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Filed December 17, 1917.

NEW JERSEY SUPREME COURT.

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

Notice and Grounds of Appeal.

To Messrs. Wescott and Weaver, Attorneys for Plaintiffs and Respondents:

TAKE NOTICE that the defendant, Mary Cooper Slough, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

1. The Court refused the motion, after both sides had rested, to direct a verdict in favor of the defendant.

2. The Court, against objection made on behalf of the defendant, admitted in evidence testimony as to what was done to the tree and walk in question after the accident.

3. The Court, against objection made on behalf of the defendant, admitted in evidence testimony as to the condition of the tree and pavement, shown by certain pictures taken after the accident, and that the pavement was repaired after the accident.

4. The Court, against objection made on behalf of the defendant, admitted the photographs, Exhibits P-1, 2, 3 and 4, showing the condition of the pavement taken ten days after the accident.

5. The Court, against objection made on behalf of the defendant, admitted in evidence testimony as to why the defendant repaired the pavement after the accident.

6. The Court, against objection made on behalf of the defendant, admitted in evidence testimony in relation to photograph Exhibit P-4, showing that the pavement had been repaired and the roots of the tree cut off after the accident.

7. The Court refused the second motion, after both sides had rested the second time, to direct a verdict in favor of the defendant.

8. The Court refused the third motion, after both sides had rested the third time, to direct a verdict in favor of the defendant.

9. The Court refused to charge, as requested, defendant's second, third, fifth, seventh, eighth and ninth requests.

10. The Court improperly charged the Jury as follows, in reference to the pictures or photographs offered in evidence and in qualification of the defendant's request No. 7:

> "Gentlemen, I affirm that and at the same time I will say to you 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 that there would be some evidence as to ownership or a right of control. In other words, usually a person does not go on a 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."

11. The Court improperly charged the Jury as follows, in qualification of defendant's request No. 9:

"I do not understand that this lady saw the root or obstacle that she actually fell over, if she did fall over this obstruction, and to that extent her narrative is more or less circumstantial, and her proof is not in the legal sense direct proof. But that does not deprive you of the right to accept it as evidence of the fact that she did fall over this root or that it caused the thing that happened. Now, with respect to the use of the word clearly as to the measure of proof that is required, if by that is meant that the thing must be established by a preponderance of proofs, that is true. If it means to go further than that, of course, it would not be true."

12. The Court improperly charged the Jury as follows:

"It is also argued to you that there is no adequate proof that the plaintiff was injured by reason of stumbling over this condition of affairs. Well, gentlemen, the law does not require a demonstration either mathematical or otherwise in most cases; it does require that before a jury can come to a conclusion the evidence must point with reasonable probability to the existence of the thing which you are to conclude. It is not necessary for this plaintiff to show she actually saw the stone that she fell over and saw that that stone was raised by the root of the tree; but if from all the evidence in the case that is a fair conclusion to be drawn from the testimony, then a jury is justified in drawing it."

BLEAKLY & STOCKWELL,
Attorneys for Defendant and Appellant.

Dated December 10th, 1917.

(Endorsement)

NEW JERSEY SUPREME COURT.

ANNA M. ROSE

and

THEODORE F. ROSE,

Plaintiffs,

vs.

MARY SLOUGH,

Defendant.

NOTICE AND GROUNDS OF APPEAL.

BLEAKLY & STOCKWELL,
Attorneys for Defendant and Appellant,
317 Market Street, Camden, N. J.

Due and legal service of the within notice and grounds of appeal is hereby acknowledged for the plaintiffs-respondents.

WESCOTT & WEAVER,
Attorneys of plaintiffs and respondents.

SUPREME COURT OF NEW JERESY.

CAMDEN COUNTY.

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

Transcript of Pleadings for Trial.

(Summons Issued September 6, 1916).

Summons and Complaint filed September 8, 1916.

The plaintiffs, Anna M. Rose and Theodore F. Rose, of Merchantville, in the County of Camden and State of New Jersey, say:

1. That on or about the 28th day of June, 1916, the defendant was the owner of certain premises located at 219 East Walnut avenue, Merchantville, Camden County, New Jersey.

2. That on the date above mentioned said defendant negligently and carelessly permitted the pavement upon and in front of said premises to become out of repair and maintained said pavement in a dangerous and unsafe condition.

3. That on the date above mentioned the plaintiff, Anna M. Rose, was lawfully proceeding along said East Walnut Avenue, when, because of the dangerous condi-

tion of said pavement and without fault on her part, she was thrown suddenly and violently to the ground.

4. That because of the circumstances above set forth the plaintiff, Anna M. Rose, sustained a fracture of the arm and was cut, bruised, shocked and otherwise seriously and permanently injured.

5. By reason of the circumstances above set forth the plaintiff, Anna M. Rose, has been caused to forego her usual occupations and has been caused to suffer pain of body and mind.

6. The plaintiff, Anna M. Rose, claims damages in the sum of $5000.

7. At the time above mentioned the plaintiff, Theodore F. Rose, was, and still is, the husband of said Anna M. Rose and, by reason of the above circumstances, has been deprived of the assistance, services, comfort and companionship of his said wife and has been caused to expend large sums of money in an effort to bring about a cure of her said injuries and has been obliged to expend moneys for assistance in and about his household.

The plaintiff, Theodore F. Rose, claims damages in the sum of $5000.

WESCOTT & WEAVER,
Attorneys for Plaintiffs.

Filed September 12, 1916.

SUPREME COURT OF NEW JERESY.

CAMDEN COUNTY.

ANNA M. ROSE
and
THEODORE F. ROSE,
Plaintiffs,

vs.

MARY SLOUGH,
Defendant.

Answer

Answering the complaint in the above cause, the defendant, who resides at Pensauken, in the County of Camden and State of New Jersey, says:

1. She denies the first paragraph as far as the same fixes the location of her property in Merchantville, but admits that she owns the said premises which are located in the Township of Pensauken, Camden County, New Jersey.

2. She denies paragraph 2 of said complaint.

3. She denies paragraph 3 of said complaint.

4. She denies paragraph 4 of said complaint.

5. She denies paragraph 5 of said complaint.

6. She denies that the plaintiff, Anna M. Rose, has suffered any damages by reason of any fault or default on her part.

7. She denies that the plaintiff, Theodore F. Rose, has been deprived of the assistance, services, comfort or com-

panionship of his said wife, or that he has been caused to expend large sums of money by reason of any fault or default on her part.

Dated September 12, 1916.

BLEAKLY & STOCKWELL,
Attorneys for defendant.

Filed April 9, 1917.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

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

Action at Law.
Amendment

It is, on this ninth day of April, 1917, on motion of Wescott & Weaver, attorneys for the plaintiff herein, ordered that the complaint heretofore filed in this cause be amended by striking out the second paragraph thereof and by substituting therefor the words: "That on the date above mentioned said defendant owned and maintained at said 219 East Walnut Avenue, between her sidewalk and the curb adjoining said East Walnut Avenue,

a shade tree for her use, pleasure and comfort, and for the beautification of her said property; that the sidewalk adjoining said shade tree and in front of said property consisted of patent-paving blocks; that the defendant permitted and caused the roots of said shade tree to extend across said sidewalk under said pavement and permitted and caused the roots of said tree to break said blocks and pavement in many places, and permitted and caused the roots of said tree to separate said patent-blocks and portions of said pavement and to raise the same several inches in the air over and above the level of said sidewalk and thereby caused holes and excavations in said sidewalk, and caused the same to become dangerous and unsafe for persons passing along said sidewalk or pavement."

And it is further ordered that the defendants answer this amended complaint within five days from the service of an uncertified copy hereof upon the defendants' attorneys.

Dated April 9, 1917.

WESCOTT & WEAVER,
Attorneys for Plaintiff.

Let this order be entered.

FRANK T. LLOYD,
Judge.

(Endorsement)

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

ANNA M. ROSE and THEODORE F. ROSE,
Plaintiffs,

vs.

MARY SLOUGH,
Defendant.

ACTION AT LAW.
AMENDMENT.

WESCOTT & WEAVER,
Attorneys for Plaintiffs,
301 Market Street, Camden, N. J.

Served April 9, 1917.

Filed April 17, 1917.

NEW JERSEY SUPREME COURT.

ANNA M. ROSE
and
THEODORE F. ROSE,
Plaintiffs,
vs.
MARY COOPER SLOUGH,
Defendant.

Answer to Amended Complaint.

The defendant, answering said amended complaint, says:

1. She denies paragraph 2 of said complaint, as amended.

2. By way of defense to said action, the defendant says:

First Defense.

The defendant was not responsible for and owed no duty to the plaintiff respecting the matters set forth in paragraph 2.

Second Defense.

The negligence of the plaintiff, Anna M. Rose, contributed to the injury complained of.

BLEAKLY & STOCKWELL,
Attorneys for Defendant.

Dated April 14, 1917.

(Endorsement)

Service acknowledged this 14th day of April, 1917.

WESCOTT & WEAVER,
Attorneys of Plaintiffs.

Filed October 9, 1917.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

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

Action at Law.
Postea.

This case was tried before Judge Frank T. Lloyd with a jury at the Camden County Circuit Court on October 5, 1917. The jury rendered a general verdict against the defendant and in favor of the plaintiff, Anna M. Rose, for $400, and a general verdict against the defendant and in favor of the plaintiff, Theodore F. Rose, for $200.

FRANK T. LLOYD,
Judge.

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office. In testimony whereof I have set my hand and the seal of said Court at Trenton this day of A. D., nineteen hundred and .

WM. C. GEBHARDT,
Clerk.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

ANNA M. ROSE
and
THEODORE F. ROSE,
Plaintiffs,
vs.
MARY SLOUGH,
Defendant.
} Action at Law.

APRIL TERM, 1917.

APPEARANCES:
For the Plaintiff, WESCOTT & WEAVER, Esqs.
For the Defendant, BLEAKLY & STOCKWELL, Esqs.

Before LLOYD, J. and a Jury.

Mr. Wescott opens the case for the plaintiff as follows:

If the Court please, gentlemen of the jury: The case you are about to try now is a decidedly interesting case. The Plaintiffs are Anna M. Rose and Theodore F. Rose, husband and wife. They live out at Merchantville, if I understand. The defendant is Mary Slough. Mary Slough owns a property out in Merchantville on East Walnut Avenue, 219 East Walnut Avenue.

MR. BLEAKLY: Judge, I think it is in Pensauken Township, that is an error.

MR. WESCOTT: Well, Pensauken Township, what difference does it make?

MR. BLEAKLY: Well, get it correct. It is not in Merchantville, it is in Pensauken Township.

MR. WESCOTT: Now, Mr. Rose and his wife lived out there. On the 28th day of June, 1916, Mrs. Rose left her home in Merchantville and proceeded up the street on the sidewalk, which is made of Belgian blocks, been down there quite a good while. She had her mind full of her errand, which was to go to the store and make some purchases, and being in rather an absorbed state of mind, as she was walking along she found her foot caught, either under a root or in some of these Belgian blocks, and down she fell, and she fell hard, cut her head, broke her arm in three places, and while the arm has healed to some extent, it is still partially useless, and, as I understand, I have been informed always will be. This lady suffered a great deal of pain and distress and does yet with a broken arm. Now, you will naturally ask the question, "Well, how did she happen to fall?" Mrs. Slough, the defendant in this case, had a tree in front of her house, a big shade tree; I think it was a little outside the front fence; anyhow, it was her shade tree. Now, the tree developed roots, and some of them were big roots, and they went out under that pavement and raised the pavement up and tore it to pieces, so that the blocks did not hold together and they were loose and in all kinds of conditions there. Now, that had been the condition of that pavement for a long while and quite a number of people got hurt there and they made complaints to Mrs. Slough about it, but she did not repair the pavement, cut out the roots or fix the blocks, she

just let her neighbors take a chance when they went along, until Mrs. Rose fell and was hurt so seriously that Mrs. Slough immediately got a lot of help and went there and cut out the big roots—

MR. BLEAKLY: That will be out of the case, of course, anything that was done after the accident.

MR. WESCOTT: I am not so sure about that. I intend to get it in the case; things don't go out of the case just because you say they do. They cut the roots out and leveled the pavement and fixed it so that it was safe for the general public to cross over. Now, that is the case.

I might say to your Honor, now that I am on my feet, I am not perfectly sure of the exact state of the law of New Jersey in a case of this character. I believe we have adopted the old common law rule, that the owners of adjoining property are not, as a rule, responsible for the condition of the sidewalk, just as we have adopted the rule that municipalities are not responsible for the negligence of their agents. I do not know of any other state in the Union where the law on this subject is as uncertain as it is in New Jersey. If I understand it, the basic conception underlying the question of legal obligation in cases of this character is that wherever the condition of the sidewalk is due to the intervention of the adjoining owner, wherever the interest of the adjoining owner is involved in the condition of that sidewalk, then there is legal culpability.

THE COURT: That there must be affirmative negligence.

MR. WESCOTT: Yes. Now, the question is what constitutes it. I remember very well the case of Robinson vs The Gas Company here. I think Judge Garrison, when he was in the other room, tried that case in the old Court

House, Judge Carrow representing the plaintiff and I representing the defendant in that case. The proof was that the Gas Company let water trickle out of its yard across the sidewalk at the time of freezing weather, and that water froze and accumulated and created a ridge across the sidewalk, and I earnestly insisted that the case should be non-suited. Judge Garrison said no, that under the rule in this State the action would lie, and it went to the Supreme Court and was sustained. In that case a woman walking on the street fell over this ridge of ice.

THE COURT: Did that case get to the Court of Errors?

MR. WESCOTT: No, it did not get to the Court of Errors; we took a rule to show cause, of course, and could not get in the Court of Errors. It would have gone there if we had not adopted the practice of rules. Now, I think that where a person has a tree and allows that tree to increase in size and get under a sidewalk and tear the sidewalk up it is such an act of intervention on the part of the plaintiff, so much a matter of the plaintiff's interest—I mean the defendant—so much a matter of the defendant's interest to have the tree there, a cultivated tree, that they must not allow it to creep through the soil, just as the Gas Company allowed water to creep under the fence and go across the sidewalk and create a dangerous condition. Upon that conception of the law this suit was brought. It is a very interesting one for that reason. There have been two or three declarations on the subject; Judge Garrison wrote the opinion in some case—what is that case?

MR. BLEAKLY: The Harrison case.

MR. WESCOTT: Where it seems there had been a fence built along the sidewalk and it rotted down, fell down, or a row of hitching posts, and left a hole in the ground along the sidewalk where one of these posts was, and the

plaintiff walking on the sidewalk stepped in that hole and was injured. There it was held that a recovery could be had. That is a Court of Errors case. And there is still one other case where Chief Justice Gummere on demurrer writing the opinion—

THE COURT: Is that the ice case?

MR. WESCOTT: No; this was a case—

THE COURT: Judge Bergen wrote the opinion on the ice case, I think, where there was an accumulation of ice by reason of the act of the tenant.

MR. WESCOTT: No, the case I referred to just now, a drain ran across the sidewalk and a person fell in that.

THE COURT: Was that by reason of decay in that case, or was it by reason of construction?

MR. WESCOTT: No, it got out of order. The action lay upon the conception that the plaintiff had an interest in it, in the maintenance of that drain. So in this case, the plaintiff had an interest in this shade tree.

THE COURT: Yes, I recollect now; it was a case of decay, and the Court held that he must anticipate that in the course of time there would naturally be a gradual decay.

MR. BLEAKLY: If the Court please, I will address the Court first, as long as Judge Wescott has taken up the question of law in this case, before we touch really, the facts. The case is based on the second count of the declaration, that is, the question of negligence. I want to read that to your Honor: "That on the date above mentioned said defendant negligently and carelessly permitted the pavement upon and in front of said premises to become out of repair and maintained said pavement in a dangerous and unsafe condition." On that declaration I must differ from my friend, Judge Wescott, about the condition of the law of this State.

THE COURT: That may be the declaration, Mr. Bleakly; the opening is broader than that, however.

MR. BLEAKLY: Then, of course, we are not ready to meet any case except that which was in the declaration. If there are other facts we are charged with, something else, we are not ready to meet that case. I am here prepared to meet the case set forth in the declaration, the pavement out of order.

THE COURT: Is it alleged in the case that the present owner planted the tree?

MR. BLEAKLY: There is nothing of that kind in the declaration at all.

THE COURT: I do not suppose it is the fact.

MR. WESCOTT: No, I don't imagine so; it has been there quite a while.

THE COURT: I do not know that it is material at all.

MR. BLEAKLY: It would be material if we maintained it. There is nothing about a tree in the case that we are supposed to be here to meet. The leading case is Rupp vs Burgess.

THE COURT: Judge, just a moment, don't you think your declaration is shy on your opening?

MR. WESCOTT: I don't know, it might be amended, perhaps, but the declaration is, "On the date above mentioned said defendant negligently and carelessly permitted the pavement upon and in front of said premises to become out of repair, etc."

THE COURT: Yes. Now, that is just the thing you recognize the law has provided no remedy for, that is to say, permitting the thing to get out of repair.

MR. WESCOTT: But in the drain case they allowed it to get out of repair; here they allowed—

THE COURT: Did not the drain case rest upon the fact that the defendant in that case had actually con-

structed the drain and was answerable for maintaining its condition. That was originally constructed—

MR. WESCOTT: Yes.

THE COURT: Is the situation the same where a thing is negligently permitted to be—

MR. WESCOTT: Yes, we don't set out the evidence, that is all.

THE COURT: No, but ought not you to set out that this tree by its growth caused an eruption in the pavement?

MR. WESCOTT: I think that is a matter of proof, if the Court please.

THE COURT: I am not so sure where you are alleging more or less a conclusion. You see, your declaration is simply an allegation of a conclusion of negligence.

MR. BLEAKLY: I think this case, if you read it, will throw a great light on that very point. "The first count plainly discloses no cause of action. It is based upon the assumption that the owner and occupant of the premises abutting upon a public street is under a legal duty to keep in repair the sidewalk in front of his property. But no such obligation rests upon him unless by virtue of the requirements of a statute or municipal ordinance," and it goes on to say that even then he has no remedy except the penalty under the ordinance. "The second count, however, though loosely drawn, we think may stand. It states substantially that a drain or trench which was an appurtenant to the premises of the defendant and used for the purpose of carrying the surface water therefrom, extended across the sidewalk to the curb line; that the defendant negligently permitted the covering of this drain or trench to become so dilapidated, broken and out of repair that the plaintiff, while passing along the street, without any negligence on her part, stumbled over the

broken covering and fell into the drain, thereby receiving serious injury." In this case there is just the first count here; they haven't any second count in this case, therefore we are not apprised of anything of that nature.

THE COURT: Well, are you surprised?

MR. BLEAKLY: Certainly, we are not here to meet that case, have no witnesses to meet that case, your Honor; that is a totally different case. I shall, of course, object to any testimony about a tree or anything of the kind; that would be entirely immaterial to the issue that is here before us.

THE COURT: Judge, do you think it is safe to go on with this case in the present shape of the pleadings?

MR. WESCOTT: Well, I don't know; I will say this to your Honor, that I knew nothing about this case until last Saturday. Ethan here drew the complaint, and the question was raised right away whether that complaint would embrace the facts in this case, and we had quite a discussion, Mr. Weaver, my son and myself, over the thing, and rather reached the conclusion that it would, because the facts which constitute the dangerous condition of this pavement did not have to be pleaded. Now, let me see if I can make that stronger—

THE COURT: Let me suggest this, gentlemen—just a moment, Judge—this case is in the Supreme Court and it is an important question.

MR. WESCOTT: Yes, it is an important case.

THE COURT: Let me suggest to you that the facts be set out in the pleadings and the other side move to strike it out and you will get a ruling of the Supreme Court on the subject so that you may be saved a trial or you may then go to trial with clear prescience of what the trial duty will be.

MR. WESCOTT: If the other side is willing to do that,

I am.

THE COURT: Is that agreeable to you, Mr. Bleakly?

MR. BLEAKLY: I would not want to say until I saw the declaration.

THE COURT: Oh, well, I am assuming that the declaration will allege that this—You see, under the present declaration your position is that there is no case.

MR. BLEAKLY: If the Court please, I would prefer not to make any agreement at this stage. I want to be accommodating to the other side, but I prefer not to—I don't want to be bound; I don't know what my views will be when the facts are set out as the other side has stated them.

THE COURT: I know, but the question is a clear-cut legal question; it is a highly important one. When a rule can be obtained on a statement—

MR. BLEAKLY: I agree with your Honor up to a certain point. There might be questions of fact here, and to settle those questions of fact—

THE COURT: Very true, but you have a right to come back; the Court will simply require you, if the declaration is sufficient to—

MR. BLEAKLY: I might agree, your Honor, but I do not want to agree now to that situation.

THE COURT: Well, you may be embarrassed; I may let this amendment go in and you may have to go on and try the case.

MR BLEAKLY: Well, that would be rather unfair.

THE COURT: You know what the situation is very well.

MR. BLEAKLY: I haven't any witnesses to that state of the case.

MR. WESCOTT: Do you mean to say you did not know what caused that trouble there?

MR BLEAKLY: All I know is a broken pavement, Judge; I have never been out there.

THE COURT: If you gentlemen cannot agree to have the matter taken up in the Supreme Court, I will give the defendant three days to prepare his case.

MR. WESCOTT: All right, that will be satisfactory. I move to amend by inserting, "That the defendant maintained a tree between her sidewalk and the curb line, the roots of which she allowed to extend underneath the said sidewalk and uplift the same and to make the said sidewalk dangerous and unsafe." I may change the phraseology a little, but that is the idea.

THE COURT: I suppose the word "cause" instead of "permit" would be more in keeping with your position. Well, she caused the tree to grow by her original maintaining of it.

MR. WESCOTT: Yes, all right.

MR. BLEAKLY: When will you let me have that in writing, Judge?

MR. WESCOTT: Let you have it right away.

MR. BLEAKLY: If I decide then, I can let your Honor know and Judge Wescott.

THE COURT: Now gentlemen, let me say to you this: This question is one that ought to be disposed of in the Supreme Court. You can get the whole thing threshed out there, you have the exact facts as the other side will maintain them, and I do not suppose there will be a serious denial of the fact that a tree growing naturally has an effect on the soil and what is on it, but you can get a deliverance from the Supreme Court and get it in a way that will save this trial, and in this time it is highly incumbent, it seems to me, upon the Bar as well as the public, to conserve the time of everybody.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY CIRCUIT.

ANNA M. ROSE
and
THEODORE F. ROSE,
Plaintiffs,

vs.

MARY SLOUGH,
Defendant.

Action at Law.

October Term, 1917.

APPEARANCES:
For the Plaintiff, WESCOTT & WEAVER, Esqs.
For the Defendant, BLEAKLY & STOCKWELL, Esqs.

Before LLOYD, J. and a Jury.

THE CASE FOR THE PLAINTIFF.

(Mr. Wescott opens the case for the plaintiff to the jury).

(Mr. Bleakly opens the case for the defendant to the jury).

MRS. ANNA M. ROSE, Sworn.

By Mr. Wescott:

Q. Mrs. Rose, you are one of the plaintiffs in this case, are you?

A. Yes.

Q. What is your age, please?

A. Forty-nine.

Q. On the 28th of June, 1916, where did you live?

A. 223 East Walnut Avenue, Merchantville, New Jersey.

Q. Your husband's name is what?

A. Theodore F.

Q. How long had you lived there.

A. About eight years.

Q. Now, on that day were you walking along East Walnut Avenue?

A. Yes.

Q. What time in the day was it, about?

A. About—well, it was about between eight and nine in the morning.

Q. And you had come from where?

A. From my home.

Q. And you were going where?

A. I was going to the grocery store.

Q. Did you have anything in your hands?

A. My pocket book.

Q. No basket?

A. No basket.

Q. And what were you going to the store for?

A. I was going to get something for breakfast.

Q. And as you walked along the street what happened to you?

A. Well, as I was walking along in my usual way I passed this house next door to me and tripped over some sort of a hump or lump that was on the walk. I had—it seemed to me I had gone over a place and then my heel caught into something—I don't know really what it was—and tripped me.

Q. Now, whose place were you in front of?

A. I was in front of Mrs. Slough's.

Q. The defendant in this case?

A. Yes.

Q. Well, when you fell, what happened to you?

A. Well, I bruised my knee and my head and I didn't know whether my arm was broken or not until I got home, until I had gone back home, because my arm was hanging, of course, sort of in a loose way, and I did not know really what had happened to it.

Q. Was you arm broken?

A. It was broken then, yes.

Q. Now did you go on after you fell to the store?

A. No, I turned back and went home.

Q. Were you having any pain at that time?

A. Yes, a great deal.

Q. And where was the pain located?

A. Well, my arm and knee and also my head.

Q. Now, who was at home when you got there?

A. I beg pardon?

Q. Who was home when you got there?

A. My husband.

Q. What did you do immediately?

A. Well, he was upstairs and I called him down and said I thought something had happened to me.

Q. Never mind what you said, but did you send for a

doctor?

A. Right away, yes.

Q. What Doctor?

A. Dr. Benjamin.

Q. Did he come?

A. Yes.

Q. Did you know your arm was broken before he came?

A. Yes, my husband thought it was broken; I didn't know.

Q. Well, did you learn from the doctor that your arm was broken?

A. Yes.

Q. What did he do to your arm?

A. He set it and then took me to the Cooper Hospital to have the X-rays taken.

Q. How long were you at Cooper Hospital?

A. I judge about two hours.

Q. Then from there you went back home?

A. Went back to the doctor's office and then he fixed it right, you know, reset it again—he can tell better about that than I can.

Q. And from there you went back home?

A. Then I went back home, yes.

Q. How long were you confined to your home as a result of this injury?

A. It was about three months.

Q. And during that time will you tell us with as little exaggeration as possible about your suffering?

A. Well, I did suffer dreadfully and for a week I couldn't sleep at night for pain. I suffered during the day, it would hurt me off and on all through that time that I had it in the splint.

Q. Well, when did your arm get so it did not pain

you?

A. Well, that was about—after it was out of the splint, then it was not painful then.

Q. Has it ever pained you any since?

A. Yes, when we have stormy weather I feel it where the break was.

Q. What condition was your arm left in?

A. Well, in a very weak condition.

Q. What do you mean by that?

A. Well, I could hardly raise it up to dress my hair or to put my hat on. I have to support it on the dresser, and I couldn't reach up at all with it; I have to support it with my right arm to get it up to reach anything.

Q. How long has that been the case?

A. That has been ever since it happened; that has been over a year.

Q. How much use have you of that left arm?

A. Well, at present I haven't any use of it.

Q. Well, but between the time of the accident and another accident that you had—

A. Well, I couldn't use it for my household duties.

Q. Could you use it at all?

A. Yes, I could use it a little by supporting it with the right arm or hand.

Q. Could you swing it around, lift it above your head?

A. No.

Q. Use it to dress yourself with?

A. Yes, I dressed myself with it, yes; I could put on my clothes, but I had difficulty in combing my hair because I had to reach up here.

Q. Give us a more definite idea as to how much use you had of that arm after the splints were taken off, from time down to the time you got hurt again?

A. Well, for months I really hadn't any use of it at

all after the splints were out; then, of course, I could gradually use it a little better; as I told you, I couldn't use it until this accident to reach anything; I didn't seem to have the power to lift it up.

By the Court:

Q. Which arm was broken, Madam?

A. The left arm.

By Mr. Wescott:

Q. Did you meet with another accident?

A. Yes.

Q. When was that?

A. The 12th of this month.

Q. And was this same arm injured again?

A. The same arm.

Q. Broken?

A. Broken.

Q. In the same place that it was broken before?

A. In the same place.

Q. Did your head and knee get over the bruise?

A. Yes.

Q. Now, what effect did this accident have and the pain you suffered upon your general health?

A. It gave me a dreadful nervous shock.

Q. What do you mean, Mrs. Rose, by that? Tell us what your experiences were?

A. Well, I am very nervous, became very nervous, and lost my appetite and lost flesh since then.

Q. Have you any idea how much weight you lost since then?

A. Well, I weighed 121 before and I weigh 99½ now.

Q. Did you gradually lose weight after this accident?

A. Gradually, yes.

Q. Did you notice anything about your strength, your general physical strength?

A. Weak, I was weak, have been weak all along.

Q. How did you happen to have this second accident?

A. I was running for a car.

Q. Just go on and tell us.

A. Well, I suppose my feet twisted—I can't explain to you—and I fell, fell right on this arm, the same place. It was about the first time I had started to run since I was hurt before, but I suppose I was weak.

Q. Did your legs give out?

A. My legs seemed to cross, my feet seemed to cross, as much as I can remember.

Q. Were you able to protect yourself when you fell?

A. No, I couldn't, I didn't have the power.

Q. Why?

A. I didn't have the power in this arm to throw it out, you know, or try to keep me from falling.

Q. So it was the weakness of that left arm?

A. I think so.

Q. That prevented you from protecting yourself?

A. Yes.

Q. Did you do your housework before this accident?

A. Yes.

Q. Keep any servants?

A. Yes, I had help once a week.

Q. Well, aside from that—

A. I did my work.

Q. What did it consist of?

A. Well, taking care of a good-sized house and did gardening and kept myself busy pretty nearly all day.

CROSS-EXAMINATION.

By Mr. Bleakly:

Q. Mrs. Rose, how long did you say you had lived

out there?

A. About eight years.

Q. You live in Pensauken Township, don't you?

A. Yes.

Q. You said you lived in Merchantville, that was a mistake?

A. Well, we call it Merchantville; I beg pardon, we call it Merchantville.

Q. But you really live in Pensauken?

A. In Pensauken, yes.

Q. Mrs. Slough's property is immediately next door to yours?

A. Yes.

Q. You each have front yards?

A. Yes.

Q. And side yards?

A. Yes, we have.

Q. Between the two houses?

A. Yes.

Q. And how long had you noticed this condition of this pavement?

A. I couldn't say.

Q. You traveled over the pavement to go to the station, didn't you?

A. To the store.

Q. To the store and also to the railroad station?

A. Yes, I would have to pass there.

Q. You frequently went to the railroad station to go to Camden?

A. Well, I didn't go very often.

Q. And Philadelphia?

A. Well, I would take the trolley car, which was the other way.

Q. You sometimes went that way?

A. Yes, but not often.

Q. And I suppose you frequently went to the store?

A. Not very often; the clerk usually came for his orders; I didn't have occasion to go often.

Q. Now, did you say the paving blocks were disarranged?

A. I believe they were; I never stopped to examine the walk; of course, I can't tell just how they were. I would go along there in my usual way as I would cross any sidewalk.

Q. You had been over this and saw the roots of these trees—of this tree.

A. I probably had noticed it, but not specially; I didn't stop to look.

Q. Your mind was on the groceries you were going to buy?

A. Yes, I was thinking of what I was going to get at the store.

Q. And you weren't paying much attention to how you were walking or where?

A. No.

THE COURT: Was she examined—I did not follow the cross-examination—as to what her prior knowledge was?

MR. BLEAKLY: Yes, somewhat.

THE COURT: What did she say, Mr. Stenographer?

(The examination of the witness on this point was then read by the stenographer).

Q. Now, Mrs. Rose, were there any other stores down in the direction of the grocery store that you visited?

A. Yes, there are other stores that way.

Q. What stores were there?

A. Right across the street is a grocery store.

Q. Any drug store?

A. No, not right there; the drug store is further away.

Q. Any friends of yours in that neighborhood?

A. Yes, I have friends there.

Q. Well, in the past couple of years you had been passing up and down this pavement quite frequently, hadn't you, once a week or more?

A. No, I didn't go very often, not very often, no; I didn't have occasion.

Q. Once or twice a week, I suppose?

A. Well, maybe once, twice a week sometimes, and there has been weeks when I didn't go over it.

Q. But you did see these roots or this root?

A. I have noticed it, yes, as I was going along.

Q. Did you and your husband have any talk about it prior to the accident?

A. No.

Q. Now, what part of the pavement were you using when you fell, the middle of the pavement or next to the tree or on the other side of it?

A. Next to the tree.

Q. The tree is right close up to the blocks, wasn't it?

A. I can't say.

Q. The trunk of the tree was right next to these paving blocks, wasn't it—didn't you take notice?

A. I can't exactly say whether they were or not; I can't tell you. I never stopped to examine the walk, you see, and I can't tell.

Q. You never paid any attention—

A. I never paid any attention to it.

Q. Had you on the same kind of shoes when you were walking over that pavement that day as you have today?

A. No, I had a pair of low shoes on with rather a flat heel, not really flat, but a flat heel, much more so than those I have on today.

Q. Don't you usually wear that kind of shoe the same

as you have got on today?

A. When I go out to go out anywhere, yes, not just around to the store.

Q. Now, you said after you were hurt you were confined for three months?

A. Yes.

Q. You don't mean to say you were in bed three months?

A. No, not in bed, but I was around home.

Q. Now, were you actually in bed a week?

A. I was in bed about that length of time.

Q. About a week?

A. Yes, and many a time I felt like going to bed but did not go.

Q. You went and attended to your household duties as best you could?

A. Yes.

Q. And during the month of September you swept up the yard as usual, swept the leaves and things of that kind?

A. In September? No, I don't think I did.

Q. You are sure of that now, that in September you didn't sweep up your yard from time to time?

A. No, it was later on in the fall. There was one day I did use the broom outside with my right hand and that was in October, I believe; I don't think it was in September.

Q. Now, coming down to this accident, this recent accident—you fell on a pavement two doors from your house on the same street?

A. The third door from my house.

Q. The other direction?

A. The other direction, yes.

Q. Nothing the matter with that pavement, was there?

A. Not that I know of.

Q. How fast were you going?

A. I was running, quite fast.

Q. Running very fast?

A. Very fast, yes.

Q. You were able to run very fast, were you, this time?

A. Well, I was getting a car, going to; I suppose I became excited and made a leap and started; you see, I hadn't started to run until I got—

Q. You are sure you were not running fast on the occasion in June in front of Mrs. Slough's place?

A. I was walking my usual way, had no occasion to hurry.

Q. In last August didn't you stumble up your steps and fall headlong?

A. No, one day I had a pair of old slippers on and stumbled.

Q. Yes, you stumbled up the back steps, didn't you, in your yard?

A. My slippers fell off.

Q. You have frequently been falling around, haven't you?

A. No, I have not been frequently falling around.

Q. Had you some nervous condition or weakness of the ankle?

A. No, not since this first accident.

By Mr. Wescott:

Q. Just one word: You were asked by Mr. Bleakly if you walked along this pavement the last two years; you said you have. After you got out of your house and walked along the pavement, was the pavement smooth?

MR. BLEAKLY: I object to that if the purpose is to show a change of the pavement.

THE COURT: I suppose that is it; I don't think that is admissible.

MR. WESCOTT: But the other side has asked if she walked along that pavement since.

THE COURT: Yes, but—

MR. BLEAKLY: I didn't mean in connection with anything of that kind at all; that would not be pertinent.

THE COURT: I hardly think the door is open, Mr. Wescott. Just a moment, please. Madam, you say you had been by there a number of times before?

THE WITNESS: Yes.

By the Court:

Q. Had you noticed these stones out of their place and raised or not?

A. I hadn't noticed them particularly.

Q. Did you ever notice them at all?

A. I might have glanced at them as I went by but I never stopped to examine. I did not know the condition of the walk.

DR. DOWLING BENJAMIN, sworn.

By Mr. Wescott:

Q. Doctor. you have been practicing medicine how long?

A. About forty years.

Q. And do you make a specialty of surgery?

A. I beg pardon?

Q. Have you made a specialty of surgery?

A. To some extent.

MR. BLEAKLY: He is an expert, we won't dispute it; you need not qualify him at all.

Q. Were you called upon on the 28th of June, 1916, to see Mrs. Rose?

A. Yes.

Q. Had you known her before?

A. Yes.

Q. What sort of physical woman was she before?

A. She had weak nerves and I had attended her; she had been, had had some hemorrhages and she had had loss of appetite and she had a rapid pulse and I had attended her.

Q. Was this before her injury?

A. I had attended her—this was some months—might have been a year before the accident.

Q. What was her physical condition then?

A. Why, she was very much better, so much so that I was not in attendance at the time, and she had been discharged virtually, as she had not consulted me.

Q. Was she a fairly healthy woman when you left her?

A. Yes, her health was pretty good, had been fairly restored.

Q. When you went to see her on the 28th of June, 1916, what did you find to be the trouble with her then?

A. There was a Colles' fracture and it was comminuted, involved the joints, that is, the end of the arm bone where it joins, the end was broken; there was three pieces, and it involved the joints.

Q. How long did you attend her?

A. Oh, I attended her for some months, I can't recollect exactly, I guess it was three or four months.

Q. Did you notice any other trouble beside the broken arm?

A. Why, she became very nervous.

Q. I know, but any cuts or bruises?

A. Yes, she had a very severe contusion of the knee, and I think she had one on her elbow.

Q. Well, did she get over that?

A. Yes.

Q. Now, give us—How much have you attended her since?

A. Why, I have attended her ever since.

Q. Give the jury, if you please, a comprehensive idea of her physical life after she had this accident?

A. Her general condition?

Q. Yes, go on and tell us all about her.

A. Well, she was very much of a wreck; she had a severe nervous shock and it affected her to an unusual extent, and she lost flesh, suffered a great deal of pain and her pulse became quite frequent and the nervous tremor returned and grew bad, and she emaciated alarmingly.

Q. Got thinner?

A. Yes, became anemic and her condition became serious, but she began to improve and was a great deal better before this last accident, so much so that I had not seen her for a week or so, several weeks before she fell the last time over there. She was weak, too, in the knees, and she had not quite recovered either, her general health had not recovered and the use of her arm; she could not get the use of that.

Q. Why was that, Doctor?

A. Well, from being in splints a long time, the pain and some neuritis, inflammation of the nerves.

Q. Has she had—How much use of that left arm in your judgment as an expert did she lose as a result of this accident?

A. Oh, I think it was fully fifty per cent. impaired.

By the Court:

Q. You mean now or then, Doctor?

A. Why, after the first accident.

Q. Yes, up to what time?

A. Up to the time of this last accident.

By Mr. Wescott:

Q. Is it your judgment that she never would have recovered this fifty per cent. of usefulness of that arm?

A. I don't believe she ever would have recovered entirely. I think that in time if she kept her general health good and exercised I think she would have gained some more, how much I don't know exactly, but she could not get it entirely out in front of her in a horizontal position, and the muscles and joints were still impaired.

Q. Had she strength enough in that left hand to do manual effort or to make physical effort?

A. Not so great.

Q. How?

A. I don't think she had more than half the power.

Q. Is it a condition that would cause her any distress?

A. Well, I can't see why there should be any constant pain about it. The neuritis had disappeared and it would only hurt her on efforts to straighten it to regain the activity.

CROSS-EXAMINATION.

By Mr. Bleakly:

Q. Doctor, you had been treating this lady for over a year, you say, prior to this accident in June, 1916?

A. Yes.

Q. Two years before that time?

A. I don't know exactly how long I had been treating her before this first accident.

Q. Now, you say she had weak lungs and hemorr-

hages?

A. No, the hemorrhages were uterine.

Q. Well, she was emaciated from that, wasn't she?

A. Yes.

Q. Quite considerably, wasn't she?

A. Yes, that emaciated her.

Q. Were those severe hemorrhages?

A. She had—she lost a good deal of blood, but she had recovered from that.

Q. You think you had stopped that?

A. Oh, yes, that had stopped, and she had regained a good condition of the blood.

Q. Now, you say she also was in a nervous condition, Doctor, a year prior to this accident?

A. Yes.

Q. And you thought just about prior to this accident you had done all you could for her and quit treating her, is that right?

A. No, I did not make a formal discharge of her, but I said if she needed—whatever she needed to let me know; there was no use going to see her unless she sent for me.

Q. So just prior to the accident you had not been out to see her?

A. No.

Q. Now, you say she had weak knees?

A. Yes.

Q. Did you at any time make a physical examination to ascertain the condition of her ankles, whether they were weak or strong, liable to bend under her?

A. No, only I noticed in her movements, getting up to the table or going up and down stairs or anything like that that she did not seem very strong, and she would sometimes take hold of things to assist her, that is, after

this first accident.

Q. My question was whether prior to the first accident you ever made such examination?

A. No.

Q. You never examined at all prior to the first accident to find out whether her knees were weak or her ankles were weak, did you?

A. There was—

Q. Just yes or no, please now, Doctor.

(Question repeated).

A. No, there was no indication for local examination; it was a general weakness.

Q. So then as an actual fact prior to the first accident you did not know the condition of her knees or ankles, did you?

A. Why, there was just general weakness of all her joints and all her muscles, but she had recovered.

Q. Do you want us to believe that she is weaker now in her knees and ankles than she was prior to the first accident?

A. Oh, yes.

Q. You say that without having made an examination prior to the first accident, do you?

A. Well, an examination of the knees and ankles would not give you much information, if any. It is all a general weakness, just as weak in one joint as another, owing to general debility.

Q. But you did not make that examination prior to the accident?

A. No, there was no local symptoms in her legs; she had no locomotor ataxia or no injuries or impairments of the joints of the legs.

Q. Did you weigh her or ascertain her weight by seeing her weighed prior to this first accident?

A. No.

By Mr. Wescott:

Q. Just one word, Doctor; how much is your bill for attending her from the time she had her arm broken?

A. Why, I think the bill for attending her on her arm was $50, but Mr. Rose can tell you; I think it was $50.

Q. And did that include the number of times that you attended her after she broke her arm?

A. No, there has been some attention since that, but she was in pretty good condition and he paid—I think he paid the bill, and she was improving so I thought she would get along all right.

By Mr. Bleakly:

Q. You sent a bill for $50 and you think it was paid?

A. I think he paid $50; I can tell by my book.

Q. That was last fall, wasn't it, Doctor?

A. I don't remember exactly when it was.

Q. Well, approximately about that time, wasn't it?

A. Yes, I think so.

GEORGE A. WONFOR, sworn.

By Mr. Wescott:

Q. Where do you live?

A. 615 Market Street, Camden.

Q. You are a photographer, are you?

A. Yes, sir.

Q. I show you four photographs and ask you if you took them?

MR. BLEAKLY: Won't you find out when they were taken, please?

MR. WESCOTT: Yes, I will ask him.

A. Yes, sir.

Q. When did you take them?

A. About August 31, 1916.

MR. BLEAKLY: That is after the accident?

THE WITNESS: Yes.

MR. BLEAKLY: These don't pretend to show the condition existing—

THE COURT: No, photographs are generally taken after an accident; they are not taken before.

MR. BLEAKLY: Yes, but these don't pretend to show the condition.

THE COURT: Well, I don't know; there is no evidence on it yet. Go on with the examination.

By Mr. Wescott:

Q. Those photographs were taken of what place, a street or a sidewalk on East Walnut Avenue showing whose property.

A. I couldn't answer; I don't know the defendants.

Q. Do you know where Mr. Rose lives?

A. Yes, the property adjoining Mr. Rose's property.

Q. Which way?

A. To the west.

MR. WESCOTT: I offer those pictures in evidence.

MR. BLEAKLY: Well, I shall object for the present, your Honor; there is no proof that that is the same condition.

THE COURT: Well, Judge, these pictures seem to show a condition of the pavement as though it had been repaired or changed; what about that?

MR. WESCOTT: Well, I suppose they do to an extent, but they show the trees.

THE COURT: The difficulty is you can't show the one without implying the other.

MR. WESCOTT: That is true, but I am entitled to

show the shade tree.

THE COURT: Yes, but you see there is an altered condition there of the vital part of the case which probably excludes the picture. I am wondering if the same result cannot be obtained by a description.

MR. WESCOTT: Well, probably it can; I don't for the life of me see how you can justifiably exclude these pictures; they show the street, they show the yard and show the tree. Now, of course, there is a part of that picture which I won't describe under the circumstances, which counsel might comment upon, and, of course, there is the pavement concerning which there could be a comment.

THE COURT: Yes, of course, but don't you see right away that the introduction of that picture opens the door to an argument as to what has been done to that pavement?

MR. WESCOTT: Yes, I admit that frankly; do the other side object to it?

MR. BLEAKLY: Yes, certainly, because there is no proof at all that that is the condition of this house or this pavement at the time of the accident. Of course, I don't say the pictures are pertinent at all.

MR. WESCOTT: Well, if your Honor thinks it is not admissible—

THE COURT: Yes, I think that shuts them out.

No cross-examination.

THEODORE F. ROSE, sworn.

By Mr. Wescott:

Q. Mr. Rose, where do you live?

A. 223 East Walnut Avenue, Merchantville.

Q. Do you know the defendant, Mary Slough?

A. Yes.

Q. Where does she live?

A. She lives next door, west of me.

Q. That is her property, is it?

A. I presume it is.

Q. Oh, well, now—

A. Well, yes, sir, it is her property.

MR. BLEAKLY: It is not denied; it is admitted, Judge.

MR. WESCOTT: Yes, he knows it is, but newspaper men always get in that position; they are never certain of anything except what is not true.

Q. Now, Mr. Rose, what is your occupation, please?

A. I am Resort Manager on the North American, Philadelphia.

Q. And have been for how long?

A. Four years.

Q. Four?

A. Yes, going on four years.

Q. Were you familiar with the pavement and its condition in front of Mrs. Slough's property when your wife fell?

A. Yes.

Q. Now, what kind of pavement was it, made of what?

A. Made of these asphalt blocks.

Q. About how large, about?

A. Well, they were about five inches square, I would think; I can't tell; about five inches square and about two inches deep.

Q. And did they extend along the entire front of Mrs. Slough's property?

A. Yes.

Q. Was that the pavement that she used to go in and out of her property?

A. It is the pavement that was in front of her property; I don't know whether it went in her yard or not.

Q. Did she have a front yard?

A. She had a front yard, yes.

Q. A fence? 10

A. No, no fence.

Q. Well, was there a way to get in her house from the front?

A. Yes, a hedge row along the front and an opening where they could walk in.

Q. Was there a walk from this sidewalk up to the front?

A. Yes, up to the house.

Q. Well, did you ever see people use that?

A. Use this pavement? 20

Q. No, use the walk from the pavement to the house?

A. Yes, I have seen them go in, yes.

Q. Well, then, they did use a walk from the pavement to the house?

A. Yes.

Q. That you are sure of?

A. I am positive.

Q. Well, was it the same material running from the house?

A. No, I don't remember whether it is paved in there 30 or not; I can't tell; I remember the pavement running along the front.

Q. Now, to get to that walk from their front door, how did they do that? How did Mrs. Slough do that,

the defendant?

A. They came out the side of the house—it didn't lead right to the front, that is, it went to the front too, but you had to go around to the side to get to it; the front porch didn't open up like other houses —

Q. Then they never used the sidewalk in front of their house?

A. Yes, they had to use that sidewalk.

Q. That is just what I am asking you; did they use that sidewalk in front of their house?

A. Yes.

Q. And they used the sidewalk up to the front door, didn't they?

A. Yes.

Q. Just as you walk out here to get into this door?

A. Yes.

Q. Now, there isn't any doubt in the world about that?

A. No doubt about it.

Q. I ask you again if they used the pavement in front of their house to get to this pavement or foot path that went up to the front door?

A. They did.

Q. Do you know whether or not Mrs. Slough maintained a shade tree?

A. Yes, a very beautiful tree, one of the largest—

Q. I didn't ask you that; I asked you if she maintained a shade tree in front of her house?

A. Yes.

Q. How close was that shade tree to this block walk in front of her house?

A. Crowded right up to its edge, overlapping.

Q. What kind of a tree was it?

A. Maple.

Q. How big a tree was it?

A. Well, I can approximate its diameter; I think it was about sixteen inches, approximately.

Q. And how high a tree?

THE COURT: Do you mean in diameter?

THE WITNESS: In diameter, about 16 inches I would approximate it.

Q. About how high a tree?

A. Well, it was, I think, about ten feet above the house—let's see, that would be perhaps forty feet.

Q. Well, what kind of tree was it in appearance?

A. It was a very full, beautiful tree, maple tree.

Q. And extended its branches in what directions.

A. The larger branches extended over the street.

Q. Well, didn't it extend anywhere else?

A. Yes, I said the larger branches; yes, it extended all around.

Q. Well, where did the smaller branches extend?

A. Over the sidewalk.

Q. Was this a symmetrical tree or a lop-sided tree?

A. No, it was a nice-looking tree.

Q. Was it a symmetrical tree?

A. Rather, yes.

By the Court:

Q. Did it give shade in the yard?

A. Well, it couldn't give shade because the sun didn't work against it.

Q. Well, did it extend over the yard?

A. Yes, it gave shade all under it, all around it.

By Mr. Wescott:

Q. Did it have leaves on?

A. Oh, yes.

Q. It wasn't one of these maple trees that never has leaves?

A. No, a very pretty tree.

Q. Did the leaves obstruct the sun rays any?

A. Did the leaves, you say?

Q. Yes.

A. Well, it gave shade underneath it, yes, sure.

Q. Then it was a shade tree, was it?

A. A shade tree; it was a shade tree.

Q. Shaded the sidewalk, did it?

A. Shaded the sidewalk, yes.

Q. And shaded the front yard?

A. Not very much; it didn't reach over the front yard.

Q. What did it shade then?

A. It shaded around underneath it. The sun was on the western side and it could not throw shade in the yard so much as it could on the other side.

Q. How far did its limbs extend out toward this woman's house?

A. Similar to what a tree of that height would be, I judge.

Q. About how far? Did it extend over the sidewalk?

A. It extended over the sidewalk, yes, and about half way over the road.

Q. Well, let the road alone and get the other side.

A. Well, you see—

THE COURT: No, Mr. Rose, we are trying to find out what use this lady made of this tree and what use it was to her; just direct your mind to that.

THE WITNESS: It was a very important tree to the property.

By the Court:

Q. In what way was it important?

A. Because it was a beautiful tree and it shaded the sidewalk and it was symmetrical.

Q. You say it extended over the yard; why didn't it

shade it there?

A. Well, when the sun was over it would some times of the day, it would shade in the yard.

By Mr. Wescott:

Q. Did you ever see a symmetrical tree that would shade one side and not the other?

A. Well it would depend where the sun is.

Q. Was this an ugly or beautiful tree?

A. A beautiful tree.

Q. Now, then, had this tree roots?

A. Oh, yes.

Q. Did any of the roots grow toward the sidewalk?

A. Two very prominent ones right across the sidewalk.

Q. Did you see this place before your wife fell?

A. Oh, yes.

Q. Did you see it immediately after she fell?

A. Yes, saw it afterward.

Q. Give the jury a description now of the condition of that place—you are a newspaper man and you ought to give us a better one than you did about the shading of the tree.

A. Well, there was two large roots that put right out across the pavement to a V-shape. They started from the tree and took up about a foot across them and it was about four feet to make the larger part of the V as they went across.

Q. What?

A. The larger part of the V as they went across this way—that is the way the roots went under the blocks that make the pavement, and it required two steps for any passerby to get over them.

Q. No, I don't want that; I want you to give me a description—

A. I was going to say, these roots, I knew they were immense and when I measured them to see how high they were from the pavement, the larger root was nine inches and the other one was seven above the pavement.

Q. What is the size of these roots?

A. The roots when they were cut off the tree—I can give you some idea about what their diameter was.

Q. Well about what?

A. That larger root was about eight inches in diameter.

Q. Yes, the smaller root?

A. The smaller one was fully six.

Q. Now, those roots extended how far under that sidewalk?

A. All the way across.

Q. And what effect did they have upon the blocks which the plaintiff had there?

A. Well, they bulged the blocks up and they came off at a sharp edge, at an angle that way, left an opening or kind of a crest along over the roots.

Q. Were any of those blocks broken by the roots?

A. Yes, quite a number of them.

Q. About how large were the pieces of the broken blocks?

A. Oh, well, some were in half and some quarters, about like that, some a little less.

Q. How much of the pavement width-wise was elevated as you describe by these roots?

A. How much of the pavement?

Q. Yes.

A. Well, from the hedge it was elevated about four feet and toward the tree fully two feet.

Q. Do you mean that the pavement was up two feet and four feet?

A. That is, you mean across?

Q. Yes, these roots extended, you told us, across the pavement?

A. Yes, the wider part was about four feet between them from the edge, from the ridges.

By the Court:

Q. You mean four feet width of the paving was raised?

A. No, I do not.

Q. Or do you mean four feet of the pavement was in the air?

A. No, I mean the distance between the roots; it went down to a level each side.

Q. The question was how high the stones were raised above their normal position?

A. I told you seven and five.

MR. BLEAKLY: Inches.

THE WITNESS: Seven and five inches, yes.

By Mr. Wescott:

Q. As to the width of the pavement how far did this condition of elevated blocks extend, all the way across?

A. Well, it receded, yes, as it went across, the roots became narrower; it wasn't so high toward the hedge.

Q. Well, were they up all the way across?

A. Yes, all the way across.

Q. What was the distance about between these roots where these blocks were broken and elevated as you spoke of?

A. About four feet toward the hedge and about two feet toward the street.

Q. That distance between them?

A. Yes.

Q. How long had that pavement been getting in that condition?

A. About a year.

Q. Do you know whether or not there had been any

accidents to people there before?

A. Yes.

Q. Had been or had not?

A. Yes.

Q. There had been or had not?

A. Had been.

Q. Do you know whether Mrs. Slough's attention was called to the condition of that pavement?

A. Not by me.

Q. Well, by anybody else?

A. That I don't know.

Q. How long did the pavement remain in that condition after your wife's injury?

MR. BLEAKLY: I object; how is this pertinent, after the injury?

THE COURT: Well, I think the objection is well taken.

Q. What spaces existed between the broken blocks and the pavement?

A. Well, that depended on the size that was bulged out or kicked out by somebody's foot. If it was half a block there would be quite a hole there for the next fellow to step in, and if it was a quarter of a block it would be a hole of that size.

Q. As the roots raised these blocks up in the air, did it part the blocks?

A. It parted them, yes.

Q. And what was the space between the blocks that were thus elevated by the roots?

A. Well, approximately the top part might be about two inches and a half or three inches across; it would spread them apart as the root came up.

Q. How much have been your doctor bills in this case?

A. I am not prepared to say, I can't just tell.

Q. Well, can you come anywhere near it?

A. I don't know what I paid; it seems to me I paid about $75 all told.

Q. What was the condition of your wife's health before she had this fall on the 28th of June, 1916?

A. Well, it was fairly good, fairly good.

Q. What did she do about the house?

A. Well, she did all of her work except on Fridays we had a woman come out and help a little on that day.

Q. What has been her condition since the accident?

A. Well, she is incapacitated very much; she can't do her work hardly at all without exhaustion. If it was not for the members of our family visiting there and helping her out she wouldn't get through.

Q. Have you been obliged to employ extra help?

A. Yes.

Q. What has that cost you a week?

A. Well, that I can't tell.

Q. You don't know how much wages you pay your servant?

A. Well, my wife can answer that better than I can, as she usually pays bills of that kind.

Q. You don't know?

A. No.

Q. How soon did you have to get extra help in the house?

A. Immediately after she was hurt.

Q. Have you retained that help ever since?

A. More or less ever since, yes.

Q. Have you noticed whether your wife has been able to use her left hand or left arm since the accident as well as she did before?

A. Oh, no—since this last accident, you mean?

Q. No, the accident when she fell on the 28th of July

A. Put the question again, Judge.

Q. Your wife says she fell on the 28th day of June?

A. Yes.

Q. 1916?

A. Yes.

Q. In front of Mrs. Slough's house?

A. Yes.

Q. And broke her arm?

A. Yes.

Q. Now, from that time on until she fell and injured her arm again, did she have the use of that arm?

A. She had a very little use, very little use.

Q. Did she complain of it?

A. Yes, she complained of pain through the night and through the day, and she couldn't comb her hair except when I would take her over to the chiffonier and put her elbow up on it where she could get at it, something like that, impossible to raise the arm; she couldn't raise it at all.

Q. How long did that difficulty last?

A. It had been that way clear down to last week; she couldn't raise her arm.

Q. Did she get any heavier?

A. In weight?

Q. Yes.

A. Oh, no. Well, let me see.

Q. From the time she got hurt on the 28th of June, 1916, did she lose weight?

A. Yes, she lost weight, lost it rapidly.

Q. For how long a time?

A. Well, I guess she has been gradually losing it right along; she is down to 99½ pounds, I think, somewhere along there, from 120 or 130.

CROSS-EXAMINATION.

By Mr. Bleakly:

Q. Yet in October right after the accident, Mr. Rose, she was out working around the yard?

A. Only to get a little air and exercise, she would use her right arm.

Q. Sweeping up the yard?

A. No, she wasn't sweeping.

Q. You heard her say she was sweeping the yard?

A. She would drag things along with the arm, with her hand.

MR. WESCOTT: What hand?

THE WITNESS: The one not broke, the right, I guess it is.

Q. Did you have fruit trees out there?

A. Yes.

Q. She would pick the fruit trees?

A. She could with her right hand.

Q. And carry the basket with her left as she usually would? Now, you say you got a little extra help on Fridays?

A. Yes.

Q. But prior to the accident you always had a woman come in?

A. Yes.

Q. And you have had that woman ever since?

A. Yes.

Q. Just the same as before?

A. Yes.

Q. The only other help you got there was while you were sick there a few weeks after she broke her arm, you had some of the relatives come in, didn't you?

A. No, say months instead of weeks; some of our family were there all the time.

Q. Otherwise you just had this woman or girl or whoever it was come in Fridays, just the same as before, didn't you, Mr. Rose?

A. Yes.

Q. I think you said you lived in Merchantville—you mean Pensauken?

A. We call it East Merchantville; it is really Pensauken Township.

Q. The political division is Pensauken, isn't it?

A. Pensauken, that is the idea, exactly.

Q. How long did you say you had lived there?

A. Have I lived there?

Q. Yes.

A. Oh, I have lived there—let me see—

Q. Seven or eight years?

A. Oh, yes, I have lived there twelve years.

Q. Mr. and Mrs. Slough came there after you did?

A. No, they were there—yes, a very short time after I bought the property, pretty nearly the same time.

Q. About twelve years ago?

A. Yes.

Q. They lived in Pensauken Township, too, didn't they?

A. Yes.

Q. This property next door to you, that is Pensauken Township?

A. Pensauken Township, yes.

Q. Now, this tree was there when you both came there, wasn't it?

A. Yes.

Q. Mr. and Mrs. Slough, neither one of them, they didn't plant the tree?

A. No, it was not planted by them to my knowledge.

Q. It wasn't planted by them?

A. Not to my knowledge.

Q. It might have been planted by the public or a lot of different people?

A. I can't tell you who it was planted by.

Q. You don't know who put the tree there?

A. No, I don't know.

Q. Now, you say the tree was on the sidewalk; it was on the outer side of the sidewalk, wasn't it?

A. It was on the outer side crowded right up against it.

Q. Between the curb and this sidewalk?

A. Between the curb and this sidewalk.

Q. Now, you say these roots were eight and six inches in diameter?

A. In height, they bulged up that high. Oh, you mean, that was cut off? Yes.

Q. No, I am talking about the roots that extended across this sidewalk in June, 1916?

A. Yes.

Q. You saw them there?

A. I saw them.

Q. And you noticed the condition of these roots for a year before?

A. Yes, bulging up.

Q. Did you and your wife talk about it?

A. Oh, I presume—I don't know as I have with my wife; I used to talk about it with some of the neighbors. I think my wife and I had no conversation about it.

Q. You and your wife walked together past it?

A. We very seldom went that way.

Q. You never go out with your wife at all?

A. Yes, but we go the other way.

Q. You always went the other way; you were dodging these roots, I suppose?

A. No, that wasn't the point; it was to take the trolley four doors from us, that is the idea.

Q. And this was a matter of common talk about the condition of these roots, wasn't it?

A. Common talk?

Q. Yes.

A. Oh, I don't know, I hadn't heard much talk about it except some of the neighbors.

Q. Now, the roots raised the pavement seven or eight inches?

A. That was toward the last, when the accident happened: They didn't do that all the year around; they kept growing up to that and attaining to that in the year.

Q. How long prior to the accident were they seven or eight inches high?

A. About the time of the accident.

Q. They didn't get that way all of a sudden, Mr. Rose.

A. I know, as I say, they may have been that way for three months back, two months back.

Q. Anybody could see their condition and how the sidewalk was raised?

A. Yes, I should think anybody looking along the sidewalk could see their condition, but if he was looking upward he might not.

Q. Now, I think you said some of the blocks were kicked out by pedestrians?

A. Yes, every day nearly there was a change in the formation of that sidewalk.

Q. Of course, the roots didn't do any kicking, did they?

A. No, people passing over them.

Q. And on this particular occasion in June, 1916,

you saw the pavement just right after the accident, didn't you?

A. I saw the pavement right after the accident.

Q. The same day, didn't you?

A. Yes, the same day.

Q. You saw lots of the blocks kicked out?

A. The same day there was an effort put forth to put the pavement in order

Q. No, I didn't ask you that, please strike that out. You can't say that, Mr. Rose.

THE COURT: Strike it out.

Q. Just listen to the question: On the same day you went and examined this pavement and saw blocks were out, didn't you?

A. Yes, I went and looked at it when my wife had fallen, yes, sure.

Q. And you had noticed it right immediately prior to the accident, hadn't you, that a number of blocks had been knocked out?

A. I don't know that I had so much that way, but I had different times saw a difference in the formation of the pavement where blocks would be kicked out by people perhaps going over it at night.

Q. You say the doctor's bill you thought was $75?

A. Yes.

Q. You haven't got that bill, have you?

A. I haven't got them here, no.

Q. You don't know whether it was $50 as the doctor guessed it was?

A. I think there are two bills rendered, and I think there was one about $50 and one subsequent bill amounted to about $25.

Q. You haven't got them here?

A. No.

Q. Why haven't you got the bills here?

A. Well, I didn't know they would be called for.

By Mr. Wescott:

Q. You told Mr. Bleakly the roots had been cut off—

MR. BLEAKLY: Now, wait a minute; one minute, I object; that was stricken out, Judge.

THE COURT: Well, how did it come about? Did it come about in answer to a question?

MR. BLEAKLY: Yes, he volunteered it. I said, "That is not an answer to the question; it had better be stricken out."

THE COURT: I say, did it come about in answer to a question?

MR. BLEAKLY: No, your Honor, it was volunteered, not in direct answer to the question. The witness himself withdrew the answer. I don't know that he has the power to.

THE COURT: I think it ought to come out.

MR. WESCOTT: Well, there was no motion made to strike it out. The witness said it twice, the roots were cut off.

THE COURT: Yes, but if it were irresponsive, counsel has a right to have it stricken out. He has a right to make a motion at any time to strike it out, that is, any reasonable time; of course, he cannot avail himself of it and then strike it out.

MR. WESCOTT: Now, he said so in his chief examination and said so in his cross-examination on two occasions.

THE COURT: My impression is on his chief examination it was objected to and the Court struck it out. Now, on the cross-examination, if it was irresponsive, then of course counsel is not responsible for it and has a right to strike it out.

MR. WESCOTT: I am so confident I am right on that

I will ask your Honor to give me an exception.

THE COURT: Note an exception. I want to make sure of the terms of the question. Read the question, Mr. Stenographer.

(Former testimony of the witness on this point was then read by the stenographer).

THE COURT: Let the statement about their being cut off come out.

CHARLES GOULD, sworn.

By Mr. Wescott:

Q. Mr. Gould, where do you live, please?

A. 712 Spruce, Philadelphia.

Q. Did you live in Merchantville sometime ago?

A. 231 East Walnut Avenue.

Q. When did you live there?

A. A year ago.

Q. How long?

A. From June to November.

Q. Do you know where Mrs. Slough's property was?

A. Well, I know where it was at the time.

Q. Do you know where Mr. Rose's property was?

A. I do.

Q. Well, before the 28th of June, 1916, did you live there then, from the 17th of June?

A. On the 17th of June I lived there, yes.

Q. And before that?

A. Before that I was looking around for a suburban home.

Q. Did you live there before that?

A. No, I did not.

Q. Did you have occasion to notice a shade tree in Mrs. Slough's front, the front of Mrs. Slough's house?

A. No occasion whatever to notice it.

Q. Never noticed the tree there?

A. Never noticed the tree.

Q. Did you ever notice the pavement there?

A. When I fell over it, yes.

Q. When did you fall over it?

(Objected to).

A. The night I went down—

MR. BLEAKLY: I object; how is this material whether this man fell over the pavement or not? He is not a party to the suit. He can describe the condition of the thing—

THE COURT: Unless it was brought home to the defendant it is not competent.

Q. Did you see the pavement there?

A. No, I did not see the pavement at the time; it was twilight, at night.

Q. What?

A. It was about 7.30 at night, 7.30 to 8 o'clock.

Q. Did you see it afterward?

A. I saw it afterward, yes.

Q. Describe the condition of the pavement?

A. It was in very bad condition.

Q. That don't tell us anything.

A. It extended up probably seven or eight inches at the outer edge of the sidewalk and slanted down three or four inches at the other edge.

Q. What made it extend out?

A. Underneath the roots of the trees forcing the sidewalk up.

Q. What was the condition of the blocks?

A. Why, they were kind of ragged on the top to me,

where they had been broken off by being stepped on.

Q. How far were those roots apart?

A. Well, I couldn't exactly tell that, because I never measured them.

Q. Well, were they a mile apart?

A. Oh, no, they were within stepping distance.

Q. Within stepping distance?

A. Yes.

Q. Well, about how far apart were they?

A. Probably two feet.

Q. And you did not see the tree from which those roots came?

A. Afterward I noticed it, after I saw what I fell over, I saw the tree.

Q. What kind of tree was it?

A. A large tree, maple tree.

Q. How big a tree was it?

A. Well, I should judge about two foot; it was a good-sized tree.

Q. It extended its branches out where?

A. Well, it had pretty good spread, probably twenty feet each way.

Q. Over the front yard as well as out in the street?

A. All around.

No cross-examination.

HARRY L. KEEN, sworn.

By Mr. Wescott:

Q. Mr. Keen, did you ever live in Merchantville?

A. 227 East Walnut.

Q. Did you ever live there?

A. I live there now, have lived there for five years past.

Q. Do you know where Mrs. Slough's property is?

A. Yes.

Q. And Mr. Rose's property?

A. Yes.

Q. Did you either on June 28, 1916, or prior to that time, ever notice the condition of the sidewalk in front of—

A. Yes, frequently.

Q. Now, what is that sidewalk made of?

A. It is made of an asphaltum block.

Q. About how large were the blocks?

A. Oh, I imagine about six inches square, I would say from observation.

Q. Do they extend clear across the front of Mrs. Slough's property?

A. Clear across the whole front.

Q. And from that sidewalk how did she get into her front door?

A. I believe there is a gravel walk extending from that stone walk into the house; I am not positive of that, but that is my belief.

Q. And to get into that gravel walk, to get into her house, she had to use these blocks that were in front of the house, the pavement?

A. Unless she came directly from across the street, then she would cross over, of course; anyone going into the house using the sidewalk would naturally use that pavement.

Q. Not only naturally, but they inevitably would have to use it?

A. Absolutely.

Q. Unless they jumped clean across the sidewalk and

went in?

A. That is right, you could jump across it.

Q. You could not jump across?

A. You could, I say, it is not very wide.

Q. How wide was that block walk?

A. I should say about three feet.

Q. Did you notice a tree in front of Mrs. Slough's house?

A. Yes.

Q. What kind of tree was it?

A. Maple.

Q. About what was its diameter in your judgment?

A. Well, I don't know; I have heard various sizes given this morning; I should think the tree would be about two feet.

By the Court:

Q. Thick, you mean?

A. Thick, clear through.

By Mr. Wescott:

Q. And its branches extended how?

A. In all directions.

Q. Out over her front yard?

A. Over her front yard.

Q. Was it a symmetrical tree?

A. Yes, fairly so.

Q. An ugly or beautiful tree?

A. No, a very pretty tree.

Q. Would it make any shade when it was in leaf?

A. Yes, indeed.

Q. Shade Mrs. Slough's front yard?

A. In the morning.

Q. And beautify the place?

A. Yes.

Q. Well, did you notice anything about the pavement

itself, the condition at any time?

A. The roots had extended across the entire pavement and raised the blocks and it had made them very irregular and lumpy. Some of the blocks were broken, some of them being very loose, and it created pockets there probably six to eight inches deep. At the tree, that is, at the root of the tree, they came to a point and spread out across the sidewalk and diminished in depth as it extended to the other side of the walk. Toward the tree the pockets were much deeper than on the inner side toward the house.

CROSS-EXAMINATION.

By Mr. Bleakly:

Q. You saw the condition of this pavement at or about the time of this accident in June, 1916?

A. Well, I had observed it during—for a couple of years anyhow.

Q. Well, my question is whether you had observed is just about the time of this accident?

A. Yes, I had occasion to pass over it frequently.

Q. And some of the blocks had been kicked out, had they?

A. Some of the blocks had broken; I don't know whether they had been kicked out or forced out by roots.

Q. Well, they were out and pockets, you said?

A. They were out; sometimes they were out, and sometimes been put in again.

Q. Open spaces?

A. They were loose.

Q. The pavement was badly out of repair, wasn't it?

A. Yes, very much so.

Q. What do you mean by those pockets, blocks were

out along the side?

A. Where the roots would come underneath, it might force one block up this way and force another block up the other way, which would make the blocks lumpy.

Q. Loose?

A. Some were loose; some were very firm.

Q. Some of the blocks were out of place then, were they?

A. Some of the blocks were out of place.

Q. Kicked on the side, were they?

A. Sometimes they would be kicked on the side, lying directly on the top of the sidewalk; other times they would be replaced.

By Mr. Wescott:

Q. Do you know who replaced them?

(Objected to).

THE COURT: If he knows.

A. I wasn't home at the time they were replaced.

Q. But was it before this accident to Mrs. Rose that they were replaced?

(Objected to).

THE COURT: That is an important question.

A. Oh, you mean the pieces that were kicked out?

Q. Yes, and replaced, was it sometime—

A. They seemed to be replaced at times; they would be kicked out and then come along again somewhere—

Q. Were those instances before the accident that happened Mrs. Rose?

A. This was before the accident, yes.

Q. You don't know who did that, who repaired it or put them back?

A. No, there may be half a block or a quarter of a block kicked out, and come through there again and that might be replaced.

Q. But you noticed on several occasions that those blocks had been replaced?

A. Yes.

Q. Was the condition of the street a dangerous one at that time?

A. In my estimation it was, yes.

Q. Did you find it so yourself?

(Objected to; objection sustained).

By Mr. Bleakly:

Q. I don't know whether I asked you how high the blocks were raised above the pavement, some of them, the ones that were not out?

A. They varied; they varied from the inner side toward the house probably from about two inches to eight or ten inches.

Q. It was a very noticeable condition, wasn't it?

A. O, yes, decidedly so.

Q. Anybody could see it?

A. Anyone.

THE COURT: Are these other witnesses cumulative, Judge, on the same point?

MR. WESCOTT: Yes, sir, I suppose so.

THE COURT: Mr. Bleakly, is there any dispute about the condition of this?

MR. BLEAKLY: No, not on this point.

THE COURT: That is what I mean, on the question of the physical condition.

MR. BLEAKLY: No, if it is the same as this last witness and the witness before it is cumulative on that; we have no dispute about that.

ANNA M. ROSE, recalled.

By Mr. Wescott:

Q. Mrs. Rose, how much wages do you pay weekly to your servant since you got hurt?

A. Well, I have my mother there to help me, but if I had—

Q. How much money do you pay weekly to your servant?

A. Well, I just had the girl a day, not the whole week, you know.

Q. Only one day in the week?

A. One day in the week.

Q. How much did you pay her?

A. $1.25.

Q. Did you have her more than one day a week?

A. I have had her, yes, at house-cleaning time, I have had her more, yes, sometimes two and three days.

Q. Did you have members of your family come there to help you?

A. Yes, my mother was with me all the time that I had this first broken arm, about three and a half months.

Q. Did you pay her?

A. I haven't yet, no.

Q. Have you promised to pay her?

A. Yes.

Q. How much?

A. I didn't specify.

Q. Whatever her wages were worth?

A. Yes.

Q. What were they worth—how much do you expect to pay her?

A. Well, I should judge about $10 a week and board.

CROSS-EXAMINATION

By Mr. Bleakly:

Q. It depends on whether you win this case or not whether you pay her, don't it?

A. Well, I don't know about that, Mr. Bleakly.

Q. Now, the dollar and a quarter you paid this girl, that was the girl that came in Fridays that you spoke of?

A. Yes.

Q. That you had before the accident?

A. Yes.

Q. The same girl came afterward?

A. Yes.

Plaintiff rests.

Defendant rests.

MR. BLEAKLY: I have a motion to make. If the Court please, these people resided in these properties both located in the township of Pensauken. It is proved by the plaintiff's case that they both went there to reside about twelve years ago and this tree was there then. Who planted the tree is not in evidence in the case. Under the Township Act the Township has a right to regulate the use of all sidewalks, streets, highways, alleys, parks and public places, to regulate the planting, rearing, trimming of shade trees in the same, etc.; in other words, the public authorities have charge. There is a case exactly in point, the case of Weller vs. McCormick, where exactly the same facts were proved, but in that case instead of being a root of a tree it was a limb of the tree, but it seems to me that is exactly favorable to our case. This case holds—I will read the pertinent points—

THE COURT: Just read me what the syllabus is.

MR. BLEAKLY: (Reading) "In a city where for a long time the municipality has, by its charter, had authority

to plant, rear, trim and preserve ornamental shade trees in the streets, proof that a defendant owns and occupies the lot in front of which such a tree stands on the street is not sufficient evidence that he planted or maintains the tree for his own uses, so as to charge him with the duty of trimming the same, and with responsibility for injury received by the plaintiff, upon whom a neglected rotten limb had fallen." Let me just read to the Court what Judge Dixon says. (Reading from opinion). In this particular case it cites the charter; in our particular case I have cited the Township Act, which is, of course, the charter for the Township.

THE COURT: I haven't got that before me.

MR. BLEAKLY: What, you haven't got the Laws of the State of New Jersey?

THE COURT: That is a special act, isn't it?

MR. BLEAKLY: No, it is not; in this case it was a special act, in our case it is a general act.

THE COURT: Where was this, in Pensauken Township or Merchantville?

MR. BLEAKLY: In Pensauken Township; the pleadings admit in the case it was Pensauken. "It thus appears that since 1863 the municipality has had the power of planting and preserving shade trees in the streets; and therefore the presence of any such tree in a street may be attributed to the exercise of this power as well as to any other cause. This is inadequate to the necessities of the plaintiff's position; for a 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." That is our case here; they have proved that this tree here exists and it may have been planted by the public, may have been put there by some third party.

THE COURT: What does the statute say in this case?

MR. BLEAKLY: The statute in this case says the same as that charter there, almost word for word; the township has power to make ordinances to regulate the use of sidewalks, streets, alleys, parks and public places, and direct and regulate the planting, rearing, trimming and preserving of shade trees in the same and authorize their removal, etc. So it seems to me here is a case exactly in point as this case. The case would be entirely different on the pleadings if we had planted this tree as the pleadings seem to show; then the situation would have been entirely different; but the proofs are that this tree was there when they both came there. Now, a second proposition; it seems to me it is clear from the case that the accident may have happened because the blocks were displaced; now, there is another alternative. It seems to me it is the duty of the plaintiff not only to show what this case holds, but also that the condition was not one of bad repair, but solely and only due to the roots of the tree, which is not the fact in this case, of course; from all the facts in this case you can argue either that it happened from the pavement being out of repair or the roots of the trees, because the evidence is clear the blocks were loose and some of them kicked up.

THE COURT: I know, but the primary cause, nevertheless would be the roots; if they caused the street to get in such a condition that the ordinary uses of travel on it would make it worse, I cannot imagine that that would in any way limit the responsibility. I think the serious question in this case is who is responsibile for that tree.

MR. WESCOTT: (After further argument): If you think the title of this tree is important, perhaps I can trace it.

THE COURT: I think that is quite important; I think that is really the pinch of the case. If other evidence can be obtained on that I won't hold the case to its present status.

MR. WESCOTT: Well, I will look into that and see what I can get, your Honor.

MR. BLEAKLY: I think under the circumstances, your Honor, I am entitled to a directed verdict.

THE COURT: You will be unless something more develops or unless some evidence is disclosed as to the responsibility for the tree.

MR. BLEAKLY: Are you going to hold this indefinitely?

THE COURT: Oh, no, but if there is a situation of surprise in any case where the Court would be foreclosing it if it granted a motion to direct, the Court would be slow about doing it.

At this point the further hearing of the matter was adjourned until 1 o'clock P. M.

Trial of the cause resumed at one o'clock P. M., pursuant to adjournment, in the presence of counsel for the respective parties.

THE COURT: Now, do you want to present anything further, Judge Wescott?

MR. WESCOTT: Well, I would like to find out if your Honor intimates that who put that tree there is important—

THE COURT: Yes, I think it is, Judge.

MR. WESCOTT: Can't we hold the case open until I ascertain the facts?

THE COURT: Well, I see no reason why a reasonable time—

MR. BLEAKLY: I don't think it is fair to hold it open indefinitely, your Honor. We had this very matter

up before, you know, and it seems to me that counsel should have done that.

THE COURT: There was a phase of the testimony which was introduced which was struck out on other grounds entirely which may have some possible bearing. I apprehend you won't want to rest the case on that, however, if there is other proof of the origin of this planting.

MR. WESCOTT: No, I think I can ascertain it very speedily.

At this point the matter was further adjourned until Thursday, September 27th, 1917, at 10 o'clock A. M.

Camden, New Jersey, September 27, 1917.

On this date the further hearing of this matter was adjourned until Monday, October 1, 1917, at two o'clock P. M.

Camden, New Jersey, October 1, 1917.

Trial of the matter resumed on the above date, at two o'clock P. M., pursuant to adjournment, in the presence of counsel for the respective parties.

(By consent of counsel the case was proceeded with with eleven jurors).

THEODORE F. ROSE, recalled.

By Mr. Wescott:

Q. Mr. Rose, after this accident to your wife, the day after, did you see the defendant do anything to this tree and walk?

MR. BLEAKLY: I object; this is after the accident. The same thing has been ruled upon before. I object to any testimony as to anything—

THE COURT: I suppose this is for the purpose of showing acts of ownership.

MR. WESCOTT: Yes, sir, proprietorship.

MR. BLEAKLY: My objection still holds, your Honor, nothing at all in the way of an act of ownership or anything else done after this act can by any possibility bind or oblige the defendant in this case as to any condition existing prior thereto. That is so clear I can't see how there can be any argument about it. It does not follow that anything that was done afterward can relate back. Let me illustrate—

THE COURT: I cannot reject it on that ground. If the act of the defendant has a tendency to show ownership, it certainly is relevant, and any act that was performed—

MR. BLEAKLY: Anything that was done that way would not prove ownership or authority.

THE COURT: I would not admit it for the purpose of showing negligence; that I ruled upon the other day, because it is well settled in this State that hindsight is not to be the standard of foresight.

MR. BLEAKLY: I think the same thing will apply, if your Honor please. If I should choose to take a certain proceeding after an accident it can by no possibility be construed into binding me as to what happened or the conditions that existed before.

THE COURT: Well, that is not the point; the point is whether the fact that you go on property and do a certain thing with respect to it may not indicate that you have some right to do it.

MR. BLEAKLY: The situation may have entirely changed, your Honor; they may have gotten authority.

THE COURT: You mean to say that the defendant might have acquired a right or something of that sort?

MR. BLEAKLY: That is the idea, might have acquired a right; that is one idea. Of course, I don't base it entirely on that; I say it is absolutely irrelevant and immaterial to this issue in any point of view.

THE COURT: I cannot say that that is an irrelevant circumstance; I will admit it.

(Exception noted for the defendant).

(Question repeated).

A. Yes.

Q. When was it, the day after your wife fell?

A. On the same day.

Q. Oh, the same day?

A. Yes.

Q. What did you see the defendant do?

A. Well, he went out and began to mash down the pavement, push it down, re-arrange the blocks that tripped her.

Q. What else, if anything?

A. That is all he did that day.

Q. What did he do the next day?

(Same objection).

A. Nothing done the next day, but about a week or ten days there was a party brought there of about four men. It took them there several hours to saw off these big roots and fix the pavement in good order, which it now is.

Q. Do the pictures that were identified here yesterday show what was done?

A. Yes.

MR. BLEAKLY: I make the same objection and ask an exception.

THE COURT: That is not material. The pictures were

not admitted, were they?

MR. WESCOTT: They were excluded, if your Honor please, on the ground that—

THE COURT: Yes, but I am not excluding this question; I call counsel's attention to the fact that they are not in this case at this time.

Q. Do the pictures show what was done a week or so afterward?

A. Yes, by men that came there and fixed the pavement; the pictures show what they did,

MR. WESCOTT: I would like to offer these photographs.

THE COURT: I will admit them now; note an exception to the other side. That is the objection, is it?

MR. BLEAKLY: Yes, your Honor, no relevancy at all; these pictures show conditions existing after the accident, ten days, as he says.

(Said photographs are marked respectively Exhibits P 1, P 2, P 3, and P 4).

CROSS-EXAMINATION.

By Mr. Bleakly:

Q. Now, Mr. Rose, I understood you to say you saw Mr. Slough come out sometime after the accident?

A. Yes, sir.

Q. And re-arange some of the blocks?

A. Yes.

Q. What time of the day was that?

A. Oh, I think it was in the afternoon sometime; I think it was somewhere around one o'clock; I took my wife to the hospital in the morning about half past ten, and he came out after that.

Q. Now, then, about ten days later you think it was—

A. I approximate about that.

Q. Wasn't it a month later?

A. Oh, no, no.

Q. There were some men came there?

A. Yes, I think there were four of them.

Q. And they did some work on the pavement?

A. Yes, the contractor and his help.

By the Court:

Q. Well, Mr. Rose, don't you know who they were?

A. I don't know who the men were, but I think it was a contractor we have around there and his men; I can't recall his name.

Q. I am getting at this: Do you know anything about who they were doing it for?

A. Doing it for Mr. Slough.

Q. Do you know that?

A. Well, no; I presume they were.

Q. Well, you see this is a vital thing in the case, whether or not the defendant in this case exercised any acts which indicated that he was the proprietor.

A. I only know that they were doing the job and I presumed it was for Mrs. Slough.

THE COURT: Well, I suppose it would be equally consistent that the municipality was doing it. This only goes a step; I don't know how much more there may be.

JOHN B. STOW, sworn.

By Mr. Wescott:

Q. Mr. Stow, what is your age, please?

A. Well, if I live to see Friday I will be sixty.

Q. Where do you live?

A. Pensauken Township.

Q. Do you know where East Walnut Avenue is?

A. Yes, sir.

Q. How many years have you known that?

A. I have known it ever since it has been built.

Q. When was the avenue laid out—have you any idea?

A. I can't just recall; I remember when it was in a farm.

Q. Who owned the farm?

A. Why, Elijah Cattell.

Q. Do you know when it was laid out?

A. Yes, sir, I remember when it was laid out.

Q. About how long ago was that?

A. Well, I can't say; sometime since the blizzard, I remember that.

Q. In what year?

A. '88.

THE COURT: In 1888, you mean?

THE WITNESS: Yes, sir.

Q. And were there any streets laid out?

A. Not when it was in farm land it wasn't, no.

Q. No, I know, but when the farm land was laid out, was it laid out in streets?

A. Yes, sir.

Q. And was this one of the streets?

A. Yes, sir.

Q. Were there any trees along the street at that time?

A. No, sir.

Q. When were the trees put there?

A. I don't recollect when they were put there, sometime after the land was laid out.

Q. A long while or a short while?

A. Well, I wouldn't like to say that, because I don't know just exactly when.

Q. Were you ever a member of the Pensauken Township?

A. Yes, I am now.

Q. How long have you been a member?

A. Only a year.

Q. Only a year?

A. Yes.

Q. Were you a member before that?

A. No, sir.

Q. Now, do you know whether the Township had set out those trees or somebody else?

A. No, sir.

Q. Well, what do you know about it?

A. Well, I don't know who set them out. Mr. Moore, a man by the name of Moore bought the land and laid the streets out; I don't know who set the trees out, of course.

Q. Did the Township set the trees out?

A. That I couldn't say; we can't find any records where they did.

MR. BLEAKLY: I move to strike out the latter part of the answer; it is not responsive. (To the stenographer) Repeat the question; your Honor will see.

THE COURT: Yes, it is not responsive.

Q. Have you looked at the records of the Township for the purpose of seeing whether the Township laid out these trees?

A. Well, I haven't looked them up; some of the older committee have.

MR. BLEAKLY: I move to strike the latter part out.

THE COURT: Well, that doesn't amount to anything; that part is harmless.

Q. Who are the members of the older committee?

A. Oh, I don't know; we have had so many I can't

just recall them all.

Q. Do you know when Moore acquired this property?

A. Yes, sir.

Q. Well, when, about?

A. I don't recollect the year he did have it; I know he built a good many houses on Park Avenue and a good many on Walnut Avenue.

Q. East Walnut Avenue?

A. Yes.

Q. Well, do you know whether he set out any trees?

A. I don't know that, who set them out.

Q. Well, were there any trees set out on that street?

A. Yes, sir, there were trees planted, somebody planted some, I don't know who, couldn't say.

By the Court:

Q. Who was the last owner of this property, do you know, before Mrs. Slough?

A. I understood Mr.—— Well, I know it belonged to George Williams.

Q. Do you know how long he had it?

A. No, sir.

By Mr. Wescott:

Q. Did you ever see any trees put out along that Avenue?

A. No, sir.

Q. How?

A. No, sir.

Q. What kind of trees were they?

A. Maples I believe.

Q. Did you see them when they were small trees?

A. Yes, sir.

Q. And who occupied—who owned this property when these trees were small?

A. Well, the first man I knew of, knew that owned

this property, was Mr. George Williams.

Q. Did he get it of the Cattells?

A. I don't know.

Q. Well, who first built the house there, the houses along that street?

A. That is something I can't answer.

Q. Were there any houses built along that street?

A. Yes.

Q. There are houses there now, are there?

A. Yes.

Q. How long have they been there, any of them?

A. Well, I should say twenty-five years.

Q. Were there trees in front of the house twenty-five years ago?

A. Yes, sir.

Q. Were they little or big trees?

A. Well, they were little when they were put there; of course, they kept growing.

Q. Well, were those trees put there before the houses were built?

A. That I can't say; I can't remember.

Q. Did the Township ever put out trees anywhere along the streets there?

A. Not to my knowledge.

No cross examination.

CHARLES ROBINSON, sworn.

By Mr. Wescott:

Q. Mr. Robinson, where do you live, please?

A. Merchantville.

Q. How long have you lived there?

A. About thirty-five years, I guess.

Q. Do you know where East Walnut Street is?

A. Yes, sir.

Q. Do you know when that was in a farm?

A. Yes, sir.

Q. Who owned it then?

A. Why, Senator Cattell owned a portion of it.

Q. Do you know or remember who laid out the streets there, East Walnut Street?

A. No; now, I couldn't say who laid them out, but it laid between him and Leonard Moore.

Q. Do you remember little trees, maple trees, being planted along East Walnut Street?

A. Oh, there was plenty of trees, but I wouldn't say who put them there; I don't know who put them there. I have done lots of work along there—

Q. Have you talked to anybody about your evidence in this case?

A. No, sir.

Q. When were these trees put there?

A. Oh, there is some of them been there for—yes, for twenty years, if not longer, and some of them hasn't been there over two or three years.

By the Court:

Q. You remember these trees being put in?

A. Yes, I remember when the streets were laid out.

Q Do you remember the men that worked on it, putting them in?

A. No, sir, indeed, I couldn't tell.

Q. Did you work putting them in?

A. No, sir.

Q. Do you remember any of the people?

A. No, sir, I couldn't tell you.

Q. Were they there when the houses were built?

A. I couldn't say.

Q. You don't remember?

A. No, sir.

Q. Do you remember whether there were a lot of trees put out when the first development took place or whether they were put out at different times?

A. I am afraid to say; I don't know, I couldn't say.

By Mr. Wescott:

Q. Didn't you tell this gentleman sitting here just a few minutes ago that these trees were put out by the property-owners along the street?

MR. BLEAKLY: I object to that; that is a leading question and a contradiction and argumentative with his own witness.

THE COURT: He may ask it; it goes to the question of surprise.

A. I don't know; I didn't tell him that I knowed when they were put out. I know they were put out since 1888, I mean from 1888, 1889 and up until now.

Q. Didn't you tell him they were put out by the property owners?

A. No, I don't know who put them out, whether the contractor or property owners.

By the Court:

Q. Who do you mean by the contractor?

A. The builder, the man who built the house and sold the lot.

Q. Do you know they were put out by either one?

A. Yes, by somebody.

Q. You know they were put out by somebody?

A. Yes.

Q. Do you know who set them out, as to whether it was the Township or whether it was somebody promoting the land or somebody living on it—do you know anything

about that?

A. No, sir.

By Mr. Wescott:

Q. You know Mr. Rose here?

A. Yes.

Q. Didn't you tell him the property owners put the trees out?

MR. BLEAKLY: I make the same objection as before, your Honor.

THE COURT: Well, it is not evidential at all; it only goes to the question of surprise.

A. All I done is for the property owners on the street; I haven't planted no trees there and haven't seen nobody plant any, so I don't know who put them out.

Q. Well, do you know whether the property owners along that street put out any trees?

A. No, sir.

Q. Didn't you ever see any trees put out along that street?

A. No, sir.

Q. Well, haven't you ever seen any trees along that street?

A. No, sir.

Q. How old are those trees?

A. Some of them from twenty—from two to twenty years old.

Q. Well, you lived there when these trees were put out, didn't you?

A. Well, I was doing other work around, not up there.

Q. Did you see the trees put along the street?

A. Never paid no attention to them; I didn't do the work.

Q. I know you didn't, but did you see the trees there?

A. Oh, sure, yes, I seen the trees.

Q. When they were first put out?

A. Yes—no, not when they were first put out, no, sir.

Q. Well, did you see them after they had been out a little while?

A. After they had been out maybe six months or a year; I don't know who put them out there; it wasn't none of my business.

Q. Well, were there any houses there then?

A. Oh, possibly, yes, sir.

Q. How many?

A. I don't know; that street has been full of houses for fifteen years, I guess.

By the Court:

Q. Are you a good judge of trees? Do you know anything about them, their ages, etc.?

A. Yes, sir.

Q. What is your work—what do you do?

A. Gardening.

Q. On a farm—do any wood work?

A. No more than gardening and planting.

Q. Do you cut trees?

A. No more than around at places.

Q. Have you any idea how old this tree was in front of the Slough place?

A. I hardly know now where Mr. Slough lives, how far from Mr. Cowan or Mr. Rose.

Q. You don't know this particular property then?

A. No.

Q. Do you know the tree where the ground was—do you remember that at all?

A. No, sir, I just go attend to my own business, that is all I know.

NATHAN F. COWAN, sworn.

By Mr. Wescott:

Q. Mr. Cowan, where do you live?

A. 105 Cove Road, Pensauken.

Q. You know Mr. Slough?

A. Yes.

Q. A friend of his, aren't you?

A. Yes, he is a neighbor.

Q. Well, you and he are friends, aren't you?

A. Yes.

Q. Do you live anywhere near him?

A. My property adjoins his.

Q. You live next to him?

A. Yes, except he lives on Walnut Street and I live on Cove Road.

Q. How long have you lived next to Mr. Slough?

A. Twenty-eight years.

Q. Did you build the house he lives in?

A. No, sir.

Q. Who did build it?

A. I don't know.

Q. Were you familiar with that place before you bought your place twenty-six years ago?

A. No, I wasn't familiar with it.

Q. Never saw it?

A. Only when I bought it of Mr. Cattell.

Q. Well, were there young trees in front of the house when you bought it of Mr. Cattell?

A. No.

Q. Did you plant trees in front of your house?

A. I planted the trees on my own property on Cove Road.

Q. And does that connect with—how far are you from

Slough's place?

A. It adjoins Slough's, and there are no trees between Slough's house and Cove Road except what I planted in my own yard.

Q. Have you got trees in front of your house on the street?

A. Yes.

Q. That you planted?

A. They were planted under my supervision.

Q. They are maple trees?

A. Maple trees.

Q. Are they in the line of the street?

A. On the curb.

Q. Yes; does your street run at right angles with East Walnut Street, East Walnut Avenue?

A. Yes.

Q. How far from East Walnut Avenue?

A. 200 feet.

Q. Were there any trees along East Walnut Avenue when you put out your trees?

A. No.

Q. They were put out afterward then?

A. Yes.

Q. Who put them out?

A. I don't know.

By the Court:

Q. Who lived there then in the Slough property?

A. When I moved there?

Q. Yes.

A. Nobody.

Q. Nobody?

A. No.

Q. Who was the first tenant?

A. I don't know.

By Mr. Wescott:

Q. Well, was the Slough house standing there when you built?

A. No.

Q. Put up afterward?

A. Yes.

Q. And don't you remember whether there was a maple tree in front of it and other maple trees along the line of the street?

A. There were.

Q. Small trees, weren't they, young maple trees that had been put out there?

A. Yes, twenty-eight years ago.

Q. Yes, they are about twenty-eight years old, aren't they?

A. Yes.

Q. Well, do you know who laid that property out?

A. Only as far as my property goes.

Q. Yes; who laid it out?

A. Senator Alexander Cattell.

Q. It all belonged to Cattell, Senator Cattell, at one time, didn't it?

A. Yes.

Q. And he laid it out in streets?

A. He laid out Walnut Avenue.

Q. Well, weren't there trees put along it?

A. There were trees there.

Q. Well, weren't they planted there?

A. They have been planted there, yes, of course.

Q. Well, were they planted there when he laid it out?

A. No.

Q. Afterward?

A. Afterward.

Q. How long afterward?

A. I don't know.

Q. Were they put out after yours were put out?

A. Yes.

Q. How long after you put yours out?

A. I don't know.

Q. Trees put out on both sides of the street?

A. Both sides.

Q. Both sides?

A. Yes.

Q. Were trees put out on other streets there at that time?

A. No.

Q. Were they put out by the public authorities or by the owners?

A. I don't know.

Q. Well, the public authorities didn't put yours out?

A. No.

Q. You put yours out?

A. On my own property, yes.

Q. Well, did your neigbors put out trees on their property along the line?

A. Not that I know of.

Q. You never saw any trees along the line except your own?

A. No.

Q. Well, aren't there trees now beside yours?

A. There are now, yes.

Q. You don't know when they were put there or who put them there?

A. No.

No cross-examination.

CHARLES E. SLOUGH, sworn.

By Mr. Wescott:

Q. You are the husband of the defendant in this case?

A. Yes.

Q. How long have you occupied that property there?

A. Going on fourteen years.

Q. You planted no trees in front of your house?

A. No, sir.

Q. They were there when you took the property?

A. Yes.

Q. Well, you knew of the accident to Mrs. Rose, didn't you?

A. We did not; we did not know of the accident.

Q. Never heard of it?

A. Oh, we heard of it; yes, we never knew she fell there, didn't see her fall.

Q. Well, after the accident you fixed the pavement and trees, didn't you?

A. No, sir.

Q. Who did?

A. Mr. Tilton; we got the contractor to straighten up the pavement.

Q. Who got the contractor to do it?

A. Well, we did.

Q. Who is "we?"

A. Mr. and Mrs. Slough, of course.

Q. And did you pay him for doing it?

A. Oh, yes.

Q. Why did you get him to fix it?

MR. BLEAKLY: I object to that as immaterial and irrelevant.

THE COURT: The objection is overruled.

(Exception noted for the defendant).

Q. Why did you get the contractor to fix it?

A. Not that we thought it was dangerous; it was merely to—there were roots extending across the pavement and caused a slight raise, it was gradual, the blocks were perfectly smooth, which had been possibly that way for quite a while, and that by gradual use was rounded off, but we thought that we could have that changed.

Q. Didn't you hear of people falling over those roots?

A. Never heard of anyone falling over them, no: no complaint all these years we lived there.

By the Court:

Q. Mr. Slough, does your property line go to the middle of the street?

A. No, I guess not; as far as I know, I guess it merely extends if there is any building line, as far as I know.

Q. You don't know what your title shows?

A. No, I guess it extends—it begins at the line of the property.

Q. Well, if you don't know; I thought perhaps you had examined your deed. You haven't examined that?

A. No, I have read over it, but I just can't recall whether it extends to the middle of the street.

By Mr. Wescott:

Q. Look at Exhibit P 4 and see whether that is the street with the tree in front of it, and whether that is what you had done to the tree, the cutting off at the root there?

MR. BLEAKLY: Of course, you understand my whole objection goes to all this line, your Honor.

THE COURT: Well, this, as I gather it, is testing who is responsible for this change.

MR. BLEAKLY: Yes, it is after the act.

THE COURT: No, I don't mean that; I don't mean for negligence; I don't think it is admissible on any such

line. It is only admissible upon the theory—

MR. BLEAKLY: My objection—

THE COURT: I know, but if it is admissible for any purpose I can't keep it out entirely. I want you to understand the Court's ruling; it does not rule the paper in as evidence of any misconduct, but simply as bearing, as far as it may go, upon the question of acts of ownership.

Q. Is that the street?

A. That is the street, yes.

Q. And that is the tree?

A. That is the tree.

Q. That shows where you cut off the roots?

A. I didn't cut them off.

Q. Well, where your people you employed cut them off?

A. Yes.

By the Court:

Q. Mr. Slough, how 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.

A. I just told him to bring it in line, to remove the roots so we could get rid of that raise in the pavement.

Q. Now, if these were trees that belonged to the Township what was your idea in cutting the roots off?

MR. BLEAKLY: I object to that as immaterial and irrelevant.

A. Of course, I don't know anything about who had charge of it or under whose control, whether is was our place to straighten up the sidewalk or the Township's; we never had any complaints; it was just merely a gradual raise which came by years.

THE COURT: What is the fact about this title; where

does this title go, to the middle of the street?

MR. BLEAKLY: I don't know.

MR. WESCOTT: By legal presumption it goes to the middle of the street, of course.

THE COURT: No, I think not; I think there is no legal presumption on the subject. There are two ways in which Townships get roads; some by gift, some by simple condemnation of the right of way; this might be either.

MR. WESCOTT: I think in that very case we were looking at the other day it says that the legal presumption is the owner goes to the middle of the street.

THE COURT: I do not recall that.

MR. WESCOTT: That has always been my understanding of the law.

By Mr. Wescott:

Q. Do these other pictures show the same tree where the roots were cut off?

A. These are greatly magnified, all those trees are magnified.

Q. No, do they show?

A. Oh, yes, yes, but you can't tell where these trees might be from those two pictures there.

By the Court:

Q. Who did you buy it from? Who did your wife buy it from?

A. Mr. Howarth.

Q. Who did he get it from, do you know?

A. From Mr. Williams.

Q. And how long ago did Williams own it, do you know?

A. How long ago?

Q. Yes, how far back did his ownership go?

A. We have been living there nearly fourteen years.

Q. Now, how long back of that?

A. That would possibly be—Howarths had lived there five and they lived there previous to—

Q. Do you know how long Williams lived there?

A. I do not.

Q. A number of years or just a short time?

A. Oh, yes, a number of years, no doubt.

Q. Who is it, George P. Williams?

A. Yes.

Q. A man about as gray as you or I are?

A. Yes, that is it.

Q. Rather short, full face?

A. Yes.

Q. He is living, isn't he?

A. Oh, yes.

Q. You don't know who he got it from?

A. Who he got the house from?

Q. Yes.

A. No, I can't say; they say that Moore, Leonard Moore built those houses there; of course, I only know what they say.

Q. You don't remember the trees being put out at all?

A. No.

NO CROSS-EXAMINATION.

PLAINTIFF RESTS.

DEFENDANT RESTS.

MR. BLEAKLY: I renew my motion. The situation is just the same as it was the other day. There has not been a particle of evidence to show the planting of the tree or any acts of ownership prior to this act, and not only is that so, but there is not a single line of evidence here yet in reference to the acts of the public authorities. A witness comes here who has been in the Township Committee one year; now, that must be positive proof on their side as held by Judge Dixon in the second case; it must be positive proof on their part as to that situation. In other words, there are four different things for them to prove and they haven't proved one of them in reference to this tree.

THE COURT: Well, gentlemen, let me say this before you go any further with this case: Either the defendant is responsible for this tree or he is not. That is a question of fact which should be susceptible of comparatively easy solution. If the Township has taken control of the properties in that Township in a way to control the foliage and the trees on the highway, there must be some ordinance or regulation of the Township Committee conferring it or taking jurisdiction. It does not seem to me this case ought to rest upon the merest conjecture of title. There is no proof yet that I recall that the defendant is the owner of this tree, unless that is admitted. Was that admitted in the pleadings?

MR. BLEAKLY: Yes, I think that was; but, if your Honor please, I have just this to say: This case came up at the last term of Court in May and we came here with our witnesses, my client came here with a lawyer and had to pay the lawyer and witnesses to meet a certain case. Now, through the laches of the plaintiff that case was not ready.

THE COURT: Mr. Bleakly, I am not going to throw

cases out of court simply because somebody is inconvenienced.

MR. BLEAKLY: It is not a question of that; it is a case of dollars and cents.

THE COURT: I know, but I have practiced law too long not to know that mistakes may happen.

MR. BLEAKLY: May I put my motion on the record?

THE COURT: Yes, but that is not the question just now; I am saying something anterior to that, that is the reason we allow amendments; that is the reason the statute of amendments and all the recent rules were passed.

MR. BLEAKLY: Now, for one week they have had a chance to do all this. Now, I must come in again and my client must; I don't think it is fair, your Honor, to compel my clients in this case—to treat them that way.

THE COURT: Well, if the plaintiff wants to rest his case as it stands I will rule on it, but I do think if there is merit in the case it ought to have proofs worked out and completely identified. There is no complete testimony here yet.

MR. WESCOTT: If the Court please, my situation is this: A lawyer can't do everything himself; he has got to rely on other people. I told Mr. Rose what I wanted, I told him to get the Township Committeemen or their records here; I wanted him to find some old residents out there who knew when those trees were planted, who planted them. He said he could do it and he reported to me he had done it, that they had a couple of witnesses here who knew all about those trees, in fact, one of them voluntarily came to Mr. Rose and told him so, that they knew who put them out. Now, ordinarily—of course, I haven't seen the witnesses—but ordinarily a lawyer would be justified, I think, in taking that as evidence. I put these two men on the stand and they did not know

a thing.

THE COURT: I am not criticizing, Judge, the status of the case. I am only saying to counsel that the Court is not ever inclined to dispose of a case on technical situations if it can avoid it; it wants them threshed out on their merits. Now, if there is any reasonable likelihood of, as it seems to me, this very palpable fact being established by proofs, I am going to give you an opportunity to do it, but if you think that cannot be done, there is no use in my wasting time with the case any further.

MR. WESCOTT: I think it can be done; I will take hold of it myself; I won't rest on my clients for it.

THE COURT: Well, I can't see that the other side is embarrassed very much. They came into court and rested without proof, and I suppose they would do the same thing at another time.

MR. BLEAKLY: I think there ought to be a limit to those things, if your Honor please.

THE COURT: I agree with you, Mr. Bleakly, but I don't think the limit has yet been reached. It seems to me there is likely evidence in the case. I will hold it still further and an opportunity will be presented. Note an exception to the Court's action.

At this point the further hearing of the matter was adjourned until Thursday, October 4, 1917.

Camden, N. J., October 4, 1917.

Trial of the above case resumed on the above date, at 3.15 o'clock P. M., pursuant to adjournment, in the presence of counsel for the respective parties.

(By agreement of counsel the case was proceeded with with ten jurors).

ROBERT V. PEABODY, sworn

By Mr. Wescott:

Q. Mr. Peabody, where do you live?

A. Pensauken.

Q. What is your public position?

A. Township Clerk.

Q. Do you have custody of the records and by-laws and resolutions of the Township?

A. Yes, sir.

Q. Have you them with you?

A. Yes, sir.

Q. Will you produce them, please?

By the Court:

Q. How long a period do they cover, Mr. Peabody?

A. This covers from 1899 to 1915. I did not bring 1915 with me.

THE COURT: Well, just a moment; when was it these trees were said to have been planted?

MR. WESCOTT: The time has not been fixed by anybody. What I propose to prove by this witness is that there was no ordinance or by-laws or resolutions or other action.

THE COURT: Well, it is undoubtedly competent; go on.

Q. Are there or have there been any ordinances, by-laws, resolutions, minutes or proceedings by the Township in relation to either the setting out, the trimming or control of trees on the public streets?

A. Why, there has been an ordinance about trimming trees.

Q. When was that passed?

THE COURT: Do you remember, Mr. Peabody?

A. It has been very lately, within the past five years.

I think that just had reference to cutting them within eight feet.

Q. What is that?

A. That just had reference to cutting them within eight feet of the sidewalk so they wouldn't touch the pedestrians' hats and umbrellas.

MR. BLEAKLY: Of course, we will have to have the ordinance.

Q. That is what the ordinance was?

A. Yes.

MR. BLEAKLY: Wait; I object to any testimony about the ordinance unless it is produced; the ordinance will have to speak for itself; that is a well-known rule.

THE WITNESS: I thought I had them here; they have all been transcribed.

THE COURT: It is a pretty long hunt, is it?

THE WITNESS: It seems to be; they were all in here—this is the way they were.

MR. WESCOTT: Well, I will withdraw that question for the time and see if we can get along without it.

Q. Have you any ordinance or resolutions or minutes concerning the planting of trees?

A. I have not.

Q. Was there anything to show that the Township has ever taken over the control and management of the trees, shade trees along the streets?

A. Not in anything I have.

By the Court:

Q. Well, you have got the entire records, haven't you, of the Township?

A. No, sir; I have only got from 1899. Now, the records before that I don't know what has become of them; that was long before my time.

By Mr. Wescott:

Q. Well, do you know where they are?

A. I do not.

Q. Have you looked for them?

A. Oh, yes, I have looked for them.

Q. Where have you looked?

A. I have looked through all the old records. They were turned over to me in barrels and boxes and baskets, tied up and loose.

Q. Well, do you know whether there ever were any such—

A. I don't know.

Q. Rules or by-laws or resolutions or ordinances?

A. I don't know.

By the Court:

Q. Haven't you got a book or set of the ordinances?

A. Yes, that is the way they are. (Indicating).

Q. Well, haven't you got the ordinances for the entire period of the Township?

A. Why, no, sir, I have not. Up until three years ago they were kept as I say, in books like this, pasted in and put in here loose, and three years ago they started new ordinances.

Q. As a matter of practice do you know whether the Township has taken any part in the planting of trees?

MR. BLEAKLY: I object.

A. Nothing as I know of.

MR. BLEAKLY: I object to that, if the Court please.

THE COURT: Answer it; note an exception.

A. No, sir; they have not within the past three years while I have been identified with the Township Committee, the Township Clerk.

Q. You don't know what took place away back?

A. No, sir.

CROSS-EXAMINATION.

By Mr. Bleakly:

Q. Mr. Peabody, you have been Clerk for three years?

A. No, sir.

Q. I understood you to say three years?

A. No, sir, I said not since I have been identified with the Township Committee or Township Clerk.

Q. How long have you been Clerk?

A. Since May 14th, this year.

Q. And isn't it a fact that there are a number of ordinances of the Borough known to be in force that are not in this book that you have produced here?

A. Oh, yes.

Q. Take the Garbage Ordinance, for instance.

A. Why, that is a late ordinance.

Q. Well, there is another Garbage Ordinance, too, passed long prior to this time not found in this book at all, isn't that a fact?

A. Not that I know of, no; the present Township Committee has passed a Garbage Ordinance.

Q. No, I don't mean that; I mean other ordinances passed prior to your time which are known to the Township Committee which were not in this book?

A. Not that I know of.

Q. All the records that you have go back to 1899?

A. Yes, 1899.

Q. And you haven't got all the records between that time, have you, between 1899 and 1915?

A. Why, I have the minute books.

Q. But you haven't got the ordinances?

A. Here is what there is of the ordinances, what is left of them.

Q. Who put those ordinances in that book?

A. I don't know; they are signed by various men.
By the Court:
Q. As Clerks, you mean?
A. As Clerks, attested as Clerks and signed as Chairman of the Township Committee.
Q. Did they come into your hands as Clerk?
A. Yes, sir.
MR. WESCOTT: I offer the ordinances.
THE COURT: They will be marked.
MR. BLEAKLY: You mean you offer this book?
MR. WESCOTT: I offer the ordinances, everything he has got which is called the record.
THE COURT: You can't mark them very well, I suppose.
MR. BLEAKLY: Let's see; if it is this book, I would like to know what is offered; is this the whole thing?
MR. WESCOTT: That is what the Clerk says.
MR. BLEAKLY: Then I would like counsel to point me out anything there pertinent.
MR. WESCOTT: There isn't anything there pertinent; that is the point about it.
THE COURT: I suppose, Mr. Bleakly, it is offered as far as it goes to show that within that time the Township has passed no legislation on the subject.
By Mr. Wescott:
Q. Mr. Peabody, you have in your possession all the records that there are out there, haven't you?
A. Yes, sir, as far as I know everything was turned over to me that the preceding Clerk had.
By the Court:
Q. You can find this ordinance, can't you, about the trimming of trees? You need not find it at this minute, but I say, you can find it at your leisure, can't you?
A. Oh, yes, I can find it, but this is a comparatively

recent ordinance.

MR. WESCOTT: See if you can find it right away; just take your seat here.

IRVINE BEATTY, sworn.

By Mr. Wescott:

Q. Mr. Beatty, how old are you, if you don't care?

A. Sixty-nine.

Q. You and I will shake hands.

A. I am younger than you are, though.

Q. No, you ain't; younger in some respects, but not in years. Now, have you ever lived out in Pensauken Township?

A. No, sir.

Q. Lived near there?

A. Yes, sir.

Q. How near?

A. Across the street.

Q. Do you know this Mrs. Slough property on East Walnut Avenue?

A. Well, is it the house immediately back of Nathan Cowan's?

Q. Yes.

A. Yes, I know that house.

Q. How many years have you known that street?

A. Ever since it was built.

Q. That goes back how far?

A. Oh, it goes back twenty-five years.

Q. Were there shade trees set out on that street?

A. They were set out, yes.

Q. Did the Township set them out?

A. Well, now, I couldn't say that the Township set them out.

Q. I don't want you to.

A. I didn't know that they did.

Q. Well, who did set them out?

A. I don't know positively who set them out?

Q. Well, what do you know about the setting?

A. I know there were no trees there when that house was built.

Q. And that house was built how many years ago?

A. Well, to rough recollection I would judge it was built about twenty-three years.

Q. Who built it?

A. Leonard Moore.

Q. Do you know whether Mr. Moore set trees out in front of his houses?

(Objected to as immaterial and irrelevant).

THE COURT: Oh, no, that is very pertinent.

A. I know that Leonard Moore set some trees out, but I couldn't tell which ones he set out.

Q. Well, did he set out trees along that street?

A. Some on that street.

Q. And how long is that street, Mr. Beatty?

A. What do you want, in feet or squares?

Q. Either.

A. Well, it is—that extension was two squares long then.

Q. And Mr. Moore, D. Leonard Moore, was the fellow that made the extension, was he?

A. Yes.

Q. How many streets did he have there in that neighborhood?

A. Oh, he had several places; he built on Walnut Avenue extension and on Cove Road and on Park Avenue

and all around there.

Q. And he had a habit of setting trees out along the edge of the street?

(Objected to as leading).

THE COURT: Yes.

Q. Well, did he set them out?

A. He set some out; I don't know whether he had the habit of setting them out or not.

Q. He set trees out?

A. Set some trees out.

Q. Maple trees?

A. Some were poplar.

Q. And some maple?

A. Some maple.

Q. How many trees were set along this street?

A. I couldn't tell you that. It was none of my business and I didn't keep an accurate account of it.

By the Court:

Q. Do you know whether they were all put out at once, Mr. Beatty?

A. No, they were not.

Q. In this block or in these two blocks?

A. No, they were not.

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.

Q. Moore owned the property, did he? Who else—

A. He built the house and sold it to a man named Williams, I think.

By Mr. Wescott:

Q. Well, do you know whether Williams set out these trees? We had Williams here and he is gone.

MR. BLEAKLY: Well, Ethan sent him away; at least, he said he did. I met him going down the street and he said Ethan sent him away.

MR. WESCOTT: Well, he didn't.

Q. Do you know whether Williams set any trees out?

A. I couldn't say whether he did or did not.

THE COURT: Well, Judge, if the property was owned by Moore and Moore built the house and sold it to Williams, and either he or Williams put it out, does it make any difference which?

MR. WESCOTT: No, I don't know as it does.

THE COURT: Well, this witness said that one or the other of them did.

MR. WESCOTT: All right; cross-examine.

CROSS-EXAMINATION

By Mr. Bleakly:

Q. Did I understand, Mr. Beatty, that you saw either Mr. Moore or Mr. Williams plant those trees?

A. No, I didn't say that; I said that I saw Mr. Moore plant some trees.

Q. You don't mean to say that you saw either Mr. Williams or Mr. Moore plant this particular tree?

A. I do not.

Q. As a matter of fact you don't know who planted this particular tree?

A. I do not.

Q. That is the truth, isn't it?

A. Yes, I think it is.

Q. Well according to your recollection?

A. According to my recollection.

Q. You never saw Mr. Williams plant any trees, did you?

A. No, I would go away in the morning and come back at night and the tree was there.

Q. You did see Mr. Moore plant some trees?

A. I did see some, yes.

Q. Now, as a matter of fact, did you actually see Leonard—you knew Leonard Moore very well, didn't you?

A. Oh, yes.

Q. In fact we all did—you never really saw him dig a hole—

A. Not he personally, but his men. If I have a servant and he does my bidding, that is me.

Q. Sure, there is no dispute about that; I just wanted to have it straight. They planted some trees on this street?

A. Yes.

Q. That is all you know about it?

A. That is all I know about it.

By Mr. Wescott:

Q. Did you ever know of the Township planting trees on any street?

A. Neither the Township or Merchantville, either one; I never knew them to.

By the Court:

Q. Mr. Beatty, have you been familiar with the Township affairs there, that is to say, their operation?

A. No, I live in the Borough.

Q. I know, but have you kept track at all of their actions since that time?

A. Except at political times someone might find fault and I would acquiesce, but I wasn't interested in it.

Q. No, did you keep track of it sufficiently to know whether they would plant trees or not?

A. No; I wasn't sufficiently interested in it to find out whether they did or not.

MR. WESCOTT: We offer the history of the title of this deed; that is the deed of Senator Cattell's to Mr. Moore.

MR. BLEAKLY: There is a missing deed there he wants to put in.

THE COURT: Anything further?

MR. WESCOTT: That is all; we rest.

THE COURT: Proceed, Mr. Bleakly.

MR. BLEAKLY: I would like a chance to look at these minutes; of course, I cannot do that just now, or this ordinance. Of course, they haven't produced that ordinance yet.

MR. PEABODY: I have a copy of it but I do not find the original in the book here.

MR. WESCOTT: Where is the copy?

MR. PEABODY: At home; you see these ordinances were all taken together and written out in the book from this conglomeration here. The book I have at home is not signed.

MR. BLEAKLY: I would like to see that ordinance, of course.

THE COURT: Well, subject to that, Mr. Bleakly, you can go on.

MR. BLEAKLY: We may not have anything to go on if I see that.

MR. WESCOTT: That can't possibly have anything to

do with this case; an ordinance concerning trimming of trees can't bear any relation to the question of whether the Township planted this tree.

MR. BLEAKLY: I think it would bear a very material relation. Can't he let me have it in the morning?

MR. WESCOTT: Oh, yes certainly.

THE COURT: I cannot see, though, Mr. Bleakly, how it would be of any consequence except in a negative sort of way.

MR. BLEAKLY: It is very material, I think.

THE COURT: You see the contention of the plaintiff here is that on your property is found a tree which was permitted to attain a status that interfered with the travel on the highway, made it dangerous. Now, as I understand, it is admitted that the title to the property is in the defendant to the middle of the street—isn't that in the pleadings?

MR. WESCOTT: Yes, the pleadings admit the title to the property.

THE COURT: Now, would an ordinance of the Township forbidding people to trim their trees, say the upper part, or come within eight feet of the ground—

MR. BLEAKLY: Well, that is just the point; is that the ordinance; I don't know, and even then it might be material. I haven't seen this ordinance, if the Court please. I would like to see that ordinance, it may be a very material ordinance, may determine this case.

At this point a recess was taken until Friday morning, October 5, 1917, at ten o'clock A. M.

Camden, N. J., October 5, 1917.

Trial of the cause resumed at ten o'clock A. M., on the above date, pursuant to adjournment, in the presence of counsel for the respective parties.

ROBERT V. PEABODY, recalled.

By Mr. Wescott:

Q. Will you produce the paper that you were requested to bring.

A. I have a copy of it; the original I can't locate. Now, this copy was made for the convenience of the Township Committee, and this is what was turned over to me.

MR. BLEAKLY: Do you want me to look at it, Judge?

MR. WESCOTT: Why, certainly.

MR. BLEAKLY: I suppose the stenographer can make a copy of that.

THE COURT: Just read it into the record. Is it long?

MR. BLEAKLY: No, it is short. (Reading). "An ordinance regulating the trimming of shade trees in the Township of Pensauken, in the County of Camden. Be it ordained by the Township Committee of Pensauken Township in the County of Camden:"

"1. That all shade trees standing along the streets, roads, avenues and highways in said Township on which sidewalks or pavements of any description have been or may be laid or constructed, shall be trimmed, and all limbs and branches removed therefrom to a height of eight feet from the said sidewalks or pavements."

"2. Any owner or owners of any shade trees who shall fail, neglect or refuse to trim such shade trees located as aforesaid upon his, her or their property or properties, as provided in the foregoing section, within ten days after notice in writing so to do has been given by the Township Clerk of said Township of Pensauken, shall forfeit and pay a penalty of $5.00 to be recovered in an action of debt before any Justice of the Peace of the State of New Jersey in and for the County of Camden,

for the benefit of said Township, and in default of the payment thereof shall stand committed to the County Jail of the County of Camden for a term of five days and until said penalty be paid; and the said Township Committee may further order and direct that such shade trees as aforesaid be trimmed as provided in the foregoing section at the cost and expense of the said owner or owners thereof. This ordinance shall take effect immediately."

CROSS-EXAMINATION.

By Mr. Bleakly:

Q. You don't know when that ordinance was passed.

A. No, sir.

Q. You don't know whether it was ever repealed after it was passed?

A. I can't vouch for anything previous to three years ago. Those records I will certify; previous to that I cannot.

Q. This ordinance is not in those three years?

A. No, sir.

Q. When was this Township organized?

A. 1892.

Q. Now, have you any minutes or records back of 1899 from which you can certify the existence or non-existence of any of the ordinances of this Township?

A. I won't certify to anything previous to three years.

Q. The question is if you have any records or minutes by which you could so certify?

A. I haven't any minutes previous to 1899.

Q. Can you with any certainty certify the existence or non-existence of any ordinance for more than three years back?

A. No, sir.

Q. When did you first learn of the chaos existing in this Township on the records?

A. Why three years ago.

Q. Was Mr. Dubree one of the former clerks of this Township?

A. Yes, sir.

Q. Is he still alive?

A. Yes, sir.

Q. Was Mr. Stow one of the former Clerks?

A. Joseph Stow.

Q. He is still alive?

A. He is still alive.

Q. Who was the Clerk prior to your going into office last spring?

A. William Sheppard.

Q. Is he still alive?

A. Yes, sir.

THE COURT: What is the date of that ordinance?

THE WITNESS: There is no date on it. It is just a copy for the convenience of the Township Committee. They gathered all the old records they could together and made copies of them for their own convenience.

Q. Is the ordinance signed?

A. No, it is just a copy of it.

Q. Is there any signature appearing on it, even a copy?

A. No, sir.

By Mr. Wescott:

Q. Let me ask you this question: Does the Township operate under that ordinance?

MR. BLEAKLY: I object to that as immaterial and irrelevant.

THE COURT: You mean, is it enforcing it?

MR. WESCOTT: Yes.

THE COURT: He may answer that.

(Exception noted for the defendant).

A. Why, there has never come an occasion where it is necessary to enforce it.

BOTH SIDES REST.

MR. BLEAKLY: I desire to renew my motion. As far as the proofs in this case go, the cause of this accident is still in the alternative. The accident may have been caused by the pavement being out of repair, and, if so, the defendant admittedly is not liable. The accident may have been caused by the gradual growth of the roots of this tree raising or breaking the pavement, but the liability of the defendant therefor is still an open question, in the alternative, as I have said. The date of the planting of the tree, who planted it, who cared for it, who maintained it, are all questions still open to doubt which may be resolved at least in one of two ways. The negligence of the defendant has not been proved; the existence or non-existence of any ordinance in regard to either the planting or maintenance of trees in this Township is still uncertain; the only matter about which there is no doubt in the case is the contributory negligence of the plaintiff. On those grounds I ask the Court to direct a verdict.

THE COURT: Gentlemen, I think there is sufficient in this case to go to the jury. The fundamental question as to whether or not the development of a tree and its normal growth, whereby the sidewalk is rendered unsafe for travel, I think is decided in the Supreme Court of this State, in the case of Weller vs. McCormack, decided by Justice Dixon. I can see no distinction between permit-

ting the growth of branches on the top interfering with the free use of the highway and the undergrowth of the roots having the same effect. As to the question of the contributory negligence of the plaintiff, I think that is clearly a jury question, whether it was such a danger as ordinary prudence in the use of the highway would legally fasten upon the user the character of negligence if not observed. With regard to the responsibility for the tree itself, that question is not disposed of as clearly as might be desirable, but I am inclined to think that there is sufficient in the case to go to the jury on that point. It is undoubtedly true that where the evidence leaves open the question of responsibility for a given condition, the force of the evidence does not preponderate in either direction, and in such a case it would be a mere guess for a jury to reach a conclusion; but it seems to me in this case there is something more; there is the fact that trees were planted by private parties along this highway at or about the time that the tree in question was placed. It is a part of the admitted pleadings in the case or the admissions from the pleadings in the case that the highway belongs to the owner of the property subject to the implied grant for public uses. 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, but disregarding that, it does seem to me that the action of the plaintiff himself in directing the cutting of these roots afterward—

MR. BLEAKLY: You mean the defendant.

THE COURT: The defendant, I should say, in cutting these roots afterward, and taking a position to them which only ownership would be consistent with, coupled with the other testimony in the case as to the placing of the trees and the absence of any Township provision

upon it, and any interference by the Township is sufficient to take the case to the jury on the question of ownership. For those reasons the motion will be denied and exception noted.

CHARGE OF THE COURT.

LLOYD J.:

Gentlemen: Before saying anything to you in a general way I will deal with certain requests which counsel have handed me. The defendant asks me to say to you first that, "No damages can be recovered in this case for any expenses incurred or paid for loss of the wife's services, because the proof is there was no money paid except to the one woman who was employed one day or so a week and she was employed before the accident in the same manner as after the accident. The proof is that the other extra services needed were furnished by relatives and there is no proof of any payment being made to any of these relatives by the husband or of any stipulated amount being agreed to be paid." I think that is true, gentlemen, as far as any actual expenses are concerned.

MR. WESCOTT: What number is that?

THE COURT: No. 1. "2. The only proof in this case of any loss suffered by the husband for expenses paid through this accident is the sum of $50.00, which Dr. Benjamin says covers his bill for services rendered to Mrs. Rose in connection with this case." Gentlemen, that also is true with the qualification that my recollection is that Mr. Rose himself said he had paid out about $75. You will see both these requests deal with the question of

actual moneys paid out. You will hear something more from me a little later on.

Now, with respect to negligence: "3. If the roots of this tree raised these paving blocks five to seven inches, it was not done suddenly, but was a gradual development, and according to Mr. Rose's testimony"—Oh, I cannot affirm that; the first paragraph of it is a legal statement and it assumes a fact which does not necessarily exist.

"4. It was the duty of the plaintiff, Mrs. Rose, in passing over this pavement to keep such a lookout for any defects in the pavement as would protect a person from injury who used ordinary care. And if she knew of the existence of the defect and the condition of this pavement, she should have used special care to avoid the accident, and if she did not she is guilty of contributory negligence and cannot recover for injuries so sustained." That is true.

"6. The defendant, by reason of being the owner or occupant of the premises in front of which this defective sidewalk existed, was under no legal duty to keep in repair the sidewalk. If the sidewalk got out of repair through natural wear and tear, the defendant is not responsible for any accident caused thereby." That is true.

"7. The pictures offered in evidence are not to be considered as an admission of guilt on the part of the defendant, nor is any statement made by the defendant or any other witness showing any changes in the pavement made after the accident happened to be considered as such an admission. If the defendant, or anyone for her, repaired this pavement after the accident, that is in no sense an admission of guilt on her part." Gentlemen, I affirm that and at the same time I will say to you 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 that there would be some evidence as to ownership or a right of control. In other words, usually a person does not go on a 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.

"8. The burden is on the plaintiff to prove that the tree, the growth of whose root or roots is alleged to have raised this pavement, was planted or placed there by the defendant or one of the predecessors in title under whom this defendant claims. The mere fact of the existence of the tree in front of the defendant's property does not prove that the tree was placed or maintained there by the defendant for her private benefit." The fact alone is not sufficient; that point I affirm.

"9. There is no direct proof in the case that the accident which caused the injury complained of by the plaintiff arose by reason of the root or roots of the tree in front of the defendant's property. The burden is on the plaintiff to prove not only that the accident happened, but how it happened, and if she claims that she fell over one of the roots of this tree or the gradual elevation in the pavement caused by the growth of one of these roots, she must prove it clearly. This fact cannot be assumed simply because she fell and simply because the root existed in the pavement. For all we know in this case from the plaintiff's testimony, she might have fallen on some other part of the pavement, and if she fell on some other part of the pavement because that part of the pavement was out of repair, then the defendant is not liable, and if you so find you should render a verdict in favor of the defendant." Gentlemen, I affirm that in a general way with two explanations. You will see the first part

of it speaks of direct proof. Well, there is in the law what is known as direct proof and circumstantial proof. Direct proof is where one sees a thing actually with the eye and portrays it to a jury. The other is circumstantial where it is indirect. I do not understand that this lady saw the root or obstacle that she actually fell over, if she did fall over this obstruction, and to that extent her narrative is more or less circumstantial, and her proof is not in the legal sense direct proof. But that does not deprive you of the right to accept it as evidence of the fact that she did fall over this root or that it caused the thing that happened. Now, with respect to the use of the word clearly as to the measure of proof that is required, if by that is meant that the thing must be established by a preponderance of proofs, that is true. If it means to go further than that, of course it would not be true.

Now, gentlemen, the claim in this case is of a two-fold nature. There are two parties plaintiff, the husband and wife. Mrs. Rose is suing for the damages which the law accords to an injured person who is married and which have resulted from the wrongful act of the other party. The husband is suing for damages which the law permits to be recovered by a husband as husband of the wife, and both of them, gentlemen, rest upon the fundamental proposition that the injury to the wife, from which these respective claims arise, was caused by the negligence of the owner of this lot in permitting this tree by its gradual growth to so obstruct the sidewalk as to make it defective and dangerous and negligently doing so.

This tree, according to the testimony in the case, was of considerable growth, had been there a good many years. The plaintiff's testimony is that the roots, it being a maple tree, by their gradual growth had grown probably in all

directions, expanding up as well as laterally and downward, and the result had been that these two roots had raised the sidewalk to a height of several inches. The sidewalk was composed of some sort of composition pavement blocks and they were displaced by reason of the growth of the tree, and it is claimed that the tree was under the control of the defendant as the owner of the property, and that she ought to have seen that that condition did not arise, and that consequently it was a negligent act to permit the tree to so develop as to disarrange the blocks and make them dangerous to public travel. The question becomes clearly one then of fact, as to whether there was negligence in this action, whether in fact it was her tree, whether she was responsible for it. It is also argued to you that there is no adequate proof that the plaintiff was injured by reason of stumbling over this condition of affairs. Well, gentlemen, the law does not require a demonstration either mathematical or otherwise in most cases; it does require that before a jury can come to a conclusion the evidence must point with reasonable probability to the existence of the thing which you are to conclude. It is not necessary for this plaintiff to show that she actually saw the stone that she fell over and saw that that stone was raised by the root of the tree; but if from all the evidence in the case that is a fair conclusion to be drawn from the testimony, then a jury is justified in drawing it. That is the next question for you, and the fourth question, if you find all of these questions in favor of the plaintiff, namely, you find that the tree was within the control of the defendant, that it was her tree, secondly, that she negligently permitted it to become a source of danger in the highway, and third that the condition was the actual one which brought about the plaintiff's injury, you still have a fourth legal proposi-

tion to deal with, how you shall regard the plaintiff's own action in using the highway. Now, a sidewalk, gentlemen, as we all know, is not of billiard table smoothness nor is it of parlor smoothness; there are irregularities in it, but a person using the highway has certain rights; those rights are to assume that it is in reasonably safe condition, and one using the highway is not obliged always to keep their eyes on their feet, on the steps that they are taking; if they did there would be many other dangers perhaps that they would run into, which would be more serious than a fall on the sidewalk. But the law does not absolve them, gentlemen, from a duty to use care for that reason; it does require that a person using a sidewalk, as in any other relation of life shall use the reasonable care required by the circumstances. That is the test to be applied to this plaintiff, and the care required under the circumstances, gentlemen, is that which an ordinarily prudent person uses under like circumstances. Now, you will apply that test to this plaintiff here and if she used it then she is not guilty of any contributory negligence; if she did not use it, then she has failed to comply with the standard which the law exacts and she would be guilty of contributory negligence, and if so, neither she nor her husband would have any right to recover.

That, gentlemen, composes all of the legal problems that present themselves to your mind in this case as I now view it upon which you are to predicate the liability of the defendant. If anyone of them is decided by you against the plaintiff, then that puts them both out of Court. If they are all decided by you in favor of the plaintiff, then you award such damages as you think are fair and just compensation under the evidence for the injuries sustained.

The wife claims that she has suffered pain and she complains that there has been an impairment of the enjoyment of the use of the arm by reason of the break which took place, and whatever would be a fair money value for that suffering and impairment the jury has a right to take into consideration in determining its damages. With respect to the husband, the law is that a husband is entitled to the wife's services and companionship. There is also an obligation resting on him—when a man's wife is hurt the law imposes upon the husband primarily the duty of paying the bills of getting her cured, and it is claimed in this case that the husband is entitled to a sum of money based upon both of these aspects, that is, that he paid out money or obligated himself to pay out money to the doctor, and secondly, that he is deprived of the wife's services. It so happens in the case, according to the testimony, that Mrs. Rose had generally performed the services in her household, but that upon one or two days a week help was called in before this accident and did some of the work. After the accident for a time she was incapacitated, and the same woman who came in before continued to come in and render like services after the accident; otherwise, as far as the extra labor was concerned, it seems to have been done by persons who were relatives and as to whom there has been no proof of any obligation to pay them. But, gentlemen, Dr. Benjamin testified that there was a loss, an impairment of the utility of this arm. Now, what I have just said to you about actual expense you will take in connection with the request that I read to you a few moments ago, in reading it I said I would mention it again. That dealt with expenses incurred. Now, the law does not limit a liability to actual expenses actually paid out, but it holds one answerable for the natural and prob-

able consequences of the wrongdoing. It is claimed by the plaintiff in this case that you could fairly find some proofs that in the future there may be some impairment which would contemplate payments by the husband. The mere fact that he has been fortunate enough to get help without paying for it up to this time does not imply that he always could during any impairment of the wife's physical condition. But in considering that question let me remind you and caution you that this is a broken arm simply, and the plaintiff is not wrecked; her life is not destroyed nor her physical health broken. I do not see that you would be justified in finding large damages for any loss and injury. There is no proof in the case that the injury is permanent; there is proof that it is impaired at this time, and Dr. Benjamin says he would say to the extent of fifty per cent., but that does not make a person helpless, you know, even when one arm is impaired in its usefulness, they still have another arm, and they have got that arm for what it is worth.

Now take this case, gentlemen, and consider it in all its aspects; determine first whether or not the defendant is answerable, if not, that is the end of the case. If the defendant is answerable, then you determine what compensation should be awarded to the plaintiff for that feature of the damages that the Court has mentioned with respect to the wife, and secondly those damages which are peculiar to the husband.

MR. BLEAKLY: If your Honor please, I desire to take an exception to the failure to charge request No. 2 as requested. Your Honor made a qualification and I ask an exception to the qualification.

No. 3 was refused and I ask an exception.

No. 5 was refused and I ask an exception.

I ask an exception for the failure to charge No. 7 as requested and to the qualification added by your Honor when you said they tended to show that there was some evidence, usually a person does not go, etc.

I also ask an exception to the Court's refusal to charge request No. 8.

I also ask an exception to the Court's refusal to charge request No. 9.

I also ask an exception to what was charged in reference thereto, that there are two explanations, what was said about direct proof and circumstantial proof, "I don't understand that she saw, that it does not deprive you," and about the use of the word "clearly" and "further than that."

I also ask an exception to what his Honor said that there was no adequate proof and the law does not require evidence, etc., and it is not necessary for the plaintiff to show, that sentence, but if it is a fair conclusion, etc.

Also under the fourth question your Honor discussed a person using the highway can assume that is in reasonably safe condition and not obliged to keep their eyes down, something to that effect.

Also an exception to the part where it does not limit the liability to actual expenses.

EXHIBIT.

HISTORY OF TITLE REFERRED TO AT END OF PLAINTIFF'S CASE, ON OCT. 4, 1917.

GEO. F. H. HOWARTH
to
MARY C. SLOUGH.

Book 284, 517.
Dated, June, 4th, 1904.

Beginning in the North line of Walnut Avenue distant 200 feet Eastward from the East line of Cove Road and extending thence Eastward in said North line of Walnut Avenue 75 feet in front or width and having a depth of that width Northward between parallel lines at right angles to said Walnut Avenue of 184 feet. Being lot No. 7 on map or plan of property of Alexander G. Cattell.

CENTRAL TRUST CO.
to
GEO. F. H. HOWARTH.

Dated Sept. 27th, 1897.
Book 225, page 15, &c.

GEO. P. WILLIAMS, et ux.,
to
CENTRAL TRUST CO.

Dated April 30th, 1895.
Book 206, page 52, &c.

TWO DEEDS

D. LEONARD MOORE
to
MARIE L. WILLIAMS (wife of Geo. P. Williams).

Dated Sept. 26th, 1892.
(1)
Book 180, page 250, &c.

ALEXANDER G. CATTELL
to
MARIE L. WILLIAMS (wife of Geo. P. Williams). Dated Sept. 27th, 1892. (2) Book 180, page 252, &c.

TWO DEEDS

JOHN LOUTY, et ux.,
to
ALEXANDER G. CATTELL. Dated Jann. 28th, 1863. (1) Book 40, page 131.

HEWLINGS LIPPINCOTT, TRUSTEE, &c.
to
ALEXANDER G. CATTELL. Book 169, page 486, &c. (2) Dated May 29th, 1891.

Being the same premises intended to be conveyed by deed from said Alexander G. Cattell to D. Leonard Moore, dated July 25th, 1892. Book 178, page 328, etc., but which said deed was erroneously described as being 70 feet in front instead of 75 feet in front and as being located in the Borough of Merchantville instead of near said borough.

DEFENDANTS' REQUESTS TO CHARGE

The defendant respectfully requests the Court to charge the Jury as follows:

1. No damages can be recovered in this case for any expenses incurred or paid for loss of the wife's services, because the proof is there was no money paid except to the one woman who was employed one day or so a week and she was employed before the accident in the same manner as after the accident. The proof is that the other extra services needed were furnished by relatives and there is no proof of any payment being made to any of these relatives by the husband or of any stipulated amount being agreed to be paid.

2. The only proof in this case of any loss suffered by the husband for expenses paid through this accident is the sum of $50.00, which Dr. Benjamin says covers his bill for services rendered to Mrs. Rose in connection with this case.

3. If the roots of this tree raised these paving blocks five to seven inches it was not done suddenly, but was a gradual development and according to Mr. Rose's testimony, a witness for the plaintiff, this condition had existed for two or three months and, in such case, the roots made an obstacle in the pavement that must have been apparent in daylight to any person passing over the sidewalk using ordinary care, and if Mrs. Rose did not use ordinary care to avoid a perfectly patent and visible obstruction of this kind, she is guilty of contributory negligence and cannot recover damages against the plaintiff.

4. It was the duty of the plaintiff, Mrs. Rose, in passing over this pavement to keep such a lookout for any defects in the pavement as would protect a person from injury who used ordinary care. And if she knew of the

ment, she should have used special care to avoid the accident and if she did not, she is guilty of contributory negligence and cannot recover for injuries so sustained.

5. Shade trees in the streets of a city are for public as well as private utility and the public have a right to plant and maintain shade trees in the public highways and the condition of the roots of this tree, as far as the evidence in this case goes, may have been due to the neglect of the public authorities. The proofs in the case simply show that the tree may have been maintained either by the defendant or by the public authorities and such proof is not sufficient on the part of the plaintiff to bind the defendant.

6. The defendant, by reason of being the owner or occupant of the premises in front of which this defective sidewalk existed, was under no legal duty to keep in repair the sidewalk. If the sidewalk got out of repair through natural wear and tear, the defendant is not responsible for any accident caused thereby.

7. The pictures offered in evidence are not to be considered as an admission of guilt on the part of the defendant, nor is any statement made by the defendant or any other witness showing any changes in the pavement made after the accident happened to be considered as such an admission.

If the defendant, or any one for her, repaired this pavement after the accident, that is in no sense an admission of guilt on her part.

8. The burden is on the plaintiff to prove that the tree, the growth of whose root or roots is alleged to have raised this pavement, was planted or placed there by the defendant or one of the predecessors in title under whom this defendant claims. The mere fact of the existence of the tree in front of the defendant's property does not

prove that the tree was placed or maintained there by the defendant for her private benefit.

9. There is no direct proof in the case that the accident which caused the injury complained of by the plaintiff arose by reason of the root or roots of the tree in front of the defendant's property.

The burden is on the plaintiff to prove not only that the accident happened, but how it happened, and if she claims that she fell over one of the roots of this tree or the gradual elevation in the pavement caused by the growth of one of these roots, she must prove it clearly. This fact cannot be assumed simply because she fell and simply because the root existed in the pavement. For all we know in this case from the plaintiff's testimony, she might have fallen on some other part of the pavement and if she fell on some other part of the pavement because that part of the pavement was out repair, then the defendant is not liable, and if you so find you should render a verdict in favor of the defendant.

10. Under all the proofs in this case, you are directed to bring in a verdict in favor of the defendant.

BLEAKLY & STOCKWELL,
Attorneys.