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New Jersey Court of Errors and Appeals.

EPHRAIM PRAY, Plaintiff in Error,

vs.

THE MAYOR AND COMMON COUNCIL OF JERSEY CITY,

Defendants in Error.

} Writ of Error to Supreme Court of New Jersey.

JACOB WEART, *Attorney for Plaintiff in Error.*

A. K. BROWN, *Attorney for Defendants in Error.*

This cause was brought in Supreme Court to recover the value of a horse injured by an obstruction in the street.

The cause was tried at the Hudson Circuit at the January term 1867, and a verdict rendered for the plaintiff for the sum of $370.75.

The Court reserving a question of law to be settled at the full bench of the Supreme Court.

The cause was argued in the Supreme Court, June Term, 1867, upon the case reserved.

The following is a state of the case, upon which the cause was argued in the Supreme Court. 10

NEW JERSEY SUPREME COURT.

EPHRAIM PRAY,

vs.

THE MAYOR AND COMMON COUNCIL OF JERSEY CITY.

} In trespass on the case.

STATE OF THE CASE.

The Mayor and Common Council of Jersey City passed a resolution authorizing the construction of a sewer in South Third street, Jersey City, which resolution was approved by the Mayor, July 12th, 1857.

This resolution authorized and directed the board of water commissioner to construct said sewer.

By the city charter and the water act, the Mayor and Common Council authorize the sewers to be built, and the water commissioners do the work.

Under this resolution the South Third street sewer was constructed.

The street was graded, filled, and paved to about 100 feet west of Jersey Avenue, and from that point to the western boundary of the city the street had not been filled and raised up to the established grade.

In the construction of the sewers openings are left which are called man holes, to allow men to go down into the sewers to cleanse them ; these man holes are raised up to the level of the street and coped with granite stone, the same being about three feet square.

When the sewer passed the graded and paved portion of the street the man holes were kept up to the established grade of the street, so that the man hole, about midway between Jersey avenue and Coles street, was about one foot above the level of the street, some of the witnesses put it at eight inches, and one at eighteen inches, as the street was then cut up, the same being very rutty and muddy.

Near this man hole stood an engine house, and the hose had been stretched upon the side walk for a considerable

distance to dry, and just as the team of horses of Mr. Pray was approaching the man hole, in April, 1866, one of the firemen came out of the hose house and gave the hose a pull which frightened the horse nearest to the curb, and in starting up threw the horse adjoining the man hole against it, whereby the horse was injured, from which injuries the horse became worthless and was killed.

The counsel of the defendants contended that the water commissioners were the authors of the nuisance.

And second, that no action would lie against the city for an injury of this character.

The Court charged the jury that the Mayor and Common Council of Jersey City had the control of the streets of the city, and upon them involves the duty of removing all obstructions and nuisances, and that in the construction of the sewer the water commissioners were the agents of the Common Council.

The Court further charged the jury, that the Mayor and Common Council had the entire control of the streets of Jersey City, that they were bound to remove all obstructions in the same, and keep the streets so that they were safe and secure for the passage of the citizens, on foot and in wagons; and if the Common Council allowed an obstruction to remain in the street, which caused injury to a person using ordinary care and diligence in passing along the street, the corporation was liable in damages to the persons sustaining the injury.

The Court reserved two questions to be submitted to the Court, as follows, to wit:

1. Is the Mayor and Common Council liable in this action, or the water commissioners, or either of them?

2. If the liability belongs to the Mayor and Common Council can an individual bring an action against a municipal corporation in this State to recover damages for injuries received from obstructions or want of repair in the street? The verdict was for the plaintiff.

JACOB WEART,
Attorney for Plaintiff.

RICHARD D. MCCLELLAND,
Attorney for Defendants.

At the February term, A. D. 1868, of the Supreme Court, the cause was decided, and the Supreme Court ordered that the verdict be set aside, and that the plaintiff be nonsuited.

On the return of the writ of error in the Court of Errors the plaintiff in error assigned errors as follows, viz :

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and
THE MAYOR AND COMMON COUNCIL OF JERSEY CITY,
Defendants in Error.
} In Error.

Afterwards, to wit, at the term of June, in the year eighten hundred and sixty-eight, before the Judges of the Court of Errors and Appeals at Trenton, comes the above named plaintiff in Error, by Jacob Weart his attorney, and says, that in the record and proceedings aforesaid, there is manifest error in this, to wit :

1st. Because the Court below unlawfully decided that an action would not lie against a municipal corporation, to recover damages for negligence in not removing a nuisance erected by them in a public street or highway, in performance of work authorized to be done by the charter, whereby by means of such nuisance the plaintiff in error sustained the injuries complained of.

2d. Because the Court below unlawfully decided that no action would lie against a municipal corporation for injuries sustained, for want of repairs or failure to remove obstructions placed in a street or public highway.

3d. Because the Court below unlawfully decided to set aside the verdict of the jury, rendered in this cause, when they ought to have maintained said verdict.

And the said plaintiff in error prays that the judgment of the Supreme Court, for the errors aforesaid and for other errors in said record being, may be reconsidered, annulled, and altogether holden for nought, and that he may be restored to all things that he has lost by reason of said judgment.

JACOB WEART,
Attorney for Plaintiff in Error.

COMMON JOINDER IN ERRORS.

The following is the opinion of the Supreme Court setting aside the verdict and nonsuiting the plaintiff.

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BEASLEY—*Chief Justice.*

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 skilfully 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 intrusted 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 Appeals, Vol 1, p. 93. "A reference to this decision in which the train of cases on the subject are carefully collated and criticised, 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 of *prima 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.

In the year 1840 the case of the Freeholders of Sussex *vs.* Strader, reported in 3 Harr. 108, was decided, and the principle adopted as one of the grounds of adjudication was that an action would not lie at the instance of an individual having suffered a special damage from the neglect of a corporate body in the performance of a public duty. It is an utter misapprehension of the standing of the case to suppose, as was done on the argument before us, that the conclusion of the Court rested on the Statutes of the State relating to bridges. The language used by the Chief Justice, and by Mr. Justice Dayton, who each delivered an opinion, is so clear that the views entertained by the Court, and the legal groundwork on which the result was put, cannot be deemed to be left in the least uncertainty. The case then before the Court was not regarded in any respect as of an exceptional character, but was treated and decided as one of a class, regulated and controlled by a rule of law, having a wide scope and embracing every instance within the reason of such rule.

"The principle," says the Chief Justice, "I take to be this, that when a corporate body, whether of a 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 owe a duty to the *public* and neglect to perform it, although every individual comprising that public is thereby injured, some more, some less, yet they can have no *private* remedy at the common law."

Such was one of the main grounds of decision in the case reported, a ground which in principle obviously rules the case now before this Court. The rule of law thus promulgated nearly thirty years ago, has never, so far as I am aware, been disturbed by any hint of a doubt as to its propriety from the bench; it has often at the Circuits received a practical application, and it has on several occasions been recognized as a part of the legal system of the State by this Court. In Cooley *vs.* Freeholders of Essex, 3 Dutch, 415, under circumstances apparently identical with those of the original case, the same doctrine was applied by this Court; and in Collabeen *vs.* Township of Morris, 1 Vroom, 161, in defining the obligation of the townships with regard to the repair of highways, Chief Justice Whelpley remarks, "The Common law casts upon the township the burthen of making and repairing its public highways as it does upon the county that of making and repairing bridges. But the township is not liable civilly for a neglect of the duty to any body sustaining especial injury thereby; nor is a county in a like case, for injury arising for non repair of bridges. The duties are owing to the public not individuals, and their performance is enforced by indictment, not suit by individuals."

But the most authoritative sanction of the doctrine is to be found in the case of Livermore *vs.* Board of Freeholders of the County of Camden, 5 Dutcher, 245. The suit was for a special damage caused by the neglect to repair a bridge. In the Supreme Court the decision, which was against the liability of the defendants, went on the comprehensive theory that a public body was not amenable civilly in consequence of a neglect of duty. This case was afterwards in the term of June, 1864, affirmed and placed on a similar foundation in the Court of Errors, 2 Vroom, 508: "That an action will not lie," says the opinion which was read on this last occasion, "in behalf of an individual who has sustained special

damage from the neglect of a public corporation to perform a public duty I consider the settled law of this state. This was the doctrine laid down by the Supreme Court of this State after much research and a careful consideration of the authorities in the case of the Board of 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 opinions, in my judgment, rest upon the solid foundations of ancient precedent and public policy."

From this review of the decisions it is quite impossible to avoid the conclusion that the adjudication in Strader *vs.* the Freeholders of Sussex, not only decided that case but acknowledged and established an important rule of law, which is, that the neglects of agents of the public in the discharge of their legitimate functions cannot constitute the basis of an action in behalf of an individual who has sustained a particular damage. Such neglects are public offences and must be remedied by indictments.

The plaintiff's case being within the regulation of this principle he should have been nonsuited on the trial, and the Circuit Court should be so advised.