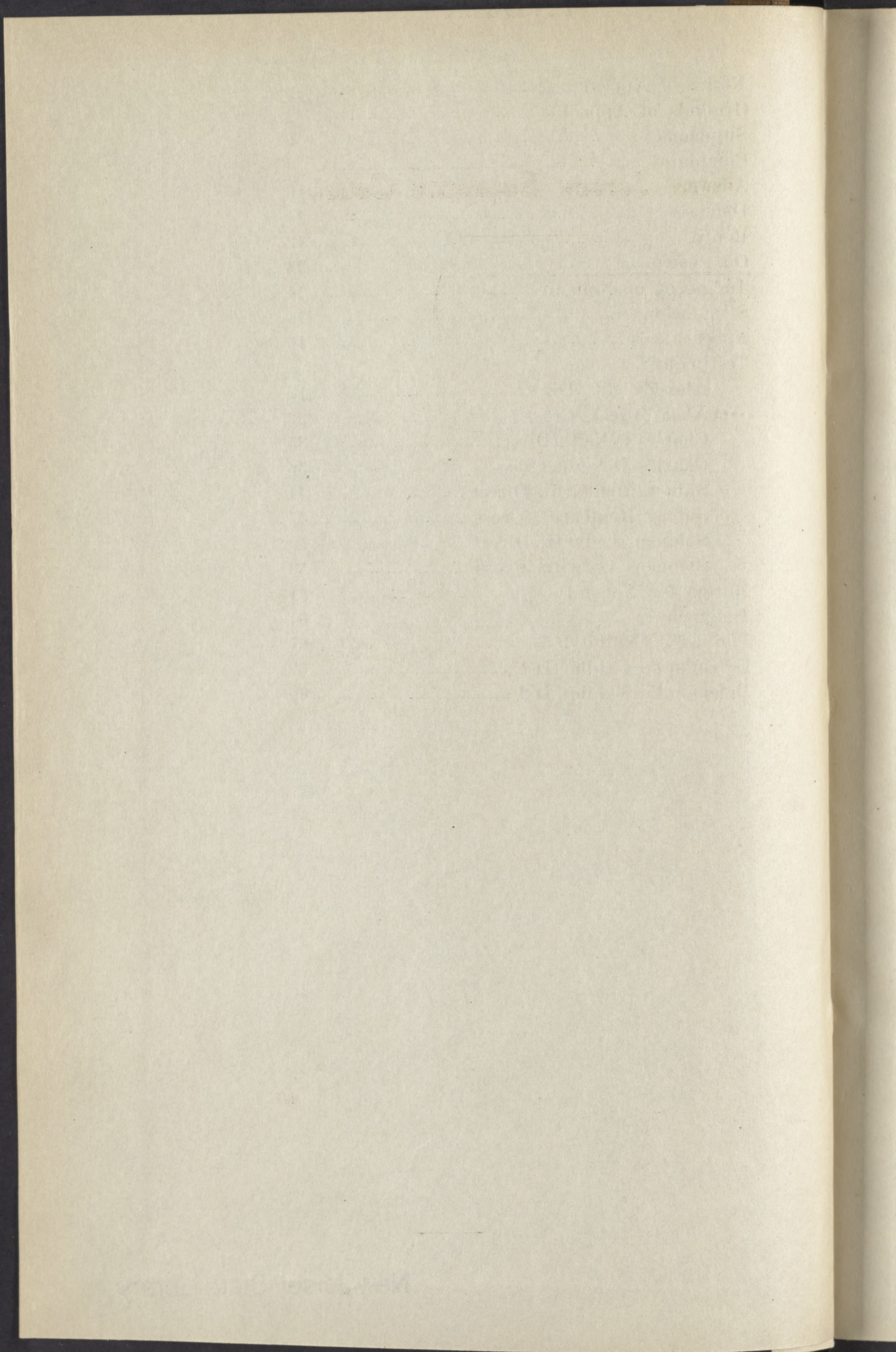


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New Jersey Supreme Court

ALEX ZWICKL,

Plaintiff,

vs.

BROADWAY THEATRE COMPANY
OF LONG BRANCH, body cor-
porate,

Defendant.

Action 10
at Law.

Notice
of Appeal.

To DURAND, IVINS & CARTON,

Attorneys for the Defendant,

Asbury Park, N. J. 20

SIRS:

TAKE NOTICE, that the plaintiff, Alex Zwickl, appeals to the New Jersey Court of Errors and Appeals for the whole of the judgment entered in the above entitled cause.

Yours truly,

QUINN, PARSONS & DOREMUS,
Attorneys of Plaintiff.

Dated December 1st, 1926.

30

New Jersey Supreme Court

Monmouth County

10	ALEX ZWICKL,	}	<i>Plaintiff,</i>
	<i>vs.</i>		
	BROADWAY THEATRE COMPANY OF LONG BRANCH, INC., body corporate,	}	<i>Action at Law. Complaint.</i>

Plaintiff, Alex Zwickl, residing in the City of Long Branch, in the County of Monmouth and State of New Jersey, says that:—

20

FIRST COUNT:

1. On February 12, 1926, the defendant was the owner of certain premises, situate in the city of Long Branch, and located on the south side of Broadway, in the city of Long Branch.
2. The defendant, by its agents or servants, maintained in front of said premises, a sidewalk for the use of the public, and for the passing and re-passing of passengers.
- 30 3. The defendant further had erected and constructed a building adjacent to said sidewalk, and on said building had erected a water leader or drain.
4. Said drain or water leader was so constructed and maintained by the defendant, its agents or servants, that it became and constituted a nuisance, and became dangerous to passersby and pedestrians lawfully using said sidewalk on said premises.
- 40 5. By reason of the maintenance and construc-

Complaint.

tion of said drain or leader, and by reason that it was so maintained by the defendant, the plaintiff, in passing along said sidewalk lawfully and prudently, fell and was severely injured as hereinafter set forth, which fall and injury was a direct and proximate result of the action of defendant in maintaining such nuisance.

6. Plaintiff suffered and sustained the following injuries: He was thrown violently to the pavement and suffered a double compound fracture of 10 his leg, depriving him of the use of the same for a long time, and permanently injuring him in the use of such leg. Plaintiff suffered divers other bruises and contusions. He suffered great nervous shock and still suffers from the same. He has been unable to attend to his business or occupation, and has lost thereby his profits or earnings. He has been forced to expend large sums of money in and about endeavoring to be cured of his injuries, and will in the future be forced to expend further large 20 sums of money in endeavoring to be cured of his injuries. He has undergone great pain and suffering and will in the future undergo further pain and suffering.

SECOND COUNT:

1. Plaintiff repeats paragraphs one, two and three of First Count.

2. The defendant, by maintaining the building and the leaders actively and negligently diverted 30 water and snow falling upon said building, so that it became contained in large and dangerous quantities. Defendant further so constructed said building that the snow falling thereon did not melt and disappear naturally, and as snow elsewhere in the vicinity, but by reason of the heat in said building said snow melted faster than elsewhere and by the construction of said building a large and dangerous amount of water was held and detained upon the lands of the de- 40

Complaint.

fendant, and such snow and the resulting water was diverted by the act of the defendant from its natural course.

3. By reason of the diversion of the snow and by reason of the melting of said snow, upon the roofs of said buildings and providing for diverting said melting snow by a faulty and insufficient outlet, the same escaped upon the sidewalk in front of said building and there became ice.

10 4. As a result of the act of the defendant in diverting said snow, and causing it to be held upon the roof of said building, and causing it there to be melted by other causes than that of nature, and not providing a proper means of disposal of said melted snow, and by the same escaping on to the sidewalk, the same formed ice upon the sidewalk.

5. The plaintiff carefully and prudently proceeding along said sidewalk, then and there fell and suffered the injuries hereinafter set forth, said
20 injuries being the direct and proximate result of the unlawful act of the defendant in diverting said snow from its natural place, and in restraining said snow so it should be melted, and diverting water resulting from said melting.

6. Plaintiff repeats paragraph 6 of the First Count.

THIRD COUNT:

1. Plaintiff repeats paragraphs one, two and
30 three of the First Count.

2. The defendant, by its agents or servants, so negligently, carelessly and imprudently constructed said building and more particularly the roof thereof, and the leader or drain pipe leading therefrom, and so negligently maintained the same, that as a direct and proximate result of this negligence ice formed upon the sidewalk over which the plaintiff was lawfully and prudently passing, and

Complaint.

causing him to fall to the ground, inflicting upon him the injuries hereinafter set forth.

3. The defendant was negligent in the following manner in the construction and maintenance of said building and said drain pipe:

- (a) The drain pipe was of insufficient capacity.
- (b) No proper outlet was provided for said pipe.
- (c) Both the outlet and the inlet of said pipe were permitted to become clogged.
- (d) A joint of said pipe was permitted to be-10
come detached.
- (e) Insufficient drain pipes or leaders were provided for said roof.

4. Plaintiff repeats paragraph 6 of the First Count.

FOURTH COUNT:

1. Plaintiff repeats paragraphs one, two and three of the First Count.

2. Defendant undertook to perform a duty to 20
the public to protect the public in the result of the overflow of water from said roof, and held itself out to the public, and more particularly that portion of the public traversing the sidewalk, in front of said premises by performing a service and protecting the said pedestrians from the result of the overflow of water from said roof, and had performed said service for a long period of time, to wit, for more than five years of which the general public had notice. 30

3. After performing said service the defendant on or about February 12th, became negligent and careless in the continuance of said duty and though it had previously apprised the public of its performance of such duty, it permitted the safeguards and appliances protecting the public to become out of order so that water was discharged across the sidewalk, and freezing endangered the life and limb of the public, and more particularly the plaintiff lawfully upon the said sidewalk, and as a 40

Complaint.

direct and proximate result of such failure to properly continue such safeguards as it had provided, the plaintiff was injured by falling upon the ice formed there, and sustained the injuries hereinafter set forth.

4. Plaintiff repeats paragraph six of the First Count.

FIFTH COUNT:

1. Plaintiff repeats paragraphs one, two and
10 three of the First Count.

2. On or about February 12, 1926, great quantities of snow fell and lodged on the sidewalk or pavement in front of said premises where it remained until the defendant, its agents or servants, removed said snow and deposited it along said sidewalk.

3. It then and there became the duty of the defendant, its agents or servants, to use due and proper care in placing of sufficient guards and
20 protections around said snow while it remained deposited, so that the water resulting from the melting of said snow could not run along and upon the said sidewalk, and so congealing and hardening into ice and render the said sidewalk unsafe and insecure for the passage on foot of persons lawfully being in and upon said highway and walking upon or crossing the said sidewalks.

4. The said defendant, its agents or servants, not regarding their duty in that behalf, did not
30 use due and proper care in the placing of safeguards or protections around the said snow, so that the water resulting from the melting of said snow could not run along and upon the said sidewalk, and there congeal into ice, but wholly failed and neglected so to do, and carelessly and negligently and wrongfully when the said snow melted as aforesaid, allowed and permitted water resulting from the same to run along and upon the said sidewalk in front of said premises, and there per-
40 mit it to remain, and carelessly, negligently and

Complaint.

wrongfully allowed and permitted the said water to harden and congeal into ice, and carelessly, negligently and wrongfully allowed and permitted the said ice when formed as aforesaid, to be and remain on the sidewalk in front of said premises for a long space of time.

5. By reason of the premises he, the plaintiff, on February 12th, 1926, while lawfully and carefully walking upon said sidewalk, slipped upon the ice congealed on the sidewalk as aforesaid, lost his 10 footing and fell, and with great force and violence was thrown to the ground.

6. Plaintiff repeats paragraph six of the First Count.

Plaintiff demands as damages the sum of Fifteen Thousand Dollars and costs of this suit.

QUINN, PARSONS & DOREMUS,
Attorneys of Plaintiff.

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New Jersey Supreme Court

Monmouth County

10	ALEX ZWICKL,	} <i>Plaintiff.</i>	} <i>Action</i>
	<i>vs.</i>		
	BROADWAY THEATRE COMPANY	} <i>at Law.</i>	} <i>Answer.</i>
	OF LONG BRANCH, INC., body		
	corporate,		
		} <i>Defendant.</i>	

The Defendant, with its principal office in the City of Long Branch, County of Monmouth and State of New Jersey, says that:—

20 **FIRST COUNT:**

1. It admits the First Paragraph.
2. It denies the Second Paragraph.
3. It admits the Third Paragraph.
4. It denies the Fourth Paragraph.
5. It denies the Fifth Paragraph.
6. It denies the Sixth Paragraph.

SECOND COUNT:

- 30 1. Defendant repeats its answers to Paragraphs 1, 2 and 3 to the First Count.
2. It denies the Second Paragraph.
 3. It denies the Third Paragraph.
 4. It denies the Fourth Paragraph.
 5. It denies the Fifth Paragraph.
 6. It repeats its answer to Paragraph 6 to the First Count.

THIRD COUNT:

- 40 1. Defendant repeats its answers to Paragraphs 1, 2 and 3 to the First Count.

Defenses.

2. It denies the Second Paragraph.
3. It denies the Third Paragraph.
4. It repeats its answer to Paragraph 6 to the First Count.

FOURTH COUNT:

1. It repeats its answers to Paragraphs 1, 2 and 3 to the First Count.
2. It denies the Second Paragraph.
3. It denies the Third Paragraph.
4. It repeats its answer to Paragraph 6 to the First Count. 10

FIFTH COUNT:

1. It repeats its answers to Paragraphs 1, 2 and 3 to the First Count.
2. It denies the Second Paragraph.
3. It denies the Third Paragraph.
4. It denies the Fourth Paragraph.
5. It denies the Fifth Paragraph.
6. It repeats its answer to Paragraph 6 to the First Count. 20

DEFENSES.

FIRST DEFENSE: This defendant says that the said alleged accident and the injury sustained by the plaintiff were not caused by or were not the result of any carelessness, negligence, lack of duty or want of care or caution on the part of this defendant or any of its agents, servants or employees. 30

SECOND DEFENSE: This defendant says that the said alleged accident and the injury sustained by the plaintiff were caused by and were the result of carelessness and negligence and want of care and caution on the part of the plaintiff.

DURAND, IVINS & CARTON,
Attorneys for Defendant. 40

New Jersey Supreme Court

Monmouth County

ALEX ZWICKL,			
	<i>vs.</i>	<i>Plaintiff,</i>	
10 BROADWAY THEATRE COMPANY			<i>Action</i>
OF LONG BRANCH, INC., body			<i>at Law.</i>
corporate,		<i>Defendant.</i>	<i>Reply.</i>

Plaintiff, by way of reply to the answer herein filed, says that he denies the new matter raised therein and joins issue on the same.

QUINN, PARSONS & DOREMUS,
Attorneys of Plaintiff.

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New Jersey Court of Errors
New Jersey Supreme Court

BROADWAY THEATRE COMPANY OF LONG BRANCH, INC., body corporate, <i>ads.</i> ALEX ZWICKL,	}	<i>Defendant,</i> <i>Plaintiff.</i>	<i>Action</i> 10 <i>at Law.</i> <i>On Postea.</i>
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It is ordered that judgment or non-suit be and hereby is entered in favor of defendant and against the plaintiff with costs to be taxed nisi.

Entered December 3, 1926. 20

On motion of

DURAND, IVINS & CARTON,
Attorneys.

Costs \$

30

New Jersey Supreme Court

10	ALEX ZWICKL, <i>Plaintiff,</i>	}	<i>Action at Law. On Postea.</i>
	<i>vs.</i> BROADWAY THEATRE COMPANY OF LONG BRANCH, INC., body corporate, <i>Defendant.</i>		

JUDGMENT OF NON-SUIT.

20 DURAND, IVINS & CARTON,
Attorneys.

Costs \$

Judgement entered this third day of December, A. D. nineteen hundred and twenty-six, in favor of defendant and against the plaintiff for the sum of costs.

30

WM. S. GUMMERE,
C. J.

40

New Jersey Court of Errors and Appeals.

ALEX ZWICKL,	10
<i>Plaintiff-Appellant,</i>	
<i>vs.</i>	<i>Action</i>
BROADWAY THEATRE COMPANY	<i>at Law.</i>
OF LONG BRANCH, INC., body	<i>Stipulation.</i>
corporate,	
<i>Defendant-Respondent.</i>	

It is hereby stipulated between the parties, by their respective counsel, that in the record the testimony of Dr. Harold Kazmann, Joseph Weiss, and 20 Noah Ciccone and Louisa Zwickl, be eliminated from the State of Case.

QUINN, PARSONS & DOREMUS,
Attorneys for and of Counsel With
Plaintiff-Appellant.

DURAND, IVINS & CARTON,
Attorneys for and of Counsel With
Defendant-Respondent. 30

40

New Jersey Court of Errors
New Jersey Supreme Court
Monmouth County

10 ALEX ZWICKL, *Plaintiff,*
vs.
BROADWAY THEATRE COMPANY *Action*
OF LONG BRANCH, *at Law.*
Defendant.

Freehold, N. J., November 11, 1926.

20

TESTIMONY

Before Hon. R. V. Lawrence, Judge, and a Jury.

APPEARANCES.

For Plaintiff—

MESSRS. QUINN, PARSONS & DOREMUS.

For Defendant—

30

MESSRS. DURAND, IVINS & CARTON.

New Jersey Supreme Court
Monmouth County

ALEX ZWICKL,

Plaintiff,

vs.

BROADWAY THEATRE COMPANY
OF LONG BRANCH,

Defendant.

*Action
at Law.*

10

Freehold, N. J., November 11, 1926.

20

ALEX ZWICKL, *Sworn for Plaintiff.*

Direct Examination BY MR. PARSONS:

Q. Mr. Zwickl, you live where? A. 89 North Broadway, Long Branch.

Q. How long have you lived there? A. About seven years.

Q. Your business is what? A. Poultry and eggs, wholesale.

Q. Were you living there in the winter of 1925 and 1926? A. Yes, sir.

Q. Directing your attention to February 12, 1926, can you tell us what sort of a day it was? A. It was a cold day, freezing.

Q. And can you tell us what the previous day had been? A. Very cold and snow.

Q. Did you go out on that day? A. On February 12th?

Q. Yes. A. I took my girl up to the station at one o'clock.

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Q. So we can understand, where is North Broadway with relation to the station? A. It is about twelve minutes' walk.

Q. Just give us the location of it, North Broadway in Long Branch. Some of us may not know it. A. Well, North Broadway lays—you know there is two Broadways, South Broadway and North Broadway. It parts on Second avenue.

Q. And will you just tell us how you went to
10 the station? A. I walked down Second avenue to the station.

Q. Now where is the station at Long Branch? A. Pavilion avenue, near the hospital. I don't know as you know.

Q. What did you do after you left your girl at the station? A. Walked home on Third avenue and stopped in Koops grocery store to get a catalogue from a wholesale house.

Q. Where is this grocery store, on what street?
20 A. On Broadway. It is about just opposite Liberty street, the south side of the street.

Q. On the south side of Broadway? A. On the south side of Broadway.

Q. Broadway runs in what direction by the point of the compass. A. South. What do you mean?

Q. Broadway in Long Branch runs which direction? A. West.

Q. East and west?

30 MR. CARTON: It is generally east and west, I think.

Q. And this grocery store is on the south side of Broadway? A. Yes, sir.

Q. Now in going toward your home from the grocery store in which direction did you walk? A. I walked past the theatre.

Q. And in which direction from the point of the compass is that from the grocery store? A. East.

40 Q. You were walking east? A. East.

Alex Zwickl, Direct.

Q. As you walked past the theatre will you tell us just what happened? A. I walked past the theatre and past a few stores there and I slipped, I fell.

Q. Now will you tell us how many stores past the theatre entrance there are, Mr. Zwickl, where you fell? A. One, two, three, four—it must have been the fifth store.

Q. At the fifth store? A. The fifth store.

Q. And at this spot where you fell do you know 10 what caused you to fall? A. There must have been ice there.

Q. What happened after you fell, Mr. Zwickl? A. After I fell, and I broke my leg in two places.

Q. Where were you taken? A. They picked me up there and took me in the store, Ledwitz's hardware store.

Q. Then where were you taken? A. From there they took me up to the hospital.

Q. What theatre is this? A. It is the Broadway 20 Theatre.

Q. Of Long Branch? A. Long Branch.

Q. And are all these stores along there part of that building? A. That is part of the building. They rent to him.

Q. Now how long were you at the hospital, Mr. Zwickl? A. I got there Friday, they took an X-ray, took another X-ray on Saturday, and they put me in a cast and I came home on Monday with the ambulance, Monday afternoon. 30

Q. What did you do when you got home? A. Well, I had to lay in bed, had a cast put on here. (Indicating.)

Q. How long did you have that cast on? A. Ten weeks.

Q. And then what did you do? A. The doctor took off the cast and I begin to walk on crutches.

Q. How long did you use the crutches, Mr. Zwickl? A. About five weeks.

Q. And then what did you do? A. I was in irons, 40

braces, iron brace.

Q. And how did you get around? A. With a cane, had to limp to walk.

Q. Now your business is what, Mr. Zwickl? A. Wholesale chickens and eggs.

Q. What doctor did you have? A. Dr. Kazmann.

Q. And he practices in what place? A. On Broadway.

10 Q. I mean what town? A. Long Branch.

Q. Now during the time that you had this cast on were you able to do any work? A. Couldn't work, stiff.

Q. And during the time that you were using the crutches were you able to do any work? A. Couldn't do any work, going on crutches.

Q. Then how long after you got off from crutches did you use the brace and cane? A. When I used the brace and the cane I begin to learn to
20 walk and drive the car.

Q. Prior to February 12th and about that time, Mr. Zwickl, how much were your profits from your wholesale egg business?

(Objected to.)

THE COURT: I think it is objectionable in that form.

Q. What did you make prior to that time, Mr. Zwickl?

30 MR. CARTON: Objected to, if it has relation to his business.

Q. What did you lose as a result of your being unable to pursue your ordinary work, that is the question. A. About \$75 a week.

Q. Now after you were injured did you hire anybody, Mr. Zwickl? A. Yes.

Q. And whom did you hire? A. Mr. Weiss.

Q. How long did he work for you? A. Ten
40 weeks.

Q. How much did you pay him? A. Fifteen weeks, because I couldn't work with the crutches. Fifteen weeks he was driving the car.

Q. How much did you pay him? A. He worked five days in the week, see? About \$7 a day; that is \$35 a week.

Q. And did you have anybody after that helping you? A. I had a boy.

Q. What was his name? A. Noah Ciccone.

Q. How long did he work for you? A. He 10 worked about two months for me.

Q. How much did you pay him? A. \$20 a week.

Q. What did he do, Mr. Zwickl? A. Well, I drove the car and he done the labor work or carried the goods and carried the chickens.

BY THE COURT:

Q. Did you do that yourself before the accident? A. Yes, sir.

Q. You say it was necessary to employ these people? A. Yes, sir. 20

BY MR. PARSONS:

Q. How much did you pay the hospital, Mr. Zwickl, while you were there? A. I paid him \$35 for the four days that I was there, Friday, Saturday, Sunday and Monday.

Q. And you said you took an ambulance home; how much did you pay for that? A. \$15.

Q. And how much were the X-rays? A. \$7 a picture. I don't know exactly how many pictures.

Q. How much was your brace? 30

BY THE COURT:

Q. How many X-rays did you have? A. I guess the doctor will show that. I don't know how many pictures.

BY MR. PARSONS:

Q. How much was the brace, Mr. Zwickl? A. The brace was \$25.

Q. And from whom did you procure that brace? A. Dr. Morford in Red Bank.

Q. And did he make an examination? A. He 40

made an examination.

Q. And what was his fee for the examination?

A. \$20.

Q. How much was Dr. Kazmann's bill? A. It run about \$200.

Q. During that time, Mr. Zwickl, that you were laid up will you just describe, did you have any pain? A. I had some pain.

Q. You will have to speak a little louder so the
10 jury will all hear. A. I had pain.

Q. How long did that pain continue? A. It continued—as long as I had the brace on it hurted very much. I mean the cast, when it loosened up, but it still comes back on me.

Q. Are you able to do the lifting that you have done in the past? A. I couldn't.

Q. As a result of working all day will you just describe how you feel? A. Well, the more I sit the better it feels. I can't do much work on it.

20 Q. You say it; what do you mean by it? A. What is it?

Q. When you say it what do you mean you can't do much walking on it? A. Well, I can't do much walking on my leg as I did before.

Cross Examination BY MR. CARTON:

Q. What did you say your business was, Mr. Zwickl? A. Poultry and eggs.

30 Q. Poultry and eggs? A. Yes.

Q. Wholesale? A. Yes, sir.

Q. Where is your place of business? A. 89 North Broadway.

Q. How long have you been in business there? A. About six years, seven years, as long as I lived there.

Q. What say? A. As long as I lived there.

Q. Who did you have employed in your business on February 12th last? A. Nobody. Before I had
40 nobody employed.

Q. Hadn't any one before that? A. No.

Q. What business you did was what you took care of yourself, I suppose? A. Yes, sir.

Q. And what did that work consist of? What did you actually do? A. Why, I have contracts with different farms where I get the eggs for the whole year. It is right around here in Freehold.

Q. No, I mean what did you actually do physically during the day at your business? A. Well, I drive the car, load up my eggs and deliver to several stores in Long Branch when there is demand for them. If there is no demand for them my eggs go to New York.

Q. The demand in the winter months, I suppose, is not heavy, is it? A. That is just the time it gets very heavy.

Q. That is the time it gets heavy? A. Yes.

Q. What makes it heavy at that time? A. You take the Leghorn chickens, they begin to lay heavy in those months and breeding season begins with the large farmers.

Q. But you had no one employed in the business last February except yourself? A. Yes, sir.

Q. And your work consisted in filling orders? A. Yes, sir.

Q. And taking these orders, didn't it? A. Yes, sir.

Q. You had no one in your store when you went out, I suppose? A. I have no store.

Q. Have no store? A. No, sir. 30

Q. Where do you do business there? A. I do store business; I sell in the stores.

Q. Where is your station or your plant? A. Right at my home.

Q. Your home? A. Yes, sir.

Q. When did you employ Mr. Weiss? A. He went out the day after I got home; that was on Tuesday.

Q. And how many weeks did he work for you?

A. About fifteen weeks. 40

Q. When did you take up your work yourself?
A. Right after this I started to drive the car.

Q. Well, what time? How long after February 12th was it? A. It was around June I started in.

Q. Around June? A. Yes, sir.

Q. How long did you say you were in the hospital? A. I was from Friday till Monday afternoon.

Q. And how long before you started doing business after you got home from the hospital, how long was it before you started in your work? A. Well, I had to lay in bed with the cast. The cast was heavy.

Q. Yes; well, how long was the cast on? A. The cast was on ten weeks.

Q. Ten weeks? A. Yes.

Q. And after the cast was removed did you go about some then? A. I couldn't walk, I had crutches.

20 Q. Went on crutches? A. Yes.

Q. And you say it was about June before you started in at your work? A. I suppose about June, yes, sir.

Q. You are taking care of your work now in the regular way, are you not? A. Yes, sir.

Q. You stated that the day this accident happened, February 12th, was a very cold day and freezing. Is that your recollection of the matter?

A. It was cold and freezing, yes, sir.

30 Q. And the day prior was cold and freezing, was it not? A. Yes, sir.

Q. What have you to say about whether or not there was snow on the streets of Long Branch those days? A. Well, there was snow on the street.

Q. There was considerable snow on the streets, was there not? A. Well, I recollect there was heavy snow on—

Q. There was heavy snow, it was a very cold spell? A. A cold spell.

40 Q. You say you walked down Second avenue to

the railroad station that day? A. Yes, sir.

Q. Where is Second avenue, is that where the two Broadways converge? A. Yes, sir.

Q. Did you walk all the way from Broadway on Second avenue to the railroad station? A. I walked from my house to the railroad station, yes, sir.

Q. What was the condition of the sidewalks that day? A. You could walk on it. It was all shoveled off.

Q. What was? A. The snow was shoveled off.

Q. But they were pretty slippery, were they not? 10
A. I don't know if it was slippery. I didn't fall.

Q. Well, you had difficulty getting along, didn't you? A. No. I had my little girl with me and we both walked.

Q. Well, there was ice on the sidewalk as you went along up to the railroad station, wasn't there?

A. Not that I noticed any.

Q. Don't remember any? A. No, sir; I didn't notice any.

Q. Did you walk back from the railroad station 20
to Broadway? A. Yes.

Q. Going down Third avenue? A. Yes.

Q. Any ice on this sidewalk going down Third avenue to Broadway? A. The snow was all shoveled off.

Q. All shoveled off? A. Yes.

Q. Was there any ice on the sidewalk where the snow had been shoveled from? A. I didn't see any.

Q. Not any? A. No ice.

Q. How about when you got to Broadway and 30
Third avenue and turned east? You did turn east, I suppose, didn't you? A. Yes.

Q. On the south side of Broadway? A. Yes.

Q. Any snow and ice on the sidewalk there? A.
There was no snow there.

Q. Not a bit? A. No.

Q. All clear? A. The stores down there all cleaned it off.

Q. There was no snow or ice on the sidewalk?

A. No.

Q. Where did you first find any snow or ice on that sidewalk that day? A. Didn't find any.

Q. Oh, you fell, you said. A. I fell over ice, yes.

Q. What? A. I fell over something there, either ice or snow.

Q. Do you know whether it was ice or snow that you fell over? A. I didn't know it till I fell.

Q. Didn't know till you fell? A. No.

Q. Well, where did you meet that mishap, where
10 on the Broadway sidewalk? A. Between—there was two stores.

Q. After you had gone by the theatre building?
A. Yes.

Q. This building where those three stores are that you refer to is beyond the theatre building, isn't it? A. Yes, sir.

Q. Further east? A. Further east.

Q. Now what happened when you fell? I mean do you know what caused you to fall? A. Be-
20 cause the ice made me slip.

Q. You don't know whether it was ice or not, do you? A. Well, it was ice after I seen it, after I lay there.

Q. Didn't you see it before you fell? A. I didn't see it because it was covered.

Q. Covered up with what? A. Some snow laying over it.

Q. Covered with ice? A. I suppose people walked over it and they covered it up some way
30 or other.

Q. You saw that the snow had been covered over by the ice? A. I didn't see nothing.

Q. What did you say then? A. I fell over and after I fell I seen it.

Q. What did you fall over? A. It was snow and ice I fell over.

Q. Was it snow or was it ice? A. It was ice and covered up with snow just when you pass by. You know yourself that you see some kind of ice

laying on the sidewalk and that it is covered up with snow.

Q. Where was this point at which you fell? Where was that with relation to any store there? What store was it opposite to? A. Opposite to? Why, there is two stores there.

Q. Who are the occupants, do you know? A. One was Reinhardt, the radio shop, and the other one was Ledwitz's store.

Q. Which is the most eastwardly? A. Led-10 witz's store.

Q. Had you gone by the radio shop? A. Yes.

Q. The sidewalk all right there, was it? A. It was all right.

Q. And it was opposite the Ledwitz store that you fell, was it? A. Yes, sir.

BY THE COURT:

Q. Which leg was broken? A. The right.

Q. The right leg? A. Yes, sir.

BY MR. CARTON:

20

Q. Anybody with you when you were going along there? A. Alone.

Q. Where was your little girl? A. She went to Perth Amboy.

Q. Were you looking as you went along the sidewalk to see what was there? A. I didn't look for anything.

Q. What say? A. I didn't look for anything. I walked along as everybody else would.

Q. But you say there was no ice along Broadway 30 until you got to this point? A. There was no ice.

Q. There wasn't any ice? A. No, sir; all stores along Broadway and they cleaned it off.

THE COURT: When did the snow fall?

MR. PARSONS: I am going to introduce the weather report.

BY THE COURT:

Q. I say, when did snow fall, if you know, Mr. 40

Zwickl, before you fell, before the accident? A. The day before.

Q. The day before? A. Yes, sir.

Q. There had been a fall of snow? A. Yes, sir.

Q. Heavy? A. A heavy fall of snow.

BY MR. CARTON:

Q. The streets were quite well filled with snow, were they not? A. I think they were.

Q. What say? A. There was quite some snow on
10 the ground.

Q. And did you observe that there was no parking at the curb that day, that the snow had not been removed from the curb along Broadway? A. At some places there was and in some places there was plenty of room, as they pile them up, you know, and make room for cars.

Q. Was there considerable snow piled up along there? A. Well, Ledwitz was considered one of the first ones along Broadway to clean off his place
20 for parking. He always had plenty of room there and he cleans his gutters, too.

Q. And it was in front of Ledwitz's store that you fell, wasn't it? A. Yes. It wasn't right in front, it was in front of that drain pipe there.

Q. Do you know whether he had cleaned off his sidewalk or not that day? A. What say?

Q. Do you know whether he had cleaned off his sidewalk or not that day? A. It was clean there.

Q. All the sidewalks were clean? A. Clean, yes.

30 Q. I didn't learn yet, Mr. Zwickl, whether you slipped on something or whether you tripped over something. Which was the fact? A. I slipped over the ice there.

Q. You didn't trip over some ice or snow? A. No, sir.

Q. You stepped on it and slipped? A. It just turned me around.

Q. Were you going fast or slow? A. I was walking the regular—

40 Q. Just the regular? A. Regular.

Q. And was it your purpose to go into Ledwitz's store? A. No, I didn't have nothing to do with Ledwitz. No, sir; I was going home.

Q. You were not going into his store? A. No.

Q. Nor in any of those stores along there in the Broadway theatre building? A. No.

Q. Just walking along the sidewalk? A. Yes.

Q. How wide is that sidewalk, if you know? A. It is quite a wide sidewalk.

Q. 15 or 20 feet? A. I should judge about 15 10 feet.

Q. As far as from where you are sitting to where I am? A. I couldn't tell you exactly. No, I don't think it is that wide.

Q. Not as wide? A. No, I don't think so.

Q. Where were you walking, where on the sidewalk, in the inside, outside, center or where? A. If you had a picture here I could show you.

Q. Well, can't you tell without a picture? A. About 3 feet away from the gutter, 3 or 4 feet away 20 from the gutter.

Q. From the gutter? A. Yes.

BY THE COURT:

Q. The curb? A. Yes.

BY MR. CARTON:

Q. And you were then quite some distance from the building line?

BY THE COURT:

Q. What is that street? A. It is Broadway.

Q. Broadway? A. Yes. 30

Q. A public street there in Long Branch? A. Yes.

BY MR. CARTON:

Q. You were quite some distance away from the building line then, the path that you were walking in? A. I couldn't tell you how far I was away from the building line.

Q. Don't you know that is a very wide sidewalk?

A. That is a very wide sidewalk, yes, sir.

Q. And then you were about 3 or 4 feet from the curb, you think?

MR. PARSONS: I will just put Dr. Kazmann on.

BY THE COURT:

Q. One moment. You spoke of a gutter or leader on the building. A. Yes.

10 Q. You saw that gutter, did you, or leader?

MR. CARTON: If your Honor please, I guess I was nodding. I didn't hear him say anything about it.

THE COURT: I understood him to say it came from the leader.

MR. CARTON: I missed that.

Q. Where was that leader? A. The leader is right on the building.

20 Q. What building? A. On the Broadway theatre building.

Q. You saw it there? A. When I fell I seen a lot of ice hanging down.

Q. Where, at the top of the building? A. Yes, at the top of the building, at the top of the leader. You see there is a leader shoots right out from the building.

30 Q. What kind of a leader was it? Did it come down the side of the building? A. It comes down the side of the building and it shoots into an iron grating.

Q. Where is that iron grating? A. Right through the sidewalk out in the gutter.

Q. Does the iron grating go across the sidewalk? A. Yes, sir.

Q. And it was that way at the time of your accident? A. It was that way at the time of the accident.

40 Q. You had seen that before, had you? A. I didn't took notice of it.

Alex Zwickl, Cross.

Q. Never had taken notice? A. Well, I don't go much on Broadway. I just go with the truck up and down that street.

(Witness temporarily withdrawn.)

ALEX ZWICKL, *Resumed for Plaintiff.*

Cross Examination BY MR. CARTON:

Q. Mr. Zwickl, you were evidently mistaken in your thought that that cast was on your leg for some ten to twelve weeks, weren't you? A. I was not mistaken. I think it shows in the picture. They took a picture with the cast on it about six or seven weeks afterward. You have got the pictures here. ¹⁰

Q. Was the cast on on April 1st when this picture was taken? A. Yes.

Q. Sure about that? A. Yes, it is on the picture.

Q. You just heard Dr. Kazmann— A. Well, I just remarked to my attorney here— ²⁰

Q. He is mistaken about that? A. Yes.

Q. You are quite sure the cast was taken off— A. It shows on the picture.

Q. When was the cast taken off, as a matter of fact? A. As I said, about ten weeks afterward.

Q. About ten weeks afterwards? A. Yes, sir; they split the cast, opened it one time and oiled it up; took the skin off, but the cast was on it.

Q. Now as you left the stand, Mr. Zwickl, the court called your attention to some reference you had made to a leader or a gutter. I didn't hear anywhere in your testimony where you had made any mention of a leader or gutter. What did you say about that? A. About what? ³⁰

Q. Just what I said.

BY THE COURT:

Q. About the leader or gutter; what did you say about it? A. How the leader was? ⁴⁰

Q. Well, in your direct examination you said, as I got it, "I saw the leader or gutter." A. Well, I didn't get it at that time; but naturally when you fall down or something, it is natural the first minute you look you fall over.

Q. Look for the cause? A. Yes.

Q. What did you see? A. I looked and I seen a piece of ice hanging down on the leader and a streak of whatever that was, or water or ice, that
10 came down from that leader over the pipe.

Q. Did the pipe run across the sidewalk? A. No, it must have run in liquid form.

Q. Not what it must; did you see it? A. I saw it.

Q. Was there any ice on the walk when you slipped? A. Well, I didn't see it when I slipped, but you know you turn around there when you lay there and you see the ice and snow and everything.

BY MR. CARTON :

20 Q. Did you see any ice there any other place or leader on Broadway as you came down that way? A. I didn't take notice. It was nice walking all down.

Q. And you didn't see this ice on the leader until after you had fallen to the ground? A. Yes.

Q. Did you become unconscious when you fell? A. I didn't become unconscious. I was hurt a lot.

Q. You were hurt a lot? A. Yes.

Q. And the first thing you looked at was up on
30 the building to see about the leader, was it? A. I didn't look for the leader, I looked for the cause where I fell down.

Q. Well, you didn't see this ice hanging when you were looking at the place where you fell down? A. It was right in front of me, couldn't help see it.

Q. You couldn't help seeing what? A. It was right in front of me.

Q. Looking in front of you where did that take your vision to? A. As I walked down I slipped
40 and fell and it turned me around on that spot and

as I laid there I looked for the cause what I fell for.

Q. I understood you to say you looked up at the building. A. Well, I seen the building but I seen that ice hanging down on the building.

Q. Where was this ice you saw? A. On this leader hanging there.

Q. Did you see men working on that building? A. I didn't see nobody working on that.

Q. You are very sure, are you, that that was the 10 first ice you struck as you walked down Broadway that afternoon? A. First slipping.

Q. What time of day was it? A. It must have been around two o'clock.

Q. Was the sun shining on that side of Broadway? A. The sun was shining on that side. It is the south side. It must be shining on that side.

Q. But the sun doesn't hit the south side of Broadway at all, does it, in the wintertime? A. It does so. 20

Q. Do you know whether it was that day or not? A. What is that?

Q. Do you know whether it shone on that side of the sidewalk that day or not? A. I couldn't tell you.

Q. Do you know whether there was any sun at that time or not that day? A. What is that?

Q. Do you know whether there was sun shining or not that day? A. There was sun shining that day. 30

Q. There was sun shining? A. Yes, sir.

Q. How much of the sidewalk where you fell, at about the point where you fell, had ice on it? A. Just about the particular place I fell.

Q. And outside of that the sidewalk was free from ice? A. Yes, sir.

Q. Quite sure about that? A. Yes, sir.

Q. How big a space did this ice cover? A. About a foot. 40

Q. Just one foot. A. Coming down from the building.

Q. What were you looking at when you walked down the sidewalk that day? A. What was I looking at?

Q. Yes. A. I walked home.

Q. What? A. I didn't look at any particular thing.

Q. Did you observe the sidewalk as you went
10 along? A. I walked along as everybody else would.

Q. Did you observe the condition of the sidewalk as you walked down? A. It was all right all over.

Q. Well, did you observe it?

BY THE COURT:

Q. Did you look? A. Did I look? Sure, I looked.

BY MR. CARTON:

20 Q. You say the sidewalk was all right but it was not all right, was it? A. No, not on that spot.

Q. What? A. No, not at that spot.

Q. Well, didn't you look to see whether it was all right or not? A. I didn't look for any falls.

Q. What? A. I didn't look for any ice. I just walked home, you know, as—

Q. What were you carrying? A. I carried a catalogue.

Q. What, a catalogue? A. A catalogue.

30 Q. What sort of catalogue? A. From Butler Brothers, a wholesale house in New York.

Q. Where did you get that catalogue? A. In Koops'.

Q. Koops'? A. Yes. The grocery store up the street.

Q. How far is Koops' from the point where you fell? A. About three houses above.

Q. Were you opening up and looking at that catalogue as you walked along? A. I had it under my
40 arm.

Q. Did you have anything else under your arm?

A. That is all.

Q. You haven't any books showing what business you were doing last February 12th, have you?

A. I couldn't show you my books.

MR. PARSONS: I wish to offer in evidence the weather report from the Signal Corps at Camp Vail.

10

(Mr. Carton consents.)

THE COURT: There is no objection to it, I understand?

MR. CARTON: No objection.

(Paper marked Exhibit P-5.)

CHARLES O'NEILL, *Sworn for Plaintiff.*

Direct Examination BY MR. PARSONS:

20

Q. Mr. O'Neill, you live where? A. Long Branch, Ellis avenue.

Q. And during the winter of 1925 and 1926 for whom were you working? A. Zuckerman & Hiles.

Q. What is their business? A. Coal.

Q. Did you deliver any coal to any of the stores in the Broadway theatre? A. Reinhardt's and Tappan's and Butler's.

Q. Will you tell us where Mr. Reinhardt's store is? A. Mr. Reinhardt's store is the third from the Broadway—or which way do you want me to go?

Q. Just locate it, please. Suppose you take it from the east end of that Broadway theatre building. A. Reinhardt's is the third store.

Q. Now did you deliver any coal there during the winter of 1925 and 1926? A. Right.

Q. And did you deliver coal there before February 12, 1926, before Lincoln's birthday, last Lincoln's birthday? A. Yes.

Q. Did you in delivering coal to Mr. Reinhardt's

store notice any ice there on the sidewalk? A. I did.

Q. And this was before Lincoln's birthday? A. Yes.

Q. What did you do when you noticed that ice? A. I didn't do anything, I only made the remark that the leader should be fixed on the building.

MR. CARTON: I move to strike that out.

10 MR. PARSONS: I consent that it be stricken out.

THE COURT: Strike that out. That is, he may go on and say what he observed, not what he remarked, what it was.

Q. When you looked what did you see? A. I seen the ice hanging from the top of the leader and from the bottom where it was overflowed from the bottom.

20 Q. Now will you just tell us on the bottom of the leader what condition you saw there? A. The bottom of the leader had a gap in it about that far.

Q. From what? A. From the base, from the bottom; a gap of about that far, and the top was open, and by the water freezing coming over it made an overflow.

Q. You say the top was open? A. Yes.

Cross Examination BY MR. CARTON:

30 Q. When did you observe that, O'Neill? A. Oh, that was afterwards, when I went to Reinhardt's store, about the third time I went there.

Q. When was it, last January, February, March, or when? A. Around about in the last of January.

Q. The last of January? A. Yes.

Q. Well, what time in the last? Was it the last day or the 15th, or what? A. I couldn't tell you; near the last of January.

40 Q. How do you place it as being near the last of January? A. Because I know it, because I did-

n't go till about the middle of January to work for Zuckerman & Hiles.

Q. What attracted your attention to this situation at that time? A. By me carrying coal in and slipped my own self.

Q. When was that? A. About the last of January, pretty near the last of January.

BY THE COURT:

Q. Where did you slip? A. Right there between Sherman's and Reinhardt's. 10

BY MR. CARTON:

Q. What made you slip, ice on the sidewalk? A. Yes, because I couldn't get in to the gutter, the snow was banked up. There was a path by Ledwitz's and I had to go by Ledwitz's.

Q. What were you, delivering coal to Ledwitz? A. No, Reinhardt's.

Q. Did you speak to Mr. Reinhardt about having his sidewalk cleaned? A. No, Mr. Reinhardt's sidewalk was clean. All the sidewalks had been cleaned along there but— 20

Q. You were delivering coal at Reinhardt's, weren't you? A. Yes.

Q. What were walking on anybody else's sidewalk for? A. Because you couldn't get in there.

Q. Why not? A. Because snow was banked up so you couldn't get in. I had to leave my truck there and come across.

Q. In front of whose store was it that you slipped? A. Between the two stores, Reinhardt's and Ledwitz's. 30

BY THE COURT:

Q. In what building is the Reinhardt store? A. It is the adjoining building to the Broadway theatre.

Q. Where is the Ledwitz store? A. The Ledwitz store is next to Reinhardt's.

Q. What building is that? A. All in one building. 40

Q. All in the Broadway theatre building? A. Yes, all in one floor together.

BY MR. CARTON:

Q. You say there was so much snow in the street on Broadway that time that you couldn't back in to the curb? A. Absolutely.

Q. What? A. Yes, sir.

Q. Was there a path beaten into the sidewalk?
10 A. Yes, there was a path by Ledwitz's at the time.

Q. Well, there was snow and ice all over the street at that time, was there not? A. Yes.

Q. You never slipped anywhere else except on this place, did you? A. Oh, yes.

Q. You did? A. Oh, yes.

Q. It is not an unusual thing for you to slip when you are carting coal to people's buildings in the winter time, is it? A. No.

Q. Where was this gap, I think you described
20 it—where was this gap that you observed? A. The gap was from the bottom as you go into the drain.

Q. Well, explain to us. A break in the gutter?
A. No, but where the leader is not all the way down into the bottom.

BY THE COURT:

Q. You mean the leader stopped? A. Yes.

Q. About how many inches? A. About that far.
(Indicating.)

30 Q. About six or eight inches from— A. From the bottom.

Q. From the bottom? A. Yes, where it goes into the—

MR. PARSONS: His indication would be nearer two for the purpose of the record. He was indicating with his fingers then.

Q. Well, indicate again how much there was. A. About that much. (Indicating.)

40 MR. PARSONS: About three now.

THE COURT: Three inches.

THE WITNESS: Either that, three or six inches. I didn't stop to measure it, you know.

BY MR. CARTON:

Q. Three to six inches from a point flush with the sidewalk, three to six inches above that? A. Yes, sir.

Q. Then this thing that you refer to as a gap was really the opening between the lower end of the gutter and the part that ran under the sidewalk? A. Right.

Q. You are sure about that, are you? A. I am.

Q. Now what did you observe that was happening because of that gap? A. Why, I didn't know, because I didn't pay no attention.

Q. What attracted your attention to the gutter? What had that to do with what you were doing? A. By the ice being there.

Q. You saw ice where this gap was? A. Absolutely.

Q. Wasn't there ice all up and down the side of the building? A. There was.

Q. And all up and down the side of all the buildings on that side of Broadway at that time? A. No.

Q. Did you observe whether there was or not? A. Yes, because I delivered all over Broadway.

Q. And you didn't find ice on any other part of Broadway except this point; is that right? A. Found it on the sidewalk different places.

Q. And you had to be careful when you found ice on the sidewalk, didn't you?

(Objected to as not proper cross examination.)

THE COURT: Of course he is not an expert. I can answer that as well as he. I will give you some law on it after a while.

Q. How does this gutter—what does it do, run up the side of the building? Is it flush with the building or flush with the wall of the building or does it protrude from the wall? A. Comes from the wall.

Q. Outside of the building? A. Yes.

Q. And then how does it extend from the building across the sidewalk to the gutter, the curb, the drain? A. Comes down on the side and goes underneath. I guess there is a pipe goes underneath the sidewalk to the gutter.

Q. And what covers that pipe, if anything? A. Concrete, I think, if I ain't mistaken.

Q. Is that pipe flush with the sidewalk? A. No, it is underneath the sidewalk.

Q. Well, is the gutter pipe flush with the sidewalk? A. I imagine it is.

Q. Let me show you a picture.

MR. CARTON: I think it is consented that these photographs may be offered. Will you look at them?

(Photographs examined by Mr. Parsons.)

MR. CARTON: By consent I would like to have these photographs marked.

(Photographs marked Exhibits D-1 and D-2.)

BY THE COURT:

Q. How long had you noticed that pipe in that condition? A. I don't remember.

Q. You don't remember? A. I don't remember.

Q. Did you notice it before the day that you speak of? A. Yes.

Q. What? A. I think I did before that, about two or three days before that, I went into there before I went into Butler's.

Q. Did you see this before? A. Yes.

BY MR. CARTON:

Q. I have here a picture, Mr. O'Neill, marked

Exhibit D-1. Do you recognize that picture as showing a part of the building in question and the sidewalk in front of it? A. Yes.

Q. I show you also Exhibit D-2, which seems to show the Ledwitz store. A. Yes.

Q. Do you recognize the situation shown in that photograph? A. I do.

Q. As being in front of the Ledwitz store and the radio store? A. Yes.

Q. Where was the building located to which you were carrying coal?

(Witness indicates.)

Q. The radio store? A. Yes.

MR. PARSONS: May I ask, if this examination is going on, if Mr. O'Neill could step down in front of the jury and point out to the jury so they can get it?

MR. CARTON: We will show them to the jury.

20

Q. When you pointed your finger to the picture you pointed on the right hand side of the photograph under the sign "radio," didn't you? A. Yes, sir.

Q. Directing your attention to Exhibit D-1, does that show how the gutter is carried, continued from the building to the curb across the sidewalk? A. Yes.

Q. And does that show the same situation as you observed as you traveled by there? A. Now? 30

Q. Now or then. A. Then there was ice all in here then.

Q. Well, in the wintertime. A. At that time. Otherwise it is the same.

Q. I mean when there wasn't ice, when it wasn't covered with ice, in the summer time? A. It was the same as it is now.

Q. Will you indicate on this photograph where you say this gap was? A. Right in here.

40

MR. PARSONS: I would like to have that indication before the jury.

THE COURT: I think he may step down. You had better step down and show the jury.

MR. CARTON: Yes, I think he had better.

Q. Suppose you stand here so all the jury can see you. A. Right in here. (Indicating.)

10 MR. PARSONS: Just step down here and show all of them exactly.

(Witness indicates to jury.)

BY THE COURT:

Q. Now the black mark in that picture is what, O'Neill? Indicate the drain and the pipe and the surroundings there.

(Witness indicates.)

BY MR. CARTON:

20 Q. Now on this photograph Exhibit D-2 will you point out to the jury where you saw that gap or break?

(Witness indicates.)

A. Just the same on one as it is on the other.

MR. CARTON: Indicating a point at the base of the building and the sidewalk.

30 Q. Did you observe what sort of a gutter that was coming down the side of the building? A. Copper gutter.

Q. Copper gutter? A. Copper leader.

Q. How long have you lived in Long Branch? A. Twenty-three years.

Q. Do you know how old this building is? A. No, I can't call how old it is, but I know when it was built.

Q. Built in the last few years, was it not? A. Yes, there used to be an open air picture place
40 there before that.

Q. But you say that a part of this copper gutter was broken or gone and left a gap there, do you? A. I don't know if it was broken off or not long enough to reach the ground, but there was a gap in there.

Q. And you say you saw water coming out of that pipe? A. Well, there was ice coming out and the water was froze up and it couldn't come out.

Q. Well, what did you see there, ice or water?

A. Ice.

10

Q. That stopped the water coming, did it, that ice? A. Yes.

Q. You say that was about the middle of January, the latter part of January? A. The latter part of January.

Q. How did you come to notice that, O'Neill?

A. By carting coal.

Q. How much of this sidewalk had ice on it at that time you were delivering coal? A. From the beginning, from the building right on down.

20

BY THE COURT:

Q. Over the drain? A. Over the drain and all.

BY MR. CARTON:

Q. And for a considerable distance each side of the drain, I suppose? A. Yes.

Q. How far? A. Oh, I don't know, I imagine about three or four feet; because there was a lot of ashes spread over it at the time too.

Q. Oh, there was ashes? A. There was.

Q. Do you know who put the ashes on it? A. I 30
imagine the janitor put it on there.

Q. Do you know who put it on? A. No, I dont know.

Q. In front of whose building was that, the radio or Ledwitz building? A. Between the both of them.

Q. Between both of them? A. Yes.

Q. When had you been there after the latter part of January, or had you been there any time from this time you delivered coal, the latter part of Jan- 40

uary up until the 12th of February? A. Oh, I imagine it was after the 12th of February when I was there again, because I didn't know nothing about the accident at all.

Q. You don't know anything about the condition of this sidewalk at the point of time around February 12th, do you? A. No, I don't.

10 SIDNEY REINHARDT, *Sworn for Plaintiff.*

Direct Examination BY MR. PARSONS:

Q. Mr. Reinhardt, you live where? A. 289 Broadway.

Q. And your business is what? A. Radio business.

Q. And in the winter of 1925 and 1926 and at Lincoln's birthday on February 12th, 1926, where was your place of business? A. In the Broadway
20 theatre building, Long Branch.

Q. And who is your landlord? A. Walter Reade, or the company, I don't know exactly who it is.

Q. With reference to your place of business among those stores there can you tell us how many stores your store is east of the entrance to the Broadway theatre? A. It is the fifth store.

Q. The fifth store east? A. Yes, counting every one.

Q. What is east of yours? A. There is a brick
30 wall and then Ledwitz's store.

Q. Do you know how many leaders or drain pipes from the roof are in the face of that building between the entrance to the Broadway theatre and the end of those buildings? A. I don't know exactly. There is only one that I know of. That was next to my store.

Q. How long had you occupied that store, Mr. Reinhardt? A. Approximately two years, one way or another.

40 Q. Now can you tell us about the condition of

Sidney Reinhardt, Direct

that leader while you were occupying that store prior to February 12th, 1926? A. Well, there has always been a freezing. Whenever it is cold weather it freezes, the water is always flowing out of the top and bottom on the sidewalk rather than in that little drain, whatever they call it, that runs in the sidewalk.

Q. Had you seen anybody in reference to that?

A. Why, yes.

Q. Who did you see? A. Well, I seen every man-10
ager they had there.

Q. And what have you told them? A. Why, I
told them they better fix it.

Q. What did they say to you? A. They would.

BY THE COURT:

Q. Covering what period of time was that? A.
Every winter that I have been there, sir.

Q. How long have you been there? A. Two win-
ters. 20

Q. So that the last two years, eh? A. Yes, si

Q. You say that condition of that pipe has ex-
isted. A. Yes, sir.

BY MR. PARSONS:

Now on this day in question when Mr. Zwickl
was injured, Mr. Reinhardt, do you know if there
were any men working on the roof at that time?

A. I don't know.

Q. You say you don't know whether there was
anybody working on the roof at that time? A. No. 30

MR. PARSONS: Can I use those pictures, Mr.
Carton?

MR. CARTON: Yes.

Q. Now, Mr. Reinhardt, please step down here in
front of the jury. I show you Exhibit D-2. You
just stand behind me and can you look over the top
of that picture? A. Yes, if I see it. 40

Q. Now just show us your store, Mr. Reinhardt.
A. Right here.

Q. That is your store? A. Yes.

Q. Will you show us the leader? A. Why, it is running down here, this portion right here.

Q. How does the water get from the leader over the sidewalk? A. Through a cavity in the sidewalk. I don't know whether it is a pipe or not.

Q. Can you tell us with relation to this leader, 10 showing you also Exhibit D-1, prior to February 12th, and during last winter prior to February 12th, can you tell us the condition of the leader with reference to the drain pipe underneath the sidewalk? A. Well, there has always been a gap there.

BY THE COURT:

Q. How wide is that gap, Mr. Reinhardt? A. Why, I should judge approximately two inches or 20 so. I don't know exactly; I never measured it.

THE COURT: Proceed.

BY MR. PARSONS:

Q. Now referring to this picture, Mr. Reinhardt, Exhibit D-2, with reference to the water coming in your store will you point out where it came in?
A. Well, I don't know where it came in.

Q. Well, did you examine the outside? Can you 30 say where the water came down then? A. Well, the water came down starting from this end of the store, approximately down to the middle of the store, over the window and fell down on the inside and outside of the window.

Q. And during the winter was there any ice along this gutter—the leader pipe, rather? A. Well, every time it freezes.

Q. Now you say you have spoken prior to February 12th, you have spoken to the managers 40 there? A. Yes.

Sidney Reinhardt, Cross.

Q. About fixing this? A. Yes.

Q. And they said they would fix it? A. Yes, sir.

Cross Examination BY MR. CARTON:

Q. How long have you been a tenant in that store, Mr. Reinhardt? A. Approximately two years.

Q. About two years, did you say, Mr. Reinhardt?
A. Yes, sir. 10

Q. When did you first observe that the copper gutter running down the side of the building didn't connect up with the drain running under the sidewalk? A. It was during the first year before that. Of course we first had some discussion as to what caused the water to come in, and naturally having a tinsmith next door we went out and tried our own views on the proposition, we observed it.

Q. You found there was an opening there of about two inches? A. Approximately so. 20

Q. Did you ever have your tinsmith fix that? A. I have no tinsmith. I said there was a tinsmith next door.

Q. Oh, you mean the storekeeper? A. Yes.

Q. Who is that? A. Ledwitz.

Q. You pointed on this photograph Exhibit D-2 when you were before the jury and stated that the water, as I understood you, ran over here and ran down; is that so? A. No, I didn't say that at all.

Q. I misunderstood you. What did you say 30
about it? A. I said that from this point, the end of the store to approximately in the middle, there several points within that space the water fell inside the window and outside the window.

Q. Well, I think that is what I asked you. A. You said it ran down to the end of the store and ran off. I didn't observe that at all.

Q. Well, will you tell us again what you did observe? A. Between this space at the end of the store and the middle window, approximately in 40

several spaces the water fell inside and outside the window.

Q. And where did that water come from, if you know? A. Why, I don't know.

Q. It didn't come from this gap down here in the sidewalk, did it? A. I don't know.

Q. Well, was there anything unusual in rainy weather in water falling down there? A. Why, yes, any time it rained I got my share in the store.

10 Q. You mean it ran down inside your building?

A. Yes.

Q. How long had that been happening? A. As long as I can remember.

Q. The whole two years you have been there?

A. Yes, sir.

BY THE COURT:

Q. There was no repair made of the pipe? A. I don't know if there was or wasn't. They said they
20 were going to repair it. Whether they did or not I don't know.

BY MR. CARTON:

Q. When did you first observe this gap at the point of the sidewalk? A. As I told you before, it was the year before we were speculating as to what might cause the thing, and naturally I examined the entire pipe.

30 Q. You made no effort to have this cured after you saw this gap there, did you? A. No, sir.

Q. And you say it did cause you annoyance? A. Yes, sir.

Q. You didn't have any plumber or tinsmith make an examination of the leader? A. No, sir.

MR. PARSONS: I object. It was immaterial. It was not his duty. He was a tenant.

THE COURT: It is proper to ask that question, I suppose. It might verify the situation.
40 For that purpose it is admissible.

Q. Now you say you notified some one of this condition. Who did you notify? A. I notified Mr. Lee, Mr. Burns, Mr. Hoff—every manager they had there.

Q. What notice did you give them? What did you say to them? A. Why, I told them that water was leaking in the window..

Q. Well, what you were complaining of was water coming in your building, was it not? A. That is right. 10

Q. Did you ever notify them about the condition of the sidewalk or there being ice on the sidewalk?

A. That is not my place.

Q. Did you ever notify anybody to that effect? A. I might have. I don't remember if I did.

Q. Did you? A. I dont remember.

Q. Then you didn't? A. I didn't say I didn't at all.

Q. Then you dont say you did, do you? A. I dont say that I did. 20

Q. Which is it? A. I dont remember.

Q. Then why do you say you did or you didn't, if you dont remember? A. Well, it is either one.

Q. Well, it might not be either? A. That is right.

THE COURT: He may have and then again he may not. "I dont remember which." I think that has a definite meaning. Well, anything more?

MR. CARTON: He may have, your Honor, 30 but I cant get it through my head.

THE COURT: Well, you can argue it to the jury.

Q. How long had Mr. Hoff been manager there?

A. I dont know the exact time.

Q. You know Mr. Hoff, dont you? A. Yes, sir.

Q. When did you see Mr. Hoff about this matter prior to February 12th last? A. I dont remember. 40

Solomon Ledwitz, Direct.

Q. Well, was it a month or two months? A. I dont remember at all.

Q. Do you remember what the weather conditions were around February 12th last year? A. Yes, they were quite cold.

Q. Quite cold? A. Yes, sir.

Q. A lot of snow on the street and sidewalk? A. I dont know about the sidewalk. I didn't do very much on the sidewalks of Broadway.

10 Q. You have to walk on them to get into your store? A. That is right.

Q. Any ice on the sidewalk? A. If I recollect correctly there was ice between the two buildings, that is all.

Q. Have you any independent recollection of whether there was any ice on any other part of the sidewalk? A. Well, I know there was none on mine because I cleaned it off.

Q. You cleaned it off? A. Yes.

20 Q. How about Ledwitz? Do you know whether there was any on the front of his? A. No, there was none there, because that is where I came in, through that entrance there.

SOLOMON LEDWITZ, *Sworn for Plaintiff.*

Direct Examination BY MR. PARSONS:

Q. Mr. Ledwitz, you live where? A. 181 Second
30 avenue.

Q. What town? A. Long Branch, New Jersey.

Q. Your business is where? A. 130 Broadway,
Long Branch.

Q. What place is that? A. Broadway theater
building.

Q. Your landlord is whom? A. Mr. Reade now,
Walter Reade.

Q. Your store is where with reference to Reinhardt's store? A. Next door to Reinhardt's going
40 east.

Q. Now between your store and Reinhardt's store what is there there, Mr. Ledwitz? A. There is a pillar about starting eighteen inches or so.

Q. I show you this Exhibit D-2 and D-1. Referring first to D-2, will you just step down in front of the jury, please and point out on that picture your store?

(Witness indicates.)

Q. And where is Mr. Reinhardt's store?

(Witness indicates.)

10.

Q. Are you still a tenant there, Mr. Ledwitz?

A. Yes.

Q. Now you can just take the stand, Mr. Ledwitz, please. On this day in question, February 12th, 1926, where were you? A. In the store.

Q. You were in the store? A. Yes, sir.

Q. Were you present thereabouts or shortly when Mr. Zwickl fell? A. I was in the store at that time.

Q. What did you do? A. We picked him up and 20 brought him in the store.

Q. Now around the site where he fell what was there? A. Why, there was ice there.

Q. Just tell us the extent of that ice, Mr. Ledwitz, please. A. What do you mean by the extent of the ice?

Q. Where the ice ran, what distance. A. Well, the ice when I came in the morning—

Q. No, I mean just at that time when you went out there and saw Mr. Zwickl. A. Just facing the 30 plate towards the leader.

Q. When Mr. Zwickl fell what did you do? A. Picked him up and brought him into the store and made him comfortable.

Q. Now previous to that time, before the time Mr. Zwickl fell that day, were there any men there working? A. Yes.

Q. Where were they working? A. On the building, on other leaders except this one, too.

Q. On the other leaders? A. Yes, sir.

40

Q. And with reference to this leader, Mr. Ledwitz, where is that other leader? A. There is one about two stores towards the Broadway theatre going from east towards the west.

Q. That would be in a westerly direction from this one? A. Yes, on the same side of the wall.

Q. Do you do roofing work, Mr. Ledwitz? A. Yes, sir.

Q. And assuming, Mr. Ledwitz, that the weather
10 is freezing and that there is snow on the roof of a building and that building is occupied with heat in the building, despite the weather being freezing, can you tell us what would happen to the snow?

MR. CARTON: I object. The jury will judge as well as Mr. Ledwitz.

MR. PARSONS: I suppose I had to have have something in the record.

20 THE COURT: Oh, yes. I think that is not the subject of a hypothetical question. Cant we take judicial notice of the fact that it is a matter of common knowledge that water will freeze and snow will melt and drain pipes carry it off and sometimes they dont? What do you want to show?

30 MR. PARSONS: What I want to get in the record—I have already offered in evidence the weather report to show that at all times it was freezing during this period of time; but nevertheless that this snow collecting on a building, that this store being occupied and the heat there, the snow on the roof melted and water flowed out.

THE COURT: He might have observed it himself and without testifying as an expert.

BY THE COURT:

Q. Did you see the snow melting there? A. I couldn't see it, it was on another roof.

40 Q. Are you able to answer this question that was

put to you? A. Well, if a store is heated, of course, like any other house, the sun will melt the snow from the top, and if there is any heat escaping from the store through the ceiling and through the attic way, that will just melt it a little, I should think, I am not quite positive about it, but my assumption is that the heat will do a little melting to most anything that is freezing.

Cross Examination BY MR. CARTON: 10

Q. Were these stores all along there occupied?

A. What is that?

Q. Were these stores all along in that building occupied? A. They were all occupied at that time.

Q. Did you have heat in the store? A. Yes, sir.

Q. Do you know that Mr. Reinhardt had heat in his store? A. Yes, sir.

BY THE COURT:

Q. Did you see the condition of that pipe on the 20 morning of this accident? A. Yes, sir.

Q. What was it? A. Well, it seemed that somehow or other—

Q. Not what it seemed, what it was. What condition? What did you see? A. It was not clean.

Q. In what respect? A. Well, it was covered with ice.

Q. Covered with ice? A. Yes.

Q. Was there ice on the sidewalk? A. Yes, right from the leader. 30

Q. Right from the leader? A. Right from the leader, right around here.

Q. How far did the ice extend toward the curb? A. Well, the ice extended quite a bit out.

Q. You saw that? A. Yes, sir.

Q. And how wide a space was covered by the ice? A. Well, I should judge about three feet.

Q. On either side of the drain? A. Well, just say a foot and a half on either side of the drain. 40

Q. You saw that yourself, did you? A. Yes, sir.
Can I speak any further?

Q. Go on. A. When I came to the store in the morning I found the ice there and I took an ax before I opened the store—we usually clean our sidewalks off—and I chopped off as much as I could and then from the gutter towards the store. But the ice over here was quite heavy, but over here was much thinner, so I found I could dig a path so people could walk in, with some ashes and stuff, as
10 much as I could help.

Q. You put ashes on it? A. Yes.

Q. You did that yourself? A. Yes, sir.

Q. That morning? A. Yes, sir.

THE COURT: Proceed.

BY MR. CARTON:

Q. February 12th last was a very cold time, was
20 it, Mr. Ledwitz? A. It was.

Q. What was your observation that day with regard to the icy condition of the sidewalk on the south side of Broadway at this point and at other points? A. Well, I seen only this point.

Q. That is all the ice you saw? A. Yes, because that was my store and that was my place and I didn't go anywhere else.

Q. Did you have occasion to walk up or look up and down Broadway that day to see whether there
30 was any more ice on the sidewalk?

MR. PARSONS: I object. It is not cross examination. There has been no evidence by this witness about that on the direct.

THE COURT: I will allow it.

A. As far as I can remember maybe there was, but I am not positive, as I didn't walk up or down Broadway; I came there in a car.

Q. Do you know whether there was any ice on

Broadway all the way up and down?

(Objected to.)

THE COURT: He may testify to that, in view of his previous answer.

A. May be true, but I didn't see it.

BY THE COURT:

Q. As a matter of fact, you dont know? A. I dont know.

10

BY MR. CARTON:

Q. Does the sun shine on the south side of Broadway in the winter time? A. Not very often. It does get—

Q. Hasn't it been your observation that when there are snowstorms that there is always ice on the south side sidewalk of Broadway there?

MR. PARSONS: I object. That is clearly improper, what it has generally done in the past. 20

MR. CARTON: No, he has talked about ice on the sidewalk. I think it is proper cross examination.

MR. PARSONS: His attention was directed to this one particular time but not the general custom. I think it is objectionable.

THE COURT: He may answer it.

(Objection noted for plaintiff as ground of appeal.)

(Question repeated.)

30

A. There is always ice on all sidewalks, but we usually kept ours cleaned off as soon as it came, because we always had shovels and scrapers in front of our store, that is, we are selling them, and it is always a practice to keep the street where I worked clear over in front of the store.

Q. But you were not able to do it this day in question, were you? A. Well, I done as much as I could to make a path for people to get through. 40

Q. Where did you make this path? A. From the gutter towards the store, like one block. The sidewalk is parted in three or four blocks.

BY THE COURT:

Q. Was there snow on the sidewalk at that time?
A. On the sidewalk?

Q. Yes. A. Well, there was until I came to the store and opened the place of business and cleaned
10 it off.

BY MR. CARTON:

Q. There was snow on the sidewalk that morning, wasn't there? A. When I came to the store, yes.

Q. Do you remember what the conditions were the day before, whether there was snow or ice on the sidewalks before the morning of the 12th? A. That I can hardly remember.

20 Q. You haven't any independent recollection about it now? A. No.

Q. But you do recall that there was snow on the sidewalk the morning of the 12th? A. The morning when I opened my store, yes.

Q. Was that fresh snow or snow that had been there several days? A. Fresh snow.

Q. But there had been a snowstorm several days prior to that time, hadn't there? A. There was.

BY THE COURT:

30 Q. Did you see Mr. Zwickl fall? A. No, I didn't. I was in the store at the time, on the floor from the doorway.

Q. Did you go out before he got up? A. Yes.

Q. He was lying on the walk when you came there? A. Lying on the walk when Mr. Wolf, the manager, and myself were in the store at the time.

Q. Was there ice where he fell? A. Yes, sir.

BY MR. CARTON:

40 Q. I was about to ask you if it is not a fact that

there was considerable snow and ice banked in the street part of Broadway that day? A. Yes, there was.

Q. What? A. Yes, there was.

Q. And it was banked right up even with the gutter and sidewalk, was it not? A. Well, that I couldn't remember, if they cleaned the gutterways from the city, too, at that time I just couldn't remember.

Q. Well, the gutterways had not been cleaned by 10 the city that day, had it? A. Well, the street cleaner used to come up with a shovel—

Q. I am asking you what you remember about this day, not what he used to do. A. I couldn't recollect seeing him.

Q. The cars were obliged to park out inside of the street, were they, and not come up to the gutter? A. No, certain places, but in front of my place they were able to.

Q. You had an opening made into your place? 20
A. Yes.

Q. Was the entire sidewalk in front of your place covered with snow that morning? A. When I opened the place of business, yes.

Q. I suppose if there was snow in one place there was in another? A. I don't remember. There was in front of my place. I just couldn't say whether there was anywhere else.

Q. Do you remember making the statement that you shoveled a path about four feet wide on the 30 sidewalk in front of your place that day? A. Yes.

Q. And was that to let pedestrians go by? A. For that purpose.

Q. Now when you shoveled that snow off was there some ice left on the sidewalk? A. Not in the four feet where I dug it.

Q. But at other points on the sidewalk there was? A. Only in that direction, you know, from the leader down towards the gutter.

Q. Do you remember definitely the character of 40

the snow that had fallen and that you shoveled off that morning, whether there was a result of water, there was ice left on the sidewalk when you shoveled it off as a result of the damp snow or whether it was a dry snow and you took it all off? A. Well, there was very little snow that I can remember, but it seemed that it thawed towards evening and it was frosty towards morning.

Q. It was freezing all that day, was it not, Mr. 10 Ledwitz? A. I couldn't just remember.

Q. The weather report seems to indicate that it was. There was no melting on the sidewalk that day at any time, was there? A. Not that I can remember.

Q. Did you observe just where Mr. Zwickl fell? A. After I went out to pick him up, yes, sir.

Q. And where was that with relation to the four foot path that you had dug? A. It was about the middle of the second block. I think the sidewalk 20 goes in four blocks, four, eight or twelve feet.

Q. Is that the width of the sidewalk, twelve feet? A. I should think it is twelve feet.

BY THE COURT:

Q. How far from the building, do you recall? A. About six feet.

Q. From the building? A. Yes, sir.

BY MR. CARTON:

30 Q. Was that where you found him when you came out? (Indicating on photograph.) A. Yes, sir.

Q. About six feet from the building? A. Yes, sir.

Q. Where was this path that you dug that morning? A. Right here. (Indicating.)

Q. Within three or four feet of the curb? A. Yes, sir.

Q. And you dug that path all in front of your 40 building, I suppose? A. Well, you see the side-

walk, Broadway is pitched towards the east, and anything that came down, ice or anything, comes towards the east.

Q. Runs to the gutter? A. Yes. And this here was something like this here. Now this here was clean as we left it the day before when we closed business, and in the morning I found this bad right here.

Q. Then you think snow had fallen that night, in the night, had it? A. Possibly it did. 10

Q. Well, it must have. What have you to say as to whether Reinhardt's sidewalk was clean or not that day? A. I dont remember that.

Q. Couldn't remember it? A. No, sir.

Q. But you do know that in front of your place you dug a path some four feet wide? A. It was perfectly clean all the way from the inside on this part right here, where the ice was, and here is what I chopped out a path right here.

Q. Indicating a point over the gutter to the side-20 walk? A. On the sidewalk.

Q. And you did dig a path across that gutter clean. A. Yes, sir.

Q. And was, as you intended, for the safe travel of pedestrians? A. Yes.

Q. Now you say the point where you picked Zwickl up was several feet nearer the building, the path? A. About the center of the sidewalk.

Q. Who heats your building? A. We do.

Q. You mean the tenants do? A. Yes. 30

Q. Did you have the place heated that day? A. Yes, sir.

Q. Do you recall whether or not as a fact that the gutter leading from the sidewalk up to the building was frozen up that day? A. Well, you mean under the sidewalk?

Q. No, I mean now from the sidewalk, from the bottom of the gutter, the point of the sidewalk, up to the building.

THE COURT: The leader.

Q. The leader. A. Was frozen?

Q. Yes. A. Well, I judge it must have been frozen.

MR. CARTON: I ask to strike it out.

THE COURT: Your best recollection.

Q. Do you know whether it was or not? A. The
10 ice was outside the leader. I didn't look into the
leader to see whether there was ice in there or not.

Q. Do you know whether there were men working on that day with a view of thawing it out, that very day?

(Objected to.)

THE COURT: I dont see why you object to that. Go on.

A. On the pipe facing over my store?

20 Q. Yes. A. On that day?

Q. Yes. A. Not before the accident happened.

Q. Not before the accident happened? A. They were working—

Q. Were they there after the accident happened that day? A. Yes, they were working all the morning on the building.

Q. Well, the accident happened in the afternoon? A. Yes.

Q. Then they were working there before the ac-
30 cident happened? A. On other leaders.

Q. On other leaders? A. Yes.

Q. On this building? A. On this building.

Q. Oh, I see. You observed them working there, did you? A. Yes, sir.

Q. Who was working there? A. Mr. VanPelt, known as a tinner, I know.

Q. Do you know whether the gutter running under the sidewalks out to the street, whether that was frozen or not that day? A. That I couldn't say,
40 whether that was frozen, because it was covered.

Motion for Nonsuit.

Q. You say you put ashes on the sidewalk? A. Yes, sir.

Q. Where did you put the ashes? A. Just wherever there was ice.

Q. Do you know what time of day you did that? A. I did that in the morning.

Q. On more than one occasion? A. On more than one occasion, yes, sir.

Q. How many times? A. Well, every time I put it on people walked and scraped it off, then I would put some more on.

Q. You did that two or three times during the day? A. Yes, sir.

PLAINTIFF RESTS.

MOTION FOR NONSUIT.

MR. CARTON: If you Honor please, I wish to make a motion for nonsuit. It is my contention that no actionable negligence has been shown in this case by the plaintiff's witnesses. Without attempting to recite the facts, if stated briefly it would show a situation where there were buildings on the south side of Broadway in Long Branch, defendant's and other buildings; that a leader was attached to the building running under the sidewalk to the curb to take away the drain. The plaintiff has sworn that he was walking down this sidewalk, that there was ice on the sidewalk opposite this drain and he fell and met with this accident.

Now it is my contention that that does not show a case of negligence on behalf of this defendant. There certainly is no liability unless some act which would amount to actionable negligence on behalf of the defendant had been shown.

Motion for Nonsuit.

THE COURT: Active or passive?

10 MR. CARTON: Active or passive. In the case at present there was no passive negligence shown; that is, such negligence as would make the defendant liable. A person is not liable for one falling on the sidewalk in front of his building. In this instance there has nothing appeared in the plaintiff's case to show that this was not the proper handling of this situation. There was ice there, there is no doubt. The evidence is that the weather was beyond freezing point at that time. The last witness or two has said that the buildings were heated and that probably caused ice to melt from the buildings and run down on the sidewalk. As it ran down of course it froze, because it was freezing weather. Now certainly this defendant cannot be held accountable for that. This matter has been treated by our courts and I think the sum total of the cases on the matter show conclusively that in a situation presented as plaintiff has presented this case a cause of action is not shown.

20

THE COURT: What do you think is the effect of Mr. Reinhardt's testimony that he had called the manager's attention to the condition of the pipe or leader?

30 MR. CARTON: Well, in point of time he says some two or three months prior to the present manager. He fixes no time with relation to the happening of this accident at all. And even in that regard, if your Honor please, it is my contention, even though this defendant provided a gutter to take the water to the street and that gutter got out of repair, that there is no obligation on him to continue to keep that gutter in repair. It is a matter the condition of which is obvious to the passerby,

40

Motion for Nonsuit.

of which he must take notice. And I wish to add to my motion of nonsuit also the question of contributory negligence, which your Honor may say is not for the court.

THE COURT: A question of law.

MR. CARTON: In this instance I contend it is a question for the court, because there is no other conclusion that can be reached from the plaintiff's own testimony of what he did and 10 what happened but that in law it amounts to contributory negligence, of which the court will take cognizance without it being a question of fact for the jury. Any one who is passing over an icy way is obliged to act with prudence and caution. The witness Ledwitz said that there was ice at that time. Some of the former witnesses did not seem to think that there was. He said there was ice at that time and he dug a path some four feet wide 20 within three or four feet of the curb, from which he had taken the ice. If there was ice there it was this plaintiff's duty to notice that path and to use it and not to go in where the ice had not been cleared. Of course there is a discrepancy between the plaintiff and Ledwitz on that. The plaintiff says he was within three or four feet of the curb when he was walking down, which would take him exactly in this path. Mr. Ledwitz says it was within 30 five or six feet of the building and some several feet to the south of the path.

MR. PARSONS: It was after he had fallen.

MR. CARTON: When he had fallen. Now there is no law, there is no duty that I see imposed upon this defendant, that is, his duty to those using the sidewalk, that has been violated. Unless some active, open negligence can be shown where he caused the situation 40

Judgment.

which happened, which caused this accident, there can be no liability. I have a memorandum here of some few cases with which your Honor is undoubtedly familiar. (Continues argument.)

(Mr. Parsons replies.)

RECESS TILL 1:30 P. M.

10

Trial of the cause resumed at 1:30 P. M.

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THE COURT: In this case there has been a motion for a nonsuit on the ground that no cause of action within the definition of our law has been established by the plaintiff. I confess to some surprise at the status of our law, especially as enunciated in the cases of *Jessup v. Bamford Brothers Company*, 66 N. J. L. 641, and in *Cavanaugh v. Hoboken Land Company*, 93 N. J. L. 163. Of course this court is bound by the pronouncements of the appellate courts of this state, and on the subject of liability in a case such as we now have before us our decisions appear to be directly contrary to those in Massachusetts as found in 51 L. R. A., N. S., in the case of *Striger v. Deickman*, at page 309. I am unable to reconcile those cases, but of course am bound by the authority of our own courts.

30

In the Cavanaugh case we find it cited with approval that in a case where plaintiff has fallen upon ice which formed upon the sidewalk in front of defendant's premises from surface water cast thereon by the defendant, the court held that the concentration of the flow of water and its altered transmission through and upon a public highway was a necessary incident to the legitimate beneficial user

40

Judgment.

of its property by the defendant, and that consequently any injury arising therefrom was not actionable.

It is further held in the Cavanaugh case that a person who assumes to protect others against injury which might result to them from the exercise by him of a legal right in a legal manner is under no obligation to continue that protection indefinitely. He may abandon his purpose at his own will, and having done so, is under no obligation to afford further protection to third persons who have knowledge or notice of such abandonment. 10

Now I would be inclined to differentiate the present case from the authority just cited upon the theory that there is no proof that the plaintiff had notice of the condition of the drain pipe in question or of an abandonment by the defendant of its maintenance of such drain pipe. But in view of the very broad declaration made by the court in the case of *Jessup v. Bamford Brothers Company*, I incline to the view that our appellate court has held that there is no liability at all on the part of a property owner who diverts surface water from his building into the street, even though the natural result thereof would be, especially in the winter season, the freezing of such water upon the sidewalk. 20

Now I confess that in other states it appears that the courts hold just the other way, that it is an act of negligence. However, our own court seems to take a different view. The theory apparently laid down is that the property owner has a perfect right to get rid of surface water which accumulates from natural causes in any way that he may see fit, even though he casts it on to the street or in the highway, and therefore he owes no duty or obligation to persons passing upon such high- 30 40

Judgment.

way. I must confess it is a surprise to me to find the law in this particular situation.

10 Moreover, I desire to add that there is no proof in the case that the erection of the drain or water pipe on the premises of defendant was for any other purpose than the latter's convenience and the protection of its property, or that such drain was intended or designed to protect the traveling public upon the adjacent sidewalk. In other words, there is no proof in the case that the object in placing the drain or pipe upon the building was with intent to benefit the public instead of merely protecting the property of the defendant.

20 In the circumstances I am bound by the authority laid down in the Cavanaugh case and I feel obliged to grant the motion for nonsuit on the ground that there is no proof of liability or negligence shown. That motion will be granted and an exception will be allowed, and I will say that I think that it is a case that should go to the Court of Appeals.

(Objection noted for plaintiff as ground of appeal.)

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Plaintiff's Exhibit P-5.

U. S. Signal Corps Meteorological Station

Fort Monmouth, N. J.

November 9, 1926.

I certify that the information given here below is a true copy of Meteorological data taken from the records of this office of February 11th and 12th, 1926.

	February 11, 1926		February 12, 1926		10
	8:00 a.m.	4:00 p.m.	8 a.m.	4:00 p.m.	
Sea level pressure	29.63	29.68	30.01	30.03	
Temperature	8.4	19.9	13.2	33.0	
Humidity	76	56	76	46	
Maximum temperature since preceding observation	23.9	20.0	19.9	33.5	
Minimum temperature since preceding observation	5.4	8.4	12.0	13.2	
Wind at surface	NW-8	NW118	NW-9	W-15	
Precipitation *	.07	0	0	0	
Clouds	2 A. St. NW Clear	0 Clear	2 St. Cu. NW Clear	6 Ci. St. NW 3 Ci. Cu. NW Cloudy	

* Note

Snow began 2:15 p. m. February 10, 1926

“ ended during night before Mdt.

Snow on ground at 4:00 p. m. February 11th.... 20
6.8 inches.

Snow on ground at 4:00 p. m. February 12th....
6.2 inches.

HARROD G. MILLER,
2nd. Lieut. S. C.
Met'l. Officer.

[SEAL]

30



Tom
Brook
Brook

FAIR STORE

LEDWITZ BROS

RADIO

JAME

HARD WARE
Paints, Oils Varnishes

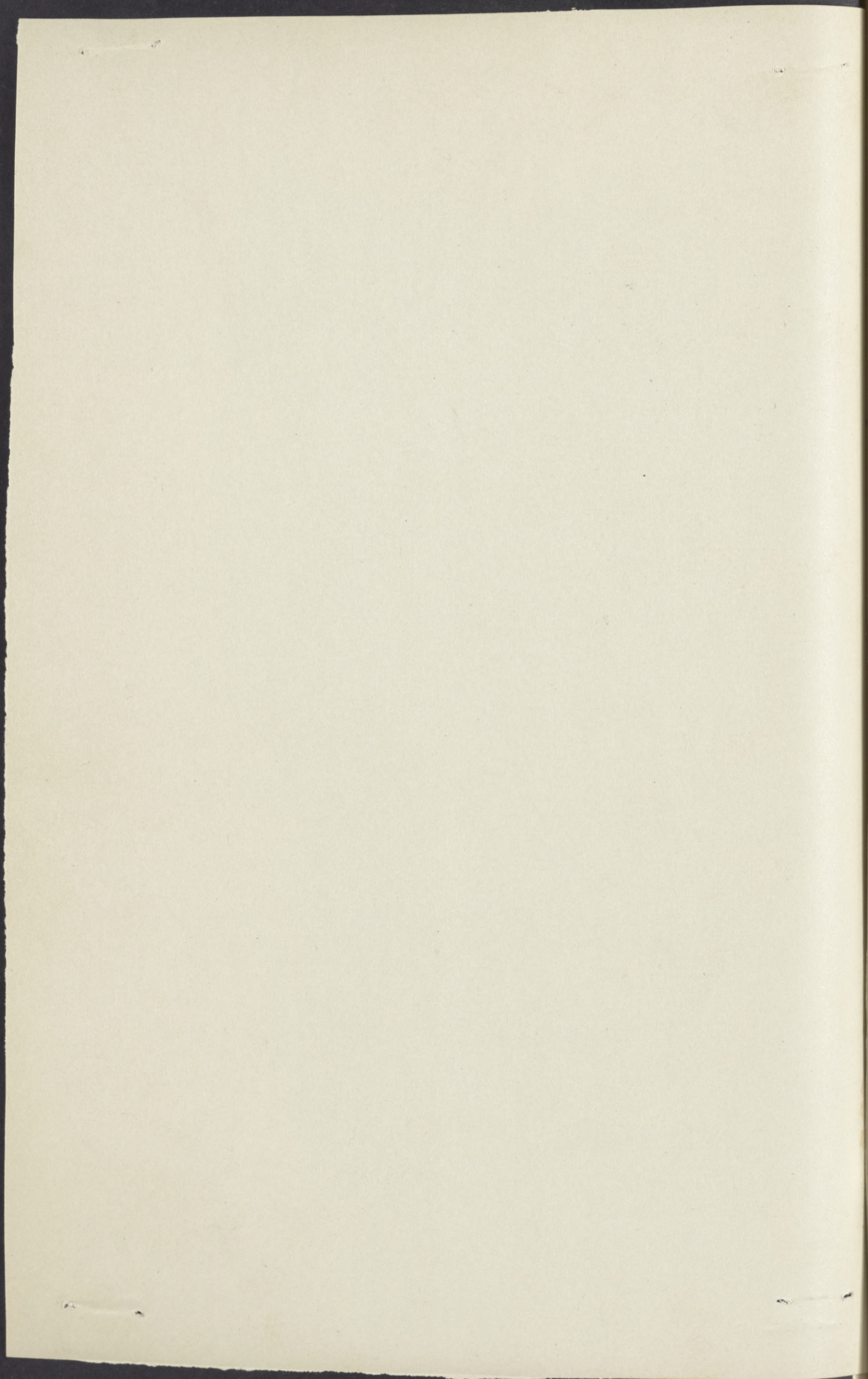
HOUSE FURNISHINGS

The LONG BRANCH
RADIO SERVICE
WE ARE MOVING
Opposite B'way, Theater
145 B'way, L.B. or About MAY, 1st

FRESH FRUIT VEGETABLE MARKET



PHN
BROS



New Jersey Court of Errors and Appeals.

ALEX ZWICKL,

Plaintiff-Appellant,

vs.

BROADWAY THEATRE COMPANY
OF LONG BRANCH, INC., body
corporate,

Defendant-Respondent.

*On Appeal
from
Supreme
Court.*

BRIEF ON PART OF PLAINTIFF-APPELLANT.

STATEMENT OF FACTS.

Plaintiff-Appellant, Alex Zwickl, appeals from a non-suit entered by the Trial Court on November 11th, 1926, at the Monmouth Circuit in favor of the defendant-respondent, Broadway Theatre Company. Plaintiff brought suit for personal injuries which he suffered as the result of a fall on February 12th, 1926. He was walking on the sidewalk in front of the Broadway Theatre at Long Branch, New Jersey, when he slipped on ice upon the sidewalk and fell, fracturing his leg. At the point where he fell a leader ran from the top of the building to the sidewalk, at which point there was a channel or course made underneath the sidewalk and covered by an iron grating.

This leader had become out of repair and did not meet the iron grating, so that water passed over the sidewalk. For two days prior to February 12th

the temperature had been below freezing. The building consisted of stores, all of which were heated. The testimony shows that this heat against the ceilings caused the snow on the roof to melt. The resulting water ran down through the leader, spread upon the sidewalk, freezing and forming ice upon which the plaintiff slipped and fell.

The Trial Court non-suited the plaintiff on the ground that the ice had been caused by diversion of surface waters for which there was no liability upon a landowner.

The plaintiff-appellant appeals on two grounds, namely, (1) that the landowner had assumed a duty to the general public which he was still performing and had not abandoned, and if temporarily abandoned the plaintiff as part of the general public, had had no notice of the abandonment; and (2) because the water which formed the ice was not the result of natural causes, but was the result of heat within the building, an act for which the landowner was responsible, and that therefore the case is not one of diversion of surface water.

TESTIMONY.

The plaintiff offered four witnesses. Alex Zwickl, the plaintiff, on February 12th, was walking past the Broadway Theatre (page 19). The day was a cold, freezing day (page 17, line 35, and page 24, line 26). There was considerable snow on the streets. (Page 25, line 35.) The rest of the sidewalks were not slippery, and there was no ice on the other sidewalks (page 25, line 15), but only between the two stores in the Broadway Theatre building. (Page 26, lines 10, 20 and 30). There was no ice along Broadway until he reached the point where he fell. (Page 27, line 30.) There was a leader on the building at the point where he fell. Ice was on the leader and ice was across the iron grating. (Page 30.) Plaintiff noticed no

ice at any other place on Broadway. (Page 32, line 20.)

Charles O'Neill, a witness for the plaintiff, delivered coal at the Broadway Theatre building in the last part of January, 1926, (page 25, line 30), several times. He had noticed ice there on the sidewalk. There was a gap between the bottom of the leader and the drain where the water had overflowed and formed ice. (Page 36.) He had slipped between Sherman's and Reinhardt's. (Page 37, line 10.) The gap was from the bottom as it went into the drain. The leader did not extend into the drain. (Page 38, lines 20 to 30). There was ice where this gap was. (Page 39, line 20.) He saw ice coming out of the pipe in the latter part of January. (Page 43, lines 8 to 18.)

Sidney Reinhardt was a store keeper in the Broadway Theatre building on February 12th, 1926. He had occupied the store for two years. During that period of time the water had flowed from the bottom of the leader onto the sidewalk. He had notified the managers of the theatre, who had promised continually to repair the leader. (Page 44 and page 45, line 15.) There was ice in the gutter and leader pipe whenever the weather was freezing. (Page 46, line 38.) There was a gap between the leader pipe and the drain of two inches. (Page 47, line 20.) Reinhardt notified every manager of the Broadway Theatre. (Page 49, line 3.)

Solomon Ledwitz kept the store east of the Reinhardt store. Reade was his landlord and his store was in the Broadway Theatre building. (Page 50, lines 30 to 40.) He picked Zwickl up after he fell and there was ice at the point. (Page 51, line 20.) Men at that time were working on the leaders of the building, but not on this identical one. (Page 51, line 40.) A heated store will melt snow on the roof though the weather is freezing. (Page 53, lines 1 to 10.) There was heat in his store and

Reinhardt's store. . (Page 53, lines 18 and 19.) There was ice on the sidewalk from the leader to the curb. (Page 53, lines 30 to 40.) The day was a cold day. (Page 54, line 20.) There was ice where Zwickl fell. (Page 56, line 38.)

As part of the testimony reference is also made to plaintiff's Exhibit 5, which is part of the record, which shows that on February 11th and 12th, the temperature was at all times freezing. (Page 67.) Reference is also made to defendant's Exhibits 1 and 2, pages 68 and 69, which show the leader and drain and gap between the leader and drain, which plaintiff charged was the cause of discharge of water on the sidewalk, which formed the ice.

ARGUMENT.

Defendant Having Undertaken the Performance of a Duty to the General Public, by Maintaining a Leader and Drain, Was Liable for Negligent Performance if the Plaintiff Had No Notice of Abandonment.

The status of the proof at the close of plaintiff's case left no doubt that the drain and leader were constructed for the purpose of carrying water from the roof to the street. This drain was maintained by the Broadway Theatre building. Three witnesses in addition to the plaintiff, testified as to the faulty and defective condition of this drain. The leader failed to meet the drain and through the intervening gap water was discharged upon the sidewalk, causing the overflow from which the ice formed. In addition to the presumption that the defendant had notice of this condition through its long existence, proof was given of the actual knowledge of the defendant through its managers who had been notified by the witness Reinhardt. There had been no abandonment of this safeguard, for the managers of the defendant repeatedly promised to

correct the defects and place the drain in a proper condition.

Briefly, snow was upon the roof of the defendant's building. The water resulting from the melting of the snow has as its natural course of outlet, a leader running from the roof to the sidewalk and discharged there under the sidewalk through a drain. The leader was defective in that it did not reach the sidewalk, and the overflow passed upon the sidewalk itself. The defendant had notice of this defective condition and agreed to repair it. As a result of the ice forming the plaintiff fell.

In such a state of facts plaintiff respectfully submits that there has been submitted to the court proof sufficient to justify a finding of liability on the part of the defendant.

The plaintiff admits that under ordinary circumstances there is no liability for negligence on the part of the landowner in maintaining gutters and leaders along a public highway. The cases in this jurisdiction are few, but the law seems to be well settled.

In *Jessup v. Bamford Bros. Co.*, 66 N. J. L., 642, this Court held that there was no liability on the part of the landowner for diversion of surface water. This rule was applied strictly to surface waters and no further, and has its origin in the right of a landowner to beneficially use his property. This right of beneficial user has as its natural and concomitant result the concentration of surface water as a result of the erection of buildings. The Court quoted with approval the Massachusetts doctrine as follows:

"The right of a party to the free and unfettered control of his own land cannot be interfered with or restrained by any consideration of injury to others, which may be occasioned by the flow of mere surface water."

This case was followed by that of *Aull v. Lee*, 84 N. J. L., 155. This was before the Supreme

Court and sustained a cause of action by a pedestrian against a landowner. The complaint alleged that the landowner had piled up snow upon a different place upon his property than that where it had fallen. Ice from the melting snow upon the sidewalk injured the plaintiff. Such a state of facts gives rise to a cause of action. The Court says:

“There is a distinction between surface water and the natural fall of snow, conditions over which one has no control, and the collection of snow and ice by physical means in unusual quantities for the convenience and benefit of the party making the accumulations.”

The Court of Errors again passed upon this question in the case of *Lightcap v. Lehigh Valley*, 90 N. J. L., 620. In that case the plaintiff sued for injuries resulting from a fall upon an icy sidewalk, caused by melting snow running from defendant's property upon the sidewalk. The plaintiff charged that the defendant had altered its property by building a retaining wall, but plaintiff offered no proof that there had been any artificial accumulation of snow by the defendant. This Court affirmed the verdict in favor of the defendant, on the ground that the defendant had transported no snow, nor had they changed its original situs, but had only changed the condition of the grade or slope of the land.

In *Cavanaugh v. Hoboken Land Co.*, 93 N. J. L., 163, the facts were substantially similar to the instant case, except as distinguished by the Trial Judge in his decision granting the motion for nonsuit. In the Cavanaugh case a leader had become broken and out of repair, so that the water passed out upon the sidewalk and froze. Upon the ice the plaintiff slipped. A distinguishing feature of the instant case and the Cavanaugh case, exists because in the Cavanaugh case the plaintiff testified that she knew of the situation, and that the leader

had been out of repair for sometime. In the Cavanaugh case, for the first time, was raised the doctrine laid down by the Supreme Court in *Wolcott v. New York & Long Branch Railroad Co.*, 68 N. J. L. 421. Chief Justice Gummere in applying the doctrine of the Wolcott case, says:

“A person who assumes to protect others against injury which may result to them from the exercise by him of a legal right in a legal manner, is under no obligation to continue that protection indefinitely. He may abandon his purpose at his own will, and having done so is under no obligation to afford further protection to third persons who have knowledge or notice of such abandonment.”

The Chief Justice then holds that Mrs. Cavanaugh had knowledge of the abandonment and that the defendant had temporarily abandoned his duty, and that therefore there was no liability because of the defective drain.

In the case sub judice the absolute reverse of these facts appears. Zwickl, the plaintiff, did not know of the existence of the defective leader. He testified that he was not aware it was out of repair. Therefore, there can be in no way, under his testimony, and a careful reading of it will substantiate this assertion, any inference deduced that the plaintiff had knowledge that the defendant had temporarily abandoned the maintenance of this leader. On the contrary, affirmative testimony was offered that the defendant had not abandoned its duty, but on the other hand was continuing to perform its duty and was intending to repair the leader.

One of the defendant's own tenants, Mr. Reinhardt, testified that he had spoken repeatedly to the managers of the defendant company, and each manager had in turn promised that they would take care of the leader. There is here knowledge on the part of the defendant of the defective condition and the

promise to repair. There was no abandonment of the duty voluntarily undertaken by the defendant.

The witness Ledwitz, testified that on the very day of the accident the defendant had men upon the roof repairing other leaders. These men had not reached the point yet where they had been able to work upon the leader in question. The defendant evidently was maintaining these leaders, and intended to maintain them, but through its negligence allowed this condition to exist for a long period of time. It is shown this condition existed for at least a year, and had existed during the winter when the accident happened. This condition is clearly portrayed upon the photographs offered in evidence. The naked eye can see the defect in the leader. To maintain this leader but to permit it to become so out of repair and remain out of repair during the winter, so that ice could repeatedly form, was a clear act of negligence on the part of the defendant.

Applying, then, the doctrine of the Wolcott case the defendant had assumed the duty of protecting pedestrians on the sidewalk from the overflow of this surface water, and having assumed that duty, it was bound to perform it with due care.

It is further respectfully submitted that having proven that the defendant assumed this duty, it was then incumbent upon the defendant and the burden of proof shifted to the defendant to prove that it had abandoned the duty it had assumed.

There is not a scintilla of evidence in the plaintiff's case from which it may be assumed that this duty had been abandoned. On the contrary, there is affirmative evidence that the defendant had not abandoned this drain, but on the other hand defendant was preparing to place it in proper condition.

After the Cavanaugh case the Supreme Court affirmed the doctrine of the Jessup case in *Arning v. Druding*, 96 N. J. L. 47. The defendant had

shovelled snow from the sidewalk in front of his property and had piled it along each side. This was held to be not an artificial condition, because there was no more snow there than had fallen from natural sources, and the non-suit of the Trial Court was affirmed.

The case of *Sewell v. Fox*, 98 N. J. L., 819, reaffirms the doctrine that a landowner is under no obligation to maintain his sidewalk free from snow and ice.

It is believed that the appellant has covered and cited every case in this jurisdiction passing upon the question in issue.

The rule as adduced from these various decisions governing the liability of a landowner, would briefly seem to be as follows: A landowner is under no liability to a pedestrian to maintain a sidewalk abutting on his premises free from ice or snow accumulated there as a result of natural causes. And this liability is not affected by a change in the position of the snow actually upon the sidewalk. Nor is a landowner liable for snow or ice formed upon his sidewalk as a result of the diversion of surface waters naturally caused. However, where a landowner assumes by the erection and construction of a drain to protect pedestrians from the formation of ice upon the sidewalk, caused by the diversion of surface waters, and where the pedestrian has no notice of an abandonment of the duties so assumed, then if the landowner is negligent in the performance of this duty he is liable to the pedestrian for any damages which may be the proximate result of the negligent performance of the duty so assumed.

Concisely, the evidence is that the defendant maintained this drain and leader; that the drain and leader became defective with the knowledge of the defendant, and had remained so for such a length of time that the defendant should have had knowledge; that the defendant was in the very act

of repairing the leader and drain prior to the accident; that as a result of the defective condition of the leader and drain, water was thrown upon the sidewalk, froze, formed ice, and the plaintiff, who had no notice of this defective condition nor any notice of the abandonment of the duty assumed by the landowner, fell and was injured.

It is respectfully submitted therefore, that the Court erroneously non-suited plaintiff in the instant case.

II.

Defendant Cannot Avail Itself of the Rule of Surface Waters.

The water cast upon the sidewalk was the result of artificial and not natural causes. As has been stated above, all the cases in this jurisdiction have been cited.

In the Jessup case the decision was on the ground that the water cast upon the sidewalk was surface water, and that the diversion of the surface water created no liability. There appears to be nothing in the Jessup case showing the origin of this water, other than that it was surface water.

In the Lightcap case the origin of the water was shown to be the melting of snow upon a wall. Obviously the snow was melted by natural causes. The decision hinges upon the failure of proof by the plaintiff that there had been change in its condition or original situs, by reason of an act of the defendant.

In the Druding case there also was an admission that the snow had melted in the middle of the day and froze at night. This was all the result of natural causes, and the case is decided in favor of the defendant, because no act of the defendant caused any change in a condition created by na-

ture, except other than the diversion of surface waters. The Court says:

“The acts of the defendant did not cause any more snow to be accumulated on the sidewalk than had fallen thereon from natural sources.”

In the Cavanaugh case there is nothing in the decision to indicate that the water cast upon the sidewalk arose from any other cause than the natural melting of snow upon the roof, or from water upon the roof, and that it was surface water only.

In the Aull case the Court says:

“There is a distinction between surface water and a natural fall of snow, conditions over which one has no control, and the collection of snow and ice by physical means in unusual quantities for the convenience and benefit of the party making the accumulations.”

Surface water was defined in 27 R. C. L., page 1137, as

“Water flowing on the surface of the ground and is such as falls from the clouds in the form of rain or snow, or rises to the surface from springs.”

In 40 *Cyc*, 639, *Sec. 5*, “Such as diffuse themselves over the surface of the ground.”

The freedom which a landowner has from liability for the diversion of surface waters, and the casting of surface waters upon a sidewalk, and the beneficial user of his property, must be confined only then to waters arising from natural causes. In the present case the water cast upon the sidewalk and causing the ice, can have resulted from only one cause, namely, the artificial melting of the snow upon the roof of the building. The weather report to which reference has been made, shows conclusively that up to the time that Zwickl fell, there had been no temperature sufficient to cause melting. On the other hand, the temperature was below freezing.

The effect of this knowledge, which must have been imparted to the plaintiff, that the weather was freezing, is obvious. The plaintiff walking along the street and knowing the weather was freezing, naturally realized that there was no occasion for there being any ice upon the sidewalks. This is borne out by his testimony that nowhere along his journey did he strike any ice upon which he slipped. If this water which formed the ice could not have arisen through natural causes, it must have been the result of an artificial cause, and this artificial cause was due to the act of the defendant.

There is further evidence to show that these stores contained heat, and as the Trial Judge suggested it is common knowledge that a heated building will cause snow upon its roof to melt. There was further evidence by one witness that such would be the result. If the temperature had not reached melting, how can this water cast upon the sidewalk be said to be the result of an act of nature? It is well known that a certain amount of evaporation of snow takes place, though there may be no actual melting. This evaporation passes off into the atmosphere. This is a fact of natural science concerning which common knowledge may be presumed. If this defendant had not caused the snow by its acts to be melted artificially, in due time may not most of the snow have evaporated? Furthermore, would not the snow have remained there with no melting until a rainstorm arose and carried the snow off? Naturally, if this had happened there would then have been no freezing weather to have congealed the melting snow into ice, and causing the plaintiff's fall.

This melting was caused in no other way than by the defendant's use of its property. True it is, that the defendant had the right of improving its property and diverting surface water. But the defendant in erecting this building for commercial

purposes and receiving the benefits therefrom, it is respectfully submitted, had no right whatsoever by an artificial condition to cast water upon the sidewalk where it would freeze and cause injury to the plaintiff. Can it be doubted that if the defendant, in the interior of its building had constructed a fire sprinkler system with a vent over the sidewalk, and through the negligence of the defendant this vent had burst and flooded the sidewalk, and ice had resulted therefrom, that the defendant would have been liable to the plaintiff?

It is insisted that the present case is analogous to such an instance, and must be governed by the same rules of law. The water cast upon the sidewalk from which the ice formed was not the result of an act of nature, nor did it arise from natural causes. The water was formed there by artificial means, namely, the erection of a building which was heated and melted the snow upon the building while the temperature was below freezing. This melting and casting of the water was the direct result of a positive act of the defendant. The defendant's liability, therefore, cannot be governed by the rules of liability applicable to the diversion of surface waters. The rule of liability governing the defendant's act in this case must be the same as governing any other positive act of a landowner in placing an obstruction upon a sidewalk. This law is too well settled to burden this brief with citations.

A pedestrian upon a sidewalk has the right to presume that the sidewalk is free from any obstructions placed thereon. The plaintiff in the instant case had the right to presume that if the weather were such that no ice would naturally form upon the sidewalk, that then the sidewalk would be free from such obstruction. The artificial accumulation of this ice upon the sidewalk by defendant's negligent act, renders the defendant liable to the plaintiff for placing such an obstruction upon the

sidewalk. Nowhere in the evidence does it appear that the plaintiff was not exercising ordinary care, and such care as was commensurate with the presumption in his favor that the sidewalk was free from any artificial obstructions. His injury resulting from an artificial obstruction placed thereon by the defendant, it is respectfully submitted that the non-suit was erroneously ordered.

III. CONCLUSION.

Plaintiff-appellant therefore respectfully submits that the judgment of non-suit entered below should be reversed and for nothing holden, because—

1. The defendant assumed a duty of protecting pedestrians upon the sidewalk from the overflow or diversion of surface water, which duty the defendant did not abandon, nor did it give any notice to the plaintiff that it had abandoned, and which duty the defendant performed so negligently that water was cast upon the sidewalk turning into ice and injuring the plaintiff;

2. That the water which was cast upon the sidewalk and formed the ice, was not surface water which was the result of natural conditions, but on the other hand was created and formed by artificial causes within the control of the defendant, and that the defendant therefore, having cast the water, created by its positive act, is liable to the plaintiff for all damages which are the proximate result of its negligent act.

Respectfully submitted,

QUINN, PARSONS & DOREMUS,
Attorneys for Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

ALEX ZWICKL,
Plaintiff-Appellant,
vs.
BOARDWAY THEATRE COM-
PANY OF LONG BRANCH,
INC., Body Corporate,
Defendant-Respondent.

ACTION
AT LAW.

Brief of Defendant-Respondent

DURAND, IVINS & CARTON,
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SCHUYLER PRESS, ASBURY PARK, N. J.

THE JURY COURT OF ERROR AND APPEALS

ALY ZWERN
THE NEW YORK
BOARDWAY FIDELITY CO.
100 N. BROAD ST.
NEW YORK

Brief of Defendant-Respondent

CLARENCE B. CLARK
Attorney for Defendant-Respondent

NEW JERSEY COURT OF ERRORS AND APPEALS

ALEX ZWICKL,

Plaintiff-Appellant,

vs.

BOARDWAY THEATRE COM-
PANY OF LONG BRANCH,

INC., Body Corporate,

Defendant-Respondent.

ACTION
AT LAW.

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BRIEF OF DEFENDANT-RESPONDENT.

On this appeal, the plaintiff-appellant relies upon two grounds:—

1. That the land owner, defendant, had assumed a duty to the general public which he was still performing and had not abandoned, and if temporarily abandoned, the plaintiff, as part of the general public, had had no notice of the abandonment. 20

2. Because the water which formed the ice was not the result of natural causes, but was the result of heat within the building, an act for which the land owner was responsible, and that therefore the case is not one of diversion of surface water.

We shall take up the points of the plaintiff-appellant in this order. 30

POINT I.

(1). The argument of the plaintiff-appellant that the defendant, because of having undertaken the performance of a duty to the general public by maintaining a leader and drain to carry off the surface water from the roof of the building, and as a result was liable for any negligence, is based upon a 40

- false assumption of fact. This argument has for its premises that the defendant had undertaken the performance of a duty to the general public. This assumption, upon the part of the plaintiff, is not based upon any evidence but is simply laid down as a proposition from which he argues this point. No where in the case do we find any evidence to the effect that this leader, erected by the defendant on the outside of the building, was put there for the protection of the public, nor can there be any assumption or inference drawn that it was for this purpose. The more reasonable and likely contention, and there is no proof to help us one way or the other, is that the object of erecting this leader was not with any intent to benefit the public, but that it was simply put there in the general course of construction of the building and for the purpose of protecting the property of the defendant.
- 10
- 20 Plaintiff attempts to place the case at hand under the ruling of the Court in the case of *Wolcott v. New York and Long Branch Railroad*, 68 Law, 421. In the *Wolcott* case, the Railroad Company had stationed a flagman where its railroad crossed a public highway, though under no legal obligation to do so. The plaintiff was injured at this crossing by reason of the negligence of the flagman. The Court held that because the defendant had voluntarily assumed to protect this crossing, it was answerable for injuries to *Wolcott* which resulted solely from the flagman's negligence. The obvious and only purpose of a flagman being stationed by the Railroad Company was to warn travelers along the highway of approaching trains. The flagman was put there not for the use of the Railroad, but for the use and protection of the public. Here, on one hand, we have defendant constructing a leader on the building to carry off surface water from the roof, and on the other hand, the defendant in the *Wolcott* case placing a flagman at a
- 30
- 40 crossing. These facts and the reasons underlying

the same are not similar, nor can they by any stretch of the imagination be placed in the same category. One is obviously for the protection of the public, while the other is for the convenience and benefit of the defendant, landowner.

It cannot be said, it seems to us, that the mere fact that a gutter or leader is placed on a building to conduct rain and snow water from the roof of a building, was placed there by the owner of the building for the purpose of protecting the public.

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Unless the plaintiff can show that this leader was erected by the defendant for the purpose of protecting the public, it is respectfully submitted that this first point raised by the plaintiff is without merit and is based upon a false assumption of fact not sustained by the evidence.

- (2) Notice not necessary because there is no evidence that the leader was erected for the protection of the public.

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In the case at hand, the facts are identical with those of *Cavanagh v. Hoboken Land Co.*, 93 Law, 163, with this exception, that in the *Cavanagh* case, Mrs. Cavanagh had notice of the defect in the leader before she was injured. In that case, on the evening before her injury, she noticed water running from the broken leader and freezing on the sidewalk, and the Court held that the defendant having abandoned its purpose, at least temporarily, of taking care of the flow of water by conducting it through a leader into the drain, and Mrs. Cavanagh having knowledge of such abandonment, that she was not entitled to recover upon the theory of having once assumed to protect the public using the sidewalk against danger of accumulated ice, it was under a legal obligation to continue that protection. The instant case, with the exception of this element of knowledge upon the part of the plaintiff, is exactly similar to the Cav-

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10 anagh case and the same result must be reached unless we can say because the plaintiff here had no notice of the defective drain, if it was defective, this fact, and this alone, will take it out of the rule of the Cavanagh case. The rule as annunciated by that case is that one who assumes to protect others from injury which may result to them from the exercise by him of a legal right in a legal manner is under no obligation to continue that protection indefinitely and he may abandon his purpose at his own will and having done so is under no obligation to afford further protection to third persons who have knowledge or notice of such abandonment.

20 It is the contention of the defendant in this case that no such notice was necessary and that the only cases where this element of notice is material are those in which the plaintiff has shown, that that which was abandoned, was erected for the purpose of protecting the public.

Here, as we have stated before, there is no evidence nor proof before this Court that the defendant had erected this for the protection of the public and because of this fact no notice was necessary. It was simply an improvement put upon the building in its general course of construction by the defendant for his own benefit in the protection of his property, and as such, could be abandoned by him at any time without any notice to the public.

30 Again, there is no evidence before this Court that the plaintiff had noticed this leader on previous occasions and had relied upon same to carry off the surface water from the roof and hence prevent freezing on the sidewalk.

(3) If notice was necessary, there is the same notice in the instant case that there was in the Cavanagh case.

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The witnesses called by the plaintiff testified that this leader had been defective for upwards of two years and that the defendant's attention had been called to this fact by notice to the various managers in charge of the theatre. If this is the fact, as the evidence seems to indicate, and the defendant did not do anything in the course of two years to repair this alleged defect, it is a very likely assumption that the defendant had abandoned these leaders. According to the testimony of the plaintiff's witnesses, whenever there was severe weather, the rain and snow water from the roof escaped from the leader, flowed on the sidewalk and froze. The evidence also shows that the street as a whole was free and clear of all ice, with the exception of a small part of the sidewalk immediately in front of the alleged defective leader. The fact that there was no ice at any place, except here, is notice that the leader on this side of the building was out of repair and that the defendant had abandoned its purpose of protecting the public by means of this leader designed to carry off the surface water, if it ever had any such purpose.

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If, in the Wolcott case, the defendant had taken the flagman away from the crossing, and had caused signs to be printed and posted in prominent places to the effect that it was no longer protecting this crossing, can it be said that it would be liable for someone injured there because this injured party had never seen these signs and did not have actual notice that the Railroad Company was no longer protecting this crossing.

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Outside of the question of contributory negligence the defendant contends that the fact that the street was clear and free from ice, except in front of the leader, was notice to the public as a whole that said leader was out of repair and not carrying out its functions of depositing the water from the roof into the street.

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The only notice in the Cavanaugh case was ice on the sidewalk which Mrs. Cavanaugh had seen, and the notice here was exactly the same, ice nowhere except in front of this leader.

10 The plaintiff says he did not see it. Even though notice was not brought home to the plaintiff, it was such that he should have seen it, and it cannot be contended that because of the fact that he did not actually notice this ice and because actual notice was not brought home to him, that this fact will take him out of the rule of the Cavanaugh case.

20 Again, the testimony that various people had brought home the fact to the defendant Company that the leader was defective and not carrying out its functions for which it was allegedly constructed, shows that the defendant is not the only one that had notice or should have had notice of this defect. If, as the testimony shows, it had been defective for over a year and various persons had called the defendant's attention to it, and as a result, the defendant had notice of it for all this length of time, then it could fairly be assumed that the defendant had abandoned it and such abandonment was notice to the public.

30 Before the plaintiff can contend that this case falls under the rule of the Wolcott case, it is respectfully submitted that he must first show that this leader constructed on the outside of the building was put there for the purpose of protecting the public, and unless that can be shown there is no force or weight in the argument that defendant must cause notice to be given to the public of its abandoning such safe guard.

POINT II.

40 The second point relied upon by the plaintiff is that the water which was cast upon the sidewalk and formed the ice, was not surface water which was the result of natural conditions, but on the other hand

was created and formed by artificial causes within the control of the defendant, and that the defendant therefore, having cast the water, created by its positive act, is liable to the plaintiff for all damages which are the proximate result of its negligent act.

To this contention of the plaintiff, the defendant offers two answers.

1. There is no proof in the case that the alleged artificial diversion of the surface water was caused by the defendant. 10

If we turn to the evidence, we find on page 59, line 29 the questions put to Solomon Ledwitz, a tenant in the Broadway Theatre Building:—

“Q. Who heats your building?

A. We do.

Q. You mean the tenants do?

A. Yes.

Q. Did you have the place heated that day? 20

A. Yes, sir.”

And again on page 53:—

“Q. Were these stores all along in that building occupied?

A. They were occupied, they were all occupied at that time.

Q. Did you have heat in the store?

A. Yes, sir.

Q. Do you know that Mr. Reinhardt had heat in his store? 30

A. Yes, sir.”

This is the only testimony in the case relating to the heating of the building. Therefor it appears that the only evidence we have of any heat in the building is that Mr. Ledwitz's store and Mr. Reinhardt's store were heated. Mr. Ledwitz stated he supplied his own heat. There is no proof whatever nor any statement upon which we could assume that the defendant heated this building. The only evi- 40

dence offered shows that the tenants heated these two stores. The contention of the plaintiff that the diversion of the surface water, i.e., the snow on the roof, was caused by the positive act of the defendant is without merit. The only evidence regarding heat in the building is to the effect that the tenants of the defendant Company supplied the heat in their stores, and certainly the defendant is not responsible for this, and as far as there being any positive act of
 10 diversion of snow on the roof by the defendant by artificial means which occurred as plaintiff alleges, by the positive act of the defendant, there is no proof at all.

2. Our second answer to this contention of the plaintiff is this:

Even if the defendant heated the building and the heat in the building caused the snow upon the roof to melt and thus flow over upon the sidewalk and then freeze, that it had a perfect right
 20 to do so under the rule laid down in the case of *Jessup v. Bamford Bros. Co.*, 66 N. J. L., 641. That case is somewhat similar to the one now before us, as in that case the plaintiff fell upon ice which had formed upon the sidewalk in front of the defendant's property caused by surface water cast there by the defendant. The Court held that the concentration of the flow of water and its altered transmission to and upon a public highway was a necessary incident
 30 to the beneficial user of its property by the defendant; and that consequently any injury arising therefrom was not actionable.

In the *Jessup* case, the Court cites with approval the following quoted from the case of *Gannon v. Hargadon*, 10 Allen 106:—

“That the right of a party to the free and unfettered control of his own land cannot be interfered with or restrained by any consideration of injury to others which may be oc-
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casioned by the flow of mere surface water, in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers, or changing the level of the soil, so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil." 10

We believe it is impossible to reconcile the rule laid down in the Jessup case and followed in the Cavanagh case on page 164 with the contention of the plaintiff. 20

If the proof showed that the defendant had heated the building and caused the surface water to flow over the side and hence on to the sidewalk, then the defendant was perfectly within its rights because the act of so doing was a necessary incident to the legitimate use of its property by the defendant, and therefore under the cases just cited there is no liability upon the part of the defendant for any injury arising as a result of this diversion of the surface water. 30

POINT III.

Outside of the points argued in the plaintiff's Brief, a non-suit was justified on the question of contributory negligence. Generally contributory negligence is a question for the jury, but there are cases where contributory negligence is so apparent that 40

no other result can be reached and in this situation it is a question of law and may be decided by the Court.

Schnackenberg & Company v. Delaware, Lackawanna & Western Railroad, 86 Law, 517.

10 In this case it is the contention of the defendant that the plaintiff was clearly guilty of contributory negligence. This was one of the points which was argued by counsel in his motion for non-suit and although the Court did not decide the motion on this question it is submitted that the non-suit is justified on this ground.

If we look at the testimony on page 26 in the examination of the plaintiff we find—

“Q. Where did you first find any snow or ice on that sidewalk that day.

A. Did not find any.

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Q. Oh, you fell you said?

A. I fell over ice, yes.

Q. What?

A. I fell over something either ice or snow.

Q. Do you know whether it was ice or snow that you fell over?

A. I did not know it until I fell.

Q. Did not know it until fell?

A. No.

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Q. Well, where did you meet that mishap, where on the Broadway sidewalk?

A. Between—there are two stores.

Q. After you had gone by the Theatre building?

A. Yes.

Q. This building where those three stores are that you refer to is beyond the Theatre building isn't it?

A. Yes, sir.

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Q. Further east?

A. Further east.

Q. Now, what happened when you fell? I mean do you know what caused you to fall?

A. Because the ice made me slip.

Q. You don't know whether it was ice or not, do you?

A. Well, it was ice after I seen it, after I laid there.

Q. Didn't you see it before you fell?

A. I didn't see it because it was covered.

Q. Covered up with what?

A. Some snow laying over it.

Q. Covered with ice?

A. I suppose people walked over it and they covered it up some way or other.

Q. You saw that the snow had been covered over with the ice?

A. I didn't see nothing.

And again on page 27 in the examination of the same witness on line 23 we find—

Q. Were you looking as you went along the sidewalk to see what was there?

A. I didn't look for anything.

Q. What say?

A. I didn't look for anything. I walked along as everybody else would.

Q. But you say there was no ice along Broadway until you got to that point?

A. There was no ice.

Q. There wasn't any ice?

A. No, sir. All stores along Broadway and they cleaned it off.

Again on page 29, line 16—

Q. Where were you walking—where on the sidewalk, on the inside, outside, center or where?

A. If you had a picture here I could show you.

Q. Well, can't you tell without a picture?

A. About three feet from the gutter. Three

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or four feet from the gutter.

10 It is submitted that this testimony of the plaintiff shows clearly that the plaintiff was guilty of contributory negligence. He had been walking along the street where there was not any snow or ice, according to his testimony, and continued walking in this manner until he was opposite the Broadway Theatre building where several witnesses had testified there was considerable ice under the leader. The plaintiff says that he did not see any ice until after he fell and he was not looking out for himself as he walked along. Certainly on a cold, freezing day, when the streets were filled with snow it was the plaintiff's duty to watch his path and he should have known that there was apt to be ice at any place along the sidewalk, and it was his duty to look at the sidewalk before he walked on it and pick out the places that seemed the best for walking.

20 Solomon Ledwitz, the owner of the store in front of which the accident occurred, on page 57, lines 29 to 36, testifies that he shovelled a path about four feet wide on the sidewalk in front of his store on the day that the accident occurred.

Again on page 58, line 35, the same witness testifies this path was located within three or four feet of the curb.

30 If the plaintiff had been alert and on his guard as he was walking along he could not have helped but to have seen the ice in front of this building and also have seen the path which was shovelled by Ledwitz in front of his store for the use of the traveling public.

40 The witness, Ledwitz, testifies the plaintiff fell about six feet from the building, which was several feet nearer the building than the path. This again shows that the plaintiff had not been on his guard and had not walked in the path shovelled there for the use of pedestrians, but had walked blindly over the ice when there was no need of doing so. This it

is respectfully submitted shows clearly the plaintiff was guilty of contributory negligence and as there is no testimony to dispute this fact the question of contributory negligence is one of for the Court and a non-suit is justified on this ground.

It is respectfully submitted that there was no error in the action of the trial court in granting the non-suit and that this appeal should be dismissed.

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Respectfully submitted,

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