

Court of Errors and Appeals of N. J.

GRANT J. WHEELER,
Plt'ff. in Error,

vs.

THE ESSEX PUBLIC ROAD BOARD,
Def't's. in Error.

*Writ of Error,
Ret'ble March
Term, 1876.*

(WRIT OF ERROR.)

NEW JERSEY, TO WIT :

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* ~ * The State of New Jersey to our Chief Justice
{ L. S. } and other the Justices of our Supreme Court,
* ~ * Greeting :

Because in the record and proceedings, and also in the giving of judgment in a certain writ which was in our said Court, before you, between Grant J. Wheeler, plaintiff, and The Essex Public Road Board, defendants, in a plea of trespass on the case, manifest error hath intervened to the great damage of said Grant J. Wheeler, as by his complaint we are informed, we being willing that the error, if any there 20 be, shall in due manner be corrected and full and speedy justice done the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then that without delay you distinctly and openly send to the Court of Errors and Appeals, in the last resort in all causes, at Trenton, on the second Tuesday of March, in the year of our Lord one thousand eight hundred and seventy-six, under your seal, the record and proceedings aforesaid, with all things concerning the same, and this writ ; that the record and proceedings being inspected, we may further cause 30

to be done thereupon for correcting that error, what of right and according to the laws of New Jersey ought to be done.

Witness THEODORE RUNYON, Esquire, our Chancellor and Presiding Judge of said Court of Errors and Appeals, in the last resort in all causes, at Trenton, the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and seventy-six.

HENRY C. KELSEY, *Clerk.*

JOHN R. EMERY, *Attorney.*

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- 10 The Answer of the Justices of the Supreme Court of New Jersey within named, the record and proceedings whereof mention is within made, with all things touching or concerning the same, we do certify to the Court of Errors and Appeals, in a certain schedule to this writ annexed, as within commanded.

M. BEASLEY, *Chief Justice.* [L. s.]

Pleas before the Justices of the Supreme Court of the State of New Jersey, of the twenty-seventh day of November, A. D. eighteen hundred and seventy-five.

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Witness, MERCER BEASLEY, ESQUIRE,
Chief Justice.

BENJAMIN F. LEE, *Clerk.*

ESSEX COUNTY, ss.

- The Essex Public Road Board, the defendants in this suit, were summoned to answer unto Grant J. Wheeler, the plaintiff therein, of a plea of trespass in the case, and thereupon the plaintiff by John R. Emery, his attorney complains. For that whereas the plaintiff before and at the time of the committing of the grievances hereinafter mentioned, was lawfully possessed of a mill or factory, lands and premises, situated in the township of Montclair, in the said county, with the appurtenances, and by reason thereof ought of right to have, had and enjoyed, and up to the time of the committing of said grievances, did have and enjoy the use and benefit and advantage of the water of a certain stream or natural
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water course, called Tony's Brook, for supplying said mill with water power, to run and operate the same, and the use, benefit, privilege and advantage of having a mill-dam in said stream, proper and sufficient to collect and retain the water of said stream, for the purpose of supplying said mill with said water power, to-wit, at Newark, aforesaid; and the plaintiff says, that the defendants by an Act of the Legislature of the State of New Jersey, entitled "An Act constituting a Public Road Board, for laying out, constructing, appropriating, improving, and maintaining public carriage roads in the county of Essex," approved March thirty-first, eighteen hundred and sixty-nine, and the supplements thereto, were authorized and empowered to lay out, construct, appropriate, improve and maintain for the purpose of free carriage roads in the county of Essex, certain avenues in said county; one of said avenues being Bloomfield avenue, running through said township of Montclair, and which said avenue runs across or over said water course, near the mill of plaintiff; and were in and by said act and supplements, vested with all the rights and powers necessary and expedient to lay out, locate, construct, reconstruct and maintain said avenue, and were directed to construct the same, and in the construction thereof, to build all bridges on said avenues and all necessary culverts pertaining to the same, to-wit, at Newark, aforesaid; and the plaintiff says, that the defendants did lay out and construct said Bloomfield avenue in the township of Montclair, and across or over said water course near the plaintiff's said mill or factory, and across or over the dam aforesaid: and that in the construction thereof across the said stream, the defendants tore out, removed and destroyed the mill dam thereon (being one proper and sufficient for the purpose aforesaid, and enjoyed by the plaintiff as aforesaid), and built and constructed a bridge on said avenue over said stream, and also a dam, abutting or resting upon the said bridge; yet the defendants well knowing the rights of the plaintiff on the premises, and contriving and intending to wrong and injure the plaintiff therein and to deprive him of the use of the water of said stream, so negligently, carelessly and unskillfully constructed the said bridge and dam that by reason of the careless, negligent and unskillful and

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improper construction of said bridge and dam, the said dam was totally destroyed, washed out and carried away by the said stream, and by reason thereof the water of said stream wholly escaped and was carried away from the mill of the plaintiff, and the plaintiff was wholly deprived of the use of said stream and of his said mill, to-wit, at Newark aforesaid, on the fifteenth day of August, eighteen hundred and seventy-five, by means whereof the plaintiff for a long space of time to-wit, one month, was wholly deprived of the use of

10 his said mill and of the large gains and profits, to-wit, fifteen hundred dollars, which he might and would have made from the use thereof during that time; and by means whereof, also a large quantity of paper and other materials in process of manufacture in said mill of great value, to-wit, of the value of four hundred dollars, were rendered and became wholly worthless and lost to the plaintiff; and by means whereof, also, the machinery of said mill suffered damage and loss to a large amount, to-wit, two hundred dollars; and by means whereof, also, the plaintiff was obliged to lay out

20 and expend, and did lay out and expend, a large sum of money, to-wit, four hundred dollars in and about the erection of temporary dams in said stream to retain the water thereof for the use of said mill, and in and about the erection of a flume or raceway to conduct water from said stream to his said mill for the purpose of supplying the same until another dam for the use of said mill should be constructed on said stream; and by means whereof, also, the plaintiff has been deprived of the use of said stream in as beneficial a manner as he was and is entitled to the same, to-wit, at New-

30 ark aforesaid. And for that whereas also, the plaintiff before and at the time of the committing of the grievances hereinafter next mentioned, was seized in his demesne as of fee of a certain other mill or factory, land and premises, situated in the township of Montclair aforesaid, with appurtenances, and by reason thereof ought of right to have, had and enjoyed, and up to the time of the committing of the grievances hereinafter mentioned, did have and enjoy the uses, benefit and advantage of a certain stream or natural water course called Tony's Brook, for supplying said last men-

40 tioned mill with water power to run and operate the same;

and also of a certain mill dam to supply said last-mentioned mill with said water power, then and there being upon said stream built and located, upon lands adjoining those of the plaintiff above-mentioned, which said lands are owned by or in possession of the Morris and Essex Railroad Company or their lessees, and not of the plaintiff, to wit, at Newark aforesaid; yet the defendants, well-knowing the rights of the plaintiff in the premises, and contriving and intending to wrong and injure the plaintiff and to deprive him of the use of the water of said stream and of the said water power afterwards, to wit, on the first day of August, eighteen hundred and seventy-four, tore out, removed and destroyed said mill dam, by means whereof the said plaintiff has wholly lost and been deprived of the use of the water of said stream, to wit, at Newark aforesaid, to the damage of the plaintiff three thousand dollars, and therefore he brings his suit, &c. 10

And the said defendants by John W. Taylor, their attorney, come and defend the wrong and injury when, &c., and say that they are not guilty of the said supposed grievance above laid to their charge, or any or either of them, or any part thereof, in manner and form, as the said plaintiff hath above thereof complained against them; and of this they, the said defendants, put themselves upon the country, &c., and the plaintiff doth the like. 20

Therefore let a jury thereupon come before the Chief Justice, or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Newark, in and for the county of Essex, on the first Tuesday of December, eighteen hundred and seventy-five, by whom, &c., and the same day is given to the parties aforesaid, when, &c., and now at this day, to-wit, the fourth Tuesday of February, in the year eighteen hundred and seventy-six, before the said Supreme Court, at Trenton, come the parties aforesaid, by their attorneys aforesaid, and the Justice before whom, &c., sends here the record had before him in these words to wit: 30

Afterwards, that is to say, on the first Tuesday of December, eighteen hundred and seventy-five, at a Circuit Court held at Newark, in and for the county of Essex, before the 40

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Afterwards at a certain Court held at the Court House, in 10
 the city of Newark, on the first Tuesday in December, eight-
 teen hundred and seventy-five, before HON. DAVID A. DEPUE,
 Esq., one of the Justices of the Supreme Court, according
 to the form of the statute in such case made and provided,
 the aforesaid issues came on to be tried by a jury of the
 county of Essex, for that purpose duly empaneled, good and
 lawful men of said county; at which day came there as well
 the said plaintiff as the said defendants, by their respective
 attorneys, and the jurors of the jury aforesaid being called
 also come, and were then and there in due manner chosen 20
 and sworn to by the said issues, *pro ut* the pleadings in this
 cause.

And upon the trial of said issues, to prove and maintain
 the issue on his part, the plaintiff offered in evidence—

GRANT J. WHEELER, sworn :

Q You are the plaintiff?

A I am.

Q Where do you live?

A Montclair.

Q You owned the mill property on the stream known as 30
 Tony's Brook or First River?

A Yes.

Q Your mill is used for the manufacture of what?

A Straw boards.

By the Court :

Q Paper board?

A Yes, for boxes.

Further examined :

Q How long have you been in possession of the property; since 1865?

A I think so; about that.

Q Before that time who was in possession?

A We got our title—Amzi Dodd and J. Crane executors of Seymour J. Crane, conveyed to Mr. Beach and myself, and Mr. Beach sold to me; Mr. Crane was in possession before he died.

Q How long have you known the mill to have the use of that dam?

A Between fifteen and sixteen years.

Q By what means was the water supplied to the mill?

A Only by an open flume, and the last two years by an underground arched flume of brick, that leads from the pond to the reservoir near the mill.

20 *Q* Point out the location of that flume?

A It passes down from about here, going under the turnpike, that was arched with stone, and there was an open flume from there down to the mill.

(The Court marked the points A and B on the map.)

Q That would indicate the two lines of the old flume?

A Yes.

Q The upper end of this was connected with the mill-pond?

A Yes.

30 *Q* And the water was collected by the dam?

A Yes.

Q Describe the location.

A The old dam was located somewhere about here.

By the Court :

Q Very near the location of the present dam.

A Yes.

Q How long is it since that dam was built?

A That dam according to my recollection must have been built sixty years ago.

Q The same structure ?

A Yes; the old original dam; it was what was called an old rip-rap dam; there were steps from the bottom coming to the top.

Further examined :

Q To break the fall of the water over the top of the dam ?

A Yes.

Q What was the width of that dam ?

A I could not state exactly; I think across the top some 10
25 or 30 feet; that is the old original dam.

By the Court :

Q Its height ?

A I could not state the height.

Q As near as you can tell.

A I should think ten or twelve feet.

Further examined :

Q In front of the dam, was there an open space between the top of the dam and the turnpike bridge ?

A Yes. 20

Q Is that now standing—was the turnpike bridge all taken down ?

A Yes, I think the whole arch was taken down.

Q About how far off was it, the top of the dam from the arch ?

A About ten or twelve feet.

By the Court :

Q Then there was a space between the dam and the arch of ten or twelve feet horizontally ?

A Yes. 30

Further examined :

Q What was the character of the dam as to being in good repair at the time it was taken down ?

A Very good; I believe we never expended but trifling on it; it was an old dam and well settled, and occasionally the wood would rot and we would put new in.

Q It was planked on the top to sheath the water over, I suppose?

A Yes.

Q When was that dam taken down?

A At the time the first dam was built by the Road Board, or the Railroad Company, or whoever they were, it was taken down at that time, what time it was I cannot say, I think in 1872.

By the Court :

10 *Q* Was the whole turnpike widened at that point?

A Yes.

Q How much?

A I think they widened the whole turnpike from sixty feet to eighty feet.

Q Just there how much was it widened?

A I could not say.

Q About?

A I should say fifteen or twenty feet.

Q On which side?

20 *A* Principally on the north, I guess.

Q It was then the dam was taken down?

A Yes.

Further examined :

Q That was when the Road Board was constructing Bloomfield avenue?

A Yes.

Q Did you ever consent to the taking down of the old dam?

30 *A* No; they never asked my consent, never a word was said to me about it.

Q You say a new dam was put up, and a new bridge also?

A Yes.

Q Who had charge of that work—who was the engineer?

A Well, I think Mr. Owen, the Road Board engineer, had the principal charge of it.

Q You saw him there about the work while it was going on, did you?

A Yes.

Q Give us an idea of the structure put up by the Road Board after taking down the old dam; how was that dam made—made directly across the old stream?

A No, it was arched out into the pond.

Q Where did the ends rest?

A On the abutments of the bridge.

Q And ^{rested on} represented the sides of the arches of the bridge?

A I think so.

Q Look at the blue arch, would that represent it? 10

A As near as I can tell from the appearance of it.

[Plaintiff's map marked No. 1, and defendant's map, to the right hand marked No. 2, the lower part No. 3, and to the left hand No. 4.]

Q What was the width of the timber of that arch of the bridge as a base extending to these yellow lines?

A I don't think I can tell you.

Mr. Owen stated the scale of the defendants' map to be one inch to the foot.

Q Was the top of the dam near the top or bottom of the arch of the bridge? how far was the top of the dam from the top of the arch of the bridge? 20

A Very likely three feet six inches, or four feet: I think three feet six inches exactly.

Q While the Road Board was putting up the dam and arch, did you have conversation with Mr. Owen as to the sufficiency of the opening to accommodate the stream?

A I did after it was done; I don't recollect about that whether I did while it was being done; I don't know I could tell while it was done. 30

Q What passed?

A I always said it would never carry the water in any kind of a freset.

Q How long did your dam stand when the second dam was carried away?

A I think about two years; I think the 11th of August, 1875.

Q Was the whole dam carried away?

A Yes, it was all gone.

Q So that the whole of the water in the dam escaped? 40

A Yes.

Q Part of the bridge, too?

A The arch cracked about five or six feet from the front of the arch, and in rebuilding again they took it all down again to that crack.

Q Was your mill in operation at the time the dam was carried away?

A Yes.

Q It had been working?

10 A Yes.

Q Been working all that season?

A Yes.

Q And after the time it was carried away, I suppose your work was stopped at the mills, was it not?

A Yes.

Q How long was the mill stopped?

A About three weeks.

Q Have you the statement of the amount of work the mill was doing at the time, and the amount of profits from
20 the work of the mill?

A There is a statement as near as I can give it.

Q What do you make the amount of profits which the mill would have made in that time? State it generally.

A I have every day's work done from the 1st of April, when I took the mill down, to the time when the mill went away.

(Defendants' counsel objected.)

The Court: I suppose it is competent to include profits which might have been made, and it is only a question as to
30 how they are to be arrived at; let the paper go in, and if you are not satisfied it is that kind of evidence you think the Court would receive, you can recall the witness and examine him.

Further examined:

Q State the amount of loss of profits.

A It amounts to about \$900—\$903 it is.

Q At the time the dam was carried away the mill was working?

A Yes.

Q And you had in the machinery the full amount of stock?

A Yes, we had a pretty large amount; and by laying in a heap so long in warm weather, some of it was not good for anything.

Q A large amount was rendered useless?

A Yes, nearly so.

Q What was the value of that stock?

A We calculated at a low figure it would be \$250 damage of stock and felts, and running stock; it is in a very bad condition to run stock after being in a heap some time, it slips on the cylinder.

By the Court :

Q Could you have sold it to another manufacturer?

A No.

Q Could you have sold it to another manufacturer?

A I don't know another straw-board manufacturer in this section.

Further examined :

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Q What efforts did you make?

A I went to see Mr. Owen immediately, and made every effort I could in some manner to get water for the mill; I went to work and put up a temporary dam on Mr. Owen's instructions, and the dam almost got full of water, and went away; and we put up another one, and that went away; finally, we went up to the top of the dam and put up a dam and built a flume and finally went to work again.

Q Point out where that wooden flume was built.

A On this side of the dam; on the east edge.

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By the Court :

Q Is there a pipe running to that point yet?

A There is, up to the railroad; running up to the railroad there was formerly a bridge, and the railroad put an iron pipe and filled it full.

Q There is still an opening under the avenue?

A Yes.

Further examined :

Q How much did you expend in the erection of that dam and flume ?

A The dam and flumes, etc., amount to \$335 ; damage of material \$250 ; loss of profits, \$903, making altogether \$1,488 that it comes to.

Q What time was the dam No. 3 built by the Road Board completed ?

A I don't know ; not a great while ago ; we used water
10 a long time from this race-way before it was completed ; it was after the suit was commenced.

Cross-examined :

Q You say as near as you can recollect, the old dam was the one that stood there some sixty years ; was the turnpike then there ?

A Yes.

Q Was it not within the lines of the turnpike ?

A I could not say whether it was not a little north of it ; I have rather made up my mind it was a little north of it.

20 Q Was not dam No. 2 within the lines of the turnpike as widened ?

A I guess it was ; it may be.

Q If dam No. 1 was not within the lines of the turnpike, and was not taken in in widening, how came they to remove the dam—erected in 1872, I refer to now.

A It was removed to widen the avenue, I suppose.

Q You were aware of it at the time ?

A Yes.

Q Did you make objection ?

30 A I made objection to the way they were working there when they started ; I don't know that I did object to moving the dam ; they built the dam ; I suppose the Road Board ; and I understood the Delaware, Lackawanna & Western Railroad Company were interested with them, and were to pay part of the money or something of that sort ?

Q Whose engineer was at work to construct the bridge in 1872 ?

A I think Mr. Owen principally.

Q Did you see a man named Henderson ?

A He was a contractor for Mr. Fairbanks.

Q And Mr. Fairbanks was about there?

A Yes, he was overseer of the contractor.

Q Was Mr. Mason there?

A Yes.

Q Was he in the employ of the Delaware, Lackawanna & Western Railroad Company?

A I don't know that he was.

Q Which was put up first, dam No. 1, or the Newark & Pompton Turnpike? 10

A I cannot tell; I have made inquiries of some of the old men there who seemed to know; I don't know.

Q You don't own any land on which the dam stood?

A No, I don't claim the land, only the water rights.

Q In regard to these temporary dams, you say you erected one and that went away?

A I erected two.

Q What carried it away?

A The water.

Q What was the difficulty? 20

Q We thought it would hold the water, but the fifteen-inch timber went; we thought it was rotted at the bottom; we finally got a very narrow space and put timbers and double planked that, and that is there yet, I believe; if the temporary dams had been properly constructed, I suppose they would have stood.

Q What did the third dam cost you?

A I cannot tell.

Q How long were you delayed by the two first dams that were constructed? 30

A About three weeks.

Q How long did it take to construct the third dam?

A A very short time; three or four days completed the dam and the flume.

Q If you had put your dam there in the first place, you would not have been delayed more than three or four days?

A No; and if dam No. 2 had stood, we would not have been delayed at all.

By the Court:

Q How long after the dam broke up, was the first one up? 40

A I should think more than a week, probably.

Q How long did it stand ?

A It was gone next morning ; it was the pressure of the water ; there was not strength enough to hold the water.

Q Was there any accessions by rains ?

A No ; I think not.

Further cross-examined :

Q You speak of your damaged stock ; could it not have been disposed of to others in the same line of business ?

10 *A* I don't know anybody in the same line of business.

Q Did you try to dispose of it ?

A I did not.

Q Who do you sell to ?

A I am selling in Newark, to William King, and others in the hat box business, and to some parties in New York.

Q Did you not lose a considerable portion of your profits in the failure of somebody ?

A There was a failure on the first of September where there was a pretty good loss.

20 *Q* What time of the year is your business most worth ?

A We generally run pretty steady.

Q How do the profits vary, Winter, Summer and Fall ?

A The prices are about the same, and the working about the same.

Q Were the profits about the same during the three weeks of your suspension, as during the three weeks before that ?

A Just about the same ; I have given about a fair statement ; I have calculated interest and insurance and coal ;
30 we sometimes vary, five and a half or six tons a day, at a cost of five dollars and six dollars a ton.

Q Was it not usual with you to stop your works, to clean your machinery ?

A We generally stop every six months to clean out the bearings ; it may be about July we stop to clean them ; we generally have to stop about a week ; it may be we cleaned them about the time of this suspension ; I don't know, we stopped at Christmas or New Years.

Q Did you not avail yourself of cleaning during these three weeks?

A No.

By the Court :

Q Did you not tell Mr. Owen after the second bridge was built, it was the best bridge in the county?

A I don't remember anything of the kind.

Q Did you not say that was a very well-constructed bridge?

A I don't remember; I remember saying I did not think 10 it was.

Re-examined :

Q In making your temporary dams, was it to get water?

A Yes.

Q Did Mr. Owen have anything to do with the men in putting up the temporary dams?

A I don't know whether he did with the first; he did with the second.

By the Court :

Q You gave the name of the man who was overseer; 20 what was his name?

A Fairbanks.

Further re-examined :

Q Do you know whether the Road Board have drawn on the Freeholders?

A I don't know; there has been appropriations made by Freeholders for bridges, but I don't know whether for this part of it.

Plaintiff's counsel also called—

THOMAS F. HOXEY, sworn :

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Q Where do you reside?

A Manchester township, Passaic county.

Q What is your business?

A Contractor, general contractor in mason work, build-

ing contractor, and I am acquainted with the construction of bridges.

Q Did you construct the bridge at the dam on Tony's Brook on Bloomfield avenue, near Mr. Wheeler's mill?

A I constructed a portion of the bridge and new dam standing there now; the present bridge and dam.

Q In the construction of that dam, did you take out the old dam?

A Yes; a portion of the old dam that remained.

10 *By the Court :*

Q A portion of dam No. 2 that remained?

A Yes.

Further examined :

Q How much of dam No. 2 had been carried away?

A There was a small portion of the westerly side of the dam standing when I put my men to work; a point extending from about here to the abutment that is on the side of Wheeler's mill; it was a stone dam of masonry and stone.

Q Could you ascertain the foundation on which it was built?

A I excavated the point occupied by the old dam and started where it started from.

Q What was the character of the foundation?

A It was a mud foundation; there was a stratum of hardish gravel mixed with stone, of nine or ten inches, or perhaps a foot in depth, and below that it was mud; at one point it was perhaps two and a half ^{feet} and on the north-easterly side it was perhaps four ^{feet} ^{deep} below the stratum of gravel; it varied from two and a half to four feet, I should think.

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Q In constructing, did you go through the mud?

A We went down to hard pan, and in one or two points to rock; two and a half to four feet below the bottom of that material we excavated.

By the Court :

Q Did you find it necessary to go that deep before it was satisfactory to you?

A Yes.

Witness : It looked perfectly safe, but on investigation we found it was not.

Further examined :

Q The nature of the foundation could have been found out by investigation ?

A Yes, if they had investigated carefully.

Q Is it usual in structures of that kind to test for foundations, and what tests do you resort to ?

A As a rule the engineer generally does that ; driving 10 pointed, spiked bars down to determine how deep you could drive them into the material ; we continued our digging through this stratum of hard gravel, and after we got about a foot that way, it was apparently good to build on, and when we got through about a foot, we found it rested on mud.

Q What is your opinion as to whether the foundation of that dam was selected with sufficient care ; was the foundation of that bridge a proper one ?

A I think in digging down at the time they built it, they might have considered it such ; I did not consider it 20 so myself.

(Defendants' counsel objected.)

By the Court : Let him give his opinion whether that dam was properly constructed ; that will include everything ; the apparent fastenings of the soil, and then ask the question as to the means usually adopted in order to obtain a good foundation, and whether those means were adopted in this case, and then it will be a question for the jury.

Q What are some of the tests adopted in order to secure the proper foundation for structures of this kind ? 30

A Digging test pits and driving down iron bars or rods to determine the character of the bottom.

Q Knowing the character of the soil, what kind of foundation was proper to secure a structure of this kind ?

A Hard natural earth, or gravel or rock, I should think.

Q Would a stratum of nine or twelve inches of gravel which rested on a stratum of two and one-half or four feet of mud, be a sufficient foundation for a dam to be put to the use this was intended to be put to ?

A I should think not; it was ordinary loamy black mud, alluvium, leaves and trees.

Q Decayed vegetable matter?

A Yes.

Q How do you account for ten or twelve inches of gravel being on the top of that?

A I don't know unless it was washed from banks or something.

By the Court :

10 *Q* Describe the gravel; was it fine or coarse?

A The gravel had every bit of vegetable matter washed out and pieces of red sandstone, shale.

By a Juror :

Q Not clay?

A No.

Q Would a sufficient thickness of this gravel have been a sufficient foundation?

A Yes.

Q It was only a deficiency of thickness?

20 *A* I don't think solid matter resting on mud would be a sufficient foundation, but resting on rock or hard-pan it would.

Further examined :

Q Can you say from the remains whether the opening was sufficient to carry the water?

A No; I don't know a great deal about it; I never saw the stream; I don't know anything about it.

Q Did you test the foundation for the foundation of the third bridge?

30 *A* Yes.

Q You found it necessary to do that?

A Yes; my men dug through it; it was very hard when we struck it; we were almost at one time about to abandon it and consider it good.

Q But you continued to test?

A Yes, and found it was not.

Cross-examined :

Q Where the foundation of dam No. 2 so opened by the flood that you could see the mud, was not the foundation opened to view, scoured out?

A No; they were refilled by wash from above, what was carried out by the flood; we took in some eighteen or twenty feet here, and running down to hard-pan first and found the same underlying stratum under the whole surface; I should think that must have been below the bed seven feet in the centre here; the gravel was quite near the surface when we did find it; there was not a great deal of mud about it. 10

By the Court :

Q The upper deposit of mud had been washed off?

A Yes; we dug fifteen or eighteen inches to discover the gravel, I don't recollect.

Further cross-examined :

Q What kind of mud was it?

A The top we took off was vegetable matter, and underneath it was depressed; various deposits; very compact; it cut like cheese. 20

Re-examined :

Q Could you tell whether that was the foreign cause of the foundation giving way; would you judge that that was the effect of its falling?

A That question is pretty hard to answer; I have a theory on the subject; I think the foundation did go out under this dam, but not primarily; I think the water ran—as far as I can see, there is a space about like that, and that is the side of the arch where all the filling had gone out on the public road—something had carried it out, and the only way this could have been removed was under the side or abutment of the bridge; that was entirely empty; it tore this up and rooted up the timber; the crack was right over the sheathing of the arch; we took down all the arch, measuring on the face of the opening about twenty feet. 30

Q Did you get down far enough to be able to discern the foundation on which the arch rested ?

A The foundation where it stopped was apparently good all the way down ; the foundation from that point of the crack down was good ; we took it out about twenty feet.

Q From your observation the foundation of the arch of the bridge was sufficient ?

A I don't know ; I think the water determined the distance it extended ; the dam proper was built of good stone.

10 Q Did you notice the kind of fastenings ?

A It butted against here, and for a distance, a reasonable distance, it was tied in the body of the abutment—built continuously.

Q Were there any timbers back of this projection of the dam ?

A No ; some sheathing here ; the sheathing maintained this in position ; the sheathing was perfect, I should think, for a foot and a half below the foundation proper into which the dam was built ; the sheathing was spruce or pine
20 timber, two and one-half inch, and planked ; I took it down all the way to the foundation.

Q Did you know how the end was sustained ?

A It rested on gravel.

Q Could you tell from appearance, whether the part that stood was ?

A Yes ; but the sheathing maintained it.

Q I understand you to say what in a great measure kept the dam, was the sheathing and the support against the sides of the bridge ?

30 A The masonry abutted against there.

Q May not the first difficulty have been the settling of the bridge ?

A Yes ; unquestionably, or it could not have gone from the side ; the primary cause was water carried in here, dropping on *this* side of the abutment against *this*, which rested *there*, and the water continuing to fall, got in here.

By the Court :

Q The invert is how deep ?

A Six inches.

Q How does the invert correspond with the foot of the dam?

A It had a fall to the foot of the stream of eight or ten inches.

Q The bottom of the dam was about a foot and a half below the invert?

A I think the bottom of the dam was three feet below the bottom of the invert.

Q If the invert had remained, it all would have remained? 10

A Yes.

Q You think the difficulty was not the fault of the dam but the bridge?

A Yes.

Further re-examined :

Q If the foundation had been down to hard-pan, it would not have mattered whether the invert goes or not?

A Yes.

By the Court :

Q The bottom of the tumble for the water did not have a chance to wash away the soil to the foot of the dam? 20

A No, it could not have affected the dam at all until the invert went out.

Witness : Something had carried away that mass of dirt, and it must have been away under the abutment of the arch.

Re-cross-examined :

Q Was there appearances of exceeding high water?

A Yes; I should think over the railroad.

By the Court :

Q Did you see marks of water? 30

A No.

Further re-cross-examined :

Q Do you know there was a great fall of water?

A I was in Newark and Bloomfield that day and it was extraordinary; the height of it was about three or four

o'clock in the afternoon, between Bloomfield and Newark, and I know the rain-fall was great; it filled Bloomfield avenue from curb to curb at that point.

Q Do you know whether the heavy rain-fall was confined to that locality where you were?

A No.

Q Did you look at the streams on towards Newark?

A No.

By the Court :

10 *Q* How long did it rain?

A About forty minutes, I should think, at intervals.

Q Are you acquainted with the streams in the neighborhood?

A No.

Plaintiff's counsel also called—

GERALD D. HARRISON, sworn :

Q You are a resident of Montclair?

A Yes.

Q How long have you lived there?

20 *A* All my life-time.

Q What is your age?

A Seventy-three.

Q Whereabouts do you live?

A I live right by this stream; it passes right by my door.

Q How long do you recollect the old dam being there?

A That dam was formed, you know, by the turnpike and the cotton mill; that stood where the mill does and dates back to my earliest recollection; I should think it has been
30 there sixty or seventy years; I have a recollection of a talk of building a dam.

Q Are you familiar with the character of that stream?

A Yes.

Q As to being subject to sudden and rapid rises?

A It is very subject to it, and more so now than it formerly was.

Q And as to the height of these rises?

A I cannot answer ; it is low ground here that received a lot of freshets ; it is dished out and makes a rush of water, increasing and increasing, and greater than it formerly was, and instead of the high lands retaining a large share of it hurries off,

Q You saw the dam put up by the Road Board ?

A Yes.

Q Did you see that in company with Mr. Owen ?

A I simply happened there ; Mr. Wheeler was in my company, and I passed my opinion on this structure, that it 10
was insufficient to carry the water ; I had no doubt about it.

Q What is your opinion about it ?

A I had no doubt just that same thing happening ; that it would be liable to overflow if it did not give way ; it must run over the turnpike if the dam did not give way.

Cross-examined :

Q How far did you live from the bridge ?

A About two miles.

Q Do you remember the time this bridge went away ?

A When this freshet was, certainly ; I was there at home. 20

Q Was it a large freshet ?

A Certainly ; it was a very large freshet, but in answering to satisfy you, during my life-time I have seen a number of freshets that this opening would be insufficient for and would have gone over the road.

This was a very sudden rise of the water and a very extensive one ; I have no doubt during my life-time I have seen very much of it, but lately not so much of it ; I should doubt whether in twenty years I had seen as great a rise of water as I saw then. 30

Re-examined :

Q Were you down near the stream at the time of the freshet ?

A No.

Witness : The water is held up ; all that can get through would go down with a rush ; it is hurried down ; if there was something to guide it through, a great deal more water would be discharged through it.

Re-cross-examined :

Q Was the dam built too near the bridge ?

A The circle—if there had been more room I should think it would have vented more water.

Q The dam and bridge was too near together, and the difficulty was, the space between the bridge and the dam was not sufficient for this unusual supply of water ?

A Certainly.

Q If the bridge had been away there would have been
10 more room for the water to have escaped.

A If it had come down with something to guide it, it would have forced it, but it was held up here, and it has simply to drop, and it is raised up and nothing to force it; if there was something under there, opening of two feet, there would be something to attract it; I understood Mr. Wheeler there was an opening but they could not open it.

Q What was the trouble about that time ?

A Not a sufficient outlet; that water lies nearly as high as the top of the road.

20 Q If the bridge had been built a little higher up, the difficulty would have been obviated ?

A I suppose it would make more room.

By the Court :

Q Have you ever known water to run over the turnpike ?

A This stream crosses the turnpike at this point, and not again until it reaches Bloomfield.

Q Have you ever known it at this point to cross the turnpike ?

A No.

30 Q How near did it ever come to the level of the turnpike ?

A I could not tell.

Q A foot or two ?

A I could not answer the question; my impression is, there has been a pretty good outlet there; I never examined it.

Q Has the avenue been raised above or depressed below the grade of the old turnpike ?

A I cannot answer; I should think raised a little.

Further re-cross-examined :

- Q The old dam stood all the strain ?
 A Yes.
 Q And has seen a good many great freshets ?
 A Yes.
-

Plaintiff's counsel also called—

WILLIAM CADMUS, sworn :

- Q Where do you live ?
 A Bloomfield.
 Q Since when ? 10
 A I was brought up there.
 Q What is your age ?
 A Fifty-six.
 Q Your business ?
 A Mason and builder, generally, until within the last five years.
 Q You have had considerable experience in the construction of bridges in this county ?
 A Yes.
 Q Do you know the premises about which testimony has 20 been given ?
 A Yes.
 Q Were you ever called to look at the works of the construction of the second dam, after the first dam was taken down, and if so, by whom ?
 A I was called there twice, I think, if not three times, by Mr. Owen.
 Q Who was he ?
 A Engineer of the Road Board.
 Q Did you go with him up to the bridge ? 30
 A I met him; he lived above it and I below it.
 Q He sent for you there ?
 A Yes.
 Q What did he want to see you about; with reference to the bridge ?
 A Yes.
 Q What took place the first time ?

A The first time we were just putting in at nearly the junction, where the dam connects with the bridge; they did not put it in all at once; they had to put it in in sections; they had one or two stones in, and he, Mr. Owen, objected to them; they were not in the right position, and he ordered the men to take them up; I think Mr. Fairbanks had charge of it and moved them; he wanted to know if they could be moved without taking them out; I told him yes; I did move them where Mr. Fairbanks wanted them.

10 *Q* What is the character of the foundation where that stone was?

A Muddy; on account of water running.

Q Did you say anything to him about getting a foundation?

A I asked if he was not going deeper; he said no, it is deep enough, as he was going to fill inside the arch with concrete and put the invert arch on that.

By the Court:

Q That is the invert under the bridge?

20 *A* Yes; and continued to inside the dam where the water fell on.

Further examined:

Q Do you know anything about the nature of the material on which the invert arch was put?

A No.

Q Did you see the remains after the bridge was carried away?

A Yes.

Q Did you make any examination?

30 *A* The most was to see where the water went to, where it got away.

Q What did you make up your mind as to that?

A It was somewhere *there* at *that* point.

By the Court:

Q In the abutment of the bridge?

A Under the abutment, because there was a hollow, and nobody had touched it.

Q That is the west abutment?

A Yes.

Further examined :

Q What was the appearance of the structure there, anything to indicate how the fault occurred?

A It had gone from the bottom, because the work as a general thing was good and stuck together. The upper portion of the invert above and under the bridge had gone—six or eight feet under the bridge.

Q Can you tell? 10

A The invert had been carried out; it came from the pressure of water from under the wall; the water must have went under that foundation.

By the Court :

Q Under the abutment?

A Yes.

Witness : It had to come from the under side at first, because it could not rise from the top.

Further examined :

Q What effect would it have on the solid foundation? 20

A I don't think it would have went out; it would have broke the turnpike away.

By a Juror :

Q Is the invert arch laid in cement?

A No.

Q Is it laid dry?

A Mr. Owen told me the contract called for it to be laid in concrete; the lower portion is laid in concrete; the other, dry stone and grouting—that is, the cement is run in among the dry stone. 30

Further examined :

Q What is the effect of that?

A It would hold the stream.

Q From whatever source it would have come?

A Yes.

By the Court :

Q The juror asks what would have been the effect if there had been filling?

A The water would have gone outside.

Q And the dam would not have washed away?

A No.

Q Nor the bridge?

A No.

Further examined :

10 Q Would that have been the proper course?

A Either concrete or large stone thoroughly grouted would have made it water-tight.

Q Is not this grouting liable to the water getting down and undermining it?

A Yes.

20 *Witness :* At the lower end of the arch there was some concrete—down the stream and at the upper end, dry stone, and grouting run in. On this side, stone eighteen inches deep have got to be filled, and not only solid, but at the same time made water-tight, and concrete is mixed with coarse gravel and cement and made solid—mixed before it is put in.

Q That is the only difference between grouting and cement?

A Concrete is where the materials are mixed before it is put in.

Q And grouting is where the materials are put in, and pouring the cement in?

A Yes.

30 Q Which is considered best?

A Concrete is considered best to work on immediately.

Q Which is best?

A I should prefer concrete in that case.

Q Is there a period of time where grouting is equal to concrete?

A It takes more time.

By a Juror :

Q Can you get cement to run in through all the stone in grouting?

A It takes more time; they ought not to go over 16 inches without grouting.

By the Court :

Q After it sets, the work done with grouting is as good as the other?

A Yes.

Further examined :

Q Provided it is put in in the proper way?

A Yes.

Q You have to take more care over it?

10

A Oh, no.

Q You have lived in the neighborhood of that stream some time?

A Yes.

Q You saw the second dam put up?

A Yes.

Q Was that opening sufficient to discharge the water of the stream, taking it to be subject to such rises as you knew?

A No, I should not think it was.

By 12th Juror :

20

Q Have you been employed as superintendent of public works in this county?

A Yes, I am on two standing committees now.

By the Court :

Q In what way would the inability of this arch to carry the water of the stream affect the standing of this dam?

A If that water had not got under the abutment it would have went over the turnpike; there is a sewer crosses the turnpike to take the wash of the turnpike between the bridge and the mill; there is the lowest point, the water runs from the depot, it would have run from the depot to the mill. 30

Q What in your judgment would be the effect of the smallness of the vent on the dam, as to being liable to wash it out?

A They were working in water while they were at it.

There was plenty of room after the dam got ^{out} through; after ~~the water got over~~ the dam, ^{got out} there was room for two such streams.

Further examined:

- Q There was water when they were working the arch ?
 A Yes, water filtering.
 Q And would it filter under the invert arch ?
 A Yes.
 Q And make it insecure ?
 10 A Yes.
 Q Suppose that should continue any length of time, what would be the effect, supposing there was any freshet ?
 A That is what I laid it to continually, and the freshet only increased it.
 Q In the course of time you think it would have gone any how ?
 A Yes.

Cross-examined :

- Q You speak of pressure of water in the invert arch
 20 having caused the trouble—how was that pressure exerted ?
 A It is liable to go both ways.
 Q Was the pressure greater than the column of water in the stream or channel ?
 A Yes.
 Q How did the water get in behind ?
 A There was nothing but dry wall on the upper side ?

By the Court :

- Q Was it the surface water that fell on the bridge, or water from the dam ?
 30 A Water from the dam. I don't believe the bridge would have went if there had not been escape of water and working behind there, but the turnpike would have gone instead ; it was from the water getting behind the wall and undermining it ; there was a spot right *here* and *there* of dry wall, and the water went through the dry wall, and through the new road right all the way to the bottom of that foundation.

Q It was water that reached that from the road?

A It was water from the dam.

Q When the water worked in there during the time of the freshet?

A Ever since it was built there, I have seen water pumped from the invert arch.

Q Are you sure that the water which exerted this pressure did not reach the point of the abutment there at the time of this freshet, and when part of the surface could not escape between the top of the arch of the bridge and the dam, but flowed over on the bridge on the side, and worked on that way? 10

A No, I don't believe it went over the top?

Q You could not tell but what the space under the bridge was adequate to carry off the water at all times?

A I should not think it was from the old bridge.

Q Was not the old one of sufficient capacity?

A It always answered the purpose; it was sufficient.

Q Was it ever subject to as large a flood or freshet?

A I think one; in the neighborhood of 30 years ago 20 there was one equal to this; last summer I think all the lands from there to the river were affected.

Q Did it run over the turnpike then?

A I was not there.

Adjourned.

FRIDAY, 21st Jan.

Plaintiff's counsel also called—

P. F. P. HURLBURT, sworn:

Q Where do you live?

A Montclair. 30

Q What is your occupation?

A Surveyor for many years.

Q You were at one time with Mr. Owen, Engineer of the Road Board?

A I was.

Q Did you make the map behind you?

A I did.

Q How did you take the lines of Bloomfield avenue?

A From survey on the ground, not from monuments; I am familiar with the locations.

Q The horse-shoe diamond there, is that the diamond as it now stands?

A Yes.

Q What is the length of the projected lower part of the horse-shoe?

A It is not quite at right angles, the westerly part extends out seven feet and a half, and the other ten feet.

Q Have you seen the dam.

A I have.

(Plaintiff's counsel offered record of condemnation of the Newark and Pompton Turnpike, to show the Road Board took the title of the road under the act filed Feb'y, 1872.)

(Also offered report of the Public Road Board for the year 1873, and referred to the item January 27th, 1874, paid Henderson & Dougherty for bridge, \$4,400.)

Plaintiff rests.

20 Defendants' counsel moved for non-suit.

The motion was granted by the Justice upon the grounds:

(1.) That the defendants being a corporation created for the performance of a public duty, are not liable to an action for an injury of this character.

(2.) That an action for negligence in construction of their works can be sustained only on the ground of personal negligence of members of the Board, and must be brought against the negligent members individually.

And exception to this ruling ordering non-suit was taken, 30 and a bill of exceptions rendered, and it is sealed accordingly.

DAVID A. DEPUE, J. [L. S.]

ASSIGNMENT OF ERRORS.

Afterwards, that is to say, on the _____ day of _____ in the year of our Lord one thousand eight hundred and seventy-six, before our Court of Errors and Appeals, in the last resort in all causes, as heretofore, at Trenton, came the said Grant J. Wheeler, by John R. Emery his attorney, and says, that in the record and proceedings aforesaid, and in signing the judgment aforesaid, there is manifest error in this :

(1.) That by the record aforesaid it appears that the judgment aforesaid was given against the said Grant J. **10** Wheeler, whereas by the law of the land the said judgment should have been given for the said Grant J. Wheeler.

(2.) That the justice at the trial of said cause in contravention of the law, directed that the plaintiff should be nonsuited, whereas he should have refused so to do.

(3.) That the judgment of the said Court is in divers other respects, erroneous and contrary to law.

JOHN R. EMERY, *Att'y of Pl'tf.*

NEW JERSEY
Court of Errors and Appeals.

THE ESSEX PUBLIC ROAD BOARD, } *In Case.*
ads. }
GRANT J. WHEELER. } *On Error to the*
} *Supreme Court*

BRIEF FOR DEFENDANTS IN ERROR.

I.

THE PLEADINGS.

The declaration (to which the plea of not guilty is filed) contains two counts.

1. *The first count* alleges that the plaintiff was lawfully possessed of a mill or factory, &c., situate in Montclair, in the county of Essex, and, by reason thereof, was entitled to the use and advantage of a certain natural stream or water-course, called Tony's Brook, for supplying said mill with water power, to run and operate the same, and to the privilege and advantage of having in said stream a mill-dam, proper and sufficient to collect and retain the water of said stream, for the purpose of supplying said mill with said water power; that the defendants were authorized, &c., to lay out certain avenues in the county of Essex, including Bloomfield avenue, "running through said township of Montclair, and which said avenue runs across or over said water-course near the mill of said plaintiff;" * * * "that the defendants did lay out and construct said Bloomfield avenue

in the township of Montclair, and across or over said water-course, near the plaintiff's said mill or factory, and across or over the dam aforesaid; and that in the construction thereof across the said stream, the defendants removed, &c., the mill-dam thereon, &c., and built and constructed a bridge on said avenue, over said stream, and also a dam abutting or resting upon the said bridge; yet the defendants, well knowing, &c., so negligently, carelessly and unskillfully constructed the said bridge and dam, that, by reason of the careless, negligent, unskillful and improper construction of said bridge and dam, the said dam was totally destroyed," &c.

2. *The second count is as follows, viz.:*

And for that whereas also, the plaintiff before and at the time of the committing of the grievances hereinafter next mentioned, was seized in his demesne as of fee of a certain other mill or factory, land and premises, situated in the township of Montclair aforesaid, with appurtenances, and by reason thereof ought of right to have, had and enjoyed, and up to the time of the committing of the grievance hereinafter mentioned, did have and enjoy the uses, benefit and advantage of a certain stream or natural water-course called Tony's Brook, for supplying said last mentioned mill with water power to run and operate the same; and also of a certain mill-dam to supply said last-mentioned mill with said water power, then and there being upon said stream built and located, upon lands adjoining those of the plaintiff above-mentioned, which said lands are owned by or in possession of the Morris & Essex Railroad Company or their lessees, and not of the plaintiff, to wit, at Newark aforesaid; *yet the defendants*, well knowing the rights of the plaintiff in the premises, and contriving and intending to wrong and injure the plaintiff, and to deprive him of the use of the water of said stream and of the said water power, afterwards, to wit, on the first day of August, eighteen hundred and seventy-four, *tore out, removed and destroyed said mill dam, by means whereof the said plaintiff has wholly lost and been deprived of the use of the water of said stream*, to wit, at Newark aforesaid, to the damage of the plaintiff three thousand dollars, and therefore he brings suit, &c.

II.

THE EVIDENCE.

1. Under the *first* count, the gravamen of which is *negligence*.

The evidence under this count relates—

(1.) To the *laying of the foundation* of the bridge.

(See testimony of Hoxsey, *p. 18, 23*;

See testimony of Cadmus, *p. 28.*)

(2.) To the *laying of the invert arch* of the bridge.

(See testimony of Cadmus, *p. 28.*)

(3.) To the *adjacency or contiguity of the dam to the bridge*.

(See testimony of Harrison, *p. 24, 27*; Cadmus, *p. 31, 33.*)

2. Under the *second* count, the gravamen of which is the *removal of the [old] dam*.

The evidence under this count is found only in the testimony of Wheeler (the plaintiff,) which is as follows, reduced to the form of a narrative:

(1. *Location of Dam.*)

The old dam was located very near the location of the present dam. (*p. 8, l. 33, 35.*)

In front of the dam there was an open space between the top of the dam and the turnpike bridge. There was a space between the top of the dam and the arch of the turnpike bridge of ten or twelve feet, horizontally. (*p. 9, l. 11, 30.*)

The turnpike was widened at that point, I think from sixty feet to eighty feet. It was widened fifteen or twenty feet; principally on the north side. It was when the Board was constructing Bloomfield avenue [by widening the turnpike], that the dam was taken down. (p. 10.)

The turnpike was there when the old dam was built, and had stood there some sixty years.

I could not say whether it was not a little north of the lines of the turnpike. I have rather made up my mind it was a little north of it.

Dam No. 2 [the one built by the Road Board in place of the old one,] *may be, I guess was within the lines of the turnpike, as widened.* (p. 14.)

(2. *Occasion and circumstance of removal.*)

It was removed to widen the avenue, I suppose. I was aware of it at the time, I made objection to the way they were working there, when they started.

I don't know that I did object to moving the dam.

The Road Board built the [new] dam, I suppose; and I understood the Delaware, Lackawanna & Western Railroad Company were interested with them, and were to pay part of the money, or something of that sort. (p. 14.)

III.

POINTS.

A. Under the first count.

1. The evidence does not show, or tend to show, (assuming that the count sets forth,) any cause of action against the defendants. If they neglected any duty, it was a duty to the public, not to the plaintiff.

Freeholders of Sussex vs. Strader, 3 Harr., 108, (1840).

Cooley vs. Freeholders of Essex, 3 Dutch., 415, (1859).

Livermore vs. Freeholders of Camden, 5 Dutch., 245, (1861).

Same case on error, 2 Vroom, 507, (1864).

Pray vs. Jersey City, 3 Vroom, 394, (1868).

The case of the *Freeholders of Sussex vs. Strader*, was twice argued by distinguished counsel, and thoroughly considered, and the decision concurred in by all the judges, (Hornblower, Dayton, Ford, White and Nevins.)

The negligence complained of, was the omission in the construction of public bridge, to erect side railings or parapets, whereby the horse of Strader fell off and was killed, while being carefully driven over the bridge.

The Court decided that the action would not lie, holding the law to be as follows:

“Where a corporate body, whether municipal or of a private character, owes a specific duty to an individual, an action will lie for a breach or neglect of that duty, whenever such breach or neglect has occasioned an injury to that individual; but if such corporation owes a duty to the public, a neglect to perform it, although every individual composing that public is thereby injured, some more and some less, yet they can have no private remedy at the common law.”

The case of *Cooley vs. Freeholders of Essex*, was of like character—the action being for the recovery of damages “for an injury sustained by the plaintiff, by reason of an alleged defect in a public bridge, constructed by the defendants.”

The case was argued before Chief Justice GREEN and Justices WHELPLEY and VREDENBURGH, and the opinion, which was delivered by the Chief Justice, and concurred in by the other Justices, is as follows :

“The case falls directly within the authority of the *Freeholders of Sussex vs. Strader*, 3 Harr., 108. It was ruled in that case, after an elaborate investigation, that no action lies by an individual against the Board of Chosen Freeholders for injuries sustained in consequence of their not completing or keeping in repair a county bridge.

“We find nothing in the cases cited at the bar to shake the authority of that case.”

The case of *Livermore vs. Freeholders of Camden*, 5 Dutch., 245, was argued before Chief Justice WHELPLEY and Justices OGDEN, VREDENBURGH and BROWN, the opinion being delivered by the Chief Justice, who uses the following language :

“This case is before the Court upon a demurrer to the plaintiffs’ declaration. The question presented for decision is, whether the defendants are liable for the consequential injury sustained by the plaintiffs’ mill-dam and sluice over the south branch of Timber Creek, in the county of Camden, by reason of the fall of a county bridge upon the dam and sluice-gates, per quod the dam and gates were broken down and the water let out of plaintiffs’ pond, who were thus deprived of the use of water as motive power for their grist-mill, situate below the dam and gates.

"The declaration alleges that the falling of the bridge was occasioned by the neglect of the defendants to repair it, as they were bound to do.

"This Court held, in the *Freeholders of Sussex vs. Strader*, 3 Harr., 108, that no action lies at the suit of an individual against the Board of Chosen Freeholders of a County, for injuries sustained in consequence of their not completing or keeping in repair a County bridge or its abutments; that the only remedy was by indictment. This principle was reaffirmed by this Court in *Cooley vs. The Chosen Freeholders of Essex*, 3 Dutcher, 415. The ground on which these decisions rest is, that the duty is owed to the public, and not to each individual who may have occasion to use the bridge, and that the adoption of any other rule would be highly inexpedient and destructive of the public interests, by subjecting these public corporations to numberless suits for every petty neglect occasioning inconvenience to any one. The counsel for the plaintiff attempted to distinguish this case from the cases cited, in this, that in this the duty was owing to the mill owner, and not to the public as in the other. But I am unable to perceive the soundness of the distinction.

"The whole suit rests upon the obligation to repair the bridge, because it is a part of a public highway. The duty counted on is a public duty. The plaintiff alleges a private injury, sustained by reason of the neglect of this public duty. It may be that this private injury is of a peculiar character, occasioned by the falling of the bridge upon the dam, instead of that sustained by one in the use of the bridge; but that cannot alter the fact, that the obligation or duty neglected, was public, instead of private. It cannot be pretended that the plaintiffs had any right to enforce the building of the bridge in this place—it was not especially for their use."

On the case being removed by writ of error to this Court (see 2 *Vroom*, p. 507), the judgment of the Supreme Court was affirmed almost unanimously—only one Judge (Kennedy) voting for reversal.

The opinion was delivered by the present Chief Justice, who uses the following language: "That an action will not lie in behalf of an individual who has sustained special damage by reason of the neglect of a public corporation to perform

a public duty, I consider the settled law of this State. This was the doctrine approved of by the Supreme Court, after much research and a careful consideration of the authorities in the case of *The Freeholders of Sussex vs. Strader*, 3 Harr., 108, and the same principle was reaffirmed in the case of *Cooley vs. Freeholders of Essex*, 3 Dutch., 415.

"These decisions, in my judgment, rest upon the solid foundations of ancient precedent and public policy."

These cases were all against the Boards of Chosen Freeholders, which were not, strictly speaking, municipal corporations, but are only *quasi* corporations, created for special governmental purposes and invested with very limited powers and privileges.

1 *Dillon on M. C.*, § 10.

2 *Kent's Com.*, (12th ed.) 278.

1 *Bouvier's Inst.* (1870), § 185.

Shearman & Redf. on Neg. (3d ed.), § 118.

But in the case of *Pray vs. Jersey City*, 3 Vroom, 394, decided in 1868, the same principle was again affirmed, and held applicable to a municipal corporation, of the most plebeian kind. The case was argued before the Chief Justice, and Justices Depue, Woodhull and Vredenburg, who concurred in the opinion delivered by the Chief Justice, of which the following is an extract:

"The present case turns on the solution of a single legal question, viz: *whether a civil suit will lie against a municipal corporation, in consequence of damages sustained by an individual, by reason of a public street being in an improper condition.* The defendants are charged with an omission of duty. It appeared on the trial that the sewer in the street was properly and skillfully constructed, the complaint being that the public authorities neglected to have the street filled in to the requisite grade, in consequence of which the coping of stone around one of the entrances into the sewer was left projecting, and formed the obstacle which occasioned the accident giving rise to this suit.

"The question as to the extent of the responsibility, in a civil action, of a corporate body, entrusted by statute with the performance of a public duty, and receiving therefrom

no profits or emoluments for itself, has recently received a very elaborate examination in the important case of *The Mersey Docks and Harbor Board Trustees*, ads. *Gibbs and others*, *Law Rep., English and Irish Appeal*, Vol. 1 p. 93. A reference to this decision, in which the train of cases on the subject are carefully collated and criticized, will disclose the fact of the great discordance in judicial opinion, with regard to the question involved. And it will also appear from the briefest examination of the American Reports, that the legal mind of this country upon this topic is in a similar state of dubiety. If the matter, therefore, were one *primae impressionis* in this Court, it is obvious a broad field for investigation would be thrown open; but such is not the case. I CONSIDER THE QUESTION IN THIS STATE AS SO ENTIRELY SETTLED THAT IT ADMITS OF NO DEBATE."

It is impossible to distinguish the case at bar from those referred to, or to take it out from the principle governing them, and which would seem to be settled, if repeated solemn adjudications can settle anything, or if the doctrine of *stare decisis* is to be any longer regarded.

1. The defendants are a public body—a *quasi* corporation.
 2. Their *duty*, the neglect of which forms the gravamen of the first count, was a duty to *the public*, not to the plaintiff.
 3. The negligence complained of, was in *not building a good and sufficient bridge*.
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The case of *The Mersey Docks and Harbor Board Trustees vs. Gibbs*, L. R., 1 H. of L., 93, cannot be cited as evidence of the law of New Jersey, as against the case of *Livermore vs. Freeholders of Camden*, in this Court; but the former case appears upon careful examination, to be hardly inconsistent with the latter,—and it is certainly not an authority against the defendants in the case at bar.

(1.) That case (*The Mersey Docks and Harbor Board Trustees vs. Gibbs*), was decided on the peculiar language of the acts of incorporation—the Court quoting, with approval, the words of Lord Campbell in another case, viz: “that in every case the liability of a body created by statute, must be determined on a true interpretation of the statute under which it is created,” (pages 104, 118.)

(2.) Under the incorporating enactments in that case, the plaintiffs were authorized to levy the amount of any damages occasioned by the *insufficiency of the work*, or the *negligence and misconduct of the officers*, (p. 94.)

(3.) The Board of works were substitutions, on a large scale, *for individual enterprise*, and it was thought that the “true rule was, that the Legislature *intended* that the liability of corporations *thus substituted for individuals*, should, *to the extent of their corporate funds*, be co-extensive with that imposed by the general law on the owners of similar works.” (See pages 117, 118 and 119.)

(4.) The plaintiffs were occupiers of the dock, received tolls therefrom (though in trust), were ratable for the relief of the poor, and authorized to raise money on bonds. (p. 106, 111, 123.)

(5.) The Court did not distinguish between the liability of the *corporation* and that of the *committee*, who were *directors*, owing to a stipulation made by the defendants that judgment might be entered against the corporation, if *either* were liable. (p. 109.)

(6.) The case was decided in part on the ground that though a Public Board, they *were not*, under the peculiar enactment creating them, *governmental agents or servants*, in the sense in which a surveyor of the highways was. The Court, referring to the principle on which certain public officers or corporations were exempt from liability for negligence, says :

“The principle is the same as that on which the surveyor of the highways is not responsible to a person sustaining injury from the parish ways being out of repair, though no

action can be brought against his principals, the inhabitants of the parish." (p. 111.)

The defendants, in the case at bar, stand in a position similar to that of a surveyor of the highways in England.

See Laws of 1870, p. 190, § 15.

Road Board Charter, p. 33, § 38.

Pray vs. Jersey City, 3 Vr., 397.

See also, 2 Dillon on M. C., §§ 761, 762, 763, and note 2. Shearman and Redf. on Negligence, (3d Ed.) § 118 and note. ~~Wheaton~~ on Negligence, § 956, and note.

2. The defendants have no funds, and no means of raising money, directly or indirectly, to pay damages recovered against them.

They can raise money by assessment, to the extent of benefits, to pay compensation for property taken.

Road Board Acts, § 29.

See Laws of 1876, p. 185, § 6.

"And the costs and expenses of executing the act, and of laying out, opening and constructing the avenues," are paid by the county and collected by taxation.

See Laws of 1870, p. 185, § 7.

Road Board Acts, § 30.

"All bridges and culverts built and constructed," are built and constructed at the expense of the county.

See Laws of 1871, p. 176, § 4.

Road Board Acts, § 53.

3. But the work was done by contractors, and if there was any negligence in the construction, they, and not the Board, are liable therefor. If the evidence does not show that the work was done through contractors, *it does not show it to have been done at all by the defendants.*

See Reports of Essex Public Road Board for 1873, offered in evidence, (p. 34 of printed case.)

See p. 24 and 39 of Report.

(Extract from page 24.)

" 1873, Jan. 6.

HENDERSON & DOUGHERTY,

Bridge, Bloomfield avenue, \$3,000 00

1873, Jan. 13, " " " 4,400 00"

(Extract from page 39.)

" Wheeler's pond bridge, 60 feet long, 15 feet span, contract price, \$15,000
One-half paid by D. L. & W. R. R. Co."

See Shearman and Redf. on Negligence, § 79.

Wharton on Negligence, § 181.

Cuff vs. Newark & N. Y. R. R. Co., 6 Vroom, 17.

4. Besides, the evidence shows that the bridge and dam yielded only to an extraordinary freshet.

No negligence can be imputed, and no action will lie, if (as clearly appears,) the bridge was "suitably constructed, so as to let the water pass off with reasonable freedom, at all times, except in case of extraordinary freshets not occurring annually."

Sprague vs. Worcester, 13 Gray, 193; and see *Nichols vs. Marshland*, L. R., 10 Exch., 255.

Testimony of Hoxsey, p. 23, l. 29, to end;

Testimony of Harrison, p. 25, 26;

Testimony of Cadmus, p. 33, l. 19, to end.

5. The damages arose not from the construction, or defective construction, of the bridge, but from the erection of the dam near to, and against the bridge.

(See opinion of Vredenburg J., in *Livermore vs. Freeholders of Camden*, 2 Vroom, 249.)

If the defendants erected the dam at ^{an} improper place, or in an improper manner, they must have done it as the agents or servants and by the sanction of the plaintiff, and not as a corporation.

The erection of a dam was entirely *ultra vires*. The Board had no more right or power to construct a dam near to or in connection with a bridge than they had to construct it at a distance and independently.

No action can lie against them in a corporate capacity for supposed negligence in any such business.

See *Mayor, &c. of Albany vs. Cunliff*, 2 N. Y., 165.

Anthony vs. Adams, 1 Mctc., 284.

2 *Dillon on M. C.*, §§ 766-770.

B. Under the *second* count, very little need be said.

1. It clearly appears from the only testimony in the cause (*Wheeler's*) in relation to the removal of the old dam, that it was not removed tortiously but by the consent or acquiescence of the plaintiff.

2. It also appears that the dam so removed was within the lines of the avenue, and if he was entitled to any compensation, he could recover it only in the mode provided by the law authorizing the taking.

See *Laws of 1870*, p. 185, § 11.

“ “ “ p. 186, §§ 8-11.

Road Board Acts, §§ 28, 31-34.

Compensation for property taken for a highway, by a public corporation, need not precede the taking.

Lowery vs. The Mayor, &c. of Newark. Sup. Ct., Nov. Term, 1875, 1 L. & E. Reporter, 272.

JOHN W. TAYLOR,

Counsel for Def'ts.

NEW JERSEY

Court of Errors and Appeals.

GRANT J. WHEELER
vs.
THE ESSEX PUBLIC ROAD BOARD.

Points for
Plaintiff in
Error.

JOHN R. EMERY, *Attorney.*

(1.) Public corporations, in the absence of legislative provisions changing the rights of the parties, are responsible for injuries to riparian owners occasioned by improper construction of their works across natural water-courses.

Dillon on Munic. Corp., §§ 797, 781, 802, and cases cited, (*inter alios*.)

Perry vs. City of Worcester, 6 Gray, 554, 547, an action for negligently narrowing the space for water in building a bridge. Here SHAW, *Ch. J.*, p. 547, puts the liability of defendants upon the ground that damages to private property, ~~sustained~~ by improper and unskilful manner of doing a public work is not justifiable under the authority to build bridges.

Also, *Parker vs. City of Lowell*, 11 Gray, 353, 357, action for obstruction of water-course by insufficient culvert. BIGELOW, *Ch. J.*, p. 357: "It is now the well settled rule of law in this commonwealth, that in all cases where a highway, turnpike, bridge, townway or other way is laid across a natural stream of water, it is the duty of those who use such franchise or privileges to make provision by open bridges, culverts, or other means, for the free current of the water, so that it shall not be obstructed and pent up to flow back on lands belonging to the riparian proprietors."

(The above are decisions at common law, and not on statutes.)

Also, *Rochester Lead Co. vs. Rochester*, 3 Comst., 463.

(b) This liability may also be placed upon the ground that the defendants, as owners or occupiers of land, are bound equally with individuals or private corporations, so to use their own property as not to interfere with that of others.

See *Bailey vs. New York*, 3 Hill, 531.

Rochester Lead Co. vs. Rochester, 32 N. Y., 468.

Oliver vs. City of Worcester, 102 Mass., 501.

Eastman vs. Meredith, 36 N. H., 295, 296.

Inhabitants of Shrewsbury vs. Smith, 12 Cush., 177, where an individual was held to be liable for the negligent construction of his dam, which carried away the bridge of the town.

(2). The action of the plaintiff is based on an injury to his private, individual and special rights in a natural water-course, and, in this fundamental respect, is distinguishable from the cases relied upon for nonsuiting the plaintiff, which were all cases where the right claimed to be infringed belonged equally to every other member of the community.

Freeholders of Sussex vs. Strader, 3 Harr., 108 Sup. Ct., 1840, was an action by an individual for injuries sustained, by reason of a bridge not being in repair, (railings on the side not being provided). This duty (to provide railings) was one owed to all the public, founded on a public right, and therefore enforceable only by a public action, *i. e.*, an indictment.

HORNBLOWER, *Ch. J.*, p. 121, expressly distinguishes the case from one in which a corporate body owes a specific duty to an individual, for breach or neglect of which he says an action will lie.

Cooley vs. Freeholders of Essex, 3 Dutch., Sup. Ct., 415, was an action for an alleged breach of the same public duty, (that of keeping bridge in repair) and the above case was approved.

N. J. Court of Errors and Appeals.

<p style="text-align: center;">GRANT J. WHEELER, <i>Plaintiff in Error,</i> <i>vs.</i> THE ESSEX PUBLIC ROAD BOARD.</p>	}	<p><i>Writ of Error on Judgment of Nonsuit, ordered at Circuit.</i></p>
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STATEMENT OF PLAINTIFF'S CASE.

The plaintiff, since 1865, has been the owner of a mill or manufactory, situate near Tony's Brook or First River, a natural stream in Montclair township, Essex county. For sixty years (Gerald D. Harrison, p. 24, l. 25,) the mill had the use of the water of the stream, which was conveyed from the mill pond, across or under the turnpike, by means of a flume or raceway. The water of the mill pond, previous to 1872, was collected and retained by means of a rip-rap dam, which extended across the pond, and was twenty-five or thirty feet in width across, and ten or twelve feet in height. The dam was strong, well settled, and in good repair. (*Wheeler*, pp. 8 and 9). Below the dam, and at a distance of ten or twelve feet, the bridge of the turnpike crossed the stream. (*Ibid*, p. 9). This space was sufficient to accommodate the stream during freshets. In February, 1872, The Essex Public Road Board took the turnpike by condemnation, (case, p. 34,) pursuant to provisions of act of Feb. 16, 1870, §§ 1 and 4. The Road Board took down the turnpike bridge, widened the whole turnpike from sixty to eighty feet, so that the avenue as widened extended to the old dam.

In the construction of the avenue, they took down the old dam and built a new bridge, extending across the whole width of the avenue. The bridge was of stone, with an arched culvert, and a circular dam extending out in the pond about feet, was built into the bridge, the two ends of the circular dam resting on the sides of the arch of the bridge, (*Wheeler*, p. 10 and 11 and maps.) The top of this dam was 3 ft. 6 in. below the top of the arch of the bridge, (*Wheeler* 11, l. 20, &c.) The opening for the water was insufficient for the stream. (*Harrison*, p. 25, l. 10, &c.; *Cadmus*, p. 33, l. 14, &c.) The space with the old dam and bridge was sufficient, (*Harrison*, p. 27, l. 1.)

On August 11, 1875, during a freshet, the dam was carried away, and the plaintiff's mill stopped in consequence, for a considerable time.

There was also evidence that the foundations of the dam were defective, being laid not upon stone or hard pan, but upon a gravel or mud foundation, (*Hoxsey*, p. 18, line 20, &c.) and had proper tests been applied, the defective character of the foundation could have been ascertained, (*Hoxsey*, p. 19 and 20; *Cadmus*, p. 28, line 10, &c.)

Sheathing of pine or spruce had been driven down behind the dam for one and a-half feet *below the foundation of the dam*, (*Hoxsey*, p. 22, line 15.) There was also proof that water filtered through the dam and the dry walls of the bridge ever since it was built, (*Cadmus*, p. 32, line 5, &c.)

A nonsuit was ordered upon the grounds stated in the case, p. 34, line 20, &c.

Livermore vs. Freeholders of Camden, 5 Dutch., 215, and S. C. on appeal, 2 Vroom, 507, was an action in which the duty owed to the plaintiff was stated in the declaration (the case being heard on demurrer) to be that of repairing a bridge; and this being held to be a public duty, the previous cases were followed. This case did not purport to extend the previous cases.

In *Pray vs. Jersey City*, (Sup. Ct.), 3 Vroom, 394, an action for injury resulting from improper condition of streets, the same rule was extended to municipal corporations.

(3). In the decisions of this State, denying the claim of private corporations to the same immunity with public corporations for infringement on private rights in the construction of their works, the Courts have been careful to restrict the immunity of public corporations from actions for private injuries to cases where they have not been guilty of negligence.

Thus in *Tinsman vs. Bel. Del. R. R. Co.*, 2 Dutch., 148, an action for damages to water-course by construction of railroad. *Ch. J. GREEN*, distinguishing between private and public corporations says, p. 160: "The principle is well settled that no action can be maintained for injuries resulting to individuals from acts done by persons in the execution of a public trust and for the public benefit, *acting with due skill and caution, and within the scope of their authority.*"

Also in *Trenton Water Power Co. vs. Raff*, 7 Vroom, 335, an action of the same general nature, *DEPUE, J.*, p. 340, says: "The injuries to which immunity from responsibility attaches are only such as arise incidentally from acts done under a valid act of the Legislature, in the execution of a public trust for the public benefit, *by persons acting with due skill and caution.*"

Also in *Quinn vs. City of Paterson*, 3 Dutch., 35, an action of trespass against city for curbing, *Ch. Jus. GREEN* says: "The work being done in the execution of a public trust for a public benefit, and being within the scope of the city authority, *and there being no suggestion that it was not done with due skill and caution*, the defendants are not liable

if in point of fact, the *locus in quo* was within the limits of the street.”

See also *Sedgwick on Damages*, 110, 111, and cases cited, showing that in those States where the grantees of franchises have the same immunity as public bodies, it is held that this immunity exists only where the grantees or their agents have not exceeded the powers conferred upon them, and when they are not chargeable with want of due care.

(4). The tendency of modern decisions and of modern legislation is to *extend* the liability of public bodies for injuries of this character.

Mersey Docks vs. Gibbs, 11 House of Lords, 686, the latest exposition of the English law.

Dillon on Munic Corp.

N. J. Statutes, as to bridges, N. D., 842.

“ “ as to injuries from change of grade.

(5). The building of the bridge and dam being a corporate act of the defendants, and the duty or obligation to the plaintiff being to *build a proper bridge*, they cannot evade responsibility by employing contractors or servants to do this duty for them.

Conrad vs. Trustees of Ithaca, 16 N. Y., 158.

Pickard vs. Smith, 10 C. B. N. S., 480.

Mersey Docks vs. Gibbs, *supra*, p. 716, commenting on *Pickard vs. Smith* and *Hall vs. Smith*, 2 Bing., 156.

Tany vs. Ashton, E. L. Rep., 1 Q. B. Div., 314.

Hall vs. Railway Co., 6 H. & N., 488.



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