INDEX

PLAINTIFFS' EXHIBIT

DEFENDANTS' EXHIBIT

Complaint

(Filed January 3, 1930)

Hudson County Circuit Court

MARINDA VOLKE and FRED VOLKE, *Plaintiffs,* v. EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER, *Defendants.*	Action at Law

Plaintiffs residing in the Township of West New York, County of Hudson and State of New Jersey, respectfully say,

FIRST COUNT

1. On or about December 24th, 1927 Horatio H. Otway was the owner of property located in the City of Union City, County of Hudson and State of New Jersey, designated at 915 Bergenline Avenue, said Bergenline Avenue being a public street and highway in said City.

2. Extending from said property into the portion of Bergenline Avenue reserved for the use of the public as a sidewalk was a cellar-way in

which were constructed steps used for the purpose of gaining ingress to and egress from the cellar of said building to the sidewalk aforesaid.

3. Said cellar-way or stairway was covered with an iron cellar door or doors, which when closed were flush with the sidewalk aforesaid and could be and were opened outward from said cellar on hinges, which permitted said doors to fall back upon the concrete sidewalk surrounding the opening into the cellar aforesaid.

4. Through the negligence of said Horatio H. Otway and his agents, servants and employees, the concrete sidewalk surrounding the cellar doors was broken, damaged and permitted to exist and continue in a dangerous and defective condition, and as a result of such negligence and resultant dangerous and defective condition of said sidewalk, the plaintiff Marinda Volke, who was on the date aforesaid walking along and upon the sidewalk aforesaid adjacent to the building aforesaid tripped, stumbled and fell over the portion of said sidewalk which had become damaged, defective and was left in a state of disrepair and danger, and as the result thereof suffered the injuries hereinafter alleged.

5. The negligence of said Horatio H. Otway, his agents, servants and employees consisted in this,

(a) Said iron cellar doors were so constructed and maintained that when the same were opened they fell back upon the concrete sidewalk, thereby damaging and breaking said sidewalk to such an extent as to cause the existence of a dangerous condition.

(b) No stop or guard was provided to prevent said cellar doors when opened from falling back upon the concrete sidewalk aforesaid, and by reason thereof when said doors were opened, same came into contact with said concrete sidewalk, with the result that from the continuous opening thereof the sidewalk became damaged and in a state of disrepair, creating a condition dangerous to those lawfully using said sidewalk.

(c) Although said Horatio H. Otway knew and had notice of the fact that the concrete sidewalk surrounding said cellar doors had through the opening of said doors as aforesaid broken and damaged said sidewalk, he, long prior to the date aforesaid permitted said sidewalk to remain in a condition of disrepair, dangerous to those lawfully using said sidewalk, thereby creating and continuing a nuisance.

(d) Although said Horatio H. Otway knew of the dangerous and defective condition of said sidewalk and had notice and knowledge thereof, no effort was made to properly repair the same and to put the same in a condition reasonably safe for lawful users of the sidewalk aforesaid.

6. By reason of the negligence aforesaid and the resultant tripping and falling of the plaintiff Marinda Volke as aforesaid, she, the said Marinda Volke was injured about the head, limbs and body and suffered particularly a fracture of the leg and foot, and by reason thereof has suffered and undergone and in the future will suffer and undergo great pain and agony, and she, the said Marinda Volke has been and in the future will be unable to perform the duties theretofore performed by her, and by reason of the serious-

ness and permanency of said injury may be compelled to have said foot amputated, and whether or not such foot is amputated she, the said Marinda Volke will permanently remain in a crippled condition. Further as the direct and proximate result of the injury to said foot, other portions of her body, and particularly the organs thereof have become seriously affected and will continue so to remain, causing her severe pain and agony, which will continue indefinitely into the future, and has prevented and will prevent her from performing the duties heretofore performed by her.

7. Subsequent to the date aforesaid said Horatio H. Otway has died, but by virtue of the statute in such case made and provided his Estate remains liable for any loss sustained by the said plaintiff Marinda Volke as a result of the negligence of the said Horatio H. Otway or his servants, agents or employees.

8. Said Horatio H. Otway died leaving a last Will and Testament, which has been admitted to probate, and in which he designates the defendant Emma H. Otway as his Executrix, and she, the said Emma H. Otway has qualified as such, and by reason thereof is made a defendant herein.

To the damage of the plaintiff Marinda Volke the sum of $50,000.

SECOND COUNT.

1. Plaintiff Fred Volke, is the husband of the plaintiff Marinda Volke.

2. He hereby makes paragraphs 1 to 8 inclusive of the first count a part of this count in the same manner and to the same effect as if the same were herein repeated and realleged, and further says,

3. By reason of the injuries sustained as aforesaid by the plaintiff Marinda Volke he has been obliged and will be obliged to lay out and expend large sums of money for medicines, physicians and medical expenses in an endeavor to cure the said Marinda Volke of the injuries sustained as aforesaid by her, and he has been and in the future will be deprived of the services, comfort, companionship and consortium of the said Marinda Volke.

To the damage of the said plaintiff Fred Volke the sum of $25,000.

THIRD COUNT

1. On or about December 24th, 1927 Frank A. Jaeger was a tenant and occupied as such the ground floor and cellar or basement of property located in the City of Union City, County of Hudson and State of New Jersey, designated as 915 Bergenline Avenue, said Bergenline Avenue being a public street and highway in said City.

2. Extending from said property into the portion of Bergenline Avenue, reserved for the use of the public as a sidewalk was a cellar-way in which were constructed steps used for the purpose of gaining ingress to and egress from the cellar of said building to the sidewalk aforesaid.

3. Said cellar-way or stairway was covered with an iron cellar door or doors, which when closed were flush with the sidewalk aforesaid and could be and were opened outward from said cellar on hinges, which permitted said doors to fall back upon the concrete sidewalk surrounding the opening into the cellar aforesaid.

4. Through the negligence of the said Frank A. Jaeger and his servants, agents and employees, the concrete sidewalk surrounding the cellar doors was broken, damaged and permitted to exist and continue in a dangerous and defective condition, and as a result of such negligence and resultant dangerous and defective condition of said sidewalk, the plaintiff Marinda Volke, who was on the date aforesaid walking along and upon the sidewalk aforesaid adjacent to the building aforesaid, tripped, stumbled and fell over the portion of said sidewalk which had become damaged, defective and was left in a state of disrepair and danger, and as the result thereof suffered the injuries hereinafter alleged.

5. The negligence of said defendant Frank A. Jaeger, his agents, servants and employees consisted in this,

(a) For the purpose of making use of the basement or cellar aforesaid, the door or doors aforesaid were thrown back upon the concrete sidewalk in such a careless and negligent manner as to cause a damaging and breaking of such sidewalk, thereby creating and continuing a dangerous condition.

(b) No stop or guard was constructed or maintained to prevent said cellar door or doors when

open from falling back upon the concrete sidewalk aforesaid, and by reason thereof such doors when open were permitted to come into contact with said concrete sidewalk, with the result that from the continuous opening thereof said sidewalk became damaged, defective and in a state of disrepair and was permitted so to remain, thereby creating a condition dangerous to those lawfully using said sidewalk.

(c) Articles of merchandise used in the business conducted by the defendant Frank A. Jaeger were delivered into and out of said place of business through the cellar-way hereinbefore referred to and preparatory to the delivery thereof were so carelessly thrown, dropped and placed thereon as to cause a cracking, breaking and damaging of the concrete surrounding the said cellar-way and doors connected therewith, thereby making said sidewalk unsafe and dangerous to persons lawfully using the same.

(d) Although said Frank A. Jaeger knew and had notice of the fact that said concrete sidewalk surrounding said cellar doors had through the opening of said doors and the dropping, placing and throwing articles of merchandise upon the concrete surrounding the same, broke and damaged said sidewalk, permitted said sidewalk to remain in a condition of disrepair, dangerous to those lawfully using the same, thereby creating and continuing a nuisance.

(e) Although said Frank A. Jaeger knew of the dangerous and defective condition of said sidewalk and had notice and knowledge thereof, no effort was made by him, nor any one for him to properly repair the same and to put the same

in a condition reasonably safe for lawful users of the sidewalk aforesaid.

6. By reason of the negligence aforesaid and the resultant tripping and falling of the plaintiff Marinda Volke as aforesaid, she, the said Marinda Volke was injured about the head, limbs and body and suffered particularly a fracture of the leg and foot, and by reason thereof has suffered and undergone and in the future will suffer and undergo great pain and agony, and she, the said Marinda Volke has been and in the future will be unable to perform the duties theretofore performed by her, and by reason of the seriousness and permanency of said injury may be compelled to have said foot amputated, and whether or not such foot is amputated she, the said Marinda Volke will permanently remain in a crippled condition. Further as the direct and proximate result of the injury to said foot, other portions of her body, and particularly the organs thereof have become seriously affected and will continue so to remain, causing her severe pain and agony, which will continue indefinitely into the future, and has prevented and will prevent her from performing the duties heretofore performed by her.

To the damage of the plaintiff Marinda Volke the sum of $50,000.

FOURTH COUNT

1. Plaintiff Fred Volke is the husband of Marinda Volke.

2. He hereby repeats and makes all the allegations contained in the third count a part of this count, in the same manner and to the same effect as if the same were herein repeated and realleged, and further says,

3. By reason of the injuries sustained as aforesaid by the plaintiff Marinda Volke, he has been obliged and will be obliged to lay out and expend large sums of money for medicines, physicians and medical expenses in an endeavor to cure the said Marinda Volke of the injuries sustained as aforesaid by her, and he has been and in the future will be deprived of the services, comfort, companionship and consortium of the said Marinda Volke.

To the damage of the said plaintiff Fred Volke the sum of $25,000.

FIFTH COUNT

1. Plaintiff Marinda Volke hereby makes paragraphs 1 to 8 inclusive of the first count and paragraphs 1 to 6 inclusive of the third count a part of this count in the same manner and to the same effect as if the same were herein repeated and realleged, and further says,

2. By reason of the combined and joint negligence and carelessness of the said Horatio H. Otway, now deceased and the defendant Frank A. Jaeger and their respective agents, servants and employees, she suffered and will suffer the injury and damage hereinbefore alleged.

To the damage of the plaintiff Marinda Volke the sum of $50,000.

SIXTH COUNT

1. Plaintiff Fred Volke is the husband of the plaintiff Marinda Volke.

2. He hereby makes paragraphs 1 to 8 inclusive of the first count and paragraphs 1 to 6 inclusive of the third count a part of this count in the same manner and to the same effect as if the same were herein repeated and realleged and further says.

3. By reason of the combined carelessness and negligence of the said Horatio H. Otway and the defendant Frank A. Jaeger and the resultant injuries to the plaintiff Marinda Volke, he has suffered and will suffer the damages hereinbefore alleged.

To the damage of the plaintiff Fred Volke the sum of $25,000.

WALLACE P. BERKOWITZ,
Attorney of Plaintiffs.

I hereby deputize Eugene McDermott to serve the within Writ. Witness my hand and seal this 20 day of Dec. 1929.

WILLIAM V. O'DRISCOLL, Sheriff.
By THOMAS J. PRIOR, Under Sheriff.

Served within Summons and Complaint Dec. 23/29, personally on the defendant Frank A. Jaeger, at 913 Bergenline Avenue, Union City.

WILLIAM V. O'DRISCOLL, Sheriff.
By EUGENE MCDERMOTT, S. D. S.

Answer of Defendant Frank A. Jaeger

Service of the within summons and complaint is hereby acknowledged for and in behalf of the defendants Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased and the Estate of Horatio H. Otway, deceased this 20th day of December, 1929 and service as provided by statute is hereby waived.

ADOLPH J. H. PETERS,
Attorney for Emma H. Otway, Executrix of the estate of Horatio H. Otway, deceased, and the estate of Horatio H. Otway, deceased.

Answer of Defendant Frank A. Jaeger

(Filed January 7, 1930)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE,
Plaintiffs,
v.
EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER,
Defendants.

Action at Law
Answer

The defendant Frank A. Jaeger, of the City of Union City, County of Hudson, State of New Jersey, says that:

Answer of Defendant Frank A. Jaeger

First Defense to Third Count

1. Paragraphs 1, 2, & 3 are admitted.

2. Paragraphs 4 and 5 are denied.

3. He has no knowledge or information sufficient to form a belief as to paragraph six of the Third Count and therefore denies same.

First Defense to Fourth Count

1. He has no knowledge or information sufficient to form a belief as to paragraphs 1 and 3 of the Fourth Count and therefore denies same.

2. As to paragraph 2 of the Fourth count he repeats and reiterates his answers to paragraphs 1, 2, 3, 4, 5, and 6 of the Third Count.

First Defense of the Fifth Count

1. As to paragraph 1 of the Fifth Count, he repeats and reiterates his answers to paragraphs 1, 2, 3, 4, 5, and 6 of the Third Count.

2. He has no knowledge or information sufficient to form a belief as to paragraph 2 of the Fifth Count and therefore denies same.

First Defense to the Sixth Count

1. He has no knowledge or information sufficient to form a belief as to paragraphs 1 and 3 of the Sixth Count and therefore denies same.

2. As to paragraph 2 of the Sixth Count he repeats and reiterates his answers to paragraphs 1, 2, 3, 4, 5, and 6 of the Third Count.

First Separate Defense

He says that if the plaintiff Marinda Volke sustained any injury, same was due to her contributory negligence, in that she was walking in a careless and reckless manner.

Second Separate Defense

He says that if the plaintiff Fred Volke sustained any damage, either for loss of services of his wife, Marinda Volke, or for moneys expended for medical service or medicines, same was due to the contributory negligence of his wife, Marinda Volke.

N. J. Cafarelli,
Attorney for Defendant Frank A. Jaeger.

Reply to Answer of Defendant Frank A. Jaeger

(Filed January 15, 1930)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE, *Plaintiffs,* *v.* EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER, *Defendants.*	Action at Law Reply to Answer of Defendant Frank A. Jaeger

Plaintiffs replying to the answers of Frank A. Jaeger, say that,

1. They deny the first and second separate defenses.

WALLACE P. BERKOWITZ,
Attorney of Plaintiffs.

Notice of Trial

(Filed January 20, 1930)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE, *Plaintiffs,* *v.* EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER, *Defendants.*	Action at Law Notice of Trial

SIR:

PLEASE TO TAKE NOTICE, that the trial of the issues joined in this cause will be moved before said Court, in the presence of such Judge or Justice thereof, as shall then be holding said Court, on the 28th Tuesday of January, A. D. 1930, at the Court House, in Jersey City, in and for the County of Hudson at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

Dated Jan. 13, A. D. 1930.

WALLACE P. BERKOWITZ,
Attorney of Plaintiffs.

To

N. J. Cafarelli, Esq., Attorney of Defendant Frank A. Jaeger and Adolph J. H. Peters,

Atty. for Defts., Emma H. Ottway, Executrix of the Est. of Horatio H. Otway, dec'd and the Est. of Horatio H. Otway, dec'd.

Service of the within Notice of Trial is hereby acknowledged this 14th day of January A. D. 1930.

N. J. Cafarelli,
Attorney for Defendant
Frank A. Jaeger.

Service of the within notice of trial is hereby acknowledged this 16th day of Jan. 1930, Adolph J. H. Peters, Attorney of Defts. Emma H. Otway, Executrix of the Estate of Horatio H. Otway, dec'd and the Estate of Horatio H. Otway, dec'd.

Answer of Defendant Emma H. Otway

(Filed May 18, 1930)

HUDSON COUNTY CIRCUIT COURT

Marinda Volke and Fred Volke, *Plaintiffs,* *v.* Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of Horatio H. Otway, deceased, and Frank A. Jaeger, *Defendants.*	Action at Law Answer

Defendant Emma H. Otway, Executrix of the

Answer of Defendant Emma H. Otway

Estate of Horatio H. Otway, deceased, answering the complaint herein, says:

ANSWER TO FIRST COUNT

1. She admits paragraph one.

2. She denies paragraphs two-three, four, five, six and seven.

3. She admits paragraph eight.

ANSWER TO SECOND COUNT

1. She has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph one, and therefore denies the same.

2. She hereby repeats her answers to paragraphs one to eight, inclusive, of the First Count in the same manner and to the same effect as if the same were herein repeated.

3. She denies paragraph three.

ANSWER TO THIRD COUNT

1. She admits paragraph one.

2. She denies paragraphs two, three, four, five and six.

ANSWER TO FOURTH COUNT

1. She has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph one, and therefore denies the same.

2. She hereby repeats her answer to the Third Count and makes the same part hereof in the same manner and to the same effect as if the same were herein repeated.

3. She denies paragraph three.

ANSWER TO FIFTH COUNT

1. She repeats her answers to paragraphs one to six, inclusive, of the First Count in the same manner and to the same effect as if the same were herein repeated.

2. She denies paragraph two.

ANSWER TO SIXTH COUNT

1. She has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph one, and therefore denies the same.

2. She repeats her answers to paragraphs one to eight, inclusive, of the Third Count, in the same manner and to the same effect as if the same herein repeated.

3. She denies paragraph three.

FOR SEPARATE AND DISTINCT DEFENSES to each Count, this defendant says:

FIRST DEFENSE

That the plaintiffs did not suffer any loss or sustain any injuries by reason of any negligence

on the part of this defendant, or the deceased Horatio H. Otway.

SECOND DEFENSE

That the plaintiffs did not suffer the loss or sustain the injuries alleged, by reason of any negligence on the part of this defendant, or the deceased Horatio H. Otway.

THIRD DEFENSE

That the plaintiff Marinda Volke was guilty of contributory negligence.

FOURTH DEFENSE

If the plaintiffs suffered any loss or sustained any injury through the negligence of any person, it was through the negligence of a third party for whose acts this defendant, or the decedent Horatio H. Otway, were in no wise responsible.

ADOLPH J. H. PETERS,
Attorney of Emma H. Otway, Executrix of the estate of Horatio H. Otway, deceased, and the estate of Horatio H. Otway, deceased.

It is hereby on this 14th day of May, 1930 consented to the filing of the within answer as within time.

WALLACE P. BERKOWITZ,
Attorney for Plaintiffs.

Order Striking Out Summons and Complaint as Against Estate of Horatio H. Otway

(Filed June 20, 1930)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE, *Plaintiffs,* *v.* EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER, *Defendants.*	Action at Law Order

Motion having been made in the above entitled matter to strike out the Summons and Complaint in so far as the defendant The Estate of Horatio H. Otway, deceased, and the Court having considered the matter, it is on this 9th day of May, 1930,

ORDERED that the Summons and Complaint be stricken out as against the defendant The Estate of Horatio H. Otway, deceased.

HENRY E. ACKERSON, JR.,
Judge.

Order for Examination Before Trial

(Filed June 20, 1930)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE, *Plaintiffs,* *v.* EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER, *Defendants.*	Action at Law Order

It appearing that the issue in the above stated cause has been joined and the cause has not been tried; and it further appearing that the said defendant Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased, desires to examine the said plaintiffs as witnesses in the said cause before trial, in pursuance of the statute in such case made and provided, and has made application for an order to that effect, and I being of an opinion that such application should be granted:

It is therefore, on this 9th day of May, 1930, ORDERED that Marinda and Fred Volke, the said plaintiffs, appear before William H. Bradley, a Master in Chancery of New Jersey, 84 Washington Street, Hoboken, N. J., on the 23rd day of May, 1930, at three o'clock in the afternoon,

daylight saving time, to be examined as witnesses in the above stated cause, before trial, by the said defendant Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased, or her attorney or counsel.

HENRY E. ACKERSON, JR.,
Judge.

Service of true copy acknowledged.

WALLACE BERKOWITZ,
Atty. of Pltf.

Reply to Answer of Defendant Emma H. Otway

(Filed June 29, 1930)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE, *Plaintiffs,* *v.* EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER, *Defendants.*	Action at Law Reply

The plaintiffs for a reply to the answer of the defendant Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased, say that:

1. They deny all the allegations contained in the paragraphs of the first, second, third and fourth defenses of each count.

WALLACE P. BERKOWITZ,
Attorney of the Plaintiffs.

Notice of Motion to Amend Complaint

(Filed June 22, 1932)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE,
Plaintiffs,
v.
EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER,
Defendants.

Action at Law

Notice of Motion to Amend Complaint

To

Adolph J. H. Peters, Esq., Attorney of Defendant Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased, *et al.*, and N. J. Cafarelli, Attorney of Defendant Frank A. Jaeger.

SIRS:

TAKE NOTICE that on Friday, January 22nd, 1932, application will be made before such Judge as shall be holding the Hudson County Circuit

Court, at the Court House in Jersey City at ten o'clock in the foreoon of said day, for an order amending the complaint served and filed in the above entitled cause as follows:

1. By adding to Paragraph 5 of the first count, specifications of negligence as follows:

(e) The sidewalk in front and adjacent to the premises in front of which plaintiff Marinda Volke fell and was injured was in a dangerous and defective condition and was rendered dangerous and defective, by reason of the fact that motor driven and horse drawn trucks were driven upon, over and across said sidewalk, and heavy articles of merchandise were dropped upon, thrown upon, rolled, pushed, and dragged across, upon and along said sidewalk, and by reason thereof said sidewalk from all of said causes was damaged and broken up, and although such condition was known to the defendants, no effort was made to repair or place the same in a reasonably safe condition for use by pedestrians.

(f) The dangerous and defective condition of the sidewalk aforesaid constituted a nuisance, and such nuisance was permitted to continue to exist over a long period of time, although there was knowledge of the existence thereof and no effort was made to abate the same. Said defective and dangerous condition constituting a nuisance was not caused through ordinary wear and tear through use by pedestrians, but to the contrary was caused by extraordinary use to which the same was subjected, to wit:—That horse drawn and motor driven vehicles were permitted to go upon, over and along said sidewalk and heavy boxes, barrels and articles of merchandise

were dumped upon, thrown upon, pushed, dragged and rolled upon, over and along said sidewalk, into and through the premises adjacent to said sidewalk, and the cellar and cellarway thereof.

2. By adding to Paragraph 5 of the Third Count, specifications of negligence as follows:

(f) The sidewalk in front and adjacent to the premises in front of which plaintiff Marinda Volke fell and was injured was in a dangerous and defective condition and was rendered dangerous and defective, by reason of the fact that motor driven and horse drawn trucks were driven upon, over and across said sidewalk, and heavy articles of merchandise were dropped upon, thrown upon, rolled, pushed and dragged across, upon and along said sidewalk, and by reason thereof said sidewalk from all of said causes was damaged and broken up, and although such condition was known to the defendants, no effort was made to repair or place the same in a reasonably safe condition for use by pedestrians.

(g) The dangerous and defective condition of the sidewalk aforesaid constituted a nuisance, and such nuisance was permitted to continue to exist over a long period of time, although there was knowledge of the existence thereof and no effort was made to abate the same. Said defective and dangerous condition constituting a nuisance was not caused through ordinary wear and tear through use by pedestrians, but to the contrary was caused by extraordinary use to which the same was subjected, to wit:— That horse drawn and motor driven vehicles were permitted to go upon, over and along said sidewalk and heavy boxes, barrels and articles of merchandise

were dumped upon, thrown upon, pushed, dragged and rolled upon, over and along said sidewalk, into and through the premises adjacent to said sidewalk and the cellar and cellarway thereof.

WALLACE BERKOWITZ,
Attorney of Plaintiffs.

Service of the within notice of motion to amend complaint is hereby acknowledged this 18th day of January, 1932.

ADOLPH J. H. PETERS,
Atty. of Defts. Emma H. Otway, Executrix of the Est. of Horatio H. Otway, deceased, and the Est. of Horatio H. Otway, deceased.

N. J. CAFARELLI,
Atty. of Deft. Frank A. Jaeger.

Order Amending Complaint

(Filed Jan. 22, 1932)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE, *Plaintiffs,* *v.* EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER, *Defendants.*	Action at Law Order

Upon application of the plaintiffs for leave to amend the complaint served and filed in the above entitled cause,

It is on this 22nd day of January, 1932 ORDERED that said complaint be amended by adding to paragraph 5 of the First Count the following:

(e) The sidewalk in front and adjacent to the premises in front of which plaintiff Marinda Volke fell and was injured was in a dangerous and defective condition and was rendered dangerous and defective, by reason of the fact that motor driven and horse drawn trucks were driven upon, over and across said sidewalk, and heavy articles of merchandise were dropped upon, thrown upon, rolled, pushed and dragged

across, upon and along said sidewalk, and by reason thereof said sidewalk from all of said causes was damaged and broken up, and although such condition was known to the defendants, no effort was made to repair or place the same in a reasonably safe condition for use by pedestrians.

(f) The dangerous and defective condition of the sidewalk aforesaid constituted a nuisance, and such nuisance was permitted to continue to exist over a long period of time, although there was a knowledge of the existence thereof and no effort was made to abate the same. Said defective and dangerous condition constituting a nuisance was not caused through ordinary wear and tear through use by pedestrians, but to the contrary was caused by extraordinary use to which the same was subjected, to wit:—That horse drawn and motor driven vehicles were permitted to go upon, over and along said sidewalk and heavy boxes, barrels and articles of merchandise were dumped upon, thrown upon, pushed, dragged and rolled upon, over and along said sidewalk, into and through the premises adjacent to said sidewalk and the cellar and cellar-way thereof.

And by adding to Paragraph 5 of the First Count, the following:

(f) The sidewalk in front and adjacent to the premises in front of which plaintiff Marinda Volke fell and was injured was in a dangerous and defective condition and was rendered dangerous and defective, by reason of the fact that motor driven and horse drawn trucks were driven upon, over and across said sidewalk, and heavy

articles of merchandise were dropped upon, thrown upon, rolled, pushed and dragged across, upon and along said sidewalk, and by reason thereof said sidewalk from all of said causes was damaged and broken up, and although such condition was known to the defendants, no effort was made to repair or place the same in a reasonably safe condition for use by pedestrians.

(g) The dangerous and defective condition of the sidewalk aforesaid constituted a nuisance, and such nuisance was permitted to continue to exist over a long period of time, although there was knowledge of the existence thereof and no effort was made to abate the same. Said defective and dangerous condition constituting a nuisance was not caused through ordinary wear and tear through use by pedestrians, but to the contrary was caused by extraordinary use to which the same was subjected, to wit:— That horse drawn and motor driven vehicles were permitted to go upon, over and along said sidewalk and heavy boxes, barrels and articles of merchandise were dumped upon, thrown upon, pushed, dragged and rolled upon, over and along said sidewalk, into and through the premises adjacent to said sidewalk and the cellar and cellarway thereof.

It is further ordered that the answers of the defendants be filed within ten days after service of a copy of the Amended Complaint.

A. Dayton Oliphant,
Judge Hudson County Circuit Court.

Consent is hereby given to the making and entry of the within order.

Attorney of Plaintiff.

Answer of Defendant Frank A. Jaeger to the Amended Complaint

(Filed Feb. 1, 1932)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE,
Plaintiffs,
v.
EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER,
Defendants.

Action at Law

Answer of Defendant Frank A. Jaeger to the Amended Complaint

The defendant, Frank A. Jaeger of the City of Union City, County of Hudson and State of New Jersey, answering the amended complaint alleges:

ANSWER TO FIRST COUNT

1. This defendant denies all the allegations in all the paagraphs therein which may in any way be intended or construed as referring to or directed to this defendant.

2. He denies paragraph 6.

ANSWER TO SECOND COUNT

1. He has not sufficient knowledge or informa-

tion to either admit or deny paragraph 1, and leaves plaintiffs to their proof.

2. Answering paragraph 2, he repeats and realleges all the allegations contained in all the paragraphs of his answer to the first count.

3. Denies paragraph 3.

ANSWER TO THIRD COUNT

1. Denies paragraph 1, except he admits that on or about December 24, 1927, he occupied as a tenant, the ground floor and the rear portion of the cellar or basement of the property located at 915 Bergenline Avenue, Union City New Jersey and that Bergenline Avenue is a public highway in said city.

2. Admits paragraph 2.

3. Denies paragraph 3 except he admits that the cellarway or stairway was covered with an iron cellar door or doors, which, when closed, were flush with the sidewalk.

4. Denies paragraph 4, 5, and each subdivision thereof and 6.

ANSWER TO FOURTH COUNT

1. He has not sufficient knowledge or information to form a belief as to the allegations therein contained and leaves plaintiffs to their proof.

2. Answering paragraph 2, he repeats and realleges all the allegations contained in all the paragraphs of his answer to the third count.

3. Denies paragraph 3.

ANSWER TO FIFTH COUNT

1. Answering paragraph 1, he repeats and realleges all the allegations contained in all the paragraphs in his answer to the first and third counts.

2. Denies paragraph 2 in so far as the allegations therein contained refer to or are directed to this defendant.

ANSWER TO SIXTH COUNT

1. He has not sufficient knowledge or information to form a belief as to the allegations contained in paragraph 1 and leaves plaintiffs to their proof.

2. Answering paragraph 2, he repeats and realleges all the allegations contained in all the paragraphs of his answer to the first and third counts.

3. Denies paragraph 3.

FIRST SEPARATE DEFENSE TO FIRST, SECOND, THIRD, FOURTH, FIFTH AND SIXTH COUNTS.

Any damages or injuries sustained by the plaintiff herein were caused by reason of the contributory negligence of Marinda Volke in that she carelessly and negligently proceeded, walked and conducted her movements at the time and place mentioned in the complaint and failed and neglected to make reasonable and proper ob-

servations in and about her movements at said time and place.

SECOND SEPARATE DEFENSE TO FIRST, SECOND, THIRD, FOURTH, FIFTH AND SIXTH COUNTS.

Any damages or injuries sustained by the plaintiffs herein were caused by reason of the negligence, carelessness and conduct of others over whom this defendant had no control or connection.

THIRD SEPARATE DEFENSE TO FIRST, SECOND, THIRD, FOURTH, FIFTH AND SIXTH COUNTS.

Any damages or injuries sustained by the plaintiffs herein were caused by reason of the natural and usual wear caused by use of the public or portions thereof in and about and over and upon the sidewalk at said time and place.

M. J. CAFARELLI,
Attorney for Defendant
Frank A. Jaeger.

Reply to Answer of Defendant Frank A. Jaeger, to Amend Complaint

(Filed March 4, 1932)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE, *Plaintiffs,* *v.* EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER, *Defendants.*	Action at Law Reply to Answer of Defendant Frank A. Jaeger, to Amend Complaint

Plaintiffs replying to the answer of defendant, Frank A. Jaeger, to the amended complaint, say that:

They deny the allegations contained in the answer.

WALLACE P. BERKOWITZ,
Attorney of Plaintiffs.

Memorandum

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE,
Plaintiffs,
v.
EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway; the Estate of HORATIO H. OTWAY, and FRANK A. JAEGER,
Defendants.

Memorandum

This is an action by a pedestrian and her husband to recover damages from the owner and tenant of premises for alleged injury claimed to have been sustained by the woman plaintiff, the pedestrian, as the result of falling on the sidewalk in front of the premises.

The alleged accident occurred on December 24th, 1927. Suit was instituted by the plaintiffs on or about December 20th, 1929.

The original complaint is in six counts *sounding in negligence.* The first count is by the woman plaintiff against the owner; the second count is by the husband against the owner; the third count is by the woman plaintiff against the tenant; the fourth count is by the husband against the tenant; the fifth count is by the woman plaintiff against the owner and tenant jointly; and the sixth count is by the husband plaintiff against the owner, and tenant jointly.

Memorandum

The theory of the plaintiffs' cause of action against both the landlord and the tenant is briefly this: That extending from Bergenline Avenue in front of the premises, down into the basement or cellar, was a stairway which was covered by iron doors; that when the iron doors were opened they would fall back upon the sidewalk; and that the continuous contact between the doors and the sidewalk broke the sidewalk and created a hole, of which it is charged that both the owner and tenant had knowledge or notice and were negligent in not repairing the same.

In January, 1932, the plaintiffs gave notice of a motion to amend the first and third counts of the complaint by adding two paragraphs to each of said counts, as *further specifications of negligence.* An order was made upon the return of the notice, in which the first count is amended twice and the third count, which pertained to the tenant, was not amended at all.

The obvious purpose of the amendment was to bring the plaintiffs' case within the decision in the case of *Zak* v. *Craig,* 5 N. J. Misc. 275, and perhaps the earlier case of *Davis* v. *Tallon,* 91 N. J. L. 618.

In the *Zak* case, supra, the complaint alleged that the premises were leased as a garage for the storage of motor trucks, and that the defendant, by her servants and agents, drove motor trucks and permitted motor trucks to be driven to and from the building across the sidewalk until a hole about 7 inches in diameter and 6 inches deep was worn in the sidewalk, and that the plaintiff using the sidewalk was thrown down and injured. The plaintiff recovered at the

Circuit and there was an appeal to the Supreme Court. The judgment was sustained on the theory that the condition constituted a public nuisance, the liability of the defendant for the nuisance being summed up by the Court in its opinion in these words, at page 278:

> "The defendant having leased the premises for the use of a stable and as the only ingress to and egress from the stable and street for horses and vehicles could only be accomplished by driving over the sidewalk, and the defendant having rented the premises for the purposes indicated, she became liable to respond in damages to a person injured if such use of the sidewalk created the nuisance which caused the injury."

The Supreme Court said that the participation of the owner in the use which was made on the sidewalk which was claimed to be a nuisance "was to be inferred from the fact that the premises were leased for a purpose which subjected the use of the sidewalk for the passage of heavy carts to the lot in question."

There is no allegation either in the original complaint or in the complaint as amended that the premises were rented for a business which required the running of trucks over the sidewalk, or that there was any participation on the part of the owner or tenant in the use of the sidewalk complained of, and we submit that in the absence of an authorization to third parties or in a participation by the owner or tenant in the use made by third parties, there is no liability upon either the landlord or the tenant.

Memorandum

In Davis *v.* Tallon, 91 N. J. L. 618, Court of Errors and Appeals, the plaintiff's case was not rested upon any legal obligation of the owner to keep the sidewalk in repair, but upon the claim that the defendants, by subjecting the sidewalk to a use not intended, created a nuisance which rendered them liable for injury to persons lawfully using it.

Justice Bergen, speaking for the Court of Errors and Appeals, said at page 620:

> "The jury might infer from the evidence that the appellants leased the land and sidewalk for a use not consistent with the purpose for which the walk was constructed; that they had knowledge of the character of the proposed use, and that such use might and probably would create a nuisance by obstructing the safe use thereof by pedestrians. These inferences would justify a finding that the condition of the sidewalk, because of the use, *was the result of participation* 'in the creation of the nuisance either by authorizing it or by making the act of the tenant his own.' *Freeholders of Hudson* v. *Woodcliff Land Co.,* 74 N. J. L. 355."

There is no obligation upon the owner and occupant of premises abutting a public street to keep in repair the sidewalk in front of the premises. Rupp *v.* Burgess, 70 N. J. L. 7; 56 Atl. 166. In that case, Chief Justice Gummere said:

> "The first count plainly discloses no cause of action. It is based upon the assumption that the owner and occupant of 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 city or municipal ordinance * * * and even when the duty of repairing sidewalks is imposed upon the abutting owner by statute or ordinance, failure to perform that duty does not render the owner responsible to individuals for injuries received by them resulting from defects in the sidewalk due to want of repair. The only liability which rests upon the property owner for non-performance of such a duty is the penalty provided by the statute or ordinance.''

There are circumstances where the abutting owner may be held liable for failure to repair, as where he constructs in or on the sidewalk something for his own private use, such as a drain, or such as cellar doors, coal holes, etc. and injury results from his failure to maintain the same.

Since the amendment to the complaint fails to allege that the alleged condition was caused by any act of the defendants, either owner or tenant, and fails to allege a participation in or authorization of such use, we submit that it states no cause of action, and we further urge that to permit an amendment of the complaint at this time to include such allegations, after the statute of limitations as to all of the causes of action set out in the complaint has run, would be to permit plaintiffs to set up a new cause of action.

Rule for Judgment

In *De Lello* v. *Manufacturers Land & Improvement Co.*, 11 N. J. Misc. Rep. Page 164, Circuit Court Judge Eldredge refused to permit an amendment to a complaint in a similar cause after the statute of limitations had run.

Rule for Judgment

(Filed March 23, 1932)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE, *Plaintiffs,* *v.* EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER, *Defendants.*	Action at Law Rule for Judgment

The above entitled cause having been tried before the Honorable Thomas Brown, Judge of the Hudson County Circuit Court, with a Jury, in said Court, on March 21st and 22nd, 1932, and the cause having been heard and submitted to the Jury, they rendered their verdict in favor of the plaintiff, Marinda Volke, for the sum of Fifteen Thousand ($15,000.) Dollars and in favor of the plaintiff, Fred Volke, for the sum of One Thousand ($1,000.00) Dollars both against the defendants, Emma H. Otway, Executrix of the Estate of Horatio H. Otway, Deceased, and Frank A. Jaeger.

Judgment Entered March 23, 1932

It is, on this 23rd day of March, 1932, ordered that judgment final be entered in the above entitled matter in favor of the plaintiff, Marinda Volke for the sum of $15,000.00 and in favor of the plaintiff, Fred Volke for the sum of $1,000.00 against the defendants, Emma H. Otway, Executrix of the Estate of Horatio H. Otway, Deceased, and Frank A. Jaeger, with costs to be taxed.

Thomas Brown,
Judge.

Rule entered this 23rd
day of March, 1932,
on Motion of:

Wallace P. Berkowitz,
Attorney of Plaintiffs.

Judgment Entered March 23, 1932

(Filed)

HUDSON COUNTY CIRCUIT COURT

Marinda Volke and Fred Volke,
Plaintiffs,
v.
Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of Horatio H. Otway, deceased, and Frank A. Jaeger,
Defendants.

Damages $16,000.00
Costs 82.94
Total 16,082.94

Wallace P. Berkowitz,
Attorney

Judgment On Verdict in the above entitled cause was entered in this Court on the 23rd day

of March, in the year of our Lord One Thousand Nine Hundred and Thirty-two, in favor of the Plaintiffs, Marinda Volke and Fred Volke, and against the Defendants, Emma H. Otway, Executrix of the Estate of Horatio H. Otway, Deceased, and Frank A. Jaeger, in a plea of Action at Law for the sum of Fifteen thousand Dollars in favor of Marinda Volke, and One thousand Dollars in favor of Fred Volke; and Eighty-two Dollars and Ninety-four cents costs of suit.

Judgment entered and signed this 23rd day of March, 1932.

THOMAS BROWN,
Judge.

Rule to Show Cause on Application of Defendant Emma H. Otway

(Filed March 24, 1932)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE, *Plaintiffs,* *v.* EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and FRANK A. JAEGER, *Defendants.*	Action at Law Rule to Show Cause

Application being made to the Court by the defendant Emma H. Otway, Executrix of the

Rule to Show Cause (E. H. Otway)

Estate of Horatio H. Otway, deceased, within six days after the rendering of the verdict by the jury in the above entitled cause, for a rule to show cause requiring the plaintiffs to show cause before this Court, why the verdicts rendered by the jury in their favor should not be set aside and a new trial granted. And the Court having considered the same, it is on this 24th day of March, 1932

ORDERED that the plaintiffs Marinda Volke and Fred Volke, show cause before this Court, at the Court House in the City of Jersey City, on Friday, the 15th day of April, 1932, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, why the verdicts rendered in their favor and against the defendant Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased, should not be set aside and a new trial granted on the following grounds: That the damages awarded by the jury were excessive, that the verdict of the jury was against the weight of the evidence, and was the result of prejudice, mistake or passion, and it is further

ORDERED that the issuing of execution and of all proceedings thereon be stayed after levy made and until the further order of this Court. And it is further

ORDERED that the attorney of the defendant Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased, may certify a true copy of this rule for service.

THOMAS BROWN,
Judge.

Service of the within Rule is hereby acknowledged this 24th day of March, 1932.

WALLACE P. BERKOWITZ,
Attorney of Plaintiffs.

N. J. CAFARELLI,
Attorney of Defendant,
Frank A. Jaeger.

Rule to Show Cause on Application of Defendant Frank A. Jaeger

(Filed March 24, 1932)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE,
Plaintiffs,
v.
EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and FRANK A. JAEGER,
Defendants.
} Action at Law

Application being made to the Court by the defendant Frank A. Jaeger, within six days after the rendering of the verdict by the jury in the above entitled cause, for a rule to show cause requiring the plaintiffs to show cause before this Court, why the verdicts rendered by the jury in their favor should not be set aside and a new

trial granted. And the Court having considered the same, it is on this 24th day of March, 1932,

Ordered that the plaintiffs Marinda Volke and Fred Volke, show cause before this Court, at the Court House in the City of Jersey City, on Friday, the 15th day of April, 1932, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, why the verdicts rendered in their favor and against the defendant Frank A. Jaeger, should not be set aside and a new trial granted on the following grounds: That the damages awarded by the jury were excessive, that the verdict of the jury was against the weight of the evidence, and was the result of prejudice, mistake or passion. And it is further

Ordered that the issuing of execution and of all proceedings thereon be stayed after levy made and until the further order of this Court. And it is further

Ordered that the attorney for the defendant Frank A. Jaeger, may certify a true copy of this rule for service.

Thomas Brown,
Judge.

Service of the within Rule is hereby acknowledged this 24th day of March, 1932.

Wallace P. Berkowitz,
Attorney of Plaintiffs.

Adolph J. H. Peters,
Attorney of Defendant Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased.

Opinion

(Filed May 4, 1932)

HUDSON COUNTY CIRCUIT COURT

Jersey City, N. J.
THOMAS BROWN, *Judge*

May 4, 1932.

Hanley & Wynne, Esqs.,
Counsellors at Law,
84 Washington Street,
Hoboken, N. J.

William B. Stites, Esq.,
Counsellor at Law,
37 Newark Street,
Hoboken, N. J.

Wallace P. Berkowitz, Esq.,
591 Summit Avenue,
Jersey City, N. J.

Re: Volke et al. *v.* Otway, et als.

Dear Sirs:

A consideration of the testimony and briefs in the above cause leads the court to the conclusion that the verdicts in favor of the plaintiffs are excessive and that they clearly indicate that the jury was prompted by sympathy or were mistaken in their consideration of the evidence. Under those circumstances the rule will be made absolute as to both damages and liability.

An order may be entered accordingly.

Very truly yours,

THOMAS BROWN.

TB.FF

Rule Granting New Trial

(Filed May 6, 1932)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE,
Plaintiffs,
v.
EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and FRANK A. JAEGER,
Defendants.

Action at Law

On Rule to Show Cause Why New Trial Should Not Be Granted

Rule Granting New Trial

A rule to show cause having been heretofore allowed why the verdict entered herein should not be set aside and a new trial granted and said rule having come on for argument and the court having considered the testimony, briefs, and reasons assigned for the granting of a new trial;

It is on this 6th day of May, 1932, on motion of Nicholas J. Cafarelli, attorney for the defendant, Frank A. Jaeger, Ordered, that said rule to show cause be and it hereby is made absolute and that the verdict herein and the judgment entered thereon and proceedings taken on said judgment be in all things reversed, set aside and for nothing holden and that a new trial be granted herein and that the defendants recover their costs to be taxed.

THOMAS BROWN,
Judge.

Order Setting Aside Verdict

(Filed May 13, 1932)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE, *Plaintiffs,* *v.* EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and FRANK A. JAEGER, *Defendants.*	Action at Law Order

A rule to show cause having been granted to the defendant, Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased, requiring the plaintiff to show cause before this Court, as to why the verdict of the jury rendered in favor of the plaintiff Marinda Volke for $15,000. and in favor of the plaintiff Fred Volke for $1000., should not be set aside and a new trial granted, and the Court having considered the matter, it is on this 10th day of May, 1932

ORDERED that the verdict rendered by the jury in favor of the plaintiffs and against the defendant Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased, be set aside and for nothing holden, and that the rule to show cause be made absolute and that a venire de novo do issue.

THOMAS BROWN,
Judge.

Rule for Judgment

(Filed October 11, 1933)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE, *Plaintiffs,* *v.* EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER, *Defendants.*	Action at Law Rule for Judgment

This action was tried before the Honorable Thomas Brown and a jury at the Hudson Circuit on October 9th and 10th, 1933.

At the close of the plaintiffs' case, the defendants moved for a non-suit and the Court granted the motion.

WHEREUPON, it is ADJUDGED that the plaintiffs be non-suited and the complaint dismissed, and that the defendants recover of the plaintiffs their costs to be taxed.

THOMAS BROWN,
Judge.

Judgment entered
October 11th, 1933.

On motion of
JOHN MILTON,
Attorney for Defendants.

Judgment Entered October 11th, 1933

(Filed)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE,
Plaintiffs,
ads.
EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER,
Defendants.

Damages .....
Costs $53.38
Total 53.38

JOHN MILTON,
Attorney

Judgment non-suit in the above entitled cause was entered in this Court on the 11th day of October in the year of our Lord One Thousand Nine Hundred and Thirty-three, in favor of the Defendants, Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased and the Estate of Horatio H. Otway, deceased and Frank A. Jaeger, and against the Plaintiffs, Marinda Volke and Fred Volke, in the plea of Action at Law for the sum of Fifty three Dollars and Thirty eight cents costs of suit.

Judgment entered and signed this 11th day of October, 1933.

THOMAS BROWN,
Judge.

Notice of Appeal and Grounds

(Filed October 2, 1934)

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE, *Plaintiffs-Appellants,* *v.* EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and FRANK A. JAEGER, *Defendants-Appellees.*	Action at Law Notice of Appeal

To: John Milton, Esquire,
Attorney of Defendants-Appellees.

SIR:

TAKE NOTICE that the Appellants, Marinda Volke and Fred Volke, appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the Judgment entered in this cause on the following grounds:

1. Because the trial Judge granted a non suit at the close of the case of the plaintiffs, although it was error so to do.

WALLACE P. BERKOWITZ,
Attorney of Plaintiffs-Appellants.

Clerk's Certification

Service of a copy of the within Notice of Appeal is hereby acknowledged this 22nd day of September, 1934.

JOHN MILTON,
Attorney of Defendants-Appellees.

Clerk's Certification

STATE OF NEW JERSEY

HUDSON COUNTY, ss.:

I, GUSTAV BACH, Clerk of the County of Hudson aforesaid and also Clerk of the Circuit Court and Court of Common Pleas, holden therein

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of Summons & Complaint, Answer, Reply, Answer, Order, Order, Reply, Notice, Order, Answer, Reply, Memorandum, Rule for Judgment, Judgment Record, Rule to Show Cause (2), Order, Rule Granting New Trial, Order, Rule for Judgment, Judgment Record, Notice of Appeal. In the case of Marinda Volke and Fred Volke, Plaintiffs, *vs.* Emma H. Otway, Executrix of the Estate of Horatio H. Otway, deceased; and Frank A. Jaeger, Defendants as the same is taken from and compared with the original as entered, filed and recorded in my office. This Certificate is issued so that the said cause may be removed to the Court of Errors & Appeals of the last resort of all causes at Trenton, N. J., for adjudicature according to law.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Courts and

County, at Jersey City this Twenty-fourth day of October 1934.

GUSTAV BACH,
Clerk.

Case

HUDSON COUNTY CIRCUIT COURT

MARINDA VOLKE and FRED VOLKE,
Plaintiffs,

v.

EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of HORATIO H. OTWAY, deceased, and FRANK A. JAEGER,
Defendants.

Before—Hon. THOMAS BROWN, *J.*, and a Jury

Jersey City, N. J.,
October 9, 1933.

APPEARANCES:

WALLACE P. BERKOWITZ, Esq., ALFRED E. BRENNER, Esq., of Counsel, for the Plaintiffs.

N. J. CAFERELLI, Esq., JOHN MILTON, Esq., of Counsel, for the Defendants.

A jury was duly empanelled; being found satisfactory, they were sworn.

(Adjourned to October 10, 1933, at 10 A. M.)

October 10, 1933. 10 a.m.

(Counsel opened to the Jury)

The Court: Before the witness is sworn, I have just read the Charge in the previous trial, furnished to me by the Stenographer's office.

The Charge indicated that in that trial were eliminated some of the issues that were raised by the pleadings. I think the original pleadings contained a charge that the negligence of the defendant consisted in maintaining a door and in permitting it to fall back.

Mr. Brenner: Yes; that was eliminated.

The Court: You abandon that at this trial?

Mr. Brenner: Yes, sir.

The Court: So that leaves what counts that you are relying upon now? There was an amendment referred to in the last Charge. You eliminate the first and second counts?

Mr. Brenner: There was an amendment in the file.

The Court: Yes; I was wondering just what counts we are going to try this case on.

Are you relying upon the amendment now?

Mr. Brenner: Yes; the amendment was made January 22nd, 1932, and amended Count One by adding a paragraph five.

The Court: What I am asking is if you are going to retain what is there, the charge of the cellar door falling back.

Mr. Brenner: No.

The Court: So that you are relying upon the amendment?

Mr. Brenner: Yes, sir.

The Court: That is paragraph 5 of the First Count.

Mr. Brenner: Yes, sir.

The Court: The other theory of negligence, that is, the falling back of the door and failure to have the place fixed; you are not going ahead on those?

Mr. Brenner: No, those are abandoned.

The Court: There is an amendment to the third count. I suppose that is of the same nature as the other amendments.

Mr. Brenner: Yes, sir.

The Court: And I see by the file that there was an examination before trial in this case.

Mr. Brenner: Yes, sir.

Mr. Milton: We have a survey made here, which shows the location of the curb, the property, the doors, trolley pole and roadway. It might help in the examination of the witnesses.

Mr. Brenner: I haven't any objection to putting it on the board, but I do object to marking it in evidence at this time until the engineer testifies.

Mr. Milton: Unless it is in evidence, you could not use it to refer to. It is not so important. I thought it might help the Jury.

MRS. MARINDA M. VOLKE, sworn for the plaintiffs:

Direct examination by Mr. Brenner:

Q. Mrs. Volke, on December 24th, 1927, where did you live? A. 410 7th Street, West New York.

Q. Are you still living there? A. Yes, sir.

Q. On that evening, in the company of your husband, did you go to Bergenline Avenue, in the vicinity of the Jaeger Bake shop? A. Yes, sir.

Q. For the purpose of coming from West New York to the Jaeger Bake shop, it was necessary for you to ride south along Bergenline Avenue, wasn't it? A. Yes, sir.

Q. Where did your car finally come to a stop? A. In front of the vacant lot next to Jaeger's Bakery.

Q. Now, which side of Jaeger's Bakery would that be, on the north side towards West New York, or the South side towards Jersey City? A. That would be on the north side, towards West New York.

Q. On which side is the bake shop, on the west side or the east side? A. On the west side.

Q. Now, after the car came to a stop, did you get out? A. Yes, sir.

Q. Did Mr. Volke get out? A. He followed me getting out.

Q. Did he walk with you, or in back of you? A. I walked alone.

Q. What was he doing at the time? A. He was locking the car.

Q. When you walked, did you walk in the roadway, or on the sidewalk? A. On the sidewalk.

Q. Does that sidewalk extend from the curbline, or is there a sidewalk in the center and dirt on each side? A. At the vacant lot, there is a sidewalk in the middle, with dirt on both sides at the time.

Q. Did you walk along that sidewalk? A. About a foot until I got to the other side.

Q. When you reached the Jaeger line, was the sidewalk then in the center, with dirt on each

side or did that extend from the building line down to the curb? A. From the building to the curb.

Q. Did you continue along that sidewalk? A. Yes, sir.

Q. What kind of sidewalk was that? A. Concrete.

Q. A concrete sidewalk? A. Yes, sir.

Q. And how far along that sidewalk did you get before something happened to you? A. I got right in the middle of the cellar door.

Q. Now, which side of the building are the cellars doors on? A. More north.

Q. That would be more toward West New York? A. More towards West New York.

Q. And were you walking towards the cellar doors, or were you walking away from the cellar doors at the time that the accident occurred? A. Walking past, going towards—going north.

Q. You said a moment ago that the vacant lot was north of the Jaeger store? A. The vacant lot was south.

Q. So that when you got out in front of the vacant lot, you turned north? A. Walked north.

Q. And were you walking north in front of the Jaeger bakeshop when this accident occurred? A. Yes, sir.

Q. Now, what happened to you when you got, as you describe it, about in the center of the cellar doors? A. My foot went into a hole in the sidewalk.

Q. Can you tell us about how far from the edge of the cellar door your foot caught in the sidewalk? A. About a foot.

Mr. Milton: A foot.

Mr. Brenner: Yes.

Q. What kind of cellar doors were they? A. They were iron doors.

Q. Double doors or single doors? A. Double doors.

Q. Did these doors rest in an iron frame? A. Yes, sir.

Q. Would you describe the place where your foot caught. You say it was a foot from the frame? A. Yes, sir.

Q. Now, was that in to the building, or out towards the curb? A. Out towards the curb.

Q. So that it was between the edge of the frame and the curb? A. Yes, sir.

Q. And about a foot from the cellar doors themselves? A. Yes, sir.

Q. Now, when your foot caught, what happened to you? A. I pitched forward.

Q. Did you fall to the ground or not? A. No, sir.

Q. What prevented you from falling to the ground? A. A lady and gentleman was coming the opposite way and caught me, coming the way I was going north.

Q. In the same direction you were going or the opposite direction? A. They were coming towards south.

Q. You were going north? A. Yes, sir.

Q. How far down did you go towards the ground before they succeeded in catching you? A. I was almost down when they catched me up quickly.

Q. And where was your foot at that time? A. In the hole.

Q. Had you seen the hole previous to walking into it? A. No, sir, I didn't.

Q. Did you see the hole after your foot had been caught? A. When I took my foot out of the hole, yes, sir.

Q. Can you describe for us what kind of hole that was? A. Just big enough to put my foot in; that is about all I can say.

Q. About how long would that be? A. Well, I wear a five-and-half shoe; that is all I can say at the time.

Q. Can you show us?

Mr. Milton: Will you indicate what that is?

Mr. Brenner: By measurement, it appears to be nine inches.

Q. Can you tell us how wide the hole was? A. Well, my foot was on a pitch.

Q. Can you show us in the same way you have shown us before? A. About that width.

Mr. Brenner: About three and a half inches.

Q. Can you tell us about the depth of the hole? A. About an inch and a half.

Q. Now, was this just carved out of the sidewalk, or was it cracked and broken around where the hole itself was? A. No, there was different places broken.

Q. All around? A. All around the sidewalk.

The Court: But what caused you to fall was just this one hole?

The Witness: Just this one hole caused me to fall, when I put my foot into it.

Mr. Brenner: I just wanted to show the general condition around there.

Q. Now, as these people were holding you, did your hubsand then come along? A. Yes, sir.

Q. Do you know who the people were who did catch you? A. No, sir; I don't.

Q. Did you take their names at the time? A. No, I didn't.

Q. You don't know where they lived? A. I could not tell you, no sir.

Q. Where did you then go? A. I went and done shopping in a store a few doors away.

Q. How far from Jaegers? A. About four doors, a ladies furnishing place.

Q. Now, did you experience any pain in your leg right at the time the accident occurred? A. It started to hurt me a little bit.

Q. Did you realize at that time that you had anything seriously the matter with you? A. No, sir.

Mr. Milton: Objected to.

The Court: Sustained.

Q. You continued on to the store then? A. Yes, sir.

Q. What happened there? A. I got a few little things I had to get and then I came back to the car. My foot pained me so I came back to the car.

Mr. Milton: I move that that be stricken out. She was asked what she did, and she added "My foot pained me so."

The Court: That part will be stricken.

Mr. Brenner: I thought I was the only one that could object to an answer as not responsive.

The Court: Well, I don't know. I suppose anybody can object, even the Court;

but no matter whose right it is to object, it does not appear to be responsive.

Mr. Brenner: I will ask the question again.

Q. As you went to the store from the place where you had fallen, or where your foot had caught, did you have any pain at that time? A. A little, yes, sir.

Q. Now, when you left the store and came back to the car, did you have any pain at that time?

Mr. Milton: I haven't objected to this examination. It has been leading, but I suppose it has been preliminary. We are getting to a point where we are near the crux of this witness' testimony and I think Judge Brenner ought to observe the rule.

Mr. Brenner: I don't know how I can ask the question without——

The Court: The Court has listened attentively to your questions. They were of a leading nature, but they were mostly preliminary. Now counsel objects, and I suppose the thing to do is to let the witness testify.

Mr. Brenner: I withdraw the question.

Q. As you left the store and came to the car, will you tell us what your condition was, insofar as your foot was concerend? A. My foot started to swell.

Q. Where did you then go? A. I went down to my sister-in-law's, our general visit of a Christmas Eve.

Q. How far was this away from the scene of the accident? A. She lived in North Bergen.

Q. How far is that, by the way? A. That I could not say, as far as mileage is concerend.

Q. A short ride or a long ride? A. Just a short ride.

The Court: How many blocks, can you tell?

The Witness: I should judge about half a mile.

The Court: In your car?

The Witness: Yes, sir.

Q. What time did you arrive at this home? A. Half past ten.

Q. And how long did you remain there? A. Stayed there about an hour; not quite an hour.

Q. When you started for your visit, was it your intention to remain there an hour or not? A. Expected to spend the evening.

Q. Until what time? A. Well, I could not say. We generally spent the evening of Christmas Eve.

Q. What time did you leave the home to which you had gone? A. About eleven o'clock, or a little after.

Q. Why did you leave at that time? A. Because my foot started to pain me so much.

Q. How did you get from the house back to the car when you were leaving? A. Why, my husband and one of the in-laws helped me downstairs and into the car.

Q. Who was the person who helped you, with your husband. A. My husband's brother-in-law, Mr. Benzing.

Q. Is he here? A. No, sir.

Q. Then you were driven home? A. Yes, sir.

Q. When you got to your home, how did you get into the house? A. Well, they carried me from the auto to the door.

Q. How far was that? A. Well, I should judge about, walking, take about ten steps from the car to the front door.

Q. When you arrived at the door, what happened? A. Well, I went down on my hands and knees; I crawled through two rooms, went up the staircase on my knees until I got to my bed.

Q. And when you got to your bed, what did you then do? A. Well, I got in bed; Mr. Volke undressed me.

Q. Now, did you do anything for your foot that night? A. The only thing was I put my foot, at least Mr. Volke put my foot in hot soda water; the only thing we knew of.

Q. How long did you leave it there? A. Until next morning.

Q. Did you have a doctor that night? A. No, sir.

Q. When did you get the doctor? A. Next morning, about nine o'clock.

Q. Who was the doctor? A. Dr. Older.

Q. Was he your family physician? A. Yes, sir.

Q. Were you in bed or out of bed when he came? A. I was in bed.

Q. What was the first treatment that Dr. Older gave you? A. Well, I kept my foot in soda water until an x-ray was taken.

Q. How long was that after? A. Well, the x-ray was taken on December 31st.

Q. Was the keeping of the foot in soda water your own suggestion, or did it come as a sugges-

tion from your physician? A. Well, the swelling was very bad; we had to see if it would go down.

Q. The question I asked you was whether you did that of your own volition, or under the instructions of your physician? A. Instructions from the physician.

Q. Now, did he give you any other treatment besides that? A. Well, then, after the x-ray——

Q. Before the x-ray? A. No, no sir.

Q. Did the swelling go down under the treatment that you were giving it? A. No, sir.

Mr. Milton: I object. I withdraw the objection. I think Judge Brenner, who is a very experienced trial lawyer, should not lead.

The Court: The Court does not want to make any suggestion, but to rule upon motions. I would say to counsel that he should refrain from helping the witness.

Mr. Brenner: I didn't think I was. The witness has already so testified.

The Court: Why can't you ask her what the history of her case was.

(Question read as follows: "Q. Did the swelling go down under the treatment that you were giving it?")

The Court: Do you object to it.

Mr. Milton: I do.

The Court: Sustained.

Q. You have previously testified as to the swelling. How large was this swelling? A. Well, I should judge about again the size of my usual size.

Q. Now, up to the time that the x-ray was taken, can you tell us how your leg looked? A. Before the x-ray was taken?

Q. Yes? A. It was very swollen and blue.

Q. Where did you go for the x-ray? A. They took me to the North Hudson Hospital.

Q. Who took you? A. My husband and a gentleman that worked for him.

Q. How did they take you? A. Took me by auto.

Q. And when, on December 31st, did you go there? A. Pardon me.

Q. What part of the day did you go to the North Hudson Hospital? A. In the morning.

Q. How long did you remain at the Hospital? A. Just long enough to have the x-ray taken, and then returned home.

Q. How did you get home? A. By automobile.

Q. When you got home, where did you go? A. Went upstairs, and they put me in bed again.

Q. How did you get upstairs? A. They carried me upstairs.

Q. Did the doctor come to your home after the x-ray was taken? A. Yes, sir.

Q. How long after? A. The next day.

Q. That would be on January first? A. Yes, sir.

Q. Of 1928? A. Yes, sir.

Q. And what did the doctor then do? A. He put a cast on the foot.

Q. Will you describe that cast? A. It was a plaster cast.

Q. Where it went, from where and to where? A. Went from the toes to the calf of the leg.

Q. How far up the calf of the leg? A. Well, half way up.

Q. What kind of cast was it? A. Plaster cast.

Q. Did you get out of bed then, or did you remain in bed? A. I still remained in bed.

Q. How long was the cast kept on? A. About a week.

Q. Then what happened? A. It had to be taken off, because the leg started to swell very badly.

Q. Who took it off? A. Mr. Volke took it off. My pain was so severe, he took it off from the doctor's orders over the telephone, one night at 12 o'clock.

Q. Do you know the date when that was taken off? A. Well, one week after. I could not say. One week after January first.

Q. Now, did the doctor come that night, or subsequently? A. No, not that night.

Q. When did he come? A. Came next morning.

Q. When he came next morning, what treatment did he then give you? A. Well, then I had, I think, antiphlogistin, over the leg and foot.

Q. How much of that was put on? A. That was put around the entire leg, right up to the hip.

Q. Who applied that? A. Why, I had a nurse, a friend of Mr. Volke, at that time put it on.

Q. Who was the nurse? A. I didn't have a nurse; it was a friend of ours at the time came to help Mr. Volke apply it.

Q. Who was the friend? A. A neighbor across the street.

Q. What is her name? A. Mrs. Londay.

Q. And that antiphlogistin was put on when? A. Put on the morning and for about a week, five or six days.

Q. You say the morning; which morning? A. The morning after the doctor came and ordered it.

Q. How long after the cast was removed? A. The very next morning.

Q. You say that was kept on for how long? A. About five or six days.

Q. The same application or a renewed application? A. No, renewed it.

Q. How often was it renewed? A. Every day.

Q. Who applied it? A. My husband and this lady that I referred to.

Q. Did the doctor continue treatment or not? A. He was coming to the house, then, and through the week.

Q. Did your leg get better with the application of antiphlogistin? A. Just a little bit the swelling went down.

Q. How much down did it go? A. Well, just a little, not so much.

Q. What was the size of your leg then, after the application of the antiphlogistin for a week? A. Well, I just could not tell you, swollen quite some.

Q. Did you have anybody caring for you at that time, outside of Mr. Volke and the doctor? A. Not at that time, no sir.

Q. Did you at any time have anyone taking care of you? A. I don't understand that, please.

The Court: Did you at any time, have anyone taking care of you?

The Witness: Yes, sir.

Q. Who was the first person? A. I had Mrs. Schaefer, a nurse.

Q. And when did she come to your home? A. She came on the 16th of January.

Q. Can you tell us, if you know, whether Mrs. Schaefer is a practical nurse, or a registered nurse? A. She is a practical nurse.

Q. And she came on what date? A. On the 16th of January.

Q. And how long did she remain with you? A. She remained with me until March 24th, when she had to leave me.

Q. When would she come and when would she leave your home? A. She would come at eight o'clock in the morning and go home at eight o'clock at night and stay with me all day.

Q. What work did she do for you? A. Just cared for me.

Q. What did she do? A. Attending me, my limb and my diet and my room.

Q. Were you in or out of bed during that period of time? A. In bed.

Q. Continually? A. Yes, sir.

Q. And what treatment was being given to you at that time? A. Well, there was a solution put to the foot at the time that my nurse came in.

Q. How was that applied? A. That was applied hot, hot solution.

Q. How was it put on? A. Put on with cotton and then bandaged up.

Q. How often was that solution changed? A. That was put on every few minutes, just as soon as it got cool, it was put on again; had to be hot all the time.

Q. Was there any other treatment given to you during that period of time? A. Yes, then, after that solution was put on, there was a salve put on the leg.

Q. A salve? A. Yes, sir.

Q. Was that during the time that Mrs. Schaefer was there? A. Yes, sir.

Q. And when did you start putting the salve on? A. Right after the solution was taken off.

Q. And how long did you continue to apply the solution? A. One week, about one week, after the salve was put on.

Q. How long did you continue to put the salve on? A. That was quite some time; about two or three weeks, I should judge, if I can remember right.

Q. Was Mrs. Schaefer with you during all that time? A. Yes, sir.

Q. Then, after the salve was put on, what was used? A. Then the leg had to be rubbed with alcohol and different things the doctor had ordered.

Q. Who did that for you? A. Mrs. Schaefer until she had to leave me.

Q. Now, when she did leave you, on March 24th, was there anyone engaged in her place? A. Yes, sir; Mrs. Morrison.

Q. When did she come? A. She came on the 25th of March, after Mrs. Schaefer left.

Q. And remained how long? A. She remained about three weeks.

Q. What service was she performing? A. She was massaging the leg, rubbing it, and baking with a light.

Q. What kind of light? A. A big electric light the doctor ordered.

Q. The doctor ordered that for you? A. Yes, the doctor ordered it.

Q. How often would she massage the leg and how often apply the light? A. She came to me every morning and every evening and applied the light and then rubbed olive oil, hot olive oil.

Q. How long did she remain upon each occasion? A. I should judge about an hour.

Q. You say she left three weeks after March 24th? A. Yes, Good Friday was her last visit.

Q. Now, up to that time, had you been out of bed? A. No, sir.

Q. When did you get out of bed? A. My first day out of bed was on Good Friday.

Q. Of 1928? A. 1928.

Q. Do you know when Good Friday fell, the date? A. Good Friday was I think on the 13th of April.

Q. When you got out of bed, will you describe how you got out and what you used? A. They just carried me from the bed to the chair.

Q. How long did you continue to stay in the chair? A. Well, I was sitting in the chair quite some time, until they started to carry me up and down stairs; that was around June, they were still carrying me up and down stairs.

Q. During that time were you hurt in any other way? A. Yes, I was.

Q. When was that? A. That was on Good Friday.

Q. Where were you going at the time? A. Well, I was sitting in the chair. I had crutches and wanted to see if I could use the crutches. I was going to the bathroom.

Q. When did you first get the crutches? A. They had given me crutches to see if I could walk; the first I was ever on them.

Q. When did you first get them? A. A few days before that.

Q. When did you first attempt to use them? A. On Good Friday.

Q. What happened to you at that time? A. Well, as I put the crutches under my arms, I went to go to the bathroom. They slipped from under me and down I went.

Q. Did you hurt your foot at that time? A. No, sir.

Q. Did you hurt any part of your body? A. I hurt my ribs.

Q. Were you treated for that? A. Yes, sir.

Q. Now, after the accident of falling and injuring your ribs, when was the first time that you left your chair after you had come from the bed to the chair? A. When was the first time?

Q. Yes? A. Well, I was in the chair, from the bed to the chair all the time for a long while.

Q. Until when? A. Well, I guess it was in June when they carried me up and down stairs.

Q. Did you have anyone else taking care of you during the period from when Mrs. Morrison left up to the time you left the chair in June? A. Yes, sir.

The Court: Madam, when you fell from the crutches or went down, was it in your own home?

The Witness: Yes, sir.

The Court: And was the room carpeted?

The Witness: Yes, sir; I was going to the bathroom and they slipped from me, just as I got into the bathroom.

The Court: You had the crutches under your arm?

The Witness: Yes, sir.

The Court: Which way did you fall?

The Witness: I fell on the left side; the ribs was on the left side that were hurt.

The Court: You mean you went down on your left side?

The Witness: Yes, fell right across the bath tub.

Q. What were the crutches on? A. Rubber.

Q. Was it rubber on which you slipped? A. It was a tile floor.

Q. What room? A. In the bathroom, just as I got in the door of the bathroom.

Q. You have a tile floor in the bathroom? A. Yes, sir.

Q. And after your ribs were hurt, did you remain in the chair or go back to bed? A. I had to go back to bed for a couple of days.

Q. Then back in the chair again? A. Yes, sir.

Q. Now, after Mrs. Morrison left, three weeks after March 24th, who then treated you? A. I had a Miss Ward.

Q. When did she come to you? A. She came on the 16th of April, three days after Good Friday.

Q. What service did she perform? A. She massaged the leg and treated the leg.

Q. In what way? A. Manipulated it and got the circulation back. I think the nurse could tell you that herself.

Q. Miss Ward is here? A. She will testify.

Q. How long did Miss Ward remain at your home? A. Miss Ward came the 16th of April, 1928. She continued until February first, 1929.

Q. How often would she come? A. Well, that made some time.

Q. How often? A. She would come three times a week, and then for quite some weeks, and then she went down to twice a week and then gradually

once a week, until she left; until I discharged her.

Q. What was the condition of your leg at the time that she left, I think you said, in February, 1929? A. Well. Well, I guess I could walk. That I know and this swelling was still there; it never really went down.

Q. How did you walk? A. I walked lame, with a limp.

Q. Had you ever used anything outside of the crutches? A. I used a crutch and a cane, then a cane later on.

Q. How long did you continue to use crutches? A. Until September.

Q. Then after you discarded the two crutches what did you then use? A. Then I used a cane and a crutch.

Q. Until when? A. Until the latter part of September; first two crutches.

Q. Until when? A. Until—first two crutches, then I used a crutch and cane, and then I went down to a cane.

Q. How long did you continue to use two crutches? A. I used them until, about the end of August I was still using two crutches.

Q. Then as to your crutch and cane? A. Then gradually I went to the cane.

Q. When did you go to the cane? A. About two weeks before I started to walk.

Q. When was that? A. I started to walk the latter part of September.

Q. Then did you use a cane? A. Once in a while I have to use it.

Q. How long did you continue using the cane on and off? A. Well, about, I judge—well, as a matter of fact, that leg would not act right—you know what I mean. There would be like a little

bad circulation and I would not have no support, I would have to go back on the cane.

Q. Now, during all of this time, did you remain in the house or did you go out? A. No, when I used the crutches, I used to go out and walk in the house.

Q. Did you go out in the street? A. No, sir.

Q. When did you start going into the street? A. Well, after I had discarded the crutches and cane.

Q. About when was that? A. Must be about, I guess, October, 1929.

Q. What year? A. No. 1928—no, 1929. I am right.

Q. When you finally went into the street, what was your condition then? A. Well, my leg and foot was very swollen, just the same.

Q. Anything else? A. Yes, bad circulation.

Q. You can't tell us what it was from. You can tell us how you felt, and how your leg appeared? A. My foot to me felt twice the size. It was always swollen, and more when I would walk around on it.

Q. How is your leg now? A. It is very much swollen. I cannot walk but a block or two, when the swelling gets so bad, my foot goes from under me. Don't seem I have any support for the foot at all.

Q. Does that condition exist at the present time? A. Yes, sir.

Q. Besides the practical nurses and the friends that helped you, was there anyone else that you had in your home doing anything for you? A. Yes, I had a housekeeper by the name of Mrs. Olsen.

Q. When did she come with you? A. She came on the 16th of January and stayed.

Q. Of what year? A. 1928.

Q. How long did she continue in your employ? A. Well, off and on, she continued to, about, two years ago.

Q. What work did she do? A. Housework; general housework.

Q. Did you do any of the housework yourself? A. No, sir.

The Court: Well, didn't you do the housework before this injury?

The Witness: Yes, sir.

Q. Took care of your own home? A. Yes, sir.

Q. Did you have anybody employed previous to the time you were injured? A. No, sir.

Q. Did anybody do your washing and ironing? A. My washing was done out.

Q. Your ironing? A. Yes, done out.

Q. Was any part of your housework done by anybody that you employed? A. No, not before the injury, no.

Q. Was Mrs. Olsen the first one who came to your home for the purpose of doing the housework? A. Yes, sir.

Q. And she came what date? A. She came the 16th of January.

Q. Of what year? A. 1928.

The Court: Madam, what was your injury; I haven't heard. What was your injury?

The Witness: The foot.

The Court: Where?

The Witness: In the side of the foot.

The Court: What was the matter with it?

The Witness: It was broken.

The Court: Fractured?

The Witness: Well, they have X-rays.

The Court: You are depending on the medical testimony?

The Witness: Certainly.

The Court: You, yourself, can you tell what was the matter?

The Witness: There was a break in the side of the foot, between the toe and the heel. Otherwise, in medical terms, I don't know how to express it.

The Court: I mean what you felt yourself; did you feel anything?

The Witness: Certainly; swelling and pain.

The Court: Besides that, what part of your foot, exactly?

The Witness: Why the heel and the foot and the leg was——

The Court: Swollen?

The Witness: Yes, sir.

The Court: What was injured. You say, here is a hole, nine inches by three and a half wide and an inch and a half deep; you stepped into it, but you didn't fall down?

The Witness: Yes, sir.

The Court: You walk about afterwards?

The Witness: Yes, sir.

The Court: And you have this swelling?

The Witness: Yes, sir.

The Court: You give us a history of swelling. Now, what bones were affected; do you know, yourself?

The Witness: I don't know; you could have the doctor to tell you. He will testify. I don't know.

Mr. Brenner: To clear it up, if the Court would like to clear it up, Mr. Milton has consented to the proof of the X-ray under the testimony of Dr. Broeser, without calling him.

The Court: Possibly I am anticipating your case, being a little bit impatient, probably.

Q. Judge Brown asked you a question, or suggested that after your foot caught in the hole that you walked to this store where you did some shopping?

The Court: She testified, didn't she?

Mr. Brenner: I just want to bring one thing out.

The Court: About four stores away?

The Witness: Yes, sir.

The Court: And then back to the car.

Q. How did you get to the store? A. By holding on to Mr. Volke's arm, leaning heavily against him.

Q. Why did you do that? A. Why, because I could not walk. My foot was swollen.

Q. Now, Mrs. Olsen who took care of your housework, I think you said she was there two years? A. Up until about two years ago; off and on.

The Court: Did you have a high heel or a low cut shoe?

The Witness: No, an Oxford tie; I always wear them.

The Court: That was a medium heel?

The Witness: Yes, sir.

The Court: Was your heel in the hole, too?

The Witness: The whole foot.

The Court: Your right foot?

The Witness: Left foot.

The Court: It was in the hole you got caught; you didn't fall down?

The Witness: No, I was almost down when these people caught me.

The Court: Did you go forward, or otherwise?

The Witness: I pitched forward.

The Court: Well, what caught you?

The Witness: The whole weight was on that one foot and I went over.

The Court: How near the ground did you get?

The Witness: Well, way down, so that they grabbed me under the arms.

The Court: How far would you say from the ground would you say; did you make any attempts to save yourself?

The Witness: Certainly, as I pitched.

The Court: You stuck your hands out?

The Witness: And they grabbed me.

The Court: They grabbed you before you got down?

The Witness: Yes, just before I got down, and held me there until Mr. Volke got around.

The Court: Can you give us any idea how close to the ground you were, that is, your hands, as you extended them?

The Witness: Well, now, how can I do that.

The Court: I don't wish you to demonstrate it; you might tell. I will ask ask you another question. Before this accident, were you an active woman?

The Witness: Yes, sir.

The Court: Agile on your feet?

The Witness: Yes; I was very active.

The Court: Could you touch the ground with your hands, without bending?

The Witness: I had physical culture; I never tried that.

The Court: You know what I mean; did it cause you any trouble to bend over?

The Witness: No.

The Court: You could bend very easily?

The Witness: Yes, sir.

The Court: Can you tell us how far you were from the the ground, or the sidewalk when you were caught; would you say it was two or three feet?

Mr. Brenner: Possibly the witness can show rather than give it in feet.

The Court: All right; let her show.

Q. Will you step down, Mrs. Volke.

The Court: The Court would like to know how this result was obtained, from a position, physically, that did not entail any fall.

Q. Will you step down, Mrs. Volke, and just show us with your hand or hands the distance

from the ground that you were, using the floor as the ground. Don't show us with your own body; I just want you to indicate so that we can get the distance? A. The foot went in the hole. I went down, way down, like that. My knee bent. I was about almost down when they picked me up. That is how I can explain (indicating).

The Court: You want that on the record; she extends her hands outward.

The Witness: I pitched forward.

The Court: Her body to almost parallel with the floor?

Mr. Brenner: Yes.

The Court: Or nearly so. Or her body from the hips up.

Mr. Brenner: Yes.

Q. Before taking the stand again, will you just step down. You were asked concerning the type of shoe you wore. How did the shoe you wore compare with the shoe that you now have on? A. The same thing. I have always worn this kind of shoe.

Q. Would you mind turning around so that the jury can see the heel? A. Yes, a Cuban heel. I have always wore this kind of shoe.

The Court: How high is the heel, can counsel agree?

Mr. Brenner: I would like to measure it.

Mr. Milton: I don't think a Cuban heel is regarded by the ladies as a high heel.

Mr. Brenner: An inch and a half from front of the heel, two inches to the back.

Mrs. Marinda M. Volke, cross

Q. How old were you at the time this accident occurred? A. Forty-seven.

The Court: In good health.

The Witness: Yes, I was very active, dancing and everything; very well, which I cannot do now.

Q. Did you ever walk with a limp prior to the time that this accident occurred? A. No, sir.

Q. Have you ever walked without a limp since the time the accident occurred? A. No, sir.

Q. And the way that you walked in front of the jury, is that different from the way you usually walk, or the same as you usually walk? A. You mean since the accident, or before the accident?

Q. Since the accident? A. The same thing.

Q. Did you keep account of what was paid to the nurses and Mrs. Olsen, or did Mr. Volke keep that? A. Mr. Volke kept track of the bills.

Q. Also the bill of Mrs. Olsen? A. Yes, sir.

Cross examination by Mr. Milton:

Q You said, Mrs. Volke, that the reason you walked on the arm of your husband to the shop that was four doors away, was because your foot was swollen; is that right? A. Yes, sir.

Q. So that you want this jury to believe that instantly after this accident happened, your foot was swollen? A. Started to swell; it did.

Q. You said it was swollen; was it or not? A. It was swollen, yes, sir.

Q. Immediately after the accident. What kind of a house did you live in in 1927, at the time of this accident, a two-family or single-family? A. Two-family house.

Q. Did you live on the ground floor or upper? A. We lived in the whole house; we occupied the whole house; it is a one-family house.

Q. I thought you said a two-family house? A. One-family house.

Q. How many rooms? A. I have six rooms, counting the porch.

Q. On one floor or more than one floor? A. Two floors.

Q. Your bedroom is on the upper floor? A. Yes, sir.

Q. The rooms that you prepare the meals, the kitchen and so forth, are on the lower floor? A. Yes, sir.

Q. Mrs. Schaefer was the first practical nurse you had? A. Yes, sir.

Q. So that, from the time of the accident, until January 16th, when she came, you were alone in this house? A. With my husband.

Q. Of course. He was employed? A. What is that?

Q. He was employed? A. He has got his own business.

Q. And I assume, like most men, he spent the hours of business at his business? A. At home; he has his men working for him.

Q. What kind of business is it he carries on at his home? A. Moving business.

Q. I want to be fair about this thing. You want the jury to understand that this whole period from December 24th, when this accident happened, until January 16th following, Mr. Volke stayed at home and didn't go out about his business; is that right? A. He stayed home with me, yes, sir, and took care of me.

Q. You said that Mrs. Olsen was employed

by you as general houseworker, off and on? A. Yes, sir.

Q. How frequently off and how frequently on? A. For a while she came in every day.

Q. How long a while? A. That I could not say; it was quite some time.

Q. You have been most particular. You were able to fix the exact date when Mrs. Schaefer came, January 16th; you were able to fix the exact date when Mrs. Olsen came; you fixed the exact date when you got up and used crutches; you have fixed exact dates, but you can't tell me now when Mrs. Olsen was on and when she was off. Why is that? A. Because she came every day for quite some time.

Q. How long is quite some time? A. Well, I should judge about six months.

Q. She was with you the full period there, about two years? A. Yes, sir; up until two years ago she left.

Q. When did she first come? A. The 16th of January.

Q. What year? A. 1928.

Q. 1928, and she remained with you in this on again and off again employment to about two years ago, or October, 1931? A. Off and on, yes, sir, she did.

Q. And the first six months she was there every day? A. Yes, sir.

Q. So then, from time to time in June of 1928, she was there regularly; is that right? A. Two or three times—then she went down to two or three times a week.

Q. So there were days when this six rooms and two floors was not attended to at all, either by you or by someone other than Mrs. Olsen? A.

By friends that I had come and visit me, usually tidied up a little bit.

Q. Who is the friend? A. No, Mrs. Olsen's friend from Jeffersonville.

Q. Of Mrs. Olsen? A. Yes, sir.

Q. Jeffersonville, where? A. Sullivan County.

Q. So that she would leave Jeffersonville, in the lovely, beautiful country of Sullivan County, to come down to Hudson County? A. She was not living in Jeffersonville at the time; she was in Union City.

Q. When did she go to live in Jeffersonville? A. In 1930.

Q. Can you give us the exact date? A. Yes, I can.

Q. Please give us that? A. I can give you that, because she was——

Q. Give it to me, please; never mind the reason? A. Because she was there——

Q. Date, please? A. I said when; I just told you the date, sir.

Q. I asked for the exact date? A. I could not tell you the exact date.

The Court: Well, as near as you can tell?

The Witness: Well, that I could not; I could not tell you that.

The Court: The Court does not want the exact date; as near as you can?

The Witness: I don't know.

The Court: She doesn't know.

Q. Well, Mrs. Volke, is this your story to the jury; while Mrs. Olsen, the regular general housekeeper was off the job, Mrs. Olsen's friend came in and tidied up? A. Occasionally, yes, sir.

Q. Did Mr. Volke keep a record of how much money he paid Mrs. Olsen, the regular housekeeper? A. That I don't know.

Q. Did you? A. No, sir, I didn't.

Q. So that if we are going to get any light as to the frequency of Mrs. Olsen's employment, or the regularity of it, you think we will get it from Mr. Volke's figures, do you or not? A. Well, I suppose he will testify as to the amount.

Q. He will testify as to the amount? A. Yes, sir

Q. And what rate were you to pay her? A. $4 a day.

Q. Have you any children, Mrs. Volke? A. No, sir.

Q. You testified on direct examination that prior to this accident, you were in good health? A. Yes, sir.

Q. And never limped? A. No

Q. Isn't it a fact that prior to the accident you did walk with a limp? A. No, sir.

Q. Did you, ever? A. No, sir; excuse me.

Q. Did you ever hear anybody say that you walked with a limp? A. Not that I know of.

Q. You know Mrs. Seback? A. Yes, I know.

Q. She would have no reason, so far as you know, to say that you had a limp before the accident, if in fact you did not?

Mr. Brenner: I object to that.
The Court: Yes, at this time.
Mr. Milton: I withdraw it.

Q. Have you had heart trouble? A. No, sir; never.

Q. Never had heart trouble? A. No, sir

Q. Did you ever have any illness that your husband thought was heart trouble.

Mr. Brenner: I object to that.

Q. So far as you know? A. No, sir, not that I know of.

The Court: Aside from that, I suppose there would be another way of getting it.

Q. Do you know what phlebitis is? A. No.

Q. Do you know what varicose veins are? A. Yes, sir.

Q. Have you been troubled with varicose veins? A. No, sir.

Q. Who was it prescribed the use of antiphlogistin? A. My doctor, Dr. Older.

Q. That is a paste, isn't it? A. A white salve.

Q. White salve or paste? A. Yes, sir.

Q. Frequently used for drawing boils out, isn't it? A. For inflammation, I believe.

Q. I have made the Milton children submit to it for boils, so I happen to know a little bit about it? A. Why, yes, it is used for anything, inflammation.

Q. It is quite readily put on and off and after it hardens it looks like putty, and you can scrape it off very easily, can't you? A. Yes, sir

Q. Nothing painful about it being put on; might be a little hot sometimes, when they heat it, but nothing painful about it? A. No pain attached to it.

Q. As a matter of fact, it is just a little pleasant, isnt it? I remember it was rather pleasant when I slapped it on my youngsters. A. No, I don't know; I can't remember that.

Q. Now, can you give me a little more definite information as to how frequently Mrs. Olsen, the housekeeper, was employed at your

house, after the first six weeks, so that I can help Mr. Volke to give us the exact dope when he gets up here? A. Three times a week for quite some time. I could not exactly tell you, and then twice a week, and that as I gradually got better, I was up and around and then she came once a week.

Q. But you can't fix that by month or by week? A. No, I could not say, sir.

Q. Doctor Older attended you for how long after this accident? A. Up until Good Friday was his last visit.

Q. Good Friday, 1928? A. 1928.

Q. You didn't mean to imply, I take it, that Dr. Older came every day to your house from December 24th, 1927, until Good Friday, which was April, April 13th, you say, 1928? A. No. He didn't come every day.

Q. As a matter of fact, after the first ten days, he called rather infrequently, didn't he? A. No, there was quite some time he came every day.

Q. Quite some time? A. Yes, sir.

Q. Let us see if we can now get your measurement of quite some time. How long after the accident was it he called every day? A. Let me see; until after the cast was put on.

Q. And when was the cast put on? A. The cast was put on on January first.

Q. How long after the cast was put on, the day after the cast was put on? A. What is that?

Q. That he stopped coming every day? A. Yes—no. Couldn't you ask the doctor that?

Q. I know; I am asking you. A. I don't know, I could not exactly tell you the time.

Q. You said it was quite some time. Let us

get a little particular about it. I want to know if the doctor didn't stop coming every day after the first week or ten days? A. He stopped coming every day, yes, sir.

Q. After the first week or ten days? A. Yes, sir.

Q. And wasn't it from that time, until Good Friday, in the period between say January first or second or third, and Good Friday, that he got there infrequently? A. He came some time every other day, for some time then once a week, until Good Friday, which was the last visit.

Q. Are you able to fix the number of times that this doctor called between January 3rd and April 16th? A. No, I can't fix that.

Q. Your memory of that isn't as good as your memory of dates? A. No, it is not.

Q. Is Dr. Older here? A. He will be.

Q. Dr. Older, by the way, is not the physician that you called in to treat you when you fell and hurt three ribs? A. Yes, sir.

Q. He is? A. Yes, sir.

Q. Who is Dr. Osheran? A. Was the doctor I called after Dr. Older.

Q. For what reason? A. About the ribs. I would like to explain why, if I can.

Q. Let us get the fact established first. I asked you if Dr. Older was the physician—— A. Yes, he attended to me.

Q. You don't know what I am going to ask you. A. You asked me if Dr. Older came in at the time my ribs was hurt.

Q. Did he or did he not? A. Yes, he did.

Q. After that you had Dr. Osheran about your ribs, to treat you for that? A. Dr. Older.

Q. Osheran? A. Osheran, he followed Dr. Older.

Q. How long after Dr. Older? A. Two days.

Q. How long did Dr. Older attend you in connection with the injury to the ribs? A. He only called twice.

Q. How frequently did Dr. Older call to attend you in connection with the injury to the three ribs? A. Only called once; that was on Good Friday, to strap me.

Q. You referred once or twice to bad circulation? A. Yes, sir.

Q. Is your circulation poor? A. In the foot and leg.

Q. Who told you that? A. The way my leg feels, and foot.

Q. Did any physician tell you that you had bad circulation? A. Not that I know of.

Q. So that, because of some feeling you have in the leg and foot, you think your circulation is bad, is that right? A. Why, certainly, the leg swells and it is blue; it must be bad circulation, that is all I know.

Q. I don't know; I am a lawyer. A. Can you get that testimony from my doctors?

Q. I just want to find where you got the impression that your circulation is bad. I want to find out if some doctor told you that. You say no doctor did? A. No.

Q. But it is something you pulled out of the air yourself. What time of the night was it you got out of the automobile in front of the vacant lot adjacent to the Jaeger property? A. Ten o'clock.

Q. How much shopping did you expect to do? A. I expected to do quite some shopping.

Q. Between ten o'clock and the time the stores closed? A. Yes, sir.

Q. What time did the stores close? A. Christmas Eve, I guess they are open quite late.

Q. Maybe it is a long time since Santa Claus worked in my family; you were not in a hurry that night? A. No.

Q. Do you remember being examined before trial, Mrs. Volke? A. Yes, sir.

Q. Do you remember being asked these questions and making these answers: "Q. Were you watching as you went along? A. Not at the time, because I was in a hurry." A. I was in no hurry, sir

Q. Did you say what I repeated to you? A. Well, no, I don't remember that remark, that I was in a hurry. I don't remember it, because I was in no hurry.

Q. Let us get the fact afterwards. What I want to know from you now is if, on the 19th day of February, 1932, in an examination before trial, conducted before William H. Bradley, at Washington Street, Hoboken, you were not asked the question I read to you and you did not make the answer I read to you. What have you got to say about that? A. That I don't remember, sir; it is quite some time.

Q. 1932 is quite a while ago for you to remember whether or not you told the lawyer who was asking you, that you were in a hurry when you walked the sidewalk, is it? A. Well, I don't know how I could be in a hurry; it was Christmas Eve.

Q. I asked if it was quite a while ago, since 1932? A. No, I thought less than that.

Q. It was in February of 1932 you were asked

that question and now you can't remember whether you said that you were in a hurry? A. No, I can't remember

Q. Your memory is pretty good? A. Yes, it is.

Q. You have been able to tell us when Mrs. Schaefer came and went, when Mrs. Olsen came and went, when Mrs. Morrison came and went, you have named date by date, month by month, and now you can't remember that; that is true? A. Could I answer in my own way on that?

Q. You have named these dates? A. I know, but the reason why——

Q. Now you can't tell? A. The reason I remember them distinctly is because they were waiting on me personally.

Q. And yet you can't remember whether, in answer to the examination by your own counsel, you told him that you were in a hurry when you walked along the sidewalk?

Mr. Brenner: I object because the examination was not conducted by her own counsel.

The Court: It will be sustained, unless counsel can agree.

Mr. Milton: Perhaps I mis-read.

Q. You remember the examination by your own counsel?

The Court: Anyway, on the examination there, did you say these things, that you were in a hurry?

The Witness: I can't remember.

The Court: Now counsel wants to know——

The Witness: If the testimony is there, I suppose I said it.

The Court: It isn't that. They want to know whether you said it or not. Counsel is interrogating you, if you could remember things that happened before that time, and you answered that you could, about the employment of these persons shortly after your injury several years ago, why you can't remember an examination as late as a year and a half or two years ago—less than that?

The Witness: I don't think I do.

Q. You knew this sidewalk was broken, didn't you, before that night? A. I know it was in bad condition, yes, sir.

Q. You had passed Mr. Jaeger's bakeshop many times? A. Once in a while I would go past there.

Q. How long have you lived in West New York? A. Going on eleven years. No, I have lived in West New York about twenty-two years.

Q. Bergenline Avenue is the popular and principal thoroughfare of North Bergen? A. Yes, sir.

Q. It has many good shops? A. It has.

Q. And the ones that you were intending to go to that night, I assume you have gone to before many times? A. No, I never went there before.

Q. Let us get that ironed out Why did you come to pick out this particular shop that Christmas Eve, to go to, if you had never been there before? A. Well, that I could not say; I really could not say.

Q. What shop is it you were going to go to that night, that Christmas Eve? A. The name

I don't know. They are out of business now. It was a ladies' supply, usually ladies' apparel.

Q. How did you come to pick it out, a shop you had never entered before, this vital Christmas Eve? A. That I don't know.

Q. You don't know that? A No, I could not explain that.

Q. Now, you want this jury to understand then, that on this Christmas Eve, that you were going to a place or shop you had never been to before in your life? A. Yes, sir.

Q. That is right, is it? A. Isn't it customary for people to do that, may I ask?

Q. I don't shop; my wife does. You had in fact passed over this sidewalk many times? A. Went past there.

Q. Prior to the accident? A. Yes, sir.

Q. And were familiar with it? A. The sidewalk was broken in different places, yes, sir.

Q. And that night, when you walked along the sidewalk, you just didn't think about it being broken, did you? A. No, I didn't. I didn't have it in mind, no, sir.

Redirect examination by Mr. Brenner:

Q. On this night, as you were going along that sidewalk, what was its condition, insofar as people were on the sidewalk? A. It had a lot of people going back and forth.

Q. In both directions? A. Yes, sir.

Q. Was there anyone in front of you, besides the two people who happened to catch you? A. There was people coming back and forth, yes, sir.

Q. Coming towards you? A. Yes, sir.

Q. Was there anyone back of you? A. Yes, there was people in back.

Q. Were there people on the side of you or not? A. People going back and forth; that is all I can say.

Q. One question I meant to ask you before, Mrs. Volke. Some suggestion was made by Mr. Milton of your having waited almost two years before you started this suit. That is the fact, isn't it?

Mr. Milton: That is objected to. I made no suggestion, in the examination, at least.

The Court: In the opening. I suppose you are anticipating.

Mr. Brenner: I am not anticipating, because that is a fact. Mr. Milton already referred to it.

The Court: That is not in evidence yet.

Mr. Brenner: I realize that.

The Court: Aren't you anticipating something that is not in evidence?

Mr. Brenner: It might never be put in evidence. The difficulty is that counsel would have the right, even on the summation, to refer to it, because the date of starting suit is a matter that is properly referred to. I want to get from this witness the reason that she waited two years. I won't press if Mr. Milton objects.

Mr. Milton: I withdraw any objection. I would like to have this witness explain why she waited two years.

The Court: Let us hear it.

Q. Why did you wait that period of time before starting suit, Mrs. Volke? A. Well, the reason was, I was waiting to see if my foot would

get better that time, and time went by and it never got any better and maybe getting worse, and the time passed by, and that was the reason why I started. I had no intention when the injury was first got, I never had no intention——

The Court: Whether it was getting better or getting worse, when you were injured before this property, and you felt that you were injured through the fault of someone, why didn't you call it to their attention?

The Witness: As I said, I didn't have no intention of ever going through with anything like that, until my foot got so that I would see it would never get any better, and bothered me all this time. Then I asked my attorney, spoke to him about it and he told me I would have to act quickly if I intended to do anything.

Recross examination by Mr. Milton:

Q. Now, when did this change in your mental attitude, with respect to your bringing suit, occur? A. Well, when my foot didn't get any better.

Q. You knew, did you not, in June, 1929, that your foot was not going to get better, just as well as you knew it in December? A. No.

Q. Although the injury was then some nineteen months old, you didn't know whether your foot was going to get better, in June? A. No; could I answer?

Q. Answer any way you please. A. The reason was because I thought as it went on, I thought it would correct itself, but I saw it didn't.

Q. What about July? A. What about July?

Q. Did you know in July, 1929, your foot wasn't going to get better? A. No, I didn't. I didn't know it as it went along.

Q. What about August, did you know it in August? A. No.

Q. Nor in September? A. I kept waiting and waiting.

Q. Waiting and waiting? A. Yes, sir.

Q. Until within five days before this claim that you say you assert against Mr. Jaeger and Mrs. Otway would have been outlawed, and you started your suit; that is right, isn't it? A. Because I didn't know anything at all about the law, and didn't know what the law or outlawed was.

Q. Luckily you did and didn't wait until the five days before it expired. A. Not until my attorney told me.

Q. How long had you been talking to your lawyer, about? A. Never before.

Q. When did you first talk to a lawyer about this case? A. Well, when the suit started.

Q. That very day? A. No.

Q. How long before the day? A. I judge about two months before.

Q. Two months before, so that you did get a little whispering up in your mind that there might be something to this case? A. No, no intention like that at all.

Q. You had waited without even going to a lawyer for twenty-two months after this accident happened. You had not even consulted a lawyer about it? A. No, I didn't.

Q. Is that what you want the jury to believe? A. I didn't consult a lawyer, no.

Q. You never even went to Mr. Jaeger or Mrs. Otway and said, "Here, my husband had to pay out moneys for nurses, for doctors, for help in my house. I have lain in my bed week by week, month by month. Now, in the interests of a square deal you ought to pay." You never even did that, did you? A. They knew about it.

Q. Did you or did you not? A. No, I did not; no, sir.

Q. You never went to Jaeger, you never went to Otway, and said, "Your broken, disreputable sidewalk, that has been in a state of disrepair for months, has caused me to suffer injuries for over two years, from which I am not going to recover"? A. Would they believe me any more than now?

Q. The question is, did you or did you not? A. No, I did not.

Mr. Brenner: May I at this time offer the X-ray and read Dr. Broeser's testimony? Mr. Milton has agreed that we might read that instead of calling the doctor.

The Court: Perhaps you had better do that later.

GRACE L. WARD, sworn for plaintiffs.

Direct examination by Mr. Brenner:

Q. Miss Ward, where do you live? A. 67 East Park Street, East Orange, N. J.

Q. What business or profession are you engaged in? A. Physiotherapy.

Q. That is a profession, is it not? A. I believe so; yes, sir.

Q. How long have you been in that profession? A. Since 1927.

Q. When in 1927 did you start? A. I started in the Fall of 1927.

Q. Before you attended Mrs. Volke? A. Yes, sir.

Q. When did you start taking care of Mrs. Volke? A. About the middle of April.

Q. Were you at that time connected with any institution? A. Yes, sir.

Q. What institution? A. North Hudson Hospital, Weehawken, N. J.; Orthopedic Hospital in Orange.

Q. Are you still connected with either of these? A. The New Jersey Orthopedic Hospital.

Q. By whom were you directed to go to Mrs. Volke? A. Dr. Osherin.

Q. Now, will you tell us what treatment you gave to Mrs. Volke? A. I gave her massage treatment and eventually gave her active exercise to loosen up the muscles of the ankle and produce motion.

Q. Now, for how long did you give massage treatments? A. I should say, roughly, between, for April, May and all June, I should say she was doing some exercising of the ankle, to try to restore motion.

Q. When you refer to massage treatment, will you tell us just what that consisted of? A. I don't know just exactly how to describe it.

Q. How did you do it? A. Do it with my hands.

Q. Describe the massage treatment? A. By stroking and manipulation by the hands of the joint and member that is disabled.

Q. Is there any solution used in connection

with that? A. I usually used solid Albolene, and then rubbed the leg off with alcohol afterwards.

Q. Is that what you used in this particular instance? A. Yes, sir.

Q. You say that after giving the massage treatment that you then gave, you used the word manipulation; now, what did that consist of? A. Flexion and extension of the ankle joint and some manipulation of the toes, trying to bring back flexibility about the joint, motion of the joint.

Q. How long did you continue to do that? A. Well, I have treated Mrs. Volke, as she said, from about the middle of April to some time in the following February, and each time she was given massage and some manipulation and then the active exercise.

Q. What do you refer to as active exercise? A. Things that she does herself to limber up the joint, exercises that were given to her to do.

Q. Were they done while you were present? A. Done while I was present and when I was not there, too. At least once or twice a day.

Q. How often did you come to her between April and I think you said February? A. Well, I have a list of the times, to the best of my ability, as I remember it. In April, I gave her seven visits, starting the middle of April; they were three times a week. May, I gave her thirteen visits, again three times a week, Mondays, Wednesdays and Fridays. In June, there was eleven visits; July, nine; August, four; September, one; October, six; November, eight; December, six; January, four; and February, two.

Q. Can you tell us what your charge was? A. When I first treated her, the first fifteen visits,

I charged $3 a treatment, and then reduced it to $2.50.

Q. How does $3 a visit compare with the prices that you ordinarily charge? A. Why, to my office I get $3 a treatment and when I go out I usually get $4 a treatment.

Q. Was this done in her home? A. It was done at her home.

Q. So that it was less than you usually charge?

The Court: The test is whether it is a reasonable charge.

The Witness: Yes, it was, your Honor.

Q. Will you describe the appearance of Mrs. Volke's foot and leg when you first came there, and compare it, if you will, with its condition at the time that you ceased your treatments? A. At the time I saw Mrs. Volke first, the leg was swollen.

Q. To what extent? A. Well, for the first time, I had no comparison. I had never seen it in its natural condition.

Q. Did you compare it with the other leg? A. Yes, sir.

Q. To what extent was it swollen as compared with the other leg? A. Well, I expect about twice its size.

Q. Now, under the treatment that you were giving, did that condition improve? A. Yes, sir, it did.

Q. Immediately? A. Well, no, I could not say immediately.

Q. How soon would you say that some improvement started? A. Well, I would not have continued if I didn't feel it was giving improvement all the time.

The Court: That isn't it, Madam; counsel wants to know how soon you noticed improvement.

The Witness: I would say in about three to five weeks.

Q. Then was there a gradual improvement up to the time you left her service? A. Yes, I would say there was.

Q. Had the swelling entirely disappeared at the time that you gave your last treatment, which I think you said was February, 1929? A. That is right; no, I would not say that.

Q. To what extent was there any swelling at that time? A. I think the ankle joint, the ankle, in there was swollen.

Q. Had the swelling gone down in the calf of the leg? A. Yes, sir.

Q. Besides the swelling, what was the appearance of the leg when you first came there? A. Well, it was sort of—well, it had poor circulation at the time, and also blue and white, a drawn condition of the skin, due to the swelling, naturally.

Q. How did that compare with the other leg; was the other leg blue and white as the injured leg was? A. Not to the same degree, no.

Q. Did the blueness and the drawn condition which you first noticed, improve under your treatment? A. The drawn condition did, yes; I would say they both did.

Mr. Milton: You say they both did?

The Witness: Yes, the blueness and the swelling.

Q. Did you give us the total amount of your bill? A. I believe I did not. I think Mr. Berkowitz has a copy of it. I think it added to $185. I think yours is added to $175. I think there is a mistake in addition.

Q. Were you paid each time you came? A. Yes, sir.

Q. So that the bill which you made up was not a bill that you sent at the end of the service? A. No.

Q. It was simply made up from your records? A. To the best of my ability; yes, sir.

Mr. Brenner: Is there any objection to putting the bill in?

Mr. Milton: None at all.

Q. You say the total is $185, and not as you have it, $175, here? A. I believe so.

The Court: How can there be a bill if she was paid?

Mr. Milton: I suppose it is only a memorandum.

Mr. Brenner: The purpose of putting it in is not so much as to the amount of the bill; it will help the jury to remember the number of visits of Mrs. Ward at the home.

(Accepted and marked as Plaintiffs' Exhibit P-1 of this date.)

Q. When you first came to the home of Mrs. Volke, was she in or out of bed? A. She was in bed.

Q. How long after your visits commenced did she leave her bed? A. I should say about five weeks; three to five weeks.

Q. And then where did you find her on each occasion? A. Well, I don't know just exactly when she got downstairs, but later I would treat her on the divan down in the living room. I don't know just when she went downstairs.

Q. Could you tell whether her leg was in condition at that time that she could walk around?

The Court: Is there any objection to this testimony? Are you a physician?

The Witness: No, I am not.

The Court: You are not a surgeon?

The Witness: No.

The Court: Counsel is requesting the opinion of this woman as to the ability of this plaintiff to get around?

Mr. Brenner: Right.

Mr. Milton: It is objected to.

Mr. Brenner: I withdraw it.

Q. May I ask you, Miss Ward, did she at any time during your treatment walk? A. Yes, sir.

Q. When did she start? A. I don't know exactly, but I would say——

Q. Approximately? A. Around the Summer time.

Q. What year? A. Well, 1929.

Q. When in the Summer time would you say that her walking started? A. I would say from the end of July or the first of August, not walking alone without any support; she was walking with a cane, some support. She was getting her foot down to the ground, weight bearing.

Q. Did she walk at that time with or without a limp? A. With a limp.

Grace L. Ward, cross

Cross examination by Mr. Milton:

Q. Let me get these dates right, in the first place. In answer to Judge Brenner, you say she responded to your treatment and began to walk in the Summer time; right? A. Yes, sir.

Q. And then he asked you to fix what time, what year, and you said 1929. Now, that confuses me, because I thought you started in April, 1928, and ended February, 1929? A. That is right. You are right. I am wrong.

Q. So then, as a matter of fact, this lady began to walk within three to five weeks after April 16th, 1928? A. No, I don't think so, in three to five weeks.

Q. I thought you said that originally? A. That she showed improvement in three to five weeks.

Q. At any rate, it was the Summer time of 1928 that she began to walk, is that right? A. Yes, sir.

Q. I am interested in the condition of the other leg, Miss Ward. Which one of these legs was injured? A. The left leg.

Q. I suppose you examined the right leg when you saw this lady? A. Yes, sir.

Q. You found what appearance?

Mr. Brenner: In which leg?

Mr. Milton: In the right leg.

A. Well, it was a heavy leg, and I would say that perhaps the circulation was not as good in the right leg as it might normally be.

The Court: The right leg was not the leg that was injured?

The Witness: No.

Q. Were you able to say what caused that? I think you described the blue and white appearance of the right leg. A. Of the left leg.

Q. The right leg, the uninjured leg? A. No, I would not be in a position to say what caused it.

Q. Certainly there existed no relation between the stubbing of the lady's toe on the left leg with the poor circulation in the right; that would be a fair inference? A. Yes, sir.

Q. Now, you did find evidences of poor circulation in the left leg as well? A. In the left; yes, sir.

Q. So that, when you saw this lady for the first time in April, 1928, there was presented to you a subject who apparently had bad or impaired circulation in both of her extremities; is that right? A. I would say so.

Q. You treated both legs? A. No, sir.

Q. Just the left leg? A. Yes, sir.

Q. By massaging and manipulating the leg? A. Yes, sir.

Redirect examination by Mr. Brenner:

Q. Was there any difference in the circulation and appearance between the right and left leg?

Mr. Milton: Objected to.

Mr. Brenner: He has opened the door to it.

The Court: Can you tell the degree of circulation?

The Witness: No.

Q. Was there any difference in appearance insofar as the blueness was concerned?

Mr. Milton: Objected to.

The Court: I will permit her to testify.

A. Yes, I should say so.

Q. What was the difference? A. Well, the left leg was much bluer than the right leg.

The Court: Was the discoloration of the same hue in both?

The Witness: No, I would not say so; I would say it was darker in the left leg, the one that was injured.

Q. Was there any drawn condition of the right leg? A. No.

Q. Was there any swollen condition of the right leg? A. Yes, sir.

Q. How did the swelling of the right leg compare with the swelling of the left? A. Well, it was much more swelling in the left than in the right leg.

The Court: They were both in the same place?

The Witness: I beg pardon.

The Court: The swelling was in both legs in the same place?

The Witness: No, I would not say so. The swelling in the right leg was down around the ankle, where there is swelling sometimes. Then the left leg was swollen from the foot to the knee, right through the calf.

The Court: Both ankles were swollen, in both legs?

The Witness: The right leg was not particularly swollen.

The Court: You just said the right ankle was swollen?

The Witness: Yes, sir.

The Court: I am asking if both ankles, in both legs, were not swollen?

The Witness: I would not say the right leg was swollen; the right ankle, but not necessarily the right leg.

The Court: Did I say "leg"?

Mr. Milton: Both ankles.

The Court: Both ankles, in both legs, were swollen?

The Witness: Yes, sir.

Recross examination by Mr. Milton:

Q. So, summarizing this: there was presented to your view, this lady, claiming an injury to her left foot, who had a swollen left ankle, bluish-white condition, the swelling proceeded up the calf, and a right leg to which no injury had occurred, with a bluish-white condition and swollen right ankle; does that fairly describe it? A. Yes, sir.

WILLIAM E. HYER, Sr., sworn for plaintiffs:

Direct examination by Mr. Brenner:

Q. Mr. Hyer, where do you live? A. 649 38th Street, Union City.

Q. Where did you live on December 24th, 1927? A. I believe I lived in West New York.

Q. You are related to Mrs. Volke, are you not? A. Yes, sir.

Q. What is the relationship? A. Cousin.

Q. Were you frequently in the vicinity of the Jaeger Bake shop on Bergenline Avenue? A. Yes, sir.

Q. When did you start to go in that vicinity? A. I would judge between around late 1918, 1918 and the middle of 1919.

Q. Did you ever notice the condition of the sidewalk in front of the Jaeger Bakeshop? A. Well, yes, sir.

Q. Will you describe the condition of the sidewalk?

Mr. Milton: I think the time should be fixed.

Mr. Brenner: I withdraw the question.

Q. When did you first commence to notice anything concerning the condition of the Jaeger sidewalk? A. Well, between 1918 and the middle of 1919.

Q. What work did you do at that particular time, or what business were you engaged in? A. I was working for a man named George Lamouze, driving and painting for him.

Q. Did Mr. Lamouse have a place of business? A. He didn't have a place of business; he had a real estate office.

Q. Where with reference to where the Jaeger bakeshop was? A. Well, he had property there.

Q. How close was it? A. Well, he had some, I judge about four or five doors north of Jaegers between 45th Street, which was Fulton Street then.

Q. How far was that away from Jaegers? A. I judge to be about 150 feet or 100 feet away.

Q. Did you attend to that property for him? A. No, sir; I was working with other men. When I was not driving for him, I was going around with these other men he had working for him doing painting work.

Q. In that vicinity? A. Yes, sir.

Q. What, in 1918 and 1919 did you observe concerning the condition of the sidewalk in front of the bakeshop? A. Well, right in front of the cellar door, I judge by a foot or a foot and a half away, there was a small sized hole.

Q. Can you tell us approximately how large that hole was and how long, how wide and how deep? A. Well, I could not say definitely. It seemed to me about nine or ten inches, probably a little larger.

Q. In length or width? A. Well, it was about nine inches long; about five or six inches wide. It was oblong shaped.

Q. About how deep was it? A. I judge about two or two and a half inches.

Q. Now, what was the condition of the sidewalk immediate around that hole? A. Well, in fact, all over it was cracked up.

Mr. Milton: I move to strike that.

Mr. Brenner: I consent that it be stricken.

Q. Tell me, first, the condition right at where the hole was? A. Well, it was kind of broken up, like broke when they drive up on the sidewalk.

Mr. Milton: I move to strike that out.

Mr. Brenner: I consent to it.

The Court: That will be stricken.

Q. Did you observe the sidewalk as a whole in front of the Jaeger bakeshop? A. Well, yes; I recall some of it, yes, sir.

Q. Could you tell us whether or not all of the

rest of the sidewalk was all right, or whether there was any part of it that was broken?

Mr. Milton: As of when?

Q. In 1918?

Mr. Milton: That is objected to if the Court please.

The Court: I suppose that is calling for a conclusion, whether it was all right or all wrong. What one person would call all right, another would call wrong.

Mr. Brenner: I withdraw it.

Q. Can you tell us what you noticed as far as the rest of the sidewalk was concerned? A. Yes, sir.

Mr. Milton: As of 1918.

Q. 1918 and 1919?

The Court: He can answer yes or no.

Mr. Milton: I withdraw the objection, if he will answer yes or no.

A. Yes, sir.

Q. Will you tell us how that sidewalk, the rest of the sidewalk, appeared at that time?

Mr. Milton: That is objected to.

The Court: How is that material? That did not cause the injury to your client.

Mr. Brenner: Just to show the general condition.

The Court: What is your reason?

Mr. Milton: It seems we are reaching a point in this case where we have got to decide what the fundamental theory is of liability.

The Court: Without going into that, if you insist upon your objection, the Court will sustain it.

Mr. Milton: I do.

Mr. Brenner: Your Honor will allow me an exception.

Q. As the years went on, did you continue to pass these spots or not? A. Well, yes; I used to go to Mr. Jaeger's bakery to buy something.

Q. During what years? A. 1924, 1925.

Q. And in 1924, and 1925. (Question withdrawn.)

Q. What was the condition at the cellar door in 1924 and 1925? A. Well, I have never seen any improvement.

Q. Had the hole been filled up or repaired? A. Not that I ever noticed.

Q. Were you there at any time after 1925? A. Yes, I was going down there frequently, up until 1930, passed there, up and down. I occasionally go in there now, to Mr. Jaegers.

Q. Up to as late as December 24th, 1927, did you see any change in the condition immediately in front of the cellar door? A. No, sir.

Q. Now, during that time when you were going along Bergenline Avenue, did you ever see any trucks in the vicinity of the Jaeger bakery? A. Yes, sir.

Mr. Milton: All right—go on.

Q. Where did you see them? A. Up on the sidewalk.

Q. In front of what store? A. Mr. Jaeger's store.

Q. What kind of trucks were they? A. I judge about five-ton trucks.

Q. Motor or horse driven? A. Horse driven.

Q. Will you describe how those trucks were on the sidewalk? A. Well, the two fronts—right front wheel and right rear wheel was up on the sidewalk and one horse was on the sidewalk.

Q. What was being done on the truck when you noticed it? A. Well, they were unloading barrels.

Q. How were these barrels being unloaded? A. Coming down off skids.

Q. Where were the skids attached to? A. On the rear of the truck.

Q. And by "skids" you mean what? A. Well, two sticks coming down with hooks that hook on the back of the truck and a chain holds them together, about a quarter ways from the top or a quarter ways from the bottom to keep from spreading and then the trucks would slide down lengthways, these barrels.

Q. How big were the barrels that were slid down the truck? A. According to my judgment, I should judge about 300 or 325 pounds.

Q. How would they be slid down?

Mr. Milton: I think the witness should fix the time when this incident he has described occurred.

Q. When did you observe that, once or more than once? A. About four or five times.

Q. During what years? A. Around 1921, 1922.

Q. Now, will you just describe how these barrels were let down on the skids? A. They would tip them over on the truck.

Q. Who would? A. The men.

Q. Where were the men? A. Two men on the truck; then they would get off the truck and then

tip them over and get them on the skids and what they call the belly of the barrel would get the center of the skids so that they would not roll away when they would strike the sidewalk.

Q. When they struck the sidewalk, was there anything put on the sidewalk? A. Not that I seen.

Q. Where were the barrels put that you saw unloaded? A. They were going to Jaegers.

Q. Where, in Jaegers? A. In the cellar.

Q. Through what door or doors? A. Cellar doors.

Q. How many sets of cellar doors were there going into the Jaeger cellar? A. Well, I won't be positive, but I think there was two. They opened up, one on each side.

Q. Was there more than one entrance into the cellar, or just one entrance? A. Only one that I know of.

Q. Where were these barrels being unloaded with reference to the place where you saw this hole? A. Just right in front of the cellar door, where the concrete was broke up.

Cross examination by Mr. Milton:

Q. You are Mrs. Volke's cousin? A. Yes, sir.

Mr. Milton: That is all.

MRS. FLORENCE SCHAEFER, sworn for plaintiffs:

Direct examination by Mr. Brenner:

Q. Mrs. Schaefer, in 1927, what business were you engaged in? A. Practical nursing.

Q. Had you known Mrs. Volke prior to December 24th, 1927? A. No.

Q. Did you work for her after December 24th, 1927? A. I did.

Q. When did you start? A. It was the middle of January.

Q. What year? A. Of 1928.

Q. Where was Mrs. Volke when you first came to take care of her? A. In her bed.

Q. Who engaged you? A. Mr. Volke.

Q. Now, will you describe what her condition was when you first came there and what treatment you gave her? A. When I arrived at Mrs. Volke's, why, the leg was very swollen and all discolored, bluish, and then Dr. Older gave orders to put—there was no cast on and he gave orders to put a solution on, a warm solution and this had to be kept on constantly.

Q. Who gave orders? A. Dr. Older.

Q. To whom? A. To me.

Q. What was the solution? A. It was a prescription from him.

Q. Do you know what was in it? A. No, I do not.

Q. How was that solution applied? A. Warm; as soon as one application was cold, it had to be applied again. This was kept on constantly.

Q. What time of the day would you come there? A. In the morning.

Q. At what time? A. At about eight; say a quarter of eight or eight o'clock.

Q. What time of the day did you leave? A. Until I prepared her in the evening to go to rest.

Q. About what time would that be? A. About eight o'clock in the evening.

Q. These applications you put on, how frequently were they put on? A. Oh, about every five minutes or so; as soon as she would say it was getting cool, I had to apply a fresh one on.

Q. How long did you continue with Mrs. Volke? A. How long I was in the employ there?

Q. Yes? A. Until March; I had to leave her on account of going on another case.

Q. March when? A. 24th.

Q. Now, when these applications were put on, did the appearance of her leg improve any? A. From these hot solutions?

Q. Yes? A. No, it did not improve.

Q. To what extent was the limb swollen? A. It was again swollen then the other leg.

Q. Where did the swelling start and where did it end? A. From the toes up to the calf of the leg.

Q. How far up the calf? A. Right below the knee.

Q. And you said that this condition did not improve under this treatment? A. No.

Q. Now, did you do anything else except to apply the warm solution? A. Yes, sir.

Q. What else did you do? A. I told Dr. Older that it not improved, so he ordered salve.

Q. What kind of salve? A. A prescription from the physician and I had to apply that.

Q. When did you start to apply salve? A. That I can't just recall the date.

Q. I don't care about the exact date; how long after you got there did you start in applying the salve? A. We put the solution on for a week, anyhow, about a week and then he gave the salve.

Q. Was there any other treatment that was

being used by you? A. Yes, I had to give alcohol baths, had to rub the ligaments and the muscles that were tightening up, and I had to give alcohol rubs, massage more than anything.

Q. What did this massage consist of? A. Just alcohol.

Q. How did you massage it; what did you do with the alcohol? A. Massage the foot.

Q. Rub it in? A. Just slowly, because the foot was so swollen, there was intense pain. I had to do that very gently.

Q. How frequently would you give this massage treatment? A. Twice a day.

Q. Anything else that you took care of? A. Just her diet.

Q. Was there any different diet than any other person would have? A. Yes, just a liquid diet of soft food on account of being in bed; no solid food.

Q. During the time that you were there, was she out of bed any time? A. No, sir.

Q. Did you render a bill for your services? A. I did, sir.

Q. Do you recall the amount of it? A. I told her I would take $25 a week, on account of being no children to take care of and just taking care of the house.

Q. Was that amount paid to you? A. Yes, sir.

Q. That was starting the middle of January and ending March 24th? A. Yes, sir.

Q. Payment made in one lump sum every week? A. Every week.

Q. Is $25 a reasonable charge for that type of work that you were doing? A. Yes, sir.

Q. Is that the same or less than the charge you usually make? A. I charge more, sir.

Cross examination by Mr. Milton:

Q. You say you charged Mrs. Volke less than the usual charge? A. Yes, sir.

Q. Why? A. Because there was no children and just taking care of her. When I go nursing, I take care, usually, of the home and children. Then I charge more, because there is more labor.

Q. You said something to Judge Brenner, which I didn't hear. It is hard to hear sitting over at this table. I didn't quite catch it; something about the left leg was more swollen than the other leg?

Mr. Brenner: She didn't say that.

Mr. Milton: I am not sure; I won't be sure.

The Witness: I didn't mention the other leg.

MRS. GERTRUDE MORRISON, sworn for plaintiffs:

Direct examination by Mr. Brenner:

Q. Mrs. Morrison, where do you live? A. 34 20th Street, West New York.

Q. How long have you lived in West New York? A. Living there now about four years.

Q. Did you work for Mrs. Volke? A. I can't hear you.

Q. Did you work for Mrs. Volke? A. I was a practical nurse when she was sick.

Q. And when did you come with her? A. I followed Mrs. Schaefer, about March 25th.

Q. How long did you stay with her? A. About two weeks.

Q. And what did you do for her during the time you were there? A. Well, I applied hot applications and baking light, twice a day.

Q. Under whose directions did you do that? A. The doctor's directions.

Q. Who was the doctor at that time? A. Dr. Older.

Q. Did you make any charge for your services? A. Yes, sir.

Q. What charge did you make? A. $1.50 a day.

Q. Is that a reasonable charge for that type of work? A. Yes, sir.

Q. Did you live up in the section of the Jaeger bakery? A. At that time, I lived about five blocks away.

Q. Did you ever pass the bakery before December, 1927? A. Yes, sir.

Q. How often? A. I used to pass up and down the Avenue every day. I had a young baby and I used to pass up and down the Avenue every day.

Mr. Milton: Judge, will you fix the time?

Q. How old was the baby in 1927? A. Well, she was born September, 1924, and about October I started walking the Avenue with her.

Q. October 1924; and when you were walking along the Avenue, did you pass or didn't you pass the Jaeger bakery shop? A. Yes, I used to go up there for my bread.

Q. And when you went up there in 1924, did you notice the condition of the sidewalk? A. The sidewalk was very bad condition.

Mr. Milton: I move that that be stricken out. The question was, did she notice it.

Mr. Brenner: I consent to that.

Q. Just answer yes or no, Mrs. Morrison. Did you notice the condition? A. Yes, it was cracked and broken in places. The sidewalk was cracked and broken in places.

Mr. Brenner: It is rather difficult.

Mr. Milton: Let it ride.

Q. How long did you continue to go up and down in front of the Jaeger bake shop? A. For about two or two and a half years.

Q. Did you ever notice any repairs being made to the sidewalk, during the time that you went up and down? A. No, sir.

Q. Did you ever notice any trucks in the street? A. Trucks had to get on the sidewalk to keep out of the way of the trolley, to make deliveries.

Q. How often did you see that; when did you first notice that? A. I beg pardon?

Q. When did you first begin to notice that? A. Well, they were up there all the time. I can't say just when. Any time you passed, there was always trucks or automobiles up on the curb.

The Court: Was that so all over the street?

The Witness: All along the street.

The Court: On Bergenline Avenue?

The Witness: The street was so narrow, they got to get up there to get out of the way of trolleys, passing trolleys. At that time, it was two-way trolley.

The Court: It was the same in front of every store?

The Witness: Yes, right along the Avenue.

Q. Did you ever see any in front of the Jaeger store? A. Well, there was trucks along there, all along there, to make deliveries.

Q. Did you see deliveries being made there? A. I don't know I noticed just what they were; I noticed trucks.

Q. You noticed there were deliveries made there? A. There was trucks there, but I didn't see what the deliveries were.

Q. Did you know Mrs. Volke before this accident? A. Yes, sir.

Q. How long have you known her? A. I know her now about seventeen years.

Q. How long did you continue going up and down Bergenline Avenue, up to the time that you went to work for Mrs. Volke? A. Well, I went up for about two and a half years; then I didn't go up and down so much.

Q. Well, why? A. Then I moved away.

Q. Then you say you didn't go so much; did you go at all up until 1927? A. No, not down Union Hill; I moved over to West New York; then I used to do my shopping in West New York.

Q. When did you stop going in the vicinity of the Jaeger store? A. Well, about, I guess around the beginning of 1927; the baby was about two and a half years old.

Q. Up until that time, did you see the sidewalk being repaired? A. No, sir.

Mrs. Madelaine Ericson, direct

Cross examination by Mr. Milton:

Q. Are you a member of any society or lodge that Mrs. Volke is a member of? A. No, sir.

Q. You have known her many years? A. Yes, sir.

Q. Known her well? A. Yes, sir.

MRS. MADELAINE ERICSON, sworn for plaintiffs:

Direct examination by Mr. Brenner:

Q. Mrs. Ericson, where do you live? A. At the present time I live in Cliffside Park, 405 Park Avenue.

Q. Where did you live in the year 1927? A. 316 Brown Street, Union City.

Q. How close was that to where the Jaeger bakeshop was? A. Well, I should judge it would be about five or six blocks, from there.

Q. Did you have occasion to go to the place where the Jaeger shop was? A. Yes, sir.

Q. In what year or years did you go there? A. Well, I have been trading with them for the last twelve years or more.

Q. Still trading with them? A. Once in a while.

Q. Did you ever notice the condition of the sidewalk in front of the Jaeger bakery; just answer yes or no? A. No, I never did.

Q. Did you ever see anything the matter with it?

Mr. Milton: That is objected to

The Court: Sustained.

Q. Did you visit anybody in these premises? A. Yes, sir, I did. I was visiting the upper floor in the Jaeger building.

Q. Whom did you visit there? A. A party by the name of Mrs. McIlvaine.

Q. Did anything happen to you as you were going into that building at any time?

Mr. Milton: That is objected to.

The Court: How is that material? It seems to the Court that the case is reduced to this particular hole that caused this accident; that is the out of repair condition that you are complaining of. There might be other things wrong with that, but that is what you are relying on.

Mr. Brenner: I withdraw this witness at this time.

Cross examination by Mr. Milton:

Q. I want a description of this property, Mrs. Ericson; there are stores on the ground floor? A. Yes, sir.

Q. I am referring now to the property in which Mr. Jaeger had his bake shop in 1927; and then living quarters above it? A. Yes, sir; two stories above.

Q. The entrance was, I assume, through the hallway adjoining the bake shop? A. Yes, sir.

Q. Was the hallway on the right or left of the bake shop, as you entered? A. It was on the left of the bake shop, as you went in.

Q. Would that be towards West New York, or Jersey City? A. Towards Jersey City.

Q. That would be on the south side of the building? A. South side.

Q. The cellar doors that afforded access to the cellar, were they on the south side of the building? A. That I don't remember.

Q. You don't remember? A. No.

MRS. WILLSIE BENZING, sworn for plaintiffs.

Direct examination by Mr. Brenner:

Q. Mrs. Benzing, on the night of December 24th, 1924, it was to your home that Mrs. Volke went? A. Yes, sir.

Q. Now, what time did she arrive at your home? A. Well, I would say about 10:30.

Q. Did you notice her condition at the time she came into your home? A. Yes, sir.

Q. Now, will you describe what it was? A. Well, you see, they always had the habit of coming up Christmas Eve.

Q. I don't care about that; I am talking about this particular Christmas Eve. A. My brother rang the bell, and asked someone to come down and give him a lift, as he said his wife had hurt her foot. When she came up, I asked her, and she said——

Q. Don't tell us what she said. Did someone go out and help? A. Yes, sir.

Q. Who went out to help? A. Either my brother-in-law or my husband.

Q. What did they do to get Mrs. Volke into your house? A. They helped her up.

Q. How long did she stay at your house that night? A. I don't think quite an hour.

Q. Not quite an hour? A. Not quite an hour; I don't think it was.

Q. When she left, how did she get out of the house? A. A brother-in-law of mine and my brother took her down.

Q. How did they take her down? A. Took her by the arms.

Q. Will you tell us just how? A. I could not explain just how, one was in front and one in back. I don't know who was in front and who was in back.

Q. You saw her after that, did you? A. Yes, sir.

Q. How soon after? A. Well, I think the next week.

Q. Was she in or out of bed at that time? A. She was in bed.

Cross examination by Mr. Milton:

Q. Mrs. Benzing, you are related either to Mr. Volke or Mrs. Volke? A. Yes, Mr. Volke is my brother.

Q. Your brother? A. Yes, sir.

(Recess to 1:50 P. M.)

(After recess, 1:50 P. M.)

JOSEPH A. DAVIS, sworn for plaintiffs.

Direct examination by Mr. Brenner:

Q. Where do you reside? A. 306 Webster Avenue, Jersey City.

Q. What is your business or profession? A. I am an attorney-at-law.

Q. Have been for how long? A. Since October, 1928.

Q. Did you formerly reside in the vicinity of Jaeger's bake shop on Bergenline Avenue? A. In the vicinity.

Q. How far away did you reside from that store? A. About a mile away, in the old township of West Hoboken.

Q. Were you frequently in the vicinity of the Jaeger bake shop? A. Yes, sir.

Q. How frequently? A. I should say on an average of two or three times a week.

Q. Starting about what year and ending with what year? A. Well, from early childhood I have lived in West Hoboken, which is the adjoining municipality. I have often had occasion to go up and down Bergenline Avenue. I made most of my trips up and down in later years when I went to high school and college.

Q. Were these trips made prior to December 24th, 1927? A. Some of them; yes, sir.

Q. Do you know how wide Bergenline Avenue was and is now, approximately? A. Best of my recollection, it was about 33 feet wide.

Q. Were there car tracks laid in Bergenline Avenue? A. Yes, sir; there was a single set of car tracks in the center of Bergenline Avenue.

Q. Was there previously more than one line of car tracks? A. What part of Bergenline Avenue do you have reference to?

Q. In the vicinity of the Jaeger store. A. I am afraid I cannot truthfully recall.

Q. Passing along Bergenline Avenue, did you ever have occasion to notice any trucks, either motor trucks or horse driven? A. Yes, quite a lot of trucking going on.

Q. Did you at any time notice whether any of those trucks were off the roadway? A. Yes, sir.

Q. Where were they?

Mr. Milton: Will you please fix the time? That is all very indefinite, it seems to me.

Q. When can you first recall noticing trucks in that roadway, about what year? A. Well, I would say almost the first time I had ever stopped in that section of Bergenline Avenue.

Q. About what year would that be? A. Well, I would say that would go back into about 1910, go back as far as perhaps 1910. Do you want to go back that far?

Q. Do you know when the Jaeger store moved into the neighborhood of Bergenline Avenue? A. I could not fix the time, no.

Q. Back as far as 1910, what did you observe concerning the movement of the trucks about this vicinity?

Mr. Milton: That is objected to.

The Court: On what ground?

Mr. Milton: Here is a date some seventeen years prior to the accident. I don't see upon what theory the practice of having trucks on the sidewalk of Bergenline is material. It is not attempted to be fastened on the immediate property.

(Question withdrawn.)

Q. Do you recall seeing any trucks in front of the Jaeger bake shop? A. Yes, sir.

Q. How long previous to 1927 does your mind go back as to seeing these particular trucks? A. Well, to truthfully answer that question, I could not fix any particular time when I began to notice the fact.

Q. How many years before? A. But I would say that for a period at least five years before 1927, it has been my experience to pass up and down Bergenline Avenue in front of Jaeger's and other stores in that vicinity and notice that trucks would pull up with two wheels on the curb in order to allow trolleys to pass, and then they would unload their merchandise or load up, whatever they happened to be doing.

Q. Did you observe any of these trucks in front of the Jaeger bake shop? A. Yes, sir.

Q. What was being done as far as these trucks were concerned? A. I have a distinct recollection of flour trucks being partly on the sidewalk and unloading flour.

Q. How would that flour be unloaded? A. Well, they would take it off the rear end of the truck and drop it on the sidewalk, or, in some instances, the driver would carry it on his back from the rear platform of the truck.

Q. What container was used for that flour? A. My recollection, bags.

Q. Had you seen anything else delivered on other occasions besides flour? A. To whom? To Jaeger?

Q. Yes? A. Well, I don't think I could say that, except that I have a distinct recollection of the flour being delivered. I would not say any other article.

Q. Did you ever observe the condition of the sidewalk in front of the Jaeger premises? A. Yes, sir.

Q. What was its condition?

Mr. Milton: As of when, please?

Q. Prior to 1927? A. I would say it was in a state of disrepair.

Q. And how long prior to 1927 did you observe that; in other words, was it a week or a month or a year or period of years A. I would say a period of years.

Q. Approximately how many that you can recall? A. I am afraid I cannot pin myself down to any definite number merely by saying a period of years.

Cross examination by Mr. Milton:

Q. Mr. Davis, am I justified in the assumption that you do not intend to imply that the pulling of trucks up on the sidewalk was confined to the property in which the Jaeger bake shop was located? A. No, I don't confine it to in front of Jaeger's.

Q. Bergenline Avenue, until it was widened, a year or two ago, was a narrow street; is that right? A. Yes, sir.

Q. It is a street which is heavily built up, almost from the beginning to the end of it, running through Union City, up into West New York? A. Yes, sir.

Q. It is a street most of the property on which is devoted to business purposes, at least on the ground floor? A. Yes, sir.

Q. And it was a common practice for merchants along practically the entire distance of the street to have their merchandise carried in or out to or from trucks, which had to be driven up on the sidewalk? A. That is a fair statement. I would qualify that by saying that there, the portion of Bergenline Avenue beginning at Ful-

ton Street, which is a few hundred feet south of the bakery shop, to about 4th, where it widens out again, it was common practice to pull trucks up on the sidewalk.

Mr. Milton: It was common practice; I think that is all.

HENRY EDWARD BENZING, sworn for plaintiffs.

Direct examination by Mr. Brenner:

Q. You are related to Mrs. Benzing, who was on the witness stand this morning? A. I believe I am.

Q. You were here this morning? A. No, sir.

Q. Mrs. Benzing, who testified, was the lady to whose home Mrs. Volke went on Christmas Eve; are you related to her? A. Yes; she is my sister-in-law.

Q. You were at the Benzing home that Christmas Eve of 1927? A. I was.

Q. Do you recall seeing Mrs. Volke when she came to the home? A. No; I believe I was upstairs.

Q. Did you see her after she was there in the house? A. I did.

Q. Do you recall how long she remained? A. Well, I could not say that; I know she was there a little time.

Q. Did you observe her when she left? A. I did.

Q. What was her condition, as far as you could observe at the time she left the house? A. She could not walk.

Q. How did she get out of the house and into the car? A. Why, we helped her to the stairway.

Q. When you say "we," you mean who? A. Fred Volke and I; her husband and I.

Q. Did you then go to her home with her? A. I did.

Q. And when she got to her home, how did she get into the house? A. Why, we sort of carried her as far as the front door, and then she got down on her hands and knees. She would not let us move her any further, and she climbed the rest of the way until she got up into her bedroom.

Q. How far did you live from the Jaeger bake shop? A. About half a mile, I imagine.

Q. Did you have occasion to go in the vicinity of the bakery shop frequently? A. Oh, yes; I traded there.

Q. Did you do any work around that vicinity? A. Yes, sir.

Q. What particular work did you do? A. I was a lineman for the Public Service at the time.

Q. As lineman for the Public Service, what kind of work did you do in the street? A. Well, repair lines, installing larger transformers. When the load became heavier, we would have to take down the light and put in a heavy transformer.

Q. In your employment with the Public Service were you required to go in the particular neighborhood of the Jaeger bake shop? A. Yes, sir; several times a year.

Q. Can you recall the first year that you went there doing that work for the Public Service? A. No, I don't think that I can, because I was there so many years.

Q. Approximately? A. About '24 or '25 to '28.

Q. 1924? A. Yes, sir.

Q. During the year 1924, did you also pass the bake shop and do business with Jaegers? A. During 1924, yes, sir.

Q. Don't nod your head? A. Yes, I was down there in 1924; I traded there.

Q. Did you ever notice anything regarding trucks in the vicinity of the Jaeger bake shop? A. Yes, sir.

Q. What did you notice concerning trucks? A. Well, in order to let the trolley pass, they had to get up on the sidewalk, to handle the merchandise at all. If they wanted to deliver it, they had to get up on the sidewalk, at least one front and one rear wheel.

Q. Did you at any time notice merchandise being delivered into the bake shop? A. I did.

Q. As early as what year? A. 1925.

Q. How was that merchandise delivered? A. Well, it all depended upon what it was. If it was barrels, they generally slid it off the end of the truck and dropped it on the sidewalk. If it was boxes, they carried it away to the cellar way, or disposed of it some other way.

Q. When it was barrels, how did they take it from the truck on to the sidewalk? A. Well, some truckmen used a pair of slids to slide it down and others bounced it right down on the sidewalk.

Q. From the rear or side of the truck? A. It all depended on how the truck was backed in; if it was backed in at an angle, the chances are they would take it off the back and otherwise, he would take it off the side.

Q. How frequently have you seen trucks deliver merchandise into the bake shop? A. Most every time I worked along there.

Q. How frequently was that, covering what period of time, months or years? A. 1924 to 1927, I worked along there about at least three months of the year, and then in between sometimes, minor repairs I have to do.

Q. Can you recall the number of times you had seen merchandise delivered, barrels particularly, in the manner which you have described? A. Maybe 25 times.

Q. Now, from the year 1924, until the year 1927, did you ever notice the condition of the sidewalk in front of the Jaeger bakery? A. Yes, sir.

Q. What was its condition? A. It was very bad.

Q. What do you mean by that? A. Well, there was holes in several places, the curbline and very close to the curbline was broken down. In front of the cellar way there, why, there was a depression where barrels or whatever different kind of merchandise had been dropped there.

Mr. Milton: I move that that be stricken out.

The Court: It will be stricken, unless he saw it.

Q. Well, had you seen merchandise dropped at that particular place? A. I did.

Q. Can you describe the depression that you observed there in front of the cellar door? A. Well, about twenty inches long, maybe eight or ten inches wide and two or three inches deep.

Q. What was the nature of that depression;

how did it look? A. Well, it looked as though when the barrels, of course, had come down and hit it that way, it would not be just an exact hole, it would be the impression of the bottom of a barrel.

Q. Can you give us a complete description of how it looked, the hole or 20 inch depression you talk of?

The Court: Hasn't he described it; he has given its length, width and depth.

Q. At the time there were two car tracks in Bergenline Avenue, do you know how close the nearest rail of the car tracks was to the curb? A. Maybe four feet or five feet.

Q. The trucks that you saw making deliveries could you give us an estimate of the width of these trucks? A. A truck that heavy, would be about seven feet wide, I imagine.

Cross examination by Mr. Milton:

Q. You are the husband of the lady who testified this morning, Mrs. Benzing, are you? A. No, sir; brother-in-law.

Q. I wanted to get these relations straightened out. How are you related to Mrs. Volke, the plaintiff? A. She is my sister-in-law's sister-in-law; I don't know what that makes me.

Q. It was to your home that Mrs. Volke went on Christmas Eve? A. No, sir; to my sister's.

Q. You were at that home were you when she came? A. At my brother's home, yes, sir.

Q. It was the home of your brother that Mrs. Volke made her call this Christmas Eve? A. That is right.

Mr. Milton: May I have this blue print marked.

(Marked D-1 for Identification.)

Mr. Brenner: That shows the condition as it is today; I don't think that shows the car tracks.

Q. Can you see this blue print, D-1, from where you sit? A. I can.

Q. The straight lines running across the approximate center of the blue print are the curbline on the west side of Bergenline Avenue. You see my pencil lying along the blue print; can you see these lines? A. I can.

Q. Where the words "Bergenline Avenue" appear on the blue print, D-1, are the lines of the roadway. Now, will you be good enough to tell the Jury in what position any truck or trucks was that you saw on the sidewalk in front of or near the Jaeger bakery, when you saw it. Was it parallel with the curb, that is, the same direction in which curb runs, or was it at right angles to the curb? A. Parallel to the curb; at other times, at an angle.

Q. When you saw barrels slid down from a truck, how would these barrels be taken into the building, the ground floor of which was occupied by the Jaeger store, through the cellar doors? A. Yes, sir.

Q. Down through the cellar doors; how far from the curb was the hole that you have described here as being 20 inches in length; how far in from the curb? A. Maybe four or five feet.

Q. Did you see bags or other containers of merchandise carried from trucks down the cellar steps? A. I saw them put at the cellar entrance.

I would not say how they disposed of them beyond that.

Q. Did you actually see barrels go down the steps or did you actually see them at the cellar entrance? A. At the cellar entrance.

Q. I take it that you do not intend to have the Jury understand that you actually witnessed barrels disappearing down the steps? A. I saw them disappear down the steps. I don't know by what means they took them down there.

Q. You saw other containers deposited on the steps, but you didn't see them taken down, but you did see barrels taken down the steps? A. I saw all kinds of merchandise taken down the steps.

Q. I am trying to find out. You said before you didn't see articles taken down. You did see both barrels and other articles taken down? A. Disappear through the cellar way.

Q. That is what I want to get at. How much of the truck was in the roadway and how much of it was on the sidewalk when the truck was parallel with the curb at any time? A. Maybe two feet on the road and two or three feet on the curb.

Q. Two or three feet on the curb? A. Whatever the width of the truck might be.

Q. Will you be good enough to tell the Jury how with a truck two or three feet off the curb, parallel with the curb, barrels could be taken down a skid and make a hole in the sidewalk four or five feet away from the curb. You tell them that, will you? A. Well, if your truck is backed in on an angle, like that and parallel with the curbline, put a pair of skids on there, short skids, I am sure they can drop the barrel within three feet of the back of the truck.

Q. You think they can drop the barrel within three feet? A. Yes, sir.

Q. Now you have the truck on an angle; before you had it parallel. That may be so with the truck at an angle? A. I said they were on an angle at times and parallel at times.

Q. Was it at a right angle? A. Not a direct right angle.

Q. That would not have been possible because of the small space that intervened between the trolley tracks and the curb; that would not be possible, would it? A. Not to allow the trolley to pass, no.

Q. So that the truck had to be backed in at an angle, or else run up on the sidewalk and then allowed to remain stationary, parallel with the curb; that is so, isn't it, in order to permit the trolley to pass? A. Would not have to be absolutely parallel.

Q. Either way, either at an angle or parallel? A. Well, as I remember seeing them unload them, both ways.

Q. You say to this jury that while you were up there stringing wires for the Public Service, you saw articles of merchandise, barrels and other containers, taken off trucks at least 25 times? A. I did.

Q. And carried down through the cellar way? A. They were disposed of through the cellar way. I don't know whether they carried them or put skids there, or what they did with them.

Q. They went down the cellar way? A. They did.

Redirect examination by Mr. Brenner:

Q. Can you recall the name of any particular truck that you noticed unload there?

Mr. Milton: Yes, or no, please.

A. Yes, sir.

Q. Will you give us the name?

Mr. Milton: Objected to.

Mr. Brenner: I intend to connect it up, if the Court please, through Mr. Jaeger himself.

Mr. Milton: I object as immaterial and irrelevent.

The Court: I will reserve decision on the motion on that promise. Proceed.

Q. Will you answer that question.

Mr. Milton: Your Honor will allow me an exception to your ruling.

The Court: You may move to strike the testimony later on if it appears not to be connected.

Q. (Question read as follows: "Will you give us the name"?) A. Jaburg Brothers, I believe it was.

The Court: Jaburg Brothers?

The Witness: Jaburg I remember distinctly on the truck.

The Court: Was it Jaburg?

The Witness: Yes, I will say Jaburg.

LAWRENCE SANFORD, sworn for the plaintiffs.

Direct examination by Mr. Brenner:

Q. Mr. Sanford, in the year 1927, where did you live? A. Union City.

Q. Where, with reference to the bake shop of Mr. Jaeger? A. A quarter of a mile away.

Q. How long had you lived in that vicinity? A. About two years.

Q. Did you frequently pass the Jaeger bake shop? A. Two or three times a day.

Q. Did you deal in the place, or not? A. No, sir.

Q. In passing, did you ever notice any trucks in front of the Jaeger place of business? A. I did.

Q. Did you observe where those trucks were? A. One wheel on the curb and one in the gutter——

Mr. Milton: I suppose "yes" is the answer. May I have the witness directed to answer yes or no.

The Court: Answer yes or no.

The Witness: Yes, sir.

Q. Where were the trucks that you did see in front of the bake shop?

Mr. Milton: May I have the time fixed, if you please.

Q. Prior to December 24th, 1927? A. Well, trucks that I have always seen there—I have been born and raised there—I have seen them one wheel on the curb and one in the gutter.

Q. For how many years did you observe that before 1927? A. I should figure around about thirty years.

Q. Did you ever notice the name or names of any of the trucks that were up on the curb in front of the bake shop?

Mr. Milton: Yes, or no.

A. Yes, sir.

Q. What name did you observe?

Mr. Milton: I make the same objection.
The Court: Same ruling.
Mr. Milton: Exception.

A. Jaburg Bakery Supply.

Q. Do you recall the names of any other trucks? A. I have seen lots of trucks along the Avenue there.

Q. I am only talking now of in front of the bake shop? A. No, sir.

Q. About how many times, or could you tell us how many times you had noticed the truck bearing that particular name in front of the bake shop? A. To be truthful, just once.

Q. Do you recall what year it was that you saw that? A. Well, 1926.

Q. Without knowing or remembering the names of other trucks, can you tell us whether or not you saw other trucks in front of the bake shop? A. Well, I would not say right in front of the bakery shop; next door, in front of the hardware place.

Q. I am talking of in front of the bake shop? A. Well, I could not say.

Q. The particular truck you did observe in 1926, what was the position of the truck in front of the bake shop? A. One wheel in the gutter, one on the sidewalk.

Q. There are four wheels? A. Front and rear on the sidewalk, front and rear on the curb.

Q. Which front and rear on the sidewalk? A. Going south, one wheel front on the sidewalk, and one rear wheel on the sidewalk.

Q. When the truck was headed in what direction? A. South.

Q. Did you notice what was being done there with the truck? A. Unload barrels.

Q. Did you notice how they were being unloaded? A. Skidded down sometimes.

Q. This particular occasion I refer to? A. Skidding down.

Q. And landing where? A. On the sidewalk.

Q. How close to the cellar door? A. I should judge about three or four feet away.

Q. Did you notice at any time the condition of the sidewalk in front of the Jaeger bake shop? A. Well, there are certain places there is holes.

Q. And over what period of years did that continue? A. Why, I believe from around 1925 close up to the late part of 1928.

Q. The late part of 1928? A. 27 or 28, I am not sure.

Q. Can you at this time recall just where these holes were? A. There was some in front of the steps, some alongside of the curb, where the curb had sunk a little bit with trucks pulling up on it.

Q. Are you in any way related to Mrs. Volke? A. No, sir.

Q. Or Mr. Volke? A. No, sir.

Q. What business are you in by the way? A. I was in the trucking business.

Q. At that time? A. Yes, sir.

Cross examination by Mr. Milton:

Q. I take it, Mr. Witness, that in this general vicinity of the Jaeger place, because of the narrowness of Bergenline Avenue, and the trolley tracks, in order to either load or unload from or to any of the stores, it was necessary to get the truck up on the sidewalk? A. Yes, sir; from 48th Street to Fulton Street.

Mr. Brenner: I would like to read Dr. Broeser's testimony to the jury.

The Court: Have you put on all your liability witnesses?

Mr. Brenner: I think I have, with the exception of Mr. Volke.

The Court: Is he here?

Mr. Brenner: Yes, sir.

The Court: Put him on, if you will. I want counsel to discuss the liability, before we proceed with the medical testimony.

FRED VOLKE, sworn for the plaintiffs.

Direct examination by Mr. Brenner:

Q. You are the husband of Mrs. Volke, who was on the stand this morning? A. Yes, sir.

Q. You were with her the night of this accident? A. Yes, sir.

Q. Now, when you got out of the car—first, who was with you? A. Mrs. Volke.

Q. Where had you stopped the car? A. Well, I stopped a few feet south of the house, in front of the empty lot.

Q. And the empty lot is north or south of the Jaeger bake shop? A. South.

Q. What were you doing after she left the car? A. I closed the windows and locked the door.

Q. And she proceeded ahead of you? A. Yes, sir.

Q. Now, what did you notice as you came along concerning Mrs. Volke? A. When I got from the bakery, she stood there being held up by a man and woman.

Q. And do you know who the man and woman were? A. No, sir.

Q. Did you at that time pay any attention to the condition of the sidewalk at the place that she was standing? A. No, sir.

Q. Now, after the man and woman had let her go, where did you go with Mrs. Volke? A. Why, I took her under the arm and led her up about two or three doors into a store.

Q. How did she walk there? A. I lifted her under the arm.

Q. After going to the store, you went to this home that we referred to, to the Benzing home? A. Yes, sir.

Q. Then, later in the evening, back to your own home? A. Yes, sir.

Q. Did you make the payments to the persons who have testified as to the rendition of services to Mrs. Volke? A. Yes, sir.

Q. Can you tell us what the amounts were and to whom they were paid? A. Well, I can give about an idea. I have never kept track, because I paid each one as they done their services.

Q. Did you pay Mrs. Schaefer? A. Yes, sir.

Q. How much did you pay Mrs. Schaefer? A. $25 a week.

Q. For how many weeks? A. Commencing about the middle of January and up to the end of March.

Q. Did you pay Miss Ward? A. Yes, sir.

Q. And did you pay her the amount that she testified to this morning? A. I believe so, because I kept no track. That is about right.

Q. What about Mrs. Olsen? A. Well, we have had her quite some time. We had her from about the middle of January, from the time Mrs.

Schaefer came. We had her quite steady there for a time. It was at least about, maybe five or six months, and then we had her two or three times a week after that, for quite some time, up till about, I should say, about two years ago.

Q. Now, can you give us the approximate amount you paid Mrs. Olsen during that period? A. I will see if I can get about an idea; I won't say sure. I should judge about, I should say it was close on to $1,000 at least.

Q. Did you pay Dr. Older? A. Yes, sir; every time he called.

Q. Do you recall the amount of his bill? A. Well, I should say about thirty or thirty-five times at $3 a visit, with the exception of when he put the cast on, which was $5.

Q. Did you, around that time, observe the condition of the sidewalk? A. No; I paid no attention to it.

Q. Did you need any medicines, bandages or things of that kind? A. Yes, sir.

Q. Where did you purchase these? A. Bergenline Avenue and 10th Street.

Q. Is that what is known as the Eagle Pharmacy? A. Yes, sir.

Q. Do you recall the amount that you paid? A. No; he has a bill there. That is all I recall.

Q. Did you pay him as you got it? A. Paid every time I got it.

Cross examination by Mr. Milton:

Q. You heard Mrs. Volke testify that Mrs. Olsen was paid at the rate of $4 a day? A. Yes, sir.

Q. You want the jury to understand that you

kept in your household in West New York, a servant as general housekeeper, steadily employed for six months, whom you paid on the basis of $120 a month? A. I say about $4 a day I paid.

Q. Four times thirty is how much? A. 120.

Q. You want this jury to understand that a general housekeeper in West New York got a wage of $120 a month? A. They got it at that time; yes, sir. They got $4 a day.

Q. You mean to say that you could not go out and get a houseworker in any community in Hudson County to do that class of work for less than $120 a month? A. Probably you could. I hired her for the day.

Q. You kept her steadily employed for six months? A. Yes, sir.

Q. Your wife has been quite sick off and on before this accident? A. No, sir.

Q. And since the accident? A. She has had a little bit of nerves.

Q. Ever have heart trouble? A. Not that I know of.

Q. Is that your handwriting (handing witness)? A. Yes, sir.

Q. Read it, will you, to the jury? A. That is my handwriting; yes, sir.

Q. Do you mind reading it to the jury? A. "Mrs. Volke is not so well. You have the right date when you moved. It was Friday, October 26th, 1928. Mrs. Volke is not so well, a very bad heart attack about a month ago."

Q. What date? A. 26, 1928.

Q. 26th of what? A. October.

Q. October 26th, 1928, your wife was suffering from a very bad heart attack? A. No, sir; it was indigestion. I had the idea it was heart.

Q. When did this heart attack get translated into an attack of indigestion? A. Well, I don't know much about that. It is not a few weeks; it is a few years ago. She said she had pain there. I used to take it for a heart attack.

Q. Have you since studied medicine? A. No, sir.

Q. When did you find out it was indigestion instead of a heart attack? A. Probably two or three years.

Q. Two or three years afterwards? A. Yes, sir.

Mr. Brenner: That is our case, with the exception of the medical testimony.

The Court: The Court thought time might be saved, if there are any motions to be addressed in this case, to have them made before we take the testimony of the doctors. I have had the experience of having gone through this case before and I have my own opinion about it.

So that we can get the record in shape, if this motion is to be made, it may be made now.

Judge, have you any objection to that procedure?

Mr. Brenner: No.

The Court: That is, instead of waiting until the conclusion of the medical testimony, to have the motion now. We will understand then that the plaintiff rests.

Mr. Brenner: With the exception of putting in the medical testimony, and to get testimony concerning the bill of the pharmacist.

The Court: Well, that is in the nature of medical proof; it has nothing to do with liability.

Mr. Brenner: No.

Mr. Brenner: I have asked for a copy of the lease.

(Produced by Mr. Milton.)

Mr. Brenner: I offer it in evidence.

(Accepted and marked as Plaintiffs' Exhibit P-1.)

Mr. Milton: I now move for a nonsuit, on the ground that a cause of action against either defendant has not only not been proved, but certainly not been pleaded.

As I understand the law in this State, and your Honor will recall the opinion of the former Chief Justice, I think it is the Rupp case, in which he pointed out that so far as the landlord is concerned, there is no duty or liability to repair a sidewalk if one is injured.

Speaking for the tenant, we are not charged with having committed any offense, either in our own proper person, or through our agents, or through persons who brought stuff there at our request and delivered it at our request in this manner.

On these grounds, I rest my motion for a nonsuit.

Mr. Brenner (after argument): I would ask for leave to charge in the count in so far as Mr. Jaeger is concerned, that there was participation in that merchandise was delivered from these trucks into his premises.

The Court: What about the owner; if we are going to have any applications for amendment, I think we ought to have them all.

Mr. Brenner: We do not charge that any of this merchandise was delivered to the owner, nor that she participated in its delivery.

What we do charge, so far as the owner is

concerned, is to attempt to hold under the theory of Rankin *v.* Ingwersen (47 N. J. L., p. 18) which holds that where a nuisance is created and the premises continued with the nuisance thereon, and rented again, that there the owner is equally liable with the tenant.

The Court: That is not this case.

Mr. Brenner: It is this case; the testimony of the witnesses is that this condition started as far back as 1918.

The Court: That is before this lease?

Mr. Brenner: The lease was made in 1924. We have several witnesses who testified that this condition existed until and subsequently to 1924, at the time the new lease was made. If the nuisance was created by the tenant and that nuisance continued and was permitted to continue with the renting to a new tenant, the landlord remains responsible for the nuisance, and that is directly in line with the Rankin *v.* Ingwersen case.

The Court: Do I understand your application is to make two amendments? That is, one as against the owner and one as against the tenant?

Mr. Brenner: The application for an amendment will be the same as to the owner as it is as to the tenant. I ask leave to amend as to Otway, so that this amendment will be understandable.

The Court: Wouldn't the Court be abusing its discretion. You are asking that the landlord be held for the act of the tenant.

The Court is inclined to grant the motion as to the landlord, Otway, and permit the amendment as to the tenant.

Mr. Brenner: Your Honor will allow me an exception.

(The jury retired.)

Mr. Milton: I must oppose any further amendment as to the tenant at this time.

The Court (after argument): At the outset of the trial of this case, certain cause of action was alleged, which was contained in the original complaint, which was to the effect, in the first count and the second count, that the landlord was responsible for a certain happening.

The Court having heretofore disposed of the landlord's position in this case, will refer to the original complaint in so far as it affects this tenant, and the action charged in the original complaint against the tenant appears in the third count.

I believe there are two counts against the tenant, one by the husband and one by the wife.

Mr. Brenner: Yes, sir.

The Court: But, anyway, the action is charged in the third count and may be repeated as to the other party-plaintiff in the other count.

It is to the effect that on the 24th day of December, 1927, Jaeger was a tenant and occupied the ground floor and cellar or basement of property located in the City of Union City; that extending from said property into the portion of Bergenline Avenue reserved for the use of the public as a sidewalk was a cellar-way in which were constructed steps; said cellar-way was covered with iron cellar door or doors which when closed were flush with the sidewalk.

It is alleged that through the negligence of Frank A. Jaeger, his agents, servants, agents and employees, the concrete sidewalk surrounding the cellar doors was broken, damaged and permitted to exist and continue in a dangerous and defective condition, and as a result of such

negligence resulting in a dangerous condition, the plaintiff, who was a pedestrian, was injured.

That is a general allegation of negligence, and then the plaintiff descends to particulars, and his particulars in the original complaint are contained in paragraph 5. The provision made in that paragraph is to the effect that the door or doors were thrown back and created a dangerous condition in the sidewalk. That has been abandoned, without doubt, by the plaintiff, that charge of negligence. That there was no stop guards, or guard constructed or maintained to prevent the cellar door from falling; that has been abandoned.

There remains, then, article (c). Counsel now claims that the article C was not abandoned and ought to be read in connection and in addition to the amendment that was heretofore permitted in writing, of paragraph 5 of the third count.

So that, if you read (c) in conjunction with (f), you have this position, or this condition; that articles of merchandise used in the business conducted by Frank A. Jaeger, was delivered in and out of said place of business, through the cellar-way heretofore referred to, and preparatory to delivery thereof, and were carelessly thrown, dropped and placed thereon.

If it ended there, it could refer to nothing but the cellar door as to the cause of the cracking and breaking and damaging the concrete surrounding said cellar-way and the doors connected therewith, thereby making said sidewalk unsafe and dangerous to persons lawfully using the same.

It will be seen in that paragraph that Jaeger is not charged with the delivery of these goods, although he is charged with his use of the goods

that were delivered. The proof in the case does not go any further than to show that flour and sugar were delivered on the sidewalk. Whether it was for Jaeger or someone else is not shown. It is to be left, by inference, that the proof as submitted, if permitted to stand, or the case permitted to go to the jury, that the flour and sugar were intended for the use of Jaeger, who was in the bakery business.

If they alone was the only thing, the Court would not have much trouble. But the Court is again asked to infer that because Jaeger used the material that was put in the cellar, that the Court must infer that he participated in the delivery.

The Court thinks that it has no authorization to draw such an inference nor can the jury draw it, either, from the issues and the testimony in this case. That is one of the essential elements of the case that should be pleaded, and should be proven.

As the Court looks upon it, in an action such as is attempted here, for an abnormal use, you might say of a public way, causing damage to it, and permitting it to remain out of repair, it should be shown that the one charged participated in that.

The Court feels that it would be drawing the rule of liability by inference too far, to say that simply because a man uses an article that comes in his place of business that he is responsible for the way that article gets there.

Then again, Article (c), the Court feels, refers to the cellar-way, the dropping of the merchandise in the cellar-way. At the outset, the theory upon which the case was projected, and on the examination before trial, and on the amendment

of the count, and even after the trial of the case that was had heretofore, giving counsel and the parties full knowledge of just what they were to meet and what they were to do in the way of either bringing their action or defending it, was as to this door and cellar-way.

Now, to permit this case to go to the jury, the Court feels that there would have to be an amendment to the pleadings, and to permit an amendment to the pleadings at this time, the Court feels that it would be encouraging and permitting a cause of action to be stated that is not stated in the pleadings.

The Court feels that the theory of action that was alleged in paragraph (c) is no more and no less than the same theory that was alleged in the previous paragraph, about the door, that is, falling back and permitting the surrounding concrete to be broken by it, except in this particular instance of (c) it was the dropping of the merchandise in the cellar-way or in that spot that caused the breaking and the cracking of the concrete.

The testimony in the case is to the effect that trucks were driven upon the sidewalk, both longitudinally or parallel and also at right angles, and that skids were used to remove merchandise from the trucks on to the walk and that in doing that for a number of years past previous to the time complained of, or about that time, that barrels and other objects struck the sidewalk and broke the concrete.

If the pleadings were in that regard, or just as directly as that, and also charged Jaeger with participation in that, there would be no difficulty.

The Court feels that it cannot declare that there is a cause of action alleged in paragraph (c) any more than there is in the amendment.

Paragraph (c) and the amendment arise, in the Court's mind, to about the same dignity, except that (c) charged Jaeger with use, and it is request that with that use, that he participated in the delivery.

I shall grant the motion and you may have an exception to the ruling.

Mr. Brenner: Allow me an exception.

New Jersey Court of Errors and Appeals

MARINDA VOLKE and FRED VOLKE,
Plaintiffs-Appellants,

v.

EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and the Estate of Horatio H. Otway, deceased, and FRANK A. JAEGER,
Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS

Statement of Facts

Appeal is taken from the Hudson County Circuit Court upon the ground that the trial Court erred in granting motion for nonsuit.

On December 24th, 1927, Marinda M. Volke, while walking in front of a bakery operated by the defendant Frank A. Jaeger in property owned by Horatio H. Otway, now deceased, caught her foot in a depression in the sidewalk, causing her to fall and sustain severe, serious and permanent injuries.

The complaint alleged and there was proof in support of such allegation, that the depression

mentioned was not created through ordinary wear and tear, but because the sidewalk was subjected to an extraordinary use for which both the landlord and tenant were responsible.

Despite such allegation and proof the trial Court at the conclusion of the plaintiffs' case granted a nonsuit as to both defendants, and in so doing, it is now respectfully contended that the Court was in error.

ARGUMENT

POINT I

Nonsuit as against Frank A. Jaeger, the tenant, was error.

It was conceded by the pleadings that Horatio H. Otway, now deceased, was the owner of premises 915 Bergenline Avenue, Union City, New Jersey, the complaint so alleging (p. 1, ll. 30-40), and the answer of the defendant Otway admitting such allegation (p. 17, l. 10). It is likewise admitted that Jaeger was a tenant occupying the ground floor of the premises together with the cellar or basement thereof, the complaint so alleging (p. 5, ll. 25-30), the answer so admitting (p. 31, ll. 15-22).

Mrs. Volke at the time of the accident was walking upon the sidewalk adjacent to these premises and had reached a point opposite the cellar doors when her foot caught in a hole in the sidewalk (p. 57, ll. 30-40). This hole she says was between the edge of the frame holding the cellar doors and the curb. When her foot caught

she pitched forward, but did not fall to the ground, a passing pedestrian having caught her while in the act of falling (p. 58, ll. 10-30).

She gave no testimony as the cause of the depression. Other witnesses did testify concerning its existence and cause.

William E. Hyer became familiar with the condition in the year 1918 (p. 108, ll. 1-20). At that time he observed the depression in question which he described about nine inches long, about five or six inches in width and two or two and one-half inches in depth; the edges around the hole being cracked (p. 109, ll. 1-20).

During the following years he continued passing this vicinity, going at times into the Jaeger Bakery, particularly in the years 1924 and 1925. At that time there was no improvement in the condition and apparently no repairs made. The condition of disrepair continued until as late as December 24th, 1927, when the accident occurred.

During this period of time this witness observed trucks in front of the bakery with the wheels upon the sidewalk (p. 111, ll. 10-40). From these trucks barrels were being unloaded by means of skids which were attached to the rear of the trucks. The judgment of this witness was that these barrels weighed from 300 to 325 pounds. They were tipped off the truck, allowed to slide down on the skids and strike the sidewalk, no protective measures being used to avoid having the sidewalk chipped or broken. The barrels were brought through the cellar into the premises occupied by Jaeger. Hyer testified that the place of unloading was in front of the cellar doors at the place where the concrete was broken (p. 11, ll. 1-40; p. 113, ll. 1-30).

Joseph A. Davis, a member of the bar (p. 124, ll. 35-40), noticed trucks in front of the premises previous to 1927 (p. 126, ll. 35-40). He fixed the time at about five years prior to 1927 when he observed that trucks would pull up with two wheels on the curb in order to allow trolleys to pass and while in that position would be loaded and unloaded. He particularly recalled seeing trucks in front of the bakery from which flour was being unloaded which in some instances was dropped on the sidewalk and in other instances were carried by the driver into the premises operated by Jaeger (p. 127, ll. 1-40). The sidewalk he says, was in a state of disrepair for years prior to 1927 (p. 128, ll. 1-15).

Henry Benzing was a lineman for the Public Service Company and as a part of his employment was required to visit the vicinity of the Jaeger shop (p. 130, ll. 25-40). He fixed the time when he commenced going into that vicinity at about the year 1924, at which time he also traded with Jaeger. He testified that in order to allow trolleys to pass it was necessary for trucks making deliveries to go upon the sidewalk. As early as 1925 he noticed merchandise being delivered from such trucks into the bakery. Barrels, he said, were slid off the end of the truck and boxes either carried to the cellar or disposed or in some other way. Some of the drivers used skids while others bounced the boxes or barrels upon the sidewalk (p. 131, ll. 1-40). This situation he observed during the year 1924 until some time in 1927. The condition of the sidewalk, he said, was very bad, there being holes in several places and in front of the cellar door was a depression where merchandise had been dropped (p. 132, ll.

1-40). This depression had the appearance of an impression made by the bottom of a barrel (p. 133, ll. 1-10).

Lawrence Sanford, prior to December 24th, 1927, also saw the trucks upon the sidewalk (p. 138, ll. 30-40). He describes one in particular as being that of the Jaburg Bakery Supply (p. 139, ll. 1-10). This was the same name referred to by Benzing (p. 137, ll. 1-35). From this truck he observed barrels being skidded down landing on the sidewalk close to the cellar door and noticed holes in the sidewalk at that place, fixing the time of his observation from 1925 until the latter part of 1927 or 1928 (p. 140, ll. 1-30).

The rule is, of course, recognized that neither a landlord or tenant are responsible for injuries occasioned as the result of the ruinous condition of the sidewalk caused by ordinary wear and tear. Where, however, the sidewalk becomes dangerous through extraordinary use the tenant is responsible and likewise in some instances is the landlord. It was so held in *Zak* v. *Craig,* 136 Atl. 410, 5 Misc. 275, wherein it was stated:

> "The theory upon which the liability of the defendant was submitted to the Jury was the maintenance of a nuisance in the public highway. There was plenary proof that the sidewalk did not become defective and unsafe from the ordinary use thereof by the general public, but it became broken up as the result of a use for which it was not normally designed, namely, the passage of heavy motor trucks over it to and from the defendant's garage, leased to tenants, for the storing of motor trucks, and in which use the flagstones were broken, and a hole seven inches in diameter and six inches in depth was made in the sidewalk, making it unsafe

> and dangerous to the public having occasion to use it. The condition of the sidewalk constituted a public nuisance. The only question in the case was whether there was any evidence tending to establish that the defendant caused or maintained the nuisance."

The *Zak* case cites with approval the earlier case of *Davis* v. *Tallon*, 91 N. J. L. 618, in which Mr. Justice BERGEN stated:

> "The plaintiff's case was not rested upon any legal obligation of the owner to keep the sidewalk in repair, but upon the claim that defendants, by subjecting the sidewalk to a use not intended, that of use by ordinary pedestrians, they created a nuisance which rendered them liable for injuries to persons lawfully using it."

Referring to the testimony as previously outlined there was considerable proof that the sidewalk was subjected to the extraordinary use and that the tenant participated in such use. Because of the narrowness of the street the trucks bringing supplies, such as sugar and flour to the bakery were obliged to mount the curb and sidewalk and the goods dumped off or slid off by means of skids causing the damaged condition which brought about the plaintiff's injuries.

The trial Court appeared to recognize that the proof was sufficient to carry the case to the jury, but was under the impression that the allegations of the complaint were at variance with the testimony, the Court stating (Case, p. 151, ll. 28-40; p. 152, ll. 1-12):

> "The testimony in the case is to the effect that trucks were driven upon the sidewalk, both longitudinally or parallel and also at right angles, and that skids were used to re-

move merchandise from the trucks on to the walk and that in doing that for a number of years past previous to the time complained of, or about that time, that barrels and other objects struck the sidewalk and broke the concrete.

"If the pleadings were in that regard, or just as directly as that, and also charged Jaeger with participation in that, there would be no difficulty. The Court feels that it cannot declare that there is a cause of action alleged in paragraph (c) any more than there is in the amendment.

"Paragraph (c) and the amendment arise in the Court's mind, to about the same dignity, except that (c) charged Jaeger with use, and it is request that with that use, that he participated in the delivery."

Referring to the original complaint it is alleged in paragraph four (Case, p. 6) that through the negligence of Jaeger, the concrete sidewalk was rendered dangerous and defective, the language being:

"Through the negligence of the said Frank A. Jaeger and his servants, agents and employees, the concrete sidewalk surrounding the cellar doors was broken, damaged and permitted to exist and continue in a dangerous and defective condition, and as a result of such negligence and resultant dangerous and defective condition of said sidewalk, the plaintiff, Marinda Volke, who was on the date aforesaid walking along and upon the sidewalk aforesaid adjacent to the building aforesaid, tripped, stumbled and fell over the portion of said sidewalk which had become damaged, defective and was left in a state of disrepair and danger, and as the result thereof suffered the injuries hereinafter alleged."

In the specifications of the acts of negligence in paragraph five of the complaint, section (C) sets for the manner in which the sidewalk was broken (Case, p. 7), such section reading as follows:

> "Articles of merchandise used in the business conducted by the defendant, Frank A. Jaeger were delivered into and out of said place of business through the cellar-way hereinbefore referred to and preparatory to the delivery thereof were so carelessly thrown, dropped and placed thereon as to cause a cracking, breaking and damaging of the concrete surrounding the said cellar-way and doors connected therewith, thereby making said sidewalk unsafe and dangerous to persons lawfully using the same."

After the cause was at issue motion was made pursuant to notice to both Jaeger and Otway to amend the complaint by adding to paragraph five of the first count directed to Otway and by adding to paragraph five of the third count directed to Jaeger the following further allegations of negligence, such allegations being lettered (e) and (f) in the first count and (f) and (g) in the third count as follows (Case, pp. 24-25):

> (e-f) "The sidewalk in front and adjacent to the premises in front of which plaintiff, Marinda Volke fell and was injured was in a dangerous and defective condition and was rendered dangerous and defective by reason of the fact that motor driven and horse drawn trucks were driven upon, over and across said sidewalks, and heavy articles of merchandise were dropped upon, thrown upon, rolled, pushed and dragged across, upon and along said sidewalk, and by reason thereof said sidewalk from all of said causes was damaged and broken up, and although

such condition was known to the defendants, no effort was made to repair or place the same in a reasonably safe condition for use by pedestrians."

(f-g) "The dangerous and defective condition of the sidewalk aforesaid constituted a nuisance, and such nuisance was permitted to continue to exist over a long period of time, although there was knowledge of the existence thereof and no effort was made to abate the same. Said defective and dangerous condition constituting a nuisance was not caused through ordinary wear and tear through use by pedestrians, but to the contrary was caused by extraordinary use to which the same was subjected, to wit: That horse-drawn and motor-driven vehicles were permitted to go upon, over and along said sidewalk and heavy boxes, barrels and articles of merchandise were dumped upon, thrown upon, pushed, dragged and rolled upon, over and along said sidewalk, into and through the premises adjacent to said sidewalk, and the cellar and cellarway thereof."

Order was made amending the complaint by adding allegations e and f to paragraph five in the first count, the language in the order to amend being the same as in the notice of motion to amend (Case, pp. 27-28).

Through typographical error, however, the order amending the portion of the complaint directed to Jaeger, the same being the third count, states that section f and g be added to paragraph five of the first count instead of reading as it should to the third count (Case, pp. 28-29). That this is a typographical error is obvious as the language of sections f and g as same appear in the order are identical with e and f. F and g are the same as appear in the notice of motion to amend the third count as will appear by refer-

ring to such notice (Case, p. 25). That it was understood by Jaeger that complaint was being amended as to him is evident from the fact that he filed an answer to amended complaint (Case, pp. 30-33) and this, of course, he would not have done except that he recognized that the complaint was amended as to him, as well as to Otway, as he had previously answered the original complaint (Case, pp. 11-13).

Reading together section (C) of paragraph five of the third count directed to Jaeger (Case, p. 7) as amended by the additional sections (f) and (g) in the amended complaint (Case, pp. 28-29), there is the definite charge that articles of merchandise used in the busienss of Jaeger were delivered to his place of business through the cellarway near which the concrete pavement was cracked and broken and that this defective and dangerous condition was caused by trucks being driven upon the sidewalk from which were dropped heavy articles of merchandise. These allegations of negligence were supported by and were not at variance with the testimony.

Both the pleadings and proofs indicated that the injury to the plaintiff, Marinda Volke was occasioned by the condition of the sidewalk brought about through extraordinary use.

Although the case of *Weller* v. *McCormack*, 52 N. J. L. 470, is not in point as to facts, the rule expressed therein concerning the obligation due to pedestrians is expressed in the following appropriate language:

> "The public right is paramount, and includes the right to have the street safe for travel. That of the abutting owner is subordinate to this public right. He may use the highway in front of his premises, when not restricted by positive enactment, for loading

and unloading goods, for vaults and chutes, for awnings, for shade trees, &c., but only on condition that he does not unreasonably interfere with the safety of the highway for public travel. Any such interference arising from the want of due care on his part, is unreasonable, and therefore to occasion such interference, by negligence in the exercise of his subordinate private rights, is a breach of public duty. This public duty, to exercise reasonable care, imposed on every person using the highway for such private ends as will endanger the highway if negligence take place, exists for the benefit of individual travelers, and hence, when an individual sustains peculiar personal injury as the result of such negligence, a private action accrues to him against the person in default. For it is a general principle, that where there rests upon any person a public duty, either arising at common law or created by statute, and that duty is due to the public, considered as composed of individuals, and for their protection, each person, specially injured by a breach of the obligation, is entitled to a private action to recover compensation for his damage.''

The pleadings and proofs presented a factual question. The Court therefore erred in granting a nonsuit.

POINT II

It was error for the trial Court to grant a nonsuit as to the defendant Otway.

The complaint charges that on the date of the accident, to wit: December 24th, 1927, Horatio H. Otway was the owner of the premises occupied by the defendant, Jaeger (Case, p. 1, ll. 30-

40). This the answer admits (Case, p. 17, l. 10). It is likewise charged that he died and the defendant Emma H. Otway qualified as his executrix (Case, p. 4, ll. 25-35). This the answer also admits (Case, p. 17, l. 15). Defendant Jaeger occupied the premises under a lease, the term of which commenced May 1st, 1924, and was to continue for a period of six years (see lease). Prior to the execution of the lease the testimony shows that the sidewalk was in a dangerous and defective condition. It was so testified by Hyer, who says that he observed the condition as early as 1918 (p. 108, ll. 1-20). Although Davis did not fix the time when he first observed the condition, he testified that it had continued for a period of years prior to the date of the accident (p. 128, ll. 1-15). Without repeating references to the testimony which are set out under Point One, the witness testified that the condition was caused by trucks going upon the sidewalk and by the dropping thereon merchandise being delivered into the Jaeger store.

The law appears to be quite clear that where a sidewalk has been damaged through extraordinary use and the condition of disrepair existed prior to the rental of premises to the tenant, the landlord, as well as the tenant, is responsible for injuries caused to a pedestrian.

It was so held in *Zak* v. *Craig*, 136 Atl. 410-5, Misc. 275, the Court there stating:

> "There was also testimony in the case which tended to show that, at the time of the expiration of the lease to the grocery company and the renewal thereof to it, such renewal impliedly arising from the fact that the defendant permitted the grocery company to remain as tenant, the hole in the sidewalk existed and the flagstones were

broken, and hence, as this condition constituted a nuisance, and did not have its origin from the ordinary wear and tear of the sidewalk, resulting from a normal use by the public, according to the testimony, was created by the extraordinary strain put upon the sidewalk by the tenants of the defendant, who were authorized by her to use the premises for a purpose which caused the sidewalk to be subjected to unusual pressure and strain, and for which use the sidewalk was not designed, that is, for motor trucks or other heavy vehicles to be driven over it, the defendant became answerable to respond to the plaintiff in damages for the injuries she sustained."

The *Zak* case follows with approval the determination of the Court of Errors and Appeals in the earlier case of *Davis* v. *Tallon,* 91 N. J. L. 618, 103 Atl. 236, in which it was stated:

"Appellant argues that the finding of the jury in favor of the tenant Schreiber negatives any negligence on the part of the owners, because the only proof of impairment of the sidewalk was the result of his negligence, and therefore, when the jury found in his favor, they determined that no nuisance was created by him in which the lessors, as owners, participated. The sufficient answer to this is that the condition upon which the argument is based did not exist when the motion to nonsuit was made, but in addition to this there was testimony from which the jury might have inferred that the lot had been leased to prior tenants for the same purposes, subject to the same use of the sidewalk, and that the impairment of it was caused by prior tenants. With the broken condition of the flagstones existing, subject to the inference that the condition was caused by using the sidewalk for the passage of heavy carts from the street to the

lot by prior tenants with the knowledge and implied participation therein by the owners, and the testimony of the defendant, Schreiber that the flagstones were not broken by him, the jury might infer that the nuisance was created by the act of former tenants, and not by Schreiber, but his exoneration would not discharge the owners from liability for the acts of their other tenants in which they participated. Three causes of action are set out in the complaint: First that the owners negligently used the sidewalk so that it became dangerous, by which neglect the plaintiff was injured; and, second, that the owners, for their own convenience and that of their lessees, created and maintained this dangerous condition. On one or the other of these causes the jury found, as they properly might, against the owners. The third cause of action set up in the complaint was the negligent use by Schreiber, and on this the jury found in his favor. This finding does not destroy the evidence of the liability of the owners for the result of a use by prior tenants in which they participated.

CONCLUSION

For the reasons urged the trial Court erred in granting a nonsuit in favor of either or both defendants, landlord and tenant.

Respectfully submitted,

WALLACE P. BERKOWITZ,
Attorney of Plaintiffs-Appellants.

ALFRED BRENNER,
Of Counsel.

BAR PRESS, INC., 47 WEST STREET, NEW YORK. BO. 9 — 0157-8

New Jersey Court of Errors and Appeals

MARINDA VOLKE and FRED VOLKE, Plaintiffs-Appellants, v. EMMA H. OTWAY, Executrix of the Estate of Horatio H. Otway, deceased, and FRANK A. JAEGER, Defendants-Respondents.	On Appeal from the Hudson County Circuit Court.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS.

Preliminary Statement.

This is plaintiffs' appeal from the judgment of non-suit. The case was twice tried. At the first trial the plaintiffs had a verdict which the trial court set aside. The action was brought by plaintiffs (husband and wife) to recover damages for personal injuries alleged to have been sustained by the wife when, on *December 24th, 1927,* as she alleges, she caught her foot in a hole in the sidewalk on premises occupied by the defendant, Jaeger, as tenant, and owned by the defendant's testator, Otway, at No. 915 (old number 315) Bergenline Avenue, Union City. The summons and complaint were served on defendant, Jaeger, on *December 23rd, 1929.* The husband sought to recover for medical expenses and loss of services.

The Pleadings.

The complaint sounds in negligence and is in six counts. The first and third are the wife's claim against the landlord and tenant, respectively. The second and fourth are the husband's claim against the landlord and tenant, respectively, and the fifth and sixth are directed against the landlord and tenant jointly.

June 22, 1932, the plaintiffs obtained an order amending the complaint (Case, p. 27). The order contemplated the filing of a formal amended complaint (Case, p. 29, ll. 33-35). None was filed. Paragraph 5 of the first count was erroneously ordered amended twice. The notice of motion to amend (Case, p. 25, l. 10) indicates that it was intended to amend the third count as well as the first.

For the purposes of this appeal, it is necessary only to consider the allegations of the first and third counts, and for the sake of logical treatment, we shall take up first the allegations of the third count, as they relate to the tenant.

The third count alleges that on December 24th, 1927, Jaeger was a tenant and occupied the ground floor and cellar or basement of property, No. 915 Bergenline Avenue, Union City. This allegation is not admitted in its entirety as the appellant says in his brief on page 2, under Point I. The answer admits (p. 31, ll. 15-22) that the defendant occupied as a tenant the ground floor and "the rear portion of the cellar or basement of the property". It further alleges that in front of the property was a cellarway in which were constructed steps for gaining access to the sidewalk, and the cellarway was covered with iron doors which when opened out, would fall back on the concrete sidewalk, and through the negligence of the tenant, his agents,

etc., the concrete sidewalk surrounding the cellar doors was broken and allowed to exist in a dangerous and defective condition, as a result of which plaintiff, while walking upon the sidewalk, tripped and fell over the portion of the sidewalk which had become damaged, and suffered injuries.

It is unnecessary to consider any of the specific acts of negligence pleaded in this count other than sub-paragraphs (c), (d), (e), (Case, p. 7), and the paragraphs intended to be added by amendment, (f) and (g), (Case p. 28). The other specified acts of negligence were expressly abandoned (Case, p. 54, l. 18; p. 55, l. 10). Sub-paragraph (c) alleged that articles of merchandise used in the business conducted by Jaeger were delivered into and out of said place of business through the cellarway, and preparatory to the delivery thereof were so carelessly thrown, dropped and placed thereon, as to cause a cracking, breaking and damaging of the concrete surrounding the said cellarway and doors connected therewith, thereby making said sidewalk unsafe and dangerous to persons lawfully using the same; (d) charges knowledge or notice of the condition, permitting the condition to remain, thereby creating and continuing a nuisance; (e) seems to be a repetition of (d); (f) the sidewalk in front and adjacent to the premises in front of which plaintiff fell and was injured was in a dangerous and defective condition, and was rendered dangerous and defective by reason of the fact that motor-driven and horse driven trucks were driven upon, over and across said sidewalk, and heavy articles of merchandise were dropped upon the said sidewalk, and by reason thereof, sidewalk was damaged and broken up, and although such condition was known to the defendants, no effort was made to repair or place the same in a reasonably safe condition for use by pedestrians; (g) the dangerous

and defective condition of the sidewalk constituted a nuisance and such nuisance continued to exist for a long period, although there was knowledge of the existence thereof, and no effort was made to abate the same. Said defective and dangerous condition constituting a nuisance was not caused through ordinary wear and tear through use by pedestrians, but to the contrary, was caused by extraordinary use to which the same was subjected, to wit: That horse-driven and motor-driven vehicles were permitted to go upon said sidewalk and heavy boxes, barrels and articles of merchandise were dumped upon, etc. said sidewalk into and through the premises adjacent to the said sidewalk, and the cellar and cellarway thereof. Paragraph 6 alleges that by reason of the foregoing, she was injured. The answer of the defendant, Jaeger, denied all the allegations of negligence (Case, pp. 30-33).

There is no allegation in the complaint that the defendant, Jaeger, either authorized third parties to drive trucks or to dump articles of merchandise upon the sidewalk, and there is no allegation in the complaint that the defendant, Jaeger, participated in such use of the sidewalk, and as we shall point out there was absolutely no proof offered by the plaintiff to connect Jaeger with the alleged extraordinary use of the premises.

The first count, which is directed against the landlord, alleges the ownership of the premises by the defendant's testator; the existence of the cellarway that was covered by iron doors which were opened out on the sidewalk; that through the negligence of the landlord, his agents, etc., the concrete sidewalk surrounding the cellar doors was broken and permitted to exist and continue in a dangerous and defective condition, as a result of which negligence, plaintiff, who was walking along the side-

walk, tripped, stumbled and fell over that portion of it which had become damaged and left in a state of disrepair, and was injured.

The specific allegations of negligence contained in sub-paragraphs (a), (b), (c) and (d) of Paragraph 5 of the first count (Case, pp. 54-55) were expressly abandoned so that it becomes necessary only to consider the allegations of Paragraph (e) and (f) added by amendment (Case, p. 27), and Paragraphs (e) and (f) are precisely the same as sub-paragraphs (f) and (g) of the third count.

Nowhere in the first count is there any charge that the premises were leased by the owner for a purpose which subjected the sidewalk to an extraordinary use. Nor is there any allegation that the landlord authorized the alleged extraordinary use of the premises or participated in any respect in it, and as we shall show there is absolutely no proof which would render the landlord liable for the alleged condition. Indeed, participation by the owner was expressly disclaimed (Case, p. 146, ll. 38-41). The allegations of negligence are denied in the answer of the defendant landlord (Case, pp. 16-19).

Statement of Facts.

Plaintiff, Marinda Volke, testified that on the evening of December 24th, 1927, accompanied by her husband she drove to the immediate vicinity of the Jaeger bakery shop, on Bergenline Avenue, Union City. She got out of the car, walked a short distance along the concrete sidewalk in front of the Jaeger premises, and when she got to a point opposite the middle of the cellar door, about one foot away from the cellar door and toward the curb, her foot got caught and she pitched forward (Case, pp. 56, 57, 58). A pedestrian caught her as she was

about to fall. She described the hole as "just big enough to put my foot in" (Case, p. 59, l. 7). She testified she wore a five and one-half shoe, and her counsel took the measurement and indicated it to be nine inches (Case, p. 59, l. 18). She testified it was about three and one half inches in width, and one and one-half inches in depth (pp. 59, l. 29); that just this one hole caused her to fall when she put her foot in it (p. 59, ll. 35-40).

Her cousin, Hyer, testified that this hole existed back in 1918, and fixed its dimensions at that time as nine or ten inches long, five or six inches wide, and two or two and one-half inches in depth, (Case, p. 109, ll. 1-20); that about four or five times around 1921, 1922 (p. 112, ll. 34-40) he observed barrels rolled from trucks down on skids on to the sidewalk; that he again observed the condition of the sidewalk in 1924 and 1925 (p. 111, ll. 10-20), but saw no change, and down to December 24th, 1927, the date of the accident, he saw no change. How long before 1918 this hole existed, or who, or what caused it, nowhere appears in the record.

It should here be noted that the complaint charged that the hole which caused plaintiff's injuries was one caused by the opening of the cellar doors and allowing them to fall back on the concrete sidewalk. (Case, p. 2, par. 5; p. 6, par. 5) This theory was abandoned at the trial (Case, p. 55, ll. 1-10) and the scene of the accident was shifted to a hole in front of the cellar doors.

The testimony was that Bergenline Avenue, at the time of the alleged accident and for many years prior thereto, was a narrow street (Davis, p. 128, l. 25; Mrs. Morrison, p. 119, ll. 38-40), heavily built up almost from the beginning to the end, running through Union City into West New York, and most of the property on it was devoted to business pur-

poses, at least on the ground floor (Davis, p. 128, ll. 25-35). In the street are north and south bound trolley tracks, and in order to permit trolleys and other traffic to pass along Bergenline Avenue, it was necessary for vehicles, loading or unloading, to straddle the curbstone, placing a front and rear wheel on the sidewalk (Morrison, p. 119, ll. 23-40; Benzing, p. 131, ll. 15-20); that it was common practice for merchants along a considerable part of the street beginning at Fulton Street, a few hundred feet south of the premises in question, and extending northerly for about a mile to Fourth Street, where Bergenline Avenue widens out, to have their merchandise carried in from and out to trucks which had to be driven up on the sidewalk (Davis, p. 128, ll. 15-40; p. 129, ll. 1-10; Morrison, pp. 119-120). In order to let the trolley pass, they had to get up on the sidewalk, to handle the merchandise at all. If they wanted to deliver it, they had to get up on the sidewalk, at least one front and one rear wheel (Benzing, p. 131, ll. 15-20). The nearest rail of the car tracks was four or five feet from the curb (Benzing, p. 133, ll. 17-19). To the same effect, Sanford, p. 140, ll. 33-40.

Hyer, the plaintiff's cousin, said that when he was working in the vicinity around 1921, 1922 (p. 112, l. 35), about four or five times (p. 112, l. 34) he saw horse-driven trucks straddling the curbstone with two wheels on the sidewalk in front of the Jaeger premises, and that he saw these trucks being unloaded sometimes by means of skids attached to the rear of the trucks, down which barrels were rolled, and he saw these barrels going into the cellarway. He did not know whether or not the barrels struck the sidewalk directly or whether something was placed upon the sidewalk to break the fall of the barrels (Case, p. 113, ll. 8-10). The men

he observed on the truck were not identified as employees, servants or agents of the tenant, Jaeger, nor were the trucks identified as those of the defendant, Jaeger, or at all (pp. 112, 113). There was no testimony whatever that Jaeger, the tenant, either personally, or through his servants or agents, ever used any trucks in his bakery business, or participated in any respect in the unloading.

Counsel for the appellant, in his brief, page 4, directs attention to the fact that Mr. Davis testified that he observed flour being unloaded in front of the bakery, which in some instances was dropped on the sidewalk, but he omits to direct the attention of the Court to the fact that in response to his question, it was testified that the flour was contained in *bags* (Case, p. 127, l. 28). Benzing, who was also related to the plaintiff (Case, p. 129, l. 20; p. 133, ll. 27-40), testified that he observed merchandise being delivered as early as 1925; that some truckmen, whom he did not identify, used a pair of "slids" to slide down the boxes and barrels, and others bounced them right down on the sidewalk (Case, p. 131, ll. 31-35). Asked if he could recall the name of a particular truck that he noticed unload there, he replied "Jaburg Bros." (Case, p. 137, ll. 20-30). The witness, Sanford, testified that on a single occasion in 1926, he observed a truck bearing the name of "Jaburg Bakery Supply", which was straddling the curbstone with the front and rear wheels on the sidewalk (Case, p. 139, ll. 1-40).

Plaintiff had lived in West New York (the adjoining municipality) for about twenty-two years; she knew that Bergenline Avenue was the popular and principal thoroughfare, and had many good shops; she had occasion to pass Jaeger's bakeshop; she admitted that she knew before the accident that the sidewalk was in bad condition (p. 92, ll. 15-30);

she was familiar with the sidewalk and knew it was broken in different places (p. 93, ll. 18-28).

Exhibit P-1 (Case, p. 146, l. 8) is the lease dated October 1st, 1924, made by Horatio H. Otway, as landlord, with the defendant, Frank A. Jaeger, as tenant, and covers "All that certain ground or store floor of the premises known as and by the street number #315 Bergenline Avenue, in the Town of Union, in the County of Hudson and State of New Jersey, together with the floor above the store floor, consisting of seven rooms and bath *and the rear portion of the cellar underneath said store, being 40' x 23' more or less, with right of entrance and passage from the front of said cellar thereto, the front and remainder of the said cellar being hereby expressly reserved for the use of the landlord, and for other lessees and tenants; for the term of six (6) years, to commence upon the 1st day of May, 1924, to be used and occupied as a bakery*". Exhibit P-1 was not printed as part of the State of Case served on respondents, but counsel for the appellants, whose attention was called to the matter, agreed to have it printed and submitted to this Court.

After the motion for a non-suit was made (Case, p. 146, ll. 30-40), counsel for the plaintiffs below asked for leave to amend, by charging in the count directed against the tenant, Jaeger, that there was participation by the tenant in that merchandise was delivered from these trucks into his premises. He expressly disclaimed that there was any participation by the defendant owner in the delivery of the merchandise.

The trial Court refused to allow an amendment of the pleadings. This judicial action is not challenged, nor could it well be. The alleged accident occurred on December 24th, 1927; the summons

and complaint was not served on defendant, Jaeger, until December 23rd, 1929 (Case, p. 10, l. 35), a day before the Statute of Limitations would have run; June 22nd, 1932, an Order was made permitting an amendment to the complaint; there had been an examination before trial; a previous trial; and the plaintiff had rested his proofs on the question of liability at the trial on October 10th, 1933, almost six years after the alleged accident.

In passing on the motion to non-suit, the learned trial Judge pointed out (Case, p. 150) that there was no proof that the barrels and boxes which the witnesses had testified they observed passing into the cellarway, were intended for the tenant, Jaeger, although he indicated that it might be a permissible inference that they contained flour and sugar, which Jaeger used in the bakery business. But, he pointed out, that in addition to that inference, it would be necessary to draw a further inference that because the tenant used the material that was put in the cellar, the tenant must have participated in the delivery. Such an inference, the Court said, was not justified in the absence of proof; that participation by the tenant in the alleged extraordinary use was an essential element of the case, and it should have been both pleaded and proved.

> "The Court feels that it would be drawing the rule of liability by inference too far, to say that simply because a man uses an article that comes in his place of business that he is responsible for the way that article gets there" (Case, p. 150, ll. 32-36).

LAW AND ARGUMENT.

The action of the Trial Court in nonsuiting plaintiffs as to both defendants was eminently proper.

The sole ground urged on this appeal is that the action of the trial court in nonsuiting the plaintiffs was error. We submit that the trial court was in duty bound to nonsuit the plaintiffs, and that a refusal to do so would have been reversible error.

We have outlined the facts above. The plaintiff located the particular hole which caused her injuries at a point about one foot away from and in front of the cellar doors. She was corroborated in her location of the hole by her cousin Hyer. It cannot seriously be contended that this hole was caused by the driving of trucks upon the sidewalk. It is plain from the testimony that it was not; but assuming that it was, there is no proof in the cause that the trucks were owned or operated by the defendants, or that defendants authorized or participated in the use which they made of the sidewalk.

On page 12 of the Appellants' brief (end of first paragraph) it is said that the witness Davis "testified that the condition was caused by trucks going upon the sidewalk and by the dropping thereon merchandise being delivered into the Jaeger store". Neither the witness Davis nor any other witness so testified. Davis testified he saw trucks straddling the curb in front of defendants' premises, as was customary all along this section of Bergenline Avenue because of the narrowness of the street, and that he saw *bags* of flour dropped on the sidewalk.

He did say that the sidewalk was in a state of disrepair.

These things stand out in this record:

(1) The proof is that the store and part of the cellar were leased to the tenant for use as a bakery store. Manifestly, leasing premises for a bakery store does not contemplate, and certainly does not require, an extraordinary use of the sidewalk, as does a stable or garage, access to which can *only* be had by driving the vehicles to be stored on the premises over the sidewalk.

(2) There is absolutely no proof in this case that the tenant used any trucks in connection with his bakery business.

(3) There is no proof in this case that the tenant, or his servants and agents, loaded or unloaded any merchandise on the sidewalk.

(4) There is no proof in this case that the tenant authorized the use complained of, or participated in it in any respect.

To visit the tenant with liability the appellant is driven to one or both of these positions:

> (a) That the tenant is liable for an extraordinary use of the sidewalk, whether he participated in it or not.
>
> (b) That where third parties deliver merchandise to a tenant for his use and in delivering the merchandise, subject the sidewalk to an extraordinary use, that it is a legitimate inference that the tenant participated in the extraordinary use.

We think both of these propositions are untenable and that the cases relied upon by the appel-

lants, *Zak* v. *Craig,* 5 N. J. Misc. Rep. 235, and *Davis* v. *Tallon,* 91 N. J. L. 618, are easily distinguishable.

In *Davis* v. *Tallon, supra,* the action was against the owner and the lessee of a lot of land on Willow Avenue, Hoboken, to recover for injuries suffered by the plaintiff as a result of a fall while walking over a sidewalk laid along the front of the lot by the owner, caused by the impaired condition of the flagstones.

Justice Bergen, speaking for this court, at page 618, said:

> "There was evidence from which a jury might infer that the defendant owner leased the lot to different tenants for storing wagons, the defendant Schreiber being in possession at the time plaintiff was injured; that it was fenced from the street, with a gateway to allow wagons ingress and egress to and from the street and lot over the sidewalk; that the owners leased it for such use, and that some one of the tenants in so using it, for a purpose to which it was not adapted, broke the stones and created a condition amounting to a public nuisance."

The plaintiff's case was not rested upon any legal obligation of the owner to keep the sidewalk in repair, but upon the claim that defendants by subjecting the sidewalk to a use not intended, that of use by ordinary pedestrians, they created a nuisance which rendered them liable for injuries to persons lawfully using it. The case was submitted to the jury on this theory, who found for the plaintiff and against the owners, and allowed her $100.00, and in favor of the defendant Schreiber. The plaintiff procured a rule to show cause based upon the insufficiency of the damages, which the Supreme Court made absolute and allowed a *venire de novo* on the question of damages alone, and that

question being again submitted to the jury, the plaintiff was awarded a verdict for $600.00, upon which the judgment was entered from which the defendant appealed.

The grounds of appeal relied upon by the defendant in that case were: (a) refusal to nonsuit; (b) refusal to direct for defendant; (c) verdict contrary to the charge of the court; (d) verdict contrary to law and weight of the evidence; (e) damages excessive.

The court pointed out that the three last reasons were not available on appeal. No exception was taken to the refusal of a direction. The only question, therefore, considered was the refusal to nonsuit. The reasons offered in support of the motion were:

> "That there is no evidence in the case connecting them (defendants) with this accident; and on the further ground that there is no evidence that the broken condition of this sidewalk was the cause of this woman's accident."

The Court said, at page 620:

> "These are the only grounds offered in support of the motion appearing in the bill of exceptions, and are therefore all we can consider. *Trade Insurance Co.* v. *Barracliff,* 45 N. J. L. 543.
>
> "Neither of the reasons given are sound. The jury might infer from the evidence (1) that the appellants leased the land and sidewalk for a use not consistent with the purpose for which the walk was constructed; (2) that they had knowledge of the character of the proposed use, and that such use might and probably would, create a nuisance by obstructing the safe use thereof by pedestrians. These inferences would justify a finding that the condition of the sidewalk, the cause of the accident, was the result of participation 'in the creation of the nuisance, either by authorizing

> it or by making the act of the tenant his own.' *Freeholders of Hudson* v. *Woodcliff Land Co.*, 74 N. J. L. 355. As to the other reason, viz., that there was no proof that the broken sidewalk was the cause of the accident, it is enough to say that the plaintiff testified that her foot was caught between the broken stones of the sidewalk which caused her to fall over and thus break her leg. The motion to nonsuit was properly refused."

The liability of the owner under the circumstances of the *Davis* v. *Tallon* case was predicated upon an implied participation in the extraordinary use of the premises *by the tenant*. The fact that a fence was built around an unimproved lot with a gateway to permit the passage of vehicles over an ordinary flagstone sidewalk; the fact that it was proved that *the tenants* drove heavy wagons and carts over the sidewalk, and the fact that the flagstones were broken, justified an inference that the sidewalk was subjected to a use not consistent with the purpose for which it was constructed. And beyond that, the lease expressly contemplated such a use of the sidewalk, and the occupancy of the premises by the tenant for the very purposes for which he rented the premises required such use of the sidewalk. In these circumstances the court very properly concluded that the owner had knowledge of the character of the proposed use and that such use might and probably would create a nuisance by making the sidewalk unsafe for use by pedestrians.

We have no comparable situation in the case now before this Court. The premises here were leased for a bakery store which, as we have pointed out, did not contemplate, much less require, an extraordinary use of the sidewalk by the tenant. There is utterly no proof in this record that *the tenant* subjected the sidewalk to the use

complained of or participated in any respect in it, so that under no circumstances could either the landlord or the tenant be held answerable for that use.

Let us now proceed to consider the other aspects of the case of *Davis* v. *Tallon, supra.* As has been said, the jury found a verdict in favor of the tenant and against the plaintiff. The appellant owner argued that this finding negatived negligence on the part of the owner because the only proof of impairment of the sidewalk was the result of the tenant's negligence and, therefore, when the jury found in favor of the tenant they determined that no nuisance was created by him in which the owner participated. The court pointed out that the complete answer to that argument was that at the time the motion for nonsuit was made, this condition did not exist. But the court went further and said:

> "* * * But, in addition to this, there was testimony from which the jury might have inferred that the lot had been leased to prior tenants for the same purposes, subject to the same use of the sidewalk and that the impairment of it was caused by prior tenants. With the broken condition existing, subject to the inference that the condition was caused by using the sidewalk for the passage of heavy carts from the street to the lot by prior tenants with the knowledge and implied participation therein by the owners, and the testimony of the defendant, Schreiber, that the flagstones were not broken by him, the jury might infer that the nuisance was created by the act of the former tenants and not by Schreiber, but his exoneration would not discharge the owners from liability for the acts of their other tenants in which they participated. Three causes of action are set out in the complaint, first, that the owner negligently used the sidewalk so that it became dangerous, by which neglect the plaintiff was injured, and

> second, that the owners for their own convenience and that of their lessees, created and maintained this dangerous condition. On one or the other of these causes the jury found, as they properly might, against the owners. The third cause of action set up in the complaint was the negligent use by Schreiber, and on this the jury found in his favor. This finding does not destroy the evidence of the liability of the owners for the result of a use by prior tenants in which they participated."

The proof is that the hole in question existed in 1918. We have pointed out that there is no proof in the case as to how long before 1918 the hole existed; as to who or what caused the hole to be there. If it can be said to be the subject of a legitimate inference that the hole was caused by a similar use prior to 1918, then again we submit that the use prior to 1918 *was not the tenant's use or a use for which the tenant was in any way responsible, or in which the tenant participated,* but was a use made of the sidewalk by third parties for whom neither the landlord nor the tenant is answerable. The theory of liability in *Davis* v. *Tallon,* and the case cited by Mr. Justice Bergen, of *Freeholders of Hudson* v. *Woodcliff Land Improvement Company,* 74 N. J. L. 355, is that where a tenant commits a nuisance during his term, the owner is not liable for the creation of the nuisance. Upon the expiration of the tenant's term, however, he is bound to go in and abate the nuisance, and if he fails to abate the nuisance, he is held to liability because he adopts the tenant's act as his own. If the tenant was not guilty of the act or was not responsible for it, then, of course, there can be no adoption by the owner of the tenant's act which would visit liability upon him.

Zak v. *Craig,* 5 N. J. Misc. Rep. 235, came before the Supreme Court on an appeal from a judgment

entered on the verdict of a jury in favor of the plaintiff. The grounds of appeal were that it was error to refuse a judgment of nonsuit or direct a verdict in favor of the defendant.

The facts were as follows: June 20, 1922, plaintiff, while walking on a sidewalk in front of and abutting the premises owned by the defendant, fell and was injured as a result of a defective condition of the sidewalk. The complaint was in two counts. The first alleged that defendant permitted her building, abutted by said sidewalk, to be used *as a garage or place for the storage of motor trucks* throughout the period between January 25, 1916 and June 20, 1922, and negligently and wrongfully, *by her servants and agents,* drove motor trucks and permitted motor trucks to be driven to and from said building across said sidewalk, until a hole about seven inches in diameter and six inches deep was worn in said sidewalk, and the ground beneath the flagstones with which the sidewalk was paved, by the wheels of said motor trucks; that in the night time, the plaintiff, while lawfully and carefully walking along the sidewalk, was thrown heavily down and the bones of her foot were fractured, etc.

The second count, after reciting that *the building was occupied and used as a garage or place for the storage of motor trucks by individuals and corporations to whom defendant leased the premises for that purpose,* alleges that from January 25, 1916 to June 20, 1922, *defendant, for her own convenience and that of her lessees,* maintained a doorway in front of said garage to allow said motor trucks ingress and egress from said building and street over the said sidewalk, and that during the period intervening between January 25, 1916 and June 20, 1922, the *defendant and her lessees, agents and servants,* drove motor trucks and caused motor

trucks to be driven upon and over the sidewalk until a hole seven inches across, and about six inches deep was made in said sidewalk and the ground beneath; and that the said hole so created and maintained by the defendant and her lessees was a public nuisance and a source of great danger to all persons walking upon the said highway.

It will be observed at this point, that the action was against the owner, and not against the tenant; that the wrongful acts charged were those of defendant or her servants and agents; that the premises were leased by the owner for a garage, which necessarily contemplated the storing of motor trucks and their passage to and from the premises over the sidewalk in connection with that business. The condition complained against was not caused by strangers to the premises; that is to say, by persons making deliveries to the premises.

The three grounds relied on for reversal are as follows:

(1) There was no legal duty on the part of the defendant to keep in repair the sidewalk that had been damaged by plaintiff's brother.

(2) The defendant is not responsible for the acts of Arbuckle & Company.

(3) The defendant is not chargeable with the acts of the American Grocery Company.

The Supreme Court, in its *per curiam* opinion, said:

> "The theory upon which the liability of the defendant was submitted to the jury was, the maintenance of a public nuisance in the public highway. There was plenary proof that the sidewalk did not become defective and unsafe from the ordinary use thereof by the general

public, but it became broken up as a result of a use for which it was not normally designed, namely, the passage of heavy motor trucks over it to and from the defendant's garage, leased to tenants, for the storing of motor trucks, and in which use the flagstones were broken and a hole seven inches in diameter and six inches in depth was made in the sidewalk, making it unsafe and dangerous to the public having occasion to use it. The condition of the sidewalk constituted a public nuisance. *The only question in the case was whether there was any evidence tending to establish that the defendant caused or maintained the nuisance.*

"At the time of the happening of the plaintiff's injury the premises were in the occupancy of the Arbuckle Company, a subtenant of the American Grocery Company, the original lessee. There was proof to the effect that the defendant leased the premises to the grocery company for garage purposes, for the storing of auto trucks and wagons; that prior to that time, covering a period of many years, there was an ordinary flagstone sidewalk, which, at the time of making the lease to the grocery company, was in a very bad condition, caused by the previous use to which the sidewalk was put, in that horses and wagons were driven over the curb and the sidewalk into the building on the premises, which, prior to the letting of the premises to the grocery company, had been leased by the defendant to tenants to be used as a stable; that by the lease made by the defendant on January 1, 1919, to the grocery company the company was authorized by the defendant to lay a cement driveway and to tear up the wooden floor of the building and substitute for it a cement one, at its own expense, but to what extent the company laid the cement driveway was in dispute and, of course, was a jury question. There was also testimony to the effect that the cement driveway, ten feet in width, commenced at the doorway of the garage, and extended a distance of eight feet to the sidewalk, and that the remain-

ing space from the end of the cemented work was a flag sidewalk down to the curb. There was testimony from which a jury might have properly found that at the time the lease was made to the grocery company, the sidewalk was in such a dilapidated condition as to constitute a public nuisance, and that this condition arose from the extraordinary use to which the sidewalk had been put *by reason of its use as a driveway for horses and heavy carts and vehicles. The defendant having leased the premises for the use of a stable* and as the only ingress to and egress from the stable and street for horses and vehicles could *only* be accomplished by driving over the sidewalk, *and the defendant having rented the premises for the purpose indicated,* she became liable to respond in damages to a person injured, *if such use of the sidewalk created the nuisance, which caused the injury.*

"There was also testimony in the case which tended to show that at the time of the expiration of the lease to the grocery company and the renewal thereof, to it, such renewal impliedly arising from the fact that the defendant permitted the grocery company to remain as tenant, the hole in the sidewalk existed and the flagstones were broken and, hence, as this condition constituted a nuisance, and did not have its origin from the ordinary wear and tear of a sidewalk, resulting from a normal use by the public, but, according to the testimony, *was created by the extraordinary strain put upon the sidewalk by the tenants of the defendant, who were authorized by her to use the premises for a purpose which caused the sidewalk to be subjected to unusual pressure and strain and for which use the sidewalk was not designed, that is, for motor trucks or other heavy vehicles to be driven over it;* the defendant became answerable to respond to the plaintiff in damages for the injuries she sustained." (Italics ours.)

The court held that the motions were properly denied.

In the case last cited, we again have a situation where liability was sought to be fastened upon the owner. The facts in the case are similar to those of *Davis* v. *Tallon, supra.* The owner leased the premises to be used as a garage or place for the storage of motor trucks. The sidewalk in front of the premises was an ordinary flagstone sidewalk. The motor trucks were driven over the sidewalk by the lessees and the hole in the sidewalk was directly caused by the tenant, and its agents and servants, who were authorized by the owner to drive the trucks over the street by the very terms of the lease. From this fact, of course, it was inferable that the owner participated in the use that was made of the sidewalk.

It will be observed that the Supreme Court, in its *per curiam* opinion, said:

> "The only question in the case was whether there was any evidence tending to establish that the defendant caused or maintained the nuisance."

Obviously, the mere proof of a nuisance is not enough. There must also be proof that the person sought to be held liable for it, caused or maintained the nuisance, and of this as we have shown, there was no proof in this case to fasten liability upon the owner or the tenant of these premises.

The Supreme Court makes abundantly clear in its opinion the basis for holding the owner liable in that case. To quote from the opinion again:

> "The defendant having leased the premises for the use of a stable, and as the only ingress to and egress from the stable and street for horses and vehicles could *only* be accomplished by driving over the sidewalk, and the defendant having rented the premises for the purpose indicated, she became liable to respond in dam-

> ages to a person injured, if such use of the sidewalk created a nuisance, which caused the injury."

The lease, in the instant case, of the store and rear portion of the basement was for use as a bakery store. No one can reasonably contend that leasing a store and portion of a basement for the purpose of a bakery store contemplates an extraordinary use of the sidewalk in front of the premises. And no one can rationally contend that a lease made for that purpose would require an extraordinary use of the sidewalk.

In *Sewall* v. *Fox,* 98 N. J. L. 819, 821, Mr. Justice Kalisch quoted with approval the language of Mr. Justice Van Syckel in *Courtney* v. *Central Railroad Co.,* 18 N. J. L. J. 173, as follows:

> "An abutting owner on the highway as such owes no duty to maintain the street or sidewalk in front of his house or premises, and is not responsible for any defects therein, which are not caused by his own wrong. 2 Sherm. & Redf. Neg. 343; Ray Neg. Im. Dut. 68; Wood Nuis. 994; Weller v. McCormick, 18 Vroom 397."

In *Savarese* v. *Fleckenstein,* 111 N. J. L. 574, the Supreme Court said that an abutting owner is not responsible for the acts of strangers, nor for wear and tear by the use of the public; nor for ravages of time; nor the development of vegetation; nor for the acts of an independent contractor.

After the motion for nonsuit was made in the trial court, counsel for the plaintiffs expressly stated to the court that the plaintiffs did not charge that any merchandise was delivered to the owner, nor that she participated in its delivery. The appellant cannot shift that position in this Court.

The plaintiffs wholly failed to prove that the condition of the sidewalk of which they complained was the result of any wrong of the defendants, or that they authorized or participated in the use that was made of it. The trial judge was fully justified in granting the motion to nonsuit.

We respectfully submit that the judgment below should be affirmed.

N. J. CAFARELLI,
Attorney for Respondents.

JOHN MILTON,
Of Counsel.

Lease dated October 1, 1924

This Agreement, between Horatio H. Otway, as Landlord and Frank A. Jaeger, of the Town of Union, in the County of Hudson and State of New Jersey, as Tenant;

Witnesseth; That the said Landlord has let unto the said Tenant and the said Tenant has hired from the said Landlord;

All that certain ground or store floor of the premises known as and by the street number 315 Bergenline Avenue, in the Town of Union, in the County of Hudson and State of New Jersey, together with the floor above the store floor, consisting of seven rooms and bath, and the rear portion of the cellar underneath said store, being forty feet by twenty-three feet more or less, with right of entrance and passage from the front of said cellar thereto, the front and remainder of said cellar being hereby expressly reserved for the use of the Landlord and other lessees and Tenants;

For the term of six years to commence on the first day of May, 1924, to be used and occupied as a bakery, upon the conditions and covenants following;

1st. That the Tenant shall pay the rent, namely the sum of $300.00 per month, on the first day of each and every month invariably and in advance during the term hereby demised.

2nd. That the tenant shall take good care of the premises and shall at his own cost and expenses make all repairs to the interior of said demised premises during the term hereby demised, and at the end or other expiration of the

term, shall deliver up the demised premises in good order or condition, damages by element excepted.

3rd. That the tenant shall promptly execute and comply with all statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and City, Government, and of any and all their departments and bureaus applicable to said premises, for the correction, prevention and abatement of nuisances, violations or other grievances, in, upon or connected with said premises during said term; and shall also promptly comply with and execute all rules, orders and regulations of the Board of Fire Underwriters for the prevention of fires, at his own cost and expense.

4th. That in case the tenant shall fail or neglect to comply with the aforesaid statutes, ordinances, rules, orders, regulations and requirements or any of them or in case the tenant shall fail or neglect to make any necessary repairs then the landlord or his agents may enter said premises and make said repairs and comply with any and all of the said statutes, ordinances, rules, orders, regulations or requirements at the cost and expense of the tenant and in case of the tenant's failure to pay therefor, the said cost and expenses shall be added to the next month's rent and be due and payable as such, or the landlord may deduct the same from the balance of any sum remaining in the landlord's hands. This provision is in addition to the right of the landlord to terminate this lease by any reason of any default on the part of the tenant.

Lease dated October 1, 1924

5th. That the tenant shall not assign this agreement, or underlet or underlease the premises or any part thereof, or occupy or permit or suffer the same to be occupied for any business or purpose deemed disreputable or extra hazardous on account of fire, under penalty of damages and forfeiture and all additions and improvements made by tenant shall belong to the landlord.

7th. That the tenant shall, in case of fire give immediate notice thereof to landlord who shall thereupon cause the damages to be repaired forthwith, but if the premises be so damaged that the landlord shall decide to rebuild, the term shall cease and the accrued rent be paid up to the time of the fire.

8th. That said tenant agrees that the said landlord and agents and other representative shall have the right to enter into and upon said premises, or any part thereof, at all reasonable hours for the purpose of examining the same or making such repairs or alterations therein as may be necessary for the safety and preservation thereof.

9th. The tenant also agrees to permit landlord or his agents to show the premises to persons wishing to hire or purchase the same, and tenant further agrees that on and after February 1st, next preceding the expiration of the term hereby granted, the landlord or his agents shall have the right to place notices on the front of said premises or any part thereof, offering the premises, "To-Let", or "For Sale", and the

tenant hereby agrees to permit the same to remain thereon without hinderance or molestation.

10th. That if the said premises or any part thereof shall become vacant during said term or should tenant be evicted by summary proceeding or otherwise the landlord or his representative may re-enter same, either by force or otherwise, without being liable to persecution therefor, and relet the said premises as the agent of the said tenant and receive the rent thereof, applying the same, first to payment of such expenses as he may be put to in re-entering and then to the payment of the rent due by these presents the balance, (if any) to be paid over to the tenant who shall remain liable for any deficiency.

11th. That in case of any damage or injury occurring to the glass in the store front, or damages and injury to the said premises of any kind whatsoever, said damages or injury being caused by the carelessness, negligence or improper conduct on the part of the said tenant, his agents or employees, then said tenant shall cause the said damage or injury to be repaired as speedily as possible at his own cost and expense.

12th. That the tenant shall neither encumber, nor obstruct the sidewalk in front of, entrance to, or halls and stairs of said building, nor allow the same to be obstructed or encumbered in any manner.

13th. The tenant shall neither place nor cause, nor allow to be placed, any sign or signs of any kind whatsoever at, in or about the en-

trance to said store nor any other part of same, except in or at such place or places as may be indicated by the said landlord and consented to by him in writing. And in case the landlord or his representatives shall deem it necessary to remove any such sign or signs in order to paint the said store or make any other repairs, alteration or improvements in or upon said store, or any part thereof, they shall have the right to do so, providing they cause the same to be removed and replaced at his expense whenever the said repairs, alterations or improvements shall have been completed.

14th. It is expressly agreed and understood by and between the parties to this agreement that the landlord shall not be liable for any damage or injury by water, which may be sustained by the said tenant or other person or for any other damage or injury resulting fom the carelessness, negligence or improper conduct on the part of any other tenant or agents, or employees, or by reason of the breakage, leakage, or obstruction of the water or soil pipes, or other leakage in or about the said building.

15th. That if default be made in any of the covenants herein contained, then it shall be lawful for the said landlord to re-enter the said premises and the same to have again, re-possess and enjoy.

16th. That this instrument shall not be a lien against said premises in respect to any mortgage that hereafter may be placed against said premises, which mortgages are not to exceed in the

aggregate the sum of $12,500.00 and that the recording of such mortgage or mortgages shall have preference and precedence and be superior and prior in lien of this lease, irrespective of the date of recording and the tenant agrees to execute any such instrument, without cost, which may be deemed necessary or desirable to further effect the subordination of this lease to any such mortgage or mortgages, and a refusal to execute such instrument shall entitle the landlord or his assigns and legal representatives to the option of cancelling this lease without incurring any expense or damage and the term hereby granted is expressly limited accordingly.

19th. It is expressly understood and agreed that if for any reason it shall be impossible to obtain fire insurance on the building and improvements on the demised premises in an amount, and in the form, and in fire insurance companies acceptable to the landlord, the latter may if he so elect, at any time thereafter terminate his lease and the term thereof, on giving to the tenant three days' notice in writing of his intention so to do and upon the giving of such notice, this lease and the terms thereof shall terminate and come to an end.

20th. It is expressly understood and agreed that in case the demised premises shall be deserted or vacated or if default be made in payment of the rent or any part thereof as herein specified, or if without the consent of the landlord the tenant shall sell, assign or mortgage this lease or if default be made in the performance of any of the covenants and agreements in

this lease contained on the part of the tenant to be kept and performed or if the tenant shall fail to comply with any of the statutes, ordinances, orders, regulations and requirements, of the Federal and City, Government or of any and all their departments and bureaus applicable to said premises or hereafter established as herein provided or if the tenant shall file a petition in Bankruptcy or be adjudicated a bankrupt or make an assignment for the benefit of creditors to take advantage of any insolvency act, the landlord may, if he so elect, at any time thereafter terminate this lease and the term thereof, upon giving to the tenant five days' notice in writing of his intention so to do and upon the giving of such notice, this lease and the terms thereof shall terminate, expire and come to an end on the date fixed in such notice as if said date were the date originally fixed in this lease for the termination or expiration thereof.

All notices required to be given to the tenant may be given by mail addressed to the tenant at the demised premises.

21st. The tenant shall pay the regular annual rent or charge and all meter charges, which is or may be assessed or imposed upon the demised premises for water, when due during the term, and if not so paid, the same shall be added to the month's rent next accruing.

22nd. The failure of the landlord to insist upon strict performance of any of the covenants or conditions of this lease or to exercise any option herein conferred in any one or more instances shall not be construed as a waiver or re-

linquishment for the future of any such covenants, conditions or options, but the same shall be and remain in full force and effect.

23rd. The landlord hereby covenants and agrees to make any and all necessary repairs to the interior of said demised premises at his own cost and expense, and also covenants and agrees not to let or permit the use or occupation of the front portion of the cellar hereby reserved to or by others than himself, or than his tenants of the upper portion of said tenement.

24th. The tenant hereby covenants and agrees to remove any and all snow, ice and other obstructions from the sidewalk and gutters, fronting said demised premises, as required under an Ordinance or Ordinances regulating the same, adopted by the Town of Union, in the County of Hudson, State of New Jersey.

25th. The tenant hereby covenants and agrees to pay for the plate glass insurance for the premises hereby demised during the term hereby demised.

26th. It is hereby understood and agreed that this lease is to take the place of a certain other lease made between the parties hereto covering the premises hereby demised, bearing date, June 7th, 1915, which has been duly recorded in the Hudson County, N. J. Register's office, and said lease is hereby surrendered by the said tenant to the said landlord, and shall be considered null and void and of no effect.

Lease dated October 1, 1924

And the said landlord does covenant that the said tenant on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the terms aforesaid.

And it is further understood and agreed that the covenants and agreements herein contained are binding on the parties hereto and their legal representatives.

In Witness Whereof, the parties hereto have hereunto set their hands and seals this first day of October, 1924.

(SEAL) HORATIO H. OTWAY
(SEAL) FRANK A. JAEGER

Sealed and Delivered
in the presence of

(signed) ADOLPH J. H. PETERS.

State of New Jersey, }
County of Hudson, } ss.:

Be it remembered that on this first day of October, in the year of our Lord One Thousand Nine Hundred and Twenty-four, before me the subscriber, Adolph J. H. Peters, Attorney-at-Law, of the State of New Jersey, personally appeared Horatio H. Otway and Frank A. Jaeger, who, I am satisfied, are the parties mentioned in the within lease, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

(signed) ADOLPH J. H. PETERS.

Lease dated October 1, 1924

LEASE.

HORATIO H. OTWAY,

TO

FRANK A. JAEGER.

Dated: October 1st, 1924.

Received in the Register's Office of the County of Hudson on the 4th day of October, A. D., 1924, at 9:02 o'clock in the forenoon and Recorded in Book 1540 of Deeds for said County, page 431.

N. J. CAFARELLI,
Dispatch B'ldg.
Union City
N. J.

State of New Jersey, }
County of Hudson } ss.:

I, CHARLES F. X. O'BRIEN, Register of the County of Hudson, do hereby Certify that the foregoing is a true and correct copy of a certain Lease as the same is on Record in my Office in Book 1540 of deeds on page 431 &c.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal this 27″ day
(SEAL) of January A. D., 1932

CHARLES F. X. O'BRIEN
Register

By CHARLES M. AUSTIN
Deputy Register

BAR PRESS, INC., 47 WEST STREET, NEW YORK. BO. 9-0157-8