway* v. *Swansea Local Board* (*r*).

During argument the following additional authorities were referred to:—*Howitt* v. *Nottingham Tramways Company* (*s*); *Helm* v. *Munro & Co.* (*t*).

*Cur. adv. vult.*

The following judgments were read:—

MADDEN, C.J. This is a special case for the opinion of the Full Court by the learned Judge of the County Court at Bendigo. The question which we have to determine is whether the defendants are liable to the plaintiff for injuries which the learned Judge finds were caused to him as follows:—The defendants are the body in whom the use and control of certain tramways at Bendigo are vested by a delegation duly arrived at within the meaning of the *Tramways Act* 1890, secs. 5 and 13. Their tramway is laid in and under certain public streets in Bendigo, and the rails on which the tram cars run are, or should be, level with the surface of the street. In fact a longitudinal rut of some considerable depth, caused by carriage traffic, ran beside one of these rails and in close proximity to it. The wheel of the plaintiff's cart, while he was driving along the street, got into this rut, and the projecting rail upset the cart, and caused injury to the cart and harness and to the plaintiff. So much is found by the case. But it has been contended for the defendants that there is no obligation on them to repair or maintain the road; that the rut was in the surface of the road, and not in their *tramway*, and that therefore whoever else may be liable the defendants are not. It is therefore necessary to consider the defendants' legal position as to any duty to have effected repair of the rut which caused the damage.

The *Tramways Act* 1890, sec. 3, allows the construction of "tramways" in any municipal district, with certain expressed

(*r*) 4 E. & B. 189, at p. 195. (*s*) 12 Q.B.D. 16.
(*t*) 16 V.L.R. 791.



exceptions. "when authorized as provided in the second schedule." The second schedule, clause 4, provides that the authority for the construction of "a tramway" shall be an Order in Council, and by clause 2 that as one of the bases of any such order plans and specifications of the proposed tramway shall be lodged for the information of the Governor in Council; and clause 5 provides that every such order shall empower the promoter therein specified to make the tramway "upon the gauge and in manner therein described . . . . upon any public highway or elsewhere."

Then section 5 of this Act provides that, when the council of any municipality shall have obtained an order authorizing the construction of "a tramway" under the provisions of Part I. of the Act, such council may, subject to the provisions in Part II. contained, "delegate the authority conferred by such order to any person or corporation, to construct, maintain, and manage such 'tramway,' on terms to be agreed on, and upon the execution of such agreement, when the same shall have been approved of by the Governor-in-Council, the rights, powers, privileges, and obligations which by the said order were granted to or imposed upon such council shall, for the purposes of the order, be possessed by and imposed upon such person or corporation" as if he or it were the council of the municipality. The delegate of the authorities of the municipal councils may in turn delegate to others under the provisions of section 13 of the Act. In this case certain municipal councils were duly authorized to construct the tramway in question by Order in Council. They delegated their authorities to certain persons, and by certain mesne delegations the tramways were duly transferred under section 13 of the Act to the defendants. The Order in Council which authorized the construction of this tramway originally by the said municipal councils (Exhibit C), provides that "the gauge of 'such tramways' shall be 4 ft. 8½ in., and that the said 'tramways' shall be constructed in the manner set out and described in the working plans and specifications, numbered from 1 to 13 inclusive, now deposited in the Public Works Department, Melbourne." The right, therefore, given by the Order in Council of September 1888 (Exhibit C) to the

F.C. 1896 HOURIGAN v. THE BENDIGO TRAMWAYS COMPANY LIMITED. Madden, C.J.

persons originally authorized to construct the tramway in question was to construct it in that way, and that which was being described as "the tramway" was the work to be so constructed.

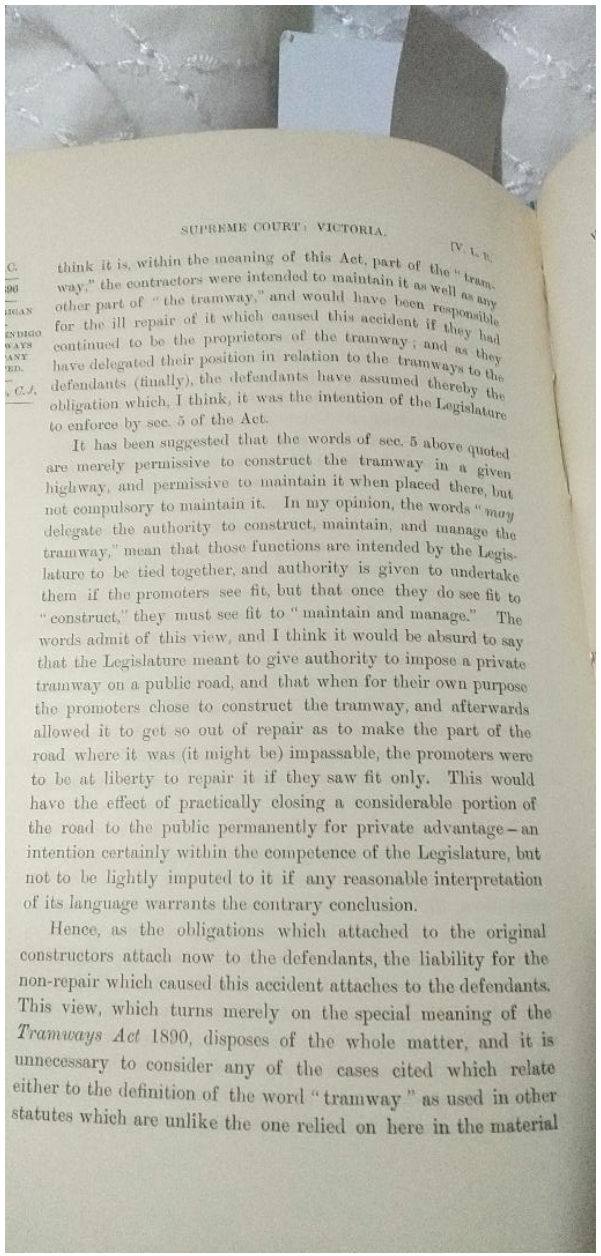
The specification referred to was not put in evidence itself, but as the words in Exhibit E, pages 2 and 3, clauses 1, 3, and 10, are identical with it as to the parts relied on, the parties agreed that it was to be looked to as, in fact, containing the specification. The "tramway," then, of which the Act speaks is "the tramway" as described in the Order in Council, and the Order in Council speaks of it as that described in the plans and specification deposited in the Public Works office. The plan shows that tramway as consisting of transverse sleepers to which the rails are attached, and the ends of the sleepers projecting eighteen inches on either side of the rails, and the whole closely packed in macadam brought up level with the surface of the rest of the street and the top of the rails. The specification provides—"That the gauge of the tramways shall be four feet eight and one-half inches, and that the top of the rails shall be level with and conform to the surface of such road;" and "that the rails laid down in connection with the said tramway shall be girder tram rails of forty-five pounds per yard, such rails to be laid on transverse wood sleepers, packed in broken metal, and conforming to the surface of the roads, which surface shall be formed of well-rolled macadam."

In my opinion the Act itself means by the words "the tramway" the whole work which the specification and the plans provide for, and that includes the packing of macadam between and over the whole length of the sleepers, and therefore includes the patch of that which was also the surface of the roadway in which the rut was which caused the accident. It is argued, that once the macadam packing was brought to the road level, it formed part of the surface of the road, and became in the control of those only who had control of the road *quâ* road, and that the defendants had neither the right nor the obligation to repair it. In my opinion, although it did become part of the road, it was none the less part of "the tramway," as the Act shows it may be, and as the Order in Council originally



F.C. 1896 HOURIGAN v. THE BENDIGO TRAMWAYS COMPANY LIMITED. Madden, C.J.

describes it for its own purpose. The tram rails are unquestionably part of the tramway in any view, and yet the tops of the rails are as much part of the road as any other two inches of the road's width would be, and the public has the same right to travel on these rails as on any other part of the road, except while the tramcars are in actual occupation of them. I think the reasonable view of the Act is that for its purposes it allows and requires the constructors of the tramways to make that which is the ballasting and packing of its sleepers to be at the same time part of the substance and surface of the road, but does not make it the less on that account part of "the tramway" within the meaning of sec. 5 of the Act, and the clauses 1, 2, 4, and 5 of the Second Schedule to the Act. I do not think sec. 37 of the *Tramways Act* 1890 at all inconsistent with this view. That section is dealing with certain special tramways, and though it uses the word "tramways" as to these, and authorizes the "removal" of such "tramways," it permits this subject to the approval of a resolution of the municipal council of the locality, which council would see that permission was not granted to so remove the "tramway," unless that part of it which made up the surface of the road was left reinstated, and until such removal is duly authorized the tramway is to be deemed one authorized under the Act of 1890, and is not to make the proprietor thereof liable as for a "nuisance," provided it is left in repair. There is nothing at all, in my opinion, which even looks exceptional to the meaning of the word "tramway" as used elsewhere in the Act, except the right of "removal," and the conditions referred to are such as to preclude any right to remove the "packing," as well as the sleepers and rails; and even if the effect of sec. 37 were to authorize the removal of the tramway, including the "packing," etc., I see nothing so absurd in that as to make my interpretation of the Act unreasonable, because its utmost result would be that the council which allowed the removal would itself have to fill up the gap in the roadway caused by the removal. Then sec. 5 also provides that those who are authorized to contruct tramways "may delegate the authority to construct, *maintain*, and manage the tramway;" and, therefore, if the macadam, ballast, and packing of the sleepers is, as I

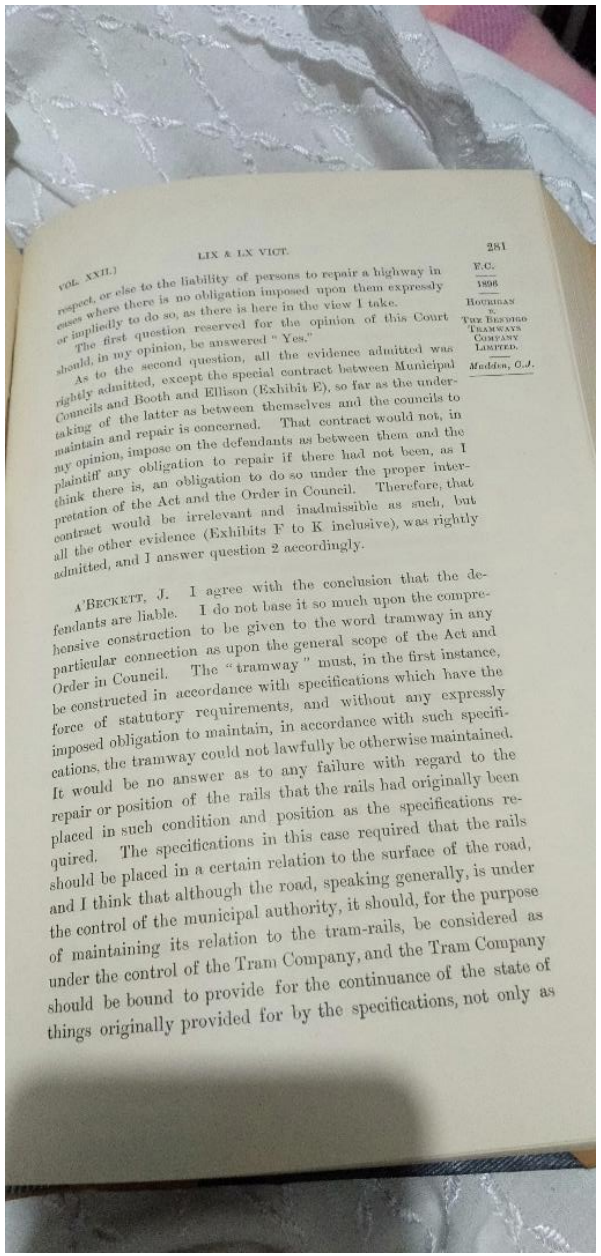




think it is, within the meaning of this Act, part of the "tramway," the contractors were intended to maintain it as well as any other part of "the tramway," and would have been responsible for the ill repair of it which caused this accident if they had continued to be the proprietors of the tramway; and as they have delegated their position in relation to the tramways to the defendants (finally), the defendants have assumed thereby the obligation which, I think, it was the intention of the Legislature to enforce by sec. 5 of the Act.

It has been suggested that the words of sec. 5 above quoted are merely permissive to construct the tramway in a given highway, and permissive to maintain it when placed there, but not compulsory to maintain it. In my opinion, the words "*may* delegate the authority to construct, maintain, and manage the tramway," mean that those functions are intended by the Legislature to be tied together, and authority is given to undertake them if the promoters see fit, but that once they do see fit to "construct," they must see fit to "maintain and manage." The words admit of this view, and I think it would be absurd to say that the Legislature meant to give authority to impose a private tramway on a public road, and that when for their own purpose the promoters chose to construct the tramway, and afterwards allowed it to get so out of repair as to make the part of the road where it was (it might be) impassable, the promoters were to be at liberty to repair it if they saw fit only. This would have the effect of practically closing a considerable portion of the road to the public permanently for private advantage—an intention certainly within the competence of the Legislature, but not to be lightly imputed to it if any reasonable interpretation of its language warrants the contrary conclusion.

Hence, as the obligations which attached to the original constructors attach now to the defendants, the liability for the non-repair which caused this accident attaches to the defendants. This view, which turns merely on the special meaning of the *Tramways Act* 1890, disposes of the whole matter, and it is unnecessary to consider any of the cases cited which relate either to the definition of the word "tramway" as used in other statutes which are unlike the one relied on here in the material





respect, or else to the liability of persons to repair a highway in cases where there is no obligation imposed upon them expressly or impliedly to do so, as there is here in the view I take.

The first question reserved for the opinion of this Court should, in my opinion, be answered "Yes."

As to the second question, all the evidence admitted was rightly admitted, except the special contract between Municipal Councils and Booth and Ellison (Exhibit E), so far as the undertaking of the latter as between themselves and the councils to maintain and repair is concerned. That contract would not, in my opinion, impose on the defendants as between them and the plaintiff any obligation to repair if there had not been, as I think there is, an obligation to do so under the proper interpretation of the Act and the Order in Council. Therefore, that contract would be irrelevant and inadmissible as such, but all the other evidence (Exhibits F to K inclusive), was rightly admitted, and I answer question 2 accordingly.

A'BECKETT, J. I agree with the conclusion that the defendants are liable. I do not base it so much upon the comprehensive construction to be given to the word tramway in any particular connection as upon the general scope of the Act and Order in Council. The "tramway" must, in the first instance, be constructed in accordance with specifications which have the force of statutory requirements, and without any expressly imposed obligation to maintain, in accordance with such specifications, the tramway could not lawfully be otherwise maintained. It would be no answer as to any failure with regard to the repair or position of the rails that the rails had originally been placed in such condition and position as the specifications required. The specifications in this case required that the rails should be placed in a certain relation to the surface of the road, and I think that although the road, speaking generally, is under the control of the municipal authority, it should, for the purpose of maintaining its relation to the tram-rails, be considered as under the control of the Tram Company, and the Tram Company should be bound to provide for the continuance of the state of things originally provided for by the specifications, not only as

F.C. 1886

HURGAN v. BENDIGO MWAYS MPANY ITED.

Hood, J.

to the rails, which are clearly part of the tramway, but as to the road in which the rails are packed.

HOOD, J. (*dissentiens*). The defendants in this case constructed, under what was in reality a statutory authority, certain tramways along some streets in Bendigo. Their work was in the first instance properly executed. In course of time, however, the roadway alongside one of the tram-rails became worn away, and so the rail was left projecting instead of being flush with the ground. By reason of this projecting rail the plaintiff was injured, and the question is—Are the defendants bound to compensate him?

It was first contended for the plaintiff that the roadway alongside the rail formed part of the defendants' tramway, so as to cast upon them the obligation of keeping it in repair. This argument is based upon certain clauses and conditions in the documents under which the defendants were empowered to put down the tramway, and it assumes that, for some purposes, the roadway between the rails and for eighteen inches on each side is part of the defendants' tramway. This view, in my opinion, is not correct. The roadway certainly did not become the property of the defendants in any sense sufficient to impose upon them the burden that rests upon every owner at common law, for it could not have been sold by them nor seized in execution for their debts, and I fail to see any liability fixed upon them by Statute. They were authorized to construct a tramway—that is, certain lines of rails upon which vehicles might travel. These rails had to be placed and kept level with the surface of the street, and the roadway, after having been disturbed, had to be restored to a proper condition. In order to arrive at these *desiderata*, the Statute and the Order in Council founded thereon imposed several obligations on the defendants: The rails had to be secured to sleepers of certain dimensions at certain intervals. The ground had to be excavated to a given depth, and the filling-up had to be of a particular kind, put in after a directed fashion. But all this does not make any of the road a part of the tramway. These are merely precautions for ensuring a level line of rails and



F.C. 1886

HOLMAN v. THE BENDIGO TRAMWAYS COMPANY LIMITED.

Hood, J.

a smooth surface of the road. It does not follow, because care is taken in the plans and specifications to provide for the proper placing of the rails, and for their stability when placed, as well as for the due restoration of the surface of the road, that therefore any part of the roadway can properly be called part of the tramway, so as to throw a liability on the defendants to keep it in repair. If the Statute had directed the defendants to keep in repair the works executed by them according to the plans and specifications, matters would, of course, have been different. But the mere direction that the tramway on the road should be constructed in a particular manner does not imply either that the road is to be considered as part of the tramway or that the defendants are bound to keep the road in order after they have once done their work properly in reinstating it. The only interest which, in my opinion, the defendants have in respect to any part of the road is the right of using it for the purposes of running their tramcars upon it; and their only duty is that of keeping their own works in proper repair; all other rights and obligations respecting the road remaining just where they were before the defendants touched it. The part of the highway with which the defendants have interfered does not, in my opinion, become in any sense a part of the tramway simply because the defendants were compelled to lay their sleepers and rails and remake the road according to given plans and specifications. The rails, of course, the defendants must attend to. These were not in the road before the defendants interfered with it. They are something foreign to the road, brought there by the defendants for their own purpose, and they must be kept in repair, and level with the road. But I do not think that there is anything to compel the defendants to keep the road up to the level of the rails, or to keep a certain portion of the road, nine feet in width, at the one level. I think, moreover, that while it is clear that the tram-lines become, for the purposes of public traffic, part of the road, it by no means follows that the converse holds good. The lines, being fixed into the road, become part of it, and it was the intention of everybody that persons driving on the road should drive along or across those lines at pleasure, except when the

F.C.
1896
HOURIGAN v. THE BENDIGO TRAMWAYS COMPANY LIMITED.
Hood, J.

tram-cars were there. But although the roadway has been dug up and relaid in a particular manner it is not a necessary conclusion that therefore any portion of the road ceases in any sense to remain roadway and becomes part of the tramway. The real question, however, is—Did the Legislature intend that the word "tramways" should include for any purpose any portion of the roadway, and if so, did it intend that the Tramway Company should maintain that portion of the roadway? I have already stated that I can find nothing in the Act of Parliament to support this view. On the contrary, sec. 37 of the *Tramways Act* uses the word in a sense totally inconsistent with this contention, for it speaks of tramways as being removable—an expression inapplicable if the roadway were in any sense included. For these reasons I think that the word "tramways" does not include any portion of the road in any sense, but merely means the line of rails which the defendants were empowered to make and maintain: See *per* Lindley, L.J., in *The London County Council and the London Street Tramways Co.* (*u*). This is the view adopted in England. The English *Tramways Act*, 33 and 34 Vict., c. 78, expressly provides, by sec. 28, that the promoters of tramways shall repair the road between the lines and for eighteen inches on each side, a provision which would be superfluous if this contention of the plaintiff's were correct, and the decisions show that the meaning of the word "tramway" under that Act is limited to the lines of rails: See *The Vestry of St. Luke's* v. *The North Metropolitan Tramway Co.* (*v*); *The British Tram Co.* v. *The Mayor of Bristol* (*w*); *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh* (*x*). There is a similar section in the *Melbourne Tramways Act*, 47 Vict., No. 765, sec. 16, but none in the Act under which this tramway was constructed, and this I think is a powerful argument against the plaintiff's contention.

It was next argued that the plaintiff should succeed because the defendants had broken their agreement with the local corporation in not keeping the road in repair. That means that

(*u*) [1894] 2 Q.B., at p. 205.
(*v*) 1 Q.B.D. 760.
(*w*) 25 Q.B.D. 427.
(*x*) [1894] A.C. 456.



F.C.
1896
HOURIGAN v. THE BENDIGO TRAMWAYS COMPANY LIMITED.
Hood, J.

a person, not a party to a contract, might sue for a breach thereof causing injury to himself. There is no authority for such a proposition, while there are many against it, and it cannot be maintained.

The last point relied upon for the plaintiff was that, as the defendants had brought the rail on to the road, they were bound to see that it did not become a nuisance, no matter what was the cause thereof. Here, again, I think that the plaintiff fails. The defendants, in putting the rails on the road, were not trespassers. They did no more than they legally were entitled to do, and they were guilty of no negligence in what they did. Under these circumstances, I cannot see that there is any liability cast upon them. It was argued that these tramways are a private speculation, for private profit, and that a stricter rule should be applied in such a case than to a public body. I cannot accept this argument as correct. If the defendants did what the law allowed, and were not guilty of any neglect in what they did, why should they be liable simply because they are a private corporation or private individuals? No doubt the courts will not readily conclude that the Legislature has given powers to private individuals to interfere with public rights, but the real question is, in every case, what is the expressed intention of the Legislature, and have the defendants brought themselves within that intention: *The Mersey Docks Trustees* v. *Gibbs* (*y*). Here Parliament authorized the construction of this tramway, and I can find nothing to show that the Legislature intended either that the defendants were to be bound to keep the roadway in repair, or to be liable for injuries caused by the lines projecting above the road owing to the default of someone else. In support of the plaintiff's view reliance was placed upon three decisions. As to two of these, they are clearly distinguishable. In both *Rex* v. *Kerrison* (*z*) and *Reg.* v. *Ely* (*a*), the defendants had cut a channel across a highway, and so obstructed it, and they were held bound to repair the bridges that they had placed over the cuts which they had made. That is, they were bound to keep their own works in repair—a question which does not arise here.

(*y*) L.R. 1 E. & Ir. App. 112.
(*z*) 3 M. & S. 526.
(*a*) 15 Q.B. 827.

F.C.
1896
CKEGAN
v.
BENDIGO
NWAYS
IPANY
ITED.
d, J.

These decisions too, are based upon the view that the Legislature, in empowering private persons for private profit to cut a channel across a highway, must have intended that such persons should afford the public some other means of passing along the highway, and therefore the defendants in those cases were bound to erect bridges and keep them in repair. The other decision cited for the plaintiff—*Oliver* v. *North-Eastern Railway Company* (*b*)—looks at first sight to be exactly in point. The defendants had laid rails across a highway, and were held liable for damages received by the plaintiff owing to the rails projecting above the road. The decision, however, is based upon the other two cases just referred to, and it also turns upon the fact that the rails themselves were improperly placed, as alleged in the declaration. Counsel for the plaintiff in that case argued that the defendants were only authorized to act without negligence, and he apparently based his claim on this view, while the answer on the other side was that the defendants, having placed their rails where they thought fit, the surveyor of highways was bound to keep the roadway up to the level of the rails. This latter view is obviously incorrect. The case is briefly reported, and no reasons are given for the judgment beyond a reference to the previous cases, and I think that it simply applies the former decisions. It is true that the second count of the declaration contains an allegation that it was the duty of the defendants to keep the rails and soil of the road in a proper condition, and that the defendants left the rails too high above the surface of the road. It also would seem that at the trial the judge told the jury that the defendants were under an obligation to keep in repair the roadway of the level crossing. But I think that the facts were that the defendants had placed their rails so as to project above the road, and had thereby obstructed the crossing. This being so, the principle of the two previous cases would apply, for the defendants would have had authority to obstruct the highway for private purposes, but only on condition, as the Court held, of keeping the crossing safe for the public. In the present case I can see no such implied condition. The defendants here have no right to obstruct the

(*b*) L.R. 9 Q.B. 409.



F.C.
1896
HUGHIGAN
v.
THE BENDIGO TRAMWAYS COMPANY LIMITED.
Hood, J.

highway, as their lines have to be placed level with the road, and I do not think that I ought to guess that Parliament meant to impose some obligation upon the defendants which probably no one at the time ever thought of. It was, however, further contended that the decisions referred to establish the proposition that whenever any person puts anything in the highway that is or may become a nuisance or obstruction he is responsible for all injuries caused thereby. In my opinion these authorities do not touch that matter, nor is the proposition as enunciated sound law, for the liability turns upon the authority by which the person acted in placing the obstruction on the road. If he acted without authority he is liable, but not if what he did was lawful. This is expressly laid down in *Moore* v. *Lambeth Waterworks Co.* (*b*). There the Waterworks Co. had lawfully put down a fire-plug in the street, and had put it down skilfully. The roadway, however, round it became worn away, and the plug projected in such a manner as to cause the plaintiff to fall. It was held that the defendants had done no wrong, and were not liable, and to the same effect is *Thompson* v. *Mayor of Brighton* (*c*). Counsel for the plaintiff attempted to distinguish *Moore's Case* by pointing out that there the defendants were expressly directed by the Legislature to put down the fire-plug. Nothing is made in that case of this point, nor do I see how it applies in the present instance. There is, of course, a distinction. If the Legislature directs a particular thing to be done in a particular place, there is an end of the matter. The thing must be done, and anyone injured must bear the consequences, or look to Parliament for redress. Where, however, the Statute only gives permission, everything depends upon the nature of the matter dealt with. If, for instance, permission is given to erect a small-pox hospital, no place being specified, and it may or may not be a nuisance, then the persons erecting it must take care not to offend. But where the Legislature says that a tram-line may be laid along a particular street, then the promoters have as much authority for the purpose of this action as though there had been an express statutory direction. In my opinion, therefore, the defendants

(*b*) 17 Q.B.D. 462. (*c*) [1894] 1 Q.B. 332.

F.C. 1896 HOUGHTON v. THE BENDIGO TRAMWAYS COMPANY LIMITED. Hood, J.

acted within their powers in placing this tramway on the street in question, and have not been guilty of any neglect of any duty towards the plaintiff, and so the question submitted to us should be answered in their favour.

Solicitors for plaintiff: *Rymer*, for *Quick & Hyett*, Bendigo.
Solicitors for defendants: *Kennedy & Woodward*, Bendigo.

R. H. C.

F.C. 1896 August 6, 7. October 8.

THE COLONIAL BANK OF AUSTRALASIA LIMITED v. RILEY AND ANOTHER (ASSIGNEES).

*Landlord and tenant—Trade fixtures—Equitable mortgage of lease—Assignment—Surrender—Bill of sale.*

Where a tenant for a term of certain premises mortgages such term by way of equitable deposit of the lease the mortgagee takes under his mortgage an interest in trade fixtures erected upon the leasehold premises by the tenant, and removable by him under the provisions of the lease, commensurable only with his interest in the term, and is not, as such, absolutely entitled to the proceeds of the sale of such fixtures.

*So held* by the Court (A'BECKETT and HOOD, JJ., MADDEN, C.J., dissenting).

*Southport and West Lancashire Banking Co.* v. *Thompson* (37 Ch. D. 64) followed.

*Mews* v. *Jacobs* (L.R. 7 H.L. 481) discussed and distinguished.

CASE STATED.

In an action in which the Colonial Bank of Australasia Limited was the plaintiff, and James Henry Riley and Frederick H. Wilson were defendants as trustees of the assigned estate of Henry Upton Alcock, by consent of parties the following case was stated for the opinion of the Full Court:—

"1. On the 24th November 1880 one Henry Upton Alcock, a billiard table manufacturer, obtained a lease from one Mary Ann Musgrave of certain land in Russell-street, Melbourne, for the term of 25 years, to be computed from the 2nd January, 1881.

"2. By the said lease it was, *inter alia*, provided that the said Henry Upton Alcock, his executors, administrators, or permitted assigns should and would, at the end or other sooner determination of the term thereby granted, peaceably and quietly yield and deliver up to the said Mary Ann Musgrave, her appointees or assigns, or other the person or persons for the