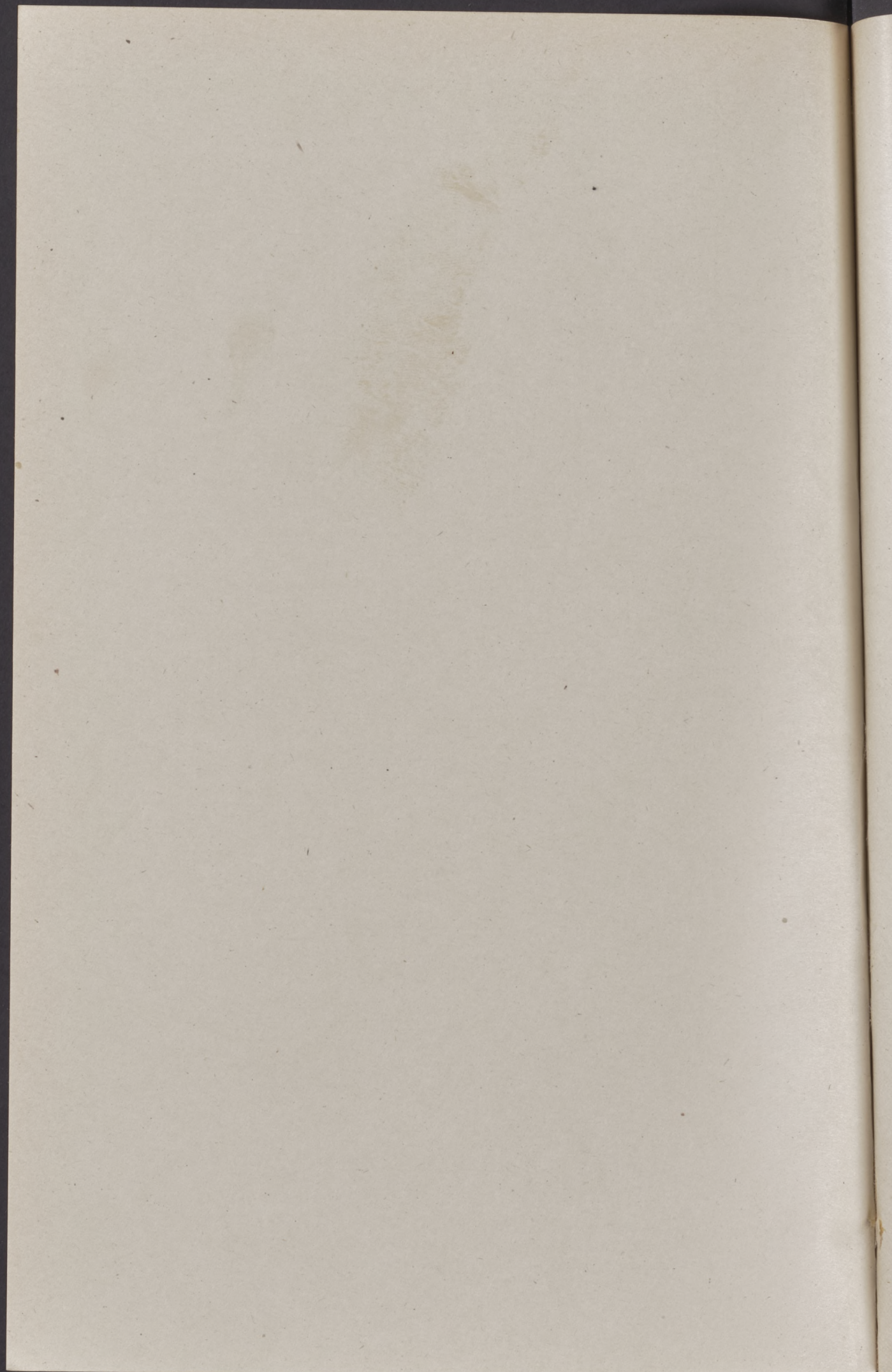


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New Jersey Court of Errors and Appeals

Stipulation

NEW JERSEY SUPREME COURT

JOHN P. BUCKELEW,

Plaintiff,

vs.

THE BOARD OF CHOSEN FREE-
HOLDERS OF MIDDLESEX COUN-
TY, NEW JERSEY,

Defendant.

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It is, on this twenty-second day of November, nineteen hundred and seventeen, stipulated and agreed by and between the respective Attorneys for the above named plaintiff and defendant, that the annexed statement may and shall be considered as the agreed State of Facts for purpose of appeal.

30

EDMUND A. HAYES,
Attorney of Plaintiff.
GEORGE L. BURTON,
Attorney of Defendant.

Agreed State Of Facts

(*Filed Dec. 3, 1917.*)

NEW JERSEY SUPREME COURT

10	JOHN P. BUCKALEW,	Plaintiff,
	vs.	
	THE BOARD OF CHOSEN FREE- HOLDERS OF MIDDLESEX COUN- TY, N. J.	Defendant.

20 By agreement, the name of the highway was amended to read "Woodbridge and New Brunswick Turnpike from Highland Park to Bonhamton," and it was admitted that the Woodbridge and New Brunswick Turnpike is a County road.

30 JOHN P. BUCKELEW, the plaintiff, testified that on the night of February 1, 1915, in going from New Brunswick to Perth Amboy, along the Woodbridge and New Brunswick Turnpike, at a point near Rolfe's Lane, and while driving an automobile at a slow rate of speed, and while traveling on the traveled part of the highway, on the right-hand side of the road, his automobile ran into a hole in the roadway and was damaged, and he was injured so that he was confined to the hospital for over a week.

40 PETER NYBO, the photographer, was sworn and proved photographs marked Exhibits 1, 2, 3 and 4, which showed that the hole complained of extended out about to the center of the traveled highway. That the hole at the edge of the road

Agreed State of Facts

was about two feet deep, and about three or three and a half feet wide; that the roadway at that particular place had been elevated some four feet above the property adjoining the highway on either side.

MAMIE ROLFE, a witness produced on behalf of the plaintiff, testified that she lived on the Woodbridge and New Brunswick Turnpike, and that the plaintiff, Mr. Buckelew, was hurt in front of her house and when she saw him he was unconscious; that the condition of the highway known as the road from Highland Park to Bonhamton was pretty bad; that there was a hole in it, and that the witness told Anthony J. Gebhardt, one of the Freeholders, about it. This notice was communicated to Mr. Gebhardt about a week before the accident; that Mr. Gebhardt had received three notices as to the condition of the highway, the first a month or so before Mr. Buckelew went into the hole; that this notice was communicated to him personally; that the practice was to repair the holes by filling them up with sand, but that the sand would wash out on each rain storm; that the witness knew that Mr. Gebhardt was the director of the Board of Freeholders, and that was the reason she notified him of the condition of the highway; that this particular hole was there about a week before the accident, and that she notified Mr. Gebhardt about the hole; that she told Mr. Gebhardt about the hole as soon as the hole appeared in the highway; that these holes were occasioned by the rains, and that each time there was a rain storm, the road would wash out; that this had continued for many months, and the witness requested a retaining wall to be placed there, and that after the accident to the plaintiff, the

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Agreed State of Facts

highway in that locality was fixed with cement and has not, since it was cemented, washed out, but that prior to the accident, it was fixed with sand by dumping loads of sand there, which was washed out with each rain fall.

- 10 It was admitted that Anthony J. Gebhardt, the person referred to by the above witness, was Director of the Board of Chosen Freeholders of the County of Middlesex in February, 1915, when the accident happened.

20 WILLIAM ROLFE, a witness produced on behalf of the plaintiff, stated that he saw plaintiff's automobile the morning following the accident, in the hole in the road; that the road was washed out in several places for a few months prior to the accident, and that the washouts were repaired by dirt, sand and gravel by dumping into the holes, and at the next rain they would wash out again and there would be another hole; that the hole which the plaintiff's automobile was in was there for very near a week; that this road was paved in 1905 or 1906, and also that there was a bridge across the road at about the spot where the accident happened, and that the water ran across the highway underneath the bridge, and when the highway was 30 repaired and paved, a pipe was laid down, but was put underneath the surface of the ground, with the result that there was no pipe or other means of taking the water away.

Mr. Burton: "I move for a non suit."

The Court: "A non suit will be entered and an exception noted."

(Endorsed):

40 Filed, Dec. 3, 1917,
Thomas F. Martin,
Clerk.

Agreed State of Facts

STATE OF NEW JERSEY

DEPARTMENT OF STATE

I Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that the foregoing is a true copy of STATE OF FACTS and STIPULATION 10
in re John P. Buckelow, Plaintiff, vs. the Board of Chosen Freeholders of Middlesex County, New Jersey, Defendant, as the same is taken from and compared with the original.

Filed, December 3rd, 1917, and now remaining on file in my office.

In Testimony Whereof, I have hereunto 20
set my hand and affixed the Official
(Seal) Seal of said Court at Trenton, this
Twenty-fifth day of February, A. D.,
1918.

THOS F. MARTIN,
Secretary of State.

Transcript Of Pleadings For Trial

NEW JERSEY SUPREME COURT

MIDDLESEX COUNTY

10	JOHN P. BUCKALEW, <div style="text-align: right;">Plaintiff,</div>
	vs.
	THE BOARD OF CHOSEN FREE- HOLDERS OF THE COUNTY OF MIDDLESEX, <div style="text-align: right;">Defendant.</div>

Edmund A. Hayes, Attorney for Plaintiff.

20

George L. Burton, Attorney for Defendant.

(Summons Issued April, 15, 1915.)

The Plaintiff, residing in the City of New Brunswick, County of Middlesex and State of New Jersey, says that:

FIRST COUNT:

30 1. For many years prior to the date of the injury herein complained of, and upon the date of said injury, the defendant Board owned or had under its control a certain highway or road leading from New Brunswick to Bonhamtown, and known as the Bonhamtown Road in the County of Middlesex.

2. Defendant, through its officers, agents and
 40 servants, wrongfully changed the grade of said

Transcript of Pleadings For Trial

highway at various points and places by piling and spreading upon said highway sand, dirt and stones, commonly called gravel, without attempting to embank and prevent said gravel from washing away.

3. Defendant by its wrongful act, caused to be made in said highway many deep excavations, thereby rendering said public highway dangerous for travel. 10

4. Defendant had been repeatedly notified of the condition of said road prior to the accident herein complained of, but made no attempt to remedy its wrongful acts.

5. On the night of February 1, 1915, the plaintiff, while passing along and upon said highway in a vehicle known as an automobile, and in ignorance of the fact that said road or highway was in any other than a perfectly safe condition, and without any fault or negligence on his part, drove and ran into a deep excavation which was wrongfully and illegally made by said defendant in said highway, and his head, shoulders and body were severely injured. 20

6. By reason of said injury so received, plaintiff was taken to St. Peter's Hospital, in the City of New Brunswick, where he was compelled to remain for two weeks, and then taken to his home, where he was compelled to remain for four weeks, and was unable to return and resume his customary duties for twelve weeks after the receiving of said injury. 30

Transcript of Pleadings For Trial

SECOND COUNT:

1. Sections 1, 2, 3, 4 and 5 of the First Count are hereby made a part of this Count.

10 2. The automobile so owned, operated and driven by plaintiff was damaged and destroyed and rendered unfit for use by reason of it so being run into the excavation so made in said highway by defendant, and plaintiff was compelled to sell and dispose of said automobile, losing thereby One Thousand Dollars (\$1,000).

20 3. At the time of the said injury plaintiff owned and conducted a garage in the City of New Brunswick, and during the time he was unable to be about his business he was compelled to employ and engage additional help, for which he paid the sum of twenty-two (\$22) per week, for a period of twelve weeks. He was obliged to pay Two Hundred Dollars (\$200) for medical attention and for medicines and for hospital expenses.

Plaintiff demands Three Thousand Five Hundred Dollars (\$3,500) on the First Count; and on the Second Count, One Thousand Five Hundred Dollars (\$1,500) damages.

30

EDMUND A. HAYES,
Attorney for Plaintiff.

(Filed April 19, 1915.)

Defendant says that:

DEFENSE TO FIRST COUNT:

1. It denies the first paragraph of this Count.
- 40 2. It denies the second paragraph of this Count.

Transcript of Pleadings For Trial

3. It denies the third paragraph of this Count.

4. It denies the fourth paragraph of this Count.

5. As to the statements in Paragraph 5, defendant has not any knowledge or information thereof sufficient to form a belief. 10

6. As to the statements in Paragraph 6, defendant has not any knowledge or information thereof sufficient to form a belief.

DEFENSE TO SECOND COUNT:

1. As to Paragraph 1 of this Count, defendant makes the same answers as have been made by it to paragraphs 1, 2, 3, 4 and 5 of the first count as above set forth. 20

2. As to the statements contained in the second paragraph of this count, defendant has not any knowledge or information thereof sufficient to form a belief.

3. As to the statements contained in the third paragraph of this count, defendant has not any knowledge or information thereof sufficient to form a belief. 30

FIRST LEGAL DEFENSE TO FIRST COUNT:

Defendant will object that the complaint discloses no cause of action. It will contend that an action will not lie in behalf of an individual who has suffered special damage from the neglect of a public corporation to perform a special duty.

SECOND LEGAL DEFENSE TO FIRST COUNT:

It will contend that a civil suit will not lie against a municipal corporation in consequence of damages sustained by an individual by reason 40

Notice of Appeal

of the improper condition of a public street or road.

THIRD LEGAL DEFENSE TO FIRST COUNT:

10 It will contend that in the absence of a statute an action will not lie against a municipal corporation because of damage sustained in consequence of a street or road being out of repair. It will contend that there is no statute imposing such a liability upon a municipal corporation.

FOURTH LEGAL DEFENSE TO FIRST COUNT:

The defendant will contend that the plaintiff was guilty of contributory negligence.

20 As to the second count, defendant will raise the same four legal defenses as above set forth, relating to first count.

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This case was tried before Judge Frank T. Lloyd, with a jury, at the Middlesex Circuit on October 30th, 1916.

At the conclusion of the plaintiff's case, a motion for a verdict was granted.

Frank T. Lloyd,
Judge.

40 To George L. Burton, Esquire, Attorney for
Defendant:

Notice of Appeal

of the improper condition of a public street or road.

THIRD LEGAL DEFENSE TO FIRST COUNT:

It will contend that in the absence of a statute an action will not lie against a municipal corporation because of damage sustained in consequence of a street or road being out of repair. It will contend that there is no statute imposing such a liability upon a municipal corporation.

FOURTH LEGAL DEFENSE TO FIRST COUNT:

The defendant will contend that the plaintiff was guilty of contributory negligence.

As to the second count, defendant will raise the same four legal defenses as above set forth, relating to first count.

GEORGE L. BURTON,
Attorney for Defendant.

(Filed June 8, 1915.)

Notice Of Appeal

NEW JERSEY SUPREME COURT

30	JOHN P. BUCKALEW, <div style="text-align: right;">Plaintiff,</div>	}	Action at Law.
	vs.		
	BOARD OF CHOSEN FREEHOLDERS OF MIDDLESEX COUNTY, <div style="text-align: right;">Defendant.</div>		

To George L. Burton, Esquire, Attorney for Defendant:

Notice of Appeal

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this case, upon the following ground:

The trial Court directed a judgment of non-suit against the plaintiff, and in favor of the defendant, when thereunto moved by counsel for the defendant, whereas, said Court should have denied said motion, and should have submitted to the jury for decision the questions involved in the issue. 10

EDMUND A. HAYES,
Attorney of Appellant.

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above stated cause as the same remain on file in my office. 20

(Seal) In testimony whereof I have set my hand and seal of said Court, at Trenton, this twenty-sixth day of October, A. D. nineteen hundred and sixteen. 30

WM. C. GEBHARDT,
Clerk.

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New Jersey Court of Errors and Appeals

JOHN P. BUCKELEW, Plaintiff-Appellant, vs. BOARD OF CHOSEN FREEHOLDERS OF MIDDLESEX COUNTY, Defendant-Appellee.	} Action at Law. Brief for Appellee
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(a) Preliminary Statement

The plaintiff, John P. Buckelew, was injured on the night of February 1, 1915, as a result of an accident to his automobile which he was driving, which accident was caused by his automobile running into a hole in the road known as the Woodbridge and New Brunswick Turnpike, in Middlesex County. This road was a county road. Suit was instituted in the Supreme Court and the plaintiff was non-suited. The case is now before this court on appeal. It appears that a rain storm had caused a washout on the road, which before repairs were made, the plaintiff ran into and was injured. It also appears that previous washouts had occurred from rain storms at or near this

point, and that each time the Board, after proper notification, would fix the same. The particular hole in which the plaintiff was injured had existed for a week previous to the accident.

(b) Argument

Point 1

The rule of law applicable to the facts in this case has been well settled by the courts of this State. In a long line of decisions it has been adjudicated in conclusive form that the neglect of a municipal corporation to perform, or its negligence in the performance of, a public duty imposed on it by law, such as the proper repair of roads, is a public wrong, to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect.

Sussex vs. Strader, 18 N. J. L., 108.

Livermore vs. Freeholders, 29 N. J. L., 245.

Pray vs. Mayor of Jersey City, 32 N. J. L., 394.

Waters vs. Newark, 56 N. J. L., 361; 28 Atl., 717.

Bisbing vs. Asbury Park, 80 N. J. L., 416; 78 Atl., 196.

It is quite evident from the facts of this case that the public at large was to a greater or less extent subjected to the same condition to which the plaintiff refers his special injury. This being so there is no private right of action by the plaintiff.

Waters vs. Newark (*supra*).

This exemption, however, it has been settled, does not extend to municipal corporations, where the injury is the result of active misconduct or active wrong doing, chargeable to the corporation. Active wrong doing as illustrated in cases hereinafter cited consist of some

positive acts on the part of a municipal corporation, such as the actual digging of an excavation by the municipality or the intentional diverting of surface water from the course it would naturally take and casting it, for a corporate purpose, in a large body on the lands of an individual, where, except for the artificial drains, it would not go.

Hart vs. Union County, 57 N. J. L., 99; 29 Atl., 490.

Kehoe vs. Rutherford, 74 N. J. L., 659; 65 Atl., 1046.

Dohrmann vs. Hudson County, 84 N. J. L., 735; 87 Atl., 463.

Jerolamon vs. Belleville, 101 Atl., 244.

In the case of *Hart vs. the Freeholders* of Union County, a case which is relied upon by the defendant, it appears that the injury was due to a deep excavation dug by the Board of Freeholders in the public highway. It is respectfully submitted that there is a radical difference between digging an excavation and permitting a depression to be worn in the road by natural causes. The first calls for active misconduct on the part of the municipality in digging the hole, whereas, the latter merely makes the municipality guilty of passive negligence.

The cases of *Kehoe vs. Rutherford*, supra; *Dohrmann vs. Hudson County*, supra, and *Jerolamon vs. Belleville*, supra, which completes the reported cases on the liability of a municipality for active misconduct, are all cases where the municipality, through artificial drains, diverted surface water from the course that it would naturally take and cast it upon the lands of an individual. This misconduct, it has been well settled, amounts to active wrong doing.

In no cases that I have been able to discover has it even been contended that the neglect to repair a road constitutes active misconduct. The most that it has ever been contended, is that it amounts to mere passive negligence

such as to bring it within the operation of the general rule, making a municipality liable to public indictment, but exempting it from suits by private individuals.

Where the municipality is not amenable *civiliter ab initio*, notice given by an individual to a municipality of a defect in the road, will be of no avail.

Waters vs. Newark (*supra*).

Reading the two lines of cases together and by grafting the exception on the general rule we find that mere neglect on the part of any municipality to repair a road even after notification, does not afford a basis for suit to a private individual who has suffered special damage thereby, and that the corporation is only chargeable for what might be called active and actual misfeasance.

The plaintiff further maintains that the defendant having been given notice of the condition of this road and having repaired it in such a manner that subsequent rain storms would destroy part of the repairs, that this was equivalent and equal to a tortious act such as if it had in the first instance dug an excavation. It is extremely difficult to follow this argument, because of the fact that in one instance non-repair of the road is due to passive negligence and permissive decay, while in the other instance it is due to positive tortious act. Passive negligence and permissive decay clearly are embraced within the rule which exempt municipalities from suit by individuals for the neglect of a public duty. In order to construe repairs to be active misconduct it would certainly have to appear that the repairs resulted in making the road worse and by no stretch of reasoning could it be considered that where repairs actually improved the road that it was tortious misconduct on the part of the municipality to so improve the road. It does not appear from the evidence in this case that the repairs made the road any worse, but on the contrary it appears they had the effect of actually improving the conditions. The kind or nature of repairs is a matter which the Court is not immediately concerned

in because of it being of a highly local character in the particular municipality affected and at any rate there is not sufficient evidence to show that these repairs were improperly made.

The defendant corporation contends that there has not been any active wrong doing on the part of the Board of Chosen Freeholders of Middlesex County by neglect to repair this road. This fact would seem to have been clearly in the mind of the trial judge when a non-suit was directed in this matter. And having been found as a fact by the trial judge his findings should not be disturbed unless there is absolutely no evidence to support such a finding.

For the reasons above stated, the appeal should be dismissed with costs.

Respectfully submitted,

FREDERICK F. RICHARDSON,
Substituted Attorney for the Board
of Chosen Freeholders of Middlesex
County.

New Jersey Court of Errors and Appeals

JOHN P. BUCKELEW,
Plaintiff-Appellant,

vs.

BOARD OF CHOSEN FREEHOLDERS
OF MIDDLESEX COUNTY,
Defendant-Appellee.

Action at Law

BRIEF FOR APPELLANT

The Facts

Plaintiff, John P. Buckelew, was injured on the night of February 1, 1915, as the result of an accident caused by an automobile which he was driving running into a hole in the road known as the Woodbridge and New Brunswick Turnpike in Middlesex County, which was a county road.

Mr. Anthony J. Gebhardt, Director of the Board of Freeholders of the County of Middlesex, had been notified about a month before the accident of the condition of the highway at this point, and had received three notices of it during that month. Each rain storm caused a washout, and it was the practice of the Board of Freeholders to repair these holes by filling them up with sand, but the sand would be washed out by the next storm. Mr.

Gebhardt, the Director of the Board of Freeholders, knew of this condition, and of the successive washouts for a period of a month prior to the accident, and knew of the particular hole which caused the accident for about one week before the accident. The Board of Freeholders had been requested to erect a retaining wall to prevent these washouts. After the accident to the plaintiff, the highway, at the point of the accident, was cemented, after which the road remained firm, and there were no further washouts.

At the conclusion of plaintiff's case, the Court directed a non-suit, to which the defendant excepted.

POINT I

The County of Middlesex is a municipal corporation and is responsible to individuals suffering special damage where the injury is the result of active wrong-doing chargeable to it.

The contention of the plaintiff is that the conduct of the Board of Freeholders in repairing this road in the manner in which they did so that a washout occurred with each successive rain-storm, and with full knowledge based upon actual experience that such washouts would occur, amounted to active wrongdoing.

The direction of a non-suit was under the authority of the cases of:

Town of Durker vs. Union, 38 N. J. Law, 21

Prey vs. Jersey City, 32 N. J. Law, 394.

Condict vs. Jersey City, 46 N. J. Law,
157.

Wild vs. Paterson, 47 N. J. Law, 406.

Jernee vs. Monmouth Co., 52 N. J.
Law, 553.

Waters vs. Newark, 56 N. J. Law, 361.

Tomlin vs. Hildreth, 65 N. J. Law,
438.

Watkins vs. Atlantic Co., 73 N. J. Law,
213.

Bisbing vs. Asbury Park, 80 N. J. Law,
416.

The plaintiff holds that this line of cases is not applicable to the facts in this case which are within the rule of the cases of:

Hart vs. Union Co., 57 N. J. Law, 90.

Kehoe vs. Rutherford, 74 N. J. Law,
659.

Bailey vs. Osborn, 80 N. J. Law, 333.

In the case of *Hart vs. Freeholders*, it was alleged that the defendant made a deep excavation in the public highway under the control of the Board into which the plaintiff fell, and this was held to constitute a common and public nuisance, created not by the defendant's neglect of or negligence in performing a public duty, but by active wrongdoing.

In the case of *Kehoe vs. Rutherford*, the defendant corporation so constructed and maintained a culvert that surface water which formerly flowed on certain streets was diverted so that it was discharged upon plaintiff's lands, where it did substantial injury. This act was held to be active wrongdoing chargeable to the corporation.

In the case at bar the defendant corporation so constructed and maintained a public highway that

each successive rainstorm caused an excavation dangerous to those using it. Had the defendant constructed the road originally or later repaired it by erecting a retaining wall, or with the use of cement, washouts would not have occurred. After the accident to the plaintiff, the road was repaired by the use of cement, and thereafter the washouts discontinued.

The Board of Freeholders had notice of this condition for at least a month prior to the accident, through personal notice given to the Director of the Board, Mr. Anthony J. Gebhardt, and during that month he was informed of it three times. The particular hole into which the plaintiff's automobile fell had been there for a week, of which the Director of the Board had also received notice. This amounted to active wrongdoing within the meaning of the case of *Hart vs. Freeholders*. In the *Hart* case the Board of Freeholders caused the excavation to be made. In the case at bar the Board of Freeholders repaired the road in such a manner that the next rain storm would cause an excavation in the road, and with full knowledge, based upon actual experience that the excavation would result. What distinction can be drawn between the act of the defendant corporation which caused an excavation to be made, and that of a defendant corporation which caused a condition to exist with full knowledge that it would result in an excavation being made by the next rain storm?

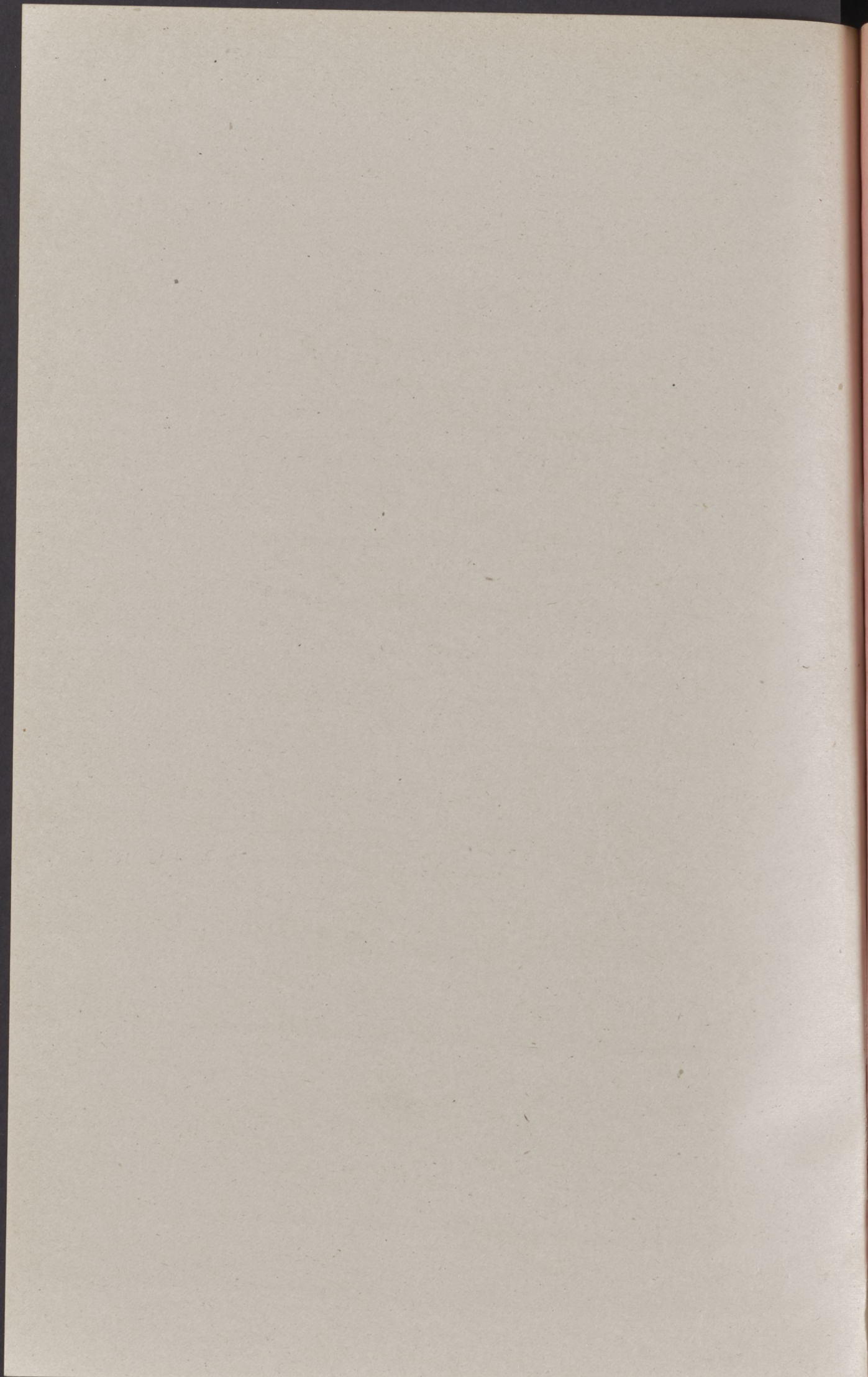
In the *Kehoe* case the defendant corporation so constructed a culvert that surface water was diverted and discharged upon the plaintiff's lands. In the case at bar, the defendant corporation so repaired the public road that to their knowledge an excavation in it would be caused by the next

rain storm, which in fact did occur resulting in plaintiff's injury. What difference is there between so constructing a culvert that it is certain to and does in fact divert drainage water and discharge it upon plaintiff's land, and so repairing a public road that it is certain to, and does in fact become washed out, causing injury to plaintiff?

In both the *Hart* case and the *Kehoe* case the acts complained of were held to be active wrongdoing chargeable to the municipal corporation, and it is submitted that in the case at bar the conduct of the Board of Freeholders in repeatedly repairing the road in such a manner that washouts were certain to ensue, and with full knowledge, based upon experience of that certainty, compels the application of the same rule, and leads to a reversal of the judgment of non-suit.

Respectfully submitted,

EDMUND A. HAYES,
RUSSEL E. WATSON,
Attorneys of Plaintiff.



HAWAIIAN

HAMMILL