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No. _____

Supreme Court of Illinois

City of Chicago

vs.

Scammon et al

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 288.

City of Chicago
vs
Jannus

1881

No 288

Seammun Stab

The City of Chicago

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Recd.

Chas. J. Dennis
May 9 1861

Am. P. H. Walker :
Ottawa. Ills
Dear Sir

I am on the plat in the
Scammon case No 288. now pending
in Supreme Court with my points
upon it.

Please put it among the papers
and preserve it there. after you have
considered it.

I will get it from the files
when proper.

I hope you and Judge Reese
will visit me. before you leave
for your homes

Very truly
Yours

Sam. W. Fuller

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Plas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the First day of April in the year of our Lord One Thousand Eight Hundred and Sixty One and of the Independence of the United States of America the Eighty Fifth

Present, The Honorable John M. Wilson Chief Justice of the }
Superior Court of Chicago. }

War H. Higgins }
Grant Goodrich } Judges.

Carlos Hearn Prosecuting Attorney.

Anthony C. Hering Sheriff of Cook County.

Attest, Walter H. H. H. H. Clerk.

Be it Remembered that herefore to wit on the eighteenth day of October in the year of our Lord One thousand Eight hundred and Sixty. The City of Chicago by John Lyle King its Attorney filed in the Office of the Clerk of the Superior Court of Chicago a certain Declaration. which is in the words and figures as follows viz.

State of Illinois
County of Cook } S.S.

In the Superior Court of Chicago
November Term 1860.

The City of Chicago vs Jonathan Y Scammon
John L Clark and William F Russell. defendants

The City of Chicago by John Lyle King her
Attorney Complains of the said defendants Jonathan Y
Scammon. John L Clark and William F Russell in
a plea of trespass on the law. For that whereas
the plaintiff is a body corporate Established and
Existing under the laws of the State of Illinois, as a
Municipal Government, having by law, its Charter,
exclusive power over the public Streets of said City
in the County of Cook aforesaid. And it being the duty
of the plaintiff to remove and abate any nuisance
or obstruction of or on the Streets, to control, regulate
and repair the same and to protect the same from
any encroachment or injury; And whereas before
and at the time of the grievances hereinafter set forth
the defendants were possessed of a certain building
with the appurtenances situate and being at the
Corner, to wit. the South East Corner of Lake and
Clark Streets in the City of Chicago, which said
Streets at the time of the committing of the grievances
herein stated and from thence thitherto have been
and still are common and public Streets or
highways for all persons to go return pass and repass

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in by and with horses, carriages, and otherwise at
their pleasure and free will, to wit at the County
aforesaid. Yet the said defendants well knowing
the premises and whilst they were so possessed of the
said building with the appurtenances as aforesaid,
to wit on the day of September AD 1859. at the
County aforesaid wrongfully and unjustly dug and
opened and made in the said Streets or highways and
at the corner thereof, next to and adjoining said
building a large pit or hole of great length, depth
and width to wit of the length of forty feet on each
side of said building of the depth of ten feet and of
width of four feet, which hole or pit was an area
or opening of the size aforesaid for access to and
lighting the basement of said building And
wrongfully suffered and permitted said hole or area
to remain during the said day and the night time
of said day wholly uncovered and unguarded and
without any sign or warning of danger to the
persons passing said Streets and said Corner thereof.

By means and in consequence of which said
negligence and improper conduct of the defendants
in that respect afterwards to wit on the day of September
1859. between the hours of o'clock in the evening
or night time of said day, at the County aforesaid
one Charles H Ormsby then and there in the exercise
of ordinary care and prudence for his personal safety
and lawfully going and passing over said Street

fell and was violently thrown into said pit, hole or
area and was then and there and thereby greatly
injured and damaged and then and there by
reason of the premises the said Charles H Ormsby
became sick sore lame and was obliged to expend
a large sum of money in endeavouring to be cured
of the said wounds and injuries received as aforesaid
to wit the sum of One hundred dollars and by reason
of the premises said Charles H Ormsby was prevented
from performing and transacting his lawful affairs
to be by him performed and transacted, and was thereby
greatly injured and damaged. and in order to
obtain compensation for the injuries and damages
so sustained by the said Charles H Ormsby as aforesaid
and which were occasioned as aforesaid by the
negligence and improper conduct of the Defendants,
the said Charles H Ormsby afterwards to wit on the
10th day of November 1859 brought suit or an action
at law against the plaintiff in the Superior Court of
Chicago. and such proceedings were thereupon had
that afterwards on the 14th day of July 1860 at the July
Term of said Court it was adjudged by said Court
that said Charles H Ormsby should recover against
the now plaintiff the City of Chicago for his damages
by him sustained in the premises the sum of One
thousand dollars and the sum of One hundred forty
dollars and Eighty five cents for his costs and charges
by him about the said suit expended whereof the

plaintiff the City of Chicago was convicted as by the records and proceedings thereof more fully appears.

By means of which said several premises the plaintiff was forced and obliged to pay and did necessarily pay to the said Charles H. Ormsby, afterwards, on the 29th September 1860 the said sum of One thousand dollars, the interest thereon from the date of said judgment to said 29th September, and the sum of One hundred forty dollars the costs of said proceedings and also was forced to expend and necessarily did expend other sums of money in and about the defence of said suit and proceedings the whole amounting to a large sum of money, to wit the sum of Two thousand dollars. By means of which premises the plaintiff was and is greatly injured and damaged, to wit at the County of Cook aforesaid.

2nd Count. And also for that whereas before and at the time of the committing of the grievances by the defendants as hereinafter mentioned there were, and from thence hitherto have been and still are certain other Streets in the City of Chicago County aforesaid called Clark Street and Lake Street, for all persons to go and return pass and repass in by and with Horses, Carriages and otherwise at their free will and pleasure. Yet the Defendants well knowing the premises heretofore to wit in the Month of July 1859. at the County aforesaid wrongfully and unjustly dug, opened made and

5 constructed at the south eastern corner of the said Streets, Clark and Lake and on each side of the building at said corner a large pit or hole, excavation or area of great length to wit of the length of forty feet on Clark Street and twenty five feet on Lake Street, of great width, to wit the width of four feet and a half, and of great depth, to wit of the depth of ten feet, which said pit hole or area the Defendants wrongfully and unjustly permitted and suffered to remain and be, on the and other days of September 1859 wholly uncovered and unguarded and without any sign or warning of danger to the persons passing along said Streets. By means and in consequence of which said negligence and improper conduct of the said defendants in that respect afterwards, to wit On the said

day of September 1859 between the hours of seven and nine o'clock in the night time of said day to wit at the County aforesaid, One Charles H. Ormsby then and there in the exercise of reasonable and ordinary care and prudence for his personal safety lawfully going and passing over said Streets and at the corner thereof as aforesaid, fell and was violently thrown into the said pit or area and there and there was greatly injured and damaged thereby and by reason of the premises the said Charles H. Ormsby became sick, sore and lame and was obliged to expend large sums of money in endeavouring to be cured of the said wounds and injuries received as aforesaid,

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to wit at the County aforesaid, and by reason of the
premises said Charles H Ormsby was prevented from
performing and transacting his ordinary business
and was otherwise greatly injured and damaged thereby.
And to obtain compensation for the injuries and
damages sustained by said Charles H Ormsby as aforesaid
which were occasioned as aforesaid by the negligence
and improper conduct of said defendants he said
Charles H Ormsby afterwards to wit on the 10th day of
November 1859. at the County aforesaid caused an
action of law to be brought against the plaintiff the
City of Chicago in the Superior Court of Chicago, and
afterward such proceedings were thereupon had that
afterwards, to wit on the 14th day of July 1860. said
Charles H Ormsby recovered in said suit against
the now plaintiff the City of Chicago, a judgment
of said Court of One thousand dollars and costs of
suit, for his damages so as aforesaid by him sustained
as by the record and proceedings thereof more fully
appear. By means of the said several premises the
said plaintiff was necessarily obliged and forced
to pay and did afterwards to wit on the twenty ninth
day of September 1860. the said Sum of One thousand
dollars and interest thereon, also the sum of One
hundred and forty dollars Eighty five Cents the costs of
said suit, and was necessarily obliged to and did
spend divers other sums of money in and about
defending the said suit and proceeding of said

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Charles B. Owsby, Amounting in the whole to a large sum of money to wit Two thousand dollars and was and is by means of the premises otherwise greatly injured and damaged, to wit at the said County of Cook.

3^d Count

And also for that whereas the defendants before and on the day of September 1859. were the owners and possessors of a certain messuage and premises with the appurtenances situate in the City of Chicago. County of Cook and near to and on the corner of two certain Streets called Lake Street and Clark Street. which Streets are common and public highways there, in which said highways or Streets there now is and before and on the ^{same} day and year aforesaid there was a certain hole or area opening into a certain cellar or basement of and belonging to said messuage and premises of the Defendants to wit at the County of Cook aforesaid,

Yet the Defendants well knowing the premises while they were so the owners and possessors of said messuage and premises with the appurtenances and whilst there was such hole or area as aforesaid, to wit on the day and year aforesaid at the County of Cook wrongfully and unjustly permitted the said hole or area to be and continue and the same was then and there so badly insufficiently and defectively covered and guarded that by means of the premises and for want of a proper and sufficient covering

or guard to the said hole or area One Charles H. Ormsby who was then and there passing on and along the said Lake Street and at the corner of the same and Clark Street and in the exercise of reasonable ordinary and proper care and prudence for his personal safety, then and there necessarily and unavoidably stepped and fell into the said hole or area and thereby the leg of said Charles H. Ormsby was then and there fractured and the said Ormsby became sick and was sore lame diseased and disordered and so remained and continued for a long time, during all of which time said Ormsby suffered great pain and was prevented from attending to and transacting his necessary and lawful affairs and business by him during that time to be performed and transacted and otherwise greatly injured and the said Charles H. Ormsby in Order to obtain compensation for the injuries and damages so as aforesaid by him sustained by reason of the negligence of the defendants aforesaid, afterwards to wit on the 10th day of November in the year 1859. at the County aforesaid brought an action at law against the now plaintiff the City of Chicago in the Superior Court of Chicago in which said Court such proceedings were thereafter had in said suit that on the 14th day of July 1860 the said Charles H. Ormsby recovered a judgment of said Court against the Plaintiff, the City of Chicago, for the sum of one thousand dollars for his damages by him sustained as aforesaid and also the cost of said suit.

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By means of which several said premises the plaintiff was forced and obliged to pay and did necessarily pay the said sum of One thousand dollars so recovered by said Charles H. Ormsby and did also pay necessarily the sum of One hundred and forty dollars as the costs and charges by said Ormsby in and about his said suit expended, and did necessarily pay and lay out divers other large sums of money in and about the defence of said suit the whole amounting to the sum of two thousand dollars, and plaintiff was and is by means of the premises otherwise greatly injured and damaged at the County aforesaid.

4th

And also for that whereas the plaintiff is a body corporate established and existing under the laws of the State of Illinois having by its Charter exclusive power over the public Streets of the City of Chicago in the County of Cook aforesaid, it being the duty of the plaintiff to remove and abate any nuisance and obstructions on the said Streets to control regulate and protect the same from any encroachment and injury, and whereas the defendants before and at the time of the committing of the grievances hereinafter next mentioned were possessed of a certain building with the appurtenances situate and being at the corner of certain Streets in the said City of Chicago called Lake and Clark Streets and at the South Eastern Corner of said Streets, as ^{the same} of the committing of said grievances and from

thence hitherto have been and still are ^{common} Public Streets or highways of said City for all persons to go, return pass and repass at their free will and pleasure, to wit at the County aforesaid, Yet said defendants well knowing the premises and whilst they were so possessed of the said Building with the appurtenances as aforesaid to wit on the day of September 1859 at the County aforesaid, Wrongfully and unjustly dug and opened in the said Streets, and along the sides of said building on each of said Streets a pit hole or area of the length on each side of said building to wit twenty five feet, of the depth to wit of ten feet, and of the width, to wit, of five feet, and wrongfully and unjustly and injuriously suffered the said pit hole or area to remain during the said day and the night time of said day wholly uncovered and unguarded and without any signs or warning of danger to the persons passing along the said Street,

By means and in consequence of which said negligence and improper conduct on the part of the said defendants in that respect afterwards, to wit on the said day of September 1859 at the County aforesaid between the hours of seven and nine o'clock in the evening of said day One Charles H. Omsby then and there in the exercise of ordinary and reasonable care and prudence for his own personal safety, lawfully going and passing over the said Streets unavoidably fell and

was violently thrown into the said pit hole or area
 and then and there by reason of the premises said
 Charles H Ormsby became sick, sore, and lame
 and was obliged to expend a large sum of money
 in endeavouring to be cured of the said sickness and
 wounds and injuries received as aforesaid, ~~to wit~~
 to wit the sum of five hundred dollars and by
 reason of the premises said Charles H Ormsby was
 prevented from performing and transacting the
 lawful affairs and business to be by him performed
 and transacted and was otherwise greatly injured
 and damaged thereby, and in order to obtain
 compensation for the injuries and damages so
 sustained by the said Charles H Ormsby which
 were so as aforesaid occasioned by the negligence
 and improper conduct of the defendants the said
 Charles H Ormsby afterwards to wit on the 10th day
 of November 1874. caused an action at law to be
 instituted against the now plaintiff, the City of
 Chicago, in the Superior Court of Chicago - And the
 plaintiff avers that due and proper notice was given
 by the plaintiff to the defendants of the pendency and
 purpose of the said suit, wherein and whereby the
 defendants were notified and called upon by the plaintiff
 to defend or assist in the defence of the said suit,
 which notice was given in due and reasonable time
 to have enabled the defendants, if so disposed, to
 prepare for said defence or to assist in the same

Yet the defendants neglected and refused to defend or to aid in defending said suit, and thereupon the said plaintiff caused the same to be defended with due and proper care and skill and diligence. And such proceedings were afterwards had in said suit, to wit on the 11th day of July 1860 at the July term of said Court it was adjudged by the said Court that the said Charles H. Crosby should recover against the plaintiff for his damages by him sustained in the premises the sum of One thousand dollars, and the costs of said suit whereof the said plaintiff was convicted as by the record and proceedings thereof more fully appear. By means of which said premises the plaintiff was forced and obliged not only to pay and did pay said sum of One thousand dollars, together with the sum of One hundred and forty dollars and Eighty five cents the costs of said suit, but divers other sums of money in and about the defence of said suit - the whole amounting to the sum of two thousand dollars, And by reason of the premises the plaintiff was otherwise greatly injured and damaged to wit at the County aforesaid -

To plaintiffs damage Two thousand dollars, Wherefore plaintiff sues.

Jno Lyle King

City Attorney.

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And afterwards. to wit, on the seventh day of November in the year aforesaid, came the defendant Scammon and Clark by Scammon McLaugh & Fuller their Attorneys, and file in the office of the Clerk aforesaid their Plea. in words and figures following Viz.

Superior Court of Chicago.
November Term 1860.

State of Illinois }
Cook County } S.S.

Jonathan G Scammon
John L Clark &
William F Russell
vs.
The City of Chicago.

And the said defendant Scammon & Clark by Scammon McLaugh & Fuller their attorneys, come and defend the wrong and injury, shown &c and say that they are not, nor is either of them, guilty of the said supposed grievances above laid to their charge, or any or either or any part thereof, in manner and form as the said plaintiff hath above thereof complained against them,
And of this they put themselves

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upon the country &c

Scammon McLaughlin & Fuller
Attys for Deft

15 And afterwards to wit, on the sixth day of December in the year aforesaid, said day being one of the days of the December Term of said Court, the following among other proceedings was had and entered of Record to wit

The City of Chicago

Jonathan Young Scammon
John L. Clark and
William F. Russell

Trespass on Case

This day comes the said plaintiff by John Lyle King City Attorney and due personal service of process of summons issued in said cause having been had on the said defendant Jonathan Young Scammon only, and he being three times solemnly called in open Court comes not, nor does any person for him, but herein he make default, which is on motion ordered to be taken and is hereby entered of Record against said Scammon for want of his plea,

And afterwards to wit on the Eleventh day of December in the year aforesaid, said day being one of the days of said December Term aforesaid the following among other proceedings was had in said Court and entered of Record to wit.

The City of Chicago.

^{vs.}
Jonathan Young Scammon

Trespass on the
Case.

On Motion defendant Jonathan Young Scammon no objection being made. It is ordered that his default heretofore entered herein against him be and is hereby set aside,

And afterward to wit on the twenty eighth day of March in the year Eighteen hundred and sixty one said day being one of the days of the March Term of said Court. the following among other proceedings was had and entered of Record in said Court to wit

The City of Chicago

^{vs.}
Jonathan Y Scammon
John L Clark &
William F Russell

Trespass on the Case.

This day comes the said plaintiff by John Lytle King City Attorney and the said Defendants Jonathan Y Scammon and John L Clark by Scammon McLeay & Fuller

then Attorney also come, and issue being joined
 herein, it is ordered that a jury come to try the issues
 joined herein on a plea of the said defendants
 Jonathan Y Scammon & John L Black, impleaded with
 the said defendant William F Russell whereupon comes
 the jury of good and lawful men to wit, Asahel
 Harris William Dowsett, Stephen Cherry, Joseph D Kellogg,
 L B Carroll, M Miller G W Bowman L McManis,
 Robert Blackwell S C Hurlbut Lewis Gony & William Dow
 who being duly elected tried and sworn to try the
 issues joined as aforesaid, after hearing part of the
 testimony and the hour of adjournment having arrived
 it is ordered upon agreement of the parties that the jury
 separate and meet the court again tomorrow on
 coming in and opening thereof.

And afterwards to wit on the twenty ninth day
 of March in the year aforesaid said day still
 being of the March term of said court, the following
 among other proceedings was had in said court, and
 entered of Record to wit

The City of Chicago	}	Trespass on Case And now again comes
vs.		
Jonathan Y Scammon		
John L Black & William F Russell		

the said plaintiff by John Lyle King City Attorney.
 and the said Defendants Jonathan Y Scammon
 and John L Black impleaded as aforesaid with
 the said defendant William F Russell ~~defendant~~ by
 Scammon McCagg & Fuller their attorneys also come
 and the jury empannelled herein on yesterday for the
 trial of the said cause on plea of the said defendants
 impleaded as aforesaid, and aftering all the
 testimony and the hour of adjournment having
 arrived it is ordered upon agreement of the parties
 that the jury separate and meet the Court tomorrow
 morning on coming in and opening thereof.

And afterwards to wit on the thirtieth day of March
 in the year aforesaid, said day still being of the
 March term of said Court, the following among other
 proceedings was had in said Court and entered of
 Record to wit:

The City of Chicago

v.

Jonathan Y Scammon.

John L Black and

William F Russell

Trespass on Case

And now again comes the

said plaintiff by John Lyle King Esq attorney
and the said defendants Jonathan G Scammon
John L Clark impleaded as aforesaid with the
said defendant William F Russell by Scammon
McLagg & Fuller their attorneys also come, and the
jury empanelled herein for the trial of said cause
upon the issues joined herein, on plea of the said
defendants impleaded as aforesaid, and as on
yesterday also come, and having heard all the
testimony arguments of Counsel instructions of the
Court retire to consider of their verdict, and afterwards
return into Court. Submit their verdict, and say

¶ 1189.33 That the jury find the said defendants Jonathan G
Scammon and John L Clark impleaded as aforesaid
guilty, and we assess plaintiff damages against
them to the sum of One thousand one hundred
and eighty nine dollars and thirty three cents.

And thereupon the said defendants Jonathan
G Scammon & John L Clark submit their motion
for a New trial of this cause.

And afterwards to wit on the tenth day of April
in the year aforesaid. said day being one of the
days of the April term of said Court. the following
among other proceedings was had in said Court &
entered of Record to wit

The City of Chicago.

^{vs.}
Jonathan G. Scammon
John L. Clark and
William F. Russell

Trespass on Case

And now again comes the said plaintiff by John Lyle King City Attorney, and the said defendants Jonathan G. Scammon and John L. Clark impleaded with William F. Russell by Scammon McLaughlin & Fuller their Attorneys. also come and this cause coming on at this time to be heard upon the motion heretofore submitted herein by the said defendants Jonathan G. Scammon and John L. Clark for a new trial in said cause. and was argued by counsel and the Court being fully advised in the premises overrules the motion of the said defendants for a new trial herein, whereupon the said defendants impleaded as aforesaid enter their exceptions to the ruling and decision of the Court in overruling their Motion for a new trial.

(Wherefore the said plaintiff ought to have judgment entered on the verdict of guilty rendered by the jury against the said defendants impleaded as aforesaid, and for damages assessed by the jury therein.

Therefore it is considered, that the said plaintiff do have and receive of and from the said

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defendants Jonathan Y. Scammon and John S. Clark impleaded with William F. Russell. damages One thousand. One hundred and Eighty nine dollars and thirty three cents. in form aforesaid by the jury here found and assessed together with costs and charges in their behalf expended and thereof have execution.

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And afterwards to wit on the tenth day of April
in the year aforesaid, the defendants filed in the
office of the Clerk aforesaid their Bill of Exceptions
which is in words and figures as follows.

State of Illinois }
Cook County }

Sup Court of Chicago.
April 7. 1861.

City of Chicago }
vs. }
Scammon et al }

Bill of Exceptions

Be it remembered that on the
trial of this cause, it was stipulated, that the
Defts Scammon and Clark, at the time of the
accident to Ormsby were and still are the owners
of ten twelfths of the premises and property abutting
and fronting upon the street and sidewalk, where the
accident occurred, for which accident Ormsby
received judgment against the City of Chicago,
and that John Forsythe was the Agent of
Scammon at the time of the accident and in
the month of May 1860.

It was also admitted that Charles B
Ormsby received a judgment against the City in
this action, for the cause, and the amount.

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and at the time alleged in the declaration in this cause,
and Defts. Seammun and Clark had notice of the pendency
of that suit, and were required to defend it,
but did not defend it,

Plff. then called Charles H. Orenby
as a witness. who was sworn and testified as follows.
" I reside in Lincoln, Logan Co. Illinois and
did in the year 1859.

In Sept. 1859. I was in Chicago during
the week of the National Fair I arrived in the
morning of the 15th Sept. On that evening, or night,
I was walking along Lake Street, with two friends, and
at the South East corner of Lake and Clark Streets, I
made a misstep and got into an area or hole, there
and found myself hanging on the iron grating
the first I knew.

I fell into the hole, and broke my
leg as I went over the stone pavement.

It was at the corner of the building. The grating
had been laid down up to the corner, and the iron
that goes in at the corner opposite. The grating
came up on each side, and as I went along, I
stepped in supposing it being a little dark, and
between 8 and 8 1/2 o'clock.

There was quite a crowd in the street, The
Moon was shining a little shade over the building.
I supposed I was stepping on a plate of iron. Like
the rest, I brought suit against the City

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and recovered a judgment, which has been paid in full.

It was admitted that this was the suit named in the declaration in this cause & was an action on the case in favor of witness Ormsby against the City for negligently suffering this sidewalk to be out of repair.

On cross examination the witness stated that at the time when he fell in to the opening the sidewalk was crowded with people and it was about eight or ten feet wide at this place.

(A plat of the premises showing the size ~~and~~ condition of the sidewalk and area at the corner of the building was here put in evidence, proved to be correct by the architect who made it, which it was agreed should be made part of this Bill of Exceptions Marked Exhibit "A" and that the same might be used on the argument of this case in the Supreme Court and treated as a part of the ^{record} ~~same~~.)

On reexamination the witness swore that the place where he fell in was at the exact corner of the building where the grating met on Lake and Clark Streets being the space covered by the iron plate between the gratings.

There was no protection there, nothing but the open space. The grates were down and nothing else in sight.

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I thought that there was an iron laid there
The gratings were up each way east and South
but the corner triangle was open.

I stepped a little to one side here from the
crowd pushing me, I was going East. the crowd
West

Then I stepped in to give room, and as I
supposed stepped on an iron plate, where it looked
dark colored, when I fell in

There was quite a large number of people
passing up & down the Street, The walls of the building
were up, but I hardly think the building was
completed.

The windows were in but no lights in
the building.

The plaintiff then called Charles E
Bennett who being duly sworn testified as follows

I observed the buildings at the corner
of Lake & Clark streets as they were going up pretty
much every day, as I went past five or six times
a day. Don't remember hearing of the accident
to Ormsby. Remember when the grating was
being put up and the flag stones laid, They
had the gratings on both sides put up in-
dependant of this plate. The grate was put up
before the plate, probably the plate for the hole
was too large or too small, so the hole was left
open, part of the time ^{covered & part of the time} not, I should think

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it was so for several days. Can't say how long. It was more than one day, finally it was repaired. Could not say whether it was open a week or four days. Should rather say that it was open a week than less. I may be mistaken, there was not even a side railing there. It was left open for some reason, I believe there was some mistake in the size of the plate.

On Cross examination the witness testified. Could not tell the width of the side walk at this place. It was the usual width that they have in the city, I think it was 10 or 12 ^{width} feet. There is considerable margin, I noticed the plate pretty much every day. If not two or three times a day, it was one plate. At one time I saw workmen about it, but at another time there were none, I can not say that they were away from that place entirely at any time after the first, I think the first plate was left there for a while, I think there were two plates there, but I won't be certain. I think the first plate was left in its place for a time.

On re-examination the witness stated, The time the hole was open was immediately preceding the time when the plate was fixed on finally as it is now.

The Plaintiff then called W J Ellenwood, who being sworn testified as follows

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In September 1889 my place of business was at 104 Lake Street, between Clark and Dearborn. I used to notice the sidewalks around the building at the corner, when I passed there, I never saw any plate there till after it was placed. I saw the open space for the plate before it was covered, I think it was nearly a week after the grating was laid before the plate was put in; to the best of my recollection

This space was open nearly every time I passed there from the time the grating was laid till ^{it was open nearly all the time to what I passed} the time the plate was laid. After Ormsby fell in I saw a board laid there, occasionally, I should think this was one of the most frequented streets in the city, the flagging or pavement was then laid, I passed there in the morning, evening & two o'clock in the afternoon.

This space opened into an area, that led into a basement or coal place, used for lighting the basement and the stairway. That is not used for a stairway there. I never noticed any board there before Ormsby fell in.

On Cross Examination the witness stated:

That he passed there three to six or seven times a day. I think it was about a week after the grate was laid before the plate was fixed in place while they were waiting for the plate, the space was sometimes open & at times there were boards thrown across it.

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The plaintiff then called E. Burling as a witness who being sworn testified as follows,

That he was an Architect & observed the constructions of the side walk, Corner of Lake & Clark Streets in September 1859. Think I have noticed the space for the iron plate, at the corner I saw it open. Cannot say how long, but think once or twice when I passed there. I have no distinct recollection how long it was open. Only distinct recollection I have is that I observed it open & having myself had places of that kind to take care I thought it was somewhat dangerous.

Objected to by defendant as opinion
The Plaintiff then called M^d Titson who being sworn testified as follows. Knew the premises in ^{Sept 1859} 1859. Knew the place where the accident occurred, at the corner of the building. My place of business was six doors off. I passed frequently night and day have no distinct recollection how long that place was open. Cant say how long or how often, I noticed the place when it was open. I have seen it in different conditions, when a protection has been put up on boxes & barrels. This was around the area. I have noticed the place at the corner left without protection. Cannot describe the condition of it, but the whole area along the side walk was frequently protected by setting up boards or boxes (Don't remember which) & planking on the boxes &

30
barrels for a protection. That was before the grating
was put ~~down~~ up.

On cross examination the witness stated that
he did not recollect the condition of the premises after
the grating was put in, before the plate was laid,
I don't remember the plate at all, the space I
speak of left open sometimes & sometimes guarded
by boxes & barrels was the area, that is now
covered by the grating, but I cannot tell what
was the condition of the premises, after the grating
was put down before the plate was laid.

The Plaintiff then offered in evidence two
ordinances of the City of Chicago. namely Section
1st 2nd & 3rd of Article 4th found on page 302
Municipal laws, also sec 1st Article 1st page 366 to
the admission of which the Deft then objected, as
irrelevant & inapplicable to this case. But the Court
overruled the objection & allowed them to be read in
evidence, to which the Deft. then & there excepted.

X. It was then stipulated that said ordinances
might be considered a part of the ~~record~~ ^{case} in this
though not incorporated in the Bill of Exceptions, &
read & referred to as part of the record in the Supreme
Court from the Volume of Municipal laws of
Chicago. It was admitted that the Jury
Judgment was One thousand Dollars less One
hundred forty Dollars eighty five cents total \$1140.85

Plaintiff here rested.

Defendant then offered in evidence an Ordinance of the City of Chicago entitled "Obstructions" Article 2nd page 400 of Municipal Laws, also an ordinance entitled "For raising sidewalks" passed March 22nd/58 page 99 New Ordinances to the admission of which Plaintiff by its Counsel objected. The Court overruled the objection and allowed the same to be read in evidence, to which the plaintiff then & there excepted. It was then stipulated that these ordinances should be treated as a part of the record, without being included in the Bill of Exceptions, and read in the hearing of this cause in the Supreme Court from the volumes before referred to.

Defts then called John Forsyth as a witness, who being duly sworn testified as follows, I know the Defts Scammon & Clark

Mr. Scammon was in Europe in 1859. he left here in July, 1857. & returned in May or June 1860. He was away all that time. I know the premises in question, at the corner of Lake & Clark streets. I had charge of Mr. Scammon's interest in them while he was away. Mr. Clarke lived in Chicago & died in 1859. I had charge of Mr. Clark's interest in that property so far as I knew. He left every thing to me so he said repeatedly. The old building on that

property was taken down in 1859 & the new one was built in the same year. Hambleton & Goodman were the contractors for taking down the old building & for doing the mason work for the new building one. A S Bolton had the contract for the iron work for the new building.

The carpenter work was contracted to Amos Sprannis. The Painting & glazing to Morrison Sons. The whole of the work was let out by contract, I think were furnished the glass.

Witness here produced the contracts for the works & stated that they were executed at the office of Van Osdel the Architect. The execution of the contracts was admitted by the Plaintiff.

The Deft. then offered the contracts in evidence. To which the Plaintiff objected on the ground that they did not protect the owners from liability & were therefore irrelevant. But the Court overruled the objection and allowed them to be read in evidence subject to such instructions as might thereafter be given to the jury, to which the Plaintiff then and there excepted.

The Contracts read were as follows,

This Article of Agreement witnesseth an agreement made and entered into this twenty eighth day of April AD One thousand eight hundred and fifty nine; by and between Joseph W Hambleton, and Daniel Goodman Masons and builders of the City of

Chicago. Party of the first part and J. Young Scam-
 -mon by John Forsyth his Attorney in fact and John
 L. Clark and Levi W. Boon Trustee of the Estate of
 Lucy L. Russell party of the second part. said first
 party agree to and with said second party for and
 in consideration of a certain sum of money hereinafter
 mentioned, To take down the old Saloon building
 on the South East corner of Lake and Clark Streets.
 as stipulated in certain specifications herein after
 referred to. And to erect build and finish complete
 a New four story & basement, brick building on
 the site of said Saloon building with new side walks
 and appurtenances complete in accordance with
 the plans drawings and specifications made and
 prepared for such building by John N. Van Osdel
 Architect which plans drawings & specifications being
 signed by the parties to this agreement are to be
 considered as forming a part of the same. That is
 to say, said first party agrees to do all the work and
 furnish all the materials as specified to be furnished
 and done by the mason in said specifications.
 said first party agrees to have the walls ready for
 the roof on or before the first day of August of the
 present year, to have the said walls finished by
 the Tenth day of June of the present year, the plastering
 of the stores to be completed by the 1st day of September
 of the present year, and the entire work to be com-
 -pleted on or before the fifteenth of said month of

September, In consideration of such work being well and truly done in the manner and time mentioned and the material being of the kind and quality specified said second party agree to pay said first party or their legal representatives the sum of Nine thousand seven hundred and sixty nine dollars in payments as the work progresses on the Certificate of the Superintendent of the work, fifteen per cent on each estimate will be retained by said second party until the entire work shall be completed as specified. It is further agreed and understood by and between the parties, that the said sum of Nine thousand seven hundred and sixty nine dollars shall be divided between the persons forming the second party in the sum as follows. to wit. said J. Young Scammon shall pay of said sum five twelfths being the sum of four thousand and seventy dollars and forty one and a half cents, and the said John Black shall pay a like sum of Four thousand and seventy dollars and forty one and a half cents, and said Levi D. Poore shall pay two twelfths of the consideration being the balance of sixteen hundred and twenty eight dollars and seventeen cents, each individual composing the second party to pay in the above proportions as the work progresses, and in no case are they liable jointly to said first party but are responsible only for the sums specified proportionately and in the proportional amounts as aforesaid provided, said second party

agree to give said first party possession of the premises on the first day of May next at which time the work will commence

In testimony of which witnesses our hands and seals this day and year first above written. the word Truth on preceding page was uttered before being signed.

Joseph H. Hamilton Seal
 David Goodman Seal

J. Young Scammon Seal
 by John Forsyth his Attorney in fact
 John L. Clarke Seal
 L. D. Boone Trustee Seal
 of the Estate of Lucy Le Russell

This Article witnesseth an agreement made and entered into this twenty eighth day of April AD One thousand Eight Hundred and fifty nine by and between A. S. Bouton Iron Worker, of the City of Chicago. party of the first part and J. Young Scammon by John Forsyth his Attorney in fact and John L. Clarke, and Levi D. Boone Trustee of the Estate of Lucy Le Russell. Party of the second part, Said first party agrees to and with said second party for and in consideration of a certain sum of money herein after mentioned, To make, furnish

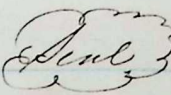
deliver and set up complete The iron Column for
 basement and first story, together with all iron sills,
 Lintels and Cornice for first story, And all gratings
 railings steps & platforms; and to make furnish
 and deliver at the building all other wrought and
 cast iron work complete; as specified, and shown
 on the drawings made and prepared for a Building
 to be erected on the South East Corner of Lake and
 Clark Street as particularly described in the Carpenters
 Specifications and diagrams of iron work. which
 Specifications, drawings & diagrams being signed by
 the parties to this agreement are to be considered as
 forming a part of the same - the work and
 materials to be of the best kind and quality - properly
 fitted and set up in substantial & best manner all cast
 iron work to be painted one coat before it commences to
 rust, to be painted inside and outside, all drill holes and
 edges to be painted, The entire iron work of the fronts of base-
 ment and first story to be set up complete on or before the
 fifteenth day of June next and the window caps & sills for
 the front windows to be delivered at such times as to cause
 no hindrance or delay in the rapid progress of the brick
 work of the fronts and all other ^{iron} work necessary to the
 erection of the building to be delivered at such times as to
 cause no delay in the Carpenters or Masons work and
 the entire iron work to be completed on or before the
 first day of September next. Time being the essence
 of this contract, In Consideration of such iron work

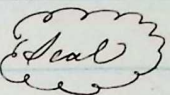
37
being done set up and delivered as aforesaid in the manner and time mentioned And the work and material being of best quality of their respective kinds Said second party agree to pay said first party or his legal representative the sum of Three thousand nine hundred and fifty dollars in payment as the work progresses at the building,

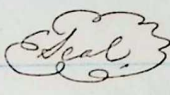
It is further agreed and understood by and between the parties, that the said sum of Three Thousand nine hundred and fifty dollars shall be divided between the persons forming the second party, in the sums following, to wit said I Young Scammon shall pay of said sum five twelfths, being the sum of sixteen hundred and forty five dollars and Eighty three and one third Cent., and the said John L Black shall pay a like sum of sixteen hundred and forty five dollars and Eighty three and one third cents; And said Levi W Boone shall pay two twelfths of the consideration being the sum of six hundred and fifty eight dollars and thirty three and one third Cent; each individual composing the second party to pay in the above proportion as the work progresses, And in no case are they liable jointly to said first party, but are responsible only for the sums specified proportionately;

In testimony of which witnesses our hands and seals the day and year first above written.

N S Bouton Seal

J Young Scammon 
by Jas Forsyth his attorney in fact

John L Clark 

L D Borne Trustee 
of the Estate of Lucy Russell

Forsyth then continued his testimony that the old building & store were torn down by Hambleton & Goodman, who had the contract & and also contracted for the mason work of the new building. They entered upon the performance of their contract about May 1st 1859. My attention was called to the accident to Ormsby by a paragraph in the paper. At that time the buildings were not complete. John W Van Osdel had the entire superintendence of taking down the old & erecting the new building. Mr. Scammon had no other agent or representative than myself, that I am aware of. I did not interfere with the work in any manner or degree. Nor did Mr. Clark have any direction of the work to my knowledge.

The grade of Clark Street was raised in the summer of 1859. The earth that was excavated from the old building that was torn down was used to fill up Clark Street adjacent. The raising of Clark Street left the old sidewalk around the buildings very much below grade so much so that one had to

39
 tear down the old building we could not pent it,
 It would have to be raised five feet to meet the new
 grade. I have measured the width of the sidewalk
 around the building at the corner, & the area around
 the building. They are as follows. On Lake Street
^{side} it was $58\frac{1}{2}$ inches and on Clark Street 56 inches. It
 would be 4 feet 8 or 9 inches on Clark Street. That is
 from the edge of the sidewalk to the building. It is the
 area from the edge of the curbstone to the building.
 I think it was half an inch wider on Clark Street
 than on Lake. These streets are 80 feet wide I think.
 The sidewalks ~~and~~ curbstones are 11 feet wide.
 The flagging stones are 11 feet in width. The blue
 space on Diagram "A" is a triangular stone. One
 Stone & from the edge of that stone to the corner of the
 building is $40\frac{1}{2}$ inches. The iron plate extends over
 that stone & covers a part of it.

Plaintiff objected to evidence of the condition
 of the area on the ground that the facts are concluded
 by the judgment in the Ormsby suit. But the
 Court overruled the objection & admitted the evidence,
 to which the Plff excepted. I am not able to say
 where is the line of private property but I think the
 building comes to the line of the street and the area
 & sidewalk are in the street. Hambleton & Goodman
 constructed the sidewalk & put down the flagging,
 Boulton had the contract for putting down the
 iron work. I am not certain whether Hambleton

* Goodman did the work themselves or employed the firm of Cook & Co. who furnished most of the flagging.

The building was not complete at the time of the accident to Ormsby. The contractors then had the occupancy of the premises, except the tenants had gone into two of the eastern stories of the building before they were completed. They were so anxious to get in during Fair Week. There were four stories on Lake Street & the two next the corner were not occupied.

None of them were completed. Bouton had not completed his contract at the time of the accident to Ormsby. He had commenced it.

I cannot tell the state of the work at that time and place. The whole superintendancy of the building was left to Mr. Van Osdel. I had no part in directing it. Therefore I had nothing to do with it.

Left then called as a witness John M. Van Osdel who being duly sworn testified as follows. I reside in Chicago. My business is that of an Architect. I know the parties. I have followed the business sixteen years. I know the premises corner of Clark & Lake Streets.

I was superintendant of the work I heard Mr. Forsyth testify. I made the contracts for the proprietors, & know the parties having the contracts for making improvements. I suppose the superintendency included the direction of the work. If the contractors did anything wrong. It was my business to have it corrected. I had seen

agreement with the proprietors as to the price I should have for superintending the work, and making the contracts. I suppose all the directions for the work were given by myself but I did not interfere with the builders, as long as they worked according to contract. I did not take it upon me to direct the work at all unless it was not in accordance with the contract. The contracts tell what they were to do, they contain the specifications. It was my business to see that they did it. I did not interfere in any manner with the way in which they sought to accomplish the work. I don't know who gave orders to the workmen of the contractors I suppose the employers. I gave no directions except when I saw the work going wrong. I had no control over the workmen. I generally make my complaints to the owners. I knew the contractors, & one of them for several years. They were selected from the mass of builders in town on account of their skill. We considered them first class contractors when we selected. This applies to all the contractors, to Boulton & to Lamberton & Goodman. They were experienced contractors.

Maintiff objected to evidence of character & skill of the contractors; but the Court overruled the objection & admitted the evidence to which Plff then & there excepted.

I think I know the condition of the premises, at the time of the accident to Ormsby. I was on

42 then two to three times a day every day except Sunday

I was there the day of the accident and the day after. I recollect the condition of the iron at that time. The iron gratings or bars over the area were all down. I think except the corner plate. This was a plain plate, the blue space on the diagram represents part of the side walk, the stone covering the angle here is one stone. It is that blue space. It is a single triangular stone on a level with the side walk & below the grate. The iron is about 38 inches above the sidewalk. The stone was in place as now.

I cannot tell when Boutin began laying down the iron work. It might have been a week before the accident to Ormsby. The buildings were not completed. My impression is there was no delay in the progress of the work, and no fault found with its progress. It went on diligently that I found no fault with it.

Plaintiff's Counsel has objected to evidence showing the witnesses' opinions as to the progress of the work. But the Court overruled the objection and admitted the evidence, to which the Plff. then & there excepted.

I was not aware of any interruption in the work. I have been extensively engaged in the erection of buildings & construction of sidewalks in this city.

It was here admitted by the Plff. that some of the City officers interfered to prohibit the progress of the work; that the City by her officers made no

43 express objection, or Complaint to any of the parties in interest in regard to the construction of the work or to the manner in which the work was done

Defendants then offered to show by their witness that the construction of the sidewalk & area around this building was proper & usual by the ordinances of the City of Chicago that the work in this case was done in a manner usual in that City for a number of years; to which Plff. objected, but the Court overruled the objection & admitted the testimony as follows, to which Plff. then & there excepted

Paul Osdel then testified that Reuben Cleveland was Superintendant of public works that year, but I cannot call to mind that I saw him there during the progress of the work. I do not remember of seeing any of the City officers about there. That it is about six years since we began to make areas under sidewalks at all. Before that it was down too near the level of the water. Our grade was so low that we could not make an area without going into the water prior to six years ago. Since the grade was raised it ^{and areas constructed to light the basements} enables us to have basements. This area at the corner of the building was to light the corner basement room, access to the basement is had thro' this area, by steps down to the basement on both streets. I don't know whether they both go into that corner basement room. They both go into the 40 feet square room, I don't

remember whether there is a partition,

Deft then asked the witness whether this area was constructed in the ordinary manner in which areas are constructed, to which question Plff objected. But the Court overruled the objection & admitted the evidence as follows to which Plff then & there excepted:

Witness answered Yes we have constructed many like it. More than a mile in this City, I have never heard any complaint or objection urged in regard to that to me or the part of the City.

Plff objected to all above evidence, but the Court overruled the objection & admitted the evidence, and Plff then & there excepted.

Witness then referred to the diagram marked Exhibit 'A' & testified that over the pink colored space in the shape of a quadrant of a circle there was to be a plate of cast iron. This was ultimately placed there. It was included in the contract with Bouton. It comes to the rim & laps over that stone, the contract for this iron was with Bouton. I did not interfere in any manner with the way in which the work was done, nor did either of the Defts. to my knowledge.

On Cross Examination By Plff. Witness testified that the space covered by the plate was open the next day after the accident. I heard of it in

45 the morning. It was open then & had been before, but I cannot say how long. I do not know that it was covered at all from the time the grate was put up until the plate was finally fixed on.

Sidewalks can be and are frequently constructed without areas. Areas are to give light & air to the basement of the building. They are not absolutely necessary for the sidewalks. They are for the benefit of the building.

Defts then offered to show by the witness that the Ordinances already given in evidence by the Defts were amended at his suggestion by the Common Council for the purpose of allowing 7 feet for the area. That he presented a petition. had a hearing & the express purpose of that amendment was to allow these areas & offered to produce the report itself.

The Court excluded the evidence to which Defts then & there excepted.

Defts then called Henry Smith as a witness who being duly sworn testified that In September 1859. he worked for Mr. Benton.

Plff. then objected to the competency of this witness. He being an employee of Bentons on the work & therefore liable even for a judgment rendered against his superior (Mr. Benton). but the Court overruled the objection & permitted the witness to testify. to which Plff then & there excepted.

The witness then testified that in September 1859 he was at work for Mr. Bouton by the day in the buildings at the corner of Lake & Clark Streets, & that he put up the iron gratings & the railings. Mr. Bouton directed me I was his foreman. I had no orders from any body else but Bouton. I heard of the accident to Ormsby. At that time I was working near the corner, where the plate is. The gratings were the railings Mr. Bouton directed over. I was then laid down. The witness then referred to diagram 'A' & testified that the black circle upon it indicates that a wrought iron bar runs from the sidewalks into the stone. It is the same on Clark Street, I had put the bars in at the time Ormsby fell in. I cannot tell at what time he fell in; but when I heard of it that frame had been up one or two days, I had then been at work on the iron work about two days. We left off work at night at six o'clock, I had a boy along with me whom I directed what to do there, Bouton employed & paid him. when I left the work at night I put some boards over the frame, I laid them across that corner. I did that every night, He told me to put something over them. some boards to cover them up. I heard of the accident to Ormsby a few days after it happened. I covered it every night when I left it. We began work at seven o'clock in the morning.

On Cross examination by Plff the

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Witness testified. I was employed ^{by} Boulton who was doing the iron work there I testified on the trial between Ormsby & the City, for the City as I have testified to day.

I always covered those grates myself. I was engaged four or five weeks in that iron work. This place at the corner was open a week or two days before the plate was finally put upon it. A Boy named George Keare worked with me all the time, on the work. We left it together, I don't know where he is. we covered it every night with boards, either that boy or myself covered the place when we left work. I could not keep the place covered all the time when I was at work on it. In the day time I had to keep it open, until I left at six o'clock in the evening. Sometimes the Carpenters took the cover off. They used the lumber for scantlings & then they took it off.

Defts then put in evidence the plat above referred to marked "A" showing the ground plan of the premises

Defts then called Daniel Goodman who being duly sworn. Plff objected to his competency as a witness, on the ground of interest in the event of the suit he being one of the contractors (Hambilton & Goodman) for doing the Mason work upon the building including the sidewalk & area. The Court overruled the objection and allowed the witness to testify to

which I'll show & then excepted

Now then testified as follows. In the summer of 1859. I was engaged as Mason & Builder & Contractor. I took the mason work in pulling down the old building & erecting the new building at the corner of Lake & Clark Streets. I excavated the lot part of the earth ~~shown~~ out was deposited in Clark St opposite the premises - Clark Street was raised to the new grade along the building in that season of 1859. It was raised from five to six feet. The old side walk was five or six feet below the new grade. We had a permit from Mayor Haines (the Mayor of the City for that year) to use the street for building purposes. I have not the permit now and cannot find it. Have not seen it since the building ^{was in progress of erection}. It was like the following permit Chicago Aug 16 1859 Permit Henthorn & Goodman to occupy one third of the street at the corner of Wells & Lake for building purposes subject to revocation by the Mayor John C. Haines per Chapman. It was to allow the use of a portion of the street to be used for placing building materials on. To the introduction of which evidence as to permit and of the aforesaid copy Plaintiff objected on the ground that it was not relevant having no reference to the area or sidewalks and because the Mayor was not empowered to give permits for building sidewalks or areas, But the Court overruled said objection and admitted evidence as to said

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alleged permit and said copy to which Plaintiff then and there excepted. Mr. Cleveland was City Superintendent that season. I saw him about the buildings several times that Season. I exhibited the permit to him at the time & to several others of the City officers. They requested to see it more than once - No objection was made to its sufficiency.

I do not know who was Street Commissioner for that Division for that year, nor who was Alderman of the ward. We made a verbal contract with the City Superintendent for the City to excavate the area for the building at the corner of Clark & Lake Streets. The City was to pay us so much a yard for the earth taken out of it, Excavate it & take it away in a given number of days. They (the City) backed out of this contract, alleging that they had no authority to fill in the Street till they had authority from the City Council & that would take too long for our purpose. The permit was granted for a specified time I think, till the end of our contract. The permit was to occupy one third of the street for building purposes. It was I think signed John C. Haines Mayor by Chapman.

Next then called John C. Haines who being duly sworn testified that he was Mayor of the City of Chicago in 1859. that E. C. Chapman was my Clerk in the employ of the City. He

was authorized to sign for me two classes of permits. One for the removal of buildings the other for placing building materials in the Street for building purposes.

This was all the evidence in the case.

x The Plff. then asked the following instructions, which the Court gave

1
The Jury are instructed that if they find for the plaintiff, upon the evidence and facts, then they must find for the full amount of the judgment and costs and interest on the judgment - it does not matter what ^{what} were the relative proportions or interest of the defendants in the property.

2
If the Jury are satisfied from the evidence that the hole or opening or excavation where Ormsby fell and was injured was one which rendered the sidewalk dangerous and detracted from the safety of travelers. then such hole or opening was a nuisance and the defendants if shown by the evidence to be owners of the premises adjoining and for the benefit of which the excavation was made are responsible for all damages resulting therefrom to the city if they caused the excavations to be made for the benefit of their own premises alone & for no other purpose and if the city was not in fault and did nothing to

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57 produce the injury and neglected nothing on his part

3

If the opening, or area into which Ormsby fell was contracted for & made for the special benefit of the property to which it belonged the owners of that property if they procured the work to be done were bound to keep the area or opening covered or protected in such a manner that it would be as safe as if the area had not been made - or at least so that the public should not suffer from the encroachment upon the street

4

If the jury believe from the evidence that there was an ordinance of the City requiring permission from the City or its Officers for the construction of areas or the building of sidewalks up to grade so as to make areas, then the defendants were not excused or relieved from obtaining such permission or authority by the fact that areas have been made by other persons in the City without permission

5

It is admitted in this case that due notice of the pendency of Ormsby's suit was given - such notice being given to and received by the defendants made them so far parties to the Ormsby

were engaged in the work, and were in the occupancy of said premises for that purpose (and that Defendants gave no orders to said contractors or their workmen as to the manner of doing said work) the injury, occurred to Ormsby from the negligence of said contractors or their workmen they will find for the defendants. } This is so unless the encroachments made upon the Streets were not manifestly necessary; and even if necessary it should appear that they were reasonable under the circumstances and even if reasonable & necessary, if the encroachments extended further into the Streets; or continued longer than was necessary & reasonable; or if necessary & reasonable, if negligently left in an unsafe condition the encroachments - became a nuisance - and defendants are liable for nuisances erected on their own premises by their Council

2

If the jury believe from the evidence that the sidewalks around defendants premises described in the declaration was such an one as was required by the ordinances of the City of Chicago and that the area around defendants buildings on said premises was such an one, as has been usually constructed and used in said City since the establishment of the present grades of the Streets and sidewalks in said City without objection by the said City of Chicago then the defendants had a right

Modifications added
by Court

to construct such side walk and area and to supply by the usual and ordinary means for that purpose and if they further believe from the evidence, that defendants employed competent and skillful contractors to do that work and if while such contractors were prosecuting the work, without the interference or direction of Defendants an injury happened to Ormsby from the negligence of said contractors or their workmen they will find for the defendants. This is the subject to the qualification made to the first instruction asked by defendants and given by the Amicus

3

The Record and proceedings in the case of Ormsby against the City of Chicago are no evidence of negligence on the part of the defendants in this action - That record establishes negligence but does not establish that defendants were guilty of negligence -

4

If the jury believe from the evidence that the injury to Ormsby occurred from equal negligence on the part of the Plaintiff and Defendants in this action then the Plaintiff cannot recover and they will find for the defendants

5

If the jury believe from the evidence that the Defendants employed competent and skillful contractors to do a lawful and proper work and that

to construct such side walk and area and to supply by the usual and ordinary means for that purpose and if they further believe from the evidence, that defendants employed competent and skillful contractors to do that work and if while such contractors were prosecuting the work, without the interference or direction of Defendants an injury happened to Ormsby from the negligence of said contractors or their workmen they will find for the defendants. This is the subject to the qualification made to the first instruction asked by defendants and given by the Court.

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5.

If the jury believe from the evidence that the Defendants employed competent and skillful contractors to do a lawful and proper work and that

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Defendants did not control or interfere with said contractors in the performance of said work then defendants are not liable for the injury happening to Dimsky from the negligence of said contractors or their workmen. This is so subject to the qualification written by the Court at the end of the first of Defts instructions

6.

If the jury believe from the evidence that defendants employed competent and skilful contractors to construct the buildings on Defendants premises and the side walk and area around the same, and that this was a lawful work then Defendants and said contractors had a right to use all lawful and proper means to accomplish it and Defendants are not liable for injuries happening to third persons from the negligence of said contractors or their workmen while engaged in the prosecution of said work without the control or interference of the Defendants. This is so subject to the qualification made to the first instruction as asked by defendants

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Defendants are not liable to third persons for injuries happening to them from the negligence of contractors whom they have employed to do a lawful work upon or around Defendants premises without the control or interference of Defendants as to

56 the manner of doing the work - This is so subject to the qualifications given by the Court to the first instruction asked by defendants & given by this Court

The Defendant then asked instructions No 8 & 9

The judgment recovered by Cornaby against the City is evidence that the city was guilty of negligence in the matter in controversy, and the City cannot maintain this action brought against these defendants for indemnity under the circumstances proved in this case

No 9

If the jury believe from the evidence that what the defendants authorized to be done upon and around the premises in question was lawful, and that the work was let out to contractors who exercised an independent employment under their contracts - but that by the careless or negligent manner in which the work was performed by said contractors or their workmen a nuisance was created, the defendants are not responsible for said nuisance unless the evidence shows that the defendants have interfered with or gave instructions respecting the manner of doing the work or that they had notice of the existence of said nuisance and neglected to remove or abate it

Which the Court refused to give

The Court then of its own motion gave instructions No 1. 2 & 3 marked Courts instructions No 1

It may not be absolutely illegal to make an execution in the Street in front of ones own premises; but when one does make such an execution for the exclusive benefit of his premises whether he does it directly by his own servant & so makes himself liable for the act of his servant on the principle of respondens superior; or whether he procures such execution to be made by a contract with a third person over whom he reserves no control he is still liable as and for a tort in case he causes a nuisance, or permits a nuisance to continue adjoining his premises

The Court instructs the jury in this case that if they believe the work was done under the written contracts offered in that the defendants are not liable for any act of negligence of the contractors except so far as the said defendants authorized an encroachment upon the Street. And that if the defendants employed the contractors to make any encroachment upon the Street without proper authority then they are liable to the City for all the damages which the City has sustained by reason thereof if the City has been guilty of no default or neglect unless the encroachments so made were manifestly necessary and were reasonable in themselves

Necessity may justify encroachments which would otherwise be nuisances. But the mere convenience of the owner of a Lot abutting on a Street does not entitle him as a matter of right to appropriate a part of the Street with out specific authority. He must at least show that the encroachments which he contracts for are reasonable and necessary. And even if reasonable & necessary if they the encroachments extended further into the Street or continued longer than was necessary & reasonable or if negligently left in an unsafe condition they become nuisances. And the owner may be held liable for permitting nuisances to exist or remain on his premises. The jury might to find that whether the excavation & area contracted for and made in the Street was necessary & proper in the erection & reconstruction of the building, or making the improvements undertaken on the Lot of defendants.

And if not then the defendants are responsible for the nuisance authorized or permitted by them.

And if the jury find that the encroachments were necessary and reasonable then they will enquire whether due care was taken by defendants or their contractors or other person to guard the place on which the encroachment had been made by a fence or other protection so that persons might pass in security along that way or avoid the obstructions or excavations placed there by defendants or their contractors.

If the Jury are satisfied from all the Evidence that the defendants Employed others to make encroachments upon the public Streets of the City for their own convenience & not from necessity then they are liable to the City for all damages suffered by Defts? acts in that behalf whether the work was performed by the Plaintiffs own servants or through the medium of contractors

In like manner they would be liable if they had made such unnecessary or unreasonable encroachment & failed to take due care to guard the exposed place or encroachment made by them -

To the giving of which instructions asked and given for the Plaintiff The modification of the instructions asked and given for the Defts by the Court & the refusal to give the instructions asked by the Defts & the giving of the instructions by the Court of its own motion as above stated the Defts then and there excepted

The Jury returned a verdict for \$1189.33 for Plff

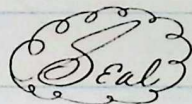
The Deft then moved for a new trial because the Court gave improper instructions to the Jury because the Court refused

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proper instructions to the jury because the Court improperly modified instructions asked & given for Defto & because the verdict was against the law and the Evidence

Which motion for a new trial the Court overruled & rendered judgment on the verdict for the Plff to which decision of the Court and overruling said motion for a new trial to set aside the verdict the Defts then and there excepted & because the several decisions of the Court herein before made and executed to, do not appear of record the Defts pray that this their bill of Exceptions may be allowed signed & sealed - which is done

Wm H Higgins
Judge



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It is hereby stipulated that this case shall be taken to Supreme Court at April T 1861 as by writ of Error Plffs City of Chicago agreeing to enter its appearance and join in error at this Term and that no execution shall issue on this judgment in the above entitled cause until the same shall be decided and disposed of by the Supreme Court and that either party may in the Supreme Court refer to the short hand Reporter copy of the evidence taken on the trial of this cause in case of disagreement about the facts as stated in the Bill of exceptions

April 10th 1861 Jno Lyle King
City Attorney
Scammon M. Hagg & Butler
For Defts

State of Illinois
Cook County } Ss.

I. Walter Kimball Clerk of the
Superior Court of Chicago. in and for said County
do hereby certify that the foregoing is a full true
and complete transcript of all the pleadings on file
in my office, and of the proceedings and judgment
entered of record in said Court, together with the
Bill of Exceptions in a certain suit wherein The
City of Chicago is plaintiff. and Jonathan Y
Leamon, John L. Clark and William F. Russell
are defendants.



In testimony whereof I hereunto subscribe
my name, and affix the seal of said
Court at the City of Chicago. in said
County this 15th day of April A.D. 1861
Walter Kimball Clerk

Assignment of error

And now comes the Plffs in error and say that in the foregoing record there is manifest error in this Court:

- 1 The Court erred in excluding testimony of witnesses Van Orsdel as to the usage of constructing areas in the city of Chicago under the ordinances offered in evidence and the report of the committee to the Common Council.
- 2 The Court gave improper instructions to the jury for the Plff -
- 3 The Court improperly modified the instructions given for Defs -
- 4 The Court erred in refusing to give the Jury instructions asked by Defs
- 5 The Court erred in giving the Jury the instructions drawn by the Court
- 6 The Court erred in overruling motion for a new trial tendering just for ~~Whelan~~

Scammon McCagg & Fuller

April 16, 1861

Attys for Plffs in error

And now comes the Card City of
Chicago defendant in error and says
there is no error in the record and
proceedings aforesaid ~~was in the Judge~~
~~and given by the Court aforesaid~~ and
is there error of any kind therein in
and record as above alleged by
Plaintiff in error. Wherefore ~~the~~
J. M. A. King
Attorney for City of Chicago.

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The City of Chicago
Ats.

Jonathan T. Scammon
et al.

\$5.00 by Fuller

His. \$15.00