

the boulevard was, at that point, nearly two inches lower than the top of the curb. The plaintiffs allege that the depression or hole in the boulevard was caused by the negligence of the defendants in taking up the old board walk, and not filling in to the level of the curb the space formerly occupied by the board walk.

This sidewalk was taken up and the work of filling in was done in 1908—Mrs. Simons, a witness called by the plaintiffs, said that the boulevard, after the walk was taken up, was filled up level with the curb, and then a storm came. She thinks the city put more sand in after the accident.

The weight of evidence is, and I so find, that the work of construction was properly done. Unless the city was bound to put concrete or some paving upon the boulevard, unless the city was not at liberty to make and maintain the boulevard with uncovered earth, the work of 1908 was reasonably well done. By reason of the storm spoken of by Mrs. Simons, and the wind, rain and snow of the fall of 1908, the winter of 1908-9 and spring of 1909, and pedestrians walking more or less upon the boulevard, it settled and was at the time of the accident in the condition described. This boulevard is part of the street. I am of opinion upon the facts of this case, that the depression or hole as it was called, although not deeper at most, as compared with the top of the curb, than two inches, was dangerous. Mr. Simons, the proprietor of the store, had with the knowledge and presumably with the consent of the defendants, constructed a concrete pavement, filling the space on Elizabeth street, between the city's pavement and the building, and extending southerly to the northern limit of the city's concrete pavement on Albert street. There was an invitation to all persons going to, or coming from Simons' store, to use his concrete walk, and persons coming from that store, intending to go down Elizabeth street and to cross Albert street, would naturally cross the boulevard as Mrs. Brown did, and might as Mrs. Brown did, trip upon the curb.

I find that the defendants were guilty of negligence in allowing that part of the street, described as boulevard on the northerly side of Albert street, where the accident happened to the plaintiff Mrs. Brown, to be out of repair, and the accident to Mrs. Brown occurred by reason of that negligence. I find that the plaintiff Mrs. Brown was not guilty of contributory negligence.

That decision is in effect that the condition of the street, which was the cause of the accident, was not due to misfeasance,