

No. 14611

Supreme Court of Illinois

City of Joliet

vs.

Verly

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 111 3

J. W. Middleton & Co., Stationers, 126 Lake St.

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Reporters

1864

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

The People of the State of Illinois,
To the Clerk of the Circuit Court for the County Ju. Page — Greeting:

Because, In the record and proceedings, as also in the rendition of
the judgments of a plea which was in the Circuit
Court of Ju. Page County, before the Judge thereof, between

~~Amelia H. Verly~~ Amelia H. Verly

plaintiff, and

The City of Joliet

defendant....., it is said manifest error hath intervened, to the injury of the
aforesaid

City of Joliet

as we are informed by its

complaints..... and we being willing
that error should be corrected, if any there be, in due form and manner,
and that justice be done to the parties aforesaid, command you that if
judgments thereof be given, you distinctly and openly, without delay, send
to our Justices of the Supreme Court the record and proceedings of the
plaint aforesaid, with all things touching the same, under your seal, so that
we may have the same before our Justices aforesaid at Ottawa, in the County
of La Salle, on the first Tuesday after the third Monday in April next,
that the record and proceedings, being inspected, we may cause to be done
therein, to correct the error, what of right ought to be done according to law.

Pinckney G. Walker

Witness, The Hon. JOHN D. CATON, Chief Justice of
our said Court, and the Seal thereof, at Ottawa, this
seventeenth day of March —
in the Year of Our Lord One Thousand Eight Hun-
dred and Sixty four.

L. Seland
Clerk of the Supreme Court.



The City of Joliet

No. *111*

vs.

Martha H. Veely

WRIT OF ERROR.

FILED A. D. 186

Clerk.

The City of Solist
Plff in error
Dft below

Amelia H. Verby
Dft in error
Plff Below

the Supreme Court
Third Maine Division
Of April T. 1864

Issue writ of Error to the
Circuit Court of the County of
DuPage to remove the judgment
in the above named case, returnable
according to law

Murdall & Fuller

To L. Leland clk, Plffs Attys.
Ottawa Ill.

111

The City of Joliet

Amelia

~~Amelia~~ A Vesby

Receipt

Filed Dec. 17, 1864,

Shelton

Clerk.

\$5.00. Clerk.

SUPREME COURT.---STATE OF ILLINOIS.

THIRD GRAND DIVISION.

The City of Joliet,)
 vs.
Amelia H. Verly.)

ABSTRACT OF RECORD.

Page.

- | | |
|----------|--|
| 1 | Placito. |
| 3 | Summons and return. |
| 5 | Now, charges that deft. is a corporation, and bound to keep Exchange street and sidewalk in good repair so as to furnish a safe and convenient passage to all persons. That on the 18th of April, 1858, and before, the sidewalk was badly and insufficiently planked—the plank loose and not sufficiently laid and fastened |
| 6 | and the sidewalk was uneven, irregular and insecure and was negligently and carelessly permitted so to remain and the plaintiff was necessarily tripped up and thrown down a flight of stone steps of the height of ten feet and her foot was dislocated and she was otherwise greatly injured. |
| 7 to 9 | 2d Count similar to the above but more particular in detail. |
| 9 to 12 | 3d Count similar to second, laying damages more specifically. |
| 12 | Plea—General Issue. |
| 13 to 15 | Trial—Verdict for Plff., \$2000. |

16 New trial granted on defendant's motion.

17 to 19 Change of Venue to DuPage County Circuit Court.

21 to 26 Trial in DuPage County and verdict for plaintiff, fifteen hundred dollars.

26-27 Motion for new trial. Reasons that the verdict is against the weight of evidence. Error of the Court in giving plaintiff's and refusing defendant's instructions. Motion overruled and defendant excepted and court allowed forty days to prepare bill of exceptions and present to the judge.

Bill of Exceptions.

95-96 Deposition of D. F. Putney.—Age 35. Jeweller. Lived in Joliet 5 years. In the spring of 1858 crossing bridge, saw pl'ff about 300 feet from me stepping off west end of canal bridge. Saw her in the act of falling with her face towards me—falling towards the north, with her face towards the east. Her face was turned to-
 97 wards me in the act of falling. At that time I crossed the place four or five times a week. My shop was in the second block east
 98 on Jefferson street. I should not consider the place dangerous.— There was a passage from the bridge to the main side walk about seven feet in length. There is a flight of stairs from the canal tow-
 99 path running up to the end of the bridge and to this passage. This passage is at the head of those stairs, and across that passage there was placed two pieces of slabs or boards laying on the ground partly embedded in the mud. They were from four to ten inches wide and used for walking across in passing from the bridge to the side walk. There was no other sidewalk then. I crossed there at the time of the fall; shouldn't consider it dangerous.

101 On cross examination. The canal bridge is from 75 to 100 feet long. A side walk on the north side of it about four feet wide. It was on this side walk the plaintiff passed at the time of the accident. The slabs or boards were about twenty inches

below the bridge. There was a stone step from the bridge and
 103 one step from that to the slabs or boards. The flight of stairs was
 stone. The slabs or boards lay in a direction nearly north west
 and south east. They were a little inclined from the street to the
 104 stone steps. Pl'ff lit on the tow-path below—fell about twelve
 feet. I think it had been raining that forenoon.

106-7 Deposition of Horatio N. Marsh.—Age 48. Rail Road agent.
 Have resided in West Joliet over 25 years—passed over canal
 bridge three or four times daily. Don't recollect any time when I
 108 considered it dangerous for people with their eyes open. I do not
 think the place could be made any safer without stopping the pas-
 sage way entirely, but I do not consider the stairs dangerous with-
 out any protection. I can see no reason why accident should have
 occurred there if ordinary care was exercised. I passed there of-
 tenest in the day time but often in the night. It was one of the
 most common thoroughfares in the town. Judge from two to five
 hundred passed there daily.

110 Deposition of George H. Wallace.—Age 25. Occupation, shoe-
 maker. Reside in Joliet. Passed canal bridge 2 or 3 times daily.
 111 Think there were one or two plank laid down. Think any individ-
 ual walking there with ordinary care was safe. If any person did
 fall off they would have to step to one side a foot or eighteen in-
 ches. Passed there both in day and night time—never considered
 any danger in either.

112 On cross-examination. I think there were some plank laid
 113-14 from the bridge to the side walk about a foot wide embedded in
 the ground tight. There was no railing across the passage way to
 my recollection.

115 Deposition of Firman Mack.—Age 43. Occupation, shoe and
 leather dealer, resided in Joliet 22 years. Heard of the accident
 to pl'ff. Was Mayor of the city—had been over a year—was re-
 elected that Spring. My place of business was about ten rods
 from the place of the accident. Crossed the bridge not less than

116 six times any business day and frequently oftener. I did not consider the place dangerous to persons passing with ordinary care.—
 117 The reason there was no railing there is that there had been some steps built by the canal company from the towpath to the canal bridge which were used as a thoroughfare by the foot passengers
 118 back and forth. A railing would close it up. There is no other convenient means of access to the buildings fronting on the canal north of Exchange street except by these stone steps. The canal bridge was controlled by the canal authorities, both built and kept in repair by them. During my administration as Mayor I am not aware that the city authorities exercised any acts of control over it or the tow-path below. I think after the accident I ordered some
 119 boards placed in the passage way. I suppose not less than 400 persons passed there daily during the year 1857 and 1858. I passed there both in the day and night time and never experienced any inconvenience. Nelson D. Elwood was Mayor next preceding me.—
 Two years in succession.

On cross examination.—Think the canal bridge about 60 feet
 120 long and the north side walk about 5 feet wide.

127 Deposition of John H. Reece. Age 35 years. Physician.—
 Reside in Joliet. Am acquainted with pl'ff. Have been her attending physician—First attended upon her in the fall of 1852 or 1853. I attended her constantly from that time to within a few months of the accident at the bridge. I was called to attend her some two or three days after the accident. My attention was directed to a dislocation of one of the bones of the foot, which I put to its place, bandaged the foot and retired. She complained of
 128 soreness in the shoulder and side but I did not examine particularly being in a hurry. For two years before the accident her health had been rather delicate. I have not been as well acquainted with her since the accident as before but from what I have seen of her should judge her health had been about the same since as before. In the year 1856—57—and 58 crossed the canal bridge on an average as often as five times a day. Could not say
 130 I ever crossed it when I considered it dangerous to persons passing with ordinary care. For the last three or four years up to that time I think the pl'ff had resided within 800 feet of that place.

137 Deposition of William A. Strong.—Age 60, reside in Joliet,
 139 passed the canal bridge as often as once or twice daily on an average. Never regarded the place as dangerous—passed frequently in the night. Did not regard it as particularly dangerous in the night time. Think several hundred persons passed there daily. Shouldn't think there would be any danger to a person passing there with ordinary care.

145 Deposition of Royal E. Barber.—Age 35, attorney-at-law.—
 146 Residence, Joliet for last fifteen years. Was acquainted with the passage way at the west end of canal bridge. My residence was on west side and my place of business east side. Usually passed at least four times every business day. The canal bridge and its sidewalk was narrower than the street and its sidewalk at the west end, and in order to connect the sidewalk of the bridge with that
 147 of the street west of the bridge a walk had to be laid at an angle with the bridge. According to my best memory the level of the sidewalk of the bridge was a few inches higher than the sidewalk along the street and the plank connecting the walk of the bridge with that of the street were so laid that it left a slight step from them on to the walk of the bridge. The walk of the street and the bridge and that connecting them were made of plank or boards. It never occurred to me to be unsafe. Several hundred must have passed daily, perhaps a thousand or more.

148 On cross-examination.—I cannot state exactly how many planks were in the passage. According to my best recollection there were more than two. I should think they were fastened with nails driven into cross pieces. I think they were lower than
 149 the center grade of the street.

150-1 Deposition of Lucy Curry.—Age 60 years, reside in Joliet 23 years, been acquainted with pl'ff six or seven years. Live 300 or 400 feet from west end of canal bridge. Crossed the bridge quite frequently. It was my usual place of crossing in going to my husband's store and to east part of city. I never found any difficulty in passing there. Pl'ff lives adjoining us—both houses in one yard. She complained as much before as after the accident,

153 and her mother told me she had always been a delicate child, though
she complained more of her arm and shoulder since the accident.

154 On cross-examination.—In spring of 1858, before accident there
were two or three plank laid down from west end of canal bridge
to sidewalk in front of omnibus building. Don't know whether
they were fastened or not. I think they lay on the ground a little
slanting. There is a flight of stone steps and these plank were not
155 more than a step or two from the top of those steps. I did not
hear plaintiff complain of her arm and shoulder before the fall. She
supported herself working out at sewing and made her home at her
father's, who was in low circumstances. I think she was confined
to her bed three or four days during the three months directly pre-
157 ceding the accident. I heard her say she thought her dress caught
on a nail on the bridge or on a plank that caused the fall. She had
on a silk dress and the skirt was rather long and would drag on the
ground unless she held it up.

158 Recross-examination.—I think the plank was slanting a little
towards the street, but won't be positive. At that time my health
was not very good. I should not think there was any danger
there for any lady walking with ordinary care.

159 Deposition of Timothy Kelley. Age 65 years. Resided in
Joliet about 25 years. Heard of the accident to pl'ff at the time
it occurred. Passed over that place during the years 1857—1858,
five to twenty times daily. The passage way in 1858, was about 7
160 inches lower than it is now. There was a step off the bridge on to
a cut stone step that was attached to the abutment; then there
were two plank run across this passage way to the main side walk,
they were about ten feet long and about a foot apart, so that two
persons could walk along side by side. I think the place was
just as safe then as it is at the present time, and it is no trouble
at all for any person to pass there as I see unless they shut their
161 eyes and tumble over. I was street commissioner in the city in
162 1857. My term closed just before the accident. I fixed the two
plank that I spoke of from the step that lead from the bridge
to the sidewalk on Exchange street on the north side. I laid a

piece of plank under each end of these two plank and spiked them down to the mudsill. I think this was during the summer
163 before the accident. The mud sills I speak of were bedded in and the plank rested on the ground. As it is now it is a little better going west, but going north down the steps it is not so good.— Those plank as I fixed them were there till some time after the happening of the accident to the plaintiff. The passage way could not be made any safer than I fixed it unless the passage down the steps was fastened up, and then there would be no means of access to the buildings, lock and tow-path north of Exchange street.—
164 From 1855 to 1858 there were two groceries, one bake shop and one meat shop fronting on the tow-path below the stone steps.— There was all of a hundred persons passed up and down those
165 steps daily. For the last 25 years about half my time has been spent in canal and railroad contracts.

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DEFENDANT'S INSTRUCTION REFUSED.

If the jury believe from the evidence that the canal bridge was under the actual control and management of the Board of Trustees of the Illinois and Michigan canal, and if they further believe from the evidence that the accident to the plaintiff was wholly in consequence of a nail projecting on said bridge, the the plaintiff's action cannot be maintained against the defendant.

AMELIA H. VERLY }
 vs. } In Du Page County, Circuit Court
 The City of Joliet, } Case for negligence.

Be it rebemered, That on the trial of the above cause the plaintiff to sustain the issues on her part introduced to the jury a certified copy of the plat of West Joliet, which is as follows:

(Here copy the plat.)

Also the original charter of the city of Joliet, entitled "An Act to Charter the city of Joliet." Session Laws of 1852, commencing on page 161. Also the Amended city Charter, being An Act, &c., (Act of 1857) which two acts are by the stipulation of the parties taken and considered a part of this bill of exceptions.

The plaintiff in the further prosecution of her suit, called Jacob C. VanAuken, who testified as follows: I have lived in city the Joliet 20 years. I knew the pl'ff a year or two before the accident happened. I saw her in the spring of 1858 passing over the canal bridge in Joliet. It was Sunday afternoon. I was in the livery stable. It was an hour or two after meeting.— I saw Radcliff and wife and the two Miss Verlys going over the bridge. I came on behind them. As Miss Verly pl'ff. passed off the bridge I saw her dress catch on a nail or spike and as she made the second step she turned to loosen her dress as I supposed and as she turned she lost her balance and down she went head foremost. I should think she struck on her head as near as I could judge. I ran down. Her sister and others got there ahead of me and helped her up. She could not stand. Radcliff, Col. Curry and some more came and carried her off. I was 30 or 40 feet behind her when I saw her fall. I was in a position that I could see her. I don't know the name of her sister. Think it was Fanny. Radcliff was ahead—his wife next—the one that got hurt next, and Fanny behind I think. They were going West off the West end of the Canal bridge. No body else between me and them. It was on the north side of the canal bridge. The south side is kept for towing. I was the first to her except her sister—next was Radcliff and his wife—next was Curry. She

was very badly hurt from appearance. I got hold of her and lifted her up and she sat down faint. Her sister held her till some people came—it was not but a second—a short time. I did not go with her when she went away. When I came up back on the bridge I think McNerny and Malachie Flanagan were standing there. I did not see Putney there. Might have seen one or two others. McNerny and Flanagan were not close by—they were off near the middle of the bridge. It is about 30 feet between the bridges—may be 40. You cross the river and I think it is 30 or 40 feet to canal bridge. There is no railing at west end of canal bridge for her to take hold of. There used to be two steps but this time there was but one. There had been one or two accidents happened there on account of it being a bad rounding place and Long and went and tore up 2 or 3 of the old planks and laid them on the top of the gravel and on the rock they stepped on. Three laid lengthwise and one on the end of them to turn off a little angling. When they built the new bridge they raised it a foot or 18 inches and graded up the street to it. It was graded up in the fall and this accident happened in the spring after. Long took the men he had in the city bridewell.—He was bridewell keeper. He did this in March two or three weeks before this accident. He is in California now. Don't know where Radcliff and wife are. They moved away shortly after and have not been back since to my knowledge. He took these men there under the direction of Firman Mack, mayor of the city. The plank were just laid on loose—not fastened.—They were old plank and whenever the sun came to them it would turn them up and twist them every way. There were but two when the accident happened and they were very much warped.—When she lost her balance she went down head first; there was nothing that she could take hold of to steady herself and she fell down upon the tow-path of the Illinois and Michigan Canal.—From where I stood to where her head struck on the tow-path of the canal, it was in the neighborhood of twelve feet. The nail was within an inch and a half of the end of the bridge. Right at the end of the plank the side-walk of canal bridge was 3 or 3½ feet wide. John Hedges fell down there and an Irishman fell down there a short time before. It is a safe place if people have good luck. If they have a little bad luck or a misstep they are gone. They were all four of them walking along minding their

own business. Plff. was walking very gracefully. It was necessary for safety to walk in single file and they passed off the canal bridge and across the walk there in single file. The nail was a large spike and the plank had worn off around it so it stuck up half an inch—may be three quarters. I was city marshal at the time. I had brought this place to the attention of the mayor at the time he told Long to take his men there and fix it. Long said it was McNerny's place to fix it. I think McNerny was elected street commissioner on the 4th of March. Timothy Kelley was street commissioner before. Long kind of leveled it off a little—very slight. The grading was principally rock drawn from the quarries on the bluff and gravel put on it. The center of the street was two feet higher than the steps. This grading was put in after the bridge had been raised. It was sloping at the head of the steps. This accident was on a pleasant day. Don't know whether it had been raining or not—ground was a little damp.—I was circulating around among people of the town at that time attending to my office. After the accident I fixed a new side walk by direction of the mayor and Col. Smith an alderman. I raised it up nearly level with the side-walk of the bridge. Put an 18 foot 4 inch scantling at the end of the steps. Plff. was going straight along on the side-walk. She had a common dress on not very long nor very wide. The loose plank were sometimes 3 sometime 6 and sometimes 12 inches from the stone steps. Think the plank lying lengthwise were about 8 or 9 feet long.

The plaintiff in the further prosecution of said case, called Alexander McIntosh, who testified as follows: I reside in Joliet, have lived there since 1843, excepting '48, and '49. Was Circuit Clerk four years, editor five years, edited the True Democrat.—Have known Plff. since '52. In '57, 58, was acquainted with situation of sidewalk at end of canal bridge. Generally very bad.—The plank were laid loose. I recollect for two or three years it was rather bad for crossing. Sometimes would be a plank out. My impression is that in the spring of '58, the plank were narrow, and one or more of them were loose. Sometimes not more than two, and for public convenience somebody would put in a plank. I don't know but some of them were boards. I know they were not substantial. The street was gravel taken from the bluff. The center of the street was high at the point. There used to be a puddle

of water there. There was a flag stone extending a part of the way from the bridge, and the rest of the way was these loose boards. I crossed over it a thousand times in that condition, and never suffered anything myself, but I should not call it safe for a sidewalk. A sure footed person might not have any difficulty, provided he stepped square. Steps down from sidewalk about three feet long, and near 15 feet perpendicular to the tow path. Recollect the accident, but could not fix the time—the condition of the passage was about the same as I have represented it. It has been repaired since. I have given you the best of my recollection of the condition of it at the time. This plat is correct. I don't know the particular condition of the sidewalk at the particular time of the accident.

The Plff. also called Leopold Swabacher, who testified as follows: I lived in Joliet in the spring of '58, at west end of canal bridge. There were loose boards and lay 4 inches wide, 4 or 5 old boards. Nothing under the boards, but mud. Lived in corner store of Omnibus buildings. It was 12 or 14 feet down the stairs. The sidewalk was 1½ or 2 inches below the bridge—went crooked like the plat. The plank had been worn. Saw Plff. when she was down on the tow path, but not when she fell. The condition of the boards was very bad at that time. It was a pleasant day on Sunday after 12 o'clock, when afternoon Church was out. Lived there 9 years.

The Plff. also called Benjamin Richardson, who testified as follows: Lived in Joliet over 25 years. Am county treasurer now, on the 6th year in all as treasurer. Have been school director 7 years, justice of the peace 8 years, coronor 6 years, alderman 2 years house painter 9 years, chairmaker 6 years. I was acquainted with the canal bridge. About 80 feet long—the space or passage at the head of the stairs between canal bridge, and main sidewalk, 6 feet. Have crossed a great many times. Know the condition in spring of '58. I considered it in rather bad condition, so bad I usually went through the road way of the bridge myself rather than go through it. From the end of the bridge were two or three boards lying loose, and some plank running diagonally from them to the main sidewalk. Remember the time Miss Verly was hurt.

The sidewalk was in about the same condition at that time. The plank were loose and warped—the street was crowning and sidling at the crossing. The boards were so warped as not to be solid, and if a person happened to step on the side of the boards, he might lose his balance. It was one step, I think from the sidewalk, to the canal bridge. Think it was 10 feet above the tow path of the Illinois and Michigan canal. When the street was graded it was left crowning. At the passage it was rather sidling. Think a puddle of mud would sometimes accumulate at the head of the steps. The material of the street was gravel. The sidewalks on Jefferson and Exchange streets were built by the city authorities and after the accident, the work across the passage was repaired by the city authorities, and a scantling put up from the railing of the sidewalk on the canal bridge to the foot, or nearly the foot of the stone steps. I consider it safer since the sidewalk was repaired at the west end of the bridge.

On cross examination, the witness was asked. "Did you ever see that in so bad a condition, that a person passing in the day time with ordinary care, would be liable to accident? To which the witness answered, "I dont know that I can say I ever did." A person passing alone with no one to jostle him, might perhaps pass without danger, if he was as sure footed as I am.

The plaintiff also called George H. Ward, who testified as follows: Lived in Joliet about 13 years. Have been a manufacturer of marble, and am now engaged in the recorders office. I recollect the time of the accident to plaintiff. My recollection of the stairs, is that there was a step down, and two, or might have been three boards lying on the ground, at the time she was hurt. One of the boards was loose, one next to the head of the stairs. I think the mud had worked down and partly covered one end of one board, the one next to the street. Board 10 or 12 inches wide Old boards, and worn. The step down from the bridge, was 8 or 9 inches. The street was quite crowning next the bridge. I had frequently spoken of it as dangerous and I regarded it as dangerous I have seen it when I thought tolerable safe for a year together, but not at the time she was hurt. I recollect of passing along

there that day, when she was hurt, I think there were two boards there. I went to look at the place immediately upon hearing of the accident on the same day, I went as a matter of curiosity for I was acquainted with plaintiff. I heard she had been hurt and went. There were two boards there, might be three but think only two. The loose board was next to the step—the end next to the bridge 14 or 18 inches from the top of the stairs, the other end angling towards stairs, say 4 inches nearer. Plff. had lived in a house adjoining me and for several years her health has been good. She was a seamstress—sewed for a living. She lived with, or made her home with her parents and went out sewing.

The Plff. also called Joel George, who testified as follows: I have lived in Joliet 28 years—am carpenter and joiner, and builder. The passage way at end of canal bridge rather bad. Sidewalks of the bridge rather narrow. Stepped off the bridge on to loose boards. There was an iron brace on the bridge that a person was very liable to hit their foot against, and made it very unsafe. The passage way was not safe. The boards were loose, and the ground sidling off towards the stairs. I had frequently remarked to different persons that some person would be hurt there yet. I had noticed it before and immediately after plff. was hurt went and examined it for it was nothing more than I had expected that an accident would occur there.

The plff. also called J. D. Verly who testified as follows—I live at Morris, Grundy county. Lived there two years. Lived in Joliet ten years. Plff. is my daughter. Recollect the time she got hurt by falling off the sidewalk at the bridge. I lived about 500 yards from there. Her health was very good before that.—About two years before that she had been sick. Health has been very bad since the fall. She sewed for a living. She got her living by sewing. I was not able to support her. Sidewalk at west end of bridge. Plank sometimes two, sometimes one and sometimes three.

The plff. also called Mrs. J. D. Verly who testified as follows—I live at Morris—lived there two years next May. Lived in Joliet before that. Amelia H. Verly is my daughter. Recollect the

time she was hurt by falling off the bridge. I think that for a year and nine months before that her health had been very good indeed—before that she was sick. Dr. Davis attended upon her. She was sick two or three weeks. Dr. Reece attended upon her when her foot was hurt, when she fell off the sidewalk. Dr. Reece had attended upon her when she was sick before the fall. The hurt was on the shoulder and ankle. It has been three times paralyzed so she couldn't raise her arm fully, then a lump settled in the breast from the effect of these injuries—the lump remained there four or five months and then by blistering and mustard plaster it was withdrawn. Her condition has been very poor indeed—sometimes been sick and then better—never three weeks alike. She was making her home with me when she was hurt, always made it her home with me. I think she has not gone three months in all three years without a blister or a mustard plaster. She has never used the right arm as she could before. The right arm has been paralyzed three times. The first time at Joliet and two or three times since. Always went to Dr. Davis—followed his prescriptions. Dr. Reece set her foot which was put out at the time of the accident. It subjected her to six weeks confinement. It was Sunday afternoon. She was sewing up to that time for a livelihood—she was able to sew before that. She worked nine months out of the twelve for the two years before she fell. She also worked at Mr. Osgood's after she was hurt, when she was able to work. Since she was hurt I don't think there has been any day she could work full ten hours. If she did it would throw her in bed two or three days. The first year after she was hurt she was better than she has been since. She never had any of this paralysis in the shoulder and arm before she was hurt.

The plaintiff also called Fanny Verly who testified, as follows:—I have been living in Chicago the past winter. My home is in Morris. Am a sister to Plff. Lived in Joliet in the spring of '58. I was with her when she fell—in the afternoon Sunday, April 18 '58. We were returning from church were walking across the river bridge—came on to the canal bridge and crossed at the west end—there is a sidewalk before we got to the main sidewalk—she was walking with Mr. Radford. I was walking with Mrs. Radford. Mr. Radford walked on the south side

—when we came to the narrow place he went ahead—my sister next. The sidewalk was lower than the bridge is. She stepped off—her dress caught on a nail in the bridge and she turned around to unloose it. As she turned the plank tipped and over she went. She landed on the towpath below—she was gone like a flash of lightning. I saw the edge of the plank tip. The next I saw, I was down with her. We passed over the sidewalk single file. I wore colors my sister was in mourning. Mrs. Radford was also in black. She was in mourning for Mrs Radford's child—she had stood Godmother to it. I don't know where Mrs. & Mr. Radford are. They left some time that summer or fall. We were walking as usual—we always walk carefully. We walked single file because it was a narrow place. The boards were loose. The nail was two or three inches from the edge of the bridge.—Nail was almost one inch up. Her skirt was nothing more than a good length—the dress not as long as they wear them now.—The fall hurt her in the shoulder and right arm and dislocated her left ankle, she was laid up six weeks. Her arm has been paralysed several times. She has applied blisters and mustard plasters and rubbed with liniment. Dr. Davis has prescribed. Dr. Davis has been her physician. It was 18 months before this that she had had a fit of sickness. She was sick twice that winter—the second winter before the accident. The first Dr. Reese attended her the second Dr. Davis. Her general health for 18 months before the accident was very good indeed, but since that very poor and has been growing worse ever since. She was sewing before that, she was a dress maker. She was able to get her own living before that—she is not able to do scarcely any thing now, anything very light causes her to be sick. That was her only means of getting a living—her father and mother are not able to support her. The skirt was covered with mud and the waist busted open at the time of the accident. She was holding up her dress a little.

On cross examination the witness testified as follows—My sister was walking before me at the time she fell. I was not walking so near as to step on her dress. I was sworn when it was tried before. I never testified that the nail was two feet from the end of the bridge. My recollection don't need any refreshing on

that subject. I don't think I said the nail was two feet from the end of the bridge, if I did it is because I don't know distances as well as you gentlemen. We used to go twice to church on Sundays. We used to go over frequently—I think my sister went over oftener than I did. Summer evenings, moonlight evenings my sister frequently came home—we lived one block from the canal and one block from the other street. There may have been three plank but to the best of my recollection there was but two—the plank lay kind of slanting, about so near. Stone step at end of bridge. Don't know whether plank came up on to end of bridge or not. I don't recollect any thing about the nail more than I have stated. I don't recollect of testifying that she was sick during the winter before she was hurt. I have seen Mr. Osgood and talked with him but did not tell him what I would testify to. The nail had been put there to nail the plank on. I don't know how the plank lay on the stone.

The plaintiff also called Dr. J. W. H. Davis, who testified as follows: I live in Joliet. Have lived there some ten years. Am a physician and surgeon and have practiced my profession some 28 years. I have known plff. about 8 years. I recollect the time she got hurt at Joliet, when she fell from the bridge. I attended upon and prescribed for her before and since she was hurt. For a year and a half before she was hurt her health was good. She has never had any good health since. It was something like a month or six weeks after she was hurt that I was called to see her. I found her right side partially paralyzed—seemed to be a non-action, and the lower part of the left lung hepatized or consolidated. I think it was caused by a blow or fall. Either a blow or fall or anything of that kind will produce such a condition of the system. When I was first called in, I made a professional examination of her. Her condition has been such that she has never been able to do much, if anything since—not at least as she had been accustomed to do. She was a seamstress and used to assist in household affairs. I have made several professional examinations of her since her fall. There is a general wasting of the system—a depletion of the whole system. I made the last examination about four months ago. She is almost constantly under medical treatment, and it is in consequence of this acci-

dent. She has to have constant applications, blistering, compress &c., and also internal remedies. She has not the full use of her arms—both, and never has had since she was hurt. She has not the full use of her right arm. There appears to be a non-action of the deltoid muscle which raises the arm. The deltoid and pectoral muscles are contracted. I consider she received such a shock and injury from her fall that she will never be well, that she will never be a healthy woman again—that it will last her through life.

On Cross-examination. It was some 12 or 18 months before her accident that I had attended upon her. The difficulty of her lungs from her injury has not ceased. On the former trial I may have stated that the lungs had got their usual strength by the use of compress. This same difficulty might not be caused wholly by rheumatic affection. If she takes cold now she has a return of her affection.

The plaintiff also called Hannah West who testified as follows. I live at Mr. Osgood's in Joliet. I am acquainted with Miss Verly, the plaintiff. Have known her eight years last fall. I recollect the time she got hurt in Joliet in her fall from the sidewalk. I had known her I think, three years before that. She had been dress-making and doing plain sewing before she was hurt. Her health for a year or a year and a half before she was hurt had been very good. It was a long time after she fell before she was able to do anything. Her health has been very bad all the time since. She can't raise up her arm as formally, and she can't use large shears to cut anything. It was five years ago this spring that she was hurt. For two or three years after that she lived at Mr. Osgood's. Before she was hurt she was working at Mr. Osgood's nine months in the year and received \$3.00 a week, sewing. After she was hurt she was at Mr. Osgood's and worked by the piece when she could work, and she complained a good deal of her side, limb or arm and she staid there some three years after she was hurt. There has been no time that she has been able to do a full days work since she was hurt. I have been there all the time and there has not been a week that she did not have to bandage her ankle and bathe her foot, arm and shoulder

with cold water. She has had to blister her shoulder often and put mustard plasters on it evenings when she went to bed.

Defendant then called William J. Heath, who testified as follows: I have lived in Joliet ever since 1836. Have been constable, deputy Sheriff, justice of the peace, Police Magistrate. I was constable 4 years, commencing spring of 1837. First elected magistrate after I had served 4 years as constable. Was justice two terms of four years, Police Magistrate six years. Elected justice for the county a year ago, and am holding that office now. I am acquainted with locality of the west end of the canal bridge—have crossed it frequently.

When asked if he considered the place, where plaintiff fell, a dangerous place, he answered. Well, now, in relation to that, to answer as I think, and as I feel, and as my memory serves me now, I never thought it a dangerous place.

On cross examination, he stated, I think there was one or two boards at west end of canal bridge, bedded in the earth, and to that extent they were fastened, but I couldnt swear what spring they were then.

The defendant also called William Smith, who testified as follows: I have lived in Joliet a little over twenty years. Before was two or three years, on the canal, and three years on Du Page river. When I first went there, I was Clerk of the Circuit Court a little over seven years. After that I was doing business as secretary of Plank Road Company. Was a magistrate several years. In May 1853 I became president of Merchant's and Drovers Bank. I reside on the bluff, on the east side of the river. When I was Magistrate, I kept my office in the omnibus buildings. The office of the Bank, was located at the east end of what was called the lower bridge. In going from my dwelling, to the office of the bank, I usually crossed the canal bridge at the omnibus buildings, on the north side of the street. My usual business engagements, would make ordinarily four times a day, that I crossed that bridge.

I crossed the bridge in the evenings frequently. After the removal of the lodge room, from the west to the east side of the river, I had more occasion to cross. From 1856, down to the present time, and always I think, most of the business has been done on the east side of the river. I think I removed to my present place of residence, in '45, or '46. In the winter time, we frequently remained in the bank building through the evening. I was elected alderman in '57 or '58, not certain which—held the office two years. I don't know that I ever took a thought about the passage way at the west end of the canal bridge, being a dangerous place. I never had any difficulty crossing, there myself. I am now in my 75th year. I do not walk with the elasticity I used to do.

On cross examination, he testified that he did not remember loose plank or boards being there. There was a time when there was a step down. I should suppose a loose board laying there, might occasion accident. If loose boards were there, it would not be safe, as now. If loose boards were left there, it would be a very careless way of leaving it.

The defendant also called Adam Comestock, who testified as follows: I drew this plat. It is a correct plat of that locality.—Lived in Joliet 27 years. Surveyor 15 years. Resided in west Joliet. Never had my attention called to the passage way at the west end of the canal bridge. I never thought it being a dangerous place. I should not consider it a dangerous place. This is the only accident of the kind I ever heard of occurring there. I don't know how it could be any safer than it is, and keep the passage way open. As it formerly was, you could step down from the bridge four or five inches. There are as near as I can estimate 11½ miles of sidewalk, in Joliet. It is 7 years since the city commenced building sidewalks. One person would pass that bridge each minute, on an average for twelve hours each day, making an aggregate of 720 passers each day. Most of the people pass on the north side of the bridge. The south side is used for the passing of canal horses. One out of ten might pass through the road way of the bridge, and two out of five pass on the south side. I live north of the street, and might pass that side half of the time. I know the city was laid out to the canal, before the canal was built. I did not know of any loose boards in the passage way, in the win-

ter or spring of 1848. If there had been any, I think I should have known it.

(Here insert Plat.)

On cross examination he said I think before the street was raised there were plank lying on the ground one end on the stone and the other end I cannot say. I couldnt recollect whether it was before or after this accident that the plank were laying down. Some two or three plank were lying there. If plank lay down on the ground loose and a person stepped down from canal bridge on sidewalk I think it wouldnt be as safe as now. My impression is the planks were not fastened on the end towards the bridge.

The defendant also called W. F. Barrett who testified as follows—Lived in Joliet about 12 years. Live about 8 blocks from west end of canal bridge. Lived there nearly six years. Before that lived within a block and a half of the place. I am engaged in the hardware business and manufacturer of tin ware. My place of business is about 125 feet from the west end of the canal bridge. Am acquainted with the passage way from Omnibus building to west side of canal bridge. 1855 to 1859 I crossed over as often as three times and back daily. I cannot swear positively on the condition at any time in any year. I remember there were plank there—put there to keep us out of the mud and water. I think they were a foot wide or over. I have no recollection of ever considering it dangerous. I dont think there was any liability to accident to any person passing with ordinary care. My wife and children crossed there as often as one of them every day. My wife is not able to come here. We usually crossed on the north side. Never heard of any accident occuring at this place but this one. Myself and family attended congregational church on east side of river. Very seldom went in the evening. My recollection of those plank is that they lay firmly in the mud and water. There was a damming up of the water. Think there is an underdrain for water to pass off down into the canal. 400 to 600 persons pass this passage way daily and many times 5000 to 10,000 people in a day. The city had the street graded up in '56 or '57. It was before this I saw the plank in the mud. Street

has been crowning ever since it was graded up. Before it was fixed we had to step down 10 inches from the bridge. It was a good deal more muddy before present grade than since. The passage way is in better condition now than at the time of the accident.

On cross examination he testified that if loose plank were laying there it might be dangerous. The crossing there was made by the city authorities. I do not remember the condition in 1857 or 1858—cannot specify as to any one year.

The defendant also called W. C. Wood who testified as follows—Have lived in Joliet 17 years last Oct. I was in merchandize up to '54 or thereabouts and since in fire and marine insurance agency. For 5 or 6 years '48 to '55 did business in omnibus building, in the corner next canal bridge. Since '55 my business office has been on the east side of the river. Should say I crossed the canal bridge 5 or 6 times each day. My family have been in the habit of crossing some of them more or less every day. We crossed there to go to church and often at evening meetings. My wife was frequently in the habit of coming over to sit with me evenings when I had work in the office. We usually crossed on the north side. The north side is the common thoroughfare of the passes there. I called the passage way an inconvenient place before the street was graded up, since, it has been much more convenient. I never looked upon it as a dangerous place with ordinary care. My children in 1858 were from 2 to 10 years old. They were in the habit of crossing there as soon as they could go alone. I don't recollect of ever knowing or hearing of an accident there except Miss Verly. I did not hear of this one until it was on trial in court in Joliet. It is my impression that Timothy Kelly laid down some mud sills and spiked the plank to them in the passage way. I have no recollection as to the time. The ordinary travel over the place would average 100 an hour from morning till night. One day I think over 5000 crossed there.—It is my impression Timothy Kelly was street commissioner when he put the plank down.

On cross-examination—I have seen loose plank there but can't state when but recollect there was a time when they had got loose. I paid but little attention—was not interested—had no property there. I know there were frequent repairs made there by the city authorities. I don't know what the condition of the passage way was in 1858—Loose boards there might occasion accident.

The defendant also called Charles Demmond who testified as follows—Lived in the town of Joliet since 1839. Am a carpenter and joiner. Been Coroner of the county 4 years. First elected 4 years ago last fall. Am acquainted with the passage way—passed it frequently. Usually cross on the canal bridge. I recollect there were some loose boards in the passage way to cover up some mud and Mr. Kelly took them up and bedded some pieces into the ground and nailed or spiked the plank to them. I could not say what time that was. I heard of the accident to plff. about the time it took place. Could not say how long the plank were nailed down before I heard of the accident. After they were spiked down I never knew them to be loose, till they were taken away and the present sidewalk put there. Sometimes I crossed two or three times a day and sometimes not quite so often. When I went to the post office I usually crossed there and usually went or sent once a day. If those plank had been loose after they were nailed down there, I think I should have known it. I am 65 years old. Don't think I am quite as spry as when I was young. I never saw the passage way when I thought it was dangerous—never considered myself in a dangerous place when I was crossing it.—Never heard or knew of any accident there except the plff. I recollect of loose plank laying there. If they were laying on any thing that they would tip, they would not be as safe.

CROSS EXAMINATION.

Don't know when, how long, or how many loose boards.—Don't know whether one or two of them, nor how wide they were. It was some time ago—I didn't expect to be called on—I didn't charge my mind with it. If a man should step off from the bridge on to loose plank and they should tip, he might fall.

The defendant also called Perry P. Scarritt who testified as follows—Have lived in Joliet 8 years last fall. The two first years I was sheriff of the county—since been deputy sheriff. Am acquainted with the passage way in question. Some days had to cross 3 or 4 times a day—may have been other days I did not cross there at all. Crossed there frequently. My judgement would be that with ordinary care persons could pass there with safety.—In ordinary times I should think 500 to 600 pass there daily.—I can call to mind two occasions when I think it would be safe to say that there were 20,000 passed there during the day. Until this, I never knew nor heard of an accident there. I cannot tell whether there were any loose planks then or not.

The defendant also called John B. Preston who testified as follows—I reside at Lockport—resided there about 8 years. My occupation is civil engineer. Before I came to Lockport my residence for 4 years preceding was in Oregon. I was Surveyor General of the territory. I came on the Illinois and Michigan Canal in May 1855, and have been acting as General Superintendent of the canal since that time. Before I went to Oregon I was commission merchant 3 years at St. Louis, and three years preceding was resident engineer on the canal. Am acquainted with location at west end of canal bridge in Joliet. This plat shows the sidewalk across the bridge, and the plank walk, that now joins the bridge—shows the railing in proper position, and the position of the steps, and crossing all seem to be correctly represented as it is at the present time. There are twelve steps. It is $7\frac{1}{2}$ or 8 feet from the surface of the tow path, to the under side of the bridge, and near ten feet to the upper floor. The steps are masonry of the bridge. The passage ways, were put there for the purpose of accomodating the canal, and I think they are neccessary for its convenient operations. I don't consider them dangerous. I thin'k there would be less danger before the present sidewalk was put there, than now. As the bridge was constructed, there was a stone step at the end of the sidewalk, of the bridge, about 9 inches wide, beyond the sidewalk. The under side of that wide stone, is the first step. I can't conceive of any possible danger as it was before, or as it is now, if a person passes with ordinary care. I can't conceive of any way it could

be made more safer, unless you remove the steps further north, from the passage way.

By the Court.—Is there any thing in the way of removing those steps further north? Answer.—It is considered sufficiently safe as it is. The theory of building a bridge, is to lay your abutment sufficient width to give free passage, and hold the earth, and that is considered sufficiently safe. To remove the steps further back, and fill up with masonry, would cost about \$250.—The bridge, passage and steps were built by the authorities of the canal, and have always been in their control and management.—Two other bridges, on the line of the canal, one at Lockport, and one at Ottawa, are built precisely like this, and no accident has ever occurred at either of those places, that I have heard of. The witness was then, by Defts. counsel, asked the following question.

Give your judgement as to the safety of the place in question as compared with simelar works, or public improvements; to which question the plaintiff, by her counsel objected, and the court sustained the objection, and overruled the said question.—To the opinion of the court overruling said question, the defendants by its counsel then and there excepted.

The witness further testified as follows: I recollect the plank running from the sidewalk of the bridge to the sidewalk in front of the omnibus buildings. There were two or three of them—ordinary plank about a foot wide, beded in the mud. I did not notice wether they were spiked or not. I had occasion to pass over these quite frequently in superintending the canal—several times in each month, and it was my business to notice such things. I never saw them loose, and if they had been, I think I should have noticed it.

On cross examination, he stated that it would be unsafe to have plank laying there loose, and on re-examination, stated he should think there were two plank there imbeded in the mud.

The defendant also called Anthony McNerny, who testified as follows: I came to Joliet in 1853. I was elected street commissioner in 1858, Timothy Kelly was street commissioner immediately before me. I was elected March 1858. I was present at the time of the accident to the plaintiff. I was back a good part on the bridge. I saw nothing at all of her falling, until I saw Mr. Curry and some lady carry her away. I thought she was going down the steps a nearer way to her fathers. There were two plank I think. I passed every day. To the question, were they loose? he answered. "I guess not." I think I saw Tim Kelly putting a piece under at one end, and spiking them, and then the other end its on a stone it was. I think it was in the fall, or some time before that I see him fixing them—can't tell exactly. I don't know whether the spikes were in yet, I know they warn't loose. In 1856 and '7, I was'nt much across only to church. I was'nt in-to office then. I don't consider there was much more danger then than now. If a person attempts to go down them steps, it's pretty dangerous now. Its the care that does the most—and did at that time.

On cross examination, he stated, at the time of the accident a good many gathered there. I saw Mr. Curry and another lady carrying the girl. I suppose the sidewalk was raised some afterwards. I suppose it was J. C. VanAuken that did it. I know I didn't, for I didn't consider it dangerous. There were two planks that time, Kelly was fixing.

The defendant also called Michael Sebastian who testified as follows: Lived in Joliet since 1852. Lived on west side of river till '58 or '59. Have passed over the passage way a good many times. In the month of March, and April 1858, I passed there four times at least every day, sometimes seven or eight times.—Always passed on the north side. I always considered it safe.—Passed a good many times at night. I think during the spring of '58 there was no time that a person going along that passage way, and using ordinary care would be in danger of accident.

On cross examination—I never examined the walk. I don't

know of any loose planks laying there, dont know how long after the accident—before the sidewalk was fixed—was not a witness in this case before.

The defendant also called Henry Shrader who testified at follows : Lived in Joliet since '52. My residence is about 20 rods from west end of canal bridge. Am a harness maker. My store is about 10 rods from the bridge. Have had occasion to pass the bridge 3—4, and 5 times a day. I heard about the accident to plaintiff, at that time. I know the passage was in such a condition that a man could pass there safe. I think it was safe for any person to pass over. I don't think there were any loose plank there. There were two planks there in the spring of 1858. I think they were firm, but I don't know whether they were fastened or not.

On cross examination. Don't know whether there were ever loose plank there—never examend, don't know whether they were loose or not—there were two planks at time of accident. I don't know when it was fixed. Whether 3—4—5—6—7 or 10 years ago.

The defendant also called Mrs. Nicolson, who testified as follows : I have lived in Joliet ever since 1856. Am acquainted with passage way at the west end of the bridge. I always considered the place safe. Have crossed there frequently, night and day.— I knew plaintiff, she always was a delicate girl. Her mother told me she was delicate from child-hood. I visited her when she was sick I think the summer before the accident, I heard of the accident and crossed the place the same day of the accident, and looked at it.— There were two planks laid from the bridge, to the sidewalk in front of the omnibus buildings, but I don't think they were loose. They lay flat on the ground and firm, but I don't know whether they were fastened or not.

The defendant also called Mrs. Demmond, who testified as follows : I have lived in Joliet ever since 1854. I am widow of Martin H. Demmond, who was in merchandizing business in Joliet in his lifetime. Live on the west side of the river. I recollect the

passage way—could not say how it was in 1858—but did not consider it dangerous for persons passing with ordinary care.

On cross examination. I could'nt say how it was in 1858.—Never noticed it particularly at any time, don't know as it was different then from now.

The defendant also called Mrs. Onderdonk, who testified as follows: I have lived in Joliet upwards of 11 years. In 1858 lived opposite the Catholic Church. Crossed the bridge generally twice on the Sabbath, and frequently at other times. During the winter previous to the accident—I attended protracted meetings, and crossed there every evening. Lived on the south side of the street—always crossed on the north side of the bridge. I know there were two planks laid there when she fell, and I know we crossed on them. I should not say that the plank were loose. It never occurred to me that it was a dangerous place. I never had but one opinion. I always thought it was safe. To the best of my recollection there were two planks. Don't know when they were fixed. Don't know whether they were loose or not.

The defendant also called Jacob Patrick, who testified as follows: Have lived in Joliet ever since 1836. I was in the printing business 9 to 11 years. Have since been Policeman.—This is my fourth or fifth term as constable. My business has required me to pass the canal bridge frequently. I think I know what was the condition of the passage way at the west end at the time of the accident to the plaintiff. About that time I was over there frequently. My recollection is the plank were spiked down at the end next the sidewalk. I should not consider the place dangerous using ordinary care. I never heard of any accident there except this. If the plank had been loose, I think I would have been likely to have noticed it. I think the sidewalk was raised soon after she was hurt. Don't know who did it. In '58 I think I was in the Signal Office.

On cross examination. I never thought of the place in connection with this suit till day before yesterday—never examined it—could not swear that the plank were nailed.

Defendant also called Mrs. McArthur, who testified as follows: I have lived in Joliet since the spring of 1854. My husband had his office in the omnibus buildings at the time I went there. I crossed the canal bridge sometimes three or four times a day and sometimes one or two weeks, I did not cross. I passed there frequently evenings. I never considered the place dangerous.

On cross examination. My attention was never called to the place in particular. Will not say what was its condition in 1858.

The defendant also called Mrs. Stillman, who testified as follows: I have lived in Joliet since 1837. My husband's livery stable was between the canal bridge, and the river. I have crossed the canal bridge frequently, but never thought of its being dangerous.

On cross examination. My attention was never called to the condition of it—don't know the condition of it in spring of 1858—never knew whether the planks were fast or loose.

The defendant also called Mrs. Bartleson, who testified as follows:—I have lived in Joliet since the winter of 1845. Am the wife of Col. Bartleson, now in the army. During the year of 1858 my husband was District Attorney. He kept his office on the East side of the river and resided on the West side. Our usual place of crossing was on the north side of the canal bridge. I crossed the bridge almost daily from '55 to '60. I never considered the place dangerous in the least. If there had been any loose plank or any thing dangerous, I should have been likely to have noticed it. I think I would noticed it if plank had been loose. Don't remember any thing about the plank or when it was fixed.

On cross-examination.—I know nothing about this sidewalk in 1858, whether the planks were loose or imbedded in the mud.

The defendant also called Dr. A. L. McArthur who testified as follows:—I have lived in Joliet 12 or 13 years. During that

time I have crossed the canal bridge two or three times a day.— Had an office in the omnibus building 4 or 5 years. I regard the passage way at the west end of the bridge as perfectly safe. I never noticed any loose plank. If there had been any I should have been likely to have noticed it. My occupation is physician and surgeon. Have been associated with Medical University at Chicago as professor of *Materia Medica* for 3 years. Am a member of the board of medical examiners in the State of Illinois, since the first of August last. Have been in active service in the army as surgeon. I was all through the battle of Murfreesboro' and remained at Nashville a fortnight subsequent to the battle.— After the battle of Pittsburg Landing, had charge of the steamer *Black Hawk*, a steamer in the river used as a hospital. I had a partner by the name of Dr. Heiss. He is in the army now as surgeon of the 100th regiment. Miss Verly, plff., called in our office in the spring of the year 1860. My impression is it was the last of April but the exact time I do not recollect, accompanied by Esq. Osgood, for the purpose of having a professional examination of her right side and shoulder particularly. Mr. Osgood speaking to Dr. Heiss and myself, said he wished us to make a critical examination for him and he would pay for it. He said he wished to ascertain whether the young lady was really injured for if she was not injured he did not wish to make the city any costs. She was accompanied by her mother as well as Mr. Osgood, and us five were all that were present. I requested the young lady to denude her chest—remove her dress which was done and I proceeded to examine her. The right shoulder being the part of which she complained the most, I commenced examination there. When I handled the arm and forearm, she complained of pain in her shoulder. The pain was not confined to any particular spot but as near as I could judge from her answers the pain was diffused through the joint and articulation. When I took hold of the arm at the elbow to raise it up, she complained of pain and in moving the arm in any direction. Mr. Osgood wished me to examine her chest to ascertain whether there might have been internal injuries which I did. The sounds upon the percussion were healthy. In the same way by putting the ear to lungs and hearing the air pass in and out, indicate the general state of health. In examining the two sides of the chest, and shoulders I found them symmetrical—one compared with the other. Hence

I came to the conclusion, that if there was any disease it must have been confined to the muscles, and possibly to the ligaments of the joints. I inquired of Mr. Osgood, and the plaintiff about the time of the injury—my recollection is they said it was about two years previous. I inferred from this fact, that if this inability to move the arm had existed two years, there would be a wasting of the muscles, which I did not find to be true. I therefore inferred that if there was any disease, it was rheumatism or neuralgia.—After my examination, Dr. Heise examined her, at the conclusion of which I told her she could put on her dress. While she was putting on her waist, Dr. Heise and myself being on opposite sides of the room, I thought I saw her voluntarily raise her arm considerably higher than I had been able to raise it. Wishing to make the examination thorough, and satisfy myself, I desired her to remove her dress again, which was done. My object was to see if she would raise the arm again, in endeavors to put her arm in the sleeve of the dress. I was confirmed in the belief that she raised the arm higher than I had been able to raise it myself.—While using efforts to raise the arm, I thought I noticed a disposition to contract the large muscles in front of the chest which made me suspicious that the resistance was voluntary and the facts that I have related about the putting on the dress confirmed those suspicions. After she had put on her dress they all retired, Mr. Osgood not asking me what my judgment was in regard to the nature or character of the case. I desired to see him to tell him our testimony would not be favorable in his case, but I did not see him to speak with him. I saw less indication of pain in the voluntary raising of the arm than when I endeavored to raise it. It was represented to me that she had had a fall at the West end of the canal bridge and that the difficulty of moving the arm resulted from that cause. I should think it very doubtful whether a fall received two years before would produce the difficulty. In my professional opinion if paralysis occurred two or three times it would be imputable not to the bruise or injury, but to other conditions of the system. I cannot conceive it possible for a bruise to produce paralysis except for four causes or conditions. 1st. Injury to the muscles and the motor nerve of the muscle. 2nd. Congestion of a nervous centre. 3rd. Effusion in and around a nervous centre. 4th. Inflammation in and around a nervous centre. In the first form of paralysis there being an in-

jury to the muscles and nerve and the part paralyzed, the paralysis would be permanent or would be relieved by the restoration to health of the part. Consequently if recovery took place it would be gradual and would correspond with the process of recovery of the parts affected. In the second variety, the paralysis depending upon the congestion would gradually subside as the congestion should be removed. The cause having ceased the effect would subside necessarily. The 3d variety effusion, by effusion I mean blood passing out of a vessel in and around a nerveous centre. Recovery of this kind of paralysis is by absorption. This taking place gradually, paralysis would be the symptom of the condition and would also subside gradually. The cause of the paralysis having been removed the paralysis itself which is a symptom of that cause would necessarily subside. The 4th variety which is inflammation, would be explained by the same course of reasoning. That is to say the inflammation is congestion and effusion—the congestion being active. The paralysis depending upon this condition which is abnormal, it being removed the effect of that cause necessarily subsides. In all these four varieties of paralysis, owing to laws which are peculiar to the nervous system, they may exist a short time after the cause is removed, but they will subside. These facts of the physiology of the nerveous system preclude the idea that an intermittent paralysis could result from an organic lesion. So far as any case that I can now think of, if paralysis occurred a second time after mechanical injury, I should refer it to some other cause. Whatever disease there was of the shoulder I regarded as rheumatism, but not of the inflammatory kind, there being present no symptoms or signs of inflammation. I was not subpoenaed or called as a witness when this case was tried before. Up to the time of the trial, I had not communicated to any of the agents of the defendant the fact that I had made an examination. Paralysis is of two kinds—one in which the paralysis affects the sensitive nerve, called paralysis of sensation. The second variety is paralysis of motion. This is what is ordinarily meant by paralysis. These two varieties of paralysis have reference to the two systems of nerves. The sensitive and the motor. The other varieties numbering four have reference to seat or location and causes. The sensitive nerves have to do with sensation—the motor with motion.

I crossed the sidewalk both in the day time and at all hours both night and day. I think if those plank had been loose I should have notice it, and remembered it. My recollection is about the time of the accident there were 2 plank 8 or 10 feet long, about one foot wide but do not recollect whether they were nailed or not. I think I recollect they were lying flat on the ground.— My impression is they were not nailed. I have no recollection of their moving under foot when I stepped on them.

On cross examination the witness testified. Pain in the arm or any part will intently and instinctively call into operation the muscles to keep it quiet. The pain would produce the appearance I saw. If a person had been injured so as to produce weakness in any part of the system, such person would be more likely to be affected by neuralgia and rheumatism in such part. The weaker part would be more likely to be rheumatic or neuralgic than the other parts. If a person had been healthy and had been hurt and disability continued and I knew it at the end of two years I should be suspicious that that would be the cause if the symptoms could not be explained upon rational grounds, I think it would be rational to conclude the injury was the cause.— The great pain in the arm in trying to raise it as described could be rationally ascribed to the injury. If there had been no rheumatism before the injury and after the injury it had arisen, it might have been caused by the fall. Rheumatism might ensue from such a cause. If the muscles were injured so as to produce rheumatism it might affect her general health and paralysis might ensue.

The defendant also called Margarret Kimball, who testified as follows.—I have been with plaintiff something over six years.— Heard of accident to her about the time it took place. Had known her at Mr. Osgood's. She told me her health was bad. She was sewing there when she was able to sew. I heard her say she was troubled with a lame shoulder. She was troubled with the nose bleed a good deal. She said her physician spoke of putting a sea-ten in her side to relieve her shoulder. This was before the accident at the bridge. It was five years ago the fifth of last August. I left Mr. Osgood's. Have been at his house two or three times

since. I lived afterwards three years at Mr. Howk's. Was gone a couple of months to Ottawa. I was at Mr. Osgood's a little over a year.

The defendant also called Patrick O'Connor, who testified as follows.—I live on the west side of the river. I was a member of the city council in 1858. I was elected three times. My last term expired in 1858. In summer and fall of 1857, Timothy Kelly was street commissioner. I was acquainted with the passage way at the west end of the bridge. I lived on the south side of the street, but usually crossed on the north side of the bridge.—Street commissioner fixed the passage way in the fall of 1857 and put two new boards there, and put a mudsill down. Did not remark particular about their being spiked down. Sometimes in spring of 1857, crossed there 20 times a day. I think in April 1858, there were no time, they were loose. I should consider it safe to a person passing with ordinary care. In 1858 I was in the Cigar business on the west side of the river.

On cross examination.—I didn't see Kelly do any thing to the place in 1857. I used to cross 20 to 50 times a day—sometimes once in two or three minutes, when I was in business—had suits of my own to attend to—I was furnishing evidence—I had business the bank. I never fell down the stairs. In 1855 and '6, one board was warped. Sometimes crossed two or three times in ten minutes. Sometimes passed down stairs to the saloon.

On cross examination. I didn't see Kelly put down the plank but I saw it the day it was down.

The defendant also called Henry Strickland, who testified as follows.—Lived in Joliet 20 years on the west side of the river.—I sometimes crossed the canal bridge three or four times a day—and sometimes not above twice a week. Myself and family usually crossed on canal bridge on the north side. I am well acquainted with the passage way at the west end of the bridge.—I know there were plank laid down there. I never had any trouble in crossing and never saw any body have any trouble in crossing.

to the best of my recollection in April 1858 the plank there were bedded down in the mud. If they had been loose, I should have been likely to have seen it. I never knew them to be loose during that spring. I knew them to be loose before that. I know they were fixed the fall before—who fixed them I could not say.—They were buried in the mud. Whether there was any thing under them to nail them to I could not say. They were in that position till the new sidewalk was built. I don't think the place is any safer than it was before—don't know as it can be made any safer and keep the passage way open. I never saw any loose plank or loose boards lying there during the month of April 1858. If there had been I should have been likely to have seen them.—My best recollection is, the plank were fast. If they had been loose, I should have been likely to have noticed it. There might have been loose plank there and I not have seen them.

The defendant also called Isaac T. Milspaugh, who testified as follows.—I have lived in Joliet since the spring of 1844. I never resided on the east side of the river. Resided on the other side about nine years ago. Sometimes crossed the canal bridge 4-5 or 6 times a week and sometimes not oftener than once in two weeks. I crossed as often after dark as any other time. Was lame with rheumatism during winter and spring of 1858. During that time there was no time that the plank were loose to my knowledge. If they were loose, I think I should have noticed it. I heard of the accident three or four days after it occurred. I did not know of any difference in the condition of the plank at that time. I always considered the place safe enough. I never thought there was any danger there. I don't think it could be made any safer unless you would put a gate there.

ON CROSS EXAMINATION.

My attention was never called to see whether the plank were loose or fastened. Sometimes I did not cross for two weeks at a time.

The defendant also called Mrs. Fellows, who testified as follows.—I have lived in Joliet since the spring of 1835. Have cross-

ed the canal bridge sometimes two or three times a week—sometimes once a week, and sometimes once in two or three weeks.—I never observed the passage closely. I always thought it was perfectly safe. I never observed loose plank there, that would endanger a persons passage. While Mr. Curry kept his store there I usually went down the stone steps to go there. Since that was removed have not passed there so frequently. Very rarely crossed the canal bridge during the spring of 1858. At that time not more than two or three times a year.

The defendant also called Mrs. Wood who testified as follows: Have lived in Joliet since the fall of 1856, on the west side of the river. My husband's business was merchandizing. Think he commenced his store in the Omnibus building about 1855, kept there three years—perhaps more, I was at his store frequently. I heard of the accident to the plaintiff shortly after it occurred. My husbands place was then in the bank building on the east side of the river.—That spring I walked over the canal bridge oftener than ever before or since—probably every day—sometimes oftener. I have no recollection of the plank being loose that spring. I think they could not have been loose. My recollection would be that they were embeded in the mud. I never considered the place the least unsafe, if I had I should never allowed my children to cross and recross as they have constantly. I never heard of any other accident there except Miss Verly.

The defendant also called Mrs. Cook who testified as follows: I have lived in Joliet 27 years. Sometimes crossed the canal bridge 2 or 3 times a day—sometimes 2 or 3 times a week and sometimes once in 2 or 3 weeks. During the winter and spring of 1858 crossed it about as frequently as other times. Never noticed any plank from 1856 to the present time in the passage way. If any had been loose I should have been likely to have noticed it. I never considered the place unsafe at all. My usual place of crossing the river was at that place. I never heard of any accident there except the one to the plaintiff. I never examined the crossing.

The defendant also called John Onderdonk who testified as follows:—I have lived in Joliet 11 years last July. Live on west side of the river. In '57 and '58 crossed the canal bridge on an average 3 or 4 times a day. In the spring of 1858 I considered it safe crossing there. I heard of the accident to the plaintiff the next day after it occurred. The day the accident occurred I must have crossed half a dozen times. It was on Sunday. I think the plank were not loose. If they had been I should have been likely to have noticed it. It runs in my mind there was some alteration there the fall before, but I could not say positively. I recollect of there being loose boards in that passage way some time before the accident—a year or two before—could not say the time exactly. I think there were no loose boards there the day of the accident. The first time I went across when I heard of the accident I looked at them to see if they were loose and they were laying solid. I could not say positively that I crossed the next day but I presume I did. At that time I had charge of the Methodist church.

The defendant also called W. W. Stevens who testified as follows:—I have lived in Joliet since August 1856. Am an attorney at law by profession. I usually passed the passage way at the west end of the canal bridge quite frequently. From the last of January till 1st of June crossed there six, eight or ten times a week. Office on east side and I boarded on west side. When I first went over there to board there were some loose plank lying there, but before winter set in they were fixed, but I can't say the exact time. As far as being fastened is concerned I do not know. I only know they lay upon the ground partly embedded in the mud. In passing over them they always remained at the same place. I passed over them a great deal in the night when it was very dark. I heard of the accident to plaintiff about the time it occurred. I must have passed over there some ten times during the week previous to the 18th April 1858. I referred to the records of the lodge and commandery. I don't think the plank could have been loose. My impression is I passed there Friday and Saturday night before the accident and Monday and Tuesday night after the accident. I don't recollect that the plank were loose then. If they had been I should have been likely to have

noticed and recollected it. I am city attorney of the city of Joliet. I don't know as I examined the sidewalk at all in the spring of 1858.

The defendant also called Anthony Scheidt, who testified as follows:—I have lived in Joliet 12 years. Present business brewing. Was elected to city council two years ago last March. My term is out this month. Live on the west side of the river, in the same block with the Omnibus building. Sometimes crossed the canal bridge twenty or thirty times a day. I went by there on the same day that Kelly put down planks in fall of 1857. He nailed a couple of them down, I think two or three. I could not tell certain which. He nailed them on some cross pieces. My recollection is the boards were all tight where you go down at the bridge, but one of them was loose the end next the Omnibus building sidewalk. I should think the place was just as safe as Kelly fixed it, as it is now. When you go there in the night, you have to look out for it. If you would step to one side you would fall the stairs down, but when you go by in the day time it is as safe as any place.

ON CROSS EXAMINATION.

I know the west end of the plank at crossing were loose because it would spring. It seems to me both plank were loose at west end.

The defendant also called Henry D. Higginbotham who testified as follows:—I have lived in Joliet 7 years; before that resided $2\frac{1}{2}$ miles from the city for 22 years. Was first elected to city council in March 1859—am member now. In 1856-7-8-9, I crossed the canal bridge more frequently than latterly. In winter and spring of '58 I crossed 8-10 or 12 times a week—more in the evening than by daylight. Most of the occasions that called me over was the masonic fraternity. I recollect the plank that lay there running from canal bridge to sidewalk in front of Omnibus building. As often as I passed there I never discovered that they were loose. If they had been loose I think I should have noticed it. The commandary was started that spring and I was over more frequently during March and April. It would be my

impression that I passed there several times from the 16th to the 20th of April. I think the plank were not loose at the time.

The defendant also called Solomon O. Simonds who testified as follows:—I have resided in Joliet a little over 11 years. Live on the east side of the river—have lived on the west side. Lived on the east side in 1858. Have been town clerk, justice of the peace, school commissioner and school inspector. Crossed the canal bridge back and forth on Wednesday of each week—went over about dusk and back from 9 to 11. Crossed occasionally at other times. Have no recollection of the plank being loose in spring of 1858. If they had been, think I should have noticed it. I never considered the place dangerous. My judgment would be that it was not specially dangerous to persons passing there with ordinary care.

ON CROSS EXAMINATION.

It would be dangerous at the head of those stairs if the plank were loose.

The defendant also called Frank Bush who testified as follows: I have lived in Joliet between 7 and 8 years. Live on west side of river. My occupation is keeping market. My present market is about 50 feet from west end of canal bridge. In spring of '58 it was about 15 feet from there. I usually attended church on east side of river. My usual place of crossing was the canal bridge on north side. Crossed from 6 to 8 times a day in 1858. In winter and spring of 1858 attended church twice every sabbath. Attended church evenings. I recollect the passage way running from sidewalk of bridge to sidewalk of omnibus building. Don't recollect the plank ever being loose. If they had been think I should have noticed it. My opinion is the place was ordinarily safe. I have noticed travel on that side; don't recollect hearing any remark of it being unsafe. My business was on the opposite side of the street in 1858.

The defendant called O. Fox, who testified as follows. I have resided in Joliet 7 years in April. Business Merchant. In the year

'56 and '57 my store was in the omnibus building, near the bridge. I recollect boards in the passage way. Passed there twice a day certain, sometimes more. Removed my store from there in Oct. '57 to east side of the river. After that boarded on west side and south side of the street. During that winter and spring crossed canal bridge from 4 to 6 times a day. After I moved, the plank were different from what they were before. Could not say what time. They were bedded in the mud. I never saw them loose after they were fixed at any time up to the time of the accident to the plaintiff. If they had been loose at any time I think I should have known it, I never considered the place dangerous.— Never heard of any accident there, except the accident to the plaintiff. Nearly all the crossing was on that side. I did not examine side walk in spring of 1858. Those plank may have been loose and I not have known it.

The defendant also called Edmund Wilcox who testified as follows:—I have been in Joliet 26 years. Live on west side of river, business merchandizing for 20 years. Store on west side of Bluff street, about 200 feet from west end of canal bridge. Was a member of city council for 4 years from organization of city. In 1857-8-9 was city treasurer. I heard of the accident to the plaintiff the same day it occurred. I remember the condition of the place at that time. In the fall previous the place was fixed by street commissioner Kelley. There were two plank laid down and I think then were bearings put under them cross wise. After the accident I saw Van Auken fixing it the way it is now. I think when Van Auken tore up the plank they were in the same condition that Kelley fixed them in the fall. I think I went over the place the afternoon that the accident occurred. It was either that afternoon or early next morning. I heard of the accident and went to look at the place. The plank were not loose then. I think they had not been loose at any time after Kelley fixed them to the time of the accident. I crossed there 4 to 20 times a day during the winter and spring of 1858. I think the place safe for persons passing with ordinary care. The defendant then propounded to the witness the following interrogatories. How many bridges are there crossing the river and canal in Joliet? Ans. Three crossing the river, and one crossing the canal. How do the other bridges compare for safety with the bridge in question? Ans. I think they

are rather more dangerous. Will you state whether or not there are any other places in said city more dangerous than the place in question? To which question the plaintiff by her counsel objected and the court inquired of the defendant's counsel the object of the question when the defendant's counsel stated to the court that the object was to show, that the defendant had done every thing in its power for the safety of passers on its street and sidewalks, and that it was proposed to follow up the question by showing that the defendant had always since it was chartered, levied all the taxes, and collected all the revenue it had power to do under its charter, and had expended the whole in repairs and improvements, more necessary to the safety of the people than the place in question, and therefore had no power under its charter to make the place in question any more safe, to all which testimony the plaintiff by her counsel objected, and the court sustained the objection and excluded said testimony. To opinion of the court excluding said evidence, the defendant by its counsel there and then excepted.

The defendant also called John Currey who testified as follows:—I have lived in Joliet 26 years last October. My house is 250 or 300 feet from the west end of the canal bridge. My occupation for the last ten or 12 years has been selling goods. In the winter and spring of 1858 I crossed the canal bridge daily from six times upwards. I did not see plaintiff fall. Saw her while she was on the towpath. I did not notice anything to endanger a persons safe passage at that time. If there had been any thing I think I should have noticed it.

The defendant further read in evidence the following depositions:

(Here insert defendants depositions.)

The plaintiff then re-called Mrs. J. D. Verly, who testified as follows:—Am acquainted with Mrs. Currey—have known her since we have lived in Joliet, I suppose 8 or 9 years. She spoke about having a very delicate child. I said that reminded me of my daughter. I said she was a very small baby and delicate.—

I am acquainted with Mrs. Nicholson since we have been in Joliet. I never said to her that Amelia was delicate. I never had anything to do with her. I know Amelia never bled at the lungs nor never had the heart disease. In 1856 she was sick and had the billious fever and went out too soon to the piscopal church to sing and caught cold and had the nose bleed. She only had the nose bleed once—one day or one evening. It was very bad. It caused her to be deaf. I was at Dr. McArthur's & Heiss' office when they made an examination of Miss Verly. My daughter and myself went to Dr. Heiss & McArthur's the day before at 9 o'clock in the morning—they had been engaged to make the examination. My daughter and myself went about 9. When we arrived, we found Dr. Heiss, Dr. McArthur and Mr. Osgood.—My daughter introduced me to Mr. Osgood. It was the first time I had the pleasure of speaking to him. Dr. McArthur gave her a chair and said she might prepare for the examination. I removed her dress, her undersleeve, her flannel sleeve that she wore under that arm and unbuttoned her under garment on the shoulder and let it down back and front—then Dr. McArthur advanced to her with both hands in his pockets. He touched in this part here nicely—gently—very (part above chest) still keeping the left hand in his pocket, and then as he was going to go over the shoulder Dr. Heise came round and examined the back, but what they said, was too low for me to catch. Then Dr. McArthur raised himself up and put his other hand in his pocket and said incurable and walked back with both hands in his pockets.—Then Dr. Heiss came forward and took her by the hand and asked her to stand up—he held her hand—he held her harm with his left—it hurt her—his right harm and post his left on the shoulder. The color immediately left her face, says she I can't stand it—says he sit down, quite cross—she sat down. Then he took the harm this way (in front near the wrist) and then he brought as far as he could back—then he brought it so (doubling the elbow) and says he trying to lift so, says he you resist me. He tried to raise the arm right up and when he said and when he said you resist me, then he tried to work this way that way with the greatest violence. Then he tried to raise up so (meaning high) but he could not do it, and then he laid it on her knees and it had no color in it at all, but looked like a dead green piece of putty. She was very faint and I asked Dr. Heiss for a glass of water. He brought her one a dirty

glass and she could not drink it. It smelt of whiskey. Then of course she was ready to be redressed and while I was putting on her red flannel sleeve I happened to look up and saw Dr. Heiss sitting on a lounge with a cat like expression on his face, watching as a cat does when she watches a mouse. I did not stop to put her undersleeve on, nor fasten her dress in front, for she was in a fainting condition. There was a man knocked at the door. Dr. Heiss let him in—they sat down—the man was sick and he was feeling his pulse when we left. McArthur still stood with his hands in his pocket and his back to us. I never sir, took the sleeve from her arm the second time. It was never asked. The dress was open in front and did not have to raise up her sleeve to put on her dress. I put it on, she could not do it. Her arm was not raised up to a level. Dr. McArthur never spoke to me after he turned his back to me nor asked her to take off her dress the second time. He did not ask her. He was talking to Mr. Osgood by the stove with his back to her. I should think just ten minutes from the time we went into the office till we went out. It was done in a hurry. When we got up to go McArthur touched her and said her lungs were sound, and I said thank God for that. I said Doctor if her lungs are sound what makes her puff and blow like an old woman when she goes up stairs. He said there was some cause from the breast bone to the shoulder and spine that would always cause slight irritation on the lungs. It made her puff when she walked up and down stairs. From there we went to Miss Bray's and remained there about an hour until we could get her composed, for she sobbed and cried hysterically. To sit here and hear Dr. McArthur tell such a big lie is very hard.

Jacob C. Van Auken recalled by the plaintiff testified as follows:—On the morning that I fixed the side walk at the head of the stairs where Miss Verly fell off, I should think it was about nine o'clock in the forenoon when I got through fixing it. I commenced it very early in the morning. Edmund Wilcox came down there where I was to work and stopped and talked a spell. He was on the street and passed by on the street, and did not come down where we were at work. I had the men digging out the floor to put the sleepers down. There were nothing said to my recollection about Miss Verly having fallen off there the day be-

fore. I was removing the rubbish to put down the scantling or joists, to nail the plank to; had got that pretty much done when Mr. Wilcox came along. I had at that time got all the plank and boards taken up. The boards were that morning lying loose on the surface of the ground as they were the day before, and I took them myself and threwed them on the tow-path of the canal. The two plank, laid on the gravel with one end resting on the stone and the other one lay from the end of them to the main sidewalk. When they were first laid down there, they were probably an inch and a half thick, but they wore and in some places they were not then an inch thick. The road was graded up with gravel from the Catholic gravel pit by the Catholic church, and there was no mud there then. To cut a platform step 3 or 4 feet square and take up the stone steps leading from the sidewalk there down to the tow-path of the canal and relay them—making the platform, relaying the whole, and putting an iron railing all along from the canal bridge sidewalk to the foot of the steps would cost perhaps \$125, and that would be, I think a big price.

This was all the evidence introduced in the case by both parties.

The plaintiff then asked the court to give the following instructions to the jury, which were given as requested and marked on the margin of the same "given." To the opinion of the court in giving the said instructions the defendant by its counsel then and there excepted.

(Here insert plaintiffs Instructions given.)

The defendant then asked the court to give the following instructions which were given and marked on the margin thereof "given."

(Here insert Defendant's instructions given.)

The defendant also asked the court to give the following instructions, which were refused and marked on the margin thereof "refused." To the opinion of the court refusing to give the said instructions of the defendant, the defendant by its counsel then and there excepted.

(Here insert Defendant's refused instructions.)

And it is certified that the above are all instructions given in said case.

The defendant then moved the court for a new trial which was overruled by the court. To the opinion of the court overruling said motion, the defendant by its counsel then and there excepted, and prayed the court for forty days time in which to prepare a bill of exceptions which is granted. And now to-wit this first day of May 1863, and within the forty days granted for that purpose the defendant by its counsel prays the court to sign and seal the foregoing bill of exceptions which is done. Given under my hand and seal this 1st day of May 1863.

ISAAC G. WILSON, [SEAL.]

The City of Solist
ms

A. H. Weir

Abstract

Supp

Filed May 3, 1864

S. L. L. L. L.

SUPREME COURT OF ILLINOIS:

THIRD GRAND DIVISION.

April Term, A. D. 1864.

THE CITY OF JOLIET }
vs. }
AMELIA H. VERLEY. }

Error to DuPage County.

BRIEF OF PLAINTIFF IN ERROR.

This was an action on the case against the city of Joliet for the damages sustained by plaintiff below by reason of the alleged neglect of def't below to keep a sidewalk in repair, as required by the charter acts of 1857. (p. 198 to 204.) With some conflict of opinion as to whether the *locus in quo* of the accident was dangerous, but with an immense preponderance that it was not, there is but very little conflict as to the facts upon which these opinions were based.

Exchange street running east and west was wider than the Canal bridge. The line of the center of the bridge, and that of the center of the street were very nearly the same. Consequently persons passing off the west end of the bridge side walk would go diagonally in a north westerly direction across the bridge embankment in order to reach the sidewalk of the street. A glance of the map is better than a description. [Record p. 93.] During the summer preceding the time of the accident which was in April, 1858, two planks, about 10 feet long, had been placed by Kelly parallel to each other, and about a foot apart leading from the sidewalk of the bridge diagonally across the bridge embankment to the sidewalk of the street. From the bridge sidewalk there was one, perhaps two steps, (we think only one,) to the surface of the two planks. At the west end of the Bridge sidewalk there was a cut stone step which formed part of the abutment of

the bridge, and the upper ends of the two planks were at the west side of this stone step. We think the upper end of the planks and the stone were on the same level, but there may have been a step down here. It is not material whether this was so or not. There was a step down from the bridge to the stone. Some witnesses think there were more than two planks. It seems to have been contended on the other side that there were but two, and that is our opinion. Kelly, who put them down, ought to know. (160) Under these two planks at the upper and lower ends were cross pieces of plank called mud-sills, imbedded in the earth, to which the planks were spiked. The longer planks either lay flat on the surface or were slightly imbedded also. Whether the surface of the earth here sloped a little to the north or not was left in doubt. There was, of course, a descent towards the west. On the north side of the more northerly of the two planks, and within one or two feet of it, was the upper one of a flight of stone steps leading from the bridge embankment down to the tow path of the canal, making a descent of 8 or 10 feet. This flight of steps was right at the end of the bridge, and the two parallel planks extended past the stair way. Whether these two planks or either of them, which had been spiked down by Kelly as aforesaid, were loose or otherwise out of repair at the time of the accident was in controversy. Under the bias of our position the evidence seems conclusive that these two planks were firm in their place. To counsel on the other side it undoubtedly appears otherwise.

The flight of steps was used by the employees of the canal, and by all such other persons as desired to pass up and down them. There was a good deal of travel up and down the stairs. Enough to have made an obstruction like a gate at the upper end extremely inconvenient.

The plaintiff was walking westwardly across the bridge on the sidewalk walk thereof where a large number of people passed daily, and where she had frequently passed before. Her hooped skirt caught on a projecting nail or spike of the bridge. According to some witnesses she turned, step-back and unhitched it. Started again, lost her balance and fell down the stairway. The belief of the writer is that the projecting spike, the step or descent at the end of the bridge and the open stairway are all the causes *de hors* the woman and her apparel which could have contributed to produce the fall down the stairs, and that the planks were in their place, and had nothing to do with the matter. If, as some of the witnesses think, she did turn to unhitch her skirt, she must have passed down the step at the end of the bridge under such circumstances that the fact she had passed impressed itself upon her mind; then passed back up the step to unhitch her dress, excited and confused, and under a kind of mental abstraction, so

that the fact that she had passed up the steps did not make an impression on the mind. She must have after unhitching started with the first impression on her mind, the latter not. Her clothes concealing the step from view, the mental error was not corrected. With center of gravity and base and the machinery of the muscles adjusted for a level surface, the unanticipated and unexpected stepping down gave her the headlong movement which sent her, as the sister says, like a flash of lightning, headlong down the stairway. The impression of the sister that she saw the plank move may be one subsequently made upon her mind, in accordance with the maxim that the wish is farther to the thought. This is a subsequently begotten thought, sired by wish since the accident, but we presume the witness actually believed it when she uttered it. But the witnesses are mistaken. The plaintiff undoubtedly fell as women always fall who catch the head of a standing spike under their skirts. Unless the hoop of the skirt, or the nail gives way, or unless the hoop slips off the nail, a woman, moving at an ordinary rate of speed, must fall. There is no time after the momentum of the lower extremities is stopped, for the forward movement of the portion of the body above the hoop to be stayed. If your Honors are not sufficiently acquainted with such matters ask the women, and they will tell you we are right. Of course such an application of force and resistance would have sent the plaintiff headlong like a flash of lightning down the stairway. The weight of her descending body would break the hoop or move the nail, and also burst the waist as mentioned by Fanny. (41) Upon this hypothesis the nail alone would be the real or proximate cause of the accident. (The hoop itself would be more proximate though.) Still the step down might have contributed by increasing the momentum of of the moving body of the plaintiff.

Perhaps these things are rather matters of curious speculation than of profitable discussion. Two juries have found verdicts for the plaintiff. They must have understood the whole subject perfectly, besides the law and practice seem to be well settled that two wrong verdicts amount to one right decision. It seems to have been considered necessary that two such wrongs should make a right lest courts of justice should spend too much time on one case for the public good. *Fiat justitia ruat coelum* that is if there is not too much trouble about it. We will not trouble the court with an extended argument as to the facts. We do contend, however, that, giving the plaintiff the advantage of considering all disputed questions of fact decided in her favor, she has not proved a case of negligence under the law sufficient to charge the defendant..

If there ever was a case of pure accident without fault on either side this is one. Some captious, crafty curmudgeon might say that if woman will

drag their skirts on the ground behind them let them abide the consequences of their folly, and that if hoops catch on nails and injury ensues while they are indulging in such folly, they have no one to blame but themselves; but the writer knows full well that women are not free agents in relation to such cases. Fashion is a tyrant whom they cannot disobey. Is it not well said that "one might as well be out of the world as out of the fashion," and if women were out of the world what would become of society. No! no! Skirts must drag if cities are ruined. Hoops must be worn though the nation perish.

Unless the city authorities of Joliet were in duty bound to keep the canal bridge in repair we do not see how it is possible for the plaintiff to

recover even if the city, by reason of having placed the planks across the bridge embankment, was bound to keep them in good order,

We do not suppose it will be seriously contended that it was the duty of either the city authorities or the Board of Trustees of the canal to have placed a barrier across the head of the stairway. A person who otherwise might have passed safely down the steps might catch a fall by turning to shut a gate, as the plaintiff did by turning to unhitch her skirt. So rigid a rule would not answer. To have gates or other barriers at all places as public as this would never do. It would hardly be more unreasonable to have required a gate at the end of the bridge sidewalk to guard against too rapid motion up or down the one or two steps at the end, a consequent fall and injury. Reasonable care under all the circumstances is all that is necessary, and we think no unreasonable want of care and caution has been shown in the case in any point of view. Suppose the head of a nail on the bridge by the wearing down of the plank or by other cause stuck up a trifle, and suppose the plank on the ground was loose at one end, are these dangerous obstructions to travellers, within the true intent and spirit of the law? Can human prudence guard against all these little defects which would require a magnifying glass of extra power to find? Is an accident such as this, happening to one of tens of thousands of people who pass so frequently that the trip of this lady across the bridge would be to all other trips as a single grain of sand to the mass on the sea shore to cost Joliet \$1500. There is reason in all things. This lady, if her life were long enough, might have passed that place without injury, under precisely similar circumstances a million times. It was a mere accident, and a similar one might never occur there again. It was as improbable an occurrence as it would have been for her to have fallen against the railing of the bridge by tripping over some inequality on the bridge when half way over. No! give her the benefit of all controversies as to fact, it was an accident only,

and not a case for damages against any one. But let us suppose there is a liability. Who is liable? The evidence shows that this was a canal bridge under the sole control of the Board of Trustees of the canal, and never repaired or controlled by the city. John B. Preston, Canal Superintendent, says the bridge, passage way and steps were built by the authorities of the canal, and have always been in their control and management - (56) and the Mayor of Joliet says also that the bridge was controlled, built and kept in repair by the Canal Company. Of course in order to make the city liable for a want of repair of the bridge there must be a duty on the part of the city to repair it. That it is for the neglect of this duty that the action lies, is a proposition requiring no authority to support it. If the city authorities have no such control of the bridge as to require the city to keep it in repair the city is not liable for the consequences of the projecting nail on the bridge; and if the projecting nail was a cause absolutely necessary to the injurious effect, the action cannot be maintained against the city. Can it? It cannot be possible that the fall down the stairs would have taken place if the dress had not caught on the nail. In any point of view that was the primary cause. There are of course an infinite number of causes running back through all time which contributed. Some slight circumstances upon which her very existence depended might not have occurred. Her parents may never have met each other. Some slight change of circumstance, and the nail would not have projected, but in the ordinary sense in which we speak of the relation of cause and effect the nail was the primary cause of the injury, a cause without which there could have been no such effect. Is it not absolutely essential to the proper management of the canal, that such bridges, and such stairways should, after the Canal Trustees have built them, be repaired by them. Who is to judge of the necessity of repairs, and the extent and expense thereof? Can the city change the plan and make the bridge higher or lower? Make any amount of repairs at any expense, and make the Canal Trustees foot the bill? It seems to us not. The city has never repaired the bridge. The Trustees have done so, and claim that it is their duty, and deny to the city the power and right so to do. Can the city be liable under these circumstances? We insist that it cannot. Therefore we claim that the refused instruction of the defendadt was the law (172) But whether this instruction was in the case or not is no matter. It is not a controverted part of the case that the nail either wholly caused the injury, or so largely contributed thereto as to leave no cause of action against the city, if the nail had not caught the skirt. There may be a bridge or other structure in a highway in a town or city with the contract or obligation to repair, so in others that the city or town will not be liable for injuries caused by the want of repair. The case of Jones vs. the Inhabitants of Waltham, 4 Cush 299 is one. That is a case of injury by falling into a railroad cattle guard

on the side of the highway. As the necessary use of the railroad presented a barrier across it, the town was held not liable. See also 7 Cush 490, and 7 Conn. 86. Does not the use of the canal as well as the public convenience require that no barrier should have been placed across the stairway? The gravamen of this case is whether there should have been a barrier there. The nail and the plank are incidental trifles of no more moment than bits of macadamized stone, by treading on a piece of which an ankle might have been turned. If a city may be made liable every time a woman's hooped skirt catches on a nail in a sidewalk, Lord help the tax payers. If the city is liable in this case, the liability would be the same if the hooped skirt only was injured. The difference in the verdict would be one of amount merely.

Is the allegation that the injury was caused by a sidewalk of Exchange street being out of repair sustained by proof of an injury caused by a want of repair at the crossing from the bridge sidewalk to the street sidewalk? Are planks placed diagonally part way across the street, any more on the sidewalk than similar planks laid across the street or right angles with it? Is it not a street crossing, not a sidewalk? Does such a declaration reasonably apprise the defendant how to meet the allegation by proof. This is a question which does not go to the foundation of the action, and we claim the benefit of it without further comment, and pass to notice as our clerical brethren say, another question.

Was the judgment of John B. Preston as to the comparative safety of the place in question, with similar works or public improvements, allowable as evidence to the jury? There is a case similar in principle in the 6th of Cushing, Raymond vs. the City of Lowell, on p. 531, will be found the analogous point. We think the court below was in error.

We object to the ruling of the court on another point. The witness, Wilcox, (84) was asked whether there were other more dangerous places in the city, and it was proposed to follow it up by proof, that the city had collected all the money by taxation; that it had the power to collect, and had expended it all on places more dangerous than the *locas in quo*. Is this not making a city liable for a neglect of duty in a case where it had done its whole duty? Has the fashion of running in debt become so common that it is now a duty of public functionaries to do so? Must the good old fashioned pay as you go notions be at last turned out of the courts of justice? If a county should not be liable because it has no funds to repair a bridge, (1 Gilm. 568) should a city which has spent all the funds allowed it by law in the repair of more dangerous places, be liable because it did

not run in debt for means to use in repairing the *locas in quo*? It would not have cost much, it is true, but does that effect a principle? See 11 Ill. Reports, 330:

The first instruction for plaintiff perhaps, but the second, certainly, is not the law. The allegation of the declaration is that the defendant negligently *suffered and permitted* the sidewalk to be out of repair, but the second instruction makes a liability without the slightest neglect on the part of the city. The fact, alone, that the sidewalk was not in suitable repair is held sufficient by the court below. This will not do at all. The plank may have been loosened or the nail started up so immediately before the accident that no degree of human diligence could have prevented the injury.

*Randall & Fuller
& Seland & Blomsted*

City of Joliet

Meten & Veily

Appellants
Briefs

Filed May 12, 1864.
L. Veland
Clk.

Written argument
attached to brief

1st & 2^d instructions

Report 380.
The first instruction is to the jury that the defendant is not guilty of the crime charged in the indictment unless the State has proved beyond a reasonable doubt that he committed the same. The second instruction is to the jury that the defendant is not guilty of the crime charged in the indictment unless the State has proved beyond a reasonable doubt that he committed the same.

SUPREME COURT.---STATE OF ILLINOIS.

THIRD GRAND DIVISION.

Amelia H. Verly, Def't in Error,
vs.
City of Joliet, Plff. in Error,

} Error to DuPage Court.

Brief of Deft. in Error.

This was an action on the case, commenced originally in Will County Circuit Court, by the Plaintiff below (Def't in error here,) to recover of the "City of Joliet" damages for injuries sustained by her in being thrown from a defective side walk in said City, occasioned by the carelessness and negligence of the city authorities of said city. The Declaration contains three counts, and particularly describes the time, manner and extent of the injuries received by the Pl'ff below, the place where received and the defective condition of the sidewalk from which she was thrown and precipitated down a flight of stone stairs some ten or twelve feet. Plea general issue. The Declaration and evidence show the injuries to have been received at the West end of the Canal bridge, crossing the Ill's and Mich. canal, on Exchange street, in what was originally laid out as "West Juliet", being west of the Des Plains River and in the corporate limits of the "City of Joliet". The record shows that two trials have been had in the case, and on each trial a verdict was rendered for the

Pl'ff below. The first trial was in the Will County Circuit court where a verdict was rendered for said Pl'ff for \$2000.00 (Record P's 13 to 15). A new trial was granted and afterwards a change of Venue taken and the case transferred to Du Page County when after a long delay occasioned by the said City another trial was had and a verdict rendered for Pl'ff for \$1500.00 at the March Term 1863 of said Court. A motion for a new trial was made by Def't below and overruled. (Record 26-27.) Exceptions were taken and 40 days were allowed by the Court, to prepare and present to the judge a bill of Exceptions. The following is the record relative to bill of exceptions (Record P. 27) " And now " again comes said Defendant, by its said attorneys and asks leave " to file bill of exceptions and the Court being fully advised in " the premises, orders that leave be granted, providing said bill " of exceptions be prepared and submitted to the judge of this " Court in vacation within forty days from the date of the entering of this order".

No bill of exceptions was filed in the case until the 21st. March 1864, as shown by the record, (P. 28) nearly one whole year after the trial. Now can the court legally take notice of this bill of exceptions? No time was asked or allowed to file a bill of exceptions in vacation other than that contained in the above order, and the judge certifies at the foot of the bill of exceptions that it was presented and signed on the 1st. day of May 1863, being some 35 days after the trial. (See last page of abstract.) Unless the bill of exceptions was properly and in accordance with law filed in the Du Page Circuit Court, it is of course no part of the record, and cannot be considered by the Court here. If however the Court shall be of opinion that the bill of exceptions was filed in proper and apt time and is a part of the record, then the whole case is presented for consideration.

The first question sought to be raised by Pl'ff in error according to the brief herein filed is, as to whether from the evidence

the *locus in quo* of the injury to Def't in error was dangerous, in which said brief the following language occurs on the first page: "With some ^{the} conflict of opinion as to whether the *locus in quo* of "the accident was dangerous, but with an immense preponderance that it was not, there is but very little conflict as to the "facts upon which these opinions were based". It seems scarcely credible that learned and eminent counsel can be found who will pretend before this court in the face of two verdicts for Def't in error, rendered by two juries of two different counties, that a verdict should be set aside and judgment reversed on the ground, as alleged by them, of a *preponderance* of evidence against the finding of the jury. Yet strange things sometimes occur, and strange positions are sometimes assumed. In as much however as this position is assumed, and in as much as it may become necessary for the Court to examine the whole case for other reasons, it may not be considered inappropriate to call the attention of the Court to the evidence. The injuries to the Def't in error were occasioned, as shown by the evidence, by the unsafe and insecure condition of the side walk leading from the Canal bridge (over the Ill's and Mich. Canal,) to the main side walk, so called, on the north side of Exchange Street in that part of the "City of Joliet" formerly laid out and known as West Juliet, being in the Corporate limits of said city as shown by the evidence, a plat of which is attached to and forms a part of the record, said West Juliet having been laid out before the Canal was located, neither the canal or bridge is shown by the plat. A plat of the canal bridge and side walk, where the injuries were inflicted, as it appeared after said side walk was repaired, after the infliction of said injuries is also attached to, and forms a part of said record at page 93. Two witnesses on the part of Pl'ff below [Jacob C. VanAuken and Fanny Verly] and one on the part of Def't below (Dexter F. Putney) testify as to having seen Miss Verly (Pl'ff below) in the act of falling when she was thrown from the side walk and precipitated down the flight of stone steps upon the towing path of the canal some ten feet or more from said side walk. Jacob C. Vanauken (Record P's 29 to 33. and P. 1. of bill of exceptions on abstract,) and Fanny Verly (Record P's 39 to 42. and P's 7-8-9 on bill of exceptions in abstract) both testify to seeing her fall from the side walk

and as to the care with which she was crossing. They both testify that four persons were walking in company, two abreast, along the side walk on the North side of the canal bridge, and that when they come to the west end of the canal bridge, and stepped off down upon the narrow side walk at the head of the stone steps, consisting of some 2 or 3. loose planks, boards or slabs, they stepped carefully down from the canal bridge in single file upon this narrow side walk, thus showing extraordinary care at this point.— Both Mr. Vanauken and Fanny Verly testify that as Pl'ff stepped from the canal bridge down upon these planks or slabs her dress (not crinoline) caught on a nail sticking up at the edge of the side walk of the canal bridge, that she turned around to disengage her dress, and as she turned Vanauken, who was some 30 or 40 feet back, says as she made the second step she turned to loosen her dress as he supposed and as she turned she lost her ballance and down she went head foremost.

Fanny Verly who was walking just behind her sister, says “ we were returning from church, were walking across the river “ bridge—came on to the canal bridge and crossed at the west end, “ there is a side walk before we get to the main side walk, she was “ walking with Mr. Radford. I was walking with Mrs. Radford. “ Mr. Radford walked on the South side, when we came to the “ narrow place he went ahead, my sister next. The side walk was “ lower than the bridge is. She stepped off—her dress caught on “ a nail in the bridge and she turned around to unloose it. As she “ turned the plank tipped and over she went, she landed on the “ tow path below, she was gone like a flash of lightning, I saw the “ edge of the plank tip. The next I saw I was down with her. “ We passed over the side walk single file.” farther along this same witness testified as follows: “ We were walking as usual, we always “ walk carefully. We walked single file because it was a narrow “ place. The boards were loose, The nail was two or three inches from the edge of the bridge. Nail was almost an inch up. “ Her skirt was nothing more than a good length, the dress not as “ long as they wear them now. The fall hurt her in the shoulder

" and right arm and dislocated her left ankle, she was laid up six
 " weeks. Her arm has been paralyzed several times." And far-
 " ther along witness says, " she was sewing before that, she was a
 " dress maker. She was able to get her own living before that.
 " She is not able to do scarcely any thing now, any thing very
 " light causes her to be sick. That was her only means of getting
 " a living. Her Father and Mother are not able to support her.
 " The skirt was covered with mud and the waist bursted open at
 " the time of the accident. She was holding up her dress a little."
 Both Mr. Van Auken and Miss Fanny Verly were in a position to
 see Pl'ff below when she stepped down from the side walk of the
 bridge upon those planks or boards, and when she turned to disen-
 gage her dress from the nail, and when she fell and know whereof
 they testify. Van Auken farther testified: " there is no railing at
 " the west end of the bridge for her to take hold of. There had
 " been one or two accidents happened there on account of it be-
 " ing a bad rounding place and Long went and tore up 2 or 3 of
 " the old planks and laid them on the top of the ground and on
 " the rock they stepped on;" also " Long took the men he had
 " in the City bridewell. He was bridewell keeper. He did this
 " in March two or three weeks before the accident. also He took
 " these men there under the direction of Firman Mack Mayor of
 " the City. The plank were just laid on loose, not fastened. They
 " were old plank and whenever the sun come to them it would
 " turn them up and twist them every way. There were but two
 " when the accident happened and they were very much warped.
 " When she lost her balance she went down head first; there was
 " nothing that she could take hold of to steady herself and she
 " fell down upon the tow path of the Illinois and Michigan Ca-
 " nal," &c. Farther " John Hedges fell down there and an irish-
 " man fell down there a short time before." Farther " It was
 " necessary for safety to walk in single file and they passed off
 " the Canal bridge and across the walk then in single file. The
 " nail was a large spike and the plank had worn off around it so
 " it stuck up half an inch, may be three quarters. I was City
 " Marshall at the time. I had brought this place to the attention
 " of the Mayor at the time he told Long to take his men there

"and fix it." &c. "Long kind of leveled it off a little, very
 "slight, The grading was principally rock drawn from the quar-
 "ries on the bluff and gravel put on it. The center of the street
 "was two feet higher than the steps. This grading was put in
 "after the bridge had been raised. It was sloping at the head
 "of the steps &c. Farther "I was circulating around among peo-
 "ple of the Town at the time attending to my office. After the
 "accident I fixed a new side walk by direction of the Mayor and
 "Col. Smith an Alderman. I raised it up nearly level with the
 "side walk of the bridge. Put on an 18 foot 4 inch scantling at
 "the west end of the steps. Plaintiff was going straight along
 "on the side walk. She had a common dress on, not very long
 "or very wide. The loose plank were sometimes 3. sometimes 6
 "and sometimes 12. inches from the stone steps" &c.

On being recalled after Def's evidence in the case had been
 closed this witness farther testified among other things that " On
 'the morning that I fixed the side walk at the head of the stairs,
 "where Miss Verly fell off, I should think it was about nine
 "o'clock in the forenoon when I got through. Edmund Wilcox
 "came down there while I was at work and stopped and talked
 "a spell, he was on the street and passed by on the street and
 "did not come down where we were at work. I had the men
 "digging out the floor to put the sleepers down. There was
 "nothing said to my recollection about Miss Verly having fallen
 "off there the day before. I was removing the rubbish to put
 "down the scantling or joists to nail the plank to; had got that
 "pretty much done when Mr. Wilcox came along. I had at
 "that time got all the plank and boards taken up. The boards
 "were that morning lying loose on the surface of the ground as
 "they were the day before and I took them up myself and throw-
 "ed them on the tow path of the canal." &c. Near the close of
 his evidence said witness said: "To cut a platform step 3 or 4
 "feet square and take up the stone steps leading from the side
 "walk there down to the tow path of the Canal and re-lay them
 "making the platform, relaying the whole and putting an iron

"railing all along from the Canal bridge side walk to the foot of the steps, would cost perhaps \$125.00 and that would be I think a big price."

The following witnesses on the part of Pl'ff below, all testify to the bad condition of the side walk at the W. End of the Canal bridge at the immediate point where the injury was occasioned at the time the injury was committed viz: Jacob C. Van Auken, Alexander McIntosh, Leopold Schwabacker, Benjamin Richardson, George H. Ward, Joel George, J. D. Verly, Mrs. J. D. Verly and Fanny Verly and they testify from *their knowledge*. George H. Ward, one of the said witnesses testified (Record P's 36 and 37) that the board next the head of the stairs at the time of said accident was loose, that there were two and might be three boards there. He thinks mud had worked down and partly covered one end of the board next the street, that the street was quite crowning. That he had frequently spoken of it as dangerous and he regarded it as dangerous. He recollected of passing along that day when Pl'ff below was hurt. That he went to look at the place immediately upon hearing of the accident on the same day. That he was acquainted with her and heard she had been hurt and went to see. That there was then a loose board next the step." &c.

Joel George also testified the boards were loose and the ground sidling off towards the stairs. That the passage way was unsafe. That he had frequently remarked to different persons that some one would be hurt there yet. That he had noticed it immediately after Pl'ff was hurt and went and examined it. &c.

Benjamin Richardson one of said witnesses testified that he was acquainted with the Canal bridge and the space at the head of the stairs between the Canal bridge and main side walk in the spring of—58 and had crossed a great many times. He considered it in rather a bad condition. That from the end of the bridge

were two or 3 boards lying loose &c. Remember the time Miss Verly was hurt and the side walk was in about the same condition at that time. The plank were loose and warped, the street was crowning and sidling at the crossing. The boards were so warped as not to be solid and if a person happened to step on the side of the boards he might loose his balance &c. That the side walks on Jefferson and Exchange Streets were built by the City authorities and after the accident the walk across the passage was repaired by the City authorities and a scantling put up from the railing of the side walk on the Canal bridge to the foot or nearly the foot of the stone steps &c.

Nearly all the witnesses of Pl'ff below testified to having seen and noticed the said side walk before and at the time of said injury and some of them to making an examination of it on the day the injury was received and they knew what was its condition, and they agree, all who were asked the question that said Pl'ff was a poor sewing girl, dependent upon her own exertions for a living, and that she has become disabled on account of said injuries and can perform but very little labor. Doct. J. W. H. Davis testified that he had been a practising physician and surgeon some 28 years (Record P's 42 to 44) and his evidence clearly shows that her disability is the result of said injuries. that he has carefully examined her professionally several times since the said injuries were received. That he was well acquainted with her before and knew her health to be good. That since said injuries there is a general wasting of the system—a depletion of the whole system. That she has never been able to do much if any thing since. That he made his last examination about four months before the trial. That she has to have constant applications, blistering, compress &c. and internal remedies. That she has not the full use of both her arms and has not had since she was hurt. That she has not the full use of her right arm. That he considers she has received such a shock and injury from her fall that she will never be well, that she will never be a healthy woman again, that it will last her through life, The testimony of Mr. and Mrs. J. D. Verly, Fanny Verly, Miss

Hannah West, Doct. Davis and others—show that the health of Pl'ff below for a long time previous to her injuries was good, that she was able to labor and earn her \$3.00 per week. That since her said injuries she has never seen a well day. That a great portion of the time she has not been able to labor at all. The foregoing presents but a mere outline, an imperfect view of the case of said Pl'ff below, as the court will perceive on examination.

The Def't below (Pl'ff in error here) by its att'ys undertook on the trial, to overwhelm the Pl'ff with witnesses, and to endeavor to make a show of proof of the security and good condition of the said side walk at the time of said injury. 35 witnesses were called upon the stand to testify in behalf of Def't below and the depositions of 9 others were taken and read to the jury on the same side, making together 44 witnesses, a large majority of whom testified that they did not know the situation or condition of said side walk at the time of said injuries and the jury seems to have believed them. The services of no less than eleven astute and able Lawyers was called into requisition on the part of the defence in the courts below, who brought to bear all the ingenuity skill, ability, and legal learning of which they were capable to defeat the Pl'ff there, and failing in that they have brought the case to this court, and four learned and experienced Counsellors are retained and are seeking if possible to reverse the small judgment of this poor girl, who as the evidence shows has been seriously injured and rendered an invalid during her whole life, by the gross negligence and carelessness of the Pl'ff in error, and the agents under its control. If there are *legal* grounds for reversing the judgment they will of course succeed.

The court cannot fail to notice on examination of the abstract of the evidence given to the jury in the deposition of D. F. Putney, Horatio N. Marsh, George M. Wallace, Firman Mack, Doct. John H. Reece, Wm. A. Strong, Royal E. Barber, Mrs.

Lucy Curry and Timothy Kelly, on comparing said abstract and depositions that the evidence of said witnesses is not only very imperfectly and inaccurately abstracted, but that the testimony of said witnesses in said abstract is most grossly garbled and perverted, for some reason. The testimony of most of these witnesses, is much of it uncertain, vague, indefinite and unsatisfactory, a great deal of it given at random, by guess and although the witnesses testify that they did not consider that passage very dangerous at the time of the accident to Def't in error here, yet they disclose sufficient by their evidence as given, to show that it was in fact an unsafe and dangerous place, and that the city authorities knew it, and had been inexcusably (and I might say even criminally) careless and negligent in regard to it, that said passage way at the head of said stone steps had for a long time been left with some 2 or 3 boards thrown down carelessly upon the ground for unsuspecting people to pass over, on the most important thoroughfare in the city as shown by the evidence, said plank being loose and insecure and liable to tip and move about and endanger the lives and limbs of passers over it—corroborating in this regard the testimony of the witnesses of Pl'ff below.—True Timothy Kelly, who was street commissioner testifies that some time in the summer of 1857. (the year before the accident) he fixed this side walk by putting down bearings and nailing the planks of said side walk to them—and Van Auken a witness for Pl'ff below testified that some 3 weeks before Miss Verly was thrown down, Long the bridewell keeper, with the men in his charge, by order of the Mayor took up these plank or boards, which had become covered with mud and gravel, and kind of leveled off the gravel and laid them down on the surface of the ground without fastening them in any manner, and nearly all the witnesses, who were interrogated on that point testified that after Miss Verly was thrown down, the said side walk then was raised, fixed, fastened and made permanent and secure, and much safer than before. The testimony of most of the forty-four witnesses of Def't below was vague, indefinite, uncertain, much of it given by guess, a long time having elapsed since the injury was received by Miss Verly before the trial, and the said witnesses, their

attention never having been called to the said side walk, could not recollect about the situation and condition of it and they so testified, and on their examination thought, guessed, considered, but did not know.

Wm J. Heath an old resident of Joliet was the first witness called by Def't below, and when asked whether he considered the place where Pl'ff fell dangerous he said " Well now in relation to " that to answer as I think and as I feel and as my memory serves " me I never thought it a dangerous place " and on cross examination he stated " I think there was one or two boards at the " west end of Canal bridge bedded in the earth, and to that extent they were fastened, but I could not swear what spring they were there."

Next Col. Wm. Smith an old resident and an old man some 75 years of age was called, who testified that he often crossed at that point and that he never had any difficulty crossing there himself. On cross examination he said " that he did not remember loose plank or boards being there. There was a time when " there was a step down. I should suppose a loose board lying " there might occasion accident. If loose boards were there, it " would not be safe as now. If loose boards were left there it " would be a very careless way of leaving it."

Next witness was Adam Comstock City Surveyor. He never had his attention called to that passage way. On cross examination he said " I think before the street was raised there were " plank lying on the ground one end on the stone, and the other " end I cannot say. I could'nt recollect whether it was before " or after this accident that the plank were lying down. Some " two or three plank were lying there. If plank lay down on " the ground loose and a person stepped down from canal bridge " on side walk I think it would'nt be as safe as now. My im-

"pression is the plank were not fastened on the end towards the bridge."

Next W. F. Barrett was called for Def't below. He says in his direct evidence among other things "I called the passage way an inconvenient place before the street was graded up; since it has been much more convenient. I never looked upon it as a dangerous place with ordinary care. The passage way is in better condition now than at the time of the accident." He is very indefinite. On cross examination he testified "that if loose plank were laying there it might be dangerous. The crossing there was made by the city authorities. I do not remember the condition in 1857 or 1858, cannot specify as to any one year."

Next come Wm. C. Wood. He was very uncertain and indefinite, but on cross examination he testified "I have seen loose plank there but can't state when, but recollect there was a time when they had got loose. I paid but little attention, was not interested, had no property there. I know there were frequent repairs made there by the city authorities. I don't know what the condition of the passage way was in 1858. Loose boards there might occasion accident."

Charles Demmond was next called. He was a man 65 years old. At the close of his direct examination he says "I recollect of loose plank lying there. If they were laying on any thing that they would tip they would not be as safe." On cross examination he said "Don't know when, how long, or how many loose boards. Don't know whether one or two of them, nor how wide they were. It was some time ago. I didn't expect to be called on. I didn't charge my mind with it. If a man should step off from the bridge on to loose plank and they should tip he might fall."

Perry P. Scarritt was next called and at the close of his testimony he says "I cannot tell whether there were any loose plank there or not,"

Next John B. Preston was called. Lived at Lockport. Is civil engineer. General superintendent on the canal. In answer to the question put to him by the court "Is there any thing in the way of removing those steps further north?" the witness answers evasively. And as to the question asked him by Def'ts counsel "Give your judgment as to the safety of the place in question as compared with similar works or public improvements." It seems unnecessary to take time to show that this was irrelevant and improper. It is apparent upon the face of the question or proposition itself. On cross examination said witness testified, "that it would be unsafe to have plank laying there loose," and on re-examination stated he should *think* there were two plank there imbedded in the mud. I will not further repeat evidence of the witnesses separately. The following witnesses of the Def't below among other things testify either that they did not know the situation and condition of said side walk in the spring of 1858, when Miss Verly was injured, or that they had not noticed it, or did not know whether the plank were fastened or not. viz:—

Michael Sebastian, Henry Shrader, Mrs. Nicholson, Mrs. Demmond, Mrs. Onderdonk, Jacob Patrick, Mrs. McArthur, Mrs. Stillman, Mrs. Bartleson, Dr. A. L. McArthur, Isaac T. Millsbaugh, Mrs. Fellows, Mrs. Cook, W. W. Stevens. And all these witnesses were called to prove the permanency and security of said side walk. Anthony Scheidt for Def't below said on his cross examination he knew the west end of the plank at crossing were loose because it would spring &c. And Solomon O. Simonds on his cross examination said "It would be dangerous at the head of those stairs if the plank were loose." And O. Fox did not examine the side walk in the spring of 1858. "The plank may have been loose and I not have known it." On the examination of Edmund

Wilcox a witness for Def't below, the following question was asked him by Def'ts Counsel " Will you state whether or not there " are any other places in said city more dangerous than the place " in question?" the counsel stating that it was proposed to follow it up by showing that Def't had levied all the taxes and collected all the revenue it had power to do &c. and had done ever ything in its power for the safety of passages on its streets and side walks. Pl'ffs counsel objected to the question and the objection was sustained by the court, and this is alleged as error! What legal bearing could an answer to this interrogatory have upon the case? The city had assumed and acted upon the very liberal powers conferred by its Charter and it was bound to exercise the powers therein contained and to keep its streets, bridges, and side walks in such condition and repairs as to insure the safety of persons and their property while passing over and along the same, and particularly at the passage by the head of these stairs it was necessary and incumbent upon the city to keep the side walk firm and secure. and not allow obstacles to be placed or remain there, nor suffer or allow the plank or boards of which it was composed to lie loose upon the gravel of which the street was composed, where a person passing even with the utmost care, might make a mis-step, or might step upon the side of such plank or board and be thrown from his balance and precipitated down the said stairs, and killed outright or maimed for life. It was not in this case a mere accident, as characterized in the brief of Pl'ff in error. But it was an injury caused by the gross negligence and carelessness of the city authorities and the passage had been for a long time unsafe, and it was well known to the city authorities. It was not the nail sticking up that caused the fall of Miss Verly. It was the insecure manner in which the side walk was suffered to remain, the plank of which it was composed lying there loose upon the surface composed of gravel and liable to tip if a person should step a little one side of the center.

The responsibility or liability on the part of the city of Joliet is sought to be avoided, by placing it upon the Board of Trustees

of the Illinois and Michigan Canal, by showing that said Trustees built the canal bridge and steps, and that they have had the control and management of the same. It is immaterial whether the city or the Canal Trustæ built the bridge or who had in fact controlled it. The city cannot relieve herself of the responsibility enforced by the terms of the city charter, after having once assumed to act under the charter. The provisions of the City Charter are full and ample and give to the city full and complete power and jurisdiction for all municipal purposes at least, over all public grounds, streets, alleys, cross and side walks and bridges, and the city by the terms of its Charter is legally bound to keep in repair all the streets, alleys, bridges, cross and side walks in the corporate limits where the public pass and repass and this responsibility cannot be changed or shirked to or upon any other person or corporation. If the Canal Trustees had neglected or refused to build the canal bridge, or had suffered it to decay and become dangerous after they had built it, will it be contended that the city had not a right and that it was not its bounden duty to build and keep the bridge in proper repair on the thoroughfare described by the evidence in this case? But aside from this the evidence both on the part of Pl'ff and Defendant shows that all the Trustees ever did was to build the abutments, stairs and superstructure, and that the street, (the filling up of the abutments, including said passage way and the side walk over the same) was made by the city and kept in repair by the city. The city charter confers ample powers and gives the city full and complete jurisdiction over all the streets, bridges, side walks &c. in the corporate limits Sess. L. 1857. (Private Laws) P. 188. Among the powers conferred see Chap. IV. §. 4. paragraph 21. on P. 200 also paragraphs 28 and 29 of same §. also paragraph 48 of same §. under which last paragraph the city is "to exclusively control regulate, repair, amend and clean the streets and alleys, bridges side walks, and cross walks &c." Also see Chap. V. on the subject of taxation generally, and Chap. VII. on assessment for Public Improvements §. 1. "The Common council shall have power from time to time to cause any street, alley, or highway to be graded leveled, paved, macadamized or planked and keep the same in repair."

Second. To cause cross and side walks &c. to be constructed &c. §. 2 provides for the payment of the expenses of such improvements by assessment upon the real estate fronting and adjoining such improvement according to the width of the respective ~~points~~ ^{fronts}. Thus imposing the payment for all this class of improvements on the property (real estate) adjoining the improvement. §. 7. of same chapter provides that the owners of property may make the improvements or repairs, in such manner as the city by ordinance may prescribe. See also Chaps. XIII. § §. 18. 19 for farther powers and exemptions.

In regard to the matter of improvements of streets, repairing of side walks and cross walks the city has no occasion to resort to its general taxes or revenues, the adjacent real estate being liable to assessment for the whole expense of such improvements; hence the interrogatory to Edmond Wilcox was wholly irrelevant and improper and the court properly rejected it. The city has the same right to tax the property of the Canal Trustees as any other. There can be no doubt whatever that the city has full, complete and ample authority under its charter to build and keep in repair a bridge across the canal and the city cannot shirk or transfer its liability upon the Canal Trustees, any more than it can upon any other parties. But are the Canal Trustees liable in any manner either to build or keep in repair this bridge? In the case of the People ex. rel. Hoes ~~et~~ al. vs. Canal Trustees 14 Ill's Rep, 403. the court refused to grant a mandamus against the Canal Trustees requiring them to build a bridge across a highway on the ground that there is no legal obligation upon the State or the Canal Trustees to erect the bridge. There is nothing in the law requiring either the State or the Canal Trustees to build a bridge at this point, and consequently there is no legal obligation on said Trustees to build or keep in repair a bridge there, and in fact the Canal Trustees have no right as such Trustees under the laws of this State to build, keep in repair or control such bridge. The only authority in the statute authorizing the Canal Trustees to build a bridge is the act, passed in 1855, (Sep. L. 1855 P. 104.) which authorized the building a bridge at

Seneca La Salle County. The instruction of the Def't below was properly refused, the city of Joliet being the only party that could be made liable for the injury in this case. The cases of *Jones vs. The Inhabitants of Waltham*. 4 Cush. 299. *Sawyer vs. Inhabitants of Northfield* 7 Cush 491, and the *Goshen Turnpike Co. vs. Sears* 7. Conn. 86. are cited by Pl'ff in error to show that said Pl'ff in error is not liable for the injuries to Def't in error, but they are not authorities applicable to the facts in this case.

That the place in question where the injury was inflicted was properly designated and called in the declaration a side walk there can be no doubt. It is so designated and called by the witnesses & is in fact a side walk and so found by the jury, and this as well as other exceptions taken by Pl'ff in error is purely technical. The point raised by Pl'ff in error, or attempted to be raised, that the city should not be held liable because it had expended all the taxes collected and had no funds with which to repair the said side walk at the head of the stairs at the canal bridge has already been adverted to, and it has been shown by the City Charter that the adjacent property is liable for the expense of such repairs, and the authorities referred to by Pl'ff in error viz:—1. *Gil*. 568, and 11. *Ill's Rep*. 330. are inapplicable.

The city by its Charter was legally bound to furnish and keep in repair a good convenient and safe side walk, as well at the place where Pl'ff below was thrown down and injured as at other places and for a failure or neglect to keep such side walk in a safe condition for the passage of persons over it, the city was and is undoubtedly liable in damages for injuries occasioned by their carelessness or neglect. On this point see the case of *The Mayor &c. of the City of New York vs. Furze* 3. *Hill* 612. The court below in which the trial in that case was had on P. 613 charged the jury, "That the Defendants were bound to put and "keep in repair the sewers &c. in the city and to see that they "remained unobstructed, so as to carry off the rain or water

" from the streets ; and further that the Defendants were liable
 " for acts of omission by the officers appointed by them." The
 Supreme Court, after stating the provisions of the Charter of the
 City of New York on that subject, which are similar in their lan-
 guage to the provisions of the Charter of the City of Joliet, on
 P. 614. says, " This statute is one of public concern relating ex-
 " clusively to the public welfare, and though permissive merely
 " in its terms, it must be regarded upon well settled rules of con-
 " struction as imperative and peremptory upon the corporation.
 " When the public interest calls for the execution of the power
 " thus conferred the defendants are not at liberty arbitrarily to
 " with-hold it. The exercise of the power becomes then a duty
 " which the corporation are bound to fulfil "&c. See also the
 cases of *Hutson and wife vs. The Mayor &c. of New York*, and
Carlin and Harriman vs. The same 5 Selden 163 decided at the
 Dec. Term 1853. These were actions commenced in the Superior
 Court of N. Y. and both presented the same legal questions. In
 the first a recovery was sought for injuries done to Mrs. Hutson
 by the falling of a carriage in which she was riding, into a chasm
 made in the construction of the Harlem R. R. in 4th. Avenue in
 the city of N. Y. The second for injuries done to the carriage.
 The court say on P. 167. " The simple question is presented in
 " these cases, whether the Defendants who have negligently suf-
 " fered a public street in the city of New York to be and remain
 " out of repair, are liable for damages sustained by the Plaintiff
 " whilst carefully driving along such street, their carriage being
 " upset and the bad condition of the road being the sole cause
 " of the injury thereby sustained." &c. and on P. 168. the court
 say. " It must however be considered as admitted by the pleadings
 " that these injuries were received upon one of the public streets
 " of the city. That this street at the place in question was subject
 " to the control of the defendants as a municipal corporation must
 " be conceded. The setting the curb and gutter stones by the
 " defendants was done in virtue of the power conferred by §. 175
 " 2. R. S. 407 and in their municipal character. The Defendants
 " therefore possessed this extraordinary power and over this street.
 " They owned the fee of the land and held it in trust for the pub-

"lic as a street with a franchise in themselves conferred for public purposes, authorizing them to maintain and keep the same in repair and to defray the expenses thereof by assessment upon the adjacent owners or occupants or upon the lots themselves. It was that this might and should be done that these powers were conferred upon the defendants. It requires no argument to prove that it is the duty of the defendants to see that the public streets of this densely crowded city are kept in repair; for where a public body is clothed by statute with power to do an act which concerns the public interest, the execution of the power may be insisted on as a duty, though the statute conferring it be only permissive in terms."

As in that case, so in the present case, the plea being the general issue only, it must be considered as admitted by the pleadings that the injuries to Pl'ff below were received upon a public sidewalk of the city, and that the place in question was subject to the control of the Def'ts below as a municipal corporation must be conceded, see also 11. Wend. Rep. 539. The People vs. Corporation of Albany. 9. Mich. Rep. 165. The city of Detroit vs. Corey

It is alledged that the 1st. instruction for Pl'ff perhaps. but the 2d. certainly is not the law. The att'y for Pl'ff in error must certainly have strained a point to have arrived at this conclusion. But even if there were a technical error in the instructions, if the court are satisfied that justice has been done, it is not cause for reversing the judgment. For when substantial justice has been done, even if errors have been committed by the court below upon the trial in the admission of evidence or in the giving or refusing instructions the judgment will not be reversed see 1. Gill. Rep. 475. Gilbert et. al. vs. Sweat. 3d. Id. 202. Greenup vs. Stoker. 18. Ill. 449. 454. Newkirk vs. Cone, 19. Ill's 59. Dishon et. al. vs. Schorr. The judgment of the court below should unquestionably be sustained.

URI OSGOOD,
Att'y for Def't in Error.

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Sup. Court

A motion to. Verdy

all,

Cts of Police

Brief of Dep. in Error

Filed May 19. 1864

L. S. Landon clk

SUPREME COURT.---STATE OF ILLINOIS.

THIRD GRAND DIVISION.

Amelia H. Verly, Def't in Error,

vs.

City of Joliet, Plff. in Error,

} Error to DuPage Court.

Brief of Def't. in Error.

This was an action on the case, commenced originally in Will County Circuit Court, by the Plaintiff below (Def't in error here,) to recover of the "City of Joliet" damages for injuries sustained by her in being thrown from a defective side walk in said City, occasioned by the carelessness and negligence of the city authorities of said city. The Declaration contains three counts, and particularly describes the time, manner and extent of the injuries received by the Pl'ff below, the place where received and the defective condition of the sidewalk from which she was thrown and precipitated down a flight of stone stairs some ten or twelve feet. Plea general issue. The Declaration and evidence show the injuries to have been received at the West end of the Canal bridge, crossing the Ill's and Mich. canal, on Exchange street, in what was originally laid out as "West Juliet", being west of the Des Plaines River and in the corporate limits of the "City of Joliet". The record shows that two trials have been had in the case, and on each trial a verdict was rendered for the

Pl'ff below. The first trial was in the Will County Circuit court where a verdict was rendered for said Pl'ff for \$2000.00 (Record P's 13 to 15). A new trial was granted and afterwards a change of Venue taken and the case transferred to Du Page County when after a long delay occasioned by the said City another trial was had and a verdict rendered for Pl'ff for \$1500.00 at the March Term 1863 of said Court. A motion for a new trial was made by Def't below and overruled. (Record 26-27.) Exceptions were taken and 40 days were allowed by the Court, to prepare and present to the judge a bill of Exceptions. The following is the record relative to bill of exceptions (Record P. 27) " And now " again comes said Defendant, by its said attorneys and asks leave " to file bill of exceptions and the Court being fully advised in " the premises, orders that leave be granted, providing said bill " of exceptions be prepared and submitted to the judge of this " Court in vacation within forty days from the date of the enter- " ing of this order".

No bill of exceptions was filed in the case until the 21st. March 1864, as shown by the record, (P. 28) nearly one whole year after the trial. Now can the court legally take notice of this bill of exceptions? No time was asked or allowed to file a bill of exceptions in vacation other than that contained in the above order, and the judge certifies at the foot of the bill of exceptions that it was presented and signed on the 1st. day of May 1863, being some 35 days after the trial. (See last page of abstract.) Unless the bill of exceptions was properly and in accordance with law filed in the Du Page Circuit Court, it is of course no part of the record, and cannot be considered by the Court here. If however the Court shall be of opinion that the bill of exceptions was filed in proper and apt time and is a part of the record, then the whole case is presented for consideration.

The first question sought to be raised by Pl'ff in error according to the brief herein filed is, as to whether from the evidence

the *locus in quo* of the injury to Def't in error was dangerous, in which said brief the following language occurs on the first page: "With some conflict of opinion as to whether the *locus in quo* of the accident was dangerous, but with an immense preponderance that it was not, there is but very little conflict as to the facts upon which these opinions were based". It seems scarcely credible that learned and eminent counsel can be found who will pretend before this court in the face of two verdicts for Def't in error, rendered by two juries of two different counties, that a verdict should be set aside and judgment reversed on the ground, as alleged by them, of a *preponderance* of evidence against the finding of the jury. Yet strange things sometimes occur, and strange positions are sometimes assumed. In as much however as this position is assumed, and in as much as it may become necessary for the Court to examine the whole case for other reasons, it may not be considered inappropriate to call the attention of the Court to the evidence. The injuries to the Def't in error were occasioned, as shown by the evidence, by the unsafe and insecure condition of the side walk leading from the Canal bridge (over the Ill's and Mich. Canal,) to the main side walk, so called, on the north side of Exchange Street in that part of the "City of Joliet" formerly laid out and known as West Juliet, being in the Corporate limits of said city as shown by the evidence, a plat of which is attached to and forms a part of the record, said West Juliet having been laid out before the Canal was located, neither the canal or bridge is shown by the plat. A plat of the canal bridge and side walk, where the injuries were inflicted, as it appeared after said side walk was repaired, after the infliction of said injuries is also attached to, and forms a part of said record at page 93. Two witnesses on the part of Pl'ff below [Jacob C. VanAuken and Fanny Verly] and one on the part of Def't below (Dexter F. Putney) testify as to having seen Miss Verly (Pl'ff below) in the act of falling when she was thrown from the side walk and precipitated down the flight of stone steps upon the towing path of the canal some ten feet or more from said side walk. Jacob C. Vanauken (Record P's 29 to 33. and P. 1. of bill of exceptions on abstract,) and Fanny Verly (Record P's 39 to 42. and P's 7-8-9 on bill of exceptions in abstract) both testify to seeing her fall from the side walk

and as to the care with which she was crossing. *They both testify* that four persons were walking in company, two abreast, along the side walk on the North side of the canal bridge, and that when they come to the west end of the canal bridge, and stepped off down upon the narrow side walk at the head of the stone steps, consisting of some 2 or 3. loose planks, boards or slabs, they stepped carefully down from the canal bridge in single file upon this narrow side walk, thus showing extraordinary care at this point.— Both Mr. Vanauken and Fanny Verly testify that as Pl'ff stepped from the canal bridge down upon these planks or slabs her dress (not crinoline) caught on a nail sticking up at the edge of the side walk of the canal bridge, that she turned around to disengage her dress, and as she turned Vanauken, who was some 30 or 40 feet back, says as she made the second step she turned to loosen her dress as he supposed and as she turned she lost her ballance and down she went head foremost.

Fanny Verly who was walking just behind her sister, says
 “ we were returning from church, were walking across the river
 “ bridge—came on to the canal bridge and crossed at the west end,
 “ there is a side walk before we get to the main side walk, she was
 “ walking with Mr. Radford. I was walking with Mrs. Radford.
 “ Mr. Radford walked on the South side, when we came to the
 “ narrow place he went ahead, my sister next. The side walk was
 “ lower than the bridge is. She stepped off—her dress caught on
 “ a nail in the bridge and she turned around to unloose it. As she
 “ turned the plank tipped and over she went, she landed on the
 “ tow path below, she was gone like a flash of lightning, I saw the
 “ edge of the plank tip. The next I saw I was down with her.
 “ We passed over the side walk single file.” farther along this same
 witness testified as follows: “ We were walking as usual, we always
 “ walk carefully. We walked single file because it was a narrow
 “ place. The boards were loose. The nail was two or three in-
 “ ches from the edge of the bridge. Nail was almost an inch up.
 “ Her skirt was nothing more than a good length, the dress not as
 “ long as they wear them now. The fall hurt her in the shoulder

" and right arm and dislocated her left ankle, she was laid up six
 " weeks. Her arm has been paralyzed several times." And far-
 " ther along witness says, " she was sewing before that, she was a
 " dress maker. She was able to get her own living before that.
 " She is not able to do scarcely any thing now, any thing very
 " light causes her to be sick. That was her only means of getting
 " a living. Her Father and Mother are not able to support her.
 " The skirt was covered with mud and the waist bursted open at
 " the time of the accident. She was holding up her dress a little."
 Both Mr. Van Auken and Miss Fanny Verly were in a position to
 see Pl'ff below when she stepped down from the side walk of the
 bridge upon those planks or boards, and when she turned to disen-
 gage her dress from the nail, and when she fell and know whereof
 they testify. Van Auken farther testified: " there is no railing at
 " the west end of the bridge for her to take hold of. There had
 " been one or two accidents happened there on account of it be-
 " ing a bad rounding place and Long went and tore up 2 or 3 of
 " the old planks and laid them on the top of the ground and on
 " the rock they stepped on;" also " Long took the men he had
 " in the City bridewell. He was bridewell keeper. He did this
 " in March two or three weks before the accident. also He took
 " these men there under the direction of Firman Mack Mayor of
 " the City. The plank were just laid ou loose, not fastened. They
 " were old plank and whenever the sun come to them it would
 " turn them up and twist them every way. There were but two
 " when the accident happened and they were very much warped.
 " When she lost her balance she went down head first; there was
 " nothing that she could take hold of to steady herself and she
 " fell down upon the tow path of the Illinois and Michigan Ca-
 " nal," &c. Farther " John Hedges fell down there and an irish-
 " man fell down there a short time before." Farther " It was
 " necessary for safety to walk in single file and they passed off
 " the Canal bridge and across the walk then in single file. The
 " nail was a large spike and the plank had worn off around it so
 " it stuck up half an inch, may be three quarters. I was City
 " Marshall at the time. I had brought this place to the attention
 " of the Mayor at the time he told Long to take his men there

"and fix it." &c. "Long kind of leveled it off a little, very slight, The grading was principally rock drawn from the quarries on the bluff and gravel put on it. The center of the street was two feet higher than the steps. This grading was put in after the bridge had been raised. It was sloping at the head of the steps &c. Farther "I was circulating around among people of the Town at the time attending to my office. After the accident I fixed a new side walk by direction of the Mayor and Col. Smith an Alderman. I raised it up nearly level with the side walk of the bridge. Put on an 18 foot 4 inch scantling at the west end of the steps. Plaintiff was going straight along on the side walk. She had a common dress on, not very long or very wide. The loose plank were sometimes 3. sometimes 6 and sometimes 12. inches from the stone steps" &c.

On being recalled after Def's evidence in the case had been closed this witness farther testified among other things that " On the morning that I fixed the side walk at the head of the stairs, where Miss Verly fell off, I should think it was about nine o'clock in the forenoon when I got through. Edmund Wilcox came down there while I was at work and stopped and talked a spell, he was on the street and passed by on the street and did not come down where we were at work. I had the men digging out the floor to put the sleepers down. There was nothing said to my recollection about Miss Verly having fallen off there the day before. I was removing the rubbish to put down the scantling or joists to nail the plank to; had got that pretty much done when Mr. Wilcox came along. I had at that time got all the plank and boards taken up. The boards were that morning lying loose on the surface of the ground as they were the day before and I took them up myself and throwed them on the tow path of the canal." &c. Near the close of his evidence said witness said: "To cut a platform step 3 or 4 feet square and take up the stoue steps leading from the side walk there down to the tow path of the Canal and re-lay them making the platform, relaying the whole and putting an iron

“railing all along from the Canal bridge side walk to the foot of the steps, would cost perhaps \$125.00 and that would be I think a big price.”

The following witnesses on the part of Pl'ff below, all testify to the bad condition of the side walk at the W. End of the Canal bridge at the immediate point where the injury was occasioned at the time the injury was committed viz: Jacob C. Van Auken, Alexander McIntosh, Leopold Schwabacker, Benjamin Richardson, George H. Ward, Joel George, J. D. Verly, Mrs. J. D. Verly and Fanny Verly and they testify from *their knowledge*. George H. Ward, one of the said witnesses testified (Record P's 36 and 37) that the board next the head of the stairs at the time of said accident was loose, that there were two and might be three boards there. He thinks mud had worked down and partly covered one end of the board next the street, that the street was quite crowning. That he had frequently spoken of it as dangerous and he regarded it as dangerous. He recollected of passing along that day when Pl'ff below was hurt. That he went to look at the place immediately upon hearing of the accident on the same day. That he was acquainted with her and heard she had been hurt and went to see. That there was then a loose board next the step.” &c.

Joel George also testified the boards were loose and the ground sidling off towards the stairs. That the passage way was unsafe. That he had frequently remarked to different persons that some one would be hurt there yet. That he had noticed it immediately after Pl'ff was hurt and went and examined it. &c.

Benjamin Richardson one of said witnesses testified that he was acquainted with the Canal bridge and the space at the head of the stairs between the Canal bridge and main side walk in the spring of—58 and had crossed a great many times. He considered it in rather a bad condition. That from the end of the bridge

were two or 3 boards lying loose &c. Remember the time Miss Verly was hurt and the side walk was in about the same condition at that time. The plank were loose and warped, the street was crowning and sidling at the crossing. The boards were so warped as not to be solid and if a person happened to step on the side of the boards he might loose his balance &c. That the side walks on Jefferson and Exchange Streets were built by the City authorities and after the accident the walk across the passage was repaired by the City authorities and a scantling put up from the railing of the side walk on the Canal bridge to the foot or nearly the foot of the stone steps &c.

Nearly all the witnesses of Pl'ff below testified to having seen and noticed the said side walk before and at the time of said injury and some of them to making an examination of it on the day the injury was received and they knew what was its condition, and they agree, all who were asked the question that said Pl'ff was a poor sewing girl, dependent upon her own exertions for a living, and that she has become disabled on account of said injuries and can perform but very little labor. Doct. J. W. H. Davis testified that he had been a practising physician and surgeon some 28 years (Record P's 42 to 44) and his evidence clearly shows that her disability is the result of said injuries, that he has carefully examined her professionally several times since the said injuries were received. That he was well acquainted with her before and knew her health to be good. That since said injuries there is a general wasting of the system—a depletion of the whole system. That she has never been able to do much if any thing since. That he made his last examination about four months before the trial. That she has to have constant applications, blistering, compress &c. and internal remedies. That she has not the full use of both her arms and has not had since she was hurt. That she has not the full use of her right arm. That he considers she has received such a shock and injury from her fall that she will never be well, that she will never be a healthy woman again, that it will last her through life, The testimony of Mr. and Mrs. J. D. Verly, Fanny Verly, Miss

Hannah West, Doct. Davis and others—show that the health of Pl'ff below for a long time previous to her injuries was good, that she was able to labor and earn her \$3.00 per week. That since her said injuries she has never seen a well day. That a great portion of the time she has not been able to labor at all. The foregoing presents but a mere outline, an imperfect view of the case of said Pl'ff below, as the court will perceive on examination.

The Def't below (Pl'ff in error here) by its att'ys undertook on the triel, to overwhelm the Pl'ff with witnesses, and to endeavor to make a show of proof of the security and good condition of the said side walk at the time of said injury. 35 witnesses were called upon the stand to testify in behalf of Def't below and the depositions of 9 others were taken and read to the jury on the same side, making together 44 witnesses, a large majority of whom testified that they did not know the situation or condition of said side walk at the time of said injuries and the jury seems to have believed them. The services of no less than eleven astute and able Lawyers was called into requisition on the part of the defence in the courts below, who brought to bear all the ingenuity skill, ability, and legal learning of which they were capable to defeat the Pl'ff there, and failing in that they have brought the case to this court, and four learned and experienced Counsellors are retained and are seeking if possible to reverse the small judgment of this poor girl, who as the evidence shows has been seriously injured and rendered an invalid during her whole life, by the gross negligence and carelessness of the Pl'ff in error, and the agents under its control. If there are *legal* grounds for reversing the judgment they will of course succeed.

The court cannot fail to notice on examination of the abstract of the evidence given to the jury in the deposition of D. F. Putney, Horatio N. Marsh, George M. Wallace, Firman Mack, Doct. John H. Reece, Wm. A. Strong, Royal E. Barber, Mrs.

Lucy Curry and Timothy Kelly, on comparing said abstract and depositions that the evidence of said witnesses is not only very imperfectly and inaccurately abstracted, but that the testimony of said witnesses in said abstract is most grossly garbled and perverted, for some reason. The testimony of most of these witnesses, is much of it uncertain, vague, indefinite and unsatisfactory, a great deal of it given at random, by guess and although the witnesses testify that they did not consider that passage very dangerous at the time of the accident to Def't in error here, yet they disclose sufficient by their evidence as given, to show that it was in fact an unsafe and dangerous place, and that the city authorities knew it, and had been inexcusably (and I might say even criminally) careless and negligent in regard to it, that said passage way at the head of said stone steps had for a long time been left with some 2 or 3 boards thrown down carelessly upon the ground for unsuspecting people to pass over, on the most important thoroughfare in the city as shown by the evidence, said plank being loose and insecure and liable to tip and move about and endanger the lives and limbs of passers over it—corroborating in this regard the testimony of the witnesses of Pl'ff below.—True Timothy Kelly, who was street commissioner testifies that some time in the summer of 1857. (the year before the accident) he fixed this side walk by putting down bearings and nailing the planks of said side walk to them—and Van Auken a witness for Pl'ff below testified that some 3 weeks before Miss Verly was thrown down, Long the bridewell keeper, with the men in his charge, by order of the Mayor took up these plank or boards, which had become covered with mud and gravel, and kind of leveled off the gravel and laid them down on the surface of the ground without fastening them in any manner, and nearly all the witnesses, who were interrogated on that point testified that after Miss Verly was thrown down, the said side walk then was raised, fixed, fastened and made permanent and secure, and much safer than before. The testimony of most of the forty-four witnesses of Def't below was vague, indefinite, uncertain, much of it given by guess, a long time having elapsed since the injury was received by Miss Verly before the trial, and the said witnesses, their

attention never having been called to the said side walk, could not recollect about the situation and condition of it and they so testified, and on their examination thought, guessed, considered, but did not know.

Wm J. Heath an old resident of Joliet was the first witness called by Def't below, and when asked whether he considered the place where Pl'ff fell dangerous he said " Well now in relation to " that to answer as I think and as I feel and as my memory serves " me I never thought it a dangerous place " and on cross examination he stated " I think there was one or two boards at the " west end of Canal bridge bedded in the earth, and to that extent they were fastened, but I could not swear what spring they were there."

Next Col. Wm. Smith an old resident and an old man some 75 years of age was called, who testified that he often crossed at that point and that he never had any difficulty crossing there himself. On cross examination he said " that he did not remember loose plank or boards being there. There was a time when " there was a step down. I should suppose a loose board lying " there might occasion accident. If loose boards were there, it " would not be safe as now. If loose boards were left there it " would be a very careless way of leaving it."

Next witness was Adam Comstock City Surveyor. He never had his attention called to that passage way. On cross examination he said " I think before the street was raised there were " plank lying on the ground one end on the stone, and the other " end I cannot say. I could'nt recollect whether it was before " or after this accident that the plank were lying down. Some " two or three plank were lying there. If plank lay down on " the ground loose and a person stepped down from canal bridge " on side walk I think it would'nt be as safe as now. My im-

"pression is the plank were not fastened on the end towards the
"bridge."

Next W. F. Barrett was called for Def't below. He says in his direct evidence among other things "I called the passage way an inconvenient place before the street was graded up; since it has been much more convenient. I never looked upon it as a dangerous place with ordinary care. The passage way is in better condition now than at the time of the accident." He is very indefinite. On cross examination he testified "that if loose plank were laying there it might be dangerous. The crossing there was made by the city authorities. I do not remember the condition in 1857 or 1858, cannot specify as to any one year."

Next come Wm. C. Wood. He was very uncertain and indefinite, but on cross examination he testified "I have seen loose plank there but can't state when, but recollect there was a time when they had got loose. I paid but little attention, was not interested, had no property there. I know there were frequent repairs made there by the city authorities. I don't know what the condition of the passage way was in 1858. Loose boards there might occasion accident."

Charles Demmond was next called. He was a man 65 years old. At the close of his direct examination he says "I recollect of loose plank lying there. If they were laying on any thing that they would tip they would not be as safe." On cross examination he said "Don't know when, how long, or how many loose boards. Don't know whether one or two of them, nor how wide they were. It was some time ago. I didn't expect to be called on. I didn't charge my mind with it. If a man should step off from the bridge on to loose plank and they should tip he might fall."

Perry P. Scarritt was next called and at the close of his testimony he says "I cannot tell whether there were any loose plank there or not,"

Next John B. Preston was called. Lived at Lockport. Is civil engineer. General superintendent on the canal. In answer to the question put to him by the court "Is there any thing in the way of removing those steps further north?" the witness answers evasively. And as to the question asked him by Def'ts counsel "Give your judgment as to the safety of the place in question as compared with similar works or public improvements." It seems unnecessary to take time to show that this was irrelevant and improper. It is apparent upon the face of the question or proposition itself. On cross examination said witness testified, "that it would be unsafe to have plank laying there loose," and on re-examination stated he should *think* there were two plank there imbedded in the mud. I will not further repeat evidence of the witnesses separately. The following witnesses of the Def't below among other things testify either that they did not know the situation and condition of said side walk in the spring of 1858, when Miss Verly was injured, or that they had not noticed it, or did not know whether the plank were fastened or not. viz:—

Michael Sebastian, Henry Shrader, Mrs. Nicholson, Mrs. Demmond, Mrs. Onderdonk, Jacob Patrick, Mrs. McArthur, Mrs. Stillman, Mrs. Bartleson, Dr. A. L. McArthur, Isaac T. Millsbaugh, Mrs. Fellows, Mrs. Cook, W. W. Stevens. And all these witnesses were called to prove the permanency and security of said side walk. Anthony Scheidt for Def't below said on his cross examination he knew the west end of the plank at crossing were loose because it would spring &c. And Solomon O. Simonds on his cross examination said "It would be dangerous at the head of those stairs if the plank were loose." And O. Fox did not examine the side walk in the spring of 1858. "The plank may have been loose and I not have known it." On the examination of Edmund

Wilcox a witness for Def't below, the following question was asked him by Def'ts Counsel "Will you state whether or not there are any other places in said city more dangerous than the place in question?" the counsel stating that it was proposed to follow it up by showing that Def't had levied all the taxes and collected all the revenue it had power to do &c. and had done everything in its power for the safety of passages on its streets and side walks. Pl'ffs counsel objected to the question and the objection was sustained by the court, and this is alleged as error! What legal bearing could an answer to this interrogatory have upon the case? The city had assumed and acted upon the very liberal powers conferred by its Charter and it was bound to exercise the powers therein contained and to keep its streets, bridges, and side walks in such condition and repairs as to insure the safety of persons and their property while passing over and along the same, and particularly at the passage by the head of these stairs it was necessary and incumbent upon the city to keep the side walk firm and secure. and not allow obstacles to be placed or remain there, nor suffer or allow the plank or boards of which it was composed to lie loose upon the gravel of which the street was composed, where a person passing even with the utmost care, might make a mis-step, or might step upon the side of such plank or board and be thrown from his balance and precipitated down the said stairs, and killed outright or maimed for life. It was not in this case a mere accident, as characterized in the brief of Pl'ff in error. But it was an injury caused by the gross negligence and carelessness of the city authorities and the passage had been for a long time unsafe, and it was well known to the city authorities. It was not the nail sticking up that caused the fall of Miss Verly. It was the insecure manner in which the side walk was suffered to remain, the plank of which it was composed lying there loose upon the surface composed of gravel and liable to tip if a person should step a little one side of the center.

The responsibility or liability on the part of the city of Joliet is sought to be avoided, by placing it upon the Board of Trustees

of the Illinois and Michigan Canal, by showing that said Trustees built the canal bridge and steps, and that they have had the control and management of the same. It is immaterial whether the city or the Canal Trustæ built the bridge or who had in fact controlled it. The city cannot relieve herself of the responsibility enforced by the terms of the city charter, after having once assumed to act under the charter. The provisions of the City Charter are full and ample and give to the city full and complete power and jurisdiction for all municipal purposes at least, over all public grounds, streets, alleys, cross and side walks and bridges, and the city by the terms of its Charter is legally bound to keep in repair all the streets, alleys, bridges, cross and side walks in the corporate limits where the public pass and repass and this responsibility cannot be changed or shirked to or upon any other person or corporation. If the Canal Trustees had neglected or refused to build the canal bridge, or had suffered it to decay and become dangerous after they had built it, will it be contended that the city had not a right and that it was not its bounden duty to build and keep the bridge in proper repair on the thoroughfare described by the evidence in this case? But aside from this the evidence both on the part of Pl'ff and Defendant shows that all the Trustees ever did was to build the abutments, stairs and superstructure, and that the street, (the filling up of the abutments, including said passage way and the side walk over the same) was made by the city and kept in repair by the city. The city charter confers ample powers and gives the city full and complete jurisdiction over all the streets, bridges, side walks &c. in the corporate limits Sess. L. 1857. (Private Laws) P. 188. Among the powers conferred see Chap. IV. §. 4. paragraph 21. on P. 200 also paragraphs 28 and 29 of same §. also paragraph 48 of same §. under which last paragraph the city is "to exclusively control regulate, repair, amend and clean the streets and alleys, bridges side walks, and cross walks &c." Also see Chap. V. on the subject of taxation generally, and Chap. VII. on assessment for Public Improvements §. 1. "The Common council shall have power from time to time to cause any street, alley, or highway to be graded leveled, paved, macadamized or planked and keep the same in repair."

Second. To cause cross and side walks &c. to be constructed &c. §. 2 provides for the payment of the expenses of such improvements by assessment upon the real estate fronting and adjoining such improvement according to the width of the respective ~~points~~^{fronts}. Thus imposing the payment for all this class of improvements on the property (real estate) adjoining the improvement. §. 7. of same chapter provides that the owners of property may make the improvements or repairs, in such manner as the city by ordinance may prescribe. See also Chaps. XIII. § §. 18. 19 for farther powers and exemptions.

In regard to the matter of improvements of streets, repairing of side walks and cross walks the city has no occasion to resort to its general taxes or revenues, the adjacent real estate being liable to assessment for the whole expense of such improvements; hence the interrogatory to Edmond Wilcox was wholly irrelevant and improper and the court properly rejected it. The city has the same right to tax the property of the Canal Trustees as any other. There can be no doubt whatever that the city has full, complete and ample authority under its charter to build and keep in repair a bridge across the canal and the city cannot shirk or transfer its liability upon the Canal Trustees, any more than it can upon any other parties. But are the Canal Trustees liable in any manner either to build or keep in repair this bridge? In the case of the People ex. rel. Hoes & t. al. vs. Canal Trustees 14 Ill's Rep, 403. the court refused to grant a mandamus against the Canal Trustees requiring them to build a bridge across a highway on the ground that there is no legal obligation upon the State or the Canal Trustees to erect the bridge. There is nothing in the law requiring either the State or the Canal Trustees to build a bridge at this point, and consequently there is no legal obligation on said Trustees to build or keep in repair a bridge there, and in fact the Canal Trustees have no right as such Trustees under the laws of this State to build, keep in repair or control such bridge. The only authority in the statute authorizing the the Canal Trustees to build a bridge is the act, passed in 1855, (~~Pub~~^{Stat} L. 1855 P. 104.) which authorized the building a bridge at

Seneca La Salle County. The instruction of the Def't below was properly refused, the city of Joliet being the only party that could be made liable for the injury in this case. The cases of Jones vs. The Inhabitants of Waltham. 4 Cush. 299. Sawyer vs. Inhabitants of Northfield 7 Cush 491, and the Goshen Turnpike Co. vs. Sears 7. Conn. 86. are cited by Pl'ff in error to show that said Pl'ff in error is not liable for the injuries to Def't in error, but they are not authorities applicable to the facts in this case.

That the place in question where the injury was inflicted was properly designated and called in the declaration a side walk there can be no doubt. It is so designated and called by the witnesses & is in fact a side walk and so found by the jury, and this as well as other exceptions taken by Pl'ff in error is purely technical. The point raised by Pl'ff in error, or attempted to be raised, that the city should not be held liable because it had expended all the taxes collected and had no funds with which to repair the said side walk at the head of the stairs at the canal bridge has already been adverted to, and it has been shown by the City Charter that the adjacent property is liable for the expense of such repairs, and the authorities referred to by Pl'ff in error viz:—1. Gil. 568, and 11. Ill's Rep. 330. are inapplicable.

The city by its Charter was legally bound to furnish and keep in repair a good convenient and safe side walk, as well at the place where Pl'ff below was thrown down, and injured as at other places and for a failure or neglect to keep such side walk in a safe condition for the passage of persons over it, the city was and is undoubtedly liable in damages for injuries occasioned by their carelessness or neglect. On this point see the case of The Mayor &c. of the City of New York vs. Furze 3. Hill 612. The court below in which the trial in that case was had on P. 613 charged the jury, " That the Defendants were bound to put and " keep in repair the sewers &c. in the city and to see that they " remained unobstructed, so as to carry off the rain or water

"from the streets; and further that the Defendants were liable
 "for acts of omission by the officers appointed by them." The
 Supreme Court, after stating the provisions of the Charter of the
 City of New York on that subject, which are similar in their lan-
 guage to the provisions of the Charter of the City of Joliet, on
 P. 614. says, "This statute is one of public concern relating ex-
 "clusively to the public welfare, and though permissive merely
 "in its terms, it must be regarded upon well settled rules of con-
 "struction as imperative and peremptory upon the corporation.
 "When the public interest calls for the execution of the power
 "thus conferred the defendants are not at liberty arbitrarily to
 "with-hold it. The exercise of the power becomes then a duty
 "which the corporation are bound to fulfil" &c. See also the
 cases of *Hutson and wife vs. The Mayor &c. of New York*, and
Carlin and Harriman vs. The same 5 Selden 163 decided at the
 Dec. Term 1853. These were actions commenced in the Superior
 Court of N. Y. and both presented the same legal questions. In
 the first a recovery was sought for injuries done to Mrs. Hutson
 by the falling of a carriage in which she was riding, into a chasm
 made in the construction of the Harlem R. R. in 4th. Avenue in
 the city of N. Y. The second for injuries done to the carriage.
 The court say on P. 167. "The simple question is presented in
 "these cases, whether the Defendants who have negligently suf-
 "fered a public street in the city of New York to be and remain
 "out of repair, are liable for damages sustained by the Plaintiff
 "whilst carefully driving along such street, their carriage being
 "overset and the bad condition of the road being the sole cause
 "of the injury thereby sustained." &c. and on P. 168. the court
 say. "It must however be considered as admitted by the pleadings
 "that these injuries were received upon one of the public streets
 "of the city. That this street at the place in question was subject
 "to the control of the defendants as a municipal corporation must
 "be conceded. The setting the curb and gutter stones by the
 "defendants was done in virtue of the power conferred by §. 175
 "2. R. S. 407 and in their municipal character. The Defendants
 "therefore possessed this extraordinary power and over this street.
 "They owned the fee of the land and held it in trust for the pub-

as a street with a franchise in themselves conferred for public purposes, authorizing them to maintain and keep the same in repair and to defray the expenses thereof by assessment upon the adjacent owners or occupants or upon the lots themselves. It was that this might and should be done that these powers were conferred upon the defendants. It requires no argument to prove that it is the duty of the defendants to see that the public streets of this densely crowded city are kept in repair; for where a public body is clothed by statute with power to do an act which concerns the public interest, the execution of the power may be insisted on as a duty, though the statute conferring it be only permissive in terms."

As in that case, so in the present case, the plea being the general issue only, it must be considered as admitted by the pleadings that the injuries to Pl'ff below were received upon a public side walk of the city, and that the place in question was subject to the control of the Def'ts below as a municipal corporation must be conceded, see also 11. Wend. Rep. 539. The People vs. Corporation of Albany. 9. Mich. Rep. 165. The city of Detroit vs. Corey

It is alledged that the 1st. instruction for Pl'ff perhaps. but the 2d. certainly is not the law. The att'y for Pl'ff in error must certainly have strained a point to have arrived at this conclusion. But even if there were a technical error in the instructions, if the court are satisfied that justice has been done, it is not cause for reversing the judgment. For when substantial justice has been done, even if errors have been committed by the court below upon the trial in the admission of evidence or in the giving or refusing instructions the judgment will not be reversed see 1. Gill. Rep. 475. Gilbert et. al. vs. Sweat. 3d. Id. 202. Greenup vs. Stoker. 18. Ill. 449. 454. Newkirk vs. Cone, 19. Ill's 59. Dishon et. al. vs. Schorr. The judgment of the court below should unquestionably be sustained.

URI OSGOOD,
Att'y for Def't in Error.

Filed May 19. 1864
J. P. M. W. M.

STATE OF ILLINOIS,
SUPREME COURT.

} ss. The People of the State of Illinois,

To the Sheriff of Grundy County, GREETING;

Because, In the record and proceedings, and also in the rendition of the judgments of a plea which was in the Circuit Court of De Pue County, before the Judge thereof, between

Aurelia H. Verly

plaintiff, and

The City of Joliet

defendant, it is said that manifest error hath intervened, to the injury of the said

City of Joliet

as we are informed by its

complainant, the record and proceedings of which said judgments we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

Aurelia H. Verly

that She be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if She shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said

Aurelia H. Verly

notice, together with this writ.

Witness, The Hon. John A. Catton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 17th day of March in the year of our Lord One Thousand Eight Hundred and Sixty-four.

L. Deland
Clerk of the Supreme Court.

City of Joliet

No. 111. vs.

Amelia H. Verly

SCIRE FACIAS.

I have duly served this
 within the meaning the
 same is the within named
 Amelia H. Verly this 26th
 day of March A.D. 1864

Chas E Gardin Shurdy
 for m & Sutton Dept

FILED. Apr. 12. A. D. 1864

L. Leland Clerk.

Bus Service 50
 " Mileage 40
 Return 10
 \$1.00