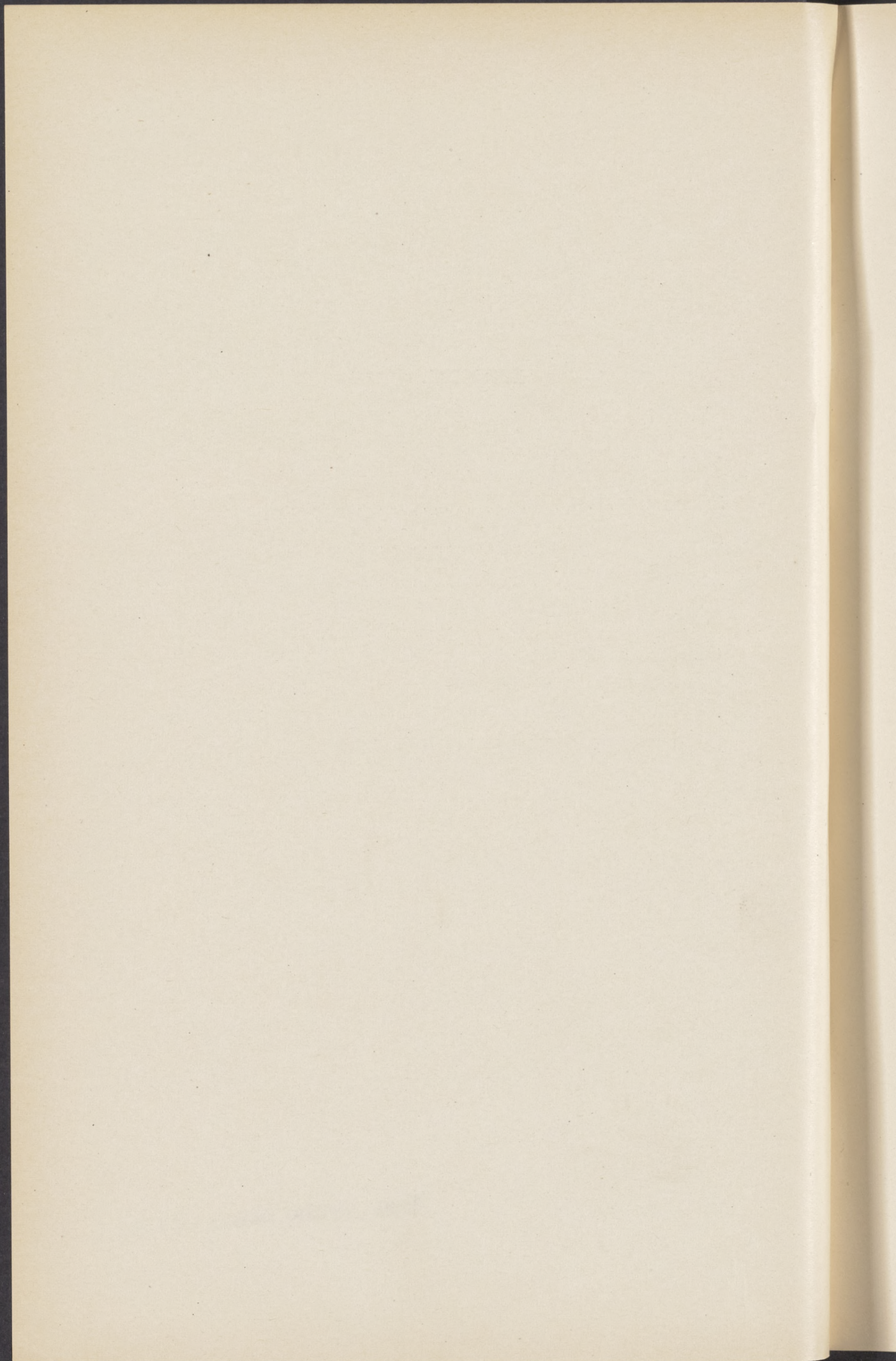


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Notice of Appeal.

10

(Filed, January 2, 1919).

New Jersey Supreme Court

BERGEN COUNTY.

ROBERT L. STEPHENS, as Admin-
istrator ad prosequendum of
Mabel Frost Stephens, de-
ceased,

Plaintiff-Appellant,
against

COMMISSIONERS OF THE PALIS-
ADES INTERSTATE PARK (a
body politic),

Defendant-Respondent.

20

Notice of
Appeal to
Court of
Errors and
Appeals.

30

To Honorable JOHN W. WESCOTT, Attorney General
of the State of New Jersey, Attorney for De-
fendant-Respondent.

Sir:

PLEASE TAKE NOTICE, that the plaintiff-
appellant appeals to the Court of Errors and

40

Notice of Appeal.

Appeals in the last resort in all cases in New Jersey on the whole of the judgment entered in this cause on the following grounds:

FIRST.—The Court erred in granting the defendant judgment upon the pleadings.

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SECOND.—The Court erred in holding that the defendant is not liable under the pleadings and granting judgment for the defendant under Rule 40 of the Supreme Court.

THIRD.—The Court erred in holding the defendant to be a public corporation immune from liability for negligence.

20

FRANK R. PENTLARGE,
Attorney for Plaintiff-Appellant,
55 Liberty Street,
New York City, and
58 Union Street,
Montclair, N. J.

30

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Summons.

(Issued October 31, 1917, Filed January 2, 1918).

STATE OF NEW JERSEY, to COMMISSIONERS OF THE PALISADES INTERSTATE PARK (a body politic):	}	10
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You and each of you are summoned to answer the annexed complaint of Robert L. Stephens, as Administrator ad prosequendum of Mabel Frost Stephens, deceased, in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton within twenty days after service upon you of this Writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 20

WITNESS, W. S. Gummere, Chief Justice Supreme Court at Trenton, this thirty-first day of October, 1917. 30

WM. C. GEBHARDT,
Clerk.

(Seal)

FRANK R. PENTLARGE,
Plaintiff's Attorney,
67 Union Street,
Montclair, N. J., and
55 Liberty Street,
New York City, N. Y. 40

Complaint.

(Filed, January 2, 1918.)

SUPREME COURT OF NEW JERSEY,

BERGEN COUNTY.

10

ROBERT L. STEPHENS, as Admin-
istrator ad prosequendum of
Mabel Frost Stephens, de-
ceased,

Plaintiff,

against

20

COMMISSIONERS OF THE PALIS-
ADES INTERSTATE PARK (a
body politic),

Defendant.

The plaintiff, Robert L. Stephens, as Adminis-
trator ad prosequendum of Mabel Frost Stephens,
deceased, residing at 127 Oak Grove Avenue, Bor-
ough of Hasbrouck Heights in the County of
Bergen, State of New Jersey, says that:

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1. The defendant now is and was at all times
herein mentioned a body politic duly created by
virtue of a special statute of the State of New
Jersey (Chapter 87 of the Laws of 1900) known
and sued as such body politic under the name
of "Commissioners of the Palisades Interstate
Park," as is more fully set forth in said act, refer-
ence to which is hereby made.

40

2. By virtue of said act and the statutes of the State of New Jersey, supplementary and amendatory thereto, reference to which is hereby made and as is more fully set forth therein, the said defendant now is and was at all times mentioned herein empowered to, and actually did, acquire, hold, own, possess, control and maintain and make available for use as a public park lands in the State of New Jersey along the Hudson River, and the Palisades immediately contiguous thereto from Fort Lee in the County of Bergen, State of New Jersey, northerly to the State line between the States of New Jersey and New York. 10

3. By virtue of said act and statutes amendatory and supplemental thereto, reference to which is hereby made, the defendant at all times herein mentioned was charged with the duty to preserve, care for, lay out and improve the said park and to make rules for the use and government of the same. 20

4. By virtue of said act and statutes amendatory and supplemental thereto, reference to which is hereby made, the defendant at all times herein mentioned was empowered to lay out, construct and maintain roads, highways, pathways and boulevards upon, across and over the said park and connecting said roads and ways in said park with other roads outside of and adjacent thereto. 30

5. Prior to the time of the accident hereinafter more fully set forth and alleged, the defendant built, erected and maintained a road or highway, in the Borough of Englewood, County of Bergen and State of New Jersey, leading from the ferry terminal in the said Borough of Englewood, County 40

of Bergen and State of New Jersey from the ferry operating on the Hudson River between the New York and New Jersey shores and generally and commonly known as the "Dyckman Street Ferry" in a general westerly direction into, over and upon the park owned, maintained, operated and controlled by the defendant as aforesaid.

6. At a point on or at the side of said highway or road mentioned in Paragraph "5" herein not far distant from the said ferry terminal aforesaid as the same ascends the Palisades from the said ferry terminal and on the left hand side of said roadway as one ascends the same, the defendant erected, built and maintained a stone retaining wall, which said retaining wall and said roadway at all times herein mentioned were owned, and under the control, care and management of the defendant herein, and were located in the said Palisades Interstate Park before mentioned.

7. The defendant herein prior to the accident, hereinafter more particularly set forth, erected, maintained and controlled a pathway in the said park aforesaid, running from a point near the top of the said Palisades parallel with the aforesaid highway described in paragraph "5" herein, and running over and upon the aforesaid stone retaining wall heretofore described, and likewise built, maintained and controlled a pathway in the said park aforesaid running from a point near the top of the said Palisades to a point upon the aforesaid pathway running on top of the said retaining wall, said intersection being at a point on top of said retaining wall where the same was twenty feet more or less from the roadway heretofore described at the base thereof.

Complaint.

8. The defendant failed to maintain any guard rail or any other protection for pedestrians along said pathway at the top of said retaining wall, and particularly failed to maintain any protection against pedestrians falling off the edge of said pathway over said retaining wall to the roadway at the base thereof at the point where the aforesaid two pathways joined. 10

9. All of the roads and paths heretofore described were erected, maintained and controlled by the defendant for the use of the general public. On or about the 5th day of June, 1917, plaintiff's intestate, while walking along the aforesaid paths erected, maintained and under the control of the defendant, at or near the point where said two paths met and joined, stumbled and fell on said pathway and fell and rolled over the top of the aforesaid stone retaining wall to the said roadway below. 20

10. By reason of said fall and the injuries sustained by plaintiff's intestate therefrom she suffered hurts and sustained injuries whereof she, on said day, died.

11. The accident to plaintiff's intestate as heretofore set forth was entirely without her fault and was due to the dangerous and defective condition of the aforesaid pathways maintained by and under the control of the defendant and upon which plaintiff's intestate was walking at the time of the said accident and the defendant's carelessness and negligence in maintaining the said pathways without having any fence, guard or other protection at the point where the said pathways came out upon the said stone wall and defendant's negligence and 30
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Complaint.

carelessness in maintaining said stone wall without any fence or other protection for pedestrians thereon, whereby it was possible and likely that persons might step and roll off the same and defendant's negligence in failing to properly guard against injuries to pedestrians on said pathways by means of adequate rules and regulations and adequate warnings as to the dangerous condition of said pathways.

12. That at the time of the said accident the defendant was well aware of the dangerous and defective condition arising by reason of the maintenance of the said pathways upon said wall without any fence or other protection for pedestrians thereon. The plaintiff's intestate was at the time of said accident and her death as aforesaid of the age of fifteen years, having been born on the 18th day of November, 1901, and left her surviving no husband and as next of kin her father, the plaintiff herein, Robert L. Stephens and her mother, Mabel L. Stephens, who have suffered pecuniary injuries because of the death of said plaintiff's intestate to the extent of Twenty-five Thousand Dollars (\$25,000).

13. Plaintiff is the administrator ad prosequendum of the estate of the said Mabel Frost Stephens, letters of administration ad prosequendum having been duly issued to him by the Surrogate of the County of Bergen on the 23rd day of August, 1917, to prosecute this action, which letters he now brings into court.

14. Plaintiff's action against the defendant was commenced within 24 calendar months from the date of the decease of the said Mabel Frost Stephens.

Answer.

The plaintiff demands judgment for the sum of Twenty-five Thousand Dollars (\$25,000) and costs of suit.

FRANK R. PENTLARGE,
 Attorney for Plaintiff,
 67 Union Street,
 Montclair, N. J., 10
 and 55 Liberty Street,
 New York City, New York.

Answer.

(Filed, March 2, 1918.)

NEW JERSEY SUPREME COURT, 20

BERGEN COUNTY.

ROBERT L. STEPHENS, as Admin-
 istrator ad prosequendum of
 Mabel Frost Stephens, de-
 ceased,

Plaintiff,

vs.

COMMISSIONERS OF THE PALIS-
 ADES INTERSTATE PARK,
 Defendant.

30

The defendant, a body politic and corporate of the State of New Jersey, which has been sued in this action by Robert L. Stephens, as administrator ad prosequendum of Mabel Frost Stephens, deceased, answering, says that:

40

1. It admits the first paragraph.
2. It admits the second paragraph.
3. It admits the third paragraph.
- 10 4. It admits the fourth paragraph.
5. It admits the fifth paragraph.
6. It admits the sixth paragraph.
7. It admits the portion of paragraph seven which reads as follows:

20 "That the defendant herein prior to the accident hereinafter more particularly set forth erected, maintained and controlled a pathway in said park, aforesaid, running from a point near the top of the said palisades parallel with the aforesaid highway described in paragraph five herein."

but denies the balance of said paragraph.

8. It admits the eighth paragraph, except the part thereof which refers to the point where the
- 30 aforesaid two pathways join, and denies that any pathways join the said pathway paralleling said road at or near the point where the accident mentioned in said complaint occurred.

9. As to the statements contained in the ninth paragraph, the defendant has not any knowledge or information thereof sufficient to form a belief, except that it admits that the road and pathway paralleling said road were maintained for the use

of the general public. It denies that the other alleged path mentioned in paragraph seven of said complaint was in fact a path or was erected, laid out or maintained by it.

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

11. It denies the eleventh paragraph.

12. It denies the twelfth paragraph except the statements therein contained concerning the age of plaintiff's intestate, and the fact that she left no husband, and as next of kin, her father, concerning which statements defendant has not any knowledge or information thereof sufficient to form a belief. 20

13. As to the statements contained in the thirteenth paragraph, defendant has not any knowledge or information thereof sufficient to form a belief.

14. As to the statements contained in the fourteenth paragraph, defendant has not any knowledge or information thereof sufficient to form a belief. 30

FIRST DEFENSE.

1. Defendant says that it was created by an act of the legislature entitled. "An act to provide for the selection, location, appropriation and management of certain lands among the palisades of the Hudson River for an interstate park, and thereby to preserve the scenery of the palisades," ap- 40

proved March twenty-second, one thousand nine hundred.

10 2. That by the terms of the act above mentioned, it became the duty of the defendant to acquire lands lying between the top or steep edge of the palisades or the crest of the slope in places where the steep palisade rocks are absent and the base of the steep rocks of the palisades, together with such lands as may lie between said base and the high water line of the Hudson River;

20 3. That the contour and physical features of said park are necessarily of such a character that many portions thereof cannot be used and traversed by the public with safety; that defendant, in order to make the park safe for the public, at great expense, built and maintained paths, which paths were so constructed and maintained that they could be conveniently and safely traversed by the public;

30 4. That the plaintiff's intestate on the day named in said complaint, carelessly and negligently, and of her own free will and accord, turned off of said safe path, which had been built and maintained by the defendant, as aforesaid, and followed a precipitous course, marked by footsteps of persons using the same without the invitation or permission of the defendant, which course was without any marks to indicate to the public that it was a pathway for public use, and which was obviously dangerous and unfit for use by pedestrians, and proceeded down said course in a negligent and careless manner, at a greater speed than was safe, and without using the care and caution which the

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character of the course obviously required for the safe passage thereof, and without looking in the direction in which she was going, and lost her foothold, stumbled and fell, and rolled over the stone wall at the foot of said course, and was thereby injured.

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SECOND DEFENSE.

1. Defendant says that the injury and death of plaintiff's intestate, mentioned in said complaint, was due to the contributory negligence of the plaintiff's intestate, in that plaintiff's intestate carelessly and negligently, and of her own free will and accord, turned off of the safe path provided by the defendant for the use of the public on to a precipitous course, marked by footsteps of persons using the same without the invitation or permission of the defendant, which course was without the invitation or permission of the defendant, which course was without any marks to indicate to the public that it was a pathway for public use, and which was obviously dangerous and unfit for use by pedestrians;

20

2. And in that said plaintiff's intestate negligently and carelessly proceeded down said course at a greater speed than was safe and without using the care and caution which the character of the course obviously required for the safe passage thereof, and in that plaintiff's intestate failed to look in the direction in which she was going, and, because of the careless and negligent manner in which she proceeded down said course, she came upon the cinder path of the defendant in such a manner and with such momentum that she was

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unable to control and check her course, and thereby fell and received the injuries complained of.

NOTICE TO DEFENDANT.

10 TAKE NOTICE that at the trial of said cause the defendant will move to strike out said complaint upon the following grounds:

1. That said complaint fails to state a cause of action against the defendant.

20 2. That the defendant is a public board and an arm of the government of the State, charged with the performance of a public duty in the maintenance of said park, and is not liable in damages for injuries to persons using said park for their amusement and recreation, whether or not such injuries may result from any dangerous conditions which may exist in said park.

30 3. That the defendant is an arm and instrumentality of the State government, and the moneys and property of the defendant are the moneys and property of the State; that it is not liable to be sued on account of any injuries resulting to persons using the park maintained by the defendants.

JOHN W. WESTCOTT,
Attorney General of the
State of New Jersey,
Attorney for Defendant.

Reply.

(Filed, April 10, 1918.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

<p>ROBERT L. STEPHENS, as Administrator ad prosequendum of Mabel Frost Stephens, deceased,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>COMMISSIONERS OF THE PALISADES INTERSTATE PARK (a body politic),</p> <p style="text-align: right;">Defendant.</p>	<p style="font-size: 4em;">}</p>	<p>10</p> <p>20</p>
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To the first defense in the answer herein, the plaintiff alleges:

(1) He admits the allegations set forth in paragraph "1" and "2" of the first defense.

(2) He denies any knowledge or information sufficient to form a belief as to the allegations set forth in paragraph "3" of the first defense.

(3) He denies each and every allegation set forth in paragraph "4" of the first defense, except that he admits that plaintiff's intestate "stumbled and fell and rolled over the stone wall at the foot of said course and was thereby injured."

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Replying to the second defense in the answer herein the plaintiff alleges:

(1) He denies each and every allegation set forth in paragraph "1" of the second defense in said answer.

10

(2) He denies each and every allegation set forth in paragraph "2" of the second defense of the said answer, except that he admits that plaintiff's intestate fell and received injuries.

FRANK R. PENTLARGE,
Attorney for Plaintiff,
55 Liberty Street,
New York, N. Y.

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**Opinion of Parker, J., on Motion for
Determination of Question of Law
Under Rule 40, Supreme Court.**

(Filed, September 17, 1918.)

NEW JERSEY SUPREME COURT.

ROBERT L. STEPHENS, Admr. ad
pros., &c.

VS.

COMMISSIONERS OF THE PALIS-
ADES INTERSTATE PARK, a cor-
poration.

10

On motion for determination of question of law be-
fore trial, pursuant to Rule 40 of the Supreme
Court.

20

Before, PARKER, J., at Chambers.

For the plaintiff, FRANK R. PENTLARGE.

For the Defendants, HERBERT BOGGS, Assistant At-
torney General.

Memorandum by Parker, J.:

30

The action is for negligence. As I recollect the
complaint which at this writing is not before me,
plaintiff's intestate is claimed to have sustained fa-
tal injuries by reason of the defective condition of
a pathway in the Palisades Interstate Park, under
the control of the defendant corporation, and plain-
tiff alleges that such condition was due to defend-
ant's negligence. The answer set up among other
things that conceding this, no legal liability there-

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for rested on the defendant: and as this goes to the root of the case, the matter is properly brought up for determination in advancing trial, pursuant to Rule 40. At the argument I expressed the tentative view that the point was well taken; and a careful reading of plaintiff's brief since received fails
10 to impress me to the contrary.

The Palisades Park Commission, created by the act of 1900, page 163, C. S. 3890, is a state agency charged with a public duty, to wit, the acquisition and development and improvement of land for a great public park along the Palisades in the States of New Jersey and New York. It performs no private functions: the commissioners are not even compensated. It may be likened to the corporations called the "State Home for Girls" (C. S. 4888).
20 "The State Home for Boys" (Id. 4880) and the "State Reformatory for Women" (Id. 4931) all these are incorporated. The State Reformatory commissioners on a hasty glance at the act (C. S. 4929) seem to be unincorporated. But all are public bodies charged with public duties by direct mandate of the state, and never, so far as I know, has any been held liable for negligence.

The present defendant, is, I think, undeniably within the same class, and plainly within the rule
30 laid down in *Strader vs. Freeholders*, 18 N. J. L., 108 and vigorously adhered to in all later decisions, that a public agency charged with a public duty is not liable to an individual member of the public for negligence in the performance of that duty. It is true that most of the decisions relate to municipal corporations; *Bisbing vs. Asbury Park*, 80 N. J. L., 416 and cases cited; but that in my judgment is incidental, and because as state agencies they are
40 within the broader rule.

A glance at the act under which defendant operates will show the essentially public character of the corporation and its duties and in the construction and maintenance of the roads and paths through this public park, the commission as the states agent should no more be liable for mere negligence than overseers of roads at the common law, or a municipal corporation or board of freeholders in the absence of a statute imposing liability. The later acts of 1909, page 177 and 1910, page 208, in no way alter the situation. Nor does the fact that the rights reserved of access across the park to lands on the water front. This is a mere incidental limitation of the full public use. 10

It is urged that the express power to sue and be sued indicates an intent to subject defendant to liability in damage suits. But this same point was considered and overruled in the *Stradée* case. 20

I conclude therefore, that the defendant is not liable in this action; and under the rule cited, judgment should go for the defendant. Rule may be entered accordingly.

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**Final Judgment Upon Motion for De-
termination of Questions of Law
Under Rule 40, Supreme Court.**

(Filed, October 17, 1918.)

NEW JERSEY SUPREME COURT.

10

ROBERT L. STEPHENS, as Admin-
istrator, etc., of Mabel Frost
Stephens, deceased

vs.

COMMISSIONERS OF THE PALIS-
SADES INTERSTATE PARK.

20

Action at Law. Judgm't Final.
Judgment for Defendant.

JOHN W. WESCOTT,
Attorney General, Atty.

Judgment entered this seventeenth day of
October, A. D. nineteen hundred and eighteen
without costs in favor of the defendant and
against the plaintiff.

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No costs.

WM. S. GUMMERE,
C. J.

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New Jersey Court of Errors and Appeals

ROBERT L. STEPHENS, as Administrator ad. prosequendum of MABEL FROST STEPHENS, deceased,

Plaintiff-Appellant,
against

COMMISSIONERS OF THE PALISADES INTERSTATE PARK (a body politic),

Defendant-Appellee.

ACTION AT LAW

Appeal from final judgment upon motion for determination of questions of law under Rule 40, Supreme Court.

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POINT UPON WHAT THE APPELLANT RELIES FOR A REVERSAL OF THE JUDGMENT APPEALED FROM.

THE COURT BELOW ERRED IN GRANTING JUDGMENT TO THE DEFENDANT ON THE PLEADINGS, HOLDING THE DEFENDANT TO BE A PUBLIC CORPORATION IMMUNE FROM LIABILITY FOR NEGLIGENCE.

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Preliminary Statement.

This action is for the wrongful death of the plaintiff's intestate, resulting from the defendant's alleged negligence in the operation and control of

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the recreation park, known as the "Palisades Interstate Park."

In its answer to the complaint, the defendant gave notice that it would move for a dismissal of the complaint on the following grounds:

10 "FIRST.—That said complaint fails to state a cause of action against the defendant.

10 SECOND.—That the defendant is a public board and an arm of the government of the State, charged with the performance of a public duty in the maintenance of said park and is not liable in damages for injuries to persons suing said Park for their amusement and recreation, whether or not such injuries may result from any dangerous conditions which may exist in said park.

20 THIRD.—That the defendant is an arm and instrumentality of the State Government and the moneys and the property of the State; that it is not liable to be sued on account of any injuries resulting to the persons suing the Park maintained by the defendant."

In short, the defendant urges that irrespective of its fault it is excused from liability as being in point of law a portion of the sovereign power of the State and as such not amenable to suit.

30

POINT I.

The commissioners of the Palisades Interstate Park is not endowed with sovereignty, and hence amenable to suit like any other corporation.

In order to arrive at the status of the defendant, recourse to the Statutes bringing it into existence is most important.

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By Act of the Legislature in 1900 (P. L. 1900, page 163), the Governor of the State was authorized to appoint a Commission of ten persons, five of whom should be citizens of New Jersey, to be known as "Commissioners of the Palisades Interstate Park." By the same Statute, corporate powers are given to the Board of Commissioners, including the "power to sue and be sued;" to have a corporate seal and to make and adopt by-laws to regulate its proceedings (Vidi, Sec. 2, P. L. 1900, page 163).

10

The power is likewise given to condemn land for park purposes and to accept gifts of park lands and funds. "*Deeds to be made to said Board of Commissioners by its corporate name.*" (Vidi, Sec. 5, P. L. 1900, page 163.)

The statute further protects the rights of quasi public corporations to maintain and acquire by eminent domain access over and through the park lands "as though the said park lands were held by private individuals."

20

By amendments in 1909, P. L., 1909, page 177 and 1910, P. L., 1910, page 208, provisions were made for State contributions. The preamble of these amendments are both instructive and illuminating. They clearly indicate that the commission was created, not so much as a State movement, but as a national enterprise for the preservation of the beauties of the Hudson River, and that contributions had been made in large sums by persons from New York, New Jersey, Pennsylvania and elsewhere. The proportion of the total contributions from the State of New Jersey ^{as} ~~and~~ shown by the amendments was less than nine per cent. of the actual cash contributed to this patriotic enterprise and this proportion would be much less were the gifts of land by Mary W. Harriman considered at

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their cash value. In short, it is plainly apparent that the legislature in order to assist in a worthy movement intended to clothe those interested therein with greater powers than they otherwise could have as individuals and hence followed the usual plan so generally used in granting special charters to individuals, hospitals, etc., and created a Board of Commissioners with certain powers set forth in the Act itself, but safeguarding the public at large and the various quasi public corporations, in order that no injustice would be worked.

It is to be noted that the Commissioners were given full powers of prescribing their own rules and regulations and no visitorial powers were given the State. Property was to be taken in its own name as Trustee for the purposes of its creation, and it is most significant that the power of eminent domain was restricted so that the corporation could not exclude public utility corporations from crossing the Park. It seems most incompatible that "An arm of the State" could exist without this latter perquisite of sovereignty.

As a contrast to the provisions of the act under which the "Commissioners of the Palisades Interstate Park" came into existence as a body corporate, attention is called to the acts creating the *Washington Crossing Park Commission, P. L., 1912, P., 59* and the *Fort Nonsense Park Commission, P. L., 1913, page 435*.

If the defendant has the attributes of a sovereign power it must enjoy such as a "public corporation," but it is impossible to recognize in the defendant or the act creating it those qualities indicative of a public corporation.

A. THE ACT CREATING THE DEFENDANT FAILS TO SPECIFICALLY GIVE IT THE ATTRIBUTES OF A PUBLIC CORPORATION BROUGHT INTO EXISTENCE AS AN ARM OF THE STATE.

At the very outset we find that we are led into conjectures as to the character of the defendant.

10

The act does not define the status of the defendant. It gives it broad powers;—power to sue and be sued; to receive vast sums from private individuals, expend the same according to its discretion (within its corporate purpose); to act as trustees for gifts and expend the same in accordance with the deed of gift. Yet withal the act is silent as to the grant of sovereignty. Are the Courts to presume sovereignty.

Have we not before us a situation similar to the Dartmouth College case where the attempt to call a private corporation a public one was frustrated by the logic of Chief Justice Marshall.

20

“It is a well settled rule that statutes in derogation of common law rights are to be strictly construed and we are not to infer that the legislature intended to alter the common law otherwise than is clearly expressed.”

Sinnickson vs. Johnson, 17 N. J. L. (11 Harrison), 129.

30

The phrase used in the act “A body politic” is of no significance as it has long been used to designate *any* artificial body.

(See “*Words & Phrases*,” and *Wheeler and Wilson vs. Coaty*, 53 N. J. L. (24 Vroom, 336.)

40

B. A PUBLIC CORPORATION IS AN AGENCY OF THE GOVERNMENT CREATED FOR PUBLIC PURPOSES WITH POLITICAL POWERS AND SUBJECT TO THE CONTROL OF THE LEGISLATURE AND ITS MEMBERS —ATTRIBUTES NOT BELONGING TO THE DEFENDANT.

10

“A public corporation is one that is created for political purposes with political powers to be exercised for purposes connected with the public good in the *administration of Civil Government*; an instrument of the government subject to the control of the Legislature and its members.”

University of Maryland vs. Williams, 22 Md. Rep., 232 (9 G. & J., 365).

20

“It (a Public Corporation), is an investment of political power in a sub-division and includes Counties, Townships and School Districts.”

Smith vs. School Trustees, 141 N. C., 143.

30

1. The mere fact that the object of incorporation is to benefit the public does not change the status of the corporation and make it a public one.

“A corporation may be private and yet the act or charter of incorporation contain provisions of a purely public character introduced solely for the public good and as general police regulations of the State; such as the Stat. 14th and 15th, Henry the Eighth, Ch. 5, creating the College of Physicians and Surgeons of London” (Gilbert’s Evid., 13th).

40

University of Maryland vs. Williams, 22
Md. Rep., 232 (9 G. & J., 355).

“To hold a corporation to be public because
the charity was public would be to confound
the popular policy with the strictly legal sense
of terms and to jar with the whole current of
decisions from the time of Lord Coke.” 10

University of Maryland vs. Williams, 22
Md. Rep., 232 (9 G. & J., 365).

“A corporation may be private and yet the
charter contain provisions of a purely public
character introduced solely for the public
good, and as a general police regulation of the
State.” 20

Waterman on Corporations, Sec. 17.

2. The lack of visitorial powers over the affairs
of the corporation is an indicia of its not being a
public corporation.

“Public corporations are to be governed ac-
cording to the laws of the land; the Govern-
ment has the sole right as Trustee of the Pub-
lic interest to inspect, regulate, control and 30
direct the corporation, its funds and franchise,
that is the essence of a public corporation.”

University of Maryland vs. Williams, 22
Md. Rep., 232 (9 G. & J., 365).

POINT II.

Even assuming that the defendant is a public corporation the rule limiting the liability of a public corporation does not apply in the case at bar.

10 Mr. Justice Parker, sitting below, lays stress upon the doctrine enunciated in Board of Chosen Freeholders of Sussex County vs. Strader (18 N. J. L., 108) and the later decisions of this State upholding the same. It is respectfully submitted that the Strader case and those cases adhering to the doctrine therein set forth are to be distinguished from the present one. A careful reading of the cases show that they practically all refer to situations wherein the power exercised by the defendant was one not voluntarily assumed, as in the case at bar, but imposed by law and custom—obligations of the State either attempted to be performed by it or else by practice from time immemorial delegated to political subdivisions. For example the governmental obligation of building and repairing roads and bridges; administering the affairs of a city; of caring for the indigent and criminal, in fact just such functions as are performed by “The State Home for Boys” and the several institutions mentioned in the opinion of Mr. Justice Parker upon the motion below. It is respectfully submitted that it is wholly against public policy to enlarge the doctrine of the Strader case so as to grant immunity to corporations which while created for the public benefit are however not public agencies, in that they do not perform duties which the sovereign has from the time of common law performed, “Duties” in this respect being equivalent to obligatory functions which the people have the right to *demand* of the

State. The Statutes creating the defendant corporation enabled private individuals to organize for a great public enterprise, but the corporation's purposes are not to perform absolute duties expected by the people to be performed by the State. The fact that it accomplishes great good in its public activities makes it no more a political subdivision of the State than is the Red Cross. The limitation of liability set forth in the Strader case should be confined to those cases where the defendant is held to the performance of a public duty, the non-performance of which would make it subject and solely subject, to indictment. 10

Maquity vs. Board of Freeholders, 72 N. J. L., 226;
Waters vs. Mayor, etc., 56 N. J. L., 301. 20

POINT III.

Irrespective of whether the statute creates a public or private corporation, the question of liability has been settled by the legislature under the very act creating the corporation.

A. THE STATUTE PROVIDES FOR SUIT. 30

The Statute in giving corporate powers to the defendant provides that "It may sue and be sued." The language is so plain that to argue further is to risk weakening the strength of the plaintiff's contention. It is to be noted, however, that the power authorizing suits stands alone, and is in nowise connected with the creation of the corporation to be known under a certain name and to 40

sue and be sued thereunder. There is a great distinction between providing that a corporation shall be known by such and such a name and may sue and be sued as such and providing, as does the act, for incorporation under a certain name, then giving certain powers to the corporation, *including the power to sue and to be sued.*

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B. TO PLACE ANY OTHER CONSTRUCTION ON THE WORDING OF THE STATUTE WOULD BE TO NULLIFY THE PLAIN INTENT OF THE LEGISLATURE.

Let us for a moment assume, first, that the corporation is a public one; second, that the Legislature HAD omitted the words "may sue and be sued." What would be the effect, so far as liability is concerned? Since previously in the act the corporation is created and has a corporate name given it, is there any doubt but that it could sue and be sued in any actions which a municipal corporation can sue and be sued. Certainly the Legislature intended something by adding to the corporate powers the right to sue and be sued and more than would have already existed if the words were not there. Before the Court can deprive an aggrieved person from the right of redress in the Courts some plain statement of limitations must be discovered in the act other than the provision giving the power to "sue and be sued."

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CONCLUSION.

The judgment below should be reversed and the case remanded for trial.

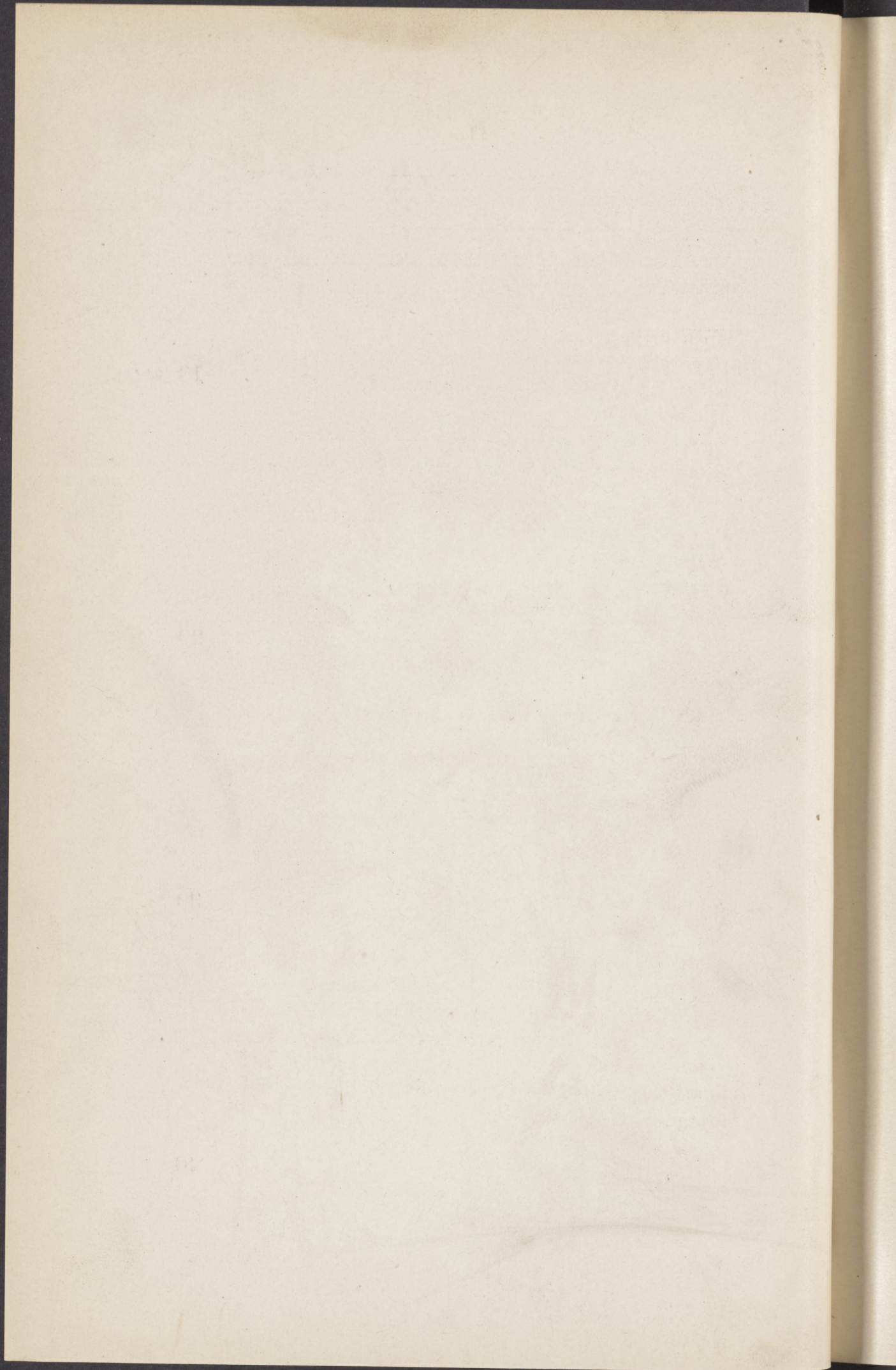
June 10, 1919.

Respectfully submitted, 10

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NEW JERSEY
Court of Errors and Appeals

ROBERT L. STEPHENS, AS ADMINISTRATOR
AD PROSEQUENDUM OF MABEL FROST
STEPHENS, DECEASED,
Plaintiff-Appellant,
vs.
COMMISSIONERS OF THE PALISADES INTER-
STATE PARK,
Defendant-Respondent.

Brief for Defendant-Respondent.

I.

THIS DEFENDANT IS A MERE AGENCY OF THE STATE OF NEW JERSEY ENGAGED IN CARRYING ON A PUBLIC WORK AND, THEREFORE, NOT LIABLE AS HERE CHARGED.

A reference to the statute (3 C. S. 3890) bringing this respondent into existence discloses that the express purpose of the Legislature was to provide for the selection, location, appropriation and management of certain lands along the palisades of the Hudson River for an interstate park, and thereby to preserve the scenery of the palisades.

At the outset it is contended that the establishment and maintenance of this park is a proper governmental function, whether we attribute the legislative action to a desire to perpetuate, for the benefit of the people of this State, the superb view of natural scenery with which this region abounds, or whether we account for it as one of the ways intended by the lawmakers to maintain the governmental duty of preserving the public health. Parks and other similar places where exercise and recreation can be indulged in and pure and clear air breathed, contribute largely to the health of the people, and, viewing the matter from this standpoint, this park occupies toward the people the same relation as do hospitals and other institutions useful and necessary in the preservation of the health, safety and morals of the people.

Treating, then, the establishment and maintenance of this park as an appropriate function of the State, it is submitted that in the promotion of this purpose the Legislature was at liberty to select any agent or agencies that it desired and whether the agency so selected be a corporation, a body of persons or a single person is immaterial.

As illustrating the manner in which the State carries out its various governmental activities, reference is made to the following:

State Home for Girls (*C. S.* 4888).

State Home for Boys (*C. S.* 4880).

N. J. Sanitorium for Tuberculous Diseases (*P. L.* 1902, *p.* 395).

State Reformatory for Women (*C. S.* 4933).

It is respectfully urged that there is nothing in the statute under consideration to indicate that the Legislature, in creating this respondent and in providing for the establishment and maintenance of this park, was impelled by any other motive but a desire to benefit the people of the State generally. There is nothing showing an intent to promote any private project. It may be true that public-spirited citizens urged the appro-

priateness of the State's action in this particular. It may be true that the State of New York took similar action with respect to lands located in that State and that there was, in a sense, co-operative action on the part of the Legislatures of the respective States, but these circumstances in no material way detract from the fact that in engaging in this work, the State of New Jersey was engaged in a work primarily to benefit its own people.

A perusal of the statute under consideration discloses that the Commissioners of the Palisades Interstate Park are appointed by the Executive of the State, with the consent of the Senate; that they are commissioned State officers, appointed for fixed terms and may, without doubt, be removed from office in the same manner as other public officers may be removed; that their duties are prescribed by the statute; that they must report to the Legislature; that they receive no compensation; that their expenditures are subject to the approval of the Governor and the Comptroller; that their records are subject to public inspection.

While it is true that the respondent is endowed with a corporate being, the purpose of the Legislature in this particular case, it is respectfully argued, can be accounted for on no other grounds than an effort to bring about a more convenient administration of the duties imposed upon them by law.

Subject to the possible reversionary right of donors in the property donated to the Commissioners, it would appear that the corporation is entirely subject to legislative control without any reference to the consent of the persons who make up the corporation.

This corporation did not originate in contract in the sense that it is within the doctrine laid down in *Dartmouth College v Woodward*, 4 *Wheat* (U. S.) 518.

This corporation has no stockholders, no membership even, and was not created for private profit, and this case can, therefore, be distinguished from *Ten Eyck v.*

Delaware and Raritan Canal Co., 18 N. J. L. 200, and *Sinnickson v. Johnsons*, 17 N. J. L. 129.

It is true that the Commissioners are empowered to receive gifts and to take title to property in its corporate name, but it is clear that such gifts are accepted and such titles taken as an agency of the State of New Jersey, and, further, that the said Commissioners have no personal pecuniary interest in the park property or in its charter.

Debts contracted by the respondent, in the due course of its agency, are debts of the State. It has no funds to answer for damages except such as must come from the public treasury.

THE WRONG COMPLAINED OF HERE IS NEGLIGENCE IN THE PERFORMANCE OF A PUBLIC DUTY IMPOSED BY LAW ON THE RESPONDENT.

It seems to be the contention of the appellant that in order to partake of the immunity from liability here claimed this agency should possess all the attributes of the sovereign. It is respectfully urged that such is not the fact. It is submitted that the true principle of public policy which gives to a governmental agency the immunity here claimed is that given by Dixon, C. J., in *Hayes v. City of Oshkosh*, 33 Wis. 314 (quoted in *Condict v. Jersey City*, 46 N. J. L. 160), namely:

“That the corporation is engaged in the performance of a public service in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants and the community. * * *”

The two acts referred to in plaintiff's brief as amendments to Palisades Park Act of 1900, creating the Board of Commissioners of the Palisades Interstate Park, are independent acts, not amendments to that act,

and authorize the Commissioners of the Palisades Interstate Park to lay out, construct and maintain a drive through the park, to be known as the "Henry Hudson Drive," and the preambles to which reference is made only apply to this particular purpose. It is not contended that the action in question occurred anywhere on this "Henry Hudson Drive."

II.

IT IS THE SETTLED LAW OF THIS STATE THAT, IN THE ABSENCE OF STATUTORY PROVISION, AN ACTION WILL NOT LIE AGAINST A PUBLIC CORPORATION IN BEHALF OF AN INDIVIDUAL WHO HAS SUSTAINED SPECIAL DAMAGE FROM THE NEGLIGENCE OF SUCH CORPORATION TO PERFORM A PUBLIC DUTY.

Freeholders of Sussex v. Strader, 18 N. J. L. 108;

Livermore v. Freeholders of Camden, 29 N. J. L. 245; *Affirmed* 31 N. J. L. 507;

Pray v. The Mayor, etc., of Jersey City, 32 N. J. L. 394;

Little v. Dussenbury, 46 N. J. L. 614 at 636;

Spencer v. Freeholders of Union, 66 N. J. L. 301 at 303;

Maguth v. Freeholders of Passaic, 72 N. J. L. 226;

Watkins v. Freeholders of Atlantic, 73 N. J. L. 213;

Van Valkenburgh v. Bergenfield, 83 N. J. L. 325;

Darville v. Freeholders of Essex, 90 N. J. L. 617;

Lydecker v. Board of Chosen Freeholders, 103 Atl. 251;

Bisbing v. Asbury Park, 80 N. J. L. 416.

III.

BY THE CLAUSE "TO SUE AND BE SUED," EXPRESSED IN THE ACT UNDER DISCUSSION, THE LEGISLATURE DID NOT INTEND TO SUBJECT THE RESPONDENT TO LIABILITY FOR NEGLIGENCE.

The question we really have to meet here is whether, by the use of the clause "to sue and be sued" in this statute, the Legislature intended that this respondent might be sued in all cases of tort in which a private corporation might be sued.

In the first place, it is urged that no binding inference should be drawn from the act of the lawmakers in conferring the capacity to sue and be sued expressly in the act, as this clause is declaratory only of that which the law would imply anyway. Secondly, it is asserted that, having in mind the object of the creation of this respondent corporation, we are not at liberty to infer, from the insertion in this statute of this merely formal declaratory clause, that the Legislature intended thereby to waive that immunity from suit for the grievance here complained of with which the public policy of this State has clothed corporations of this kind.

In the case of *Freeholders of Sussex v. Strader*, *supra*, the Court, referring to the Board of Chosen Freeholders, which was a corporate body and made liable in express language "to sue and be sued," said:

"The words 'to sue and be sued' give to this artificial person no greater powers and subjects it to no greater responsibilities than as if they were natural persons charged with the same duties. A corporate body is merely a legal or artificial person substituted for a natural person. (*Ang. and Ames*, 58.) These words of the statute are of no manner of importance; and, although it is usual in the charters granted by this State to corporations to insert this clause, yet it might be rejected as surplussage without

interfering in the slightest degree with their corporate powers. The simple act of incorporation gave to the Board of Chosen Freeholders, as a necessary incident, the right to sue and be sued. It is one of the essential and ordinary incidents to every corporation. (2 *Kent's C.*, 277, 278; 1 *Black. C.*, 475-6; *Kdy. on C.*, 69; *Ang. and Ames on C.*, 58.) An undue importance, therefore, is attached to this power as conferred by the statute. Though this corporation may, like a natural person, sue and be sued, yet this suing and being sued must always be in reference to matters and things within the legitimate scope and objects of its creation."

In *Overholser v. National Home for Disabled Soldiers*, 68 *Ohio State Reports*, p. 236, the case shows that the statute under which the defendant was organized expressly provided that it should have power to sue and be sued in courts of law and equity. This corporation was created by an act of Congress for the purpose of caring for old and infirm soldiers. It was sued for negligence and the Court in referring to its liability to respond in damages said:

"We are not persuaded by the argument that the power conferred upon this corporation, of suing and being sued both at law and in equity, must be construed as a consent by Congress that this particular governmental agency may be sued upon any cause of action, whether sounding in contract or in tort. On the contrary, we are constrained, upon all considerations, to regard this as imposing the power and liability to sue and be sued in respect to such matters only as are within the scope of the other corporate powers of the defendant. The National Home for Disabled Soldiers was not given the right to commit wrongs upon individuals. It was not contemplated that it would do so. It was created

and is perpetuated by the federal government for a very different purpose. Hence, it cannot be inferred that Congress meant to impose a liability upon this corporation so unusual, so different from its general policy and so different from the liabilities imposed on other public agencies."

Therefore, it is contended that the mere giving of the power to sue and be sued in this statute can be applied only to such matters as were incidental to the carrying out of the duties devolving upon this Commission in and about the acquirement of land and the laying out of parks.

IV.

THE JUDGMENT ENTERED IN THIS CASE SHOULD BE AFFIRMED.

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Attorney for Defendant-Respondent.

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