

File No. 7858 Continued.

OPINION.

6038

Therefore, this is not a case where the City has graded and paved streets, and thus by its own act increased the flow of surface water, which, in such event, the City would undoubtedly have to take care of. This is a case where the grading and paving was all done by the private property holder, at a time when he, and not the City, owned the streets, and who thus, himself, created the conditions which cause the nuisance, and where the City has done nothing whatever, except to take over and maintain the streets in the condition in which it found them.

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It is perfectly well settled in Maryland, that where the City, itself, by grading, paving and like works of improvement, diverts the flow of surface water from what was formerly its natural course, and then concentrates it in increased volume so that it overflows upon private property, the City is responsible; such concentration of the water by the City's own act constitutes a nuisance, and the City is liable for it.

Guest vs. Church Hill, 90 Md. 689.
 Cahill vs. Baltimore, 93 Md. 233.
 Ranstead's case, 78 Md. 501-509.
 Hitchins Brothers Co., 68 Md. 100-110.
 Willison's case, 50 Md. 139-157.

There is no case in Maryland where the City took over a street which had been so graded and paved by its former private owners as to increase and concentrate the flow of surface water, nor have I been able to find a case elsewhere involving this exact situation, but I think that on well settled principles of law the rule applicable is reasonably clear.

If the City is to be held responsible for the overflows in question, it must be on the theory, ~~not that it created the nuisance,~~ but that it has allowed the nuisance to continue. The nuisance consists in the fact that the grading and paving of the streets was such as to concentrate the surface water in such manner as to cause overflows, unless adequate provision was made to carry it off; the City did not do this. What the City has done, is to allow this condition to continue after it acquired title to the streets.

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While a person may be liable for continuing and maintaining a nuisance, it seems to be settled in Maryland, that before such liability can attach there must be: (1) either a refusal to remove the nuisance after a request to do so, or (2) some active participation in the continuance of the nuisance or some positive act done evidencing its adoption.