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MUNICIPAL CORPORATIONS — LIABILITY TO RIPARIAN OWNERS FOR POLLUTION OF STREAM — A stream into which the plaintiff in error dumped its sewage flowed through the lands of defendant in error. Odors from the stream, deposits of foreign substances on the banks, and the pollution of the waters about the farm of the defendant in error constituted a nuisance. *Held*, the city is liable to one suffering from the nuisance, irrespective of whether it is exercising a governmental function in the installation of the sewer system. *Oklahoma City v. Tyetenicz*, 175 Okla. 228, 52 P. (2d) 849 (1935).¹

The decision of the Oklahoma court would probably be reached in the great majority of states.² However, there is considerable variation in the manner in which the courts avoid the much criticized³ distinction that although municipalities are liable for injuries inflicted in the exercise of proprietary functions, they are not liable for injuries inflicted in the exercise of governmental functions. In spite of this general rule of immunity from liability for torts arising out of governmental functions, many cases hold that a municipality cannot maintain a nuisance without paying compensation, irrespective of whether it is acting in a governmental or private capacity.⁴ Despite broad language, this theory of liability is generally restricted to nuisances causing injury to property.⁵ There is, of course, no difficulty in placing the injury to the land of a riparian owner in this category. Some courts would doubtless hold the city liable on the ground that the planning and location of sewers may be deemed a proprietary function.⁶

¹ There is considerable discussion in the case as to the measure of damages.

² 43 C. J. 1149, § 1908 (1927). Notes: 48 L. R. A. 691 (1900); 61 L. R. A. 673 at 694 (1903); 20 L. R. A. (N. S.) 1050 (1909); 47 L. R. A. (N. S.) 137 (1914).

³ For a general discussion of the distinction between governmental and proprietary functions pointing out inconsistencies, lack of sound basis, and policy of non-liability based on the distinction, see: Borchard, "Government Liability in Tort," 34 YALE L. J. 1, 129, 229 (1924-1925); Doddridge, "Distinction between Governmental and Proprietary Functions of Municipal Corporations," 23 MICH. L. REV. 325 (1925).

⁴ 43 C. J. 956, § 1734 (1927); Borchard, "Government Liability in Tort," 34 YALE L. J. 229 at 235 (1925).

⁵ Borchard, "Government Liability in Tort," 34 YALE L. J. 229 at 235 (1925); 30 MICH. L. REV. 471 (1932), a note commenting on the unusual feature of *Hoffman v. City of Bristol*, 113 Conn. 386, 155 A. 499 (1931), which held a city liable for personal injury resulting from nuisance. Cf. *Virovatz v. City of Cudahy*, 211 Wis. 357, 247 N. W. 341 (1933), which denies liability for personal injuries; criticized, 9 Wis. L. REV. 202 (1934).

⁶ Doddridge, "Distinction between Governmental and Proprietary Functions of

On the other hand, some courts insist that when the pollution is done under statutory authority there is no liability. Cases where the city is expressly authorized to empty sewage into a stream would be relatively few.⁷ In the construction of statutory authority, a court may require that the language be very clear before any intent to injure private property without compensation will be inferred.⁸ The Indiana court, however, has implied such intent from a general legislative grant of authority to construct sewers.⁹ This would embrace nearly all cases inasmuch as the situation where the sewers are laid without authority would be rare. The Indiana view is tempered somewhat, since the court in the Indiana cases considered that the means of sewage disposal used were the only ones available, public necessity taking precedence over private rights,¹⁰ and a later Indiana case held a municipality liable, saying that since disposal plants could now be constructed at reasonable cost, it was no longer necessary to pollute the streams.¹¹ Some courts have held the location of sewer outlets to be a judicial function, for which there can be no liability.¹² A statute which attempts to allow injury to property without compensation would, however, in many jurisdictions be held void as violating the constitutional provisions against taking of property without compensation.¹³ Some courts, on the other hand, would assert that the injury is only consequential, and not within the "taking" clause.¹⁴ Where the constitutional provision is directed against "taking or damaging" property, there would seem to be little doubt.¹⁵ A number of cases allowing recovery for stream pollution by a municipality do not distinguish on which basis they rely.¹⁶ Even though we concede that public necessity should take some precedence over private rights,¹⁷ liability for pollution of a stream would seem a desirable result, in the light of the modern trend of

Municipal Corporations," 23 MICH. L. REV. 325 at 335 (1925); Borchard, "Government Liability in Tort," 34 YALE L. J. 229 at 235 (1925).

⁷ 47 L. R. A. (N. S.) 137 at 139 (1914).

⁸ 48 L. R. A. 691 (1900), 20 L. R. A. (N. S.) 1050 (1909), 47 L. R. A. (N. S.) 137 (1914); *Sammons v. Gloversville*, 175 N. Y. 346, 67 N. E. 622 (1903).

⁹ *City of Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610 (1897); *City of Valparaiso v. Hagen*, 153 Ind. 337, 54 N. E. 1062 (1899).

¹⁰ *City of Valparaiso v. Hagen*, 153 Ind. 337 at 342, 54 N. E. 1062 (1899): "The sewage must be dispatched or the city abandoned."

¹¹ *City of Frankfort v. Slipper*, 88 Ind. App. 356, 162 N. E. 241 (1928). See *Chattin*, "Tort Liability of Municipal Corporations in Indiana," 10 IND. L. REV. 329 at 331 (1935).

¹² *Merrifield v. City of Worcester*, 110 Mass. 216 (1872); *Attwood v. City of Bangor*, 83 Me. 582, 22 A. 466 (1891).

¹³ *Seifert v. Brooklyn*, 101 N. Y. 136, 4 N. E. 321 (1886); *City of Mansfield v. Balliett*, 65 Ohio St. 451, 63 N. E. 86 (1902); *Doremus v. City of Paterson*, 69 N. J. Eq. 775, 61 A. 396 (1905), 73 N. J. Eq. 474, 69 A. 225 (1908).

¹⁴ *City of Valparaiso v. Hagen*, 153 Ind. 337, 54 N. E. 1062 (1899).

¹⁵ *Joplin Consolidated Mining Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406 (1894); *Butchers' Ice and Coal Co. v. Philadelphia*, 156 Pa. 54, 27 A. 376 (1893).

¹⁶ *Peterson v. Santa Rosa*, 119 Cal. 387, 51 P. 557 (1897); *Village of Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218 (1894); for others see 48 L. R. A. 697 (1900).

¹⁷ *Jacobson*, "Stream Pollution and Special Interests," 8 WIS. L. REV. 99 at 117 (1933).

opinion against municipal and governmental immunity, based on the belief that burdens should be spread over the entire community.¹⁸

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¹⁸ See note 3, *supra*, and also 46 HARV. L. REV. 305 (1932); Tooke, "The Extension of Municipal Liability in Tort," 19 VA. L. REV. 97 (1932) (critical survey of legislative extension, as well as by judicial action).