

No. 14452

Supreme Court of Illinois

Korah

vs.

City of Ottawa

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 156

Korah

vs

City of Ottawa

1432

1863

155-120

15

SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

ABSTRACT OF RECORD,

AND

BRIEF

OF PLAINTIFF IN ERROR.

OSCAR KORAH, Plaintiff in Error,

vs.

THE CITY OF OTTAWA.

} ERROR TO LA SALLE.

Filed Apr. 28-1863

L. L. Land

OTTAWA, ILL.:
PRINTED AT THE REFORMER'S OFFICE.

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Motion for a new trial by defendant, overruled by the Court, and defendant excepted.

Judgment—"That the plaintiff have and recover of the defendant the sum of five dollars, its fine, also its costs and charges herein expended, and that execution issue therefor."

9 Bill of Exceptions.

Plaintiff offered and read in evidence section one (1), of an Ordinance of the City of Ottawa, as follows:

"An Ordinance to protect bridges, ferries, and wharves."

Sec. 1. Be it enacted by the City Council of the City of Ottawa, that, if the owner or master of, or any person employed on or having charge of any canal boat, or craft or float, shall injure, or run such canal boat, or other craft or float, either wilfully or negligently against any public bridge or the draw thereof, or any ferry, or any public wharf or private wharf at which wharfage is charged within the limits of this city, every person so offending shall be fined a sum not exceeding one hundred dollars, nor less than five dollars, for each and every such offence, and shall likewise be answerable to the city for damages for such injury."

10 *Edward Butler* testified as follows: I know the bridge on Madison street, across the side cut. September 6th, 1862, I was walking on the side-cut toward the bridge, and saw two men on a canal boat, shoving the bow of the boat out from the tow-path. I saw the boat strike the end of the bridge, which was turned. I was about 150 feet off. The boat was 50 or 60 feet from the bridge when I first saw it, and going slow. The bow struck the bridge and pushed it off of the pinion 3 or 4 inches, and then the boat went on through the bridge. I didn't see defendant at all. The bridge was in the city of Ottawa, and there were one or two men on it.

Cross Examined. I couldn't see the water on the other side of the boat, and couldn't tell how far from the bank she was; they stopped pushing the bow out when 50 feet from the bridge. The bow struck the end of the bridge about 3 feet from the middle.

11 *Patrick Lanagan* testified:—I worked for Armour, and attended the bridge one day last fall. I saw the boat start from Magill's, and commenced turning the bridge, and did not see her

again till she was almost to the bridge; then I saw a man running to the bow to keep the boat off of the bridge with his hands. I saw that the boat would strike the bridge or pier, and let the bridge be; the boat struck the end of the bridge, about 3 feet from the centre, and knocked the bridge out of gear; there was two men on the boat, one of them at the helm. The defendant was captain of the boat at the time, and was walking along the tow-path.

Cross Examined. I have seen three boats grounded and stuck at the bridge. The passage for boats was on the west side of the pier. The Yorktown lay above the bridge on the east side, so near that you could step from the north end of the bridge on to her. This would make a strong current on the west side. The team stopped when the boat was 30 or 40 feet from the bridge.

12 *John Colwell* testified:—I built this bridge; it is 62 feet long, and 20 feet wide. The canal is there 60 feet wide; below and clear of the docking it is 62 feet.

Question by plaintiff:—What amount of damage was done to the bridge by the boat striking it, last September?

Defendant objected, Court overruled, and defendant excepted.

Answer. I put the bridge in place again, for which I charged the city ten dollars. The bridge was strained considerable, and don't hang true now. It was worth \$10 to put it on the pivot, and \$25 to fix it as it was. From the abutment to the pier is 19 feet 8 inches, and the pier is a foot wider than the bridge.

Cross Examined. The bank of the canal slopes at an angle of 45°; don't know the distance from bottom of the slope to the pier. The slope would make it more difficult to get into the passage. The stone pier is 28 feet long; the bridge overhangs it 18 feet; presume stone work could have been put in at the end of the bridge to guard it. Leighton was there sometimes when bridge was building. The \$25 damages was in addition to the \$10. Was over it two hours before the accident; saw nothing the matter. After the accident, it would not hang true by three inches.

Re-Examined. Leighton was assistant superintendent of this division of canal.

Question by Plaintiff:—Who superintended the building of the high bridge on Madison street ?

Defendant objected, the Court overruled the objection, and defendant excepted.

Ans. Leighton.

Re-Cross Examined. Don't know whether pier is constructed parallel with the bank. The west abutment is not. The north end is furthest into the canal, 2 inches out of line. Know it is not 10 inches. I never measured it.

14 *Andrew Anderson.* Have followed boating considerable. Know the bridge; think boats can be navigated through with ordinary care. The current is the greatest difficulty after boat gets into the narrow channel. Think it would be a want of care to hit bridge on the end. It would take some labor to keep a boat in the middle of the canal. Think a boat can be run within 4 or 5 feet of bank along there.

Cross Examined. Sometimes there is a strong current in the canal at that point. Boat lying at Armour's would tend to increase it. Never run a boat through that passage but once; then rubbed the bridge. If a boat was running north, and her bow should be thrown out a little, the current would tend to give it a sheer across the current, and render it unmanageable.

Direct Resumed. Leighton was known as superintendent of this division; he took care of the canal generally. Think he had something to do with building repairing aqueduct. Never saw him draw plan or specifications for a bridge.

15 *H. B. Dimick.* Was in Armour's warehouse when boat struck bridge. Heard it, did not see it. Went out and saw the boat; it had run back a little distance; bridge was broken, and out of its place. It was the Danube. Defendant was captain. Boat was about 20 feet below bridge, near the centre of canal. Good stage of water. Bridge was properly turned.

Cross Examined. Have seen some difficulty with boats passing through bridge. When water was low, have seen boats glance on the bridge, and rub against the side. There is a current in the side-cut; the drawing of water for the mills makes

it. Have seen an eddy below the bridge when boats were passing through.

Re-Direct Resumed. It was about the middle of the day when boat struck. Have been on the canal some. Have steered into worse places without trouble. Don't think it ever safe to navigate. Think bridge is not a material obstruction to navigation.

Re-Cross Examined. Saw bridge after it was struck. That is all I know about it being in a proper position when struck. If the bow of a boat running north was thrown out from the tow-path, the current would tend it to sheer across the canal. The piers obstruct the navigation somewhat; it would be very
16 much safer and easier to get through if the passage was 4 feet wider. Never run a boat through there.

John Armour. Have lived in Ottawa twenty-five years. The first bridge on Madison street was built from 11 to 13 years ago. Before that time, the public travel run some 200 feet north from where the street is, where there was a place left to cross the side-cut. The second bridge was put in 7 or 8 years ago. That bridge had a crib built in the canal, of timber, and filled in with stone. The piers in this bridge is of mason work. The second bridge was a swing bridge, built by Green.

Question by Plaintiff:—State whether the engineers laid out the side-cut before or after the State's addition was laid out.

Defendant objected, Court overruled the objection, and defendant excepted.

Ans. I think side-cut was laid out first. I am a warehouseman; own two canal boats; had one of the first boats that was run on the canal. Think I have more skill in running canal boats than ordinary men. Have seen boats running through the bridge weekly and daily almost; used to ride on the canal to Chicago three or four times a season before railroad was opened.

I can steer a boat in the day time. Never run a boat
17 through this bridge. For the last three or four years have been in the habit of seeing boats pass through the bridge.

Question by Plaintiff:—State whether, in your opinion, boats can be run through this bridge without any material damage.

Defendant objected, Court overruled the objection, and defendant excepted.

Ans. It would be no great trouble; have seen boats light, and a high wind blowing, rub there. Don't think the bridge a material obstruction.

Cross Examined, There would be no difficulty in building a high bridge there for boats to pass under. Don't know that a high bridge there would injure any warehouse; it would require me to fix a different place for unloading wagons. Have no personal interest in keeping this low bridge. Think the bridge can be as easily passed, or nearly so, as the high bridge on Main street. Think the opening in that bridge is not more than 21 feet. There is very little slope to the tow-path, between Madison and Main streets. Don't know the width of the opening in this bridge; don't know width of the pier. Canal boats are about 17 feet 4 inches in width, locks about 18 feet wide. Have seen boats run through this bridge without touching. Have seen 18 some boats blocked there, caught in the mud. This bridge was put in in May, 1862. Think the pier in bridge of 1853 was same size as present one. There is an angle in the pier of present bridge. The slope between Magill's warehouse and bridge is caused by washing. Should not think there was 4 feet difference of width of canal between the top of bank and bottom of slope. It is docked part of the way between the bridge and Magill's.

George Bristol. Have lived in Ottawa eleven years; have been in lumber and grain trade; had from one to four canal boats. Have rode on boats in side-cut, and have steered some in side-cut. Don't profess to have particular skill as boatman; know more about it than one who never handled one. Have seen many boats pass through that bridge; think that boats can be navigated thro' there with ordinary care; not as freely as if the bridge was not there; don't think the bridge a material obstruction to navigation. Locks in the canal are about 18 feet wide. This pier is larger than the one in old bridge. Had no particular difficulty in getting through old bridge.

19 Question by Plaintiff:—State whether or not it is any more difficult to run through this bridge than through the locks on canal.

Defendant objected, Court overruled the objection, and defendant excepted.

Ans. I think not; boats are 17 feet 8 inches wide; that was the width of my boats.

Cross Examined. My judgment is not as good as boatmen, about the running of boats. When the current is heavier than usual, the navigation is more difficult; it requires more caution to run through this passage than if the bridge was not there. If it becomes necessary to throw the head of a boat out from the shore, and there was a current, it would give the boat a shear that would make it difficult to manage.

Wm. C. Richardson. I own boats; no experience in running them; think I have more skill than generality of mankind, who never owned any, in the management of them. My warehouse is south side of bridge. Have seen boats go through the bridge. Never saw any have any difficulty in passing.

Geo. W. Hobb. Saw the Danube strike the bridge; saw
20 her leave Magill's warehouse; very soon after they left the warehouse, the bow seemed to incline towards the tow-path, one man trying to push it off the bank; this was within 50 feet of the warehouse. Then the bow swung out, but did not get as far out as the centre of canal; the man kept polling until he got about 20 feet from the bridge; they appeared to be trying to keep it off the bank; did not use the pole on the outside of boat; the man who had the pole threw it down and ran to the bow, and seemed to be trying to keep the boat off the bridge with his hand; the men on the boat seemed to have the control of her; heard no direction given by any one on the bank.

Cross Examined. I stood on the east side of the canal; can't say whether another boat lay inside of the Danube, at Magill's warehouse. Saw the Danube when she started; seemed to be sheering towards the shore; was loaded; one man seemed to be keeping her bow off the shore, laid down the pole, went to the bow to keep her off the bridge with his hands; seemed to be afraid of sticking on shore, then tried to keep her off the bridge. There was a man at the helm. Defendant was not one of the men on the boat. She was going slow. After boat turned
21 off from the shore, I heard an order to the driver to hold

up; think a man on the boat gave the order. Did not see defendant.

Wm. Haskell. Was alderman of 5th ward in 1853 and 4. Wrote to Mr. Gooding, secretary of Board of Canal Trustees, for liberty to make a bridge across canal, on Madison street; he gave the privilege, and said he would be glad to do anything to further the object. The bridge was a draw, not a swing, bridge. That bridge was built in 1854; about three years after, there was a swing bridge built, and the present one was built last May.

D. W. Brush. Was city marshal last year; went to see Mr. Preston; he told me if it was the general consent of the business men on the basin, he would cause the water to be drawn off for the purpose of putting in the pier of the bridge. I told him they consented. He sent a dispatch to Mr. Leighton, the assistant superintendent on this division. I saw them putting in the pier. Mr. Leighton was there twice; one day 10 or 15 minutes.

Cross Examined. Olmstead, Nitchelm and Walters 22 were aldermen of this city last year; they were bridge committee. I presented no plan or specifications of the bridge to Preston.

Frank Whitmore. I run a boat in 1856, part of the season; was captain. Have seen boats passing this bridge; think it may be safely passed by the exercise of ordinary care.

Cross Examined. Never run a boat through this bridge. The pier in this is larger than the one in the old bridge.

John Colwell re-called. The new pier is wider than the old one. The north end of abutment projects into the bank; the south end was the line we marked from. I think this abutment is closer to the bank than the old one.

Plaintiff here rested.

23 *John B. Preston called for Deft.* Am superintendent of canal. Know the bridge. Have been civil engineer 25 to 28 years, and have more skill than ordinary men in determining the effect of obstructions in navigable waters. The bridge with the piers and abutments as the same are now constructed, is a material obstruction to navigation. The shape of bank is such that it is impossible to run a boat into the bridge except the boats run exactly straight into the opening; this the current prevents,

when a boat cannot be prevented from sheering. There should be more room between the abutments and the bank. The bridge could be protected by a fender. The pier is not straight; this lessens the passage way. The abutment is about 11 inches out of line; I examined and measured it to-day; from the end of chord to inside of the bearing on is 11 inches. Fender could have been put in so as effectually to have prevented the accident. Such fenders are always put upon draw bridges that ever I saw, of any value. I never gave my consent to have this bridge built as it now is. It is more difficult to navigate a boat through the bridge than to navigate one through a lock; the locks are in the middle, and not in one side of the canal. There is usually no current of consequence at a lock; they are constructed with hea-

vy stones at the entrance, so that a boat striking does not
24 injure the lock so much. I think 5 boats out of every 7 strike in going into a lock. If the bridge had been properly constructed, this accident would not have happened; I mean if fenders had been put in; that could be done for one hundred dollars; no difficulty in putting them in. The mills below, drawing off the water, cause a current; boats running against that current would be liable to sheer.

Cross Examined. If a boat should start from Magill's, with one lying between her and tow-path, she must get her width west to pass the bridge; in steering her the current would tend to send her bow on shore; if her bow was pushed off, the current might make her shear the other way, and strike the bridge. The passage through the high bridge, on Main street, was made under my direction; that is 21 feet 3 inches wide. Leighton had no power to authorize a bridge to be put across the canal; he did not act for the Trustees in building the aqueduct, but for the contractor. The trustees never prohibit bridges being built after plans furnished by me. I supposed this bridge was to be the same as the old bridge, but the pier is larger.

25 *L. Mayhew.* Have run canal boats about twenty years. Know bridge in question; it is difficult to get through without hitting; have been compelled to stay there an hour and a half, and often to double teams to get through.

Cross Examined. Struck there when water was low; have

stuck in the bridge on account of swift water ; have hit the bridge in passing through ; have frequently got boats stern on the bank. It is very difficult to get into the passage on account of current. Run through the bridge every week last season.

Direct Resumed. A heavy loaded boat, going into the passage from the south, is liable to be made unmanageable by the current. The bridge passage is about two boats' length from Magill's wharf ; in steering from there, you have to head towards the shore at first ; sometimes impossible to avoid striking bridge in low water.

Mr. Fishburn. Am in grain trade ; have experience as a boatman ; saw the boat when she started ; she lay outside of another
 26 her bow towards the bank ; they set the bow off with a pole, then the current struck her, and she sheered towards the other shore ; defendant was on the bank ; he halloed to stop the team ; the boat struck the eddy caused by the pier, then ran against the bridge ; the steersman done all in his power to keep her off, but, by reason of the current and eddy, had no control of her ; she would not mind the helm ; Korah could not have done anything to prevent the accident.

Question—Can you tell, from your experience as a boatman, any reason why the Capt. should be on the tow-path at the time ?

Objected to by plaintiff, Court sustained the objection, and defendant excepted.

The defendant started from the office with his papers, and went up to the bridge ; the bow line got fast, he loosened it ; before the boat struck, he halloed to stop the team.

27 Ques.—Was it, in your judgment as a boatman, a proper place for captain ?

Plaintiff objected, Court sustained the objection, and defendant excepted.

Cross Examined. Went to Chicago and back one trip as steersman ; was boatman on canal in Pennsylvania from 18 to 25 years of age. I repaired the rudder of the boat ; don't know whether it dropped too much. Defendant passed along on tow-path ; any man on the boat could have heard the command ; steersman tried to keep her off the bank at first, and when she took a shear went to other side ; did not set a pole on the other side ; the pier makes

an eddy for four feet. There was not space enough to give the boat headway; she was, when she started, about half a block from end of bridge, not room enough to get sufficient steerage way.

Capt. Cullen. Am canal boat captain; have been boatman for 14 years. I know the bridge is a material obstruction to navigation. Saw this boat going up. It is sometimes necessary for safe navigation that there should be a man on the bridge. I had
 28 once to stop a boat with a snubbing line on tow path; if she had been so far from the shore that I could not have got off, she would have hit the bridge. The water rises and falls in the side-cut very quick; it depends on the amount of water drawn off at the mills. The water was low when the Danube went up. Don't think it possible for a boat to pass that bridge at all times without striking. Saw the boat from the time she started; there was an experienced man at the helm; he did all he could; could not see anything that I could have done to have prevented the boat from striking. The Neptune lay inside of the Danube when she started; she was loaded. If proper guards had been placed there, she would not have hit.

Cross Examined. Putting a guard there would not affect the current, but would keep the boat off the bridge.

Michael McHugh. Have followed the business of towing boats two or three years; towed the Danube when she hit the bridge; there was an obstruction at the end of bridge, that would catch the tow line; it was necessary to have a man to throw the line over. Boat was about seven yards from bridge when captain called to stop the team; think there was pretty good stage of water. The Danube was full loaded; heavy current. Capt. Mayhew's boat once got aground, and struck the bridge. It is
 29 harder to pass this bridge than the old one; the difference is the power of two horses at least. This day the current was heavier than usual. The passage is narrower than in the old bridge. Have sometimes had to use blocks and tackles to draw boats through.

M. A. Ward. Am canal boatman, been on 11 years; have passed this and the old bridge. Think draw is two feet less in this than in the other bridge; about $1\frac{1}{2}$ feet more than width of

boat. Consider the present bridge a material obstruction to navigation; there is an eddy below the pier. It is impossible always to avoid striking bridge; boats hit it oftener than they miss it; guards could be built so as to protect bridge, and they would aid in shaping the course of boats into the draw.

Cross Examined. Was on Armour's platform when boat struck; think the tiller struck the ground; something prevented it from working.

Patrick Lannagan. Ques.—Could you have turned the bridge far enough around so that the boat would have struck the pier, and not the bridge?

Objection by plaintiff, sustained by Court, and defendant excepted.

30 I heard a man call to me from the bank, to turn bridge more, so that boat would not strike; had no time to turn it to prevent boat from striking.

Cross Examined. Turned bridge around in the usual place; would not have had time to have turned the bridge after I heard the voice.

B. F. Powell. Am in grain business, and a boat owner. Have passed this bridge several times; it renders navigation more difficult and dangerous; guards to the bridge would, to a great extent, relieve the difficulty; it is more difficult to pass through this than the other bridge. Think the passage is narrower in this than in the other. The bridge turns very hard; it could be made to turn easy enough to get it out of the way of the boat.

Cross Examined. Guards would stop the eddy; they would keep boats off the piers.

31 Defendant then offered in evidence the following rules and regulations of the Ill. & Mich. Canal:

Sec. 1. "No person shall, under any pretence whatever, except with permission in writing from the Board of the Illinois & Michigan Canal, or their authorized agents, dig or cause to be dug or constructed any drain, remove or deposit, or caused to be removed or deposited, earth, sand, gravel, or other material, so that the effect of such drain, or the removal of such earth, sand or gravel, or other material as aforesaid will cause the washing of any material into the canal to the injury of the same; any person

offending against the orders above specified, may be prosecuted in the name of the Board of Trustees, before any Justice of the Peace in the proper county, and, on conviction, shall be fined for each offence not less than one nor more than one hundred dollars, and shall be liable to be sued, in an action on the case, in the name of the Board of Trustees of the Ill. & Mich. Canal, for the injury done to said canal, for which recovery shall be had, with full costs."

32 Sec. 5. "If any person shall obstruct the navigation by wilfully sinking any vessel, timber, stone, earth or other material to the bottom of the canal, or placing any obstruction on the towing path thereof, or on the side or bank opposite, such person or persons shall, for every such offence, forfeit and pay such penalty as the superintendent, having charge of that portion of the canal, may impose, not exceeding twenty-five dollars over and above the expenses of removing such obstruction."

Sec. 8. "In all cases where a new road or public highway is laid out by legal authority, in such direction as to cross the line of canal, or any navigable feeder thereof by the laws of the State, and in such a manner as to require the erection of a new bridge over such canal or feeder for the accommodation of said road, such bridge shall be constructed according to a plan which shall be approved by the Board of Trustees or their authorized agents; and if any person or persons shall undertake to construct or locate such bridge without first obtaining the consent of the Board of Trustees or their authorized agents, by placing any material for that purpose upon either bank of the canal or bottom thereof, he or they shall be subject to a penalty of fifty dollars, and the general superintendent shall be authorized to remove all the aforesaid materials at the expense of the offending party."

33 Sec. 31. "If any person or persons in navigating or managing any boat or flat on the canal, shall injure any lock, lock-gate, water-gate, guard-gate, paddle-gate, bridge, aqueduct, or other work or device appertaining to the canal or any of its feeders, such person or persons shall, for every such offence, forfeit and pay a fine of not less than five, nor more than twenty-five dollars, as the superintendent may, in his discretion, impose, over and above all damage which may result from such violation."

Certificate, under seal of Wm. Gooding, Secretary of Board of Trustees, that the above are a correct copy from the records of said Board.

Plaintiff objected to the reading of said rules and each of them, Court sustained the objection, and defendant excepted.

Defendant rested.

Peter Dunlevy called by plaintiff. Have seen the bridge, and the eddy; I think it is not far from 20 feet from the bridge; should think the bridge would cover it when turned; the
34 current in the side-cut can be detected by the eye, if there is any floating substance on the water.

Cross Examined. The eddy might vary with the current; that varies with the amount of water drawn off below.

John Armour re-called. Madison street is 80 feet wide; 40 feet from centre of pier to outside of street; guards would only interfere with boats lying in the street, not when they were lying opposite my warehouse; a guard at south end of bridge would not interfere with my warehouse.

This was all the evidence.

PLAINTIFFS' INSTRUCTIONS.

If the jury believe, from the evidence, that the defendant, Oscar Korah, at the time of the injury complained of, was the captain or master of the canal boat Danube, having charge of said boat at the time, and that said boat was run wilfully or negligently against the bridge, or pier of the Madison street bridge, a public highway in the city of Ottawa, over the lateral canal, whilst the said Korah was master or captain as aforesaid, having charge of said boat, then the jury will find the defendant guilty, and fix a fine not exceeding one hundred dollars, nor less than ten dollars.

35 If the jury believe, from the evidence, that the defendant, Oscar Korah, at the time of the injury complained of, was the captain or master of the canal boat Danube, having charge of said boat at said time, and that said boat was run against the pier or bridge in controversy, and that said bridge was a public highway in the city of Ottawa, over the lateral canal, injuring said bridge or pier whilst said Korah was master or

ERRORS ASSIGNED.

Now comes the said Plaintiff in Error, Oscar Korah by Glover, Cook & Campbell, his attorneys, and says that in the record and proceedings aforesaid, and in the rendering of the judgment aforesaid, there is manifest error in this, to wit:

1st. The Court erred in overruling the motion of said defendant to dismiss said suit.

2d. The Court erred in admitting improper evidence offered by said plaintiff.

3d. The Court erred in refusing to admit proper evidence offered by defendant.

4th. The Court erred in giving to the jury the 1st, 2d, 3d, and 4th instructions asked by plaintiff, and each of them.

6th. The Court erred in overruling the defendant's motion for a new trial.

7th. The Court erred in rendering judgment aforesaid, in manner and form aforesaid.

POINTS MADE FOR PLAINTIFF IN ERROR.

The City had no right to pass the ordinance in question; the law creating the Board of Trustees, and providing for the completion of the canal, gave all the power to the Board of Trustees to make, ordain, and establish rules, by-laws, and regulations, in relation to the transportation upon the canal. The conduct of boats and rafts, "and the general police of the canal," as are usual, or may be found necessary.

1 *Purple's Stat.*, 467. *Sec.* 15.

This power had been exercised by the Trustees, and they had passed an ordinance in relation to the same offence with which defendant was charged, and had provided a punishment therefor, differing from the one provided for by the city ordinance.

See Sec. 31 of Rules of Trustees, rec. page 33.

Then the case stands thus: The State, in contracting with the bond holders to complete the canal, had enacted that the Board of Trustees should have power to make all rules, by-laws and regulations, &c., and to make the rule which they did make, by which rule a fine of not less than \$5 nor more than \$25 was im-

posed, for the commission of the offence charged upon the defendant.

The rule of the Canal Trustees, and the ordinance of the City, provided two distinct penalties for the same offence. If the defendant can be punished under the city ordinance, it is clear that he may be twice punished for the same offence. The evidence of the rules adopted by the Trustees should have been received.

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The bridge, as constructed, was an obstruction to navigation, see testimony of John B. Preston, record page 23, and it was built without authority in the way in which it was built.

Testimony of Capt. Cullen, p. 27.

“ “ *Michael McHugh, pp. 27 and 28*

“ “ *M. A. Ward, p. 29.*

The Court, in the instructions, assumed that the captain of the boat could be convicted under this ordinance if he was not guilty himself of negligence or wilful wrong, if those acting under his authority were guilty of negligence.

The first instruction says, that if the boat Danube was run wilfully or negligently against the bridge, and the defendant, at the time, was the captain and master having charge of the boat at the time, the jury should find him guilty. If this is so, then the defendant may have been found guilty for the negligent or wilful act of the hands on the boat without negligence or fault of his own. The court has applied the same principle of *respondens superior* in this action, that would be the rule in a suit brought against the master, to recover damages for the act of the servants.

GLOVER, COOK & CAMPBELL

nal: see testimony of Fishburn, page 26. Now, on this state of

facts, two questions arise; 1st, was the captain guilty of negligence in being on the bank; and second, if not, was he responsible for the act of the men on board in throwing her head out too much. He may have been responsible, or may not; it depends solely on the question whether, by the use of ordinary care as master of the boat, he could have prevented it. It is not true that he is liable in this action for the act of the men on the boat, simply because he was the master of the boat, and had charge of her, for it may be that the highest care required the master of the boat to be on the tow-path at the time, and where he could not foresee or prevent the act of the bowsman from throwing her bow out too far; we tried to prove that this was so, but the Court would not permit it. The Court clearly erred in refusing to permit the defendant to ask the witness Fishburn "Can you tell from your experience as a boatman, any reason why the captain should be on the tow-path at the time? Was it, in your judgment, a proper place for the captain?"

Now the point we make is, if the captain was in his proper place and doing his proper duty, he ought not to be ^{presented} ~~presented~~ in this form, if the men on the boat were guilty of negligence.

The 2d instruction holds the defendant liable for the want of proper skill and caution by those under his authority, even if he acted with all due care and skill himself; this is not the law.

There is a case stands thus: The State, in contracting with the bond holders to complete the canal, had enacted that the Board of Trustees should have power to make all rules, by-laws and regulations, &c., and to make the rule which they did make. The 3d instruction makes the defendant liable for the want of

a good rudder, if, by the exercise of ordinary prudence, he might have known that the rudder was out of repair.

The ordinance does not impose this fine for negligence, in not seeing that the boat was in good repair, but only for negligence in *running* the boat. The question is clearly presented by the defendant's 4th instruction, and the qualification made thereto.

The 5th instruction asked by defendant should have been given as asked, and the qualification was wrong.

There was no presumption, that if the men on the boat either negligently or wilfully run the boat against the bridge, that they were acting by the authority of defendant in such negligent or wilful act; it was begging the whole question.

The Court say if defendant does his whole duty, and the bowsman makes a blunder, that the blunder of the bowsman shall be presumed to have been directed by the defendant, and the defendant shall be punished therefor.

The Court has applied the same principle of *respondens superior*^{et al} in this action, that would be the rule in a suit brought against the master, to recover damages for the act of the servant.

GLOVER, COOK & CAMPBELL,
For Plaintiff in Error.

155-
SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

ABSTRACT OF RECORD,

AND

BRIEF

OF PLAINTIFF IN ERROR.

OSCAR KORAH, Plaintiff in Error,

vs.

THE CITY OF OTTAWA.

} ERROR TO LA SALLE.

OTTAWA, ILL.:

PRINTED AT THE REPUBLICAN OFFICE.

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SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

This was an action of debt, brought by the City of Ottawa, to recover of Defendant below a penalty prescribed by a city ordinance, for damage done to the bridge across the Side-Cut of the Illinois & M. Canal at Madison Street, in said city.

The action was originally commenced before a Justice of the Peace, and brought by appeal to the Circuit Court of LaSalle County, where it was tried.

2 Complaint—"That on the 6th day of September, 1862, within said city, defendant having charge of canal boat Danube, did negligently run said boat against Madison Street bridge, and did thereby greatly injure said bridge."

Plea, "Not guilty."

6 Motion in Circuit Court by the defendant to dismiss the suit for want of jurisdiction in the Court below overruled by Court, and defendant excepted.

7 Jury called and "sworn to well and truly try the issues according to the evidence."

8 Verdict—"We, the jury, find the defendant guilty, and assess the fine at five dollars."

Motion for a new trial by defendant, overruled by the Court, and defendant excepted.

Judgment—"That the plaintiff have and recover of the defendant the sum of five dollars, its fine, also its costs and charges herein expended, and that execution issue therefor."

9 Bill of Exceptions.

Plaintiff offered and read in evidence section one (1), of an Ordinance of the City of Ottawa, as follows:

"An Ordinance to protect bridges, ferries, and wharves."

10 *Edward Butler* testified as follows: I know the bridge on Madison street, across the side-cut. September 6th, 1862, I was walking on the side-cut toward the bridge, and saw two men on a canal boat, shoving the bow of the boat out from the tow-path. I saw the boat strike the end of the bridge, which was turned. I was about 150 feet off. The boat was 50 or 60 feet from the bridge when I first saw it, and going slow. The bow struck the bridge and pushed it off of the pinion 3 or 4 inches, and then the boat went on through the bridge. I didn't see defendant at all. The bridge was in the city of Ottawa, and there were one or two men on it.

Cross Examined. I couldn't see the water on the other side of the boat, and couldn't tell how far from the bank she was; they stopped pushing the bow out when 50 feet from the bridge. The bow struck the end of the bridge about 3 feet from the middle.

11 *Patrick Lanagan* testified:—I worked for Armour, and attended the bridge one day last fall. I saw the boat start from Magill's, and commenced turning the bridge, and did not see her

again till she was almost to the bridge; then I saw a man running to the bow to keep the boat off of the bridge with his hands. I saw that the boat would strike the bridge or pier, and let the bridge be; the boat struck the end of the bridge, about 3 feet from the centre, and knocked the bridge out of gear; there was two men on the boat, one of them at the helm. The defendant was captain of the boat at the time, and was walking along the tow-path.

Cross Examined. I have seen three boats grounded and stuck at the bridge. The passage for boats was on the west side of the pier. The Yorktown lay above the bridge on the east side, so near that you could step from the north end of the bridge on to her. This would make a strong current on the west side. The team stopped when the boat was 30 or 40 feet from the bridge.

12 *John Colwell* testified:—I built this bridge; it is 62 feet long, and 20 feet wide. The canal is there 60 feet wide; below and clear of the docking it is 62 feet.

Question by plaintiff:—What amount of damage was done to the bridge by the boat striking it, last September?

Defendant objected, Court overruled, and defendant excepted.

Answer. I put the bridge in place again, for which I charged the city ten dollars. The bridge was strained considerable, and don't hang true now. It was worth \$10 to put it on the pivot, and \$25 to fix it as it was. From the abutment to the pier is 19 feet 8 inches, and the pier is a foot wider than the bridge.

Cross Examined. The bank of the canal slopes at an angle of 45°; don't know the distance from bottom of the slope to the pier. The slope would make it more difficult to get into the passage. The stone pier is 28 feet long; the bridge overhangs it 18 feet; presume stone work could have been put in at the end of the bridge to guard it. Leighton was there sometimes when bridge was building. The \$25 damages was in addition to the \$10. Was over it two hours before the accident; saw nothing the matter. After the accident, it would not hang true by three inches.

Re-Examined. Leighton was assistant superintendent of this division of canal.

Question by Plaintiff:—Who superintended the building of the high bridge on Madison street?

Defendant objected, the Court overruled the objection, and defendant excepted.

Ans. Leighton.

Re-Cross Examined. Don't know whether pier is constructed parallel with the bank. The west abutment is not. The north end is furthest into the canal, 2 inches out of line. Know it is not 10 inches. I never measured it.

Andrew Anderson. Have followed boating considerable. Know the bridge; think boats can be navigated through with ordinary care. The current is the greatest difficulty after boat gets into the narrow channel. Think it would be a want of care to hit bridge on the end. It would take some labor to keep a boat in the middle of the canal. Think a boat can be run within 4 or 5 feet of bank along there.

Cross Examined. Sometimes there is a strong current in the canal at that point. Boat lying at Armour's would tend to increase it. Never run a boat through that passage but once; then rubbed the bridge. If a boat was running north, and her bow should be thrown out a little, the current would tend to give it a sheer across the current, and render it unmanageable.

Direct Resumed. Leighton was known as superintendent of this division; he took care of the canal generally. Think he had something to do with building repairing aqueduct. Never saw him draw plan or specifications for a bridge.

H. B. Dimick. Was in Armour's warehouse when boat struck bridge. Heard it, did not see it. Went out and saw the boat; it had run back a little distance; bridge was broken, and
15 out of its place. It was the Danube. Defendant was captain. Boat was about 20 feet below bridge, near the centre of canal. Good stage of water. Bridge was properly turned.

Cross Examined. Have seen some difficulty with boats passing through bridge. When water was low, have seen boats glance on the bridge, and rub against the side. There is a current in the side-cut; the drawing of water for the mills makes

it. Have seen an eddy below the bridge when boats were passing through.

Re-Direct Resumed. It was about the middle of the day when boat struck. Have been on the canal some. Have steered into worse places without trouble. Don't think it ever safe to navigate. Think bridge is not a material obstruction to navigation.

Re-Cross Examined. Saw bridge after it was struck. That is all I know about it being in a proper position when struck, If the bow of a boat running north was thrown out from the tow-path, the current would tend it to sheer across the canal. The piers obstruct the navigation somewhat; it would be very
16 much safer and easier to get through if the passage was 4 feet wider. Never run a boat through there.

John Armour. Have lived in Ottawa twenty-five years. The first bridge on Madison street was built from 11 to 13 years ago. Before that time, the public travel run some 200 feet north from where the street is, where there was a place left to cross the side-cut. The second bridge was put in 7 or 8 years ago. That bridge had a crib built in the canal, of timber, and filled in with stone. The piers in this bridge is of mason work. The second bridge was a swing bridge, built by Green.

Question by Plaintiff:—State whether the engineers laid out the side-cut before or after the State's addition was laid out,

Defendant objected, Court overruled the objection, and defendant excepted.

Ans. I think side-cut was laid out first. I am a warehouseman; own two canal boats; had one of the first boats that was run on the canal. Think I have more skill in running canal boats than ordinary men. Have seen boats running through the bridge weekly and daily almost; used to ride on the canal to Chicago three or four times a season before railroad was opened.

I can steer a boat in the day time. Never run a boat
17 through this bridge. For the last three or four years have been in the habit of seeing boats pass through the bridge.

Question by Plaintiff:—State whether, in your opinion, boats can be run through this bridge without any material damage.

Defendant objected, Court overruled the objection, and defendant excepted.

Ans. It would be no great trouble; have seen boats light, and a high wind blowing, rub there. Don't think the bridge a material obstruction.

Cross Examined, There would be no difficulty in building a high bridge there for boats to pass under. Don't know that a high bridge there would injure any warehouse; it would require me to fix a different place for unloading wagons. Have no personal interest in keeping this low bridge. Think the bridge can be as easily passed, or nearly so, as the high bridge on Main street. Think the opening in that bridge is not more than 21 feet. There is very little slope to the tow-path, between Madison and Main streets. Don't know the width of the opening in this bridge; don't know width of the pier. Canal boats are about 17 feet 4 inches in width, locks about 18 feet wide. Have seen boats run through this bridge without touching. Have seen 18 some boats blocked there, caught in the mud. This bridge was put in in May, 1862. Think the pier in bridge of 1853 was same size as present one. There is an angle in the pier of present bridge. The slope between Magill's warehouse and bridge is caused by washing. Should not think there was 4 feet difference of width of canal between the top of bank and bottom of slope. It is docked part of the way between the bridge and Magill's.

George Bristol. Have lived in Ottawa eleven years; have been in lumber and grain trade; had from one to four canal boats. Have rode on boats in side-cut, and have steered some in side-cut. Don't profess to have particular skill as boatman; know more about it than one who never handled one. Have seen many boats pass through that bridge; think that boats can be navigated thro' there with ordinary care; not as freely as if the bridge was not there; don't think the bridge a material obstruction to navigation. Locks in the canal are about 18 feet wide. This pier is larger than the one in old bridge. Had no particular difficulty in getting through old bridge.

19 Question by Plaintiff:—State whether or not it is any more difficult to run through this bridge than through the locks on canal.

Defendant objected, Court overruled the objection, and defendant excepted.

Ans. I think not; boats are 17 feet 8 inches wide; that was the width of my boats.

Cross Examined. My judgment is not as good as boatmen, about the running of boats. When the current is heavier than usual, the navigation is more difficult; it requires more caution to run through this passage than if the bridge was not there. If it becomes necessary to throw the head of a boat out from the shore, and there was a current, it would give the boat a shear that would make it difficult to manage.

Wm. C. Richardson. I own boats; no experience in running them; think I have more skill than generality of mankind, who never owned any, in the management of them. My warehouse is south side of bridge. Have seen boats go through the bridge. Never saw any have any difficulty in passing.

Geo. W. Hobb. Saw the Danube strike the bridge; saw 20 her leave Magill's warehouse; very soon after they left the warehouse, the bow seemed to incline towards the tow-path, one man trying to push it off the bank; this was within 50 feet of the warehouse. Then the bow swung out, but did not get as far out as the centre of canal; the man kept polling until he got about 20 feet from the bridge; they appeared to be trying to keep it off the bank; did not use the pole on the outside of boat; the man who had the pole threw it down and ran to the bow, and seemed to be trying to keep the boat off the bridge with his hand; the men on the boat seemed to have the control of her; heard no direction given by any one on the bank.

Cross Examined. I stood on the east side of the canal; can't say whether another boat lay inside of the Danube, at Magill's warehouse. Saw the Danube when she started; seemed to be sheering towards the shore; was loaded; one man seemed to be keeping her bow off the shore, laid down the pole, went to the bow to keep her off the bridge with his hands; seemed to be afraid of sticking on shore, then tried to keep her off the bridge. There was a man at the helm. Defendant was not one of the men on the boat. She was going slow. After boat turned 21 off from the shore, I heard an order to the driver to hold

up; think a man on the boat gave the order. Did not see defendant.

Wm. Haskell. Was alderman of 5th ward in 1853 and 4. Wrote to Mr. Gooding, secretary of Board of Canal Trustees, for liberty to make a bridge across canal, on Madison street; he gave the privilege, and said he would be glad to do anything to further the object. The bridge was a draw, not a swing, bridge. That bridge was built in 1854; about three years after, there was a swing bridge built, and the present one was built last May.

D. W. Brush. Was city marshal last year; went to see Mr. Preston; he told me if it was the general consent of the business men on the basin, he would cause the water to be drawn off for the purpose of putting in the pier of the bridge. I told him they consented. He sent a dispatch to Mr. Leighton, the assistant superintendent on this division. I saw them putting in the pier. Mr. Leighton was there twice; one day 10 or 15 minutes.

Cross Examined. Olmstead, Nitchelm and Walters 22 were aldermen of this city last year; they were bridge committee. I presented no plan or specifications of the bridge to Preston.

Frank Whitmore. I run a boat in 1856, part of the season; was captain. Have seen boats passing this bridge; think it may be safely passed by the exercise of ordinary care.

Cross Examined. Never run a boat through this bridge. The pier in this is larger than the one in the old bridge.

John Colwell re-called. The new pier is wider than the old one. The north end of abutment projects into the bank; the south end was the line we marked from. I think this abutment is closer to the bank than the old one.

Plaintiff here rested.

23 *John B. Preston called for Deft.* Am superintendent of canal. Know the bridge. Have been civil engineer 25 to 28 years, and have more skill than ordinary men in determining the effect of obstructions in navigable waters. The bridge with the piers and abutments as the same are now constructed, is a material obstruction to navigation. The shape of bank is such that it is impossible to run a boat into the bridge except the boats run exactly straight into the opening; this the current prevents,

when a boat cannot be prevented from sheering. There should be more room between the abutments and the bank. The bridge could be protected by a fender. The pier is not straight; this lessens the passage way. The abutment is about 11 inches out of line; I examined and measured it to-day; from the end of chord to inside of the bearing on is 11 inches. Fender could have been put in so as effectually to have prevented the accident. Such fenders are always put upon draw bridges that ever I saw, of any value. I never gave my consent to have this bridge built as it now is. It is more difficult to navigate a boat through the bridge than to navigate one through a lock; the locks are in the middle, and not in one side of the canal. There is usually no current of consequence at a lock; they are constructed with heavy stones at the entrance, so that a boat striking does not
 24 injure the lock so much. I think 5 boats out of every 7 strike in going into a lock. If the bridge had been properly constructed, this accident would not have happened; I mean if fenders had been put in; that could be done for one hundred dollars; no difficulty in putting them in. The mills below, drawing off the water, cause a current; boats running against that current would be liable to sheer.

Cross Examined. If a boat should start from Magill's, with one lying between her and tow-path, she must get her width west to pass the bridge; in steering her the current would tend to send her bow on shore; if her bow was pushed off, the current might make her shear the other way, and strike the bridge. The passage through the high bridge, on Main street, was made under my direction; that is 21 feet 3 inches wide. Leighton had no power to authorize a bridge to be put across the canal; he did not act for the Trustees in building the aqueduct, but for the contractor. The trustees never prohibit bridges being built after plans furnished by me. I supposed this bridge was to be the same as the old bridge, but the pier is larger.

25 *L. Mayhew.* Have run canal boats about twenty years. Know bridge in question; it is difficult to get through without hitting; have been compelled to stay there an hour and a half, and often to double teams to get through.

Cross Examined. Struck there when water was low; have

stuck in the bridge on account of swift water; have hit the bridge in passing through; have frequently got boats stern on the bank. It is very difficult to get into the passage on account of current. Ran through the bridge every week last season.

Direct Resumed. A heavy loaded boat, going into the passage from the south, is liable to be made unmanageable by the current. The bridge passage is about two boats' length from Magill's wharf; in steering from there, you have to head towards the shore at first; sometimes impossible to avoid striking bridge in low water.

Mr. Fishburn. Am in grain trade; have experience as a boatman; saw the boat when she started; she lay outside of another boat; she had to turn in at first towards the shore; ran
26 her bow towards the bank; they set the bow off with a pole, then the current struck her, and she sheered towards the other shore; defendant was on the bank; he halloed to stop the team; the boat struck the eddy caused by the pier, then ran against the bridge; the steersman done all in his power to keep her off, but, by reason of the current and eddy, had no control of her; she would not mind the helm; Korah could not have done anything to prevent the accident.

Question—Can you tell, from your experience as a boatman, any reason why the Capt. should be on the tow-path at the time?

Objected to by plaintiff, Court sustained the objection, and defendant excepted.

The defendant started from the office with his papers, and went up to the bridge; the bow line got fast, he loosened it; before the boat struck, he halloed to stop the team.

Ques.—Was it, in your judgment as a boatman, a proper
27 place for captain?

Plaintiff objected, Court sustained the objection, and defendant excepted.

Cross Examined. Went to Chicago and back one trip as steersman; was boatman on canal in Pennsylvania from 18 to 25 years of age. I repaired the rudder of the boat; don't know whether it dropped too much. Defendant passed along on tow-path; any man on the boat could have heard the command; steersman tried to keep her off the bank at first, and when she took a shear went to other side; did not set a pole on the other side; the pier makes

an eddy for four feet. There was not space enough to give the boat headway; she was, when she started, about half a block from end of bridge, not room enough to get sufficient steerage way.

Capt. Cullen. Am canal boat captain; have been boatman for 14 years. I know the bridge is a material obstruction to navigation. Saw this boat going up. It is sometimes necessary for safe navigation that there should be a man on the bridge. I had
28 once to stop a boat with a snubbing line on tow path; if she had been so far from the shore that I could not have got off, she would have hit the bridge. The water rises and falls in the side-cut very quick; it depends on the amount of water drawn off at the mills. The water was low when the Danube went up. Don't think it possible for a boat to pass that bridge at all times without striking. Saw the boat from the time she started; there was an experienced man at the helm; he did all he could; could not see anything that I could have done to have prevented the boat from striking. The Neptune lay inside of the Danube when she started; she was loaded. If proper guards had been placed there, she would not have hit.

Cross Examined. Putting a guard there would not affect the current, but would keep the boat off the bridge.

Michael McHugh. Have followed the business of towing boats two or three years; towed the Danube when she hit the bridge; there was an obstruction at the end of bridge, that would catch the tow line; it was necessary to have a man to throw the line over. Boat was about seven yards from bridge when captain called to stop the team; think there was pretty good stage of water. The Danube was full loaded; heavy current. Capt. May-
29 hew's boat once got aground, and struck the bridge. It is harder to pass this bridge than the old one; the difference is the power of two horses at least. This day the current was heavier than usual. The passage is narrower than in the old bridge. Have sometimes had to use blocks and tackles to draw boats through.

M. A. Ward. Am canal boatman, been on 11 years; have passed this and the old bridge. Think draw is two feet less in this than in the other bridge; about 1½ feet more than width of

boat. Consider the present bridge a material obstruction to navigation; there is an eddy below the pier. It is impossible always to avoid striking bridge; boats hit it oftener than they miss it; guards could be built so as to protect bridge, and they would aid in shaping the course of boats into the draw.

Cross Examined. Was^o on Armour's platform when boat struck; think the tiller struck the ground; something prevented it from working.

Patrick Lannagan. Ques.—Could you have turned the bridge far enough around so that the boat would have struck the pier, and not the bridge?

Objection by plaintiff, sustained by Court, and defendant excepted.

30 I heard a man call to me from the bank, to turn bridge more, so that boat would not strike; had no time to turn it to prevent boat from striking.

Cross Examined. Turned bridge around in the usual place; would not have had time to have turned the bridge after I heard the voice.

B. F. Powell. Am in grain business, and a boat owner. Have passed this bridge several times; it renders navigation more difficult and dangerous; guards to the bridge would, to a great extent, relieve the difficulty; it is more difficult to pass through this than the other bridge. Think the passage is narrower in this than in the other. The bridge turns very hard; it could be made to turn easy enough to get it out of the way of the boat.

Cross Examined. Guards would stop the eddy; they would keep boats off the piers.

31 Defendant then offered in evidence the following rules and regulations of the Ill. & Mich. Canal:

Sec. 1. "No person shall, under any pretence whatever, except with permission in writing from the Board of the Illinois & Michigan Canal, or their authorized agents, dig or cause to be dug or constructed any drain, remove or deposit, or caused to be removed or deposited, earth, sand, gravel, or other material, so that the effect of such drain, or the removal of such earth, sand or gravel, or other material as aforesaid will cause the washing of any material into the canal to the injury of the same; any person

offending against the orders above specified, may be prosecuted in the name of the Board of Trustees, before any Justice of the Peace in the proper county, and, on conviction, shall be fined for each offence not less than one nor more than one hundred dollars, and shall be liable to be sued, in an action on the case, in the name of the Board of Trustees of the Ill. & Mich. Canal, for the injury done to said canal, for which recovery shall be had, with full costs."

32 Sec. 5. "If any person shall obstruct the navigation by wilfully sinking any vessel, timber, stone, earth or other material to the bottom of the canal, or placing any obstruction on the towing path thereof, or on the side or bank opposite, such person or persons shall, for every such offence, forfeit and pay such penalty as the superintendent, having charge of that portion of the canal, may impose, not exceeding twenty-five dollars over and above the expenses of removing such obstruction."

Sec. 8. "In all cases where a new road or public highway is laid out by legal authority, in such direction as to cross the line of canal, or any navigable feeder thereof by the laws of the State, and in such a manner as to require the erection of a new bridge over such canal or feeder for the accommodation of said road

Certificate, under seal of Wm. Gooding, Secretary of Board of Trustees, that the above are a correct copy from the records of said Board.

Plaintiff objected to the reading of said rules and each of them, Court sustained the objection, and defendant excepted.

Defendant rested.

Peter Dunlevy called by plaintiff. Have seen the bridge, and the eddy; I think it is not far from 20 feet from the bridge; should think the bridge would cover it when turned; the
34 current in the side-cut can be detected by the eye, if there is any floating substance on the water.

Cross Examined. The eddy might vary with the current; that varies with the amount of water drawn off below.

John Armour re-called. Madison street is 80 feet wide; 40 feet from centre of pier to outside of street; guards would only interfere with boats lying in the street, not when they were lying opposite my warehouse; a guard at south end of bridge would not interfere with my warehouse.

This was all the evidence.

PLAINTIFFS' INSTRUCTIONS.

ERRORS ASSIGNED.

Now comes the said Plaintiff in Error, Oscar Korah by Glover, Cook & Campbell, his attorneys, and says that in the record and proceedings aforesaid, and in the rendering of the judgment aforesaid, there is manifest error in this, to wit:

1st. The Court erred in overruling the motion of said defendant to dismiss said suit.

2d. The Court erred in admitting improper evidence offered by said plaintiff.

3d. The Court erred in refusing to admit proper evidence offered by defendant.

4th. The Court erred in giving to the jury the 1st, 2d, 3d, and 4th instructions asked by plaintiff, and each of them.

5th. The Court erred in refusing to give to the jury the 2d, 3d, 4th, and 5th instructions asked by the defendant, and each of them, as asked, and in qualifying the same and each of them, and in refusing to give the 7th instruction asked by defendant.

6th. The Court erred in overruling the defendant's motion for a new trial.

7th. The Court erred in rendering judgment aforesaid, in manner and form aforesaid.

POINTS MADE FOR PLAINTIFF IN ERROR.

The City had no right to pass the ordinance in question; the law creating the Board of Trustees, and providing for the completion of the canal, gave all the power to the Board of Trustees to make, ordain, and establish rules, by-laws, and regulations, in relation to the transportation upon the canal. The conduct of boats and rafts, "and the general police of the canal," as are usual, or may be found necessary.

1 *Purple's Stat.*, 467. *Sec.* 15.

This power had been exercised by the Trustees, and they had passed an ordinance in relation to the same offence with which defendant was charged, and had provided a punishment therefor, differing from the one provided for by the city ordinance.

See Sec. 31 of Rules of Trustees, rec. page 33.

These rules so passed by the Canal Trustees, had been ~~re-~~
recognized ~~organized~~ by the Legislature. See Act in relation to The Ill. and Mich. Canal and the canal lands, approved Feb. 14, 1857.

1 *Purple's Stat.*, 485.

Laws of 1851, p. 90.

Then the case stands thus: The State, in contracting with the bond holders to complete the canal, had enacted that the Board of Trustees should have power to make all rules, by-laws and regulations, &c., and to make the rule which they did make, by which rule a fine of not less than \$5 nor more than \$25 was im-

posed, for the commission of the offence charged upon the defendant.

The rule of the Canal Trustees, and the ordinance of the City, provided two distinct penalties for the same offence. If the defendant can be punished under the city ordinance, it is clear that he may be twice punished for the same offence. The evidence of the rules adopted by the Trustees should have been received.

The bridge, as constructed, was an obstruction to navigation, see testimony of John B. Preston, record page 23, and it was built without authority in the way in which it was built.

Testimony of Capt. Cullen, p. 27.

“ “ *Michael McHugh, pp. 27 and 28*

“ “ *M. A. Ward, p. 29.*

The Court, in the instructions, assumed that the captain of the boat could be convicted under this ordinance if he was not guilty himself of negligence or wilful wrong, if those acting under his authority were guilty of negligence.

The first instruction says, that if the boat Danube was run wilfully or negligently against the bridge, and the defendant, at the time, was the captain and master having charge of the boat at the time, the jury should find him guilty. If this is so, then the defendant may have been found guilty for the negligent or wilful act of the hands on the boat, without negligence or fault of his own.

The boat was being managed by the men who were on it; the defendant was not on the boat, but on the tow-path. The negligence of the men on the boat, if there was any negligence at all, consisted in pushing the bow a little too much off shore, by which means the current struck her and made her sheer across the canal: see testimony of Fishburn, page 26. Now, on this state of

facts, two questions arise; 1st, was the captain guilty of negligence in being on the bank; and second, if not, was he responsible for the act of the men on board in throwing her head out too much. He may have been responsible, or may not; it depends solely on the question whether, by the use of ordinary care as master of the boat, he could have prevented it. It is not true that he is liable in this action for the act of the men on the boat, simply because he was the master of the boat, and had charge of her, for it may be that the highest care required the master of the boat to be on the tow-path at the time, and where he could not foresee or prevent the act of the bowsman from throwing her bow out too far; we tried to prove that this was so, but the Court would not permit it. The Court clearly erred in refusing to permit the defendant to ask the witness Fishburn "Can you tell from your experience as a boatman, any reason why the captain should be on the tow-path at the time? Was it, in your judgment, a proper place for the captain?"

Now the point we make is, if the captain was in his proper place and doing his proper duty, he ought not to be ^{presented} ~~presented~~ in this form, if the men on the boat were guilty of negligence.

The 2d instruction holds the defendant liable for the want of proper skill and caution by those under his authority, even if he acted with all due care and skill himself; this is not the law.

The 3d instruction makes the defendant liable for the want of

a good rudder, if, by the exercise of ordinary prudence, he might have known that the rudder was out of repair.

The ordinance does not impose this fine for negligence, in not seeing that the boat was in good repair, but only for negligence in *running* the boat. The question is clearly presented by the defendant's 4th instruction, and the qualification made thereto.

The 5th instruction asked by defendant should have been given as asked, and the qualification was wrong.

There was no presumption, that if the men on the boat either negligently or wilfully run the boat against the bridge, that they were acting by the authority of defendant in such negligent or wilful act; it was begging the whole question.

The Court say if defendant does his whole duty, and the bowsman makes a blunder, that the blunder of the bowsman shall be presumed to have been directed by the defendant, and the defendant shall be punished therefor.

The Court has applied the same principle of ⁸⁻¹⁻~~respondent~~ superior in this action, that would be the rule in a suit brought against the master, to recover damages for the act of the servant.

GLOVER, COOK & CAMPBELL,
For Plaintiff in Error.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1868.

OSCAR KORAH
vs.
THE CITY OF OTTAWA. } *Error to La Salle.*

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

I.

The first error assigned is that the Court below erred in overruling the motion of Korah to dismiss the suit.

This motion was predicated on the ground that if Korah had committed any offense, it was against the rules passed by the Canal Trustees, which inflicted one penalty, and that he was not answerable to the ordinance of the city of Ottawa, which inflicted a different penalty.

It is insisted by the plaintiff in error, that the rules of the Canal Trustees, and the ordinance of the city, provide "*two distinct penalties for the same offense*;" and that if Korah "*can be punished under the city ordinance, he may be punished twice for the same offense.*" The main proposition we deny, as also the corollary from it.

The act cited by the plaintiff in error, (1 Purple's Stat. 467, sec. 15,) requires the Board of Trustees yearly to establish a tariff of tolls to be paid for transportation on the canal, and empowers them to collect these

tolls, "and from time to time to make, ordain and establish such reasonable rules, by-laws and regulations in relation to the collection of tolls, the transportation upon the canal, the conduct of the boats and rafts, and the general police of the said canal, as are usual or may be found necessary, and to enforce the observance of the same."

The 31st sec. of the Rules and Regulations of the Canal Trustees, made it an offense "if any person or persons in navigating or mananging any boat or flat on the canal, shall injure any lock, lock-gate, water-gate, guard-gate, BRIDGE, paddle-gate, aqueduct, OR OTHER WORK OR DEVICE APPERTAINING TO THE CANAL OR ANY OF ITS FEEDERS."

It was the intention of the legislature, in the act referred to, to give sufficient power (and no more) to the Trustees, as would ensure the full carrying out of the objects for which the canal was created; and to this end it became necessary to give them power over the rate of tolls, the mode of their collection, the manner of transportation, so far as the conduct of boats was concerned, as well as such *general police* regulations as might be found necessary. But we submit, that all this power had reference only to the objects for which the canal was made, and was only given to protect canal bridges and other of their property, and was not inconsistent with a grant of power, which the legislature has subsequently given in broad and express terms to the city of Ottawa, by charter, reference to bridges which the city might build, as we shall presently show.

The charter of the city of Ottawa provides, that "this act is hereby declared to be a public act, and may be read in evidence in all courts of law and equity within this State without proof."

See charter, approved Feb. 10, 1853, Art. 10, sec. 14.

The charter gives to Justices of the Peace "jurisdiction in all cases arising under the ordinances of the corporation."

Art. 6, sec. 3.

The charter gives to the city council "power and authority to establish, erect and keep in repair, bridges."

Art. 5, secs. 1 and 10.

Also, "to regulate the police of the city, and to *impose fines and forfeitures, and penalties for the breach of any ordinance, and to provide for the recovery and appropriation of such fines and forfeitures, and the enforcement of such penalties.*"

Art. 5, sec. 35.

"The city council shall have power to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this act, so that such ordinance be not repugnant to the constitution of the United States, or this State."

Art. 5, sec. 38.

We can see no conflict between the rules of the Canal Trustees, and the ordinance of the city.

This Court will try to uphold both, if possible; and, to accomplish that object, they will hold that the legislature, in conferring the powers upon the Canal Trustees, intended to give them plenary police powers over their *own property*, including bridges built by the canal, so as to effectuate the purposes for which the canal was created, and in conferring the powers upon the city of Ottawa, by their charter, they intended to give them plenary powers over all bridges built by the city, within the corporate limits.

If this be so, then two distinct penalties are not created for the same offence, and a person may be convicted of the offence provided for in the Rules and Regulations of the Canal Trustees, and also for the offence provided for by the city ordinance in question.

We believe this Court will sustain the ordinance passed by the city council, as clearly within the powers conferred by the city charter, and also sanctioned by sound policy as well as necessity.

We wish to call attention to a fact, which, we think, disposes fully of this point. This lateral canal or side-cut, is not a feeder, nor does it form a part of the main canal. It is a mere hydraulic basin, not necessary to operate the canal, nor forming any part of its navigation, but is a mere manufacturing facility, authorized by the State to be leased, and leased to the Ottawa Hydraulic Company for ninety-nine years. The Board

of Trustees have never regarded it as a part of the main canal, and they have never made or established any rules or regulations in relation to the collection of tolls upon it, and none are charged or collected, nor have they ever made any rules in regard to transportation or the conduct of boats upon it, and whatever police they have ever exercised over it, is in connection with the Ottawa Hydraulic Company, in regard merely to the supply of water.

II.

We come now to the objections raised by the plaintiff in error, upon the instructions in the case, given, qualified and refused.

In determining the question whether or not the instructions were proper, it is essential that we should not lose sight of the section of the ordinance itself, upon which this judgment is predicated. By reference to it, the Court will see, that the offence consists either in a *wilful* or *negligent* injury.

The plaintiff in error seems to treat the ordinance as an ordinary *criminal* law—where the gist of the offense is *wilfulness* alone—seeming to overlook the fact, that this ordinance affixes a penalty for *negligence* as well.

Under this ordinance, the Court below did right to apply, in this proceeding, the same principle of *respondeat superior*, as would be the rule in a suit brought against the master, to recover damages for the act of the servant.

The full extent of the principle of *respondeat superior* is this: that where the act from which the injury results is done *wilfully* by the servant, and the master does not assent to the *wilfulness*, there the liability is on the servant alone. But where the master commands the act to be done, or the act is done in his presence, and by his authority, express or implied, or where the master being present does not dissent, in all such cases he makes the act of the servant, however wilfully done, his own wilful act, and both are responsible. Where the master is *present*, so that he can give his order to the servant, the legal presumption is that the master assents to the act being done, as it is done by the servant, whether wilfully or negligently. And the law throws, in such case, the

onus on the master, to negative the legal presumption and show a dissent on his part. In respect to negligence on the part of the servant, the master is always liable where he is present, unless he shows dissent. For it is said, that the reason is why the master is liable for the negligence or want of skill of the servant, that "it is the duty of the master to employ servants who are honest, skilful and careful." So both are held liable, where the servant does an injury *fraudulently*, while in the immediate employment of his master.

2 Kent's Comm. 279.
1 Blacks. Com. 431.
6 Esp. N. P. Cases, 6.
6 Gill. & Johnson, 291.
19 Wendell, 345.
1 Iredell, 240.

If the master is sitting with his servant, who is driving, and the servant negligently runs against another carriage, injuring it, the master is always liable. If the servant does the act, however *wilfully in fact*, the law will not presume wilfulness, but rather negligence. And if the master wishes to avoid liability, it is for him to show, in case where he is present, that the act was done through the wilfulness of the servant alone, by showing a state of facts which will warrant a jury in saying that it was done without the assent or authority of the master.

An authority from the master to do the act, may be express or *implied*.

If the master is present when a wilful or negligent act is committed by the servant, and is perfectly passive, without any interposition, the master is liable; for he thereby makes the wilfulness or negligence of the servant his own wilfulness or negligence. A passive acquiescence is inferable.

Chandler *vs.* Boughton, 1 Crompton & Meeson, 29.
McLaughlin *vs.* Pryor, 1 Carr & Marsh. 354.
Lyon *vs.* Martin. 8 Adolp. & Ellis, 512.

The proof shows that, at the time of this injury, Korah was present, having charge of the boat, and in full command of her and the hands upon her, and was issuing his orders to those on board "to stop the team," so that any man on the boat could have heard the command, as is fully shown by their own witnesses, Fishbern, pp. 26, 27, and McHugh, p. 28.

Being present, and having charge of the boat as master, it is wholly immaterial whether he was on the towpath at the time of the injury, or

on the starboard or larboard, on the forecastle, or on the quarter deck. His responsibility was the same in either event.

The first instruction is based on wilfulness as well as negligence, presenting both cases to the jury, in general terms, and nearly in the language of the ordinance.

The second instruction is based on negligence alone, and properly, we think, directs the jury to find Korah guilty, if they find from the evidence, that at the time of the injury, he was master of the boat, *having charge of her*, and that the injury could have been avoided by the exercise of ordinary skill and caution *by the defendant*, or those acting under his authority.

It is said by counsel for Korah, that this 2d instruction is bad, for the reason that it holds him liable for the want of proper skill and caution by those under his authority, even though he may have acted himself with due care and skill.

If the instruction did this, we think it would have been good law.

But the instruction does no such thing. It leaves his responsibility, even if resulting from want of care on the part of the servants on the boat, to depend entirely on the question to be determined by the jury, whether or not he could have prevented the injury, by the use of ordinary skill and care, as master of the boat. This, we submit, was proper.

But even if we are wrong in this, and this Court should think that both of these instructions are given in terms too loose; yet the jury could not have been misled, for the Court gave also for the defendant below this instruction, which would operate as a complete modification to both of them, viz. :

“That the defendant is not liable in this action, for the neglect or wilful acts of others, unless such acts were done by his command or authority.” (See abstract, p. 38.)

The 3d instruction of plaintiff below was applicable to the evidence, and is founded on good sense and good law so clearly, that we shall not stop to examine at length the objections made to it. The whole difficulty was in a defectively hung rudder, so that the boat would not mind her helm, as all the proof shows, and is not attributable to the pretense of a current formed there by the construction of the bridge. It is said by counsel on the other side, that the ordinance does not impose this fine for negligence, in not seeing that the boat was in good repair, but only for negligence in *running* the boat. This is not the fact. The ordinance as well makes "*injuring*" the bridge "*wilfully or negligently*," the offense.

III.

We come now to the instructions of the defendant below.

The qualifications made by the Court below, to his first, second and third instructions, are so palpably proper that the counsel for the plaintiff in error, in their brief, do not even make a point on the modifications of them by the Court below, and they need not be noticed by us.

The 4th instruction asked by the defendant was as follows, viz. :

"Unless it is proven that the defendant run the boat in question against the bridge himself, or that those who did run it in the way they did, by his command or authority, they should find for the defendant."

Without modification, this would not be law; because it improperly shifts the burden of proof from the shoulders of the defendant, where the legal presumption places it, to the plaintiff, and compels him to prove more than the law requires him to do. When the plaintiff has shown by proof the injury by the boat, and that Korah was master of the boat at the time, having full charge of her, we have made out a case *prima facie*, and the defendant must negative this legal presumption by showing that the act was done by the hands on the boat, contrary to his command and authority, if such was the fact; or that he could not have prevented it by ordinary skill and prudence, if the injury resulted from defect in the rudder.

The Court, therefore, very properly qualified the instruction by adding these words :

"The presumption is, however, if the defendant had charge of the boat at the time of the alleged offense, that the men engaged thereon acted under his authority."

The Court's qualification to the defendant's 5th instruction, did not change the force of it really in any respect, but made it more explicit.

The modification was proper.

The 6th instruction was properly refused, for reasons already assigned, inasmuch as whatever power the Board of Trustees of the canal, by virtue of the law referred to, had to make rules respecting bridges of their own, did not deprive the city of Ottawa, under her charter, to pass ordinances to protect bridges belonging to her, over the public streets of the city.

The question of currents, and whether the bridge was a material obstruction to navigation, and all other questions which could affect the liability of the plaintiff in error, were fairly and fully submitted to the jury, and passed upon.

Two juries in this case have already found against him. Though perhaps somewhat conflicting, the evidence fully supports the verdict, and this Court will not disturb it. Substantial justice has been done in the premises, and the law of the case as well as public policy dictates the propriety of affirming the judgment.

GRAY, AVERY & BUSHNELL,
For Defendant in Error.

No. 155.
Supreme Court
3^d Grand Division

Oscar Korah

vs.

City of Ottawa.

Points & Argument
for Defct. in Error.

Filed May 15 1863
J. L. Laford
Clerk

Gray, Avery & Bushnell,
Attys. for Defct. in Error.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1866.

OSCAR KORAH
vs.
THE CITY OF OTTAWA. } *Error to La Salle.*

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

I.

The first error assigned is that the Court below erred in overruling the motion of Korah to dismiss the suit.

This motion was predicated on the ground that if Korah had committed any offense, it was against the rules passed by the Canal Trustees, which inflicted one penalty, and that he was not answerable to the ordinance of the city of Ottawa, which inflicted a different penalty.

It is insisted by the plaintiff in error, that the rules of the Canal Trustees, and the ordinance of the city, provide "*two distinct penalties for the same offense*;" and that if Korah "*can be punished under the city ordinance, he may be punished twice for the same offense.*" The main proposition we deny, as also the corollary from it.

The act cited by the plaintiff in error, (1 Purple's Stat. 467, sec. 15.) requires the Board of Trustees yearly to establish a tariff of tolls to be paid for transportation on the canal, and empowers them to collect these

tolls, "and from time to time to make, ordain and establish such reasonable rules, by-laws and regulations in relation to the collection of tolls, the transportation upon the canal, the conduct of the boats and rafts, and the general police of the said canal, as are usual or may be found necessary, and to enforce the observance of the same."

The 31st sec. of the Rules and Regulations of the Canal Trustees, made it an offense "if any person or persons in navigating or managing any boat or flat on the canal, shall injure any lock, lock-gate, water-gate, guard-gate, BRIDGE, paddle-gate, aqueduct, OR OTHER WORK OR DEVICE APPERTAINING TO THE CANAL OR ANY OF ITS FEEDERS."

It was the intention of the legislature, in the act referred to, to give sufficient power (and no more) to the Trustees, as would ensure the full carrying out of the objects for which the canal was created; and to this end it became necessary to give them power over the rate of tolls, the mode of their collection, the manner of transportation, so far as the conduct of boats was concerned, as well as such *general police* regulations as might be found necessary. But we submit, that all this power had reference only to the objects for which the canal was made, and was only given to protect canal bridges and other of their property, and was not inconsistent with a grant of power, which the legislature has subsequently given in broad and express terms to the city of Ottawa, by charter, reference to bridges which the city might build, as we shall presently show.

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Under this ordinance, the Court below did right to apply, in this proceeding, the same principle of *respondeat superior*, as would be the rule in a suit brought against the master, to recover damages for the act of the servant.

The proof shows that, at the time of this injury, Korah was present, having charge of the boat, and in full command of her and the hands upon her, and was issuing his orders to those on board "to stop the team," so that any man on the boat could have heard the command, as is fully shown by their own witnesses, Fishbern, pp. 26, 27, and McHugh, p. 28.

Being present, and having charge of the boat as master, it is wholly immaterial whether he was on the towpath at the time of the injury, or

The first instruction is based on wilfulness as well as negligence, presenting both cases to the jury, in general terms, and nearly in the language of the ordinance.

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But the instruction does no such thing. It leaves his responsibility, in if resulting from want of care on the part of the servants on the boat, to depend entirely on the question to be determined by the jury, whether or not he could have prevented the injury, by the use of ordinary skill and care, as master of the boat. This, we submit, was proper.

But even if we are wrong in this, and this Court should think that either of these instructions are given in terms too loose; yet the jury could not have been misled, for the Court gave also for the defendant below

The proof shows that, at the time of this injury, Korah was present, having charge of the boat, and in full command of her: and the hands upon her, and was issuing his orders to those on board "to stop the team," so that any man on the boat could have heard the command, as is fully shown by their own witnesses, Fishbern, pp. 26, 27, and McHugh, p. 28.

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The 4th instruction asked by the defendant was as follows, viz :

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Without modification, this would not be law; because it improperly shifts the burden of proof from the shoulders of the defendant, where the legal presumption places it, to the plaintiff, and compels him to prove more than the law requires him to do. When the plaintiff has shown by proof the injury by the boat, and that Korah was master of the boat at the time, having full charge of her, we have made out a case *prima facie*, and the defendant must negative this legal presumption by showing that the act was done by the hands on the boat, contrary to his command and authority, if such was the fact; or that he could not have prevented it by ordinary skill and prudence, if the injury resulted from defect in the rudder.

The Court, therefore, very properly qualified the instruction by adding these words :

“ The presumption is, however, if the defendant had charge of the boat at the time of the alleged offense, that the men engaged thereon acted under his authority.”

The Court's qualification to the defendant's 5th instruction, did not change the force of it really in any respect, but made it more explicit.

The modification was proper.

The 6th instruction was properly refused, for reasons already assigned, inasmuch as whatever power the Board of Trustees of the canal, by virtue of the law referred to, had to make rules respecting bridges of their own, did not deprive the city of Ottawa, under her charter, to pass ordinances to protect bridges belonging to her, over the public streets of the city.

The question of currents, and whether the bridge was a material obstruction to navigation, and all other questions which could affect the liability of the plaintiff in error, were fairly and fully submitted to the jury, and passed upon.

Two juries in this case have already found against him. Though perhaps somewhat conflicting, the evidence fully supports the verdict, and this Court will not disturb it. Substantial justice has been done in the premises, and the law of the case as well as public policy dictates the propriety of affirming the judgment.

GRAY, AVERY & BUSHNELL,
For Defendant in Error.

120 No. 155
Supreme Court
3^d Grand Division

Oscar Korah

or.

City of Ottawa -

Points & Arguments
for Dept. in error.

Dated May 15. 1863

L. L. Land

CLR

Gray, Avery & Mackwell

Attys. pro Dept. in error.

State of Illinois
LaSalle County vs Pleas before the Honorable Madison
E. Hollister the Judge of the North
Judicial Circuit of the State of Illinois and the presiding
Judge of the LaSalle County Circuit Court at a term
of said Court commenced and held at the Court
House in Ottawa on Monday the 3^d day of November
A^d 1862 the same being the first Monday in
said month and of the Independence of the United
States of America the eighteenth
Present -

The Honorable Madison E. Hollister the Presiding Judge
Abraham B. Meier Clerk
Eli L. Waterman Sheriff
David P. Jones State Attorney

Be it remembered that herefore to wit on the
10th day of October 1862 there was filed in the office
of the Clerk of the Circuit Court of said County a
certain Transcript in the words and figures
following viz:

"City of Ottawa, September 10th 1862 on the Complaint
of Patrick Lemmigan warrant issued
Oscar North to Bush City marshal and on the
11th day of September 1862 warrant
returned by Bush marshal with defendant North
in Court. The City of Ottawa Police very apparent

2

for the city of C. Haven for defendant, case called
Defendant on hearing the complaint to wit; that
on the 6th day of September 1862 within said city
defendant having charge of launch Boat Danner
did negligently run said Boat against Medwin
Street Bridge and did thereby greatly injure said
Bridge - pleads not guilty - defendant committed
non pro curat to dismiss the case for want of
jurisdiction and for want of a bond for costs, which
motions were overruled. And by an agreement
of the parties this case stands continued to
September 17th 1862 at 1 o'clock P. M. on application
of defendant venire issued for six men, two
supps issued on the part of city. September 17th 1862
at 1 o'clock P. M. parties appeared Arroy + Bushnell
for city + Haven for defendant. Venire returned
with the names of William Barger, William Best
Edmund Vincent, John Batcheller, G. L. Thompson
+ Philo Keane as jurors. Two supps issued on the
part of the city. Case called, jury sworn as to competency
accepted + sworn to try. Edmund Butler, W. P. Dimmick
Peter M. Sammis, John Coburn, W. C. Richardson
Andrew Anderson, George Keble, John Armon, David
T. Brush, J. R. Fay, William Heaster M. + B. T. Mead + H. C.
Armon on the part of city and Jacob Fishburn, J. B.
Preston, John P. Roberts, Benjamin Powell, John
Newrick + Henry Meays on the part of defendant
Court adjourned to September 18 1862 at 10 o'clock
A. M. And on this 18th day of September 1862 the jury


after hearing the evidence and the counts, verdict
and after consultation returned into court with a
verdict of guilty and assess the fine at five dollars.

The court is therefore of opinion that the said
city shall and recover from the said defendant George
the sum of five dollar fine, also the sum of nine
dollars and fifty cents costs herein, and that
defendant stand committed until the same is
paid

Fine 5.00 P. M. Fees 6.00 Prof. 1.50
H. Writs 2.00 Appeal fees 1.00

Appeal granted on the prayer of Deft. Oct 8th
1862 to Circuit Court. Alexander W. Meagill Clerk.

State of Illinois I hereby certify that the foregoing
Sabelle County Ills Transcript contains a full and
perfect statement of all the proceed-
ings had before me in the above entitled case as
appears in my docket of original entries of said
case. Given under my hand and seal this
9th day of October A.D. 1862

A. B. Smith P. M. 

Also on the same day the defendant filed his
appeal bond in the words and figures following
viz:

"Know all men by these presents that our
Cesar Koch and Alexander W. Meagill of the County
of Sabelle and State of Illinois are held and firmly bound

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with the city of Ottumwa of the same county and state
with the penal sum of fifty dollars \$50, current
money of the United States, for the payment of which
with and unto to be made on time unless otherwise
the courts and administrators jointly several and firmly
by these presents. Witness our hands and seals this 6th
day of February, 1863

The condition of the above obligation is such that
whereas the said city of Ottumwa did on the 17th day of
September A.D. 1862 before Saml B. Smith a justice of
the peace in and for the county of Sadale receive a
judgment against the above defendant Oscar Korah
for the sum of fourteen dollars & fifty cents from
which judgment of the said justice the said Korah
has taken an appeal to the circuit court of the said
county and state. Now if the said Oscar Korah
shall prosecute his appeal into effect and shall pay
whatsoever judgment may be rendered by the court
on the trial or dismissal of the said appeal, then
the above obligation to be void, otherwise to remain in
full force and effect. This Bond taken in time
time by leave of court.

Oscar Korah

Mr. W. Magill

Taken and returned into
before me at my office.

day of Feb 1863

W. 83
Stamps
10

And afterwards to wit on the same 10th day of
October 1862 an appeal summons was issued out of



and under the seal of said Court in the words and figures following viz:

"State of Illinois) The People of the State of Illinois
Saballe County 3rd To the Sheriff of said County
Greeting;

We command you to summon The City of Ottumwa if to be found in said County personally to do and appear before the Circuit Court of said County on the first day of the next term thereof to be holden at the Court House in Ottumwa on the 3rd day of November next to prosecute a certain debt due the City of Ottumwa instituted against Oscar Herck and receive judgment before A. B. Smith a Police Magistrate of said County on the 18th day of September 1862 for the sum of Fifteen & 50/100 dollars besides costs, from which said judgment the said Oscar Herck has taken an appeal to the Circuit Court of said County and further to do and perform whatever the said Court may then and there consider in the premises. And hear you then and there this writ.

Witness My hand B. Mevor Clerk of said
Court and the seal of said Court at Ottumwa
this 11th day of October AD 1862

A. B. Mevor Clerk
Chas. H. Heath S^{ry}"

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Which summons was returned duly served by the Sheriff as follows, viz:

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"Send the witness by leaving a copy of the same with
the city clerk Odorous Oct 21st 1862

E. S. Waterman, Shff
G. W. Jenkins Deft

And afterwards to wit: at the February term of
said Court for the year 1863 and on the day
herewith stated ^{dit} ~~from~~ certain orders were entered
of record in said cause in the words and figures
following to wit:

"Wednesday February 4th"

"The City of Odorous

"

Appeal

Oscar Stork

On motion of the defendants by

Wm Cook & Campbell it is ordered

that he have leave to amend his appeal come on on
before Monday morning next. The defendants
assent further that the Court do dismiss this suit
for want of jurisdiction in the Court below."

"Friday February 13th"

"The City of Odorous

"

Appeal

Oscar Stork

It is ordered by the Court that

the defendants motion to dismiss

this suit, heretofore entered herein, be overruled, to
which decision of the Court in overruling said motion
defendants assent except."

"Tuesday February 17th"

"The City of Ottawa"

"Appeal

Oscar Kerak } This day the plaintiff comes
by Gray, Argy & Bushnell its
attorneys and the defendant by Stonebank & Campbell
his attorneys and thereupon came the following names
of a jury to wit: Simeon Lee, A. S. Darnheim, S. Mc,
Lee, Leck, Ezra Simmons, John Leck, Thomas J. Wade
Green Tuckwell, J. B. Briner, William Lamb, O. H. Sigler
B. B. Reynolds, and S. B. Deham who are duly selected
true and sworn to well and truly try the issues
herein according to the evidence. And after hearing
a part of the testimony, the further hearing of this cause
is postponed until nine o'clock the morning."

"Wednesday February 18th"

"The City of Ottawa"

"Appeal

Oscar Kerak } This day the parties meet again
come by their attorneys together
with the jury sworn herein and after hearing the
evidence, the further hearing of this cause is
postponed until nine o'clock the morning"

"Thursday February 19th"

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"The City of Ottawa
 vs
 Appeal
 Oscar Korah
 This day the parties heard again
 come by their attorneys and after
 hearing the arguments of counsel the judge retired to
 consider of their verdict: and after due deliberation
 thereon had returned into Court the following verdict
 to wit: "We the jury find the defendant guilty and
 assess the fine at five dollars."

Defendant counsel moved the Court for a new
 trial, which motion is granted by the Court, to which
 decision of the Court in granting said motion for a
 new trial defendant counsel except.

It is therefore considered by the Court that the
 plaintiff have and receive of the defendant the sum
 of five dollars for its fine, also its costs and charges
 herein expended and that no return be made therefor."

Friday February 27th

"The City of Ottawa
 vs
 Appeal
 Oscar Korah
 On motion of the defendant
 by Stuart Leck Campbell his
 attorney, it is ordered by the Court that they have
 thirty days from and after the adjournment of this
 Court to tender and file a bill of exceptions in
 this case."

And afterwards, to wit: on the 28th day of March
1863 the defendant by his counsel filed a bill of exceptions
in the above entitled cause, in the words and figures
following, viz:

"The City of Ottawa in Case No. 100
Be it remembered that on the 17th day of February
A.D. 1863, this cause came on to be heard and the
plaintiff read in evidence an ordinance of the
City of Ottawa entitled Sec. 1 of an ordinance to
protect bridges ferries & wharves which is as follows

"An Ordinance to protect bridges ferries and wharves"
Sec. 1. Be it enacted by the City Council of the City of
Ottawa that if the owner or master of or any person
employed or having charge of any canal boat
other craft or float shall injure or run such
canal boat or other craft or float either wilfully
or negligently against any public bridge or the draw
thereof or any ferry or any public wharf or private
wharf at which wharfage is charged within the
limits of this city every person so offending
shall be fined in a sum not exceeding one hundred
dollars nor less than five dollars for each offence
such offence and shall likewise be answerable
to the city for damages for such injury."

introduced as a witness Edward Butler who
testified as follows.

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I know defendant. I know the bridge on Meadison Street across the side cut. September 6, 1862, I was walking on the side walk going towards the bridge, saw two men on canal boat. They were showing the bow of the boat end from the tow path. I saw the boat strike the end of the bridge. (The bridge was removed. I was about 150 feet off. Boat was from 50 to 60 feet from bridge when I first saw it and going slow. The bow of the boat struck the bridge. The bridge was pushed off the pinion 3 or 4 inches. The boat went on over the bridge. I did not see the defendant at all. There was one or two men on the bridge. The bridge was in the city of Ottawa.

Cross Examination - From when I stood I could not see the water on the other side of the boat. Could not tell how far she was from the bank. She was 50 feet from the bridge when I saw them pushing her bow off. That is, when they stopped pushing. I know defendant, did not know that he was on the boat. Could not see that I saw him that day. I think the bow of the boat struck within 2 or 3 feet of the middle of the end of the bridge. They had stopped pushing her out some 50 feet before she struck. I first saw the boat about 150 feet from Meagills. They were pushing the bow off. Can't see whether that was necessary to keep her bow off the bank or not.

Patrick Lannigan Witness for Plaintiff testified as follows. I worked for Mrs. Ammons. I attended the bridge one day last fall. I went and turned the bridge. I saw the boat start from Meagills then I commenced turning the bridge & did not see her again until she was almost to the bridge. Then I saw a man passing to the bow to keep the boat off the bridge with his hands. I saw the boat would strike the bridge or pier, and hit the bridge or pier. The boat struck the end of the bridge about 3 feet from the center. Remarked the bridge out of gear. There were two men on the boat, one was at the helm. The defendant was captain of the boat, he was not on the boat at the time, he was walking along on the tow path.

Cross Ex. I have seen boats pass the bridge often. (The tow path slips towards the canal. I have seen three boats I think grounded and struck there. I often remove the bridge ridge. The passage for boats was on the west side of the center pier of bridge. The Gullettown Bay when the bridge on the East side you could slip from the North end of the bridge on to the Gullettown. See being there would make a strong current on the West side. I cannot tell whether another boat was inside of the Dam at Meagills millhouse when she started. The keel slips when boat was 30 or 40 feet from the bridge

do not know who ordered it to stop, some one did.

John Schmitt testifies. I built the bridge it is 62 feet long and 20 wide. The canal is 100 feet wide when the bridge and clear of the docking it is 62 feet wide.

Plaintiff's counsel then asked the witness this question

What amount of damage was done to the bridge by the boat striking it last September - to which question the defendant objected - The Court overruled the objection and permitted the question to be answered - to which decision the defendant then withdrew.

I put the bridge in its place again for which I charged the city ten dollars. The bridge was strained considerably, do not know how many. The bridge was knocked off the pier and strained so that one end was lower than the other, it was worth \$14. to put it on the pier, worth \$25. to fix it as it was. From the pier to the waterfront is 19 feet 8 inches. The pier is a foot wider than the bridge.

Cross Examination - I do not know the distance from the bottom of the slope to the pier. The bank slopes into the canal at an angle of 45° . The slope would make it more difficult to get into the passage. do not see how a grade could have been constructed so as to have grade at the bridge.

The stone pier in the center of the canal is 28 feet long. The bridge overshows the pier 18 feet. Presumably stone work could have been put in at the end of the bridge so as to have grouted it. Seighton was there sometimes when the bridge was being constructed. The \$25. damage to the bridge was in addition to the \$14. required to put it back. I was over it about 2 hours before the accident. Saw nothing the matter, after the accident it would not have sunk by 3 inches.

Re-Examine - Mer Seighton was assistant Superintendent, had charge of this division of the canal.

The plaintiff then asked the witness the following question.

Who Superintended the building of the high bridge on Main Street -

In which question the defendant objected. The court overruled the objection. To which decision the defendant then and there accepted.

Witness answered Mer Seighton.

Re cross examine - I don't know whether the pier is constructed parallel with the bank. The West Abutment is not parallel. The North end is farthest into the canal 2 inches out of line I think. I know it is not 10 inches out of line the O man measured it.

The Plaintiff called Andrew Anderson who testified as follows

Then followed canal boating considerable

I know the bridge, think boats can be navigated there, it is with ordinary care. The greatest difficulty is in the current and after the boat gets into the narrow channel, think it would be a matter of care to hit the bridge on the end. I think it would take some labor to keep a boat in the middle of the canal, think a boat can be run within 4 or 5 feet of the bank along there.

Cross Examination. Sometimes there is a strong current in the canal at that point. Boat lying at Anson's would tend to increase it. I never saw a boat there, that passage but once when I passed the bridge if a boat was passing north and her bow should be thrown out a little, the current would tend to give it a sheer across the canal and render it unnavigable.

Direct Recollection - Leighton was known as Superintendent of this division, his business was taking care of the canal generally, think he had something to do with building repairing a grudge, never saw him draw any plans or specifications for a bridge.

No. B. Linnick - called by plaintiff testified as follows
I was in Anson's war house when the boat struck the bridge. I heard it but did not see it, I went out and saw the boat, it had run back a little distance, the bridge was knocked out of its place

The boat was the Donahoe. The Lieutenant was
captain. Boat was about 20 feet below bridge near
the center of canal. There was a good stage of water
the bridge was properly turned.

Cross Examined - I have seen boats pass the bridge I have seen
some difficulty with boats coming up the the bridge
when the water was low. I have seen boats glance
on the bridge and put against the side. don't know
the width or length of canal boats. There is a cement
sid (the side) cut. The drawing off of water for the mills
below makes the cement. I have seen an edge below
the bridge when boats were passing the.

Pr - Direct - Resumed - It was about the middle of the day when
the boat Donahoe, had been in the canal some short
distance into some places where that without trouble.
don't think it is unsafe to navigate. don't profess
to be a skillful man in navigating canal boats.
think the bridge is not a material obstruction
to navigation.

Pr - Cross. Ex. - I saw the bridge after it was struck. That is all
I know about the bridge being in proper position
when it was struck. if the bow of a boat running
across was thrown out from the fore part the center
would give it a tendency to shear across the canal
I was on a boat on the Ohio Canal on a boat
much smaller and lighter than this. the
navigation is obstructed to some extent by the
piers. it would be very much safer and easier to

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got thro of the passage was 4 feet wider. I never
 run a boat thro there.

John Armon Testified as follows. His price in Ottawa
 twenty five years. The first bridge across the side cut
 on Meade Street was built from 11 to 13 years ago
 before that time the public travel run some 200
 feet north from where the street is, where there was a
 place left to cross the side cut. The second bridge was
 put in 7 or 8 years ago. That bridge had a crib-bridge
 in the canal, built with timbers and filled in with
 stone. The pier in this bridge is of masonry work. The
 2^d bridge was a swing bridge built by Green.

Plaintiff asked the following questions
 State whether the engineers laid out the side cut
 before or after the stone addition was laid out.

Objected to by defendant. Objections overruled to
 which decision the defendant then chose to accept.

I think side cut was laid out first. I am a
 warehouseman, own two canal boats. Had one of the
 first boats that was run on the canal. Think I have
 more skill in relation to the running of canal
 boats than ordinary men who have never had
 anything to do with them. I have seen boats running
 the two bridges weekly & daily almost. I have ridden
 on the canal some, used to ride on the canal to
 Chicago 3 or 4 times in a season before the rail
 road was opened. I have rode on boats in this basin
 I have rode on my own boat to Chicago. I can
 steer a boat well enough in the daytime, never

from a boat thro this bridge. For there has 3 or 4
times I have been in the habit of seeing boats pass
thro this bridge. The plaintiff asked the witnesses
the following questions

Q. State whether in your opinion boats can pass
thro this bridge without any material danger.

A. In which questions the defendant objected. The
objection was overruled, to which decision the
defendant then and there accepted.

Answer. It would be no great trouble, I have seen
boats light and a high wind blowing past them,
don't think the bridge a material obstruction.

Cross Ex. Then would it be difficult in building a high
bridge thro for boats to pass under. I don't know
tho a high bridge thro would injure my warehouse
it would require me to fix a different place for
unloading wagons. I don't know as I feel any
personal interest in keeping this low bridge. I think
this bridge can be as easily passed or nearly as
tho high bridge on main street. I think the
spanning in this bridge is not more than 21 feet
there is very little slope to the low part. Between
the dirt main street I don't know the width
of the opening in this bridge. I don't know the width
of the pier. Canal boats average about 17 feet 4
inches in width. The width of the boats I think
is 18 feet. I have seen boats pass thro this bridge
without touching. I have seen some boats get
blocked there, caught in the mud. This bridge

was put in in May 1862. Think the pier in
 Bridge of 1853 was of ^{some} small size as present one, but
 don't know from measurement. There is an
 angle in the pier of present bridge. The slope between
 Meagill's warehouse and the bridge is caused by
 washing, can't tell how much slope there is
 should not think there was a great difference in
 width of canal between the top of the bank and
 bottom of the slope, but never made such an
 examination as would enable me to say certainly,
 it is docked part of the way between the bridge
 and Meagill's.

Plaintiff then called

Geo Bristol - who testified as follows. Has since in Ottawa 11
 years, has been in lumber and grain trade, has
 had from one to 4 canal boats, has rode on boats
 in side cut, has steered boats some in side cut,
 has not done much boating since this bridge was
 built, don't profess to have any particular skill as a
 boatman, think I know more about it than a man
 that never handled one, has seen a great many
 boats go over the new bridge, think that boats can be
 navigated over there safely with ordinary care,
 don't think boats can be navigated there as freely
 as if the bridge was not there, don't think the bridge
 is a material obstruction to navigation, looks in the
 canal an about 18 feet wide, this pier is larger
 than the one in the old bridge, we had no particular
 difficulty in getting over the old bridge.

The Plaintiff then asked this question
State whether or not it is any more difficult to pass
the this bridge than the the boats on canal -
to which question defendant objected. The Court
overruled the objection to which decision the defendant
then chose to accept

Answer - I think not. Boats are 17 feet 8 inches
wide. That was the width of my boats.

Cross Ex.

My judgment is not as good as the boatmen
themselves about the passing of boats. When the
current is ~~fast~~ ^{heavy} than usual the navigation is
more difficult. It requires more caution to run
through this passage than if the bridge was not
there. If it becomes necessary to throw the beam
of a boat out from the shore and there was a current
it would give the boat a shear that would make it
difficult to manage.

W. C. Richardson called by Plaintiff

I own boats but have no experience in running
them. owning boats I take more interest than
ordinary men in observing them. I think I have
more skill than generality of men in the
maneuvering of them. My man-house is South side of the bridge. I have
seen boats go over the bridge sometimes 3 or 4 a
day from day more or less. never saw any
boats have any difficulty in passing the bridge.

Geo. W. Hobb - called by Plaintiff who testified as follows.

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I saw the Danna strike the bridge. I saw her

near Meagills warehouse, just soon after they left the warehouse the bow of the boat seemed to incline towards the low path, one man seemed to be trying to push it off the bank, this was within 50 feet of the warehouse. Then the bow swung out but did not get as far out as the center of the canal the man kept pushing until he got somewhere about 20 feet from the bridge, then appeared to be trying to keep it off the bank, did not use the pole on the outside of the boat, the man who had the pole threw it down and went to the bow of the boat and seemed to be trying to keep the boat off the bridge with his hands, the men on the boat seemed to have the control of her, heeded no directions given by any one on the boat bank.

Cross Cut:

I stood on the East side of the canal, could not see whether another boat was inside of the Dam at Meagills warehouse. I saw the Dam when she first started, she seemed to be sheering towards the shore, she was loaded, one man seemed to be keeping her bow off the shore, then laid down the pole and went over to the bow to keep the boat off the bridge with his hands, he seemed to be afraid of sticking on shore then tried to keep her off the bridge, there was a man at the helm, I did not see any of the men on the boat, the boat was going very slow

after the row turned off from the shore I heard
an order to the driver to hold up. I thought a
man in the boat gave the order. I did not see
who dependent at all.

Mr. Haskell called by Plaintiff testimony as follows

I was alderman of the 5th ward in 1833 & 4 went
to Mr. Gooding who was Secretary of the Board of
Local Trustees to get liberty to make a bridge across
the canal on Meadison Street, he answered giving
the privilege of building the bridge & said he would be
glad to do any thing to further the object. The bridge
I spoke of was a draw bridge & not a swing bridge.
That bridge was built there in 1854. About 3
years after there was a swing bridge built & the
present bridge was built last may

Plaintiff then called S. W. Brush who testified
I was city Marshal last year. I went to see Mr.
Purton. He told me if it was the general consent
of the business men on the Regdramatic Basin he
would cause the water to be drawn off for the
purpose of putting in the pier of the bridge. I told
him that they consented, he sent a dispatch to
Mr. Seightson the assistant Superintendent on
this division. The water was drawn off I suppose
by Seightson's orders. I saw them putting in the
pier. Mr. Seightson was there twice, one day
10 or 15 minutes.

G. E. 41 - Christina Nitchelm, and Walters were

aldermen of this city last year they were bridge
committee. I presented our plan or specifications
of the bridge to Preston.

Plaintiff called Frank Whitmore who testified
I run a boat in 1884 on this canal part of the
season. I acted as captain. never steered the boat,
think I had more skill in the management
of a canal boat than ordinary men who never
had anything to do with one. I have seen boats
passing this bridge. I think the bridge may be
safely passed by the vessel of ordinary case.

Ex. 1. I never saw a boat over this bridge. The pier in
this bridge is larger than the pier in the old bridge
my observation in regard to this bridge is that I
have seen boats pass over them but give no attention
as to how they got over

Mer. Colwell was then recalled and testified as follows.

The new pier is wider than the old one @ cut way
what is the difference between the passage now
and the width of the old passage. The North end of
the abutment projects into the bank. The South
end was the line we marked from. I think the
abutment is closer to the bank than the old one.

Then Plaintiff notice his case.

John B. Preston called by defendant testified as follows

I am Superintendent of the Canal. I know this
Bridge. I have been civil engineer 25 to 28 years
and have more skill than ordinary men
in determining what is the effect of obstructions
in navigable waters. The bridge in question with
the pier and abutments as they come on now
constructed is a material obstruction to navigation.
The shape of the bank is such that it is impossible
to run a boat into the bridge except the boat runs
nearly straight into the opening. This the
current prevents when a boat cannot be prevented
from shearing. There should be more room between
the abutment and the bank. The bridge could be
protected by a fender. The pier is not straight. This
lessens the passage way. The abutment is about
eleven inches out of line. I measured it to day from the end of chord to
inside of the bearing on it eleven inches. Fenders
could have been put in so as effectually have
prevented the accident. Such fenders are always
put upon draw bridges that ever I saw of any
value. I never gave any consent to have this
bridge built as it now is. It is more difficult
to navigate a boat through the bridge than to
navigate a boat through a lock. The locks are
in the middle and not on one side of the canal. There
is usually no current of consequence at a lock
the locks are constructed with heavy stones
at the entrance so that a boat striking does

not injure the boat so much, and these stones are rotten and sometimes have to be replaced. I think 5 boats out of every seven do strike in going into a lock. If the bridge had been constructed in a proper manner this accident would not have happened. I mean if fenders had been put in. That could be done for one hundred dollars. There is no difficulty in putting in these fenders. The mills above the bridge drawing off the water make a current, boats running against that current would be liable to shear.

Cones Et - If a boat should start from Keapills with a boat lying between her and the tow path she must get her middle West to pass the bridge and in turning her the current would have a tendency to send her bow on shore or if her bow was pushed off the current might make her shear the other way and strike the bridge. The passage through the high bridge on main street was made under my direction. That passage is 21 ft 3 in wide. Leighton had now on former to authorize a bridge to be put across the canal, he did not act for the Canal Trustees in building the aqueduct but for the contractor. The Trustees never prohibited bridges being built after plans furnished by me. I suppose this bridge was built the same as the old bridge but the pier is larger.

D. Magnew called by defendant and testified as follows. That he was engaged in running canal boats about 20 years. I know all about it. I know the bridge in question, it is hard to get through, it is difficult to get through without hitting the bridge and if it was not there the navigation would be much safer and easier. That he was compelled to say there are men & half and often to double teams to get through.

Cross Ex - Struck there when the water was low, has stuck in the bridge on account of swift water. That he had the bridge in passing through, has frequently got the stem of the boat on the bank. It is very difficult to get into the passage on account of the current. I pass through the bridge every week last season.

Direct resumed - A heavy loaded boat going into the passage from the south would be liable to be made momentary by the current. The bridge passage is about two boats length from Mc Gills wharf, in steaming a boat from Mc Gills when another boat is in use you have to head towards the shore at first. It is sometimes impossible to avoid striking the bridge in low water.

Mer Fishburn - called by defendant. I am in the grain trade that I run canal boats and have experience as a canal boatman. I saw this boat when she started, she lay outside of another boat, she had

to turn in at first towards the shore. She ran
 her bow towards the bank. They set the bow
 off with a pole and then the current struck her
 and she sheered off towards the other side
 defendant was on the bank, and he halloed
 to stop the team. The boat struck the eddy
 caused by the pier & then ran up against the
 bridge. The accident in my opinion could not
 have been avoided. The steerman done all in
 his power to keep her off. But by reason of the
 current and the eddy he had no control of the
 boat. She would not mind her half helm.
 Koch could not have done anything to prevent the
 accident. He could have given an order that
 would have prevented the collision. The
 defendant then asked the witness this question
 Can you tell from your experience as a
 boatman any reason why the Captain should
 be on the bow seat at the time. ~~The plaintiff~~
 The plaintiff objected to the question, the
 Court sustained the objection. In which decision
 of the Court the defendant then offered in evidence.
 The witness then testified as follows. The defendant
 started from the office with his papers and went
 up to the bridge. The bow line got fast and he
 loosened it. Before the boat struck he halloed to
 the team to stop. The defendant then asked
 the witness this question. Was that in your
 judgment as a boatman a proper place for the

Captain to do? The plaintiff objects to the question, the Court sustains the objection to which decision of the Court the defendant then & then accepted.

Cross Ex.

I went to Chicago on trip & back as steersman I was boatman on a canal in Pennsylvania from the time I was eighteen until I was twenty five. The rudder of the boat had been repaired. I repaired it, I don't know whether the rudder dropped too much, defendant passed along the tow path, anyone on the boat could have heard the command. The steersman tried to keep her off the banks at first and when she took a turn, he went to the other side but did not set a pole on the other side the pin makes an edge for 40 feet. There was not space enough to give the boat heading. The boat from where she started was about half a block from the end of the bridge. There was not room enough to get sufficient heading to get the boat under storage way.

Capt. Keellen - called by defendant, testified as follows.

I am ^{at canal} called boat captain, have been canal boatman for fourteen years. I know the bridge is a material obstruction to navigation. I saw this boat going up, sometimes it is necessary to the safe navigation of a boat through the bridge, that there should be a man on the tow path. That once to stop a boat with a snubbing line on the tow path. If she had been so far from shore that I could not

have got off the mill race had the bridge. The water rises & falls in the tide cut very quick, depends upon the amount of water drawn off at the mills. The water was low when the Damsel went up. I don't think it possible to pass that bridge at all times without striking the bridge. I ran the boat from the time she started. There was an experienced man at the helm and he did all he could. I could not see any thing that I could have done to have prevented the boat from striking the bridge. The Damsel started from Mr Gills war house, the Damsel bag inside of her. The Damsel was loaded. If proper guards had been placed at the bridge the boat would not have hit it.

Cross Et. putting a guard there would not affect the current but would have kept the boat off the bridge

Richard McKeough - called by deponent testified as follows
 I was one of a Rev formed for the towing of boats and have followed the business for 2 or 3 years. Towed the Damsel when she hit the bridge. There was an instruction at the end of the bridge that would catch the tow line. it was necessary to have a man to throw the line over. The boat was about 7 ft from the bridge when the captain called to stop the beam. I think there was a pretty good stage of water. The Damsel was full loaded with grain. there was a heavy current. Leaps McKeoughs boat was got aground then & struck the bridge.

There is a great difference between getting through this bridge and the old bridge. This is the hardest to pass. The difference is the span of two horses at least. This day the current was heavier than usual. The passage is narrower in this bridge than it was in the old one. I have had to use blocks and tackle some times to draw boats through the bridge.

Mr. A. Ward called by dep. testified as follows. I am a canal boat man. I have been for eleven years and incidentally it. I have passed this bridge and the old bridge. I think the draw is two feet less in this than in the other bridge. There is only about 1 1/2 feet more than the width of the boat. I consider the present bridge a material obstruction to navigation. There is an eddy below the pier. It is impossible always to avoid striking the pier. Boats hit it often when they miss it. Guards could be built so as to protect the bridge and they would aid in shaping the course of the boat into the draw.

Cross Ex. I stood on New Ammons platform when the boat struck the bridge. I think the latter struck the ground or something preventing it from making.

John W. Lemmon - called by defendant. Defendant asked witness this question. Could you have turned the bridge far enough around so that the boat would have struck the pier and not the bridge? which was objected to by plaintiff. The Court

the objection, to which decision of the Court the defendant then & there accepted. Witness testified I heard a man call to me from the bank to turn the bridge over so that boat would not strike it. I took hold of the lever, but said to myself that I had no time to do it, it was too late. I had no time to turn it over to prevent the boat from striking the bridge.

Cross Examination - I turned the bridge around in the usual place. I could not hear had time to hear someone the bridge after I heard the voice.

B. F. Pombel called by defendant testified as follows. I am in the grain business, am a boat owner. I have passed through this bridge several times. I think I am more skill than ordinary men who have had no connection with boats. This bridge renders the navigation of the river cut more difficult & dangerous. Guards to the bridge would to a great extent relieve the difficulty. The difficulty is greater in navigating through this bridge than through the other. I think the passage in this bridge is narrower than the other. The bridge turns very hard. The bridge could be made to turn easy enough to get it out of the way of the boat.

Cross Ex - The guards would affect the current only as they stiffen the eddy, but they would keep the boat off the piers.

Deposited and then offered to read in evidence the following rules and regulations adopted by the Board of Trustees of the Illinois & Michigan Canal which were certified according to law, under the Seal of said Board.

1. 5. 8 x 31
Rules By-Laws and Regulations of the Illinois and Michigan Canal

Sec 1

No person shall under any pretence whatever or without permission in writing from the Board of the Illinois and Michigan Canal or their authorized agents dig or cause to be dug or constructed any drain, sewer or ditch or caused to be removed or deposited earth, sand, gravel or other material so that the effect of such drain or the removal of such earth, sand or gravel or other material as aforesaid will cause the washing of any material into the canal to the injury of the same. Any person offending against the orders above specified may be prosecuted in the name of the Board of Trustees before any Justice of the Peace in the proper County & on conviction shall be fined for each offence not less than one nor more than one hundred dollars, and shall be liable to be sued in an action on the case in the name of the Board of Trustees of the Ills & Mich Canal for the injury done to said Canal for which recovery shall be had with full costs.

Sec 5
31

If any person or persons shall obstruct the navigation

by wilfully sinking any vessel timber stone earth or other material to the bottom of the canal or placing any obstruction on the towing path thereof or on the side or bank opposite. Such person or persons shall for every such offence forfeit and pay such penalty as the Superintendent having charge of that portion of the canal may impose not exceeding twenty five dollars over and above the expenses of removing such obstruction.

Sec 8.

On all cases where a new road or public highway is laid out by legal authority in such direction as to cross the line of canal or any navigable feeder thereof authorized by the laws of the State and in such a manner as to require the erection of a new bridge over such canal or feeder for the accommodation of said road such bridge shall be constructed according to a plan which shall be approved by the Board of Trustees or their authorized agents. And if any person or persons shall undertake to construct or locate such bridge without first obtaining the consent of the Board of Trustees or their authorized agents by placing any materials for that purpose upon either bank of the canal or bottom thereof he or they shall be subject to a penalty of fifty dollars and the general Superintendent shall be authorized to remove all the aforesaid materials at the expense of the offending party.

Sec 31

Of any person or persons in navigating or managing any boat or float on the canal

Shall engage any lock, lock gate, waste gate, sluice
gate, paddle gate, bridge, aqueduct or other work or
device appertaining to the canal or any of its feeders
such person or persons shall for every such offence
forfeit and pay a fine of not less than five nor more
than twenty five dollars, as the Superintendent may
in his discretion impose over and above all
damage which may result from such violation.

To which was attached a certificate in
the following form.

This certifies that the foregoing rules, by laws
and regulations are a correct copy from the records
of the Board of Trustees of the Illinois & Michigan
canal now in my office. Canal Office
Lockport June 16th 1838 Wm Gooding Secretary
To which was attached the seal of said Board of
Trustees. The plaintiff objected to the reading
of said rules & each of them and the court sustained
the objection and refused to permit them or either
of them to be read in evidence, to which decision
of the court including said rules and each of
them from the jury the defendant then & there
accepted.

Defendant here enters his case.

Peter Donley called by plaintiff testified as follows. I have seen
this bridge, have seen the eddy, it is a singular
thing for a person to be deceived about, but I
think it is not far from 20 feet from the bridge

The current in the side cut can be detected by the eye if there is any floating substance on the water.

Cross Cut. The eddy might range with the current, the current varies with the amount of water drawn off below.

John Armon Reel

Madison Street is eight feet wide there is five feet from center of the pier to outer side of street. Guards would only interfere with boats lying in the street, not when they were lying opposite my warehouse a guard at South end of Bridge would not interfere with my warehouse.

This was all the evidence

The Court at the request of the plaintiff instructed the jury as follows

Of the jury believe from the evidence that the defendant Oscar Kerch at the time of the injury complained of was the Captain or master of the canal boat Danube having charge of said boat at the time and that said boat was run wilfully or negligently against the bridge or pier of the Madison Street Bridge a public bridge within the city of Ottawa over the latter canal whilst the said Kerch was Master or Captain of said boat having charge of said boat then the jury will find the defendant guilty and for a fine not exceeding one hundred dollars nor less than ten dollars.

2^d

Of the prof belief from the evidence that the defendant Oscar Korah at the time of the injury complained of was the captain or master of the Canal Boat *Dennis* having charge of said boat at said time and that said boat was run against the pier or bridge in controversy and that said bridge was a public bridge in the city of Ottawa over the lateral canal injuring said bridge or pier whilst said Korah was master or captain of said boat having charge of the same and that said injury if proven could have been avoided by the exercise of ordinary skill and caution by the capt. or those acting under his authority then the prof will find against the defendant.

4th

Of the prof belief from the evidence that by the exercise of ordinary care and skill the defendant could have safely run the boat past the bridge without striking it in the place and in the manner he did (if such striking & such manner is proven by the evidence) and that the defendant negligently ran the boat against the bridge then the prof will find the defendant guilty.

3^d

It would be negligence on the part of the capt if he undertook to navigate the boat when the pudden would not make in the ordinary way & so as to be able to guide the boat under ordinary circumstances if he knew or by the use of ordinary prudence might have known that the pudden would not make well so as to guide the boat under ordinary circumstances.

35-

In the giving of each of which instructions the defendant by his counsel thrust these exceptions

At the request of defendant the Court instructed the jury as follows

1 Every citizen has a right to navigate the river with boats under the rules & regulations provided by the Trustees of the Canal and the City have no right to erect a bridge across it in such manner as to materially interfere with the navigation and if the bridge in question does materially obstruct the navigation of the river the defendant cannot be found guilty in this action.

The defendant asked the Court to instruct the jury that

"In building a bridge across the river the City were bound to use reasonable care and skill to build it in such a way as to cause no unnecessary difficulty in passing the bridge without injury to bridge or boat and if it was built in such a manner as to create unnecessary difficulty in passing without hitting the bridge the City cannot recover against defendant in this action unless he ran against the bridge or purpose."

The Court refused to give the instruction as asked but qualified the same by adding the words "or negligently" to which refusal of the Court to give the instruction as asked and in qualifying the same the defendant thrust these exceptions.

The defendant asked the Court to instruct the jury as follows

3 "Of the boat struck the bridge on account of a defect in the pudden that presents as the boat from steering with the deft. is not liable in this action unless it is proven that deft. knew of such defects in the pudden"

which the Court refused to give as asked but qualified it by adding the words "or might have known it by the use of ordinary diligence"

To which refusal of the Court to give the instruction as asked and in qualifying the same the deft. offers the exceptions.

The defendant asked the Court to instruct the jury that

4 "Unless it is proven that the defendant saw the boat in question against the bridge himself or that those who die, saw it, saw it in the way they die by his command or authority they should find for defendant."

The Court refused to give the instruction as asked but added thereto the words "The presumption is proven of deft. had charge of the boat at the time of the alleged defence that the men engaged therein acted under his authority"

To which refusal of the Court to give the instruction as asked and in qualifying the same the defendant offers the exceptions.

37 The defendant asked the Court to instruct the jury

~~that~~

5 Of the jury believe from the evidence that the men on the bow or stem of the boat spoken of by the witnesses wilfully ran the boat against the bridge in question without the direction or assent of the master, the Captain of the boat will not be answerable for the conduct of the crew in this form of action.

The Court refused to give the instruction as asked but inserted the words "and not under his authority" after the word "executed"

To which refusal of the Court to give the instruction as asked and in qualifying the same the defendants reply cannot object thereunto.

6 The Court instructed the jury

That the deft is not liable in this action for the neglect or wilful acts of others unless such acts were done by his command or authority.

7 The deft asked the Court to instruct the jury that the right to pass an ordinance to prohibit bridges on the side cut canal is vested by law in the Board of Trustees of the Ill + Mich Canal & if they had passed an ordinance providing a penalty for hitting bridges on the side cut in the manner that deft is charged with doing in this action the defendants cannot be convicted under the ordinance of the city of Ottawa which was read in evidence, which instruction was refused by the Court to which

refusal of the Court to give said instructions the
defendant then & there accepted.

The judgment for the plaintiff the sum of five
dollars. The defendant moved for a new trial
which motion was overruled and the defendant then
& there accepted, to the decision of the Court in
overruling the motion for a new trial and says
this bill of exceptions to the signed verdict and made
part of the record which is done.

M. E. Hollister
Judge of the 9th Judicial Circuit



State of Illinois J. Nathan B. Moore Clerk
Jasalle County J. B. of the Circuit Court in and
for said County and State do
hereby certify that the above and foregoing comprises a
true full perfect and complete record in the said
entire case of the City of Ottawa vs Oscar Hersh
as the same appears of record and on file in my
office.

In Testimony Whereof I have hereunto
set my hand and the seal of said Court
at Ottawa this 4th day of April
1863

A. B. Moore Clerk
J. F. Hersh Deputy



120 155
Oscar Koch

to
City of Ottawa
Receipt

Filed April 15. 1863
L. Leland
Clerk

Recd \$ 11.50

