John A. Lovely vs. Harwood G. Day

(1892)

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Foreword

In reaction to the one cent verdict in the libel lawsuit of Willis Creore, the *Minneapolis Daily Tribune* editorialized:

> Newspaper publishers are conversant with the law of libel. They are not, moreover, malicious persons. They are engaged in the reputable and highly necessary work of collecting and disseminating legitimate public news. They have no motive for doing injustice to individuals,—and use great precautions to avoid it. [1]

This was the recurrent theme of newspaper responses to the storm of libel litigation against them in the late 19th and early 20th centuries in Minnesota, and most always the papers had merit on their side. On rare occasion, however, a newspaper strayed from "disseminating legitimate public news" to pick a fight with a private citizen and use its pages to disparage him.

Chapter One

In 1891 John Graham retained the firm of Lovely & Morgan to represent him in a suit against the city of Albert Lea for severe injuries suffered in a fall into a deep hole that had opened in a public sidewalk that was under repair. He claimed damages of $15,000.

In 1890 Albert Lea had a population of 3,305. It was the seat of Freeborn County, which had a population of 17,962. It had two newspaper: *The Freeborn County Standard* and *The Albert Lea Enterprise*. Harwood G. Day published the *Standard*. [2] Two law firms were dominant. Lovely & Morgan, composed of

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[1] *Minneapolis Daily Tribune*, December 17, 1885, at 4. The complete editorial is posted in "The Libel Lawsuits of John Leppla and Willis Creore" 10-11 (MLHP, 2021).

[2] Harwood Galusha Day (1844-1914) was a journalist and lawyer, who began publishing the *Standard* in Albert Lea in 1883. The *Freeborn County Times* and *The Evening Tribune* would start later in the decade.
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Darius F. Morgan and John A. Lovely, a trial lawyer who excelled in personal injury litigation.[3] The other was William E. Todd, a sole practitioner, who specialized in defense of corporations.[4] Lovely and Todd were frequently on opposite sides of the aisle. The county was part of the Tenth Judicial District over which Judge John Q. Farmer presided. [5]

Chapter Two

The Graham suit was considered so important that the city retained Robert D. Russell, the Minneapolis city attorney, to assist in its defense.[6] The *Freeborn County Standard* described the court calendar for the May term:

> It is likely that there will be an adjourned term in July for the trial of causes by the court. The first case of importance will be that of John H. Graham against Albert Lea, which is set for to-morrow. Lovely & Morgan represent the plaintiff, and City Attorney Crane, R. D. Russell, city attorney of Minneapolis, and W. E. Todd will appear for the defendants. There is not likely to be but a few jury cases for trial this term. [7]

The jury's verdict for John Graham was headlined in the *Freeborn County Standard*, which also noted that all jurors resided "outside the city":

MULCTED FOR $4,000.

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[3] Lovely later served on the Minnesota Supreme Court. He was elected to the Court in 1898 with Republican endorsement but did not complete his six year term, which began January 1900, and would have expired in January 1906. He was not endorsed by the Republican party at its convention in July 1904, ran as the nominee of the Democrats, was defeated in the November election and resigned in October of the following year.

[4] For his profile and bar memorial, at which Lovely spoke, see "William E. Todd (1853-1899)" (MLHP, 2020).

[5] John Quincy Farmer (1823-1904) served in the state legislature, 1866-1872, and as judge of the Tenth Judicial District , 1880-1893.

[6] Robert D. Russell (1851-1901) was city attorney for Minneapolis from 1889 to 1893, when he was appointed to the Fourth Judicial District Court. He was elected to a six-year term in 1894. He resigned in 1898 to return to private practice.

[7] *Freeborn County Standard*, May 20, 1891, at 4.

This Is the Verdict Against the City in the Graham Case—It will be Appealed and the Counsel are Confident that It will be Reversed—The Burlington Road Escapes with a Surprisingly Light Verdict...

The most important case of the present term of the district court was that of John H. Graham, formerly a railroad employe, against the city of Albert Lea. He claimed to have stepped into a cave-off of a sidewalk which had been graded by the late Wm. Morin along the north side of his residence lots, and falling, permanently injured his spine. He has kept to his house, and bed part of the time since, and his physicians claimed that he was badly hurt and that his confinement was thereby enforced. The defense maintained that the walk was not built by the city, and that under the charter, it was not liable for any personal injury that might be caused through its defects. It was also claimed that Graham's injuries were largely fictitious and were in fact comparatively slight and of a temporary character.

Lovely & Morgan represented Graham and City Attorney Crane and R. D. Russell, city attorney of Minneapolis, the city. Judge Whytock and Jno. Anderson were finally associated with Lovely & Morgan.

The following, all living outside of the city, constituted the jury:
John Cotter, Jas Peterson, C. W. Ayars, Knut Fjeldbraaten, John Rice, Fred Bunse, E. K. Flaskerud, M. C. Jorgenson, Thos. English, Bennett Benson, Henry Harrison and Andrew Robinson.

The following witnesses were sworn for the plaintiff:
John Graham, Cuas A. Briggs with city records, Jno. Anderson, H. H. Lukins, Jerry Rouen, Frank Gage, S. Messinger, L. A. Brown, M. E. Cole, H. R. Fossum, Dr. Stevenson, Dr. Von Berg, Dr. J. W Andrews of Mankato, F. M. Grady, R. B. Skinner, Martin Ruden, Chas. Dudley and Mrs. Jos. Dudley.

For the city, the following were sworn and examined:
Jno H. Graham, W. G. Kellar, J. A. Fuller, W. A. Morin, Dr. Wedge, Dr. Blackmer, Dr. W. A. Jones of Minneapolis, Dr. Wilcox, mayor of

Albert Lea, Chas Lishman, J. H. Menifee, Albert Ratleff, A. C. Wood, Dennis Greenwood, Emil Friske, Isaac Botsford and M. E. Cole.

The closing arguments were made by Mr. Lovely and Mr. Russell.

The jury after an all night's session found for the plaintiff and assessed his damages at $4,000. The claim was for $20,000, and it is said at first the jury stood nine for $8,000 and three for $2,000.They finally agreed on $4,000. The case will be appealed if Judge Farmer refuses a new trial, and there is more feeling in the community over it and the verdict than has been manifested in any case tried in the city in many years.

Yesterday the case of Henry Kaemner against the B., C. R. & N. railroad was tried, Lovely & Morgan representing plaintiff and Judge Whytock the railroad company. The claim was for $15,000 for the loss of a finger and injury to another at Rockford, Iowa, caused by alleged neglect of the company while plaintiff was acting as brakesman. The jury returned a verdict of $2,000, which, considering the reputation of Freeborn county juries for giving heavy verdicts in personal injury cases and especially against corporations, was a decided surprise.[8]

That all jurors resided outside the city suggests that John Lovely struck any venireman who was a city resident and might fear his taxes would rise if he favored a sizeable plaintiff's verdict. That the *Standard* would print the names of these jurors suggests that it believed they felt free to "stick it" to the city. That the *Standard* would report that there was "more feeling in the community over [the trial] and the verdict than has been manifested in any case tried in the city in many years" was a strong indication of what was to come.

Chapter Three

A motion for a new trial was filed.[9] In mid-August Judge Famer denied the motion. His opinion was reproduced in the *Standard*:

[8] *Freeborn County Standard*, May 27, 1891, at 4 (omitted is an account of a pending suit by Mrs. Julia against the city for injuries sustained on a defective sidewalk. She was awarded $700).

[9] The city's lawyers were optimistic about the appeal. *Standard*, June 3, 1891, at 5 ("City Attorney Crane went to Minneapolis Saturday returning yesterday. He reports Mr. Russell as joining him in full confidence of a reversal of the verdict in the Graham case.").

SOCKED IT TO THE CITY.

As Everybody Expected Judge Farmer Affirms the Verdict In the Graham Case—His Reasons In Full Therefor—The Next Step Is to the Supreme Court.

Judge Farmer yesterday sent his written opinion and order overruling the motion of the city for a new trial in the John Graham case, thus confirming the verdict of $4,000 which the latter obtained for damages for injuries received by a fall off the Morin sidewalk. The opinion is as follows:

The question was submitted to the Jury, whether, at the time of the injury, the place causing the injury was in the sidewalk of the city of Albert Lea. The jury answered that question in the affirmative.

No question is raised as to the character of the defect or its existence for such a length of time as to charge the city with constructive notice of it in time to have it repaired before the injury.

So the real contention of the defendant is that the evidence did not justify the jury in finding the locus in quo was in a sidewalk which the city was bound to repair. The only record of evidence introduced was that Clark street was dedicated by William Morin to the city, and that the same was accepted, opened, graded and plank sidewalk ordered built on the north side of it and it is contended that from the fact the city by resolution or ordinance had not directed the building of a plank sidewalk on the south side of Clark street, the inference is the conclusion that the city did not intend that a sidewalk should be built and maintained. It seems to be the policy of the city of Albert Lea that the expense of building sidewalks in the first instance shall be ultimately borne by the owner of lots adjacent thereto.

Supposing that Mr. Morin, at the time he graded and constructed this earth and gravel, in anticipation of this policy had laid a good, substantial plank sidewalk there in accordance with the general plan fixed by ordinance for the construction of sidewalks, what necessity would there have been for ordering him by

ordinance to construct the walk after it was built, or to pass an ordinance accepting it in order to make it one of the sidewalks of the city? If the city constructed cross-walks across Grove and Adams streets to connect with this sidewalk as built by Morin, and the public used these cross-walks only in connection with this plank walk, would not such action of the council and the public been as effectual an acceptance as if an ordinance had been passed to that effect.

No question is raised as to the authority of the council to regulate the building of sidewalks as to plans, material, grade, etc. That necessarily implies the authority to accept and permit sidewalks built of any material, and it therefore follows that the same evidence which would tend to prove an acceptance of a plank walk constructed by Mr. Morin, would equally tend to prove the acceptance of a gravel walk, which, for convenience of the public and durability is equal to plank walk save and except the liability to wash and gully out in heavy rains. The use of the sidewalk by the public is strong evidence of its necessity, and the necessity being shown, raises a strong presumption of the city's willingness to subserve that necessity and its acts must be interpreted in the light of that presumption.

Without extending this memorandum, I will simply say I was of the opinion at the trial of this action that the question should be submitted to the jury, and after reading the arguments of counsel for the defence I am still of the same opinion, and that the evidence is sufficient to sustain the verdict, and the motion for new trial should be denied.

JOHN Q. FARMER, District Judge. [10]

Chapter Four

The Graham case was appealed to the Minnesota Supreme Court, which affirmed Judge Farmer's denial of the city's motion for a new trial on January 21, 1892.[11] This set the publisher of the *Standard* off on a journalistic temper tantrum.

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[10] *Freeborn County Standard*, August 12, 1891, at 5.

[11] *John H. Graham v. City of Albert Lea*, 48 Minn. 201, 50 N. W. 1108 (1892), is posted in the Appendix, at 27-35.

The newspaper's account of the ruling and its possible aftermath for taxpayers became increasingly shrill as it went along, ending on a sanctimonious note:

TAX-PAYERS MUST SHELL OUT.

The Supreme Court Affirms the Verdict in the Graham Case —Albert Lea will have to Levy a Tax to Pay the Claim—Citizens Generally are very Indignant Concerning the Case—What is the End to be?

The news was received last Friday of the result of the appeal of the City of Albert Lea in the case of John Graham, who last year obtained a verdict for $4,000 against it for injuries claimed to have been received on account of a defective sidewalk, and, as was expected by the majority of those who are competent to judge in such cases, the verdict was affirmed, and the city will be compelled to pay the judgment together with costs and attorney's fees amounting altogether probably to over $6,000.

The opinion of the court, in brief, is as follows:

If a municipal corporation knowingly permits a way or walk constructed upon one of its streets by a private person, and designed for the use of pedestrians, to remain and to be so used, the authorities, by their official acts inviting and inducing such use, the duty devolves upon the corporation to keep the way in proper repair as a sidewalk, and it is of no consequence that such way or walk was built of earth, instead of the usual materials.

That the city had practically recognized the walk and had assumed the duty of keeping it in repair, from the standpoint of common sense, admits of no question. It had constructed crosswalks to it at each end, and had thus invited the public to use it and, in effect, gave assurance that it was a public walk and safe to travel on. That the earth walk was defective is also beyond question. Everybody who passed by it, and was observing, noticed that it had caved and was broken down at the outer side. But as to the extent of the injury which Graham received there is a decided difference of opinion.

Whatever may be the facts the majority of our citizens believe that his injuries, whatever they are, were not caused in the main by his fall on the sidewalk, and that in truth he was injured but little if any thereby. There is, moreover, a good deal of indignation among citizens of the city over the case, and many express themselves concerning it in very severe terms. The STANDARD believes that the result is an injustice to the city and the tax-payers that Graham is not entitled to any such compensation.

HERE IS ANOTHER BLOW.

Since the foregoing was written the following notice has been served upon the city authorities named:

To the City of Albert Lea, Minnesota, and to H. H. Wilcox, Mayor, and Chas. A. Briggs, Clerk:

GENTLEMEN: —Take notice, that on the 26th day of October, A. D. 1891, Mary Sorenson, a minor child of the undersigned Andrew C. Sorenson, received serious and bodily injuries by and through a defective sidewalk on the east side of Madison avenue in the City of Albert Lea, Minnesota, opposite and contiguous to the lot and property occupied by John G. Brundin as a residence, and you are further notified that the undersigned Andrew C. Sorenson does and will claim damages for said injuries to his said minor child, Mary Sorenson, and that said Mary, Sorenson will also claim damages therefor.

Dated, January 23d, 1892. ANDREW C. SORENSON.

The attorneys in these cases, as in those of the Graham and Dudley cases, are Lovely & Morgan, and the city is again to be put to the expense of making a fight in the courts to protect the treasury and tax-payers.

How serious the girl's injuries are we are not advised, but are informed that she fell and hurt her stomach. There doubtless are doctors who will testify that she is injured for life, and other witnesses will swear that the crack in the sidewalk was a veritable death-pit but we do not share the alarm over the situation that is manifested by many of our best citizens, and which creates a general feeling of discouragement in the community.

No man who sincerely is desirous of the prosperity of Albert Lea will give aid or comfort to any unjust or outrageous prosecution, and no citizen of Freeborn county, who wants a good market, who realizes the benefits of a flourishing city and who reaps constant benefits from its business and prosperity, will knowingly contribute to bankrupt and ruin it. The day of exaggerated, speculative verdicts has gone by in Freeborn county, and we are confident that when people generally become posted as to the true situation, public sentiment will command that no further injustice shall be perpetrated. The feeling is so intense, however, that several leading citizens propose calling an indignation meeting, and it is evident that at last the community is thoroughly aroused to the calamity that is threatened through such suits.

Without assuming to pass on the merits of the claims in these new cases the STANDARD affirms, and it is a verity, that no city in Minnesota, little or big, possesses on the whole better sidewalks than those of Albert Lea, and no city in the State has exercised greater watchfulness and care in keeping its sidewalks in safe condition and repair than has this during the past year. It is discouraging to every citizen ambitious to promote the welfare and progress of the city, who is anxious and progress of the city, who is anxious to secure new business enterprises and make needed public improvements, to consider that the Graham and Dudley cases drained the treasury to the extent of $7,500. That sum would have constructed seven thousand feet of waterworks mains, extending the system into every part of the city it would have built a complete sewer system, or it would have paved Broadway from the court house to the lake.

Surely it is high time for tax-payers to realize the situation, for it strikes at the prosperity and even livelihood of the people, the poor as well as the rich, and it behooves all to unite to resist in all proper ways the imposition of any more unjust burdens.

And in this connection, if Albert Lea is to be inflicted with any more impositions, such as the cases named, public improvements may as well be stopped, and at the next session of the legislature an act should be passed repealing the chapter and restoring the

corporation to its former status as a part of the township of Albert Lea.

The STANDARD, as a representative of public interests, can no longer keep silent. It has a duty to perform, unpleasant though it be, and it will not shirk it. The situation is a grave one, and it becomes us fearlessly and fairly to discuss it to turn upon it the headlight of truth, and that we shall proceed to do.[12]

The *Standard* would not let go of the case, though it had ended. On February 24th it reported the latest gossip and took an unseemly swipe at John Lovely:

The Graham judgment of $4,000 against Albert Lea has been sold to the First National Bank, which will hold it as an investment. The total amount of the judgment including all costs will approximate $5,100. It comes to us very straight that Graham has received only $1,000 in full for "his share." Who has the other $3,000?

No wonder that John A. Lovely lives in one of the stateliest and most luxuriously furnished mansions in the State of Minnesota and that he is a director in a National Bank. [13]

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[12] *Freeborn County Standard*, January 27, 1892, at 1. In that same issue the *Standard* reported:

> John Graham, whose damage suit cost the city $6,000, and whom some of the doctors and expert witnesses swore was incurably injured, is at work as a laborer in Skinner's mill and is as well apparently as ever.

The actual "cost" to the city was far less than this estimate, according to an account of the city council proceedings in July:

> On motion of Alderman Brundln two city warrants were ordered issued, one $35.30, interest coupons to the First National Bank, and the other $4,596.20, the judgment in the Graham case, being amounts already paid.

Freeborn County Standard, July 13, 1892, at 6.
The notion that taxes would have to be raised to pay the judgments won by Lovely was rebuffed by the city attorney. *Freeborn County Standard*, July 20, 1892, at 1 ("Attorney Crane handed in a written opinion on the levying of a special tax. He quoted the statutes and city charter to the effect that no tax could be levied to pay a judgment except as by law provided, and as the Graham and Dudley judgments had been paid, a special tax to pay them would be illegal. The report was accepted and filed, and this seems to end the matter.").

[13] *Freeborn County Standard*, February 24, 1892, at 7.

In its issue the next week it repeated the fiction, as it turned out, that Graham received only $1,000:

> John Graham himself says that he only received $1,000 in full as his "share" of the grab in his suit against the city, thus confirming the report to that effect published in this paper last week. What do the jurymen who gave him the verdict think about it? [14]

Chapter Five

The last two items outraged Lovely because he believed they implied that he had cheated his client out of a fair share of the recovery. On March 3, 1892, his demand for a retraction was delivered to Harwood G. Day, the publisher of the *Standard*, as required by state libel law. [15] Day responded with a very long and defensive article (1,570 words), which included these self-servers:

> No person in our position and which the STANDARD occupies in the community, whose interest is identical with the welfare and prosperity of this city, could remain silent and perform his duty, in a case like this. . . .
>
> We trust we realize the sphere of a newspaper. We hope we are too honorable and wise to pervert it to evil uses. We know that an honest and fearless press is always the best and sometimes the only true exponent, defender and champion of the public and of the public's weal, and knowing this we long since put on our armor and decided to assume all the responsibilities incumbent on our position.

This highfalutin declaration of the mission of the *Standard* must be squared with its articles provoked by the Graham case. The public good the *Standard* "defended and championed" boiled down to vehement opposition to slip-and-fall claims against the city—that's all. Here is Publisher Harwood Day's response to John Lovely's threat of a libel suit:

MR. LOVELY IS DISPLEASED.

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[14] *Freeborn County Standard*, March 2, 1892, at 7.

[15] 1887 Laws, c. 191, § 1, at (effective March 2, 1887). It is posted in the Appendix, at 36.

He Perverts Our Language, thus forming Offensive Charges Which He Seems to Think We, Instead of Himself, should Retract—A Singular Legal Document.

To H. G. Day, Publisher of Freeborn County Standard.—Sir: —In your issue of the Freeborn County STANDARD under the date of February 24th, A. D. 1882, and on the said day, you published the following false, defamatory and libelous statement and matter, to-wit:

"The Graham judgment of $4,000 against Albert Lea has been sold to the First National Bank, which will hold it as an investment. The total amount of the Judgment including all costs will approximate $6,100. It comes to us very straight that Graham has received only $1,000 in full for "his share." Who has the other $3,000?

"No wonder that John A. Lovely lives in one of the stateliest and most luxuriously furnished mansions in the State of Minnesota and that he is a director in a National Bank."

And in your Issue of the Freeborn County STANDARD under the date of March 2d, A. D. 1892, and on the said day, you published the following false, defamatory and libelous matter and statement referring to the matter and statement above referred to and quoted under said date of February 24th, 1892, to-wit:

"John Graham himself says that he only received $1,000 in full as his "share" of the grab in his suit against the city, thus confirming the report to that effect published in this paper last week. What do the jurymen who gave him the verdict think about it?"

All of which said articles and statements contain false, defamatory and libelous matter. In each and both of these articles and in the publication of the same you intimate that I have either directly or indirectly received a greater amount or share as compensation from my client, the said John H. Graham, in his suit against the City of Albert Lea than I was entitled to, and that I have received illegal and exorbitant fees for mv services therein also that the firm to which I belong and the attorneys with whom I was associated in the case have received more than they were entitled to also that I have dealt unfairly, unreasonably and dishonestly with my said client John H. Graham also that mv client has only received from the judgment obtained by him against said City of Albert Lea one thousand dollars, being but one fourth of said judgment also that you have

received information from said John H. Graham, the plaintiff in said suit, that he has only received said sum of one thousand dollars as his share or interest in said judgment each and all of which said statements were and are false, defamatory and libelous.

This notice is served upon you pursuant to the provisions of the statute in such case made and provided (Chapter 191, Sec. 1, Gen. Laws, Minn. 1887) as a preliminary to a civil action by me against you for the publication of said false, defamatory and libelous matter in which you will have full opportunity to prove your assertions.

March 3rd, 1892. JOHN A. LOVELY.

The foregoing notice was served on us on the 3rd inst. It would appear from the notice itself that Mr. Lovely feels aggrieved at the remarks we have made in reference to what distribution has been made of the judgment recovered by Graham against the City of Albert Lea, and he brands certain statements published in our paper as "false, defamatory and libelous."'

None of these statements bear the construction that appears to have been placed upon them by Mr. Lovely, for we did not say or intend to say, or insinuate, that Mr. Lovely had been guilty of any conduct that forms an exception to that usually practiced by an attorney in the prosecution of suits of like nature. We concede the right to every man to demand and receive for his services all that he can fairly obtain, consistent with the character of the services and his relations to his client and the public.

We in nowise admit that the suit against the city was in its inception a just action. We think that the verdict, and the judgment based on such verdict, was an outrage to the tax-payers of this city; this, however, is a matter that twelve jurors have passed on, and, so far as the legal effect of the judgment be concerned, it is a finality, but this does not debar us from discussing the moral aspects of the case, or its abstract righteousness or unrighteousness. No person in our position and which the STANDARD occupies in the community, whose interest is identical with the welfare and prosperity of this city, could remain silent and perform his duty, in a case like this, and in performing that duty we have no apology to make to any living man, except by human inadvertence we may have done him an injustice. In whatever we have said with reference to this case, we

have acted from conscientious motives, without any feeling of malice towards the plaintiff or any of his attorneys, and only from a motive of expressing and only from a motive of expressing our honest sentiments in respect to the justice of this litigation. We believe this is a right conferred upon us by the law of the land, and it is one which, when in our judgment it is a duty, we shall always unhesitatingly exercise. In so far as Mr. Lovely thinks himself aggrieved by the publication to which he has called special attention in his notice, we have this to say: Our language has been clearly distorted and our meaning perverted. Whatever may be our private opinion, we did not and do not accuse him, "directly or indirectly of receiving a greater compensation" in any form than he was entitled to, or that he received "illegal or exorbitant" fees for his services, or that "the firm to which he belongs or the attornies with whom he was associated" have dealt "unfairly, dishonestly or unreasonably" with his client, for we recognize that under the law of this State, by an express statute to that effect, an attorney has a legal right to make any contract that he sees fit with his client, for compensation for his services, whatever may be the moral aspects of the case. We refuse to be so misconstrued, and repudiate the intention, words and meaning thus charged to us, and for which it would seem there is no foundation except an abnormal imagination.

We reaffirm the truth of the statement that John Graham has said that he only received $1,000 in full as his share of the judgment, but further investigation seems to show that he has told various stories about the matter, and from other information which appears to us quite reliable we learn that he received $1,500 clear of lawyers' and doctors' bills and other expenses and, not to be even in the least seemingly mistaken or unfair, we willingly concede and admit that he did clear $1,500 of the $4,000 verdict rendered in his favor but whether Graham has received $1,000 or more is to our mind entirely immaterial. We were discussing the distribution of the proceeds of the judgment and presented the fact, which seemed to be apparent and which we presume is not denied, that Mr. Lovely's fee was very profitable and probably large, and this is the only meaning that can

fairly be deduced from our language. We were calling the attention of this community and of the jury that rendered the verdict to these matters to enlighten their minds as to the original justice of such a demand against the city and the way in which it was satisfied.

If we were possessed of facts upon which to assert that Mr. Lovely's fees were exorbitant, and it became necessary as a public duty to do it, we would not hesitate to so characterize them, and if on information we believed, simply, that they were so, and if it should be required by our sense of public duty that we charge it and publish our belief, we would thereby only exercise a prerogative which a just, independent and free press possesses. And even this would not be libelous. This Mr. Lovely knows, and if he does not he ought to know it.

We have been thus explicit and lengthy because we want all to understand our position, and because we desire it to be known that in the performance of our duty we are above mere personalities, that we are not animated by prejudice, passion, spite or lack of candor.

We trust we realize the sphere of a newspaper. We hope we are too honorable and wise to pervert it to evil uses. We know that an honest and fearless press is always the best and sometimes the only true exponent, defender and champion of the public and of the public's weal, and knowing this we long since put on our armor and decided to assume all the responsibilities incumbent on our position. In every just cause we shall stand firm and not retract. The STANDARD shall not be muzzled, and it will persist and not be deflected or daunted in any course which in its good conscience it believes to be demanded by duty and the right. [16]

Two weeks later the *Standard* carried two stories on the same page about John Lovely. While the first does not name him, it quotes a resolution of the local Commercial Club "condemning" suits over "injuries from defective sidewalks." Without question the *Standard* was the force behind the adoption of these

[16] *Freeborn County Standard*, March 9, 1892, at 1.

resolutions. The second article describes the "gist" of the libel complaint of Lovely that was served by the sheriff on the publisher. From the *Standard,* March 23:

PERSONAL INJURY SUITS.

Opinion Concerning Them by Representative Business Men—Resolutions Unanimously Adopted by the Commercial Club.

At the regular meeting of the Commercial Club Monday evening the following resolutions, after a full discussion were unanimously adopted by a rising vote, and it is known that every absent member would vote the same way:

Resolved—That this Club condemns the suits which have been prosecuted and are threatened against this city on account of alleged injuries from defective sidewalks and maintains that they are a great and menacing detriment to its prosperity and improvement and its prosperity and improvement and are, if not entirely without just cause, at least unnecessary and a wrongful infliction to tax-payers.

Resolved—That we are advised and believe that the claims arising in such cases might have been and in the future will be settled by the city authorities upon a fair basis without litigation if the claimants had been and if they hereafter are disposed so to do and are not controlled by influences adverse to the interests of this community.

Resolved—That we deem it the duty of all good citizens to insist upon and aid in the settlement of all just claims against the city that all should unite to prevent the bringing and the unmerited success of suits based thereon, and we pledge the support of this Club in defending and maintaining the credit and welfare of Albert Lea and the general interests of Freeborn county through every reasonable and legitimate means at our command.[17]

[17] *Freeborn County Standard*, March 23, 1892, at 6.

Second article, same page:

TEN THOUSAND DOLLARS.

Will Satisfy Mr. Lovely and He Swears That He has been Damaged in That Sum inside of a Month—The Standard's Pulse is yet Regular, It Expects to have Heaps of Fun in this Highly Interesting World, and It Hopes All May Enjoy the Same Great Blessing.

On Friday, the 18th., the expected summons and complaint in the promised suit of Jno. A. Lovely against the editor of this paper was served by Sheriff Mitchell, and thus we are further informed in legal parlance of the claims which he makes against us. The grounds alleged are not essentially different than those contained in the demand for a retraction which was published in the STANDARD March 9, the basis being the two brief local items referring to the amount Graham received of his judgment against the city and the reference to the attorney fees.

Mr. Lovely charges us with malice in the publication of these items. We most decidedly deny it; no personal feeling entered into the matter; there was no occasion for it.

The gist of Mr. Lovely's complaint is that we have accused him of obtaining big or exorbitant fees and thereby he makes solemn oath that his business as an attorney has been injured to the extent of ten thousand dollars. The question naturally arises, if he has actually been damaged $10,000, since the first named item was published Feb. 24, in the brief period of a month, how can it be possible unless he charges and obtains big fees.

The plain fact is, it is all an effort to make a mountain out of a mole hill, and it is so viewed by every candid and fair-minded lawyer in the State, and by citizens generally who know about it.[18]

[18] Id. The story was noted in other newspapers around the state. From the *St. Charles Union*, March 25, 1892, at 2: "The papers are now served in the libel case of John A. Lovely vs. H. G.

Two more weeks passed before the *Standard* had another opportunity to complain how John Lovely controlled settlement negotiations in his personal injury suits. Somehow—probably from Graham himself—the newspaper came into possession of an agreement granting sole settlement authority of Graham's case to Lovely. Meanwhile, Lovely launched the Sorenson cases, about which the Standard reacted with alarm. From the front page of the *Standard*, April 6:

ANOTHER RAID.

The Sorenson Suits are Begun Against the City—Twelve Thousand Dollars are Demanded for a little Girl's Stumble on a Sidewalk—As Usual the "Injuries" are Chiefly of the Internal, Concealed and Awful Kind, from Which She will never Recover—Overtures and a Promise of Settlement are Rejected and the City Must Resist or go Into Bankruptcy.

The papers were served last Saturday in two personal injury suits against the city of Albert Lea based on injuries alleged to have been received by Mary C. Sorenson, an eleven-year-old daughter of Andrew C. Sorenson, the wheat buyer. The injuries are charged to have occurred Oct. 26, 1891, caused by a defective sidewalk alongside the lot of Jno. G. Brundin on the east side of Madison avenue, and it is averred that the girl while "lawfully traveling" on the sidewalk stepped into a defect and was thrown down, whereby she received permanent bodily injuries, to wit that her "back, spine and abdomen were wrenched and sprained," her "nervous and muscular system was seriously injured," and her right foot and ankle were "wrenched and bruised," all of which has been to her damage to the extent of ten thousand dollars.

Day, wherein the plaintiff sues for $10,000 damages for statements made in defendant's paper in connection with the case of J. H. Graham vs. the City of Albert Lea."

Even Publisher Day's selection of trial counsel was noted. E.g. *Minneapolis Tribune,* March 15, 1892, at 4 ("Hon. John A. Lovely, of Albert Lea, sues Editor Day, of the Standard, for libel. They will have a Lovely Day of it with Cy. Wellington to defend and enforce the alleged libel.").

The other suit is by Andrew C. Sorenson for loss of his daughter's services and for expenses, which he swears amount to two thousand dollars.

The woeful accident, as will be seen, is claimed to have been occurred last October, and very few and not even some of the nearest neighbors knew anything about it until three months afterwards. Certainly the city authorities knew nothing about it and it seems that it was purposely kept as quiet as possible. In any event the city authorities state that no definite claim or demand has been made by Sorenson that he has evaded the city's repeated overtures for a settlement, and that finally he promised representatives of the council that he would not sue until he had given the council a reasonable opportunity to make him an offer of settlement, and straightway proceeded to bring the suit, in clear violation of such promise. At least, it is so claimed by members of the council.

It is reported that the intention is to transfer the cases to the United States court on the ground that Sorenson is not a citizen of the United States. In any event is not likely that they can be tried at the May term of the district court, as there are jury cases ahead of it which will have to be tried and which will consume the entire term.

Lovely & Morgan, of course, are plaintiff's attorneys.

AN IRON-CLAD DOCUMENT.

The following document was served on City Attorney Crane and filed with the city clerk in the case of John H. Graham against the city, and it explains possibly why he violated this agreement to give the council an opportunity to settle his claim before suit, which he made with D. N. Gates, then mayor, and Alderman Ruble. It will be seen that he had absolutely divested himself of all authority to settle it.

If Sorenson has entered into a like iron-bound obligation the power to settle, no matter how fair and generous the council might be disposed towards him, is no longer in his hands.

"Know all men by these present, that I, John H. Graham, of Freeborn County, Minnesota, in consideration of one ($1.00) dollar to me in hand paid and other good and valuable considerations the

receipt whereof is hereby acknowledged, have made, constituted and appointed, and by these present do make, constitute and appoint,

"John A. Lovely of Albert Lea, Minnesota, my true, lawful and sole attorney for me and in my name, place and stead, to settle and compromise a certain action brought by me against the City of Albert Lea, Freeborn County, and State of Minnesota for damages for personal injuries to me, John Graham occurring on the 14th day of October D. 1890, and I hereby further authorize and empower my said sole attorney in fact to make such settlement, compromise or release of damages upon such terms as to him may seem best, and retain out of the money so received all attorneys' fees due to Lovely & Morgan as per contract by me entered into in writing, hereby giving and granting and relinquishing unto my said attorney in fact John A. Lovely, for the considerations aforesaid the sole and only power and authority to settle and compromise and release damages of said action and not reserving unto myself any power whatever to in any way settle, dismiss, adjourn, compromise or release the damages of said action, but granting all said power to my said sole attorney and to do and perform all and every act and thing necessary to be done in and about were personally present hereby ratifying all that my said attorney may do in the premises by virtue hereof this said power of attorney, in consideration of the premises, is irrevocable.

"Witness my hand and seal this 29th day of December, A. 1891.

JOHN H. GRAHAM."

The council held a meeting Monday evening to consider the report of committees and to decide on the best course to pursue. It appears that the overtures for a settlement have been ignored, it evidently being the purpose from the start to force the cases into court for a big haul. The council, as will be seen, is yet ready to proceed in any proper way to secure a just settlement, and it remains to be seen whether their efforts will meet with a fair response from Sorenson's lawyers, the opinion being that he has entered into a contract giving them sole and absolute authority to act in the matter. Truly it is a remarkable state of affairs. [19]

[19] *Freeborn County Standard*, April 6, 1892, at 1. The Sorenson cases, which the *Standard* prophesied would drive the city into bankruptcy, were settled the next month. From the *Standard*, May 4, 1892, at 5:

Chapter Six

In December 1892, John Lovely's libel lawsuit against Harwood G. Day was settled with the assistance of John Whytock, a former county attorney and former partner of William Todd, who had just been elected on the Republican ticket to the Tenth Judicial District Court. [20] Although retained by Lovely, he had the trust of Day. He seems to have acted as mediator to bring the case to a close. The publisher agreed to print a "retraction" about the nature of Lovely's retainer with Graham that met with Whytock's (and Lovely's) approval. They

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> The two suits against the city for alleged injuries from a defective sidewalk to the Sorenson girl have been settled with Lovely & Morgan for $400. The amount claimed in the two actions was $12,000.

The Editor of the *Standard* could not resist speculating on how little Lovely's clients received from jury awards. Here is his account of a case tried during the July 1892 term:

> Robert Croom vs. C. M. & St. P. R'y. Co., $2,000 claimed for personal injuries, Lovely & Morgan appeared for the plaintiff and H. H. Field and W. E. Todd for the defendant. Jury found for the plaintiff in the sum of $1,000.
>
> The man was undoubtedly injured and very seriously, but the railway company contend that it was his own fault. This is the opinion of many disinterested people, and the case will be appealed. If the case is affirmed by the Supreme Court, Croom will probably get three or four hundred dollars, and the expenses and the lawyers' share will likely absorb the rest. Croom, it should be understood, did not receive his injury in Freeborn county, and although he is being supported as a pauper at the poor farm, this county is not his proper residence. The taxpayers of Freeborn county, moreover, will in the end, if the judgment is affirmed, be compelled to pay every dollar of it, besides all the costs and expenses, for it must come from the earnings of the railroad company, and the company will be likely to make the loss good from the people who are obliged to patronize it.

Freeborn County Standard, June 8, 1892, at 5. The case was appealed to the Supreme Court, which affirmed the judgment. *Robert Croom v. Chicago, Milwaukee & St. Paul Railway Co.*, 52 Minn. 296, 53 N.W. 1128 (1893) (Mitchell, J.).

[20] Whytock (1835-1898) was elected on November 8, 1892:

> John Whytock.....8,782
> Henry R. Wells.....4,318

1893 Blue Book, at 480-1. He died two weeks after being re-elected in November 1898.

A month before the 1892 election, Lovely endorsed Whytock, which earned sneers at the *Standard,* October 12, 1892, at 6 ("Mr. Lovely has decided to declare himself for the Republican party and Judge Whytock, and in an interview in the Enterprise this week, takes his stand at last for the g. o. p. Thus the STANDARD'S object in publishing the current rumors of his apostacy (sic) has had the desired effect and the world again regularly revolves on its axis.").

did not foresee—or perhaps did not care—that Day would bury his retraction under a misleading headline and then proclaim "our discussion of the case was from a public standpoint and entirely in the public interest." [21]

LOVELY BACKS DOWN.

Dismisses His $10,000 Libel Suit, Pays the Costs and is "Satisfied"—The Expected Happens and the Standard Continues Business at the Old Stand.

The case brought against us by John A. Lovely has been settled upon terms satisfactory to both parties and we say, upon inquiry and investigation we have found that the contract between Mr. Lovely and his client, John H. Graham, was one that was entirely satisfactory to Graham and perfectly legal and allowable under the law, and all that we said in reference to the affair was not directed against Mr. Lovely personally, but said by way of comment on a case that attracted great interest in this locality.

In our retraction heretofore published we made in substance the above statement and we have no objection whatever to repeating the same.

Upon the request of our friend Judge Whytock, representing for this purpose Jno. A. Lovely, and the concurrence of our counsel we publish this, but this is not all.

When it is remembered that in the explanation heretofore made by us in this case we freely admitted that the contract with Graham

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[21] A different justification for the *Standard's* articles appeared on March 9 in its lengthy response to Lovely's demand for a retraction. There it said in part:

> We were discussing the distribution of the proceeds of the judgment and presented the fact, which seemed to be apparent and which we presume is not denied, that Mr. Lovely's fee was very profitable and probably large, and this is the only meaning that can fairly be deduced from our language. We were calling the attention of this community and of the jury that rendered the verdict to these matters to enlighten their minds as to the original justice of such a demand against the city and the way in which it was satisfied.

See *supra* note 16.

was technically legal that neither we nor any one has even intimated that what he received was not "satisfactory" to him, the fact being entirely immaterial, and that we have persistently maintained that our discussion of the case was from a public standpoint and entirely in the public interest, it will be understood how easily Mr. Lovely is "satisfied," and how complete is the collapse of his case.

Judge Whytock, whose name had been associated in the case, refused to appear further in it, but consented to represent Mr. Lovely to negotiate for the dismissal of the case, being given full and unrestricted authority to dispose of it as he might please. Cyrus Wellington and Mr. Todd represented us and were ready and in fact keenly desirous, as were we, to dispose of the case by trial, and at no time since its inception had they or we entertained any misgivings as to the outcome.

We refused to make any further "retraction" than we had already published, and insisted that without other terms, the case must be dismissed, Lovely paying his own costs, or it should go to trial. Our demands were complied with; the case did not go to trial; it was dismissed without a cent's damages or costs to us and that ends it.

We have no Apologies to make to John A. Lovely. We shall discuss public questions with the same freedom in the future as in the past, and if he becomes unfortunately involved therein he must take the consequences.

And now as we have given a little of our previous explanation in the opening of this article we will add the conclusion of it:

"In every just cause we shall stand firm and not retract. The STANDARD shall not be muzzled, and it will persist and not be deflected or daunted in any course which in its good conscience it believes to be demanded by duty and the right."

The STANDARD is not muzzled.

And it is ready for "business" at the old stand. [22]

[22] *Freeborn County Standard,* December 21, 1892, at 4.

Chapter Seven

Other newspapers reprinted the *Standard's* retraction, usually with some background information or editorial commentary.

Albert Lea Enterprise:

The Lovely – Day Libel Case

There is so much inquiry as to the nature of the settlement of the case of John A. Lovely vs. H. G. Day for libel that we have secured from the clerk of court a copy of a portion of the stipulation. It contains the information better than we could have synopsized it, and is as follows:

> * * * The case brought by Mr. lovely against us has been settled upon terms satisfactory to both parties and we say upon inquiry and investigation we have found that the contract between Mr. lovely and his client, John H. Graham, was one that was entirely satisfactory to Mr. Graham and one that was perfectly legal and allowable and fair under the law.
>
> And all that we say in reference to the affair was not directed against Mr. Lovely personally, but said by way of comment on a case that attracted great interest in this locality.
>
> In our retraction, heretofore published, we made in substance the above statement and we have no objection whatever repeating the same.

Cy. Wellington, the attorney of the Great Northern Railway Co., came down as attorney for defendant and assisted in securing the settlement of the case. The above is certainly a full retraction and might as well have been made before, for the humiliation is certainly as complete now as it was then.[23]

[23] *Albert Lea Enterprise*, December 22, 1892, at 3.

From the *Princeton Union*:

Settled Out of Court.

Albert Lea, Minn., Special, Dec. 20.

The case of John A. Lovely, one of the best known attorneys in the state, vs. H. G. Day, editor of the Freeborn County Standard, for libel, excited unusual interest here.

The case was settled before going to trial, the defendant agreeing to the following:

"We have found that the contract between Mr. Lovely and his client, John H. Graham, was one that was entirely satisfactory to Mr. Graham, and one that was perfectly legal and allowable and fair under the law. And all that we said in reference to the affair was not directed against Mr. Lovely personally, but said by way of comment on a case that attracted great interest in this locality."

The libel was based upon charges of Mr. Lovely extorting an enormous fee from John H. Graham, who had a suit and recovered $4,000 from the city of Albert Lea for personal damage. Mr. Lovely demanded a retraction but was refused, and so began suit.

Cy Wellington was Mr. Day's attorney.[24]

St. Charles Union:

The case of John A. Lovely vs. H. G. Day, of the Albert Lea Standard, has been adjusted so that it is dismissed. The case was for libel and Mr. Day makes a complete retraction.[25]

Mower County Transcript:

THE somewhat celebrated libel case of John A. Lovely against H. G. Day, editor of the Albert Lea Standard, was settled and dismissed last week, the plaintiff paying his own cost. Don't monkey with a buzz saw, gentlemen.[26]

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[24] *Princeton Union*, December 22, 1892, at 3. This story was reprinted in the *Spring Valley Mercury*, December 22, 1892, at 3, the *Willmar Argus*, December 22, 1892, at 1, and *Alliance Standard* (Willmar), December 23, 1892, at 5.

[25] *St. Charles Union*, December 23, 1892, at 4.

[26] *Mower County Transcript* (Austin), December 21, 1892, at 4.

Conclusion

An unusual case indeed.

When a newspaper goes on a crusade to protect the public weal, it always directs its considerable resources to investigate and expose government corruption or waste, corporate shenanigans, vice and other serious subjects. An informed public results. The press has always trumpeted how it has carried out this responsibility in the face of opposition from the government, other adverse forces and, in the late 19th and early 20th centuries, libel lawsuits.

For reasons that remain cloudy, in 1892 Harwood G. Day became incensed by lawsuits John A. Lovely brought against Albert Lea on behalf of residents who claimed they were injured while walking on defective city sidewalks. Day used his position as owner, publisher and editor of the *Freeborn County Standard* to print some terms of a private employment contract between Lovely and his client John Graham, guess about the disbursement of a jury award and wage a war against the "injustice" of "exaggerated, speculative verdicts" in personal injury suits against the city. Day soon found himself on the wrong end of a libel lawsuit and was forced to print a retraction.

Looking at this litigation from a distance of over a century, it is hard to see how Lovely could prove his claim. The implications of dishonesty he drew from the newspaper articles were tenuous. How satisfied would he have been with a one cent verdict? It is harder to justify Day's conduct. He tried to turn the suit over his misuse of his position of publisher into an attack on the freedom of the press. "The STANDARD shall not be muzzled," he bellowed. The editor of the *Enterprise* and many of the readers of the *Standard* must have chuckled and shook their heads over that line.

Appendix

MINNESOTA REPORTS

VOL. 48

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA

JANUARY—MARCH, 1892

CHARLES C. WILLSON
REPORTER

ST. PAUL
WEST PUBLISHING CO.
1893

JUDGES

OF THE

SUPREME COURT OF MINNESOTA

DURING THE TIME OF THESE REPORTS.

HON. JAMES GILFILLAN, CHIEF JUSTICE.
HON. WILLIAM MITCHELL.
HON. DANIEL A. DICKINSON.
HON. CHARLES E. VANDERBURGH.
HON. LOREN W. COLLINS.

CHARLES P. HOLCOMB, ESQ., Clerk.

ATTORNEY GENERAL,
HON. MOSES E. CLAPP.

JOHN H. GRAHAM *vs.* CITY OF ALBERT LEA.

Argued Dec. 21, 1891. Decided Jan. 21, 1892.

Sidewalk—Duty of City to Keep in Repair.—If a municipal corporation knowingly permits a way or walk constructed upon one of its streets by a private person, and designed for the use of pedestrians, to remain and to be so used, the authorities by their official acts inviting and inducing such use, the duty devolves upon the corporation to keep the way in proper repair as a sidewalk; and it is of no consequence that such way or walk was built of earth, instead of the usual materials.

Other unimportant matters considered and disposed of.

Appeal by defendant city of Albert Lea from an order of the district court of Freeborn county, *Farmer*, J., made August 10, 1891, refusing a new trial.

Action by John H. Graham against the city of Albert Lea to recover damages for personal injuries received about half past 7 o'clock in the evening, October 14, 1890, while walking east on the south side of Clark street, in the westerly part of that city. The issues were tried May 20, 1891. Plaintiff had a verdict for $4,000. The city charter is Sp. Laws 1889, ch. 10, p. 294. The assignments of error mentioned near the end of the opinion were as follows:

(4) The record shows that plaintiff was guilty of negligence which contributed to the injury.

(5) The verdict of the jury was excessive, and was the result of prejudice and passion.

(6) The court erred in submitting to the jury the question of whether the place of the alleged injury was a sidewalk.

(7) The court erred in charging that, in determining the question whether the place in controversy was a sidewalk, the jury might consider whether Mr. Morin, in dedicating this street and building this sidewalk, designed it as a sidewalk, and it was dedicated to the public as a sidewalk.

(8) The verdict was contrary to the charge of the court that if

the jury find there was a walk four (4) feet wide, in good repair, at the time of the accident, then plaintiff cannot recover.

W. N. Crane and *Robert D. Russell*, for appellant.

The place at which the accident occurred is not a sidewalk for the maintenance and repair of which, as such, the city is responsible. It is not claimed that the city has ever done any work itself, or through its officers, to build or construct a walk at the place in controversy. The view of the court below was, if the owner left his embankment in such shape that the public could walk over it and did walk over it, then he dedicated it to the city for a sidewalk, the public accepted it, and the city became responsible for it as a sidewalk, no matter how it was made, or the material of which it was made, or that it was simply the hill partly cut down, and no matter what the provisions of the charter or ordinances were with reference to sidewalks. This was error.

One of the limitations in the charter of Albert Lea is that no action shall be maintained for any insufficiency of the ground where the walks are usually constructed, where no walk has been built. It reads as follows: "Nor shall any such action be maintained for any defect in any street until the same shall have been graded and open to travel, nor for any insufficiency of the ground where the sidewalks are usually constructed when no sidewalk is built. Sp. Laws 1889, ch. 10, subch. 6, § 9, p. 321. Similar provisions are found in the charters of other cities of the state, but no case has been before this court involving this provision. The court below recognized the force of the provision, and said there would be no question in this case if this ground where this sidewalk was claimed to be built had been left in its native and original form. In such a case the limitation of this statute would apply, and if the pedestrian had wandered up over it, and had got into the hole and been injured, he would say that this limitation would apply, and that such a plaintiff could not recover. *City of St. Paul* v. *Seitz*, 3 Minn. 297, (Gil. 205;) Dill. Mun. Corp. (4th Ed.) § 94; *Attorney General* v. *City of Boston*, 142 Mass. 200; Morrill, City Neg. 84; *Saulsbury* v. *Ithaca*, 24 Hun, 12, 94 N. Y. 27; *Hines* v. *City of Lockport*, 50 N. Y. 236; *City of Lansing* v. *Toolan*, 37 Mich. 152; *Darling* v. *City of Bangor*, 68 Me. 108; *City*

of Marquette v. *Cleary*, 37 Mich. 296; *Goeltz* v. *Town of Ashland*, 75 Wis. 642.

The negligence of the plaintiff contributed to the injury. He knew the condition of the locality as well as any one. There was a light 80 feet ahead of him right in front of the pathway. He was walking at a pretty good gait when he fell, and was talking to Jerry Rowan, who was with him. No witness puts the washing away of the earth at more than two feet from the outside. *City of Chicago* v. *Bixby*, 84 Ill. 82; *Dubois* v. *City of Kingston*, 102 N. Y. 219; *Forker* v. *Sandy Lake Borough*, 130 Pa. St. 123.

Walking hastily or negligently, or knowing of a defect and being able to avoid it by taking the other side of the street, constitutes a bar to recovery. *Lovenguth* v. *Bloomington*, 71 Ill. 238. The walking in an absent-minded, inattentive, negligent manner, and so stumbling over an obstruction which a prudent person could have avoided, is a bar. *Vicksburg* v. *Hennessy*, 54 Miss. 391; Morrill, City Neg. 134.

The verdict is excessive, and would not have been rendered except for the passion and prejudice of the jury. It is true that the amount of damages in a case of this character is largely in the discretion of the jury, yet that discretion must be exercised with prudence. The damages are merely compensatory. *Gunderson* v. *Northwestern Elevator Co.*, 47 Minn. 161; *O'Malley* v. *St. Paul, M. & M. Ry. Co.*, 43 Minn. 289; *Hutchins* v. *St. Paul, M. & M. Ry. Co.*, 44 Minn. 5.

Lovely & Morgan, for respondent.

It was not essential that the city council should have formally adopted the sidewalk in question to render the city liable for injuries caused by its defective condition. The place of the injury was within the limits of a public street. The street had been graded at the particular spot where the plaintiff was hurt. Such sidewalk had long been extensively used and traveled by the public. The officials of the city had built and connected it on either end with plank cross walks at grade, thus inviting the public to use it for sidewalk purposes. This was sufficient to show that it was a legal sidewalk. *Shartle* v. *City of Minneapolis*, 17 Minn. 308, (Gil. 284;) *Lindholm* v. *City of St. Paul*, 19 Minn. 245, (Gil. 204;) *Furnell* v. *City of St. Paul*, 20 Minn. 117, (Gil. 101;) *Estelle* v. *Town of Lake Crystal*, 27

Minn. 243; *Bohen* v. *City of Waseca*, 32 Minn. 176; *Moore* v. *City of Minneapolis*, 19 Minn. 300, (Gil. 258;) *Cleveland* v. *City of St. Paul*, 18 Minn. 279, (Gil. 255;) *Young* v. *Waterville*, 39 Minn. 196.

Municipal corporations are nowhere limited to the use of wood in building a sidewalk, but may adopt any suitable substance for that purpose. 2 Dill. Mun. Corp. § 796, (635;) *Burnham* v. *City of Chicago*, 24 Ill. 496; *Burlington & M. R. R. Co.* v. *Spearman*, 12 Iowa, 112; *O'Leary* v. *Sloo*, 7 La. Ann. 25; *In re Phillips*, 60 N. Y. 16.

Defendant knew nothing of the defective condition of the walk at the time he passed over it, which was at night, when the use of his eyes would have been of no avail.

COLLINS, J. This was an action brought to recover for personal injuries received in the year 1890 in front of what is called the Morin block or tract of land, on the southerly side of Clark street, in the city of Albert Lea. On the east of this block is Adams street, on the west is Grove, both crossing Clark at right angles, about 300 feet apart. The street last mentioned was brought to grade by the street commissioner in 1886, the cut at the point in question being several feet in depth, and at the same time a plank walk was laid upon its northerly side. Since then it has been one of the main thoroughfares of the city. No plank walk was laid in front of the Morin property, but its owner, Mr. Morin, who was then an alderman, and as such had charge of the grading, employed the street commissioner to plow a few furrows on top of the bank, so that it might be terraced down, and a more convenient way made for pedestrians. Morin then, at his own expense, cut down and leveled off a walk about eight feet wide, surfaced it with gravel, and, with a slope at each end, brought it down to conform with the grade of the three streets before mentioned. The city then constructed cross walks over Adams street from the east end, and over Clark from the west end, of the walk so built by Morin, so that it was given the appearance of a continuous way or walk for foot passengers, and it was so used for more than four years before plaintiff was injured. His injuries, inflicted in the nighttime, were caused by stepping into a hole which had first been made by heavy rains, at a point where the walk was about seven feet above the street surface. The principal contention of the appellant

city is that the testimony failed to establish the existence of a sidewalk in front of the Morin property, or, if there was such a walk, that it was not one for the repair or maintenance of which it was responsible in any degree. The nature of the way has been partly described. From Adams street, going westerly, the ascent was gradual towards the center of the block to the highest point, and thence the descent was easy to Grove street. The surface was leveled off to a width of some eight feet, and covered with gravel, that it might be walked upon with less difficulty. Above it, from one to three feet, was the surface of the abutting premises used by Mr. Morin for residence purposes. At each end of this open way he had caused it to be brought down gradually to the street grades, and over the streets on each side cross walks of plank had been put in by the authorities so as to connect the graveled walk with plank sidewalks built by order of the city council, thus giving to it the appearance of being a part of the system. In this manner the public had been invited and induced to use, and for more than four years prior to the accident which befell the respondent had used, this place as a public thoroughfare, as a sidewalk. This word "sidewalk," as used in this country, does not mean a walk or way constructed of any particular kind of material, or in any special manner, but ordinarily it is used for the purpose of designating that part of the street of a municipality which has been set apart and is used for pedestrians, as distinguished from that portion set apart and used for animals and vehicles. The right to regulate the width, materials, and construction of all sidewalks within the city limits was conferred upon the council by the charter, and with this provision came the right to accept and adopt a walk made of earth. It could make no possible difference to the public, nor could it affect the rights of individuals, that materials more generally used did not enter into its construction. The city authorities so acted in reference to this walk as to hold it out to the people as a public thoroughfare, and therefore assumed the duty of keeping it in repair. It was placed in the street to be used by the public as a part of it, and thereupon it became incumbent upon the corporation permitting it to remain, and to be so used, to see that it was in a safe condition for such use.

The case, on this feature, is not essentially different from *Estelle*

v. *Village of Lake Crystal*, 27 Minn. 243, (6 N. W. Rep. 775.) And as to the general proposition that where a municipality permits a private citizen to build a sidewalk in front of his premises, and the same to be used by the public, the duty devolves upon the corporation to see that it is kept in proper repair. See *City of Champaign* v. *McInnis*, 26 Ill. App. 338; *Weare* v. *Fitchburg*, 110 Mass. 334; *Saulsbury* v. *Village of Ithaca*, 94 N. Y. 27; *Potter* v. *Castleton*, 53 Vt. 435; *Foxworthy* v. *City of Hastings*, 25 Neb. 133, (41 N. W. Rep. 132;) *Orme* v. *Richmond*, 79 Va. 86. The rule of law laid down in the cases above cited has not been seriously questioned by appellant, but it urges that no liability to plaintiff exists because of that portion of its charter which provides that actions shall not be maintained against it on account of injuries received in consequence of "any insufficiency on the ground where the sidewalks are usually constructed, where no sidewalk is built." This language is not very lucid, but, from what has been stated, it is evident that the facts to which the same might be applied are not now before us; for it was established upon the trial of this action that a way of proper width, and of material which served the purpose, had been built for sidewalk uses; that the city authorities had recognized its proposed use by connecting it with other sidewalks; and that with their knowledge it had been more or less used as a sidewalk by footmen having occasion to go that way for a number of years. It is further urged that plaintiff should not be allowed to recover because guilty of contributory negligence, and also because the walk at the place where he was hurt was shown to be more than four feet wide outside and independently of that part which had been washed away. There was no testimony on which could be founded the assertion that plaintiff contributed to defendant's negligence when it failed to seasonably repair the walk in question; and in reference to the other point, in addition to the suggestion that the argument of counsel is based upon the assumption that the ordinance prescribed the width of walks upon Clark street at not *more* than four feet, when, in fact, it was ordained that sidewalks upon that particular street should not be *less* than four feet wide, it may be said that it would be very remarkable if the duty of municipal corporations as to its sidewalks could be discharged by proper

care and diligence with respect to a part lengthwise, leaving the remainder wholly uncared for and unrepaired. We do not think that the assignments of error numbered from four (4) to eight (8) inclusive, and those relating to the rulings of the court when receiving the plaintiff's proofs, need to be discussed. There was no prejudicial error in any of the rulings. The fifth (5) assignment of error goes to appellant's claim that the verdict against it was excessive in amount. We are of the opinion that it was large, but cannot say that it was not justified by the testimony of the medical men who were sworn in his behalf.

Order affirmed.

(Opinion published 50 N. W. Rep. 1108.)

The following law, passed by the 25th Legislature (1887), was cited by John Lovely in his letter demanding a retraction from Editor Day.

CHAPTER 191.

[H. F. No. 160.]

AN ACT TO REGULATE ACTIONS FOR LIBEL.

308-191
131. . 89
41-nw 937

Be it enacted by the Legislature of the State of Minnesota:

Libel suits.

308-191
40-31 . 117

SECTION 1. Before any suit shall be brought for the publication of a libel in any newspaper in this state, the aggrieved party shall, at least three (3) days before filing or serving the complaint in such suit, serve notice on the publisher or publishers of said newspaper at their principal office of publication, specifying the statements in the said articles which he or they allege to be false and defamatory, if it shall appear, on the trial of said action, that the said article was published in good faith, that its falsity was due to mistake or misapprehension of the facts and that a full and fair retraction of any statement therein alleged to be erroneous was published in the next regular issue of such newspaper, or within three (3) days after such mistake or misapprehension was brought to the knowledge of such publisher or publishers, in as conspicuous a place and type in such newspaper as was the article complained of as libellous, then the plaintiff in such case shall recover only actual damages. *Provided, however,* That the provisions of this act shall not apply to the case of any libel against any candidate for a public office in this state, unless the retraction of the charge is made editorially in a conspicious manner at least three (3) days before the election.

Damages.

SEC. 2. The words "actual damages" in the foregoing section shall be construed to include all damages that the plaintiff may show he has suffered in respect to his property, business, trade, profession or occupation, and no other damages whatever.

When act to take effect.

SEC. 3. This act shall take effect and be in force from and after its passage.

Approved March 2d, 1887.