NEW JERSEY COURT OF ERRORS & APPEALS.

ANNA M. ROSE and THEODORE F. ROSE,
Plaintiffs-Respondents,
vs.
MARY SLOUGH,
Defendant-Appellant.

BRIEF FOR DEFENDANT.

BRIEF FOR DEFENDANT.

FACTS.

On June 28, 1916, the defendant was the owner of certain premises, known as 219 E. Walnut Avenue, in the Township of Pensauken (incorrectly stated in the complaint as Merchantville), Camden County, N. J. On that date the plaintiff, Anna M. Rose, while walking along, stumbled and fell on the pavement in front of this property and broke her arm. Suit was instituted September 6, 1916, by Mrs. Rose and her husband against the defendant.

By the original complaint (bottom of page 5, paragraph 2), the basis of the plaintiffs' claim was "that the defendant negligently and carelessly permitted the pavement to become out of repair and maintained said pavement in a dangerous and unsafe condition."

The defendant denied this fact and the case went to trial at the April Term, 1917. On the opening

then made (see page 14) the plaintiffs asserted that the root of a tree raised the pavement and caused it to become out of repair. We then claimed that this was not the issue and that the tree question was not in the case. Thereupon, permission was given counsel for the plaintiffs to amend the complaint and the case went over to the October Term. The amended complaint is found on pages 8 and 9; the gist of the amendment being that the defendant owned and maintained a shade tree, and adjoining the shade tree was a pavement consisting of patent paving blocks, and that the defendant permitted and caused the roots of the shade tree to extend over the sidewalk under the pavement and permitted said roots to break up the paving blocks and raise the same, thereby causing holes and excavations in the pavement, so that the same became dangerous, unsafe, etc.

The answer (found on page 11) denied the amended complaint and alleged that the defendant owed no duty to the plaintiff respecting the matters set forth in paragraph 2, and also set up the negligence of the plaintiff.

The case went to trial at the October Term before Circuit Court Judge Lloyd. The statement of the plaintiff, found on page 25, was that she was walking along, and tripped over some sort of a hump or lump which was on the walk, that her heel caught in something, but she really didn't know what it was.

On page 31, she said she never stopped to examine the walk although she had been over it before and she did not stop to look; she was not paying much attention as to how she was walking or where.

On page 35, line 19, she said she never stopped to examine the blocks or the walk or stones. Her husband testified, page 50, line 22, that the paving blocks

were broken. On page 51, line 30, he also testified that the pavement had been getting into that condition for about a year. On page 58, line 20, he said that the pavement was raised seven or eight inches and had been that way for two or three months; page 58, line 28, he said the blocks were kicked out by pedestrians, and that there was a change in the formation of the sidewalk caused by people passing over the blocks.

On page 59, line 7, he again stated that lots of the blocks were kicked out. On line 22, he said that the blocks would be kicked out by people going over them.

On page 66, Mr. Harry L. Keen, another witness, said some of the blocks had been kicked out and that the pavement was badly out of repair.

On page 67, he again said that the blocks had been kicked out, lines 11 and 33.

Mr. Gould, another witness, page 62, line 24, said that the pavement was in a very bad condition.

The plaintiff rested and defendant at once made a motion for a non-suit (see page 7), the grounds for the motion being that there was no proof who planted the tree and that there was a statute giving the right to the township to regulate the planting of trees.

The Court continued the case to September 27, 1917, and then again continued the case to October 1st (see page 74).

The learned trial Judge permitted, over the objection of counsel for the defendant, the admission of certain photographs showing what was alleged to have been done a week or so *after* the accident, namely, that the roots of the tree were sawed off and the pavement relaid. See pages 76 and 77.

Both sides again rested (see pages 95 and 96) and the motion to non-suit was renewed for the

reason that the question as to whether the township had planted the tree or passed any ordinance making it the duty of the township to take care of the tree was still an open one.

There had been no proof as to whether any ordinance had ever been adopted by the township under the Township Act.

On page 98, the defendant's motion was again denied and the case continued to October 4, when further evidence was submitted.

At this time a supposed ordinance was offered, page 111, providing for the trimming of the limbs and branches of trees *eight feet above the sidewalks.* It appeared (page 112) that the clerk did not know when this ordinance was passed, or whether it had ever been repealed, or (page 113), even that the ordinance had ever been signed. This ordinance did not cover the point in the case, in any event, and was only offered by the plaintiffs in an endeavor to show that it was the only ordinance that they could find. The township was organized in 1892, but the clerk did not produce any of the minutes back of 1899 (see page 112). This clerk had only been in office a year and the proofs were (on page 113) that there were other clerks still alive who were not called in the case.

The clerk who was produced said that he could not certify with any certainty as to the existence or non-existence of any ordinance for more than three years back. See bottom of page 112.

Both sides again rested (page 114) and the motion to non-suit was again renewed and denied.

ISSUES IN THE CASE.

First. Was or was not the accident caused by the pavement being out of repair, due either to natural wear and tear or to the gradual growth of these roots and the kicking out of the blocks?

If the accident happened because the pavement was out of repair from any cause, then under the decisions of this Court, the defendant is not liable.

Second. If the accident was due to the gradual growth of the roots of the tree, it was a part of the burden of the plaintiff to prove three things:

(a) Who planted the tree, the public or some private party?

(b) If a private party, that the predecessors in title of the defendant had so planted it.

(c) That the township had not adopted an ordinance under the statute in reference to the planting, trimming, or preserving of trees.

From the evidence in the case, when the plaintiff rested, the tree might have been planted and maintained by the defendant or one of his predecessors for *private* purposes *or* by the *township* for *public* purposes, or indeed by an entire stranger.

Third. Can the defendant, in any event, be held for an accident because the gradual growth of a tree root raised the pavement and permitted the blocks to be kicked out and the pavement thus put out of repair, viz.: if the condition of bad repair was the immediate or proximate cause of the accident, can the defendant be held responsible?

Fourth. The ownership of the premises and pavement in question was not an issue,—it was not disputed but admitted in the answer. Whether the tree was planted or maintained by the public or defendant was an issue. The fact that certain repairs to the *pavement* were made *after* the accident, however, was not relevant to this issue, even if the roots of the tree were cut in making such repairs because such cutting was incidental to and a part of the process of making these repairs. And the defendant was not legally obligated to make such repairs before or after the accident. The admission of this evidence, therefore, was error.

THE LAW.

A somewhat similar case was decided by the Supreme Court in this state in 1885, *Weller vs. McCormack*, 47 N. J. L. 397, page 399:

> "The Court said there the plaintiff must show by a preponderance of evidence not that either the defendant or some disconnected third party is responsible, but that the defendant is responsible."

In that case, the sudden falling of a limb of a tree growing and extending over the sidewalk in question caused the injury.

The Weller case was retried before the Middlesex Circuit Court, see 52 N. J. L. 407, and a non-suit was ordered. But it was set aside in the Supreme Court because the plaintiff on the second trial showed four things, namely, the planting of the tree by a former owner; the maintenance of the same and the passing of the former owner's title to the defendant, and lastly that the city had adopted no

rules or regulations for planting, trimming and preserving trees, except an ordinance which did not relieve the defendant of responsibility. In other words, the municipal authorities had imposed no restrictions assuming public responsibility for shade trees.

There was no such proof in this case. The Township Act found on 586 of the Revision as adopted in 1893, page 130, provides that the township committee can pass all necessary ordinances to regulate the use of sidewalks and to direct and regulate the planting, rearing, trimming and preserving of shade trees, and to authorize or prohibit the removal or destruction of trees.

This township was organized in 1892. This statute has been in effect ever since 1893, and for all we know, as far as this record is concerned, there may be now in effect an ordinance in the Township of Pensauken assuming *public* control of all shade trees.

But there is no proof in this case even that any ancestor in title of the defendant planted this tree, and for all we know the tree may have been planted by the *public* authorities, or by some stranger.

The learned trial Judge seemed to think that there was some proof in the evidence of Mr. Irwin Beatty (pages 106, 107) that some former owner had planted the tree. See cross-examination of this witness on page 106, where it was said that a former owner had set out *some* trees. Then came the following questions and answers:

> "Q. Well, do you know whether they were put out in front of the houses *as they were built?*
>
> A. *Some were* and *some were not;* some people came there and bought their houses and then they put the trees out.
>
> Q. Do you know which happened here in this house?

A. I don't positively, no, sir.
Q. Are you sure one or the other did?
A. Yes, I am sure one or the other did, but I don't know who did it."

The learned trial Judge then said on page 108 that if the property was owned by Moore and Moore built the house and sold it to Williams and either he or Williams put the tree out, it did not make any difference.

The Court claimed that the witness had said that one or the other of them did.

We feel that there is no such proof in the case. All the witness said or meant to say was that trees had been previously put out by some unknown person, in some cases the new owners came and found no trees and then they planted their own, in other cases they came and found trees already planted by some person unknown and that in this case either one of the owners subsequent to Moore's ownership planted the tree or that some unknown person had previously planted it before the house was built.

On cross-examination, page 107, the witness was very careful to state that he did not see either Mr. Moore or Mr. Williams plant the tree. He did say that he saw Mr. Moore plant *some* trees and he stated that as a matter of fact he did not know who planted this particular tree.

At the conclusion of the case therefor there was no evidence to show that any ancestor in title of the defendant planted the tree in question, or that the public authorities did not plant it.

ERRORS IN RULINGS.

The first error in the ruling of the learned trial Judge was in the admission of certain photographs marked P1, 2, 3, 4 (page 77). These were admittedly photographs taken by Mr. Wonfor on August 31, 1916 (see page 42). The accident happened June 28, 1916. The Court ruled the photographs out on page 43 on the ground that no proof had been given that the condition of the pavement, at the time the photographs were taken, was the same as at the time of the accident.

Mr. Rose stated on page 76, that he saw the defendant, we presume he really meant the defendant's husband, go out and push down the pavement and rearrange the blocks and he also stated that about a week or ten days later somebody came and sawed off the roots and fixed the pavement.

The question was then asked if the pictures which had been identified showed what was done a week or so after the accident (see page 77). The pictures in question were admitted over our objection to show conditions existing *after* the accident.

When these pictures were admitted in evidence there was no proof that the defendant directly or indirectly had made any repairs; in fact, on cross-examination of Mr. Rose at the time the pictures were admitted (page 78, lines 10-20), he admitted that he did not know who had made the repairs; he only *presumed* it was done for the defendant.

Later on, Mr. Slough was called as witness for the plaintiff, and he admitted (page 91, line 21) that he got a contractor to "straighten up the pavement after the accident."

When the pictures were offered (see page 77) no particular purpose was specified, but they went in generally to support the plaintiff's whole case.

We presented a special request in reference to these pictures (No. 7, found on page 128) but the learned trial Judge on page 117, changed or enlarged that request, stating that

> "the theory upon which those elements of evidence were admitted was that they tended to show the exercise of control by the defendant over the property, over the trees, in which the Court concluded there would be some evidence as to ownership or a right of control. In other words, usually a person does not go on property and do some things on it as a trespasser and a jury has a right to infer that when he does it, he does it under some right."

We took an exception to this modification or qualification of our request. (See page 124, lines 7-10.)

We now contend that these pictures did not show or tend to show who made the repairs, but rather the condition of the pavement *after* certain repairs to the pavement admittedly had been made ten days or more subsequently to the date of the accident. These photographs could not possibly be used to show that the defendant made these alterations unless they depicted the defendant in the act of making them and then they would only be pertinent in case the defendant denied the repair or ownership of the pavement in question. If the question of ownership or authority over the pavement were an issue in the case, and testimony were admissible to show that the defendant did have or exercise such authority, it could ordinarily only be shown by parol testimony. *How* the pavement looked after the repairs were made was certainly not material, to say the least, and that is all the pictures could possibly prove.

The ownership of the property, and of course, of

the pavement was not denied, but on the contrary was expressly admitted in the answer.

The complaint (page 5, paragraph 1) charged that the defendant was the owner of the premises in question. On page 7, paragraph 1, of her answer, the defendant denied the paragraph as to the location of the property, but admitted the ownership. The ownership of the premises and the sidewalk in question, therefore, was not an issue in the case.

The learned trial Judge said (top of page 118) that the photographs tended to show an exercise and control over the property and over the trees. Clearly, the Court was wrong in making such a charge, because these photographs showed no such thing and neither did the repairs tend to show that the defendant planted or owned the tree in question, nor did it show that the defendant maintained or took care of the tree. If the defendant had to cut the roots of the tree in order to repair the sidewalk, there can be no pretense that the repair of the sidewalk was in any sense an attempt to prune or take care of or maintain the tree in question. The roots were cut when the sidewalk was repaired, and as a part of the repair work.

In no sense, therefore, could it be claimed that the exhibition of these photographs showed the exercise of any control or authority over this tree.

The learned trial Judge further said (top of page 118) that "usually a person does not go on a property and do some things on it as a trespasser, and the jury has a right to infer that when he does it he does it under some right."

There was no claim that the defendant was a trespasser on this pavement. We admitted in our answer that we owned it and necessarily we exercised control over it. The issue was not, therefore,

whether we owned or controlled the property in question nor the pavement in question.

The erroneous inference to be deduced from this charge of the learned trial Judge was that by reason of being owner of the property, the defendant was owner of the tree in question. We think the learned trial Judge fell into this same error when he denied our last motion for a non-suit (see page 115, line 20). The Court there said:

> "It seems to me that the mere presence of a tree unexplained on a man's property, affords some slight evidence that it is there by his privity."

This is contrary to the finding of this Court in the Weller case.

In 47 N. J. L. 397, at page 398, the Court said:

> "It could not be inferred from the fact that the tree in question stood on the street owned by the defendant that it was placed or planted there by him for his private benefit."

The Court further said:

> "Shade trees in the streets of the city are of public as well as private utility" and that "the presence of any such tree in a street might be attributed to the exercise of the public authority as well as to any other cause."

That is exactly the situation here.

The mere presence of the tree unexplained, in view of the Township Act and the failure on the part of the plaintiff to prove the adoption or non-adoption of any ordinance under such act, imposed no duty on the defendant.

The learned Court below made a further error we think in admitting testimony in reference to the con-

ditions existing after the accident, or in reference to the repairs made to the pavement. The question was asked (bottom of page 74) of Mr. Rose if, after the accident, he saw the defendant do anything to this tree and walk. This was objected to and the Court claimed that it showed that it tended to show ownership. On page 73, line 17 and further at line 30, the Court said:

> "The point is whether the fact that you go on a certain property and do a thing with respect to it may not indicate that you have a certain right."

We must bear in mind that there was no dispute about the ownership of the property and the defendant was in no sense a trespasser. Exception was taken on page 76. Then it appeared that Mr. Rose saw not the defendant, but Mr. Slough, mash down the pavement, that is, rearrange the blocks. The effect of this testimony was extremely prejudicial to the defendant.

In the case of *Columbia and Puget Sound Railroad Co. vs. Hawthorne,* 144 U. S. 202, Justice Gray of the Supreme Court in reference to subsequent alteration or repairs said:

> "It is now settled upon much consideration by the decisions of the highest Courts of most of the States in which the question has arisen, that the evidence is incompetent because the taking of such precautions against the future is not to be considered as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, is calculated to distract the minds of the jury from the real issue and to create a prejudice against the defendant."

The Court there explained the case of *Reedman vs. Conway,* 126 Mass. 374-377, holding that it did not bear on the question because it simply held that "in an action for injuries from a defect in a platform brought against the owners of the land who defended on the ground that the duty of keeping the platform in repair belonged to their tenants and not to themselves, the defendants' acts in making general repairs *to the platform* after the accident, were in the nature of admissions that it was their duty to *keep the platform* in repair and were therefore competent."

The only thing done by Mr. Slough was to re-arrange the blocks or mash them down, as testified to by Mr. Rose on page 76. Mr. Slough, himself (page 91), denied planting any trees in front of his house and denied fixing the pavement *and the tree.* He admitted, however, that he did get a contractor to *straighten up the pavement* (page 91). The question of ownership of the pavement was not an issue in the case. The testimony as to any repairs made to the pavement therefore was immaterial and irrelevant.

The U. S. Supreme Court in the Hawthorne case cited the Supreme Court of Minnesota as follows:

> "We have concluded that evidence of this kind ought not to be admitted under any circumstances—that such a case affords no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law requires yet in the light of his new experience, after an unexpected accident has occurred and as a measure of extreme caution, he may take additional safeguards. It would seem unjust that he could not do so without being liable to

have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence."

The Court further cited an English case, viz.:

"I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before."

Another error in the same line which we think the learned trial Judge made is found at the bottom of page 91. Counsel for the plaintiff in examining Mr. Slough in reference to his getting the contractor to straighten up the pavement after the accident asked

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"Q. *Why* did you get him to fix it?

Mr. Bleakly: I object to that as immaterial and irrelevant.

The Court: Objection is overruled. Exception noted for the defendant."

The Court itself (page 93, line 18) said:

"Q. Mr. Slough, why did you tell the contractor to straighten the pavement up? What did you tell him to do?

Mr. Bleakly: I make the same objection to that as immaterial and irrelevant."

The learned trial Judge overruled our objections but made no declaration as to why this evidence was admitted. We may presume that the reason the Court admitted it is found on page 75, line 15, namely, that it tended to show ownership, and (line 30)

that the defendant would not go on the property and do certain things unless she had a right to do it.

We again call attention to the fact that there was no dispute as to the ownership of this pavement. The issue was as to the original planting, continued ownership, control and maintenance of the tree. The fact that the defendant after the accident repaired the pavement, which repair necessitated the cutting of the roots of the tree, was no indication that the defendant intended to trim or take care of or maintain the tree. The defendant's sole purpose was *to repair the pavement.*

A somewhat similar case is that of *Bailey vs. Kansas City, Sup. Ct. of Missouri,* 87 N. W. Rep. 1182, where the Court held:

> "In an action against a city for injuries caused by a defective sidewalk *where it was admitted the place in question was a public street,* evidence that the city, after the injury repaired the sidewalk, is incompetent and prejudicial."

The Court there said that there could be no question *as to the ownership of the sidewalk,* and that the repairs made after the accident could not be proved even though they were ordered by the proper city officers. Further:

> "the taking of subsequent precautions against future accidents is not to be construed as an admission of responsibility for the past—has no legitimate tendency to prove that the defendant had been negligent before the accident, is calculated to distract the minds of the jury from the real issue and to create a prejudice against the defendant."

That is the situation here in the present case. There was no denial of ownership of the sidewalk in

question. It was an admitted fact. The jury, undoubtedly, drew the conclusion that the subsequent repair of the sidewalk was an admission of guilt. The learned trial Judge in discussing the pictures (bottom of page 117 and top of 118) as heretofore noted, stated that "these elements of evidence," evidently referring not only to the pictures but to the repairs made, "tended to show the exercise of control by the defendant over the property and over the trees." This language necessarily directed the minds of the jury to an issue not in the case. If the defendant had alleged that she did not own the property, had nothing to do with the property or pavement in question, then, of course, if under our decisions she were liable because the pavement was out of repair, it might have been evidence that she assumed authority to repair it, and might, under a proper charge, have been offered to disprove her denial of ownership. But as it was, the jury must have concluded that here was a defendant stating that she had no authority over the pavement and yet they are permitted to hear evidence showing that she repaired this same pavement and are told by the learned trial Judge that she did not go there as a trespasser. The jury would naturally conclude that she was not a trespasser and that she had no right to pretend to be a trespasser, but that having made the repairs to the pavement, she was liable for the accident.

REFUSALS TO CHARGE.

In addition to the refusals to charge heretofore noted, the learned trial Judge refused to charge the third request. (See page 117.) The request is found on page 127. This request included a fair

statement of the facts, because the testimony of the plaintiff's witnesses was that the paving blocks were not raised suddenly, but that it was a gradual development.

From the testimony, the plaintiff evidently desired us to infer that the roots of the tree raised the paving blocks.

The testimony of plaintiff's witnesses was that it was due to a gradual growth of the roots, but that it had existed for two or three months before the accident. Page 58, one witness said two years. (Page 66.) This witness (page 68) also said that "it was a very noticeable condition" and that "anybody could see it." We had a right, therefore, to have the jury charged, in view of these facts, that if the plaintiff did not use ordinary care to avoid a perfectly patent and visible obstacle or obstruction, she was guilty of contributory negligence. *Mahnken vs. Freeholders*, 62 N. J. L. 404-408.

The learned trial Judge did not charge Request No. 5 (see page 117) which request is found on page 128.

This charge was exactly in line with the decision of the Court in the Weller case.

NON-SUIT DENIED.

The learned trial Judge thrice denied defendant's motion to non-suit. First, on page 78; second, on page 96; third, on page 114.

The final denial of defendant's motion for a non-suit is found on pages 114 and 115. It seems to us that the learned trial Judge fell into error in making certain statements to the jury. See bottom of page 115.

We have already called attention to the statement

that the learned Judge there made that "the mere presence of the tree unexplained affords some slight evidence that it was there by his privity," and that "the action of the defendant in cutting the roots and taking a position which only ownership would be consistent with, coupled with the other testimony as to the placing of the trees and the absence of any township provision was sufficient to take the case to the jury." As we have already noted, the cutting of the roots of the tree was simply a part of the work done in repairing the pavement. It was not an act which could be construed into maintenance or care or trimming of the tree.

When the Weller case was retried, 52 N. J. L. 470-471, there was proof that the defendant and his predecessors in title had cared for the tree and the proof was also clear that the public had not taken charge of the tree and had no duty in relation thereto. There was an absolute failure in the present case to produce any such proof.

If, after the falling of the limb, in the Weller case, the defendant had gone out and removed the limb from the pavement, such an act would not have been relevant to prove that the defendant was maintaining and caring for the shade tree in question. He would simply have been removing an obstacle or physical nuisance from the public highway. Any pedestrian would have been justified in so doing. If the public or some third party erected or placed a nuisance or obstacle upon the pavement in front of defendant's property, defendant had a right to remove it; in other words, abate the nuisance. Such abatement could not be construed into an admission that the nuisance was created by the owner, but rather the contrary.

The removal of the root in this case, whether as

an abatement of a nuisance or as a part of the repair of the sidewalk was not inconsistent with the claim that the public may have owned and maintained the tree; and in no sense was it an assertion of ownership or authority over the tree, but rather an assertion of ownership over the sidewalk.

DEFENDANT NOT LIABLE FOR REPAIRS.

But the duty to repair this pavement, in any event, was a public one. Dillon, Par. 1704 (1012).

Mrs. Slough was not legally obligated to repair the same. *Ruff vs. Burgess*, 70 N. J. L. 7.

What she did, after the accident, therefore, was, in no sense, an admission that she was legally obliged to repair the pavement and much less to maintain the tree.

If the tree roots had not been there, there can be no pretense that what she did, by way of repair, after the accident, would have been an admission that she was liable for injuries caused by the pavement being out of repair. The mere removal of these roots, as a part of the procedure to make these repairs to the pavement, was not therefore evidence that the defendant owned or maintained the tree in question.

If the defendant had proceeded to trim the tree as part of a trimming process or care for the tree, that would be another question. But the cutting of these roots was merely incidental to and really a part of the sidewalk repair procedure.

The root was not put under the sidewalk by the defendant, nor in fact was it proved, in the case, that the tree itself was planted by the defendant or that it was not planted and maintained by the public.

The sidewalk *was* maintained under public supervision.

If a suit could be maintained against the township for the broken pavement, even then the action of the township authorities in cutting these roots as a part of the process of making repairs after the injury, could not be construed against it to prove that the tree was public property. The only relevancy of such evidence would be to show that the street was a public highway in case the township had denied this fact and put it in issue in the case.

The learned trial Judge therefor was in error in refusing the non-suit asked for (page 114) and in holding that the cutting of these roots (page 115, line 30) after the accident, afforded any evidence (line 25) that the tree was there by the privity of the defendant.

The plaintiff having failed to prove either that the tree in question was planted by a former owner or that the defendant or his predecessors in title had cared for the tree or that the township had adopted a rule or ordinance in reference thereto, and having failed to show that the tree was there by private ownership and maintenance and not by public ownership and maintenance, the motion to nonsuit should have been granted.

Respectfully submitted,
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I. F. Huntzinger Co., Appellate Printers, Camden, N. J.

New Jersey Court of Errors and Appeals

Anna M. Rose and Theodore F. Rose,
Plaintiff and Respondent,
and
Mary Cooper Slough,
Defendant and Appellant.

Action at Law.

BRIEF FOR RESPONDENT

The defendant below was the owner of the property located at 219 East Walnut Avenue, Pensauken, Camden County, New Jersey. The sidewalk on the front of the property consisted of asphaltum blocks about six inches square (64). Immediately next to the sidewalk grew a tree (46). It was a large and beautiful maple (46). It was ornamental and shaded the property of the defendant below (47). Two roots extended from the tree underneath the sidewalk (66). The roots had lifted up the paving blocks so that the pavement had become very irregular (66). Some of the blocks were broken, some loose, and holes or pockets six or eight inches deep formed between them (66). Sometimes these blocks would be out of place altogether and sometimes they would be replaced (67). This condition had existed for a long

time (66), and the defendant below was the owner during the whole period. The condition was dangerous (68). People had fallen because of the condition (62).

Anna M. Rose, one of the plaintiffs below, was walking along the sidewalk in question, on her way to market, when she fell over the irregular and broken paving and was injured (24, 25). An arm was broken and a severe shock received. There was a verdict for Anna M. Rose of $400, and a verdict for her husband of $200.

No testimony was produced by the defendant. The learned trial Court was of the opinion that the defendant's responsibility depended upon whether she or some predecessor in title planted the tree or was responsible for it. The tree is one of a line of trees extending along the entire street. The defendant's husband was called as a witness by plaintiff and testified that the defendant repaired the sidewalk and cut off the roots of the tree (91). The line of trees was planted after the street was laid out (89). The township clerk testified that there was no ordinance in existence providing for setting out or planting trees by the township (100). The only township ordinance affecting trees provides that owners must keep them trimmed for a distance of eight feet above sidewalks or be subject to a fine (111, 112). Leonard Moore, a previous owner of the property in question, set out some trees along this street (105). Either Leonard Moore or a subsequent owner set out the trees in front of the defendant's property (106). Since the township authorities did not set out the tree, and since the defendant admits exercising acts of ownership over it, and since there is testimony to the effect that a previous owner set out trees in front of the property, the jury certainly had before

it enough information upon which to base a legitimate inference that the defendant was responsible for and maintained the dangerous condition which led to the injury.

Testimony was admitted to show that the defendant repaired the sidewalk and cut off the roots which had caused the dangerous condition. Photographs were admitted which were taken after the accident. They showed what repairs had been made (76, 77). The learned trial Court stated clearly that such evidence was only admissible in so far as it established or tended to establish ownership in the defendant. It is hardly a possibility that the defendant would exercise such acts of proprietorship unless ownership existed. The defendant seeks to avoid responsibility because of the lack of proof that she owned the tree and at the same time asserts that proof which shows or tends to show ownership is not proper.

The owner of a property is responsible for a difficulty created by a previous owner if he continues it. *Meyer vs. Harris,* 61 N. J. Law, 83. The owner of a tree along a highway must use reasonable care to see that it does not injure pedestrians. *Weller vs. McCormick,* 52 N. J. Law, 470. See also *Harrison vs. Cemetery,* 77 N. J. Law, 514.

The judgment should be affirmed.

Respectfully submitted,

WESCOTT & WEAVER,
Attorneys for Respondent.