

gram from the Agent-General informing me of the position in which these people find themselves. I can quite imagine the position they are in, and I will risk whether the House is in session or not, and if I find that these people are in a dangerous state, and cannot settle at Paraguay—and I know they cannot—if an expenditure of £200 or £300 is required to bring them back to our shores, and restore them again to civilisation, I will take upon myself to carry it out. I think the House will go with me. I may tell the hon. member that a week or ten days ago I made the first move in the direction of making an inquiry.

Mr. CRICK : I thought we did not want any more lunatics here !

Sir GEORGE DIBBS : If it cost £1,000 to bring these people back to our shores they would form a shocking example to other people who might be misled. We find that there are agents going about the country still recommending unfortunate people —

AN HON. MEMBER : To get their money !

Sir GEORGE DIBBS : Of course, to get their money. Endeavouring to take them from a country where the privileges are greater than in any other part of the world, to live among people whose language they cannot speak, whose habits I know from experience are not such that any European man or woman can put up with for a moment, and where even if these people are successful in establishing a farm, the produce of their labour will have to compete with that of people who consider themselves well paid if they get 6d. a day. I know that from my own personal observation, but I think it would be a desirable thing to get these people back to the colony, and their experience will be a fine object lesson to those who wish to leave the shores of New South Wales to escape living under the laws of civilisation and in order that they may set up a government in a country of their own. If one-tenth part of what we read in the newspapers be true, these people have been fearfully misled. It only shows that, however wicked it is for a man to be a tyrant and dictator in New South Wales, people may go further and fare worse.

Question resolved in the affirmative.

House adjourned at 4.2 a.m. (Thursday).

Legislative Council.

Thursday, 29 March, 1894.

McQuade Estate Bill—Appropriation Bill—Castle Hill Tramway Bill—Silkstone Coal-mine Railway Act Further Amending Bill (second reading)—Sydney Corporation Act Amendment Bill (second reading).

The PRESIDENT took the chair.

MCQUADE ESTATE BILL.

Royal assent to this bill reported.

APPROPRIATION BILL.

Bill received from the Legislative Assembly, and read the first time.

SECOND READING.

The Hon. Dr. MACLAURIN : It is absolutely necessary that the bill should pass at once, in order that the salaries of the civil servants and other liabilities of the Government may be duly paid; therefore I move :

That the bill be now read the second time.

Question proposed.

The Hon. R. BURDETT SMITH : I desire to draw the attention of the Government to the vote for public parks. Some time since I intended to bring this question under the notice of the House, but I did not do so, and I think this is an opportune time for saying a few words. At the end of this street, in front of Fort Macquarie, almost adjoining the Peninsular and Oriental Company's wharf, there is a piece of ground which might be made one of the most magnificent reserves, not only in Sydney, but in the colony, but which seems to be no man's land. It is one of the finest sites in Sydney, but it does not seem to be under the control of any person, and is a perfect disgrace to the city. I believe that in any other country in the world the authorities would be only too delighted to utilise such a beautiful spot for the recreation of the citizens. I walked down to Fort Macquarie the other day, and really I was ashamed of my native city that it should allow the place to be applied to its present use. I saw nothing but garbage, wood, tanks, engines, and other material lying about to the danger of passers-by by day as well as by night. At a very small expenditure, not more than £100 or £200, it

could be made the beauty spot of Sydney. I would ask the Representative of the Government, who lives in Macquarie-street, to walk down to the place and see the state it is in, and bring the matter before the Cabinet, with a view to the appointment of a trust. In the bill I observe an item of £7,500 for the improvement and general maintenance of public parks and recreation grounds. Surely a small portion of this vote might be utilised in creating a favourite health resort to which the citizens would flock. I hope my hon. and learned friend will make a note of the matter.

The Hon. J. MACINTOSH : I indorse the remarks of the hon. member who has just resumed his seat. When I had the honor of a seat in the Assembly I was the means of getting a retaining wall built round the water frontage at Dawes Point, but the south side of the reserve is, I believe, in exactly the same state as it was in when the erection of the battery was completed. When the battery was built all the rubbish left was wheeled to the south side of the reserve, and left there. I have known the place for over half a century, and I believe not one particle of improvement has been made during that time. It was made a "tip" for all the rubbish of the city, and so it remains, although it is one of the most beautiful spots in the colony. It is a pleasure to see the public enjoying themselves there on a holiday, yet the place is an eyesore ; and but for the benevolence of one or two citizens, Hyde Park would be in almost the same state as this reserve. Mr. Baptist is the only citizen of Sydney who contributes towards the maintenance of Hyde Park. A certain sum is voted for the Park every year, but the only private contribution is received from Mr. Baptist, who even imports plants for the park, and erects fountains and other ornaments. Some of our rich citizens might do something to ornament that grand place. When I sat in the Assembly, I had great pleasure in getting these parks beautified, and made more pleasant to the public ; but since I left that House, no one has taken much notice of the parks. Hon. members ought to go down to Fort Macquarie and see this disgrace to the city. What do the passengers on the ocean steamers observe as they come up the

[*The Hon. R. Burdett Smith.*]

harbour, but this eyesore. It is apt to give a visitor, as he enters the port, a bad impression of the city.

The Hon. S. CHARLES : I think that some steps should be taken to ornament Dawes' Point as well as Fort Macquaire ; but I do not think that the reserve at either place should be placed in trust for the public, because both reserves may be required in connection with the extension of the railway system into the city. It would be unwise on the part of the Government to part with the control of either place ; but in the meantime each reserve might well be improved at very little expense, and no doubt, now that their attention has been called to the matter, the Government will do something in that direction.

The Hon. R. BURDETT SMITH : I shall follow up my remarks with a motion !

The Hon. J. DAVIES : I should have been quite willing to allow the question to go had not my hon. friend, Mr. Burdett Smith, thought it worth while to call attention to what no one can deny is a very important matter ; but inasmuch as this is the only opportunity which this House has of reviewing the public expenditure, perhaps it would be fitting for me to say a few words upon some appropriations in the bill. I congratulate the Government upon the great reduction which has been made in the annual expenditure, for the bill appropriates only £7,206,451 for the services of this year. It must be a source of gratification to hon. members to find that the Government have devoted their attention to the reduction of the annual expenditure. That amount ought certainly to be ample to govern a country with a population of 1,200,000 persons. In previous years Parliament has appropriated between £10,000,000 and £11,000,000 for the purpose ; but in this bill Parliament is asked to appropriate only £7,000,000. I think that there is a great deal of inconsistency in the appointments which are made by the Government ; I refer to the appointment of old gentlemen between 60 and 70 years of age. The Civil Service Act requires that every civil servant should contribute out of his income so much to provide a fund for the superannuation of civil servants who have arrived at the age of 60 years. The Government have superannuated a large number of public servants in all the departments, but have immediately ap-

pointed gentlemen between 60 and 70 years of age to some of the most important positions in the service. It is grossly inconsistent conduct on their part, and the sooner some steps are taken to amend the Civil Service Act so that the services of some men may not be dispensed with, in order that much older men may be foisted into positions worth, in some cases, £1,800 or £2,000 a year, the better for the service and the country. I know a number of men over 60 years of age, who have been appointed by the Government during the last eighteen months. I think that the last appointment—the appointment of the Crown Solicitor—is a very good one as far as the qualifications of the gentleman are concerned; but I take exception to a gentleman between the age of 60 and 70 years being appointed to the office. What amount of service can he render to the country? In all probability it cannot be expected that his services will extend beyond from three to five years.

The Hon. Sir WILLIAM MANNING: Surely the hon. member will not kill him as soon as that!

The Hon. J. DAVIES: I am not speaking of the duration of his life, but of the termination of his official career, by reason of old age or infirmity. We know very well that there are few men like our distinguished friend, Sir William Manning, who is perhaps as hearty and young in his ways as most hon. members, and as devoted to his public duties as the youngest man in the Chamber. We have an act which provides that when a public servant arrives at a certain age, he shall be retired on that ground without any question as to his fitness, or as to whether he is capable of serving the country for another five or ten years, and yet we find the Government appointing gentlemen between 60 and 70 years of age to some of the most distinguished and best positions in the service. In order to cure this anomaly some legislation should be passed. While I take exception to such appointments on account of the age of the persons, I take no exception to the appointment of the new Crown Solicitor on the ground of fitness, because I believe there is no man in the profession of which he is an honored member more fitted for the position than he is. I take exception to the appointment on the ground of the inconsistency of the Government.

I think that men should be brought into the public service much earlier in life, or we should repeal the act, and not compel our young men for a long period to provide a retiring fund and then destroy that fund by appointing persons much more advanced in life than those who have been retired.

The Hon. J. MACINTOSH: These old fellows are very knowing!

The Hon. J. DAVIES: These old fellows are very knowing, like my hon. friend; but there are a number of improper appointments which I could mention. For instance, Mr. Brady, a gentleman of 75 years of age, has been appointed as instructor in sericulture. Why should the public money be spent in that direction? Are we likely in this country to get labour at 2d. or 3d. a day so as to make such a venture pay? If a number of private citizens wish to encourage the culture of silk, let them spend their own money, and not waste the public money, as has been done by the appointment of Mr. Brady at a salary of £350 or £400 a year, and with the likelihood of no possible result from the expenditure. Here we have another example of the waste of public funds by the appointment of an old man who should be looking after his coffin instead of the cultivation of silk. If we superannuate men who arrive at the age of 60 years, why should we appoint a man at 75 years of age? I could refer to the appointments made under the Vine Diseases Act and other legislation of the Government to show how inconsistent they have been in the appointments they have made. Although eighteen months ago I moved for a return showing the appointments made and the number of persons removed from the service, that return has not been furnished. It was alleged at the time that whilst the Government had dismissed 800 persons they had appointed 1,500 of their friends. The return, if furnished, would show the truth of that statement. It is not my intention to offer any objection to the passing of the bill, but we have a right to review the expenditure. I am pleased, notwithstanding what I have had to say, that the Government has reduced expenditure, and that the cost of governing the country has fallen from £11,000,000 to £7,000,000; and I trust that whilst this has been the case there has been no want of efficiency.

The Hon. W. J. TRICKETT : I should not have risen but for the remarks of the hon. member, Mr. Davies, in regard to the appointment of the gentleman who fills the position of Crown Solicitor. I cannot allow any reflection as to age or otherwise to be made in regard to that gentleman without entering my protest against it. Directly I heard of the appointment I was one of the earliest to congratulate Mr. Colquhoun, and also the representatives of the Government upon their excellent selection, and the good luck of the country in being able to secure his services. It is well known that the position is one which requires not only great professional ability, but long, mixed experience in all branches of the legal profession. Above all the position requires the strictest and highest integrity that one can possess. I am happy to say that the Government have obtained the services of a gentleman who possesses in every degree all those qualifications. I am quite sure that the hon. member, Mr. Davies, has no personal animosity against Mr. Colquhoun, but still it may be thought otherwise by the public. The appointment, I think, is a peculiarly happy one, and one to which the gentleman appointed will do ample justice. Although Mr. Colquhoun may not be very young I only hope that for many years he may have that health and energy which he at present possesses to enable him to carry out the important duties of the position.

The Hon. G. B. SIMPSON : I am very pleased to hear the hon. member, Mr. Trickett, speak in the way he has done of the appointment of the Crown Solicitor, and I was very sorry to hear the hon. member, Mr. Davies—although he did not cast any reflection upon the gentleman appointed—make use of any observation which might have the effect of inducing anybody outside to think that the appointment was one which did not reflect credit upon the Government who made it. I can speak with some authority in respect to a matter of this kind, because I happened not long ago, owing to the unfortunate death of the late Mr. John Williams, to be placed in a somewhat similar position of difficulty to that in which the Attorney-General found himself the other day—I mean the difficulty of inducing a gentleman whom I believed to be highly qualified for the position to undertake it for the amount

of salary attached to the office. Fortunately I succeeded in obtaining a gentleman who is not in the remotest degree a friend of my own, the late Crown Solicitor, Mr. Ernest Smith, by bringing pressure to bear upon him to accept the office. The duties of that office he fulfilled, as everyone who came in contact with him will admit, with the greatest satisfaction to all. It was to me a source of very great regret that owing to action which was taken in respect to that gentleman's salary, he felt it his duty to resign the office. I think the present Attorney-General knows this : that before I secured the services of Mr. Smith, I offered the appointment to four or five gentlemen, all attorneys of high standing, and, after consideration, one and all refused it. I dare say the Attorney-General found himself in a position of considerable difficulty before he could fill the office as successfully as he has been able to fill it. Mr. Colquhoun is a gentleman known to me for many years. He is known to all the profession, and no man in the profession stands higher than he does at this moment. I only desire to offer my congratulations to the Government and to the country also upon the selection which has been made in the person of Mr. Colquhoun.

The Hon. E. COMBES : I desire to bear testimony to the estimable character of Mr. Colquhoun, and I congratulate the Government on the appointment. I am of course a layman, and can say nothing about Mr. Colquhoun's legal qualifications. I have, however, known him for thirty-seven years, and as a man he is one to whom I would trust my life and honor. I congratulate the Government on having secured the services of not only an able attorney, but of a good and true man.

The Hon. Sir WILLIAM MANNING : I am very sorry there has been any allusion made to this gentleman, or that there has been any shot fired at old men. There are places in which it is desirable that you should have none but old men, comparatively speaking—places in which it is essential that there should be men of great experience, and with that command which age sometimes gives over youth. I think that the power to discharge men from the public service because they are 60 years of age is often very much abused, and that men have been dismissed whose experience

was worth double their salary. The power to dismiss men of 60 years of age from the service is one which it is well to place in the hands of the Executive, in order that men who have become somewhat effete may be, without offence, displaced; but that there should be an absolute rule that every one above 60 years of age should be removed simply does mischief to the service. I do not care to say anything with reference to the gentleman who has been appointed Crown Solicitor, except to say that it might seem that if I, the oldest member of the legal profession in the colony, were silent, it might be assumed that it is because I have a reason for being silent. It is not because I have a reason for being silent; on the contrary, I have reason to know that Mr. Colquhoun is a man of honor and of the highest respectability, and one who will do well in the department and will keep it in order, which perhaps a junior would not do. Besides, we must bear in mind that this is a professional appointment, and men who are eminent in their profession will not take £1,600 a year with the chance of an occasional kick in the legislature. The appointment, I think, is an excellent one on the part of the Government.

The Hon. J. DAVIES: I wish to state, in personal explanation, that it was not my intention or desire to cast any reflection on the fitness or qualification of this gentleman, and I hope I did not convey that impression. I simply wished to show the inconsistent position which the Government occupied in removing civil servants, because they had arrived at the age of 60 years, and appointing gentlemen over that age.

The Hon. Dr. MACLAURIN, in reply: I may be permitted to say a few words in reference to the discussion which has taken place. First of all, with respect to Fort Macquarie, I shall be happy to bring the views of the hon. member, Mr. R. Burdett Smith, before the Secretary for Lands, who, I have no doubt, will give full weight to them. As to the discussion with respect to the appointment of gentlemen of over 60 years of age to the public service, it seems to me that the hon. member, Mr. Davies, is under a misapprehension. No power is given by the Civil Service Act to remove or superannuate a man because he is 60 years of age. The Civil Service Act gives to a

civil servant the power of applying for his retirement at 60 years of age, if he so desires, or if he comes under the Constitution Act, at 65 years. But the Governor has, under no circumstances, the power of compelling a man to retire on the score of age. There must be something defective about him. He must be incapable of performing his duty from age or some other cause. If a man is unfit to perform his duty, it is only fair that he should be superannuated, whatever may be the cause. On the other hand, I think it is a perfectly reasonable thing for a civil servant who has served the country perhaps for forty years or more when he comes to 60 years of age, if he feels tired and worn out with his long service, to have the right of applying for such retirement as the act of Parliament provides for. The Government, however, have no power of superannuating such person against his will, provided always he is fit to perform his duties. Therefore, the charge brought against us by the hon. member, Mr. Davies, must be considered to fall to the ground. I am glad to hear the general consensus of approbation in regard to the appointment of Mr. Colquhoun. I am sure everyone who knows that gentleman will be perfectly satisfied that a better appointment could not have been made.

Question resolved in the affirmative.

Bill read the second time, reported from Committee without amendment, and passed through its remaining stages.

CASTLE HILL TRAMWAY BILL.

Bill presented by the Hon. W. J. Trickett (for the Hon. S. A. Stephen), and read the first time.

SILKSTONE COAL-MINE RAILWAY ACT FURTHER AMENDING BILL.

SECOND READING.

The Hon. Dr. MACLAURIN: As no hon. member appears to be in charge of this measure, I beg to move:

That the order of the day be postponed until this day fortnight.

Question proposed.

The Hon. J. DAVIES: I think it is to be regretted that so much of the private business on the paper for to-day has been postponed. I presume that some hon. member has taken charge of this bill, and hon. gentlemen who take measures in hand should be present to deal with them.

The Hon. A. H. JACOB: No one has taken charge of several of these measures!

The Hon. J. DAVIES: Then they ought to be discharged from the business-paper. Why should we postpone them from time to time when no hon. member will take charge of them? The sooner they are wiped out altogether the better. We know that the session cannot last very much longer. The Appropriation Bill has been passed, and as a natural sequence we may expect Parliament will be prorogued in a short time. There are on the business-paper several bills of some importance, but no one seems to have charge of them. If they are bills of an objectionable character the best thing for us to do is to discharge the order of the day instead of postponing them for a week or a fortnight.

Question resolved in the affirmative.

SYDNEY CORPORATION ACT AMENDMENT BILL.

SECOND READING.

Debate resumed (from 8th March, *vide* page 1424) on motion by the Hon. C. G. Heydon:

That this bill be now read the second time.

The Hon. W. J. TRICKETT: I am very sorry that there are not more hon. members present, because the bill is one of very considerable importance. I look upon it as of such great importance that, if it be passed, the title of the bill ought to be altered to "An act to ruin the corporation of the city of Sydney by litigation." That would be the proper term to apply to the bill if it becomes law. I have very great objection to measures of this kind being introduced in the way they are, because, if this bill becomes law, it will be a very marked instance of hard cases making bad laws. The bill, after being opposed by the Mayor of Sydney as being most undesirable, was passed by the Legislative Assembly on the motion of an hon. gentleman who had had a case in the Supreme Court against the Sydney Corporation, the verdict in which is now being appealed against by the corporation with every probability of success; so, apparently, to anticipate the success of that appeal, at any rate with regard to future liability, this measure has been brought forward. I do not think that I can put the facts more clearly before

[*The Hon. J. Davies.*

hon. members than by reading a few extracts from the judgment of Mr. Justice Windeyer, delivered in the Full Court. The case was "*Bourke versus The Municipal Council of Sydney*," the plaintiff being the widow of a man who met with a fatal accident in one of the streets of Sydney. Mr. Justice Windeyer said:

This was an action brought by the administratrix of Charles Bourke against the municipal council of Sydney to recover damages under the provisions of the act 11 Victoria, No. 32, for negligence in allowing portion of Kent-street to fall into disrepair, in consequence whereof her husband, whilst driving a cart, was thrown from it and died. The defendants pleaded not guilty by statute 43 Victoria, No. 3 (the Sydney Corporation Act), sections 67 and 68. From the evidence given at the trial it appeared that at the place where the accident occurred a depression about 2 feet in diameter and 5 or 6 inches deep had been worn in the street from the continued effects of traffic and heavy rain, and that the plaintiff, who was driving a coal delivery cart, when passing over the hole was jolted from his seat, and falling to the ground received injuries from which he died. A considerable amount of evidence was given by the defendants to show that the accident occurred in consequence of the drunken state of the deceased; but the jury, having somewhat evasively answered the questions as to contributory negligence put to them by the Chief Justice, found the defendants to be guilty of negligence in allowing the street to be in the state it was, and returned a verdict for the plaintiff for £723 6s. 8d., which, under the provisions of the statute, they apportioned between her and the children of the deceased.

A rule nisi for a new trial was obtained on the ground (1) that the verdict was against evidence, (2) that the defendants were not liable for any injury arising through the non-repair of their roads.

Taking the view which I do of the question raised as to the liability of the defendants, it is unnecessary to go into the question whether the verdict was against evidence, though the strong evidence given by the defendants of the drunken state of the deceased shortly before the accident, makes the verdict, coupled as it was with the evasive answers of the jury upon the point of contributory negligence, as eminently unsatisfactory to my mind as it was to that of the Chief Justice, who tried the case. The denial by the defendants of any liability on their part for the accident, which, for the purpose of the argument, I will assume was entirely brought about by the state of disrepair in which the street was, raises a question of considerable importance, affecting not only the interests of the defendants but the interests of all municipalities throughout the colony, having the care, construction, and management of the roads and streets within their boundaries. It was admitted by the defendants at the trial that the street had been made and formed by them, and it was admitted on behalf of the plaintiff that the street had been properly made in the first

instance. No misfeasance was charged against the defendants, and the utmost that could be charged against them was non-feasance.

His honor then quotes various sections of the old acts leading up to the present act, and goes on to say :

The question for our determination, therefore, turns entirely upon section 67 of the present act, which takes the place of the sections in the old acts, giving the council control of the streets ; but in very different language, inasmuch as it gives them power to repair without making the exercise of such power obligatory. As far as is material to the case, the section runs :

All public ways now or hereafter formed shall be vested in the council, who shall have full powers to alter, widen, level, divert, extend, construct, improve, maintain, and order such public ways and the footways thereof, and to carry off any water, mud, or filth therefrom by means of sewers, channels, or drains, or otherwise subject to the provisions of this act, and any by-laws made by the council in that behalf.

His honor quotes many learned judgments of the Privy Council, and other judgments bearing on the point, and, referring to the celebrated case of *Gibson versus the Mayor of Preston*, upon which he lays great stress, he says :

Taking the rule laid down in *Gibson versus Mayor of Preston* as our guide, the question is whether it is shown distinctly that the legislature in passing the Sydney Corporation Act had any intention to make the council liable for any and every injury which anybody thought resulted from a breach of duty by the corporation. Under the provisions of the act, no greater obligation rests upon the council to repair a street than to alter or widen it, and if the council is to be exposed to an action every time a drunken driver is jolted off his seat by a rut in the road, it is equally exposed if the plaintiff's contention is correct to an action by any person who conceives that his property has been injured because the council has not thought fit to alter or widen a street. To apply the language of Lord Justice James, in *Glossop versus Heston*, and the *Isleworth Local Board L.R. 12 ch. div. 115* to this case, it appears to me that if the plaintiff's right of action were maintained the citizens of Sydney would be buying immunity from ruts in their streets at a very dear rate indeed, by the substitution of a far more formidable nuisance in the litigation and expense that would be occasioned by opening such a door to litigious persons, or to persons who might be anxious to make profit and costs out of this act of Parliament. For such immunity from the dangers to which we are exposed by the occurrence of accidents caused by the weather and the gradual decay of materials, we must look to the intelligent and vigilant discharge of their duties by our municipalities, rather than to the provisions of acts of Parliament throwing mandatory obligations upon them to repair, which would only end in ruinous litigation and the waste of finances which would be better used in keeping our streets and roads in such fair repair as the limited resources of our country municipalities allow. As I have already pointed out, there is no

provision in the Sydney Corporation Act, making the council so liable. The act throwing no statutory obligation on the council to repair, as the older acts did, and omitting all reference to the "duties" imposed by the former acts, simply "vests" the streets in it, and places them under its "care and management," enactments which, *Gibson versus Mayor of Preston*, and *Cowley versus Newmarket Local Board*, are decisive authorities for holding do not indicate an intention to give a right of action for injuries resulting from mere non-repair.

He concludes his judgment as follows :

For these reasons, I am of the opinion that the verdict for the plaintiff should be set aside, and a verdict entered for the defendants, and with costs, as no case having been previously brought before this court in which damages were claimed on the ground of the mere non-feasance of a municipality, I can only regard this as an experiment in litigation.

I have read only a part of the judgment, which is a very able one to my mind, and goes very fully into the question. I may add that there has been quite a recent case decided in the Privy Council—the case to which the Attorney-General referred the other night—bearing out the law which is laid down by Mr. Justice Windeyer. What course of events has the judgment in that case brought about? The plaintiff, Bourké, through her solicitor, has introduced into the Legislative Assembly a measure to repeal that section of the Sydney Corporation Act, which does not make the city council liable for want of repair. It was passed through that House after receiving very strenuous opposition at the hands of the Mayor of Sydney, who of course must know how very undesirable it would be to pass a law which would enable the council to be continually worried by petty acts of any kind. In a single night, for instance, a slight rut or depression might occur in a public way in the city, and cause an accident before the corporation labourers could have an opportunity to repair the rut or the depression, and next morning a heavy action will be brought against the corporation by half a dozen persons. They will not weigh whether it is a small or a big accident ; but every person who suffers any inconvenience or damage, either imaginary or real, will worry the corporation with an action.

The Hon. J. HOSKINS : An accident may occur through a man's own fault !

The Hon. W. J. TRICKETT : An accident may occur through a man's own fault, as was very strongly urged in the case of

Bourke *versus* the Sydney Corporation, where very strong evidence was brought to show that Bourke was not in a proper state to drive a horse and cart through the city. Notwithstanding the strenuous opposition of the Mayor of Sydney, and other members of the Assembly, the bill passed that House, and it is in charge of the Attorney-General in this House. I would have much preferred if it had been introduced to this House by an hon. member who had not been connected with the case out of which it originated, because it happens that the hon. and learned member was counsel for the plaintiff.

The Hon. C. G. HEYDON: What has the bill to do with that action?

The Hon. W. J. TRICKETT: I have no desire to make any remark which may be offensive to the hon. and learned member; but I would much prefer that when a sweeping reform is proposed in the law, it should be taken in hand by some other member than the Attorney-General, who is supposed to be a safeguard to the branch of the legislature in which he sits, by giving a perfectly unbiassed opinion on such matters. No doubt the hon. and learned member is perfectly within his rights in introducing the bill, but I would have sooner had his unbiassed opinion upon so sweeping a reform as it seeks to make. I have shown briefly that the bill is sought to be passed to cure the effect of the verdict which happened to go against an unfortunate widow. There is no doubt that but for the case we should not have had the bill. What is the necessity for the bill? The old act has been in force for very many years; but we have not heard of very many hardships arising which create a necessity for passing a bill of this sweeping character.

The Hon. J. DAVIES: There is no demand for the bill!

The Hon. W. J. TRICKETT: There is no demand for the bill. I think I am safe in saying that if an accident happens to a citizen, and it is clearly proved to the mayor and aldermen that it arose through their fault, they generally make fair amends to the injured person without going into court. But in this case a sympathetic verdict was found against the corporation in favour of a poor widow. No doubt every one's sympathy would be with the widow under the circumstances. An appeal is made to the Full Court, where two judges

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decide for the plaintiff and one for the corporation, and a recent decision of the Privy Council shows conclusively that the verdict for the plaintiff was a wrong one. Instead of allowing the highest legal tribunal in the empire to decide the point whether the corporation is liable or not a bill is brought in to alter the law in order to suit this particular case.

The Hon. C. G. HEYDON: Nothing of the kind; it can have no effect upon this case!

The Hon. W. J. TRICKETT: The bill will apply to the case.

The Hon. C. G. HEYDON: The case is on appeal to the Privy Council, and the bill cannot have any effect on the case. The hon. member should be more careful before he makes a statement of that kind.

The Hon. W. J. TRICKETT: I do not know; I think that the effect will be most serious, and if the bill is passed before the appeal is decided it is very likely that great pressure will be brought to bear upon the corporation, and that the case will be settled. It will be urged that now that the council is liable in such a case it ought not to proceed any further with the appeal. No necessity has been shown for the bill except the verdict in this particular case. Let any one read the speech of the Attorney-General, and see if he can find one good reason for passing the bill. I speak under correction, but I am not aware that in the case of any corporation is such a sweeping power placed in the hands of the public as is sought to be conferred upon the citizens of Sydney by this bill. I should like to know if there is any precedent for the bill. I do not think there is, and that being so, it shows very plainly to my mind that it is undesirable to give this very large and damaging power to be exercised against the corporation from time to time. Supposing that a similar measure were in force in the city of London with its population of 4,000,000 persons; the London corporation would be ruined in a week. In London you see horses sliding on the streets, and tumbling down, and all sorts of collisions taking place, and if the corporation were to be made responsible for every loose wooden block in the streets, or every indentation in the public ways, how long would it continue to have a penny in its coffer? It would be ruined almost in a week. The same thing will happen

in Sydney. If the bill is passed, the multiplicity of actions which will be brought against the corporation will be most alarming. Day by day, and week by week imaginary injuries will be sustained, and actions will be launched against the corporation; and it must be known to every hon. member that when an action is brought against a corporation, the odds are 999 to 1 that the plaintiff will be successful. The sympathy is almost entirely with the individual, and sympathetic verdicts, such as was given in this case, regardless of the evidence, and of the doubtful state of the law at the time, will be given against the corporation. I hope that hon. members will reflect very carefully before they sanction the bill. It is not a private corporation, but a public corporation elected by the citizens, and supported by public moneys to provide for the public safety and the public good. The corporation are bound to carry out that purpose to the best of their ability with their officers, and it would be very wrong, as well as hard, if by reason of any slight disrepair in a street, the corporation should be perpetually harassed by all kinds of actions. I hope that, unless much stronger reasons can be urged in its favour than have been advanced by the Attorney-General, the bill will be defeated on the second reading.

The Hon. G. B. SIMPSON: I also hope that the motion for the second reading will be negatived. The law has already declared what the liability of the Sydney Corporation is in a case like that of Bourke, hence what necessity is there for the bill? None whatever? I do think it right to express any opinion as to the correctness or otherwise of the judgment of the court in the case, but the very strong inclination of my opinion is that the judgment of Mr. Justice Windeyer is a correct one, and that there is no liability in the Sydney Corporation such as the judgment of the majority of the court would fix upon that corporation. But, notwithstanding that, the law is declared. Mr. Justice Windeyer was in the minority. The judgment of the court, and, therefore, the declaration of the law is that such a liability as was contended for in the case of Bourke does exist. Therefore I cannot, for the life of me, see the necessity for this bill; and I am now keeping altogether clear of the question

as to whether this liability should be cast upon the Sydney Corporation or not. Surely it will be time to introduce a measure of this kind if the Privy Council should reverse the judgment of the Supreme Court; but so long as that judgment remains intact, why should this House be called upon to pass a law, which, after all, is simply declaratory of the law laid down by the judges of the Supreme Court. I cannot imagine any reason for such a course of action by this House or the other branch of the legislature. The Attorney-General has been alluded to as having been counsel in the case. I think it is quite right that the House should know that this case of Bourke, which has been alluded to, cannot be directly affected by the passing of the measure; but I think the hon. member, Mr. Trickett, is not far out when he suggested that, even if the judgment of the Privy Council should be adverse to Bourke and in favour of the city council, the fact of our having passed a law fixing the liability on the city council will be held over their heads as a very strong inducement to satisfy a claim, which, if the decision of the Privy Council be adverse to the decision of the Supreme Court, does not legally exist; and if there is any reason for supposing that such a state of things may be brought about, that seems to mean an additional reason why the House should reject the measure. When the case of Bourke is all over, when it is not *sub judice*, when the Privy Council has decided one way or other, if necessary let us then deal with a bill of this sort, but certainly not now. I hope the bill will be rejected by a large majority.

The Hon. S. A. STEPHEN: Since the last debate I have taken the opportunity of reading the judgments which were delivered in Bourke's case. When the matter first came before this Chamber, it came before us with a great deal of authority on the motion of the Attorney-General, and, coming from such a source, I at first regarded it as a quasi-Government measure; but when I found that the Attorney-General was really the counsel in the case, I regarded the matter from an entirely different point of view. To make a corporation liable for nonfeasance would open the door to such an amount of litigation that it would be a positive injury to pass such a bill as the one before us. It has

been laid down by the Supreme Court that a certain liability exists. Until that is reversed, it is the law of the land. That we should pass a bill to say that the Supreme Court has correctly laid down the law would be absurd, and on that ground alone I shall vote against the measure.

The Hon. C. G. HEYDON, in reply : I am sorry to say that the lapse of time which has passed since I moved the second reading of the measure seems to have obliterated from the minds of hon. members the explanation I then made. Before again explaining the measure, I should like to deal with what I may call the personal charge made against myself of being concerned in the introduction of the bill.

The Hon. S. A. STEPHEN : Who made the charge ?

The Hon. C. G. HEYDON : If the hon. member had been in the House, he would have heard who made it.

The Hon. S. A. STEPHEN : Does the hon. and learned member mean to say I made it ?

The Hon. C. G. HEYDON : I think the hon. member did.

The Hon. S. A. STEPHEN : I entirely disclaim any such intention !

The Hon. C. G. HEYDON : Well, I think what the hon. member said supported the charge ; but the charge, in a direct way, did not come from him. If any professional man, whether a barrister or solicitor, makes use of his seat in either branch of the legislature, or of his political position or influence to promote the interests of his clients in cases which are intrusted to him, he does that which—I will not say in every case, as it would be very hard to anticipate every case which may arise—would be exceedingly improper, and of the most dangerous tendency. In this instance the bill has nothing whatever to do with the case in which I was counsel. It was very likely suggested by that case. Bills are frequently suggested by cases in court which reveal the state of the law ; but this measure can have no effect whatever upon that case. I do not see how it can even indirectly have any effect upon it. That case, I understand, is on appeal to the Privy Council. If the decision is in favour of the corporation they will get the full benefit of it. It is said, however, that the passage of the bill would be used as a lever

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to induce them to make a settlement. That settlement would be a perfectly voluntary act on their part. They would not be bound to give a single farthing, and hon. members are told that, because an argument of that kind may be addressed to the mayor and aldermen, the bill ought not to be passed. I have never heard a more flimsy reason given for refusing consideration to a measure than that. It never occurred to me for an instant, until it was suggested by the hon. member who had moved the adjournment of the debate, that there was any impropriety in my taking up the bill. As a matter of fact, I had no knowledge that the measure was brought forward in the other Chamber until I saw in the newspaper that it had passed, and on the following evening I was asked by the gentleman who had introduced it if I would take charge of it in this House. Never dreaming that there was any impropriety in my doing so, I consented, agreeing with him as to the desirability of a change in the law. I should like to explain how what the bill is really to effect. The Sydney corporation has made, ballasted, and kerbed all the roads in the city. It is the only authority which has any power over those roads. If any man, having a dangerous hole in the road in the front of his house, attempts to repair it, he is liable to a fine. The corporation is the only authority which can repair any injury to the roads. Not only that, but it is the authority which is furnished with ample funds by law to keep the roads in repair ; if, then, they allow the streets to fall into a dangerous condition, and to remain in that condition for days, and, in consequence, a man driving along in the dusk is thrown from his cart, and has his neck broken, ought they not to pay damages ? That is the simple question. It is of no use obscuring it with a cloud of words. If they had gone to repair that damage and had carried it out in a manner which a jury considered improper and negligent, then they would have been clearly liable, as that would have been what is called a misfeasance. But because they allowed it to remain for days a standing menace to life and limb it is called a non-feasance, and it is said that they ought not to be held liable, because they have done nothing. Why that is the very essence of their wrong-doing. Take the

simple case which has been quoted, and let any hon. member apply it to himself. A man going from one part of the city to another gets into a cab which goes into a rut which has been left in the street for a week. The cab is overturned and the man is killed, leaving a wife and large family. That rut has been visible to the servants of the municipality for a week and they have done nothing to fill it up. Now comes in the argument that because they did nothing, that because they were guilty of nonfeasance, they are not to pay a single farthing of damages. My desire is to explain what the bill really seeks to bring about, and I think hon. members will see that it is not a measure of the dangerous character which has been depicted. To my mind the difference between misfeasance and non-feasance is a shadowy one. There is no moral distinction whatever between the municipality which, sending its men to construct or repair a road, does it negligently and the municipality which leaves it in a dangerous condition, although it levies funds from the ratepayers to keep it in repair.

The HON. H. C. DANGAR: The road in this instance was not in a dangerous condition!

The HON. C. G. HEYDON: The road was in a dangerous condition; but whether it was or was not the bill only deals with a road when it is in a dangerous condition. I might inform the hon. and learned member that the evidence showed that there were several deep holes in the road, and they had been left there for days. A number of persons who had driven along the road stated that their carts had gone into the holes. One man had either been thrown out or nearly thrown out, and the man whose widow brought the action was not only thrown out, but was killed.

The HON. H. C. DANGAR: But was not the man in a state of intoxication at the time?

The HON. C. G. HEYDON: I do not know that the House is a jury to try the case.

The HON. H. C. DANGAR: Let us have the facts!

The HON. C. G. HEYDON: There was evidence to show that the man was in a state of intoxication; but there was not a tittle of evidence to show that he was thrown out of the cart in consequence.

That was why the Supreme Court held that the verdict could not be touched on the ground that it was against the weight of evidence. Let it be granted, however, that the verdict was entirely wrong, and that the man jumped out of the cart and broke his own neck. The question is, whether, if a road is left for days and weeks unrepaired and dangerous, and people lose their lives in consequence, the authority liable for the repair of the road ought or ought not to pay damages. I submit that the authority ought to pay damages. The measure is not one, as has been represented, to alter the law as it has been in New South Wales for the last seventeen years. It is a bill to prevent the law from being altered as it has prevailed in New South Wales for the last seventeen years. Since the decision in the case of the borough of Bathurst *versus* Macpherson, decided in 1887, not only the corporation of Sydney, but the municipalities throughout the country have been liable for non-feasance; that is, the state of the law has been this: if a municipality did nothing whatever to a road which it had taken over—left it absolutely unimproved, unformed, or anything of the kind—it was not liable, however bad the state of the road might be. There is a great deal to be said in support of that, because we know that country municipalities sometimes take over a very great mileage of roads; they cannot possibly raise sufficient funds to put all those roads in good order at once—it may take them very many years to do it—and in the meantime they do the best they can with the roads where there is the most traffic and largest population, and they cannot be expected to do everything at once.

The HON. G. B. SIMPSON: If this bill becomes law they will be!

The HON. C. G. HEYDON: What that case decided was that once a municipality have taken over a road, repaired, formed, or done anything at all to it, they are bound to keep it in repair at their peril.

The HON. G. B. SIMPSON: That was not the decision!

The HON. C. G. HEYDON: My hon. and learned friend is wrong. If I had supposed that there could be the slightest question about that, I could have brought case after case to the House to show that what I state is absolutely right. I am astonished

at my hon. and learned friend having a different opinion. It is absolutely clear. It has been laid down over and over again and been acted upon—actions have been brought upon it over and over again—it has been understood in this colony, and it appears from the cases which I have here that it has been understood also in Canada ever since that decision that such has been the law, and the law has been so applied, not only in this colony but also in Canada, as I gather from an appeal case. Over and over again it has been laid down that if a municipality do take over a road, do put it in order and form it, and afterwards let it fall into disrepair, and if they do it by negligence—of course there must be negligence—then they are liable. I venture to say that I could bring a dozen cases.

The Hon. G. B. SIMPSON: But I say that that is not the decision of the Privy Council in the case of the borough of Bathurst and Macpherson!

The Hon. C. G. HEYDON: That has been taken to be the decision of the Privy Council in that case; that is the law that has been acted upon and applied in this colony ever since that decision. That is the law, and that is why in the case of Bourke and the municipal council of Sydney, two out of the three judges to whom the corporation appealed, held that the Sydney Corporation were liable. If I am not perfectly right in what I have said as to the interpretation of the decision in the case of the borough of Bathurst and Macpherson, how is it that the majority of the court in the case of Bourke and the municipal council of Sydney held that the corporation were liable for nonfeasance? I will read the marginal note in that case, and I ask hon. members to attend to it.

The Sydney Corporation Act, section 67, provides that all public ways in the city of Sydney shall be vested in the council who shall have power to construct, improve, maintain, repair, and order such public ways.

Held, Innes and Foster (Windeyer, justice, dissenting) that this section imposes a duty upon the council to keep such public ways in repair, and that the council are liable in an action for injuries sustained by reason of their mere nonfeasance in allowing a road properly made by them in the first instance to get into a state of disrepair.

That is what I have said was the law, and what has been denied. I ask anybody who has denied the correctness of my statement of the law to explain how it is that

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the majority of the court came to hold that the Sydney Corporation were liable for nonfeasance, and were bound to keep the streets in repair?

The Hon. S. A. STEPHEN: That is the law of the land. Why does the hon. and learned member want to say, by this bill, what the law is?

The Hon. C. G. HEYDON: I will answer that question. When this matter came to be argued before the Full Court reference was made by the learned counsel, Sir Julian Salomons and Mr. Pring, to a recent decision of the House of Lords. It was my duty to examine it, as I was arguing on the appeal, and that decision appeared to me to be absolutely inconsistent with the one in the case of the borough of Bathurst and Macpherson, or at any rate with what the court and the profession in this colony, and in Victoria too, have always understood the judgment in the case of the borough of Bathurst and Macpherson meant. It was so inconsistent and was of such a high authority that it certainly appeared that the municipal council of Sydney must be successful in appealing to the Privy Council. There is a later case to which I referred the hon. member, Mr. Stephen, namely, the municipality of Pictou against Geldert—an appeal to the Privy Council from the courts in Canada in which the Privy Council has given a decision which appears to my humble judgment to entirely set aside the view which our courts have always taken of the judgment in the case of the borough of Bathurst and Macpherson. So that in my mind there can be very little question, that the Sydney Corporation when they bring Bourke's case before the Privy Council will be successful in their appeal, and that, when that happens, the law that has prevailed in this colony for seventeen years—ever since the case of the borough of Bathurst and Macpherson was decided—will be altered. I suppose it was to prevent that that the gentleman who introduced this measure in the Legislative Assembly did so. I have not asked him why he introduced it; he simply asked me if I would take charge of it in this House. I consented to do so, and have not seen him since with regard to it. But I suppose that that was his object—not to bring about a change in the law, but to prevent one. In view of the argument that has

been addressed to hon. members—that if the bill were passed the corporation of Sydney would be ruined—it is very material for them to consider how it is that the corporation has not been ruined during the seventeen years they have been subject to actions of this kind. I do not know that their finances have fallen into such a state of insolvency that anybody can say that, in order to preserve their interests, it is necessary that the law should be altered. The matter has been put to a test—it is no longer an experiment. I would point out to hon. members that this measure applies merely to Sydney. It does not apply to the country municipalities at all. Therefore, so far as country municipalities are concerned, if the appeal of the Sydney Corporation is successful the law as it has been applied since the Bathurst case will be altered. But I submit that there is no reason why it should be altered in the case of the Sydney Corporation, because all the roads in the Sydney municipality have now been formed, ballasted, and made; there are people residing along all of them, and, therefore, rates paid in respect of each street which can be applied to keep it in order—each street has its own income that can and ought to be applied to keep it in order. Consequently, the corporation of Sydney stand in a position entirely different from that of any country municipality, and I, for one, can see no reason why they should not be bound under penalty of damages if they neglect to keep these roads in order with the funds which they have for the purpose. So far as I am personally concerned, I have no interest at all, either directly or indirectly, in the fate of this measure. I simply took it up at the request of a gentleman who, entirely without my knowledge, introduced it into the Lower House. He came and asked me to take charge of it here. It seemed and still seems to me to be a proper measure. I saw no harm in taking charge of it here, as it has gone through the other branch of the legislature, and putting it before this House as clearly as I possibly can. What ultimately becomes of it is a matter of absolute indifference so far as I am concerned, except that I must say that I honestly think that it is a proper measure. I think that in the case I have put the Sydney Corporation ought to be liable; but if hon. members

think otherwise—if they think that holes may be left in the streets for weeks and months, and injuries caused to people, without there being any liability on the corporation at all, except what they choose to give—because it has been held out as one argument that they are so generous that they always give compensation—by all means let that be affirmed. Let the thing be decided one way or the other.

The Hon. G. B. SIMPSON: Mr. President —

The PRESIDENT: The debate is closed.

The Hon. G. B. SIMPSON: I wish to refer to a statement made by the Attorney-General, which may affect the decision of the House, and to make an explanation.

The Hon. C. G. HEYDON: I have no objection!

The Hon. G. B. SIMPSON: My hon. and learned friend has assured the House that his object is to change the existing law.

The Hon. C. G. HEYDON: No; to prevent a change in the law!

The Hon. G. B. SIMPSON: The hon. and learned gentleman said that the court, in the case of the borough of Bathurst and Macpherson, really decided what this bill is supposed to declare. I hold in my hand the Privy Council report—the latest, which my hon. and learned friend has been good enough to hand to me—and in it I find these words:

It is clear to their lordships that the governing fact in the Bathurst case, the conduct complained of, was not, in the view of the committee, non-feasance but misfeasance.

That is the decision in the case of the borough of Bathurst.

The Hon. C. G. HEYDON: This is not an explanation, but a reply, and I claim a right to reply to it!

The PRESIDENT: I pointed out that the course proposed to be taken by the hon. and learned member, Mr. Simpson, was irregular, whereupon the hon. and learned member in charge of the bill stated that he had no objection. An irregular course has been pursued; but I cannot allow it to go on any further.

The Hon. C. G. HEYDON: My hon. and learned friend is absolutely under a misapprehension!

Question resolved in the negative.

House adjourned at 6·23 p.m.