

New Jersey Court of Errors and Appeals

MURRAY RUBBER Co.,

Appellant,

vs.

CITY OF TRENTON AND COUNTY
OF MERCER,

Respondents.

On Appeal
from
Supreme
Court.

BRIEF OF THE RESPONDENTS,
THE CITY OF TRENTON AND COUNTY
OF MERCER

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This is an action at law brought by the Murray Rubber Company against the City of Trenton and County of Mercer on a claim for damages growing out of the action of the waters of the Assunpink creek, which the plaintiff alleges have at various times flooded and overflowed its lands, which flooding the plaintiff attributes to certain acts and omissions on the part of the defendants. The plaintiff seeks to base its right to a legal remedy against the defendants upon the alleged existence of certain duties and obligations to keep the banks and bed of the Assunpink creek free from obstruction, and

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to prevent the discharge of surface water into the Assunpink creek. The first count of the complaint is directed against the city of Trenton, and the objections raised by the city, in its notice of this motion to the respective paragraphs of the first count, will be here treated in their numerical order,

FIRST COUNT.

1. Paragraph 2 of the first count alleges that the city for more than six years last past has had by
10 law jurisdiction and control over natural water courses, within its limits, including the Assunpink creek. This is a partial and incomplete statement of the situation.

Pamphlet laws of 1917, chapter 152, on page 370, paragraph 1, defines a local improvement as one the cost of which, or a portion thereof, may be assessed upon lands in the vicinity, and states that every municipality MAY undertake certain works as a local improvement, among which (subdivision "j"
20 on page 371) is "the widening, deepening or improving of any stream, creek, river or other waterway." This, undoubtedly, conferred upon the city of Trenton the authority, under appropriate proceedings, to assume the burden and responsibility of cleaning, widening, deepening, straightening or otherwise improving the bed and banks of the Assunpink creek. But, this duty was discretionary and not mandatory. Had the governing body of the city of Trenton, in its judgment, decided to exercise
30 this power, its procedure would have been to pass first the necessary and appropriate ordinance or ordinances. The plaintiff will not attempt to deny that the Assunpink creek is a non-navigable, non-tidal stream, and that the abutting owners have title to the center of the bed of the stream. Therefore, the city of Trenton, after passing such an ordinance as

has been referred to, in order to further effectuate its purposes, would have been confronted by the obligation of treating with the respective riparian owners abutting the stream and acquiring the right, either by agreement or condemnation, to enter upon their lands and make the necessary improvements to the banks and bed of the stream. Our own Court of Errors and Appeals has disposed of this feature of the case: "The entry upon the lands for the purpose of cleaning out the ditch and throwing the
10 refuse upon the plaintiff's land was itself a trespass. * * * That a municipal corporation is liable for such active misconduct is settled in this State." *Bailey v. Osborn*, 80 N. J. L. 333 (on p. 334). It is not, and cannot be, alleged that the governing body of the city of Trenton ever embarked upon such an enterprise, or availed itself of the right to acquire jurisdiction and control over the stream.

The second paragraph of the first count of the
20 complaint is accurate in so far as it states the right on the part of the city to assume the jurisdiction and control over the Assunpink creek, but is inaccurate in assuming that the city ever has actually acquired such jurisdiction and control.

"A municipal corporation is not impliedly liable to an action for damages either for the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character. Thus, where
30 such a corporation has under its charter a discretion as to the time and manner or plan of making public or corporate improvements, as, for example, grading streets, constructing sewers, drains, vaults, etc., and the like, neither *mandamus* nor a private action will lie against the corporation for omitting or neglecting to act; and the reason is that such powers are con-

ferred to be exercised or not, as the public interest is deemed to require, and there is no implied liability for deciding either that the public interest does not require action, or that it requires action in a particular way."

Dillon on Municipal Corporations (5th edition), paragraph 1626, on page 2838.

10 If the city of Trenton was under obligation to assume jurisdiction and control over the bed and banks of the Assunpink creek and failed to do so, the plaintiff's remedy is by *mandamus* and not by an action for damages. An action will not lie on behalf of an individual who has sustained special damage from the neglect of a public corporation to perform a public duty.

Pray v. Jersey City, 32 N. J. L. 394;
Livermore v. Board, 31 N. J. L. 506.

20 2. Paragraph three of the complaint alleges the duty of the city to remove artificial obstructions from the stream, but the defendants deny the existence of such a duty unless the legislature had expressly imposed it upon the city of Trenton either by statute or by the city's charter.

"A municipal corporation possesses no powers or faculties not conferred upon it either expressly or by fair implication by the law which created it or by other laws constitutional or statutory applicable to it."

30 *McQuillin Municipal Corporations, volume 7, section 352, on page 6623.*

It is the contention of the defendants that the duty to clear obstruction from such a stream has been nowhere imposed upon it by the Legislature, and that it is not a power or duty necessarily or fairly

implied in or incident to any powers expressly granted.

Hackettstown ads. Swackhammer, 37 N. J. L. 191;
Meday v. Rutherford, 65 N. J. L. 645;
Carron v. Martin, 26 N. J. L. 594.

A municipality is not liable for the result of the lawful or unlawful acts of individual citizens in depleting or obstructing small watercourses or for overflow of same. 10

19 *R. C. L.* 1095.

3. Paragraph four of the complaint alleges the duty of the city of Trenton to prevent the diversion of surface water from the streets into said stream "in greater quantities than by reason of the natural topography of the land lying on each side of the stream should and did flow into it." Defendants' contention as to the allegation is similar to their objections to paragraph three of the first count in that there was no duty to prevent any such diversion of surface water. The defendants draw the distinction between an obligation to prevent the diversion of surface water as compared with an obligation to refrain from collecting and diverting into the stream larger quantities of surface water, than by the natural topography of the land would have ordinarily flowed into the stream. This latter question is taken up under the discussion of paragraph ten of the first count (*post*). 20

4. The argument of the city of Trenton against paragraph five of the first count is similar, and based upon the same authorities as stated and cited in the objection to paragraph three of the first count. 30

5. With reference to paragraph eight of the first count, the city of Trenton contends that there could have been no unlawful negligence in its omission to

remove artificial obstructions from the stream unless the legal duty to remove them had been imposed by legislative act, and its contention is supported by the same authorities as it has cited above with reference to paragraph three of the first count.

6. The allegation in paragraph nine of the first count, that the city of Trenton failed and neglected to maintain the banks and bed of the stream, also fails to state a cause of action unless the duty to
10 so maintain had been imposed upon the city of Trenton by legislative act, which the plaintiff has both failed and is unable to establish. Adopting the literal meaning of the words used by the plaintiff in this paragraph of the complaint it does not allege any active wrong-doing chargeable to the city.

Garrison v. Borough of Fort Lee, 92 N. J. L. 566;

Kehoe v. Rutherford, 74 N. J. L. 659.

7. Paragraph ten of the first count alleges that
20 the city of Trenton acted negligently and unlawfully by constructing and maintaining drains which took from the "streets and other places of such municipality surface water that was carried by means of street pavements constructed and maintained by said city of Trenton with hard material, and was discharged therefrom and thereby into said stream in greater quantities than by any natural condition of the land would and did flow into said stream."

30 Plaintiff does not allege that the defendant diverted any natural water course into said stream or drained into the creek surface water which ordinarily would not flow there, but obviously relies upon the sudden discharge of surface water caused by its running off of hard street pavements rather than the natural percolation through the soil. In the language of CHIEF JUSTICE BEASLEY: "If, for such a course of acts, an action will lie, then scarcely a

grade of a street can be made or altered without the incurring of a similar liability. Fortunately the law has been settled otherwise."

Town of Union ads. Durkes, 38 N. J. L. 21;

Miller v. Morristown, 47 N. J. Eq. 62; *affirmed*, 48 N. J. Eq. 645;

Bowlsby v. Speer, 31 N. J. L. 351;

West Orange v. Field, 37 N. J. Eq. 600;

Jessup v. Bamford, 66 N. J. L. 641.

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8. Substantially every legal duty which the plaintiff in this case alleges to rest upon the defendant was raised and discussed in the case of *Lakey Company v. City of Kalamazoo*, reported in *Lawyers' Reports Annotated*, Vol. 67 (1905), on page 931. The facts in this case are strikingly similar to those in the case at bar, and every feature was taken up and discussed by the court with particular emphasis upon the lack of obligation in the municipality to keep the bed and banks of the stream
20 clear and free from obstructions, and also the right of the municipality to improve its thickly-settled area by the laying of hard pavement and then providing for drains for the rapid discharge of surface water collected by these hard pavements into the natural water course. The court cites an imposing number of cases in support of this contention, and has no difficulty in distinguishing the facts in the case before it from the facts shown to exist in the comparatively few cases which were cited in sup-
30 port of the plaintiff Lakey Company's claim for damages.

SECOND COUNT.

9. Paragraphs 3, 4 and 5 of the second count allege as against the county of Mercer the same legal obligations that are alleged in paragraphs 3, 4 and

5 of the first count against the city of Trenton, and the objections of the county of Mercer to these three paragraphs of the second count are based upon the same legal grounds as those advanced by the city of Trenton against the same paragraphs of the first count, with this additional observation: That there was only a portion of the period covered in plaintiff's complaint within which the county has even a discretionary authority to assume any jurisdiction or control over the Assunpink creek. Pamphlet Laws of 1897, on page 22, as printed in Vol. 1, Compiled Statutes, page 524, section 175, make it lawful for boards of chosen freeholders to enter upon private lands either above or below any bridge, for the purpose of changing the channel of the stream or removing obstructions, having first obtained a written consent of the owners, but this statute was repealed in Pamphlet Laws of 1918, page 642. In Pamphlet Laws of 1913, chapter 37, on page 58, the Legislature again conferred upon boards of freeholders a permissive authority, in their discretion, to define the lines of water courses, change their course and protect the banks, and this statute set forth at some length the method under which boards of freeholders might carry out such projects; but in this statute, as in the Home Rule act applying to cities, the duty was not mandatory but discretionary, and this act itself was expressly repealed by the Legislature in *P.L. 1922, page 350*, since which time boards of freeholders have not possessed even the discretionary power of exercising that jurisdiction and control over water courses, which the plaintiff alleges to have been the unqualified duty of the county to exercise. The legal principles and authorities stated and cited under paragraphs 1, 2 and 3 of this brief are relied upon by the county of Mercer in support of this objection.

10. The allegations in paragraph 8 of the second

count as to the negligence by the county in the method of constructing and maintaining bridges over the Assunpink creek is open to objection on several grounds. The complaint, by its terms, attributes the damage sustained by the plaintiff to a combination of numerous causes, *i. e.*, the encroachments upon the stream made or permitted by abutting property owners; the obstructions in the bed of the stream placed there or permitted by abutting property owners; the drainage from paved streets constructed by the city; the drainage from paved streets constructed by the county; and the fifth class of obstructions which is not specifically referred to in the complaint, but the existence of which the plaintiff cannot deny, which is the presence of wooden railway trestles and other private bridges crossing the Assunpink creek, and placed there not only by private property owners, but in, at least one case by the plaintiff itself. The plaintiff does not allege, and could not allege, with any color of truth that the bridges erected and maintained by the county are the sole and approximate cause of the flood conditions plaintiff complains of.

In a leading New York case, a natural water course had been used by the defendant (the city of Syracuse) as part of its sewer system. The defendant also constructed bridges over the stream. The bed of the stream became obstructed with ashes, cinders, rubbish and also by sewer deposit, and the stream flooded plaintiff's land. The plaintiff contended that the defendant was liable for neglect in the manner in which it constructed and maintained its bridges, and also for not cleaning out the stream, and in the lower court the plaintiff recovered damages, but the Court of Appeals reversed this decision, and held that the defendant was not liable for damages to the plaintiff, to which the acts of others, not acting in concert with it, had contributed (*i. e.*,

ashes, rubbish, &c., thrown in by others). "The municipality was chargeable with that much of the damage which was caused by its wrongful acts, and if the damage was incapable of separation and the proportions of liability could not be established, that fact affords no reason for holding the city responsible for the tortious acts of others." The same case held that, as to bridges, no liability was cast upon the city for any consequential damages claimed to have been occasioned through their having impeded the flow of the stream.

O'Donnell v. City of Syracuse, 184 N. Y. 1.

In an Iowa case, the plaintiff brought suit against eighteen defendants, because they had all placed obstructions of one kind or another, including bridges, which resulted in the flooding of plaintiff's land. Individual defendants moved to have the cause of action separated as to each defendant, and the motions were granted on the ground that the various parties who obstructed the stream had not done so by any concerted action or purpose, and were not jointly liable, but each was liable only for the damages resulting from his own acts.

Tackeberry Co. v Sioux City et al., 132 N. W. Rep. 945.

On the authority of these decisions, the defendant, county of Mercer, objects to paragraph 8 of the second count of the complaint, on the ground that the damages claimed by the plaintiff by reason of the negligence, construction or maintenance of bridges, is not specifically segregated and distinguished from the damage which, by the very terms of the complaint, has clearly resulted from a combination of acts performed in a number of different ways by a number of different parties, but not acting in concert. And the plaintiff does not and cannot, under

the terms of its complaint, attribute its damages solely to the existence of the county bridges.

Furthermore, it was not the duty of the county to provide bridge openings for other than such flood waters as it had reasonable cause to believe would occur, and it is not required to guard against extraordinary floods. Unless the county had reasonable cause to believe that there would be flood waters of extraordinary and unprecedented magnitude, it was not guilty of negligence.

Sherwood v. St. Louis Railway Co., 187 S. W. Rep. (Mo.) 260.

The culvert need not be sufficient to carry away water from extraordinary storms.

Evansville v. Decker, 84 Ind. 325.

And a municipality is not liable for the insufficiency of a culvert constructed by it where it employed competent engineers to plan and construct the same, in the exercise of their honest judgment.

Taubert v. St. Paul, 68 Minn. 519;
Van Pelt v. City of Davenport, 42 Iowa 308.

And the municipality is not an insurer against unprecedented floods or cloudbursts.

Keithsburg v. Simpson, 70 Ill. App. 467;
Sherwood v. St. Louis Ry. Co., *supra*.

11. Paragraphs 9, 10, 11 and 12 of the second count are restatements in greater detail of the allegation that it was the county's duty to remove obstructions and encroachments, and to maintain the stream, and to prevent the diversion of surface water into the stream, all of which allegations are based upon the existence of legal duties in the county, the existence of which the county denies, un-

der the principles and by the authorities heretofore cited.

10 12. And both of the defendants raise objection to the complaint as a whole, by reason of the fact that the complaint is drawn so broadly and is so general in its terms that these defendants are not advised as to just what specific acts of omission and commission are complained of, and are therefore unable with any certainty to prepare a defense upon any issues of fact. The plaintiff does not allege what streets or roads have not been properly drained into the Assunpink creek, nor how such drainage is illegal, as a matter of law or as a matter of fact. The complaint also fails to state at what points fills, deposits or other similar obstructions exist, which the defendants, or either of them, should have removed. Of the several bridges which span the Assunpink creek, the plaintiff fails to specify which ones were negligently constructed or maintained, and in what 20 manner such construction and maintenance caused the alleged damage. And the defendants object that in the absence of specific allegations of the location, character and extent of the acts of negligence complained of, they and each of them are unable to adequately prepare any defense, and that no clearly-defined issue is raised which they may prepare themselves to meet.

Respectfully submitted,

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CHARLES E. BIRD,
Attorney for City of Trenton.

FREDERIC R. BRACE,
Attorney for County of Mercer.

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New Jersey Court of Errors and Appeals

MURRAY RUBBER Co.,

Appellant,

vs.

CITY OF TRENTON AND COUNTY
OF MERCER,

Respondents.

Action at Law.
On Appeal.
State of Case.

NOTICE AND GROUNDS FOR APPEAL.

To CHARLES E. BIRD, Esq., attorney for defend- 10
dant City of Trenton:

To FREDERIC R. BRACE, Esq., attorney for
defendant County of Mercer:

Take notice, that the plaintiff appeals to the Court
of Errors and Appeals, from the whole of the judg-
ment entered in this cause, on the following grounds:

1. The Supreme Court ordered that all parts of
both counts in the complaint be stricken out, although
there was error in doing so.

2. The Supreme Court ordered that the plaintiff 20
have leave to proceed against only one defendant, the
County of Mercer, upon an amended complaint, al-
though there was error in doing so.

3. The Supreme Court held that the complaint does not disclose a legal cause of action against both defendants, although there was error in doing so.

4. Because the Supreme Court held that the complaint disclosed a misjoinder of the parties defendant, although there was error in doing so.

Respectfully yours,

JAMES J. McGOOGAN,
Attorney for plaintiff.

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SUMMONS.

THE STATE OF NEW JERSEY TO CITY OF
TRENTON AND COUNTY OF MERCER:

[L. s.]

You are summoned to answer the annexed complaint of Murray Rubber Company, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the clerk of the said New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 10

WITNESS, HON. WILLIAM S. GUMMERE,
Chief Justice of the Supreme Court, at Trenton, this sixteenth day of February, nineteen hundred and twenty-six.

EDWARD J. KELLEHER,
Clerk.

JAMES J. McGOOGAN,
Attorney.

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COMPLAINT.

Plaintiff, a corporation duly organized and existing under the laws of New Jersey, and having its principal office and place of business in Trenton, in Mercer County, in this State, says that:

FIRST COUNT.

1. The defendant City of Trenton is a municipal corporation of this State, and is situated in the County of Mercer.

2. It has had for more than six years last past, by law, jurisdiction and control over natural water-courses within the corporate limits of the municipality, including a natural fresh-water stream flowing through the municipality, and known as Assunpink Creek.

3. On and prior to March 5, 1920, April 6, 1924, and February 10, 1925, it was the duty of the City of Trenton to remove all artificial obstructions from such stream within its corporate limits, so that the flow of water therein be not interrupted or obstructed in any manner, or increased in quantity except by natural causes.

4. It was also then the duty of the City of Trenton to prevent the diversion of surface water from the streets, thoroughfares and other places of the city into the said stream in greater quantities than by reason of the natural topography of the land lying on each side of the said stream should and did flow into it.

5. It was also then the duty of the City of Trenton to so safeguard and maintain the said stream, and the bed and the banks thereof, within such corporate limits, as to prevent damage to the owners of real and personal property lying along and near the said stream.

6. Plaintiff was, on said dates, the owner and occupant of a tract of land, with factory buildings thereon erected, containing machinery and raw and finished products of its business of manufacturing and selling rubber tires, and its said properties were then and now are situated on the bank of said stream, within such corporate limits.

7. The said stream, before each of said dates, had flowed, and had been accustomed to flow, and of right should have flowed, in such a manner and at such a level as not to flood plaintiff's said works and properties.

8. The City of Trenton, disregarding its said duties, for a long time prior to and continuing to and including March 5, 1920, and thence hitherto, negligently and unlawfully failed and neglected to remove artificial obstructions from such stream, such as garbage, ashes, refuse and encroachments in and on said stream, and thereby caused great quantities of water from said stream to flood plaintiff's works and properties on said dates.

9. The City of Trenton, also disregarding its said duties, negligently and unlawfully failed and neglected to so maintain said stream, the banks and the bed thereof, as to prevent damage to plaintiff's properties lying along and near said stream, so that, in consequence thereof, the waters of said stream on said dates overflowed its banks in greater quantities than would flow in any natural manner either at flood tide or ordinary tide, and said water on said dates entered upon the properties of plaintiff along the bank of said stream, and caused great damage to the properties and the business of plaintiff by destroying and injuring said properties, and preventing plaintiff from manufacturing and selling its products, and obtaining such profits as it ordinarily would obtain if such properties had not been so destroyed and injured.

10. The City of Trenton also disregarded its said duties on and prior to said dates by negligently and unlawfully causing the diversion of surface water from its natural channels into said stream, by reason of the City of Trenton theretofore constructing and then maintaining on said dates, and since hitherto, many artificial drains, taking from the streets and

other places of such municipality surface water that was carried by means of street pavements constructed and maintained by said City of Trenton with hard materials, and was discharged therefrom and thereby into said stream in greater quantities than by any natural condition of the land would and did flow into the stream, thus causing it to overflow its banks and flood plaintiff's properties resulting in such destruction and damage.

10 11. Plaintiff, at said dates, of right ought to have had and enjoyed the benefit of the said stream flowing at such a level past plaintiff's said properties that the highest waters of the stream in its natural state, at any and all times, should not overflow and injure and destroy plaintiff's said properties, yet the City of Trenton, knowing thereof, wrongfully and unjustly injured the plaintiff as aforesaid, and deprived it of such use and benefit, and thereby hindered plaintiff from working its said properties in
20 the same manner in which it theretofore had done, and of right ought to have done, and thereby injured it in its trade, and put it to great expense.

12. The damage caused to plaintiff by the flood of March 5, 1920, amounted to \$150,676.47, by the flood of April 6, 1924, to \$3,205.04, and by the flood of February 10, 1925, to \$7,137.04, making an aggregate amount of damages suffered by the plaintiff from said three floods, of \$161,018.55, negligently and unlawfully caused by the City of Trenton as aforesaid.

30 13. Of all of which the City of Trenton had due notice.

14. Plaintiff demands \$161,018.55 damages on the first count.

SECOND COUNT.

1. The defendant County of Mercer is a municipal corporation of this State.

2. The said County of Mercer was, for more than six years last past, charged by law with the duty of building, maintaining and repairing bridges over natural streams flowing within the limits of said county, including a natural fresh-water stream known as Assumpink Creek.

3. On and prior to March 5, 1920, April 6, 1924, 10 and February 10, 1925, it also was the duty of the County of Mercer to remove all artificial obstructions from such stream within its corporate limits, so that the flow of water therein be not interrupted or obstructed in any manner or increased in quantity except by natural causes.

4. It was then also the duty of the County of Mercer to prevent the diversion of surface water from the streets, roads and other places of the county into the said stream in greater quantities than by reason 20 of the natural topography of the land lying on each side of said stream should flow, and did flow, into it.

5. It was also then the duty of the County of Mercer to so safeguard and maintain the said stream, the bed and the banks thereof within such corporate limits as to prevent damage to the owners of real and personal property lying along and near the said stream.

6. Plaintiff was, on said dates, the owner and the occupant of a tract of land, with factory buildings 30 thereon erected, containing machinery and raw and finished products of its business of manufacturing and selling rubber tires, and its said properties were then and now are situated on the bank of said stream within such corporate limits.

7. The said stream, before each of said dates, had flowed, and had been accustomed to flow, and of right should have flowed, in such manner and at such a level as not to flood plaintiff's said works and properties.

8. The County of Mercer, disregarding its said duties, prior to and including March 5, 1920, and thence hitherto, so constructed and maintained certain bridges over said stream as to prevent the flow-
10 age of the water in said stream at natural level, and by means of such bridges and the negligent manner of construction and maintenance thereof by said county, the water of said stream could not, prior to and since March 5, 1920, flow as freely and with such speed as it could and did flow in its natural state, so that on March 5, 1920, April 6, 1924, and February 10, 1925, the waters of said stream overflowed upon plaintiff's said properties situated on the bank of said stream, and destroyed and injured plaintiff's
20 real and personal property there.

9. The County of Mercer, disregarding its said duties, for a long time prior to and continuing to and including March 5, 1920, and thereafter to this time, failed and neglected to remove artificial obstructions from such stream, such as garbage, ashes, refuse and other encroachments in and on said stream and the banks and the bed thereof, and thereby caused great quantities of water from said stream to flood plaintiff's works and properties on said dates.

30 10. The County of Mercer, also disregarding its said duties, failed and neglected to so maintain said stream, and the bridges over the same within such corporate limits, as to prevent damage to plaintiff's properties lying along and near said stream, so that, in consequence thereof, the waters of said stream on said dates overflowed its banks in greater quantities than would flow in any natural manner

either at flood tides or at ordinary tides, and said water on said dates entered upon the properties of plaintiff along the bank of said stream, and caused great damage to said properties and the business of plaintiff, by destroying and injuring said properties, and preventing plaintiff from manufacturing and selling its products, and obtaining such profits as it ordinarily would obtain if such properties had not been so destroyed and injured.

11. The County of Mercer also disregarded its said
10 duties, on and prior to said dates, by the unlawful diversion of surface water from its natural channels into said stream by reason of the County of Mercer constructing and maintaining at and prior to March 5, 1920, and since hitherto, many artificial drains, taking from the roads and other places of such county surface water that was carried by means of road and street pavements constructed by the said County of Mercer with hard materials, and was dis-
20 charged into such stream in greater volume than by any natural means would and did flow into the stream, thus causing it to overflow its lands and flood plaintiff's properties with said resulting destruction and damage.

12. Plaintiff, at the said dates, of right ought to have had and enjoyed the benefit of said stream flowing at such level past plaintiff's said properties that the highest waters of the stream in its natural state, at any and all times, should not overflow and injure
30 plaintiff's said properties, yet the County of Mercer, knowing thereof, wrongfully and unjustly injured, as aforesaid, the plaintiff, and deprived it of such use and benefit, and thereby hindered plaintiff from working its said properties in the same manner in which it theretofore had done, and of right ought to have done, and thereby injured it in its trade, and put it to great expense.

13. The damage caused to plaintiff by the flood of March 5, 1920, amounted to \$150,676.47; by the flood of April 6, 1924, to \$3,205.04, and by the flood of February 10, 1925, to \$7,137.04, making an aggregate amount of damages suffered by plaintiff from said three floods of \$161,018.55.

14. Of all of which the defendant County of Mercer had due notice.

15. Plaintiff demands \$161,018.55 damages on the
10 second count.

THIRD COUNT.

1. Plaintiff became a body corporate on October 11th, 1922, and on March 5, 1920, the title to said works and properties was in Empire Tire and Rubber Corporation, and on November 15, 1922, plaintiff became possessed in its own right of the cause and causes of action hereinbefore set forth as fully and to the same extent as said Empire Tire and Rubber Corporation had or possessed the same, and
20 plaintiff is now entitled to sue for such damages of March 5, 1920, by reason of its succession in title to all of said properties and rights and causes of action.

JAMES J. McGOOGAN,
Attorney for plaintiff.

Service of the within summons and complaint is hereby acknowledged this 19th day of February, 1926.

30 CHAS. E. BIRD,
Attorney for defendant City of Trenton.

FREDERIC R. BRACE,
Attorney for defendant County of Mercer.

NOTICE OF MOTION.

To the within-named plaintiff, or James J. McGoogan, Esq., its attorney:

Please take notice, that on Tuesday, the 4th day of May, 1926, at the hour of ten thirty o'clock in the forenoon (daylight saving time), or as soon thereafter as counsel can be heard, before such justices of the Supreme Court as shall be assigned to hear and determine applications of this character, at the State House, in the City of Trenton, a motion will be made to determine the question of law raised in the complaint filed by the plaintiff in the above-entitled cause, and at such time and place, the defendants will move to strike out certain paragraphs of the complaint, as follows:

(1) Paragraph 2 of the first count.

Because the City of Trenton has not, by law, jurisdiction and control over natural water courses within the corporate limits of said city.

(2) Paragraph 3 of the first count.

Because it is not, as a matter of law, the duty of the City of Trenton to remove all artificial obstructions from streams within its corporate limits.

(3) Paragraph 4 of the first count.

Because it was not by law the duty of the City of Trenton to prevent the diversion of surface water from the streets, as alleged in said paragraph.

(4) Paragraph 5 of the first count.

Because it was not by law the duty of the City of Trenton to safeguard and maintain said stream and the bed and banks thereof, as in said paragraph alleged.

(5) Paragraph 8 of the first count.

Because the duties of the City of Trenton referred to in said paragraph were not duties or obligations

imposed by law upon the said City of Trenton, and inasmuch as said legal duty did not exist, the failure to observe it, as alleged in said paragraph of the complaint, cannot be deemed negligence.

(6) Paragraph 9 of the first count.

Because the duties of the City of Trenton referred to in said paragraph were not duties or obligations imposed by law upon the said City of Trenton, and inasmuch as said legal duty did not exist, the failure to observe it, as alleged in said paragraph of the
10 complaint, cannot be deemed negligence.

(7) Paragraph 10 of the first count.

Because the diversion of surface water, as therein alleged, does not disclose a legal cause of action in the plaintiff.

(8) Paragraph 3 of the second count.

Because, as a matter of law, it was not the duty of the County of Mercer to remove obstructions from streams, as in said paragraph alleged.

20 (9) Paragraph 4 of the second count.

Because, as a matter of law, it was not the duty of the County of Mercer to prevent the diversion of surface water, as in said paragraph alleged.

(10) Paragraph 5 of the second count.

Because, as a matter of law, it was not the duty of the County of Mercer to safeguard and maintain the said stream, or the bed and banks thereof, as in said paragraph alleged.

(11) Paragraph 8 of the second count.

30 Because, as a matter of law, the construction and maintaining of bridges by the County of Mercer, as alleged in said paragraph, was not unlawful, and did not constitute negligence.

(12) Paragraph 9 of the second count.

Because, as a matter of law, there was no duty imposed upon the County of Mercer to remove artificial obstruction from such stream, as in said paragraph alleged.

(13) Paragraph 10 of the second count.

Because the facts, as stated in said paragraph of the complaint, do not disclose a legal cause of action in the plaintiff.

(14) Paragraph 11 of the second count.

Because the duty is imposed by law upon the County of Mercer to construct road and street pavements, and to protect the same with appurtenant drainage systems, and the facts alleged in paragraph 11 of the second count do not constitute a legal
10 cause of action in the plaintiff.

(15) Paragraph 12 of the second count.

Because the allegations in said paragraph are vague, indefinite, and state conclusions without stating the facts from which such conclusions are to be drawn, and do not constitute a legal cause of action in the plaintiff.

Furthermore, at the same time and place, a motion will be made to strike out the first and second counts, of the complaint, as an entirety, on the following
20 grounds:

(a) That the allegations are vague and obscure as to the time and place of the several acts of negligence complained of.

(b) The complaint does not allege that, by reason of the acts or omissions of the defendants, the flood of water in said stream reached a higher level than it would have reached in the absence of such acts or omissions by the defendants.

(c) The complaint fails to specify at what points
30 the defendants caused or permitted artificial obstructions in or encroachments on said stream.

(d) The complaint fails to specify what streets or roads or drainage systems constructed by the defendants, or either of them, caused or contributed to the damage complained of.

(e) The complaint fails to specify what bridges were so constructed by the defendant, the County of

Mercer, as to prevent the flowage of water in said stream at a natural level, and in what manner the construction and maintenance of such bridges by said county was improper or negligent.

Yours respectfully,

CHARLES E. BIRD,
Attorney for the City of Trenton.

FREDERIC R. BRACE,
Attorney for County of Mercer.

10 Due and legal service of the foregoing notice to strike out is herewith acknowledged this 8th day of March, 1928.

JAMES J. McGOOGAN,
Attorney of plaintiff.

OPINION.

Submitted May 14, 1926; Decided December, 1926.
On motion to strike out complaint.

20 Before Justices Kalisch, Katzenbach and Lloyd.
For the plaintiff: James J. McGoogan, Esq.
For the defendant City of Trenton: Charles E. Bird, Esq.

For the defendant County of Mercer: Frederic R. Brace, Esq.

The opinion of the court was delivered by LLOYD J.

The plaintiff brought suit against the City of Trenton and the County of Mercer to recover dam-

ages alleged to have been suffered by reason of injury to the plaintiff's property caused by the overflow of Assumpink Creek which runs through both municipalities; such overflow being due to negligence or wrongful act.

The complaint is in two counts, one against the City and the other against the County. The grounds fairly summarized upon which the recovery is sought are that both the City of Trenton and the County of Mercer were under a duty to remove 10 artificial obstructions from the creek, which they failed to do; to prevent diversion of surface waters from the streets, thoroughfares and other places which they failed to do; that both the City of Trenton and the County of Mercer negligently and unlawfully caused the diversion of surface water from their natural channels by constructing artificial drains and hard surfaced street pavements causing larger quantities of water to flow into the stream than otherwise would; and finally that the County 20 of Mercer so constructed and maintained certain of its bridges over the stream as to prevent the flowage of water at natural level and consequently backing up and overflowing plaintiff's land.

It will be observed that in both counts as to the acts of omission there is an assumption by the plaintiff that there is a duty resting upon the municipality respecting the protection of the plaintiff's property from damage by reason of obstructions in the stream. This assumption we think is not well founded. 30 Certainly at common law there was no duty resting upon either municipality to invade the stream in question and clean it out or to prevent obstructions accumulating in it. The averment of a control and jurisdiction in the first paragraph of the first count does not as we think imply such duty. The words themselves are but a conclusion at best and without meaning as applied to the present situation. It is of

course true that the city has for certain purposes jurisdiction over the entire territory within its corporate limits including streams of water, and as incident to that jurisdiction certain control vested in it by the legislature. This by no means, however, implies that the city either owns or has the right to enter upon the stream in question. Presumably it is a body of water covering lands owned by individuals as to which there would be no right of

10 invasion for purposes of cleaning or removing obstructions. For the city to have gone upon the stream for such purpose, would have been in clear violation of the rights of the owners, (*Bailey vs. Osborne*, 80 N. J. L. 334, wherein it was said of a similar contention that "the entering upon the lands for the purpose of cleaning out the ditch and throwing the refuse upon the plaintiff's land was itself a trespass," unless in some way authority to that end has been conferred by the legislature.

20 In its brief the plaintiff contends that such legislative authority does exist in the act of 1910, Comp. Stat. 3722, in the act of 1917, Comp. Stat. 2195 and in the act of 1925, Comp. Stat. 2354.

None of these we think avail the plaintiff. The first deals with the failure of one municipality to keep open its gutters, drains and ditches so that the residents of an adjoining municipality may not be injured, and provides that the facts shall be ascertained by a commission appointed for that purpose;

30 and further, that if such municipality after a finding against it by such commission shall wilfully refuse or neglect &c., it shall be liable to any land owner in the other municipality for any damage sustained. Obviously this cannot be of the slightest support to the plaintiff's contention. The act of 1917 authorizes the widening, deepening or improving of any stream, creek, run or other waterway, and the act of 1910 authorizes any county or city to keep open any

stream within its limits. These acts are permissive only, and appear to be so conceded to be by the plaintiff in the absence of the adoption of the necessary steps set forth in these acts. The authority they confer has never been exercised and there is no contention in the present case that the city or county has availed itself of their provisions.

So much for authority, either at common law or legislative, upon the right of the city to invade the stream in question for the purpose of removing

10 refuse and other materials as set forth in the complaint.

There is, however, an inherent difficulty as to this phase of the charge in that at most such failure would be a mere neglect of duty, and not an affirmative act of wrongdoing, such as is illustrated in the case of *Hart vs. Freeholders*, 57 N. J. L. 90; *Kehoe vs. Rutherford*, 74 N. J. L. 659; *Elesiewicz vs. Camden*, 100 N. J. L. 336. For mere neglect of duty by a municipality no liability attaches unless such liability has

20 been created by the legislature. What has been said above applies equally to those phases of both counts.

Turning to the alleged affirmative acts of wrongdoing by both defendants we think that the plaintiff has not stated a cause of action. In substance the charge is that the city and the county have constructed artificial conduits, and that the surface waters which would otherwise flow into the stream directly are now carried through such conduits in to the stream; and also by the construction of hard

30 surfaced streets has caused water to flow through such created channels, that otherwise might not have gone into the creek. This latter is obviously intended to embody waters that without hard surfaces might seep into the ground, and to charge that they have been added ultimately to the body of the stream. We think these questions are set at rest adversely to the plaintiff. *Town of Union vs. Durkes*,

38 N. J. L. 21; *Miller vs. Morristown*, 47 Eq. 62; *Jessup vs. Bamford*, 66 N. J. L. 641.

10 What has been said covers all phases of the two counts excepting only the allegations in the second count respecting the negligent construction and maintenance of certain bridges by the county so as to prevent the flowage of water into the stream at natural level. This alleged trespass is averred for the first time in the second count and against the county alone. It appears to be in no wise, if it be true, an act in which the city has shared. The joinder of the defendants for such purpose is not authorized at common law, nor is it authorized by the Practice Act of 1912. There is nothing in common to the two municipalities in this phase of the complaint. The case of *Murphy vs. Patten* 85 Atl. 56, is authority for the proposition that a motion to strike out a complaint on the ground that it discloses no cause of action is sufficiently broad to permit the court to
20 deal with the case on the ground of misjoinder of parties, if indeed the court has not the power on its own initiative to prevent the misuse of its process.

Standing alone we are not prepared to say that the negligent construction and maintenance of its bridges by the county in such fashion as to impede the flow of water and cause its damming on the plaintiff's land does not create a cause of action. The case has not been tried, however, and it is desirable that it should be transmitted for trial in such form
30 and with such parties as may be lawfully joined and those only.

The motion to strike out the 8th paragraph of the second count will be granted with leave to the plaintiff to proceed against the county alone upon an amended complaint; and all other parts of both counts will be stricken out.

ORDER STRIKING OUT COMPLAINT FILED
JANUARY 15, 1927.

Application having been made to the court on behalf of defendants, and on due notice to plaintiff, to determine the question of law raised in the complaint, filed by plaintiff in the above-entitled cause, on the ground that the same does not disclose a legal cause of action in plaintiff, and the court having heard the argument of counsel for defendants and of counsel for plaintiff thereon, and being of
10 the opinion that the complaint does not disclose a legal cause of action in plaintiff, and does disclose a misjoinder of the parties defendant:

It is on this 23rd day of December, 1926, ORDERED that all parts of both counts of the complaint filed by plaintiff in the above-entitled cause shall be stricken out, and that plaintiff shall have leave to proceed against defendant, the County of Mercer, alone, upon an amended complaint.

Entered in the minutes January, 1927, on
20 motion of Charles E. Bird and Frederic R. Brace, attorneys for defendants.

RULE FOR JUDGMENT.

It appearing that a rule dated December 23, 1926, was entered in the above-entitled action on January 15, 1927, on motion of Charles E. Bird and Frederic R. Brace, attorneys for the defendants, that all parts of both counts of the complaint filed by plaintiff in
30 the above-entitled cause should be stricken out, and that plaintiff shall have leave to proceed against

defendant the County of Mercer, alone, upon an amended complaint:

It is, on this third day of May, 1927, ordered that judgment final be entered in this action against plaintiff and in favor of defendant City of Trenton, striking out the complaint filed by plaintiff in the above-entitled action, in respect to defendant City of Trenton, and that plaintiff shall have leave to proceed against defendant, the County of Mercer, alone, upon an amended complaint.

FRANK T. LLOYD,
Justice of Supreme Court.

New Jersey Court of Errors and Appeals

MURRAY RUBBER COMPANY,

Appellant,

vs.

CITY OF TRENTON, *et al.*,

Respondents.

On Appeal From
Supreme Court.
Appellant's Brief.

Both defendants moved to strike out the complaint, on the ground that none of the duties alleged is imposed by law on the city and the county, and the Supreme Court struck out the complaint as against the city in toto, and also against the county except the allegations respecting defective bridges, and Murray Rubber Company appeals from that part of the judgment which strikes out most of the allegations of the complaint.

In substance, the duties alleged in the complaint are:

- (a) Control over the stream in question.
- (b) Removal of artificial obstructions from the stream.
- (c) Prevention of the diversion of surface water from the streets into the stream.

(d) Safeguarding the bed and banks of the stream.

Those four duties are charged to both municipalities while an additional duty is alleged against the county only, that of keeping bridges over the stream in repair.

The theory of appellant's case finds ample support in the authorities. It rests upon damages to the Murray Rubber Company by reason of the Assunpink
10 Creek overflowing its banks, due to surface water diverted into the stream in large quantities, to artificial obstructions in the stream, and to defective bridges obstructing the natural flow of the waters of the creek, a combination of circumstances constituting such an act of active wrongdoing for which our municipalities are held liable in damages.

It is obvious that surface water is absorbed to an extent by the soil in its natural condition. As well
20 is it obvious that street pavements, built of hard substances, prevent that natural absorption, and so, if the surface water thus withheld from the soil is drained into the stream by the municipalities by means of artificial drains (and the stream in its natural state did not flood appellant's lands), and the natural flow is not only thus increased, but is impeded by artificial obstructions in the streams, and defectively-built bridges, it follows that appellant had a good cause of action.

30 "A municipality has no right, by artificial drains, to divert surface water from the course it would otherwise take, and cast it, in a body large enough to do substantial injury, on land where, but for such artificial drains, it would not go." *Kehoe vs. Rutherford*, 74 L. 659.

If, therefore, appellant proves that numerous artificial drains, constructed by both municipalities, discharged into the stream a larger quantity of surface

water than nature planned to flow into the creek, and as a consequence, appellant was damaged thereby, it must have been the duty of both municipalities to so control the waters of the creek as to prevent that damage. Hence, the allegations that the municipalities have jurisdiction and control of the stream, are founded in law, for if they used the stream for surface water drainage, they assumed sufficient jurisdiction and control over it to enable appellant to sue
10 for a non-observance of that duty. This involves also the duty assumed by the municipalities to remove obstructions from the stream, for it is clear that, if artificial obstructions can be shown to have existed in the stream, and that the removal thereof by the municipalities would have permitted the surface water to be carried away without damage to appellant, it thereby became the duty of the city
and the county to remove the obstructions.

It might have been a lawful act of the municipalities to divert the surface water into the stream,
20 provided they arranged for a proper conduit or outlet for the increased flow, by removing obstructions and repairing bridges. This the complaint charges they failed to do.

In *Murphy vs. Atlantic Highlands*, 77 N. J. L. 452, it was held that, where a sewer became clogged, and the municipality had notice thereof, it was liable to the property owner for damages caused by the flooding of her cellar.

This line of cases imposes on the municipalities
30 the duty to prevent such floods. There can be no distinction between the clogging of a sewer and the clogging of a stream by acts of the city and county in emptying large quantities of surface water into the stream, and thence upon land of appellant.

The complaint in the instant case charges that both municipalities had due notice of the obstructions

in the stream and of the agencies by which the flow of the stream was unduly enlarged.

See also *Jersey City vs. Kiernan*, 50 L. 246.

The case of *Dohrmann vs. Hudson Freeholders*, 84 L. 689, is directly in point on the question of a municipality's liability in damages for diversion of surface water by artificial drains, and that case alone is strong enough to uphold the complaint.

10 "A city may not, without making compensation for the property appropriated, collect water from a large area and by artificial means cast it on the lands over or through which it would not otherwise flow, to the injury of the owner thereof." *Doremus vs. Paterson*, 73 Eq. 474.

This ruling is in line with all our cases, and is clearly applicable to the cause of action set out in appellant's complaint.

20 The *Doremus* case also holds that the municipality is responsible for the street wash that it casts on private land through artificial means, *i. e.*, by drains that take off water that, but for the paved streets, would be absorbed by the soil. Of course, the *Doremus* case was one for pollution, but the principle is the same with reference to floods.

30 Again, in *West Orange vs. Field*, 37 Eq. 600, it is held that public authorities have no right by construction of artificial drains, to divert water and cast it on private lands. It must be borne in mind that appellant in its complaint does not rely on the laying out of streets or change of street grades as a ground of action.

The theories advanced by appellant are also supported in:

Soule vs. Passaic, 47 Eq. 28.

Miller vs. Morristown, 47 Eq. 62, aff'd 48 Eq. 645.

Town of Union vs. Durkes, 38 L. 21.

Bloom vs. Orange, 91 L. 376.

In Vol. 2, Comp. Stat. Supp. of 1925, page 2354, is found an act providing for the protection of land from the flow of waters. This statute provides a method of opening drains or ditches after view by three freeholders, on complaint of a property owner, and damages for failure of the municipality to abide by the judgment of the statutory board.

Furthermore, municipalities are vested with power to widen, deepen or improve any stream. See page 2195 of Volume 2 of 1925 Cum. Sup. to Comp. Stat. 10

As to the duty of municipalities to "keep open" any streams within its limits, the act of 1910 (Comp. Stat. of 1910, p. 3722) provides that any county or city "is hereby authorized" to do so. But, while these statutes do not appear to be mandatory, the circumstances set out in the complaint, namely, the unlawful diversion of surface water caused by the city and the county, coupled with the clogged condition of the stream, thrusts upon the municipalities 20 the duty to keep the stream open. There are numerous authorities holding that "where the means are supplied, or the public is specially interested in the performance of the act, the words 'hereby authorized' or 'shall be lawful' or 'may' have been construed to create a mandatory duty." See 28 Cyc. 270, and cases there cited.

For an act of active wrongdoing a municipality is liable to an individual damaged thereby. *Callan vs. Passaic*, 141 Atl. 778. To bring this case within that 30 principle it is essential that the acts of the municipalities alleged in the complaint be regarded as active wrongdoing, and it is appellant's contention that they should be so regarded.

Lakey vs. Kalamazoo, 67 L. R. A. 931, cites several cases holding that where a city takes water from an area greater than the natural drainage area, it

is liable for damage by creek floods, and absolves the city in that case, solely because the city emptied into the stream only the water that naturally drained into it.

In *Jerolamonn vs. Belleville*, 90 L. 206, this court held that: "A municipality has no right, by artificial drains, to divert surface water from the course it would otherwise take, and cast it in a body large enough to do substantial injury, on land where but
10 for such artificial drains, it would not go."

By causing the drains to empty into the creek, the municipalities made the stream a part of their drainage system, and therefore, if they are liable for permitting a drain or sewer to overflow, it must follow that the same liability attaches to overflowing of streams caused by artificial means chargeable to the neglect of the municipalities.

The judgment of the Supreme Court, striking out
20 the causes of action except that relating to bridges, should be reversed.

Respectfully submitted,

JAMES J. McGOOGAN,
Attorney and of Counsel
For Appellant.

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