Syllabus.

The effect of this provision is decisive. No case more proper than the one before us, for its application, can be presented.

The judgment below is

AFFIRMED, WITH COSTS.

ROBBINS *v.* CHICAGO CITY.

1. Parties having notice of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if instead of doing so they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently turn round and evade the consequences which their own conduct and negligence have superinduced.
2. The term "parties," as thus used, includes all who are directly interested in the subject-matter, and who had a right to make defence, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment.
3. Express notice to defend is not necessary in order to render a party liable over for the amount of a judgment paid to an injured plaintiff. If the party knew that the suit was pending, and could have defended it, he is concluded by the judgment as to the amount of the damages. *Chicago City* v. *Robbins* (2 Black, 418), affirmed.
4. Absence of objection by municipal officers to a person's building an area in a public sidewalk, may infer a permission to build the area but cannot infer a permission to leave it in a state dangerous to persons passing by.
5. A person building a storehouse on a street, who, in consequence of the city's raising the carriage-way of the street, raises a sidewalk so as to make it conform to the grade of the carriage-way—such person obtaining by his mode of raising the sidewalk, vaults and an area for the benefit of his building—does not do a public work, nor relieve himself from the penalty of making a nuisance if a nuisance is made by what he does.
6. In a suit caused by a person's falling into an area in a public sidewalk, a declaration charging that the defendant "*dug*, opened, and *made*," the area is sustained by proof that he formed it partially by excavation and partially by raising walls.
7. Where work done on a public highway necessarily constitutes an obstruction or defect in the highway which renders it dangerous as a way for travel and transportation unless properly guarded or shut out from public use, in such case a principal for whom the work was done cannot defeat the just claim of a municipal corporation which has had to pay

damages, or of a private party who has suffered injury, by proving that the work which constituted the obstruction or defect was done by an independent contractor. *Chicago City* v. *Robbins* (2 Black, 418), affirmed.

ERROR to the Circuit Court for the Northern District of Illinois.

This was an action on the case brought by the city of Chicago against Robbins. The declaration alleged that the city had by law exclusive control over the public streets and was bound to protect them from encroachment and injury. That Robbins owned a lot on the corner of Wells and Water Streets, and wrongfully "*dug, opened, and made*" an area in the sidewalk adjoining, and left it so unguarded that one Woodbury fell into it and was severely injured; that Woodbury had recovered, for his injuries, $15,000 damages against the city, which sum the city had paid, and which, though the city had been primarily liable for it, Robbins was bound to refund. Plea, the general issue.

The case was this:

Robbins owning an unimproved lot, at the southeast corner of Wells and Water Streets, in Chicago, contracted, in February, 1856, with one Button to build a storehouse on it; Button's principal work being the masonry, and there being seven different contractors on the building in all, on different parts of it. The whole was under charge of an architect appointed by Robbins, the duty of which person was to see that the work was done according to contract.

The city had, in 1855, ordered the grade of Wells Street to be raised about seven feet and the *carriage*-way to be filled with earth. This improvement—as Robbins wished to have vaults to his new store—rendered necessary a curb-wall from the natural surface of the ground to the height of the grade. By its position—about sixteen feet from the building—this wall would give, so far as the space beside it was covered over (an extent of about eleven feet), a vault for storage, and where open—as five feet would be left by another or area-wall—an area immediately adjoining the edifice, by means of which light and air would be given to it. En-

croachments on the street to the width of five feet were apparently allowable by the city ordinance.

In making this area there was some *excavation or digging away* of the natural soil, but the testimony of Button tended to show that what earth was thus removed was replaced by sand and other material used in flooring the space, and that the principal space was procured by the raising of the street and the erection of the wall and the edifice beside it. The depth of the space was seven or eight feet.

By his contract, Button was to be liable for any violation of the city ordinances in obstructing the sidewalks or for accidents arising therefrom; but there was no specific provision that he or any other contractor should provide proper lights or guards. There were lamps at a bridge not very far off, and one at an alley sixty-four feet from the area.

Possession of the ground was given to Button on the 1st of April, 1856, and the excavation and walls making the space were in effect raised some time during the spring; the city about the same time filling the carriage-way with earth.

Button, by the terms of his contract, was to finish his work by the 1st September, 1856, but he did not in fact complete it till February, 1857. However, the sidewalk—eleven feet—which was made by broad flagging stones placed over the two walls, was finished in the autumn; the area, which was intended to be covered with iron grating, and which when so covered would have been thrown, in a manner, into the sidewalk, not being as yet so covered.

In all respects, however, except this protection of grating to passers by, the area, it seemed, was substantially finished and ready to be covered by grating before the 19th of December. With the grating Button had nothing to do; that being a matter, with the rest of the iron-work of the building, contracted for by another person.

From the time that the area was made until the grating was put there, it was covered, as the whole space, before the sidewalk was completed, by laying flagging, had been

more or less by joists, the covering being sometimes very slight, and the area—which ran along the whole side of the building, one hundred and fifty feet—sometimes wholly *un*-covered.

Robbins was in Chicago, and during the summer and early autumn occasionally at the building. Later in the season, when ice was on the sidewalk, the city superintendent spoke to him about the dangerous condition of the area; suggested a mode in which, at a small cost, it could be made safe; telling him, at the same time, that if it happened any time to be sleety, and people should be passing by his building rapidly, and the covering was not attended to, somebody would be hurt—'a neck or a leg broke'—and the city have damages to pay.

To this Robbins replied, that it was "more the contractor's business than his," or was "wholly the contractor's business," but that he would speak to him. Previously to this the chief clerk of the superintendent's office, by direction of the superintendent, had written to Robbins, giving him notice of the dangerous condition of the place; and the clerk and superintendent, who were often in that neighborhood, and were struck with this condition, had, themselves, once or oftener, covered it with plank. The contractor was told about it also, and he spoke several times to his foreman on the subject.

On Sunday evening, December 28th, 1856, the night being stormy, Woodbury, who was passing the place, and in walking had to face the storm, fell down the area, which had been left or had become uncovered from Saturday night, and was severely hurt. He soon after brought suit against the city for damages.

The city attorney, Mr. Marsh, whose duty it was to defend the suit, now applied to Robbins to assist him in procuring testimony. Robbins told him of one Livingston, who had boarded at the same place with Woodbury at the time of the accident, whose idea was that Woodbury's injuries were not so great as he pretended, and who would therefore be a good witness for the city. Robbins promised

Statement of the case.

to write to him, and afterwards informed Marsh that he had done so. The day of the trial or the day before it, Marsh, casually meeting Robbins at the foot of the stairway of the court-house, remarked to him that the suit was about to be tried, or was coming on; but he did not tell him in what court the suit was, nor did he ever give Robbins any notice that the city would look to him for indemnity for what it might have to pay Woodbury; he "never having talked with Robbins in reference to the case with any such idea as that," the only object being to prepare the defence. Marsh did not state to Robbins that he was the city attorney, but the parties were long and intimately acquainted with each other, meeting almost daily, and Marsh presumed as of course, that Robbins knew that fact.

Woodbury recovered in his suit $15,000 damages, which the city paid.

A provision of the city charter in force at the time when Robbins built his area, declared that

"All owners in front of whose premises the common council should direct sidewalks to be constructed, should make such sidewalks at their own cost, and if not so made, that the council might make them and assess the cost against the premises."

The controversy had already been before this tribunal, when a judgment in favor of Robbins had been reversed.*

The court below now charged the jury, in substance, as follows:

"The law is, that although the city is primarily liable for an injury suffered by reason of the dangerous condition of the streets and sidewalks, yet the corporation has a remedy over against the party that is in fault, and has so used the streets and sidewalks as to produce the injury.

"The question, then, is, whether Robbins is answerable to the city for the judgment recovered by Woodbury.

"If it was through the fault of Robbins that Woodbury was injured, he is concluded by the judgment recovered against the

* Chicago City *v.* Robbins, 2 Black, 418.

city, if he knew that the suit was pending and could have defended it.

"It is not necessary that the city should have given him an express notice to defend the suit, nor is it necessary that the city should have notified him that it would look to him for indemnity. If Marsh, the attorney for the city, told him of the pendency of the suit, what it was for; told him of the day of the trial, and talked to him about the testimony of a witness, he is as much chargeable with notice as if he had been directly told that he could contest Woodbury's right to recover, and that the city would look to him for indemnity.

"It is not requisite that Marsh should have *informed* him that he was city attorney. If Robbins knew the fact, he did not need to be informed of it.

"It is urged that Robbins was not informed by Marsh, in what particular court the action was pending. This was not necessary. When Robbins was told that Woodbury had sued the city for falling into an area which he had built, then it was his duty to have ascertained in what particular court the action was to be tried.

"Was it through the fault of Robbins that the accident to Woodbury happened? The building was commenced in the spring of 1856. The grade of Wells Street had been ordered to be raised by the city, but was not actually raised until the summer of 1856. There is testimony tending to show that when Robbins removed the old sidewalk, which was on the natural surface of the ground, he removed very little earth in order to make this area. There is also testimony tending to show that what earth he did remove was replaced by sand and other materials, and it is contended that although he might be liable if there were proper allegations in the declaration, yet he is not liable in this suit, because the declaration says that he wrongfully and unjustly dug a large hole or pit, and the digging, if any was done, did not contribute to produce the injury. But if the declaration charges him with digging a large hole or pit, it also charges him with opening and making one, and in the opinion of the court it is immaterial whether the area was made by *excavating* the earth as stated by some of the witnesses, or in the manner mentioned by Mr. Button, the contractor. Robbins was not in fault in making the area so as to conform to the grade of the city, and the city was not in fault in permitting

Argument for the plaintiff in error.

him to build it. Robbins had the implied license of the city to build the area, but no license can be presumed from the city to leave the area open and unguarded.

"The fact that Robbins was building the area at the same time that the city was grading the street does not excuse him or show that the city was in any degree delinquent. Robbins impliedly agreed with the city that if he were permitted to build the area for his own benefit, he would do it in such a manner as to save the public from danger, and the city from harm. The gravamen of the offence is not that Robbins was engaged in an unlawful work when he made the area, but that he left uncovered and unprotected an area which was dangerous, and which, if left without guards to warn those who passed by, became a nuisance; what was originally lawful thereby became unlawful. The city cannot be held under any obligation to supervise the building of an area like this, under the circumstances detailed in the evidence.

"If the jury believe that this area was built under the direction of Robbins and for his benefit, and that it was left unprotected, and that Woodbury, while passing along the street, fell into it and was injured, then the jury will find the amount Woodbury recovered against the city, with interest."

To so much of the charge as related to the notice to Robbins of the pendency of the suit of Woodbury against the city, and "to so much of the charge as related to the construction of the area," the defendant excepted.

Messrs. Kales and Beckwith, for the plaintiff in error:

I. There was error in the instructions as to the obligation of Robbins to defend. The law on the subject of the conclusiveness on another party of a judgment like that given against the city is this:

Where there is no request, and where the facts are only partially communicated, it depends upon the circumstances under which the communication is made whether the party is charged with attending to the defence. If the circumstances were such that a prudent man might be reasonably expected to act upon them, then the partial communication may be considered as notice. But if from the facts commu-

nicated, and from the circumstances under which they were communicated, a prudent man would not be expected to act upon them, then the communication ought not to be deemed notice; and this is more especially true when neither the party making the communication, nor the party receiving it, had any idea that the latter was in any manner to act by reason of what was said.

Here there was no notice. It should have been submitted to the jury, whether the facts communicated—considering the circumstances under which the communication was made—were such as would have caused a prudent man to act.

II. The charge was erroneous in respect to the construction of the area.

The city had ordered the carriage-way of the street to be raised and filled to the new grade, and paved, and had compelled Robbins to put up his building with reference to the *new grade*. This improvement, as it progressed to completion, left the surface of the old sidewalks at this point far below the rest of the street, thus causing a deep, vacant space or pit around Robbins' building, on both streets. There was really no excavation. The allegation of the declaration that Robbins *dug*, opened, and made an area, is not sustained by the proof.

But, independently of this point of pleading, the city had itself created a *public* necessity for what Robbins did. As the raising of the carriage-way part of the street—an improvement lawfully undertaken by the city—would, if nothing else were done, render the rest of the street occupied by the sidewalks impassable, it became the duty of the city to cause the sidewalks to be rebuilt. To perform this duty it was necessary for the city officers, in the first instance, to order Robbins to build them, and in case he omitted to do so, then to build them themselves, and charge him or his lot with the expense. The erection of a curb wall necessarily preceded the filling and paving of the carriage-ways. Robbins, in planning the improvement of his lot, knew this, and contracted for the erection of a curb wall and sidewalk in connection with the erection of his building. He had the

right to expect the city officers would order him to construct them as soon as the city's duty to the public required the order to be made. The erection of the curb wall was required as part of the sidewalk, and it will be presumed that the city officers gave the proper order to Robbins to proceed with the work. The duty of the city to cause the sidewalk to be built was absolute, though the obligation of the mere act of building it rested upon Robbins.

Under these circumstances—and the public having a right to require the city to cause it to be done at the time it was performed—the work was primarily for the public benefit.

III. When the case was here before, it appeared that Robbins had entered into the street by but an implied license, and the fact was regarded as important in the decision then made; one against Robbins. It appears, now, that he entered by express authority of a statute. The case is therefore a new one.

The question then is, did Robbins perform his whole duty when, under such circumstances, he let out to skilful and independent contractors the execution of this work, to be done in conformity with the plan ordained; especially as *the result*, when the work was completed, conformed to what he was authorized to do? The following cases are decisive, to show that he did: *Gray* v. *Pullen* (Q. B., 1863), Law Journal Reports, N. S., vol. 32, p. 169; *Blake* v. *Ferris* (1 Selden, 48); *Painter* v. *Pittsburgh* (46 Pennsylvania State, 213); *Pack* v. *Mayor* (4 Selden, 222); *Kelley* v. *Mayor* (1 Kernan, 432); *Overton* v. *Freeman* (73 English Common Law, 867); *Allen* v. *Hayward* (7 Adolphus & Ellis, N. S., 960).

In each case above cited the party on whom the right to do the work was conferred let out the execution of it to independent contractors; injury was occasioned to others, who were without fault, by the negligent and improper manner in which the execution of the work was conducted or left during the progress of it, by the contractors' servants; the suits were against the employers, and they were held not to be liable for the negligence of the contractors or their servants.

Argument for the plaintiff in error.

The ground of decision is stated in *Gray* v. *Pullen*, where Cockburn, C. J., announces it as "common doctrine, that if a person in the exercise of his rights as a private individual, *or of those conferred on him by statute*, employs a contractor to do work, and the latter is guilty of negligence in doing it, the contractor and not the employer is liable."

In the construction of a public improvement, pursuant to a statutory right, it is as much a part of the right to intrust the execution of the work to skilful and careful contractors, as it is a part of one's individual right, in making an improvement on his own land, to let the work in that manner. On this subject the court, in *Blake* v. *Ferris*, say with force:

"The impracticability and injustice of holding the express licensees who had let the work to be liable for the contractor's negligence, in leaving the hole in the street uncovered over night, may be further illustrated by the common case of a man about to build a house for himself. He may, if he please, manage the whole, give directions, &c., &c., which his men would be bound to follow; and thus make himself the master in fact of all the persons employed; but, as Baron Parke said about the butcher driving the ox, 'he is not bound to do so, and he may not know how to do it.' He may therefore let out by contract the building of the house to some person who will undertake to do it. Would he thereby become liable for all injuries to third persons for negligence or misconduct in doing an act *tending to the construction of the house?* For instance, by the carpenter's men, in getting out timber in the forest; by the stonecutter's servants, in blasting stone in the quarry; or by the teamsters, in handling materials; such consequences would, indeed, shock the common sense of all men."

Few persons possess the skill to build a house. A particular class of persons must, to a greater or less degree, be intrusted with the execution of such a work. And the more completely the execution of it, and the manner of doing it, are placed by the employer in the hands of skilful and independent contractors, the more fully has he performed his duty to the public. He has thereby substituted

the skilful management and independent control of another over the work, pending its execution, in the place of his own probable want of skill to direct.

Where a person enters under an implied license to do work for his own exclusive benefit, which appeared to be the fact in this controversy when the case was here before, it is a condition of such license that nothing shall be done under it to the injury of the licensor. But when the right springs from an express permission, or from statutory authority, no conditions are attached but those expressed; and the obligation is different.

In this case it was pending the execution of the work, and while the work was in the exclusive control of the contractors and their servants, and while Robbins had no power or authority to remove the contractors' servants from the work, that the accident to Woodbury occurred. The omission to cover the opening properly, on Sunday night, was never directed by Robbins, but was the wrongful act of the contractors' servants.

The court is bound to presume that the plan of the sidewalk, authorized by the common council, could be carefully executed without the necessity of such a negligent omission; and Robbins had the right, as against the city, which had forced the plan upon him, to suppose the same thing.

Under these circumstances, if the contractor, *while invested with the control of the work*, unnecessarily committed a nuisance, Robbins is not liable therefor, or for the consequences.*

Mr. E. Anthony, contra:

I. *The instruction as to Robbins's obligation to defend.* Robbins was a business man, as the case shows; and no notice, whether oral or written, could have given him any more information about the suit, or about his rights and duties in the premises, than he possessed when informed of the com-

* Peachey *v.* Rowland, 76 English Common Law, 181; Overton *v.* Freeman, 73 Id. 867; Allen *v.* Hayward, 53 Id. 960; Reedie *v.* Railway Co. and Hobbit *v.* Railway Co., 4 Exchequer, 255; Saltonstall *v.* Banister, 8 Gray, 195.

mencement of the suit, of its nature, and the claim made by Woodbury, and of the trial of the case. Under *such* circumstances Robbins cannot go back of Woodbury's judgment and try the case all over.

In *Blaisdale* v. *Babcock*,* all the notice that ever was given was simply a notice that a suit had been commenced; and yet, Chancellor Kent, at that time Chief Justice, held the judgment conclusive.†

In the Leading Cases in Equity,‡ *Le Neve* v. *Le Neve*, it is said:

"It is not necessary in any case, to constitute notice, that it should be in the shape of a distinct and formal communication, and it will be implied in all cases, where a party is shown to have had such means of informing himself as to justify the conclusion that he might and ought to have availed himself of them."

Again, in speaking of notice to purchasers of property:

"It should be remembered that a purchaser will have notice whenever he has the means of knowledge, although he may choose not to know; or, in other words, whenever it may fairly be presumed that he either knew or remained wilfully ignorant."

Why does not the rule apply to this case? Is there any peculiar and extenuating circumstances presented to the court why Robbins should not be held to it?

II. The point made below as to the difference between the proofs and the averment of the declaration is scarcely pressed here.

It is argued, however, that Robbins was compelled to relay his sidewalk, and that the plan of doing the work had

* 1 Johnson, 519.

† See also Barney *v.* Dewey, 13 Johnson, 226; Kip *v.* Bingham, 6 Id. 158; Waldo *v.* Long, 7 Id. 173; Bender *v.* Fremberger, 4 Dallas, 436; Leather *v.* Poultney, 4 Binney, 352–376; Winter *v.* Schlatter, 2 Rawle, 359; Bond *v.* Ward, 1 Nott & McCord, 201; Duffield *v.* Scott, 6 Tennessee, 366; Tarleton *v.* Tarleton, 4 Maule & Selwyn, 20.

‡ 2 Leading Cases in Equity, 160; note.

been forced upon him. The argument is that it was a necessary work put on him by the city.

But the city never forced any plan whatever upon him. They never designed his sidewalk, his area, or his vaults. They never told him how or when to build them, and said nothing to him on that subject whatever. He formed his own plans, began when he got ready, used his own materials, and all that can be said about the matter with any aspect of fairness is, that the city permitted him to build up his building, using a portion of the sidewalk as an appurtenant to his building, in order to accommodate him, and nobody else. But this very fact made it his duty to see that he kept his vaults covered up, and his premises safe and secure. This was what he undertook, and what the city warned him, both verbally and in writing, to do.

III. The question in regard to contractors is out of this case, because—

1. The contracts had expired before the accident, and the presumption of law is that Robbins was doing the work himself by employing his own workmen.

2. Robbins had an architect to superintend the work all the time, and to see that the work was done according to contract.

The doctrine pertaining to contractors cannot, for other reasons, apply.

In *Ellis* v. *The Sheffield Gas Consumers*,* when the argument in regard to contractors was addressed to Lord Campbell, he said, "It would be monstrous if the party *causing* another to do the thing were exempted from liability merely because there was a *contract* between him and the person immediately causing the act to be done."

IV. The charge, in view of *the facts* of the case, is perfect and right. It condenses the entire evidence. The only exceptions which were taken to it are, first, to the sufficiency of the notice of the city to Robbins; and second, "to the construction of the area." The particular errors complained

* 12 Ellis & Blackburne (75 English Common Law), 169.

of are not set out, and we ought not to be made to argue in regard to matters *so indefinitely put* that it requires a statement at bar to show what they mean.

V. But none of these questions ought to have been argued by us. Every point raised in this case was adjudged when the case was here before, as will be seen by reference to the report. There is no essential difference between the case as now coming up and as it was then presented. And, after the language of this court, at the last term, in *Minnesota Co.* v. *National Co.*,* every question should be regarded as closed.

Mr. Justice CLIFFORD delivered the opinion of the court.

Municipal corporations having the care and control of the public streets within their limits are obliged by the laws of the State of Illinois to keep the same in good repair "for the passage of persons and property," and in case of neglect any person receiving injury in consequence of any obstruction or defect may have an action on the case to recover compensation for such injuries. Statutes to that effect exist in most of the States, but the principle is now well settled that in all cases where it appears that the obstruction or defect which occasioned the injury was caused, constructed, or created by a third person, the corporation, if it was without their concurrence, may have a remedy over against the party immediately in fault.

Severe injuries were received by one William H. Woodbury, on the twenty-eighth day of December, 1856, while passing over Wells Street, within the limits of the plaintiff corporation. He sued the corporation in the State court to recover compensation for the injuries so received. Declaration alleged that the defendant in this suit was the owner of a building lot fronting on that street; that in making improvements thereon he wrongfully excavated an area in the sidewalk in front of his lot, and adjoining the same, of great length, width, and depth, and wrongfully suffered it to re-

* 3 Wallace, 333.

main uncovered and unguarded, so that the injured party, while passing over the sidewalk during the night of that day, and while in the exercise of reasonable care and prudence, fell into the excavation and was greatly injured. Parties went to trial in that suit at the June Term of the court in 1857, and judgment was rendered for the plaintiff in the sum of fifteen thousand dollars damages and costs of suit, which the corporation was compelled to pay.

Present suit was an action on the case to recover of the defendant, as the party who constructed, caused, or created the obstruction or defect in the street, the amount of that judgment and the expenses of the litigation. Gravamen of the charge in the declaration was that the defendant made the excavation and negligently left it open and unguarded, and that the injury to the plaintiff in the suit against the corporation was caused by that obstruction or defect, and that the defendant by reason of the premises became and was answerable over to the plaintiffs in this suit for the amount of that judgment, and for their reasonable expenses in defending the action. Plea was the general issue, and the verdict and judgment at the first trial were for the defendant. Corporation plaintiffs removed the cause into this court by writ of error, and the judgment of the Circuit Court was reversed and the cause remanded for a new trial. Pursuant to the mandate of this court, a new *venire* was issued, and the verdict and judgment at the second trial were for the plaintiffs, and the defendant excepted and sued out this writ of error.

Errors alleged at the trial, as stated in the bill of exceptions, have respect to so much of the charge of the court as relates to the notice to the defendant of the pendency of the suit in which the injured party recovered judgment against the corporation, and also to so much of the charge of the court as relates to the construction of the area described in the declaration. Exceptions were also proposed to one of the rulings of the court in excluding certain testimony, but the objection appears to have been waived, as it was not made the subject of any consideration in the argument.

Opinion of the court.

I. Charge of the court in respect to the notice to the defendant of the pendency of the suit against the corporation, presents the first question for decision. Preliminary to that part of the charge which is the subject of complaint, the court remarked that although municipal corporations were primarily liable for injuries occasioned by obstructions or defects in their streets or sidewalks, they yet might have a remedy over against the party who was in fault, and who had so used the street or sidewalk as to produce the injury. Instruction was then given to the effect that if the defendant knew that the suit was pending and could have defended it, and it was through his fault that the party was injured, he was concluded by the judgment recovered against the corporation. Express notice, said the presiding justice, was not required, nor was it necessary that the officers of the corporation should have notified him that they would look to him for indemnity. Just exception certainly cannot be taken to those instructions, as they are in precise accordance with what this court decided in this case when it was before the court on the former occasion. Same principle was adopted and applied in the case of *Lovejoy* v. *Murray*,* in which the leading authorities upon the subject were collated and examined. Conclusive effect of judgments respecting the same cause of action and between the same parties rests upon the just and expedient axiom, that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination.†

Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make defence, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having those rights substantially are regarded as strangers to the cause, but all who are directly interested in the suit and have knowledge of its pendency, and who refuse or neglect

* 3 Wallace, 18.

† 2 Taylor on Evidence, § 497.

to appear and avail themselves of those rights, are equally concluded by the proceedings.*

Evidence in the record shows that the defendant knew that the party was injured by falling into the excavation, and that the action against the corporation was commenced, that he was informed of the day of trial, that he was requested to assist in procuring testimony, and that he actually wrote to a witness upon the subject. Testimony of the attorney of the corporation shows that he called upon the defendant, soon after the suit was commenced, for the purpose of finding out whether he, the defendant, knew anything about the case which would be for the benefit of the corporation in preparing the defence, and made inquiries of him to that effect. Responsive to those inquiries the defendant mentioned the name of a person who was boarding at the same place with the injured party, and whose testimony he, the defendant, supposed would be of benefit to the corporation. His idea was that the injuries of the party were not as great as he pretended, and for that reason the defendant suggested that the person named would be a good witness for the defence, and he agreed to write and get an exact statement of what he would testify if called and examined.

Inquiry was made of the witness if he told the defendant that he was the attorney of the corporation, and he answered that he was not able to say; but he further testified that he had long known the defendant, and that they were intimate acquaintances. Same witness testified that on the day of the trial of that case, or the day before, he met the defendant in the court-house, at the foot of the stairs, and told him that the case was about to be tried.

Surely it cannot be doubted that the evidence justified the instructions of the court, and, it might be added, if need be, that it fully warranted the finding of the jury. Based on that testimony, the court further instructed the jury that if the attorney of the corporation informed the defendant of the suit and its nature, and of the day of the trial, and con-

* 1 Greenleaf on Evidence, 12th ed., p. 559.

versed with him about the testimony for the defence, he was as much chargeable with notice as if he had been directly told that he could contest the right of the injured party to recover, and that the corporation would look to him for indemnity in case of an adverse result. Argument for the defendant was that the notice was defective, because the attorney did not specify in what court the suit was pending, but the presiding justice instructed the jury that when the defendant was told that the injured party had sued the corporation for the injuries occasioned by his falling into an area which he, the defendant, had built, then it was his duty to have inquired and ascertained in what court the action was to be tried. Knowledge of the pendency of the suit in the most authentic form was brought home to him, and the legal presumption is that he knew that he was answerable over to the corporation, and if so, it must also be presumed that he knew he had a right to defend the suit. Being in the court-house on the day the trial commenced, or the day before, and having been informed by the corporation attorney that the case was about to be heard, the defendant cannot evade the effect of the judgment upon the ground that he did not know in which court the case was pending. Persons notified of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if instead of doing so they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently be allowed to turn round and evade the consequences which their own conduct and negligence have superinduced.*

Decision of this court in this case, when it was here before, was that express notice to the defendant to defend the prior suit was not necessary in order to render him liable to the corporation for the amount of the judgment paid to the injured party; that if he knew that the suit was pending, and could have defended it, he was concluded by the judg-

* May v. Chapman, 16 Meeson & Welsby, 355.

ment as to the amount of the damages, and we adhere to that rule as the settled law of the court.

II. Second exception is even more general in its terms than the first, and might well be rejected on that account as presenting no definite question for the decision of the court. Statement in the bill of exceptions is that the defendant excepts to so much of the charge of the court as relates to the construction of the area described in the declaration, and the record shows that the part of the charge referred to fills more than a page of the transcript, and for the most part is merely descriptive of the circumstances under which the area was constructed.

Purport of the description is that the defendant was engaged in erecting a large and valuable building on his lot, fronting on the east side of Wells Street, and that he caused an area to be constructed in the sidewalk in front of the building, appurtenant to the same, and for its convenience and accommodation.

Prior to that time the corporation had passed an ordinance requiring the grade of this street to be raised, and the work of raising the grade as ordered was accomplished during the summer preceding the accident. Change of grade in the street made it necessary to raise the sidewalk, so that the defendant, in order to construct the area in front of his building, was not obliged to make much excavation.

Declaration alleged that the place for the area was excavated, and the defendant contended that the proofs did not sustain that allegation, as they showed that the depth of the area was chiefly created by filling and raising the sidewalk on each side of it, and not by excavation, as alleged. Charge of the court was that it was immaterial whether the depth of the area was obtained in the one or the other of these modes, or by both, and we have no doubt the charge was correct.

Material matter alleged and in issue was, that the defendant caused or created the obstruction or defect in the street which occasioned the injury and wrongfully left it open and unguarded, as alleged in the declaration; and if he did so,

it surely was immaterial whether he constructed it by excavation or in the manner described by the contractor. Strong effort was made to show in argument that the defendant, in constructing the area, acted under the express orders of the corporation, and consequently that he is not liable in this action. Theory of his counsel is, that inasmuch as the ordinance of the corporation directed the grade of the street to be raised, he but executed the orders of the corporation in doing the work. Suppose all that be granted, still it is evident that it constitutes no defence to this action. His authority to raise the sidewalk to the new grade is not contested.

Neither the ordinance nor the evidence, however, shows that in excavating, or leaving unfilled, the place for the area, he acted under the directions of the corporation, or that his acts were in any way for their benefit. Absence of objections on the part of the officers of the corporation authorize the presumption that the defendant was not in fault in constructing the area so as to raise the surface to the even grade of the street, and justified the charge of the court, that in constructing it the jury might infer that he acted under their implied license, but no license can be presumed from that fact, or from any other evidence in the case, to leave the area open and unguarded, which was the gravamen of the charge in the declaration.

Instructions of the court were substantially in accordance with those views, and were quite as favorable to the defendant as he had any right to expect.

Remarks already made show that the defendant, in constructing the area, was not constructing a public improvement for the benefit of the corporation, but was constructing a private work exclusively for his own convenience. Attempt is made to give the work a public character, because, in constructing the area, it became necessary to raise the sidewalk to the new grade, but the argument is hardly plausible, and is clearly without any solid foundation. Liability of the defendant, however, was not placed upon the ground that he was not authorized to raise the sidewalk.

On the contrary, the jury were distinctly told that the gravamen of the charge was, not that the defendant was engaged in an unlawful work when he constructed the area, but the court placed his liability upon the ground that he left the area open and without guards to warn those who had occasion to pass in the street, so that the work, which was originally lawful, became a nuisance and was unlawful at the time of the injury. Correctness of that instruction, in view of the evidence as reported in the transcript, is so manifest that it needs no support.

Objection is also taken to the instruction in which the court told the jury that if they believed from the evidence that the area was built under the direction of the defendant, and for his benefit, and that it was left open and without guards, and that the plaintiff in the suit against the corporation, while passing along the street, fell into the area and was injured as alleged, then they would find for the plaintiff. Want of reasonable care on the part of the injured party was not alleged in defence or suggested in argument, and instructions as to notice to the defendant of the pendency of the prior suit had been previously given to the jury.

Argument for the defendant is that the instruction as to the liability of the defendant was erroneous. He contends that the evidence showed that the erection of the building and all the other work, including the construction of the area, was done by an independent contractor, and that the owner of the land, for whose benefit the improvements were made, is not liable in such cases for any such injuries occasioned by an obstruction or defect in the street caused or created by the contractor or his workmen in the construction of such improvements. Two answers may be given to that proposition, either of which is satisfactory—

1. That it assumes a theory of fact which is contradicted by the evidence.

2. That this court, in its former decision, overruled it as applied to a case where the work contracted to be done was itself of a character necessarily to constitute an obstruction or defect in the street or highway requiring precautions,

care, and oversight, to protect the traveller from danger and injury.

1. Theory of fact assumed by the defendant is not sustained by the evidence. Seven contractors were employed in preparing the lot, laying the foundations, erecting and completing the building, raising the sidewalk, constructing the area, laying the flagstones, putting in the gratings, and finishing the improvements. Contractor who constructed the area finished his contract prior to the nineteenth day of December, 1856, when he left and went away, and did not return till after the accident.

Uncontradicted evidence was introduced that the defendant frequently visited the premises during the progress of the work, and that the curb-wall was raised eight or nine inches under his special directions, in the latter part of September of that year. Both the area and curb-wall were ready for the flagstones four months before the accident. When the area was completed it was covered with joists, three by twelve inches, but they were afterwards removed, when the gratings were put down, late in the fall, and were never properly replaced. Attention of the defendant was several times called to the dangerous condition of the sidewalk, and the superintendent of public works gave him notice in writing that the area was not properly covered. He gave no heed to these repeated admonitions, but insisted throughout that it was the sole business of the contractor, with which he had nothing to do. Such wilful negligence the law will never excuse.

2. Import of the decision of this court in reversing the former judgment of the Circuit Court, and remanding the cause for a new trial, was, that the party contracting for the work was liable, in a case like the present, where the work to be done necessarily constituted an obstruction or defect in the street or highway which rendered it dangerous as a way for travel and transportation, unless properly guarded or shut out from public use; that in such cases the principal for whom the work was done could not defeat the just claim of the corporation, or of the injured party, by proving that

the work which constituted the obstruction or defect was done by an independent contractor.

Strictly speaking, that question was not open in this case, but the argument was allowed to proceed; and, lest there should be a doubt upon the subject, it is proper to say that we again affirm the proposition.

Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results *directly* from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party.*

Implied authority was doubtless shown to construct the area, if it was done with proper precautions to prevent accidents to travellers, but no authority to construct it without such precautions is proved or can be presumed; and it is clear that in leaving it open and without guards during the progress of the work, or after its completion, the defendant was guilty of gross negligence, and the structure itself became unlawful. Concede that the defendant might cast the blame on the contractor while the area was being constructed, still it is clear to a demonstration that he cannot successfully make that answer for his own negligence after the work was completed, and the control and oversight of the contractor had ceased.

Looking at the case in any point of view, there is no error in the record.

JUDGMENT AFFIRMED, WITH COSTS.

* Hole *v.* Railway Co., 6 Hurlstone & Norman, 497; Ellis *v.* Gas. Cons. Co., 2 Ellis & Blackburn, 767; Newton *v.* Ellis, 5 Id. 115; Lowell *v.* B. & L. Railroad, 23 Pickering, 24; Storrs *v.* City of Utica, 17 New York 104.