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Ordered and received by J. B. ...

Complaint.

(Summons issued April 22, 1931.)

COMPLAINT.

New Jersey Supreme Court

10

MONMOUTH COUNTY.

JACOB ARNOLD,

Plaintiff,

vs.

ROSE DLUGO, WILLIAM LEVEY
and THEODORE LEVEY,

Defendants.

*Action
at Law.*

Complaint.

20

The plaintiff, Jacob Arnold, residing at No. 153 Broadway, in the City of Long Branch, in the County of Monmouth and State of New Jersey, says that:

FIRST COUNT.

1. At all times hereinafter mentioned, defendants were the owners of and in possession and control of the building and premises known as No. 147 Broadway, and being situate on the north side of Broadway, in the City of Long Branch, County of Monmouth and State of New Jersey.

30

2. At all the times herein mentioned said defendants maintained a hole in the public sidewalk on the north side of Broadway, in said city, in front of the above-mentioned premises, opening upon a passageway leading into the building

40

Complaint.

on said premises and at times said hole was covered by two plates of metal hinged to the sides of the hole so that the plates might be let down level with the sidewalk and when so placed caused a continuous surface that looked and appeared safe to pass over to anyone using said
10 sidewalk.

3. On October 28, 1930, the plaintiff was, with due care, rightfully and lawfully walking along the said sidewalk in close proximity to or over the hole maintained by the defendants, as aforesaid, and the metal plates, as plaintiff approached were level with the sidewalk and forming a continuous and apparently safe surface for passage on foot.

20 The defendants, at said time, carelessly, negligently and recklessly and without warning, caused the said plates to be violently raised upon their hinges from beneath striking the plaintiff with great force and throwing him to the ground and severely injuring him in body.

4. As a consequence of the negligence, carelessness and recklessness of the defendants, as aforesaid, plaintiff was bruised and greatly injured in his body, his right arm was fractured and broken,
30 he was generally disabled, and he was forced to remain in bed for some time and away from his usual duties as a storekeeper for a long time and was compelled to hire additional persons to help in the operation of his store and was compelled to pay a large sum of money for medical care and medical and surgical appliances in endeavoring to be cured of his said injuries and he has suffered great pain and anguish of mind and body and will continue to suffer great pain
40 and anguish of mind and body, and will continue

Complaint.

to be compelled to expend large sums of money in endeavoring to be cured of his said injuries.

SECOND COUNT.

1. Plaintiff repeats, reiterates and re-alleges the allegations contained in paragraphs 1 and 2 of the First Count. 10

2. On October 28, 1930, the plaintiff was, with due care, rightfully and lawfully walking along the said sidewalk in close proximity to or over the hole maintained by the defendants, as aforesaid, and the metal plates, as plaintiff approached, were level with the sidewalk and forming a continuous and apparently safe surface for passage on foot.

The defendants at said time, carelessly, negligently and recklessly and without warning, permitted the said plates to be violently raised upon their hinges from beneath striking the plaintiff with great force and throwing him to the ground and severely injuring him in body. 20

3. Plaintiff repeats, reiterates and re-alleges the allegations contained in paragraph 4 of the First Count.

Plaintiff, Jacob Arnold, demands as damages 30 the sum of Five Thousand (\$5,000) Dollars.

JACOB STEINBACH, JR.,
Attorney for Plaintiff.

Answer.

ANSWER.

Filed May 19, 1931.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

10

JACOB ARNOLD,

Plaintiff,

vs.

ROSE DLUGO, WILLIAM LEVEY
and THEODORE LEVEY,

Defendants.

*Action
at Law.*

Answer.

20 Defendants, answering the complaint of the
plaintiff, say that:

FIRST COUNT.

1. Paragraph one is denied.
2. Paragraph two is denied.
3. Paragraph three is denied.
4. Paragraph four is denied.

30

FIRST SEPARATE DEFENSE TO
FIRST COUNT.

Defendants allege that the plaintiff caused or contributed to his injuries and damages in that he failed and neglected to exercise reasonable care to protect his own safety under the circumstances and conditions which existed at the time of the alleged accident.

40

Answer.

SECOND COUNT.

1. Defendants repeat their answers to the allegations contained in paragraphs one and two of the first count.

2. Paragraph two is denied.

3. Defendants repeat their answers to the allegations contained in paragraph four of the first count.

10

FIRST SEPARATE DEFENSE TO SECOND COUNT.

Defendants allege that the plaintiff caused or contributed to his injuries and damages in that he failed and neglected to exercise reasonable care to protect his own safety under the circumstances and conditions which existed at the time of the alleged accident.

20

COULT, SATZ & TOMLINSON,
Attorneys for Defendants.

30

40

Reply—Verdict.

REPLY.

Filed May 19, 1931.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

10

JACOB ARNOLD,

Plaintiff,

vs.

ROSE DLUGO, WILLIAM LEVEY
and THEODORE LEVEY,
Defendants.

*Action
at Law.*

Reply.

Plaintiff denies every allegation in the answer.

20

JACOB STEINBACH, JR.,
Attorney for Plaintiff.

VERDICT.

The jury rendered a general verdict against the defendants and in favor of the plaintiff for \$875.00.

30

JUDGMENT

This cause was tried before Judge Rulif V. Lawrence, with a jury at the Monmouth Circuit on May 4th and May 5th, 1932.

The jury returned a general verdict against the defendants and in favor of the plaintiff for Eight hundred and Seventy-five (\$875.00) Dollars.

Whereupon it is adjudged that the plaintiff Jacob Arnold do recover of the defendants, Rose Dlugo, William Levey and Theodore Levey, the sum of Eight hundred seventy-five dollars

\$875.00	damages, together with his costs which
82.91	have been taxed at the sum of Eighty
<u>\$957.91</u>	Two dollars and ninety-one cents,
	making in the whole the sum of Nine
	hundred fifty seven dollars and
	ninety-one cents.

Judgment signed and entered May 10, 1932.

Notice and Grounds of Appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed June 8, 1932.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

JACOB ARNOLD,

Plaintiff,

vs.

ROSE DLUGO, WILLIAM LEVEY
and THEODORE LEVEY,
Defendants.

*Action
at Law.*

*Notice and
Grounds of
Appeal.*

10

To Jacob Steinbach, Jr., Esq., attorney for plain-
tiff:

20

SIR:

PLEASE TAKE NOTICE, that the defendants in the above-entitled cause, hereby appeal from the whole of the judgment entered therein in the New Jersey Supreme Court, and every part thereof, to the Court of Errors and Appeals in the last resort in all causes in New Jersey, on the following ground:

1. The trial court erred in refusing to direct a verdict in favor of the defendants.

30

COULT, SATZ & TOMLINSON,
Attorneys for Defendants.

Dated: June 2, 1932.

Service of the within Notice is hereby acknowledged this 6th day of June, 1932.

JACOB STEINBACH, JR.,
Attorney for Plaintiff.

40

Jacob Arnold, for Plaintiff, Direct.

TESTIMONY.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

10

JACOB ARNOLD,

Plaintiff,

vs.

ROSE DLUGO, WILLIAM LEVEY
and THEODORE LEVEY,

Defendants.

*Action
at Law.*

Freehold, N. J., May 3, 1932.

20

Before Honorable R. V. Lawrence, *J.*, and a jury.

Appearances:

For plaintiff, Jacob Steinbach, Jr., Esq.

For defendants, DeVoe Tomlinson, Esq.

PLAINTIFF'S EVIDENCE.

JACOB ARNOLD, the plaintiff, sworn.

30 *By Mr. Steinbach.*

Q Mr. Arnold, where is your place of business? A 153 Broadway, Long Branch, New Jersey.

Q Do you know the premises owned by a Mrs. Dlugo and the two Mr. Leveys? A Yes, sir.

Q And how near are their premises to your place of business? A Well, they are about six or eight doors east of us.

40

Jacob Arnold, for Plaintiff, Direct.

Q What is your business, by the way? A I am in the restaurant and delicatessen business.

Q Does this photograph represent the opening of the sidewalk which it is admitted exists in front of the defendant's building? A Yes, sir.

10

Mr. Steinbach: May I have that marked?

Mr. Tomlinson: No objection.

(Photograph referred to marked in evidence P. 1.)

By Mr. Steinbach.

Q In October, 1930, were you hurt at that place? A Yes, sir.

Q Tell us exactly what happened. A Well, it was October 28, to be exact, in the evening between 6:30 and 6 o'clock.

20

Q Was it dark? A It was, yes, quite dark. It was in the fall of the year, the latter part of October, and I was walking down to Mr. Mendelson's stand to get the evening newspaper, and as I was walking in front of Levey's furnishings and clothing store something struck me, and I fell to the sidewalk, and I discovered later that a man by the name of Scoles was coming up from the cellar.

30

Mr. Tomlinson: I object to that.

Mr. Steinbach: Never mind. I will consent that it be stricken out.

The Witness: I am trying to explain it. Mr. Scoles was coming up from the cellar, and without any warning he—

Mr. Tomlinson: I object to that part of it—"without any warning."

40

Jacob Arnold, for Plaintiff, Direct.

By Mr. Steinbach.

Q Tell us what happened. A Well, these doors flew up and hit me, knocking me to the sidewalk, and I fell on my arm and broke it.

10 Q Then what did you do? A I picked myself up somewhat bewildered, and I didn't know just what to do, and I finally went down the street to the store and got the newspaper, and about a half an hour later my arm got terribly sore, and got so that I couldn't use it in the evening, and that kept up until about 12 or 1 o'clock, and I couldn't leave the store very well because my sister was on her vacation at the time, and the next day I went to see Dr. Maher about my arm, and he examined it and began rubbing it with some liniment of some sort to relieve it, and
20 he told me—

Mr. Tomlinson: I object to what he told him.

By Mr. Steinbach.

Q Tell us anything you know which is not what somebody else told you.

By the Court.

30 Q Well, you had a broken bone there? A Yes, sir.

By Mr. Steinbach.

Q Painful, Mr. Arnold? A He didn't know whether it was broken or not.

Q In any event, he gave you treatment for it? A Yes.

Q And did you ultimately go to a hospital? A Yes, sir.
40

Jacob Arnold, for Plaintiff, Direct.

Q What did they do to you there? A They took an X-ray of my arm.

Q After that what was done? A They took an X-ray and said—

Mr. Tomlinson: I object to that.

10

By the Court.

Q Which arm was it, by the way? A The right arm.

Q What did they do with it? A Put it in a cast.

Q And how long did you wear the cast? A Over three weeks.

By Mr. Steinbach.

Q Then what happened? A Then I went back for several treatments, and for several more X-rays to the hospital, and the doctor continued to rub my arm and exercise it as much as possible, and he advised me to have some heat treatments, because he was not so sure that it was healed.

20

Mr. Tomlinson: I object to that.

The Court: The doctor is here and he can speak for himself.

30

By Mr. Steinbach.

Q Tell us what you did, Mr. Arnold? A I went back for some more treatments.

Q When was the last treatment you had? A About six weeks after the accident.

Q How many have you had in the meantime? A Half a dozen, I should say.

40

Jacob Arnold, for Plaintiff, Direct.

Q How is the arm now? A It is all right so that I can work with it, but it still hurts me at times.

Q Can you lift objects as you could before? A I don't think it is as strong as it was before I broke it, although I can use it.

10 Mr. Tomlinson: I object to the expression of opinion.

By the Court.

Q What can you do with the arm now—everything you did before? A Most everything I did before, but it is not quite as strong as it was before.

20 *By Mr. Steinbach.*

Q How long were you out of your place of business? A Around four weeks.

Q And was it necessary for you to hire additional help? A Yes.

Q Whom did you hire? A An extra girl in the daytime, and an extra girl at night.

Q Do you know how much, altogether, you paid for extra help? A Just about, yes.

30 Q How much? A About \$120 or \$130, I am not sure which.

The Court: The bill of particulars says \$120.

By Mr. Steinbach.

Q And do you know what your medical expenses were, including X-rays?

40 Mr. Tomlinson: That is shown in the bill of particulars as \$25 for doctors and \$30 for X-rays.

Jacob Arnold, for Plaintiff, Cross.

By Mr. Steinbach.

Q Is that all of your medical bills? Have you had any treatments since those bills were rendered? A No.

Q Have you had any other expenses connected with it? A No. The only other expense I had was the time I lost from my store. When I couldn't supervise my own business; that was the main expense, and it was probably for a month. 10

By the Court.

Q That was \$120 for extra help? A That is what it cost me in money, but I couldn't be there myself and—

Q I know, but you don't know how much it cost you because of the fact you were not personally present at your business. 20

By Mr. Steinbach.

Q Do you suffer any pain in that arm now? A Only in bad weather. There is an ache in it then, otherwise it is pretty fair.

By the Court.

Q How old a man are you, Mr. Arnold? 30
A I will be 41 in a few days.

Cross examination by Mr. Tomlinson.

Q Your store was a very short distance from the place where this accident happened? A Yes, sir.

Q And as I understand it, you were going down to get the evening paper? A Yes, sir.

Jacob Arnold, for Plaintiff, Cross.

Q Now, was the street very crowded? Were there very many people on the street? A No, sir.

Q And this accident happened right in front of the store that is run by Mr. Huberman; is that right? A Yes.

10 Q He runs a furnishing store there, does he not? A Yes, sir.

Q And were the windows lighted in that store? A Slided.

Q Were they lighted? A Yes, I believe they were, but I am not sure about that point.

Q You were walking along Broadway, were you not? A Yes, sir.

Q And that is a lighted street, is it not? A Yes.

20 Q And did you see these doors at all before you got hurt? A No, sir.

Q There were not many people on the street, were there? A Quite a few people on the street.

Q And the street was very well lighted, was it? A Yes, sir.

Q And yet you could not see these doors before the accident? A One door came right up as I got on top of it.

30 Q And you never saw it, did you? A No.

Q Before this accident happened had you stepped on one of the doors? A Yes, sir.

Q And it was while you were on one of the doors that the other one came up; is that right? A Yes, that is right.

Q And then after the accident you saw Mr. Scoles there, did you not? A Yes, sir. I didn't see him there, no, but I saw him that evening.

Q Did he not come out to where you were? A Yes, sir.

40

Jacob Arnold, for Plaintiff, Cross.

Q I mean while you were still there on the street? A Oh, no.

Q Well, how long did you stay there at the place where you got hurt before you walked on down to the store where you got a newspaper?

A Just a few minutes. I was somewhat bewildered there, and I saw a man coming from the cellar there, and I went on about my business, thinking I was all right. I seen scratches on my knee, and my arm hurt, but— 10

Q You say you saw a man coming up from the cellar? A Yes.

Q And that was Mr. Scoles, was it not? A Yes, sir.

Q You saw him come up from the cellar way? A Yes, after I fell down and got up.

Q Do you know Mr. Scoles? A Yes, sir. 20

Q He is a barber, is he not? A That is right.

Q Who does he work for? A He works for a man by the name of Surgeon.

Q And he was working for him at this time, was he not?

Mr. Steinbach: That is objected to as immaterial.

Mr. Tomlinson: Well, I will withdraw it if you object to it. 30

By Mr. Tomlinson.

Q Then you went down to the paper store?

A Yes.

Q And then you got your paper? A Yes, sir.

Q And you came back to your own store?

A Yes, sir.

Q And you worked there? A Yes. 40

Jacob Arnold, for Plaintiff, Cross.

Q Until what time? A Well, we generally close up about 1 o'clock in the morning.

Q And was that the time you quit then?

A That was the time I closed up, yes.

Q And then you went on home? A Well, we lived right there in the building.

10

Q And was it the next day that you saw Dr. Maher? A The next day, yes.

Q And did you see him at your home or at his office? A I went to his office.

Q And that was on October 29, was it not?

A Yes, sir.

Q 1930? A Yes, sir.

Q And then the next day, November 1, you went over and had some X-rays taken at the hospital, did you not? A Yes, sir.

20

Q And then you went there again on December 1, 1930, to have another X-ray taken, did you not? A That is right.

Q And then again on January 7, 1930? A Yes, sir.

Q Now, you told Judge Steinbach something about four weeks; what was it you said, that you couldn't work for four weeks? A I couldn't do any of the work myself for four weeks.

30

Q But you had been in the store there that four weeks? A In and out of the store, but not doing any work there.

Q But you were doing general supervision of the store? A What I could, yes.

Q And you went in there every day, did you not? A Yes, sir.

Q And you saw how things were going? A Yes, some of it.

Q And you were giving the orders as to how things should be done? A Yes, sir.

40

Dr. John Maher, for Plaintiff, Direct.

Q And what was the name of this girl that you hired? A I don't remember now.

Q You don't remember? A No.

Q How much did you pay her? Did you pay her by the day or by the week? A By the week.

Q How much a week? A \$15 a week, with her meals. She got her meals there, too. 10

Q How long did you say your arm was in this cast, Mr. Arnold? A I think around about 2 or 3 weeks.

DR. JOHN MAHER, called by the plaintiff, sworn.

By Mr. Steinbach.

20

Q Doctor, did you attend Jacob Arnold in October or November of 1930? A Yes, sir.

Q What was the matter with him? A He had an impacted fracture of the head of the radius.

Q What kind of a fracture is that? A A fracture with the edges wedged into one another, and it was at the elbow joint.

Q Did you treat that arm, doctor? A I saw him on the 29th, and we X-rayed him the next day, and the next day he had an anterior plaster splint put on that arm, and it was taken off first at the end of two weeks, and then taken off at the end of the fourth week. 30

Q And was Mr. Arnold disabled at that time? A He was.

Q To what extent? A He was unable to use that arm until I told him to exercise it, when I took the cast off at the end of the fourth week. 40

Dr. John Maher, for Plaintiff, Direct.

Q In what manner did you tell him to exercise? A Due to the fact there was absorption there rather than muscle formation, he needed something to coax a union there.

10 Q And what did you tell him to do? A I told him to have it massaged, and to do passive motions with this forearm and elbow joint.

Q And how did you get that motion? A He was showed how to flex his own arm, and take his other hand and massage over the fractured area. He was also told to have heat massaging.

Q How long did this condition last in his arm? A He was X-rayed in December, and X-rayed again in January, and in January he still had no complete union of that fracture.

20 Q When was the union obtained, or has it been obtained? A The last time I saw him was around that time, about in January. I told him then he ought to have something to take care of his arm, and if he still had that pain, he ought to have it operated on for the removal of part of that head bone.

30 Q Did you think an operation was necessary? A Well, I just saw him today, and I saw good motion in the use of that arm; he says it still pains in change of weather, but outside of that I believe there is good usage of that arm, and no necessity for an operation now. At least, I would not advise one at this time.

Q He still has pain in that arm? A Yes, sir, in change of weather and unusual usage of that arm.

40 Q What does that indicate to you, doctor? A That there still remains a restricted flexion at that union, and possibly callous and so forth, causing that pain.

Dr. John Maher, for Plaintiff, Cross.

Q In your opinion do you believe an operation will be ultimately necessary? A I would advise him to go on with his little complaint now and avoid the operation.

Q What can you say as to whether or not an operation will be ultimately necessary? A Well, after this length of time—

10

Mr. Tomlinson: I object to this unless the doctor limits himself to what is probable.

The Witness: I would say that after this length of time, the arm having improved as it has, that he had better forget about an operation.

By Mr. Steinbach.

Q In your opinion, is the result obtained in that arm good, or what is it? A I think it is relatively good. I do not think an operation would give better results.

20

Q Will he continue to suffer pain? A I don't know that. I couldn't tell you.

Q Have you rendered all your bills to Mr. Arnold? A Well, I rendered the one bill, yes, at the time, and I told him to seek other counsel if the pain continued.

30

Cross examination by Mr. Tomlinson.

Q Doctor, the radius is one of the two bones from the elbow to the wrist; is that right? A Yes.

Q When was the last time prior to today, doctor, that you examined this arm? A The only time I can definitely recall as being the last time was in the vicinity of January 7, when the last

40

David Dlugo, for Defendants, Direct.

X-ray was taken, or thereabouts. I am not positive of the date, however.

Q January of what year, doctor? A That would be the year following the accident.

Q 1931? A Yes.

10 Q And then the next time after that when you examined him was today? A Yes, I believe so.

Q He has quite a good apposition at the site of the fracture now has he not? A The apposition was there always, but the union was not there. He should have been X-rayed since.

Q You don't know as a matter of fact, whether or not he has been? A I don't know, no.

20 Q But he has fairly good use of that arm now? A Yes, I would say so.

Q And this pain that Judge Steinbach interrogated you about occurs in damp or cold weather, does it not? I mean it is more apt to occur then than at any other time; is that right? A Yes; he said that, and it limits the use of his arm.

Mr. Steinbach: We rest.

30

DEFENDANTS' EVIDENCE.

DAVID DLUGO, called by the defendant, sworn.

By Mr. Tomlinson.

Q Mr. Dlugo, where do you live, and what is your occupation? A I live at 145 Broadway, Long Branch, and my occupation is shoe merchant.

40

David Dlugo, for Defendants, Cross.

Q What connection, if any, have you with the premises at 147 Broadway, in Long Branch?

A I am active as agent.

Q And Rose Dlugo, who is one of the defendants here, and who is one of the owners of that property, is what relation to you? A My wife.

Q And what was your occupation on the 28th day of October, 1930? A Shoemaker. 10

Q Where? A Long Branch.

Q At what number? A 141 Broadway.

Q And is that part of the premises owned by your wife and the Messrs. Levey? A No, sir.

Q Now, do you have charge of the premises at 147 Broadway? A Yes, 145 and 147.

Q And do you know Jacob Scoles? A James Scoles, yes, sir. 20

Q Was he employed by you in any capacity? A No, sir.

Q Was he employed by Rose Dlugo, William Levey, or Theodore Levey in any capacity? A No, sir.

Q Do you know where he lives? A Yes, sir.

Q Where? A One flight up at 145 Broadway.

Q Over the stores? A Yes, sir.

Q And what was there in the basement or cellar of this place? A There was a space there set aside for his use. 30

Q Well, was it set aside exclusively for his use, or for the use of the tenants, generally?

A Each tenant has a particular space set aside, sort of a booth.

Cross examination by Mr. Steinbach.

Q Do you do the janitor work there? A Sir? 40

David Dlugo, for Defendants, Cross.

Q Do you do the janitor work? A No.

Q Who does? A One of the tenants.

Q And what does that janitor work consist of? A Keeping the halls clean, and keeping the yard free from any dirt.

Q Any heat in the house? A Yes, sir.

10 Q What? A An oil burner.

Q Where is that? A In the cellar.

Q Who takes care of that? A It is automatic; it takes care of itself.

Q Does anyone control the heat? A There is a control in my apartment.

Q Can it be operated from the furnace itself?

A No, it cannot.

Q It cannot be operated from the furnace itself? A No, sir.

20 Q Don't tenants go down there in the cellar and increase the heat if they want to?

Mr. Tomlinson: I object to that as improper cross examination.

The Court: Well, I will allow it as relating to his duties and functions.

Mr. Tomlinson: He was not the janitor, as I understand it.

30 Mr. Steinbach: He said he was there and had charge, and was in control of the furnace. He said the controls of the furnace were in his room.

By the Court.

Q Did you have occasion to go to the cellar?

A I used to go there once in a while, yes, and I would look to see where the tenants put things, to see that they put them where they belonged.

40 Q Tenants have access to the cellar there, do they? A Yes.

David Dlugo, for Defendants, Cross.

By Mr. Steinbach.

Q And does the passageway lead from the sidewalk into the cellar? A Directly.

Q Directly? A Yes, sir.

Q And is it locked ordinarily? A It is never locked.

10

Q Is the entranceway to the cellar guarded in any way? A No; there is just the usual bar that they put up there.

Q Where is the bar? A Underneath the doors.

Q Is that ever closed? A Where?

Q Is that ever closed?

Mr. Tomlinson: I object to that as improper cross examination, and invite your Honor's attention at this time to the complaint in this case only charging negligent opening of these doors.

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Mr. Steinbach: No; that is not the complete scope of the complaint. The complaint alleges that the owners permitted the tenants or anyone to open these doors, and that they did not place any safeguard there.

Mr. Tomlinson: That is not the allegation of the complaint.

30

The Court: Well, I will not determine that now. I will allow the examination to proceed.

By Mr. Steinbach.

Q Was this bar closed across these doors? A At this particular time?

Q Yes. A I was not present.

Q Well, was it at anytime that you know of?

40

David Dlugo, for Defendants, Re-direct.

Mr. Tomlinson: I object to that as improper cross examination.

The Court: Yes, I think it is too broad. I will allow you to show what kind of a bar it was, and whether or not it could be opened by the tenants.

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By Mr. Steinbach.

Q What kind of a bar was it? A It is a bar that hooks in each end, there being sort of a hook there, and there is a hole in each part. This cross-bar fits into the doors holding them in position at the same time.

Q And that was the arrangement at the time of the accident? A Yes; those bars were always there.

20

Q Was it ever attached so as to bar the doors? A I don't understand the question.

Q You say there was a bar there? A Yes.

Q Did the bar lock these doors? A Not automatically, no.

Q Well, did you ever lock these doors with the bar?

30

Mr. Tomlinson: I object to that as improper cross examination. We have admitted in this case in our opening that this man went down to the cellar with our consent to open the doors, or at least, with our implied consent.

Mr. Steinbach: All right; that is all.

Re-direct examination by Mr. Tomlinson.

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Q Just one question; were the fuse boxes holding the fuses for the apartments down in that basement? Well, put it this way; could the

James Scoles, for Defendants, Direct.

space where the fuse boxes were located be reached by this entrance? A Oh, yes.

Q Now, in the event a fuse were to blow out and cause a stopping of electrical current to one of the apartments, at whose expense would a new fuse be put in, under your arrangement with the tenants? A Not at mine.

10

Q Well, at the tenant's expense? A I suppose so, since I didn't need it.

Mr. Tomlinson: That is all.

JAMES SCOLES, called by the defendant,
sworn.

By Mr. Tomlinson.

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Q Mr. Scoles, where do you live? A 145 Broadway.

Q That is in the premises owned by the Dlugos and the Leveys? A Yes, sir.

Q And where do you work? A At 149 Broadway.

Q That is in the premises owned by the Dlugos and the Leveys? A No, sir.

Q And is 145 Broadway where you lived and where you worked on October 28, 1930? A Where I was working, yes.

30

Q Now, were you coming up the steps at the time the accident happened? A Yes, sir.

Q And what had you been down in the cellar for? What was your purpose in going into the cellar? A To look over some of my stuff in my part of the cellar.

Q And just tell us what you know about this accident? A I don't recall it very much, to tell

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James Scoles, for Defendants, Cross.

you the truth about it. I do recall coming out of the cellar, and I recall opening one of the doors at the cellar-way and I heard someone fall over, but I didn't know who it was until after I seen who the gentleman was.

10 Q And was that in front of Mr. Huberman's store? A Yes.

Q And had you opened both doors at this time, or only the one? A Only the one.

Q And had you opened it with your left or right hand? A Right hand.

Q Were you working in any capacity at all for Rose Dlugo, William Levey or Theodore Levey? A No, sir.

Cross examination by Mr. Steinbach.

20

Q What were you doing down in the cellar that day? A I went down to the cellar to look for certain things that I had there.

Q What? A I had went down to the cellar to look for certain things that I was interested in that I wanted to see.

Q What were they? A Some old furniture that I had there.

30 Q Your own furniture? A Yes, sir.

Q Were the electric light bulbs there, or fuses for the electric lights? A Yes, sir.

Q Were you going down there to fix that? A Afterwards.

Q One had blown out? A Yes.

Q Wasn't that the work you were on that day? A I believe it was.

Q And didn't you fix those fuses for the building? A Very seldom.

40 Q But you did? A Once or twice a year.

James Scoles, for Def'd'ts., Re-direct—Re-cross.

Q And was that known to Mr. Dlugo? A Yes.

Re-direct examination by Mr. Tomlinson.

Q Whose fuse was it that had blown out, in whose apartment? A Mine.

10

Q And when you put in a new fuse when it blew out, who paid for that? A I did.

Re-cross examination by Mr. Steinbach.

Q From whom did you buy this fuse? A From the five and ten.

Q Did your landlord undertake to furnish you light? A No, sir.

Q You paid for that yourself? A Yes, sir.

20

Q How about the lights in the hall? A I don't know.

Q That was furnished to you, was it not? A I couldn't tell you that.

Mr. Steinbach: That is all.

Mr. Tomlinson: We rest, if the Court please.

The Court: Upon what theory do you say there is any liability here, Judge Steinbach?

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Mr. Steinbach: If the Court please, it is the duty of a landlord who retains general control over a building not to permit, carelessly or negligently, persons to use parts of the building permanently fixed thereto so that they might be dangerous to the public at large.

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Motion for Direction of a Verdict.

(The Court and counsel retired to chambers, whereupon the following took place):

10 Mr. Tomlinson: If the Court please, the defendants respectfully move for a direction of a verdict in their favor upon the ground that from the entire case it conclusively appears that any injury suffered by the plaintiff was not the result of any negligence upon the part of the defendant or by reason of any breach of any duty which the defendant owed to the plaintiff. Now, I rely to a large extent, if the Court please, upon the case of *Muller v. Baskowitz*, decided by the Supreme Court of this State on December 10, 1931.

(Argument on cases followed.)

20 The Court: It seems evident to me, under the second count of this complaint, that there is an intent to plead that the doors or plates in the sidewalk leading to the cellar of defendants' premises were so constructed or arranged that they could be suddenly and violently opened from the inside, thus creating what might be termed a nuisance in the sidewalk.

30 Under the doctrine of *res ipsa loquitur*, therefore, the accident and injury to the plaintiff giving rise to this suit may well be said to make out a prima facie case of negligence against the defendants in allowing, particularly at the time of the accident, the doors or plates in question to be so arranged or left that they could be violently opened by anyone from beneath. While the pleading charges the defendants, "That at the time of the accident they carelessly, negli-

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Motion for Direction of a Verdict.

gently and recklessly, and without warning permitted the said plates to be violently raised on their hinges from beneath, striking the plaintiff with great force and throwing him to the ground and severely injuring him in and about the body," I consider that language to mean or charge defective construction, so as to permit the plates or doors in question to be violently raised upon their hinges from beneath, and so causing an injury, as in this case, to a pedestrian having a legal right to be upon the highway. 10

The result is that a motion for a direction will be granted as to the first count. The motion for a direction will be denied as to the second count, and an exception allowed, and the case will go to the jury under the second count. 20

(Exception noted for defendant as ground of appeal.)

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*Charge of the Court.***Charge of the Court.**

LAWRENCE, J.:

Members of the Jury: As this case comes to you for your consideration the primary question, of course, will be whether the plaintiff has shown
 10 negligence on the part of the defendants as charged in what is spoken of as the second count in the complaint. The Court agrees with counsel for the defendants that there can be no recovery against them for opening the door suddenly, for the very obvious reason that the immediate occasion of the accident was the act of Mr. Scoles in suddenly opening the door in the sidewalk at a time when Mr. Arnold, as he had a lawful right to do, was walking along the sidewalk.

20 The first count in this complaint apparently sought to charge the defendants with the act of opening the door suddenly, thus providing an obstruction to Mr. Arnold, as a pedestrian, which caused him to fall. The evidence does not disclose that the door in the sidewalk was opened by the defendants, and therefore, the contents of the first count of the complaint will be withdrawn from your consideration, as it concerns imputing to the defendants negligence on
 30 the part of Mr. Scoles.

There is such a thing, however, of several persons being jointly responsible, if properly charged, for the consequences of a negligent act. In other words, technically speaking, they are referred to as joint tort-feasors.

There is a second count in this complaint which I conclude is enough, even though rather narrowly drawn, to justify the Court in submitting this case to you thereunder as against the de-
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Charge of the Court.

fendants named. That count charges in effect that the plaintiff, Jacob Arnold, was rightfully and lawfully walking along the sidewalk in close proximity to or over a hole maintained by the defendants, and covered by metal plates, which have been referred to as the doors in the sidewalk leading to the basement or cellar, which metal plates were level with the sidewalk, forming, apparently, a continuously level surface for passage on foot. It is alleged in this count that the defendants carelessly, negligently and recklessly, and without warning permitted, by which of course is meant allowed, the plates, namely the doors in question, to be violently raised from the hinges beneath, striking the plaintiff with great force and throwing him to the ground, thereby severely injuring him. There is a recognized rule of law that if the owner of a building makes an excavation in the sidewalk in front of it whereby it obstructs the use by pedestrians of such sidewalk, such owner is bound to render it (the excavation) reasonably safe to the public. Now, while this count might have more specifically charged a failure to properly guard this cellarway which had been constructed in the sidewalk, as it were, I have concluded that the count is sufficient to charge the defendants with a failure to reasonably guard the cellarway where that excavation was, against one or the other, or both of the doors, being suddenly opened at a time when a pedestrian was about to use that section of the sidewalk, as a pedestrian had a lawful right to do.

There are many such areaways, of course; they are common, but there is a definite rule of law imposed upon the property owner who constructs one to maintain it with reference to his

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Charge of the Court.

duty to the walking public, and the charge made here in the second count of the complaint is that the owners of the building in question, namely, these defendants, permitted those doors to be so constructed or so placed that anyone coming from the cellar could suddenly open them, one
10 or the other, and that they so created what is sometimes spoken of as a common law nuisance in the sidewalk.

Under the first count of this complaint it was charged that these defendants, themselves, opened those doors carelessly and negligently. There is no such proof, however, in the case, because Mr. Scoles, who was a tenant in the building, was apparently down in the cellar on some legitimate errand, and he, desiring, apparently,
20 to come to the sidewalk, removed an iron bar underneath, causing the sudden opening of one of the doors just at the moment Mr. Arnold was at that particular spot, throwing him to the sidewalk.

There is evidence in the case that tenants of the building were allowed to go to the cellar where there were certain compartments used by them for storage purposes, and that they were allowed, apparently, to come up to the sidewalk
30 through the doors there. In the complaint, under the second count, it is charged, as I have heretofore indicated, that if these doors had been properly guarded against sudden opening, in view of the fact they were in the sidewalk and ordinarily formed a part thereof, the accident would not have happened. Now, the question is whether the defendants were negligent in failing to reasonably guard the use of those doors with reference to their being opened from under-
40 neath so that a pedestrian would not have knowl-

Charge of the Court.

edge of the fact that they were about to be opened, and so cause injury to such pedestrian. The defendants were under the duty of reasonably protecting the opening so as to make it safe for pedestrians using the sidewalk in question.

Now, if you find that negligence in that regard, under count two of the complaint, has been made out by a fair preponderance of the proof against the defendant owners of the building, who, apparently, had control of the areaway in question leading to the sidewalk, then you would be justified in awarding Mr. Arnold as against the defendants a sum which in your judgment would properly and adequately compensate him for the injury that he received. His injury appears to have been a broken arm. Doubtless, there was pain and suffering connected with that injury; at least, it was so indicated in the evidence, and therefore, you will ascertain the nature of the injury, the pain and suffering incident thereto and that in all reasonable probability accompanied it, and the length of time that he was incapacitated, under a fair preponderance of the proof. Then, having discovered the fact with reference thereto, you would then say what sum in your judgment would properly and adequately compensate him for such injury, plus the phases and features indicated. In addition to that he had some medical bills, the amount of which you will recall, or ascertain from the exhibits offered in evidence, and if you find those bills reasonable and necessarily incurred in attempts to have himself cured of his injuries such disbursements should be added to the sum that you find as compensation for his injury, if you so find, under the rules indicated.

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Charge of the Court.

In addition to that he is claiming that he was unable to carry on his accustomed employment, which was that of managing some sort of store, a delicatessen store, I believe; he says that he was unable to carry on that work because of his injury, and was obliged to employ assistants,
10 which otherwise would not have been necessary, involving an expenditure of \$15 a week for some period of time. Whatever that period of time was, the evidence will disclose, and you will ascertain—

Mr. Steinbach: May I correct your Honor on that?

The Court: Yes.

Mr. Steinbach: I believe it was \$15 a week for two girls.

20 Mr. Tomlinson: No, Judge Steinbach, as I remember it, it was \$15 a week to one girl, plus lunches or meals, making a total of \$120.

The Court: Well, it is for the jury to say. As the Court does not recall it, and neither counsel agrees, you will have to consult your own recollection in that regard as to what the alleged loss was as stated by him. I rather think that the total sum was \$120, the young woman being
30 so employed getting her meals at the delicatessen, or at the plaintiff's place of business, in addition to the sum indicated.

The case is accordingly left with you members of the jury under the second count in the complaint. If you find negligence on the part of the defendants under a fair preponderance of the proof, then you will consider the next question in the case, namely, whether or not there was any contributory negligence on the part of Mr. Arnold, the plaintiff in the case. That phase of
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Plaintiff's Exceptions to Charge.

negligence is said to be present in a given case where the injured person by his own negligence contributes to his own injury in such a way that but for it he would have received no injury from the person or persons from whom he seeks to recover. In any event, if you find negligence to have been proven against the defendants, and no contributory negligence on the part of Mr. Arnold, the plaintiff in the case, then Mr. Arnold may recover under the rules of law indicated. However, on the other hand, if there was negligence on the part of the defendants, and also contributory negligence on the part of the plaintiff, then no recovery can be had. There can be a recovery only in the event you resolve the issues of negligence in favor of the plaintiff, bearing in mind that he was not bound to show that he was not contributorily negligent, that being a matter of defense, and the burden being on the defendants to prove it. The case is accordingly left with you for your consideration.

Mr. Steinbach: The plaintiff respectfully excepts to your Honor's refusal to charge a request as submitted.

(Requested charge referred to is as follows):
 "Plaintiff respectfully requests the Court to charge that it does not appear that the defendants took any precaution to prevent the doors of the passageway being opened from beneath, and the plaintiff was injured by the doors being opened suddenly and without warning, and therefore, the defendants are liable to the plaintiff for such an amount as will compensate him for his injuries."

Plaintiff excepts to the statement of the Court that there can be no recovery against the defendants for opening the doors suddenly.

Defendants' Exceptions to Charge.

Plaintiff respectfully excepts to the charge of the Court wherein the Court said that it appeared that Mr. Scoles raised an iron bar underneath the door, whereas, in fact, there is no such testimony in the evidence.

10 Plaintiff excepts to the Judge's charge wherein it was said that the jury may take into consideration whether or not Mr. Arnold, himself, was negligent, there being no testimony whatsoever indicating that the plaintiff, himself, was guilty of contributory negligence in this suit.

(Exceptions granted plaintiff as ground of appeal.)

20 Mr. Tomlinson: The defendants take exception as ground of appeal to that part of the Court's charge wherein the Court stated that there is such a thing as several persons being responsible for the commission of a single act, and in such cases those persons are commonly called joint tort-feasors. The ground of this exception is that under the theory of plaintiff's counsel in this action, the owners of the premises, who are the defendants, and Mr. Scoles, were not joint tort-feasors and could not be found to be such.

30 Defendants also take exception as ground of appeal to that part of your Honor's charge wherein your Honor read to the jury the paragraph of the second count of the complaint, and then said, in substance, "The plaintiff also charges that the defendants carelessly, negligently and without warning permitted the doors to be violently raised." The ground of this exception is that the Court neglected to read to the jury the words which are used in connection with such language in the second count, reading as follows: "On said date." The ground of

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Defendants' Exceptions to Charge.

this exception is that the language of this paragraph in the second count taken in its entirety shows that the purpose of the complaint was to charge a single act rather than a continuous line of conduct.

The defendants also take exception as ground of appeal to that portion of the Court's charge wherein the Court charged substantially as follows: "If an owner makes an excavation in front of his building such owner is bound to render it reasonably safe for travel thereupon." The ground of this exception is that no such charge has been made in the complaint; also, that there is no evidence that any excavation was the proximate cause or could be found to be the proximate cause of the plaintiff's injuries. 10

Defendants also take exception to that portion of your Honor's charge, as ground of appeal, wherein your Honor charged substantially as follows: "The charge made here is that the owners permitted the door to be so constructed or so placed that one going from the cellar could suddenly open said doors. This constitutes what is commonly called in the law a nuisance." The ground of this exception is that nowhere in the complaint is the commission of a nuisance charged or pleaded; furthermore, that no proof was adduced which would justify the Court in finding that the defendants had maintained a nuisance. 20 30

Defendants also note an exception as ground of appeal to that portion of the Court's charge wherein the Court charged substantially as follows: "It is here charged that if the doors had been reasonably or properly guarded so as to prevent a sudden opening, the plaintiff would 40

Defendants' Exceptions to Charge.

not have met with this injury." The ground of this exception is that that implies an obligation which is not charged in the pleadings.

10 The defendants also note an exception as ground of appeal to that portion of the Court's charge wherein the Court charged substantially as follows: "It is for you to determine whether the defendants exercised reasonable care, or whether under the circumstances they failed to exercise reasonable care and so caused a nuisance." The point of this exception is that the complaint nowhere charges a commission or maintenance by the defendants of a nuisance, and, furthermore, that the proofs are not of sufficient character to justify the jury in finding the commission or maintenance by the defend-
20 ants of a common nuisance.

(Exceptions noted for defendants as ground of appeal.)

Verdict, \$875 for plaintiff.

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Stipulation.

STIPULATION.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

JACOB ARNOLD, <i>Plaintiff-Appellee,</i> <i>vs.</i> ROSE DLUGO, WILLIAM LEVEY and THEODORE LEVEY, <i>Defendants-Appellants.</i>	}	<i>Action at Law. Stipulation.</i>	10
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It is hereby stipulated by and between counsel for the respective parties in the above entitled matter that the counsel for the defendants admitted at the trial and now admit that they, the said defendants, Rose Dlugo, William Levey and Theodore Levey, were the owners of the property to the basement of which the entrance in the sidewalk, mentioned in the complaint and in the testimony, led. 20

JACOB STEINBACH, JR.,
Attorney for Plaintiff-Appellee.

COULT, SATZ & TOMLINSON, 30
Attorneys for Defendants-Appellants.

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AC/11/6/130

EXHIBIT

NEW YORK STATE DEPARTMENT OF TAXATION
ALBANY, N. Y.

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THE STATE OF NEW YORK
IN SENATE
January 10, 1930

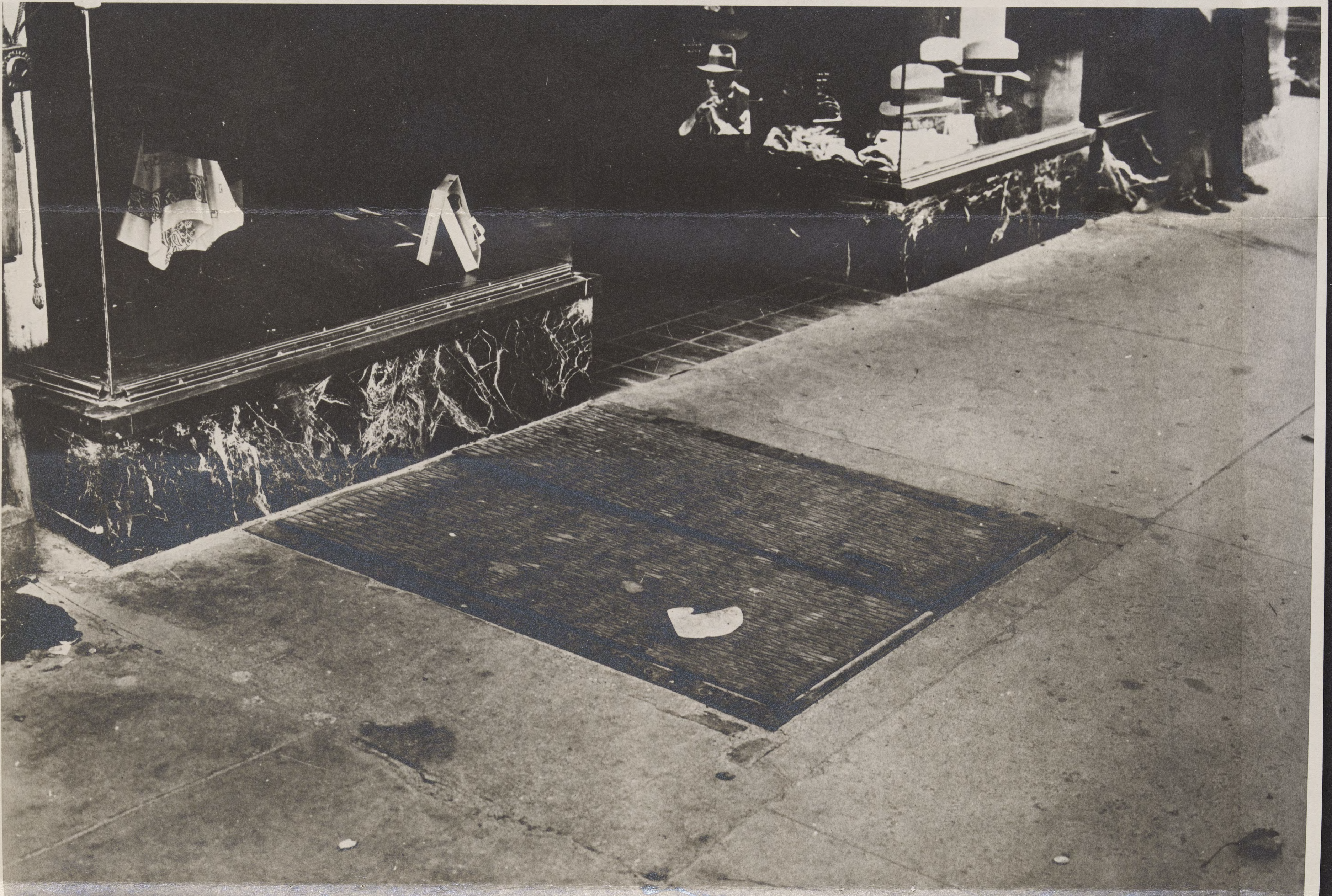
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REPORT OF THE COMMISSIONERS OF TAXATION
ON THE REVENUE FROM THE TAX ON THE
SALES OF MERCHANDISE IN THE STATE OF NEW YORK
FOR THE YEAR ENDING DECEMBER 31, 1929

30

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New Jersey Court of Errors and Appeals

JACOB ARNOLD, <i>Plaintiff-Appellee,</i>	}	<i>Action at Law.</i>
<i>vs.</i>		
ROSE DLUGO, WILLIAM LEVEY and THEODORE LEVEY, <i>Defendants-Appellants.</i>	}	<i>On Appeal from Supreme Court.</i>

BRIEF FOR DEFENDANTS-APPELLANTS.

This action was instituted to recover damages for personal injuries alleged to have been sustained by the plaintiff on October 28, 1930 while on the sidewalk in front of certain premises owned by the defendants on Broadway, in the City of Long Branch, New Jersey.

The case was tried at the Monmouth Circuit and resulted in a verdict in favor the plaintiff.

From the judgment entered thereon, the present appeal is taken.

Statement of the Case.

There is no controversy between the parties with reference to the facts surrounding the occurrence of the accident in question.

At the trial, the defendants asserting that such facts disclosed no cause of action in favor of the plaintiff as against the defendants, moved for a direction of verdict. The trial judge, however, denied this motion and submitted the case to the jury. The question of whether or not on the undisputed facts the Court was justified in such

action constitutes the sole issue involved on this appeal.

The defendants were owners of certain premises known as 145-147 Broadway, in the City of Long Branch and which abutted upon the public sidewalk. The ground or street floors of these premises were fitted up for store purposes and were occupied by certain tenants of the defendants. The defendants actually occupied no part of these premises. The upper stories of the buildings were fitted up as apartments and leased to various tenants. In the cellar of the premises were located various spaces and storerooms for the purposes and conveniences of the tenants who occupied such apartments. Access was had to the cellar by means of a stairway or areaway leading from a point in the sidewalk in front of the aforesaid stores and thence down into the cellar. The entrance to this areaway from the sidewalk was covered by two iron plates or doors. When not in use, these plates laid flat on the sidewalk. While being used they, of course, opened upwards from the sidewalk. The plates or doors in question are shown in the photograph attached to the State of Case.

One of the apartments in question was leased from the defendants and occupied by one James Scoles. Scoles was not employed by the defendants nor on the premises of the defendants. On the day in question he had been in the cellar for the purpose of replacing a fuse serving his apartment and which had blown out. This was solely for his own convenience and at his own expense. He then proceeded to leave the cellar and return to his apartment by means of the aforesaid areaway leading to the sidewalk. While he was in the cellar, the iron plates or doors had been

closed. He ascended the areaway and as it was necessary for him to do, opened or started to open one of the iron doors. As he was in the act of doing this, the plaintiff while proceeding along the sidewalk on Broadway, reached the point where these doors were located just as such door was being opened, with the result that he either tripped over or was struck by it as it was in the act of being raised.

THE NEGLIGENCE ALLEGED.

The complaint (S. C. pp. 1, 2, 3) contains two counts.

In the First Count the alleged negligence of the defendants is set forth as follows:

“3. On October 28, 1930, the plaintiff was, with due care, rightfully and lawfully walking along the said sidewalk in close proximity to or over the hole maintained by the defendants, as aforesaid, and the metal plates, as plaintiff approached were level with the sidewalk and forming a continuous and apparently safe surface for passage on foot.

The defendants, at said time, carelessly, negligently and recklessly and without warning, *caused* the said plates to be violently raised upon their hinges from beneath striking the plaintiff with great force and throwing him to the ground and severely injuring him in body.”

In the Second Count such negligence is alleged as follows:

“2. On October 28, 1930, the plaintiff was, with due care, rightfully and lawfully walking along the said sidewalk in close proximity to or over the hole maintained by the defendants, as aforesaid, and the metal plates, as plaintiff approached, were level with the sidewalk and forming a continuous

and apparently safe surface for passage on foot.

The defendants at said time, carelessly, negligently and recklessly and without warning, *permitted* the said plates to be violently raised upon their hinges from beneath striking the plaintiff with great force and throwing him to the ground and severely injuring him in the body."

It will be perceived that in neither of these counts is there any allegation that the iron plates or doors or any part of the areaway were or was in a defective condition at the time of the accident. It will further be observed that in neither of the counts is there any allegation that the doors or areaway were not of standard construction, and as an examination of the testimony will disclose, no proof of any such defect or lack of standard construction was offered at the trial.

As will also be noted, both counts charge a specific act of negligence upon a specific date. They are identical in their language except that the First Count charges that the defendants "*caused*" the doors to be opened while the Second Count alleges that the defendants "*permitted*" such doors to be opened.

At the conclusion of the trial, the trial court directed a verdict in favor of the defendants upon the First Count but submitted the case to the jury upon the Second Count upon a theory which is set forth in the following portion of his charge (S. C. pp. 31, 32).

"Now, while this count might have more specifically charged a failure to properly guard this cellarway which had been constructed in the sidewalk, as it were, I have concluded that the count is sufficient to charge the defendants with a failure to reasonably guard the cellarway where that excavation

was, against one or the other, or both of the doors, being suddenly opened at a time when a pedestrian was about to use that section of the sidewalk, as a pedestrian had a lawful right to do.

There are many such areaways, of course; they are common, but there is a definite rule of law imposed upon the property owner who constructs one to maintain it with reference to his duty to the walking public, and the charge made here in the second count of the complaint is that the owners of the building in question, namely, these defendants, permitted those doors to be so constructed or so placed that anyone coming from the cellar could suddenly open them, one or the other, and that they so created what is sometimes spoken of as a common law nuisance in the sidewalk."

ARGUMENT.

POINT I.

The trial court erroneously refused to direct a verdict in favor of the defendants.

As has already been indicated, the trial court in submitting the case to the jury attempted to justify its action in this regard upon the theory that the word "permitted" might reasonably be held to mean or imply a charge of improper construction of the doors in question. It is clear, we think, that even the widest construction of this word cannot give it the significance attributed to it by the trial court, especially where it is applied to and used in conjunction (as it was in this case) with one particular specific date, i. e., the date of the accident.

Moreover the trial court in submitting the case to the jury upon this theory either overlooked or ignored entirely the fact that no testimony

was offered or adduced at the trial for the purpose of showing that the doors in question were not of proper and standard construction.

In the case of *Muller v. Baskowitz*, 157 Atl. 389; 10 Misc. Rep. 10, a situation almost identical with that in the case at bar was considered and determined by the Supreme Court. The facts in that case were stated in the opinion to be as follows:

“The judgments in this case are the result of an action for damages for personal injuries to a child and the resulting expenses of the mother, caused by the falling of a child, 4 years of age, into a cellarway. The action was against the owner of the property.

The facts were that an employee of a tenant in carrying certain goods and merchandise from the cellar of the building caused the iron coverings of the cellarway to be laid flat on the sidewalk, and the 4 year old child walked into the opening and was injured.”

The charge of negligence in that case was the same as that charged in the second count in the instant case, to wit:

“Said defendants carelessly and negligently *permitted* and allowed said opening to be open and unsafe for the public walking along the said street, etc.”

There the trial court submitted the case to the jury, using *inter alia* the following language:

“Then the court charges you, under the decisions rendered in this State, that the owners of premises of this kind, which have openings on the sidewalk appurtenant to the premises, are responsible by reason of the facts that they are in control of those premises and in control of those open spaces or cellarways or entrances into cellars that have some connection with the premises under consideration.”

The Supreme Court reversed the judgment for the plaintiff, holding that there should have been either a non-suit or a directed verdict for the defendants below. The Court in rendering its opinion said:

“It most conclusively appears that the happening was not caused by any structural defect in the cellarway or that it was the result of the neglect of the defendants because of any control over the way.

Under such circumstances the defendants below were entitled either to a non-suit or a direction of verdict in their favor. * * *

No citation of authorities is necessary; the principles involved are entirely too fundamental.”

In the case of *Warner v. Davis*, 159 Atl. 817, the plaintiff while walking along the sidewalk tripped and fell over cellar doors which led to a building occupied by the defendant and which had been left open.

It appeared that these doors had been left open by a boy who had brought from the cellar through the doors a bicycle. There was in the case, evidence which justified the inference that this boy was an employee of the defendant. The trial court submitted the case to the jury upon the following issues: First—Whether the boy was in fact an employee of the defendant; and, Secondly—Assuming that he was such an employee, whether his acts in taking the bicycle through the cellar and leaving open the cellar door were within the scope of his authority. Of course, the converse proposition was that if the jury should find that the boy was not an employee of the defendant, then the defendant would not be liable for his action and the defendant would be entitled to a verdict.

In *Durant v. Palmer*, 29 N. J. L. 544, this court said:

“There are cases in which the tenant alone is liable, but it is in those cases in which the nuisance results from some act or negligence of the tenant and not of the landlord as if *he leaves open a cellar door or a coal hole.*” * * *

In the instant case, the person who was responsible and solely responsible for the opening of these doors and the consequent injury to the plaintiff was Scoles. The plaintiff made no contention that Scoles at such time was acting as an employee or agent of the defendants; but on the other hand, it was uncontradicted that his action in using this areaway and opening these doors was in connection with a private mission of his own and for his own convenience. This being so, and there being as pointed out, no proof that the doors were of improper construction or in a defective condition, we insist that the person who was solely responsible for this accident and plaintiff's consequent injuries was Scoles, who, for reasons best known to the plaintiff, was not made a party defendant. Clearly, therefore, the trial court should have directed a verdict in favor of the owners of the building and the sole defendants in this action.

POINT II.

The judgment should be reversed.

Respectfully submitted,

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JACOB ARNOLD,
Plaintiff-Appellee,

vs.

ROSE DLUGO, WILLIAM LEVEY,
and THEODORE LEVEY,
Defendants-Appellants.

*Action
at Law.*

*On Appeal
from
Supreme
Court.*

BRIEF FOR PLAINTIFF-APPELLEE.

Statement.

The plaintiff agrees with the defendants as to most of the facts, with these brief differences and additions.

In addition to the uses of the cellar enumerated, that each tenant had a particular space set aside therein, sort of a booth (p. 21 S. C.); that one David Dlugo, husband of one of the owners, was active as agent (p. 21 S. C.); that David Dlugo used to go into the cellar to look where tenants put things and to see that they put them where they belonged (p. 22 S. C.); that the entrance-way to the cellar was never locked (p. 23 S. C.); that there was a bar somewhere underneath (p. 23 S. C.), with a hook on each end and a hole in each part (p. 24 S. C.); but just how it barred the doors, if it did, was not shown. When the witness, who spoke of the bar (David Dlugo) was asked if the bar was ever attached so as to bar the doors, he answered that he did not understand the question, and he also stated that the bar did not automatically lock the doors (p. 24 S. C.).

Defendants say that access to the cellar was had by means of a stairway or areaway leading from a point in the sidewalk in front of the aforesaid stairs and then down into the cellar, but they do not state that it was not shown that there was no other entrance to the cellar.

The defendants said that Scoles was not employed by the defendants nor on the premises of the defendants, and the testimony shows that the witness Scoles stated that his business down in the cellar was that of looking for certain things that he had there and also he stated that an electric bulb or fuses were there and that that was the work he was there on that day and that he sometimes fixed the fuses for the building (p. 26 S. C.).

We fail to find anywhere in the testimony anything to support the statement that while he (Scoles), was in the cellar the iron plates or doors had been closed. The question is open as to whether he closed them when he entered the cellar or someone else closed them after him, or whether he went into the cellar through some other means.

It is also suggested in the defendants' statement that the plaintiff tripped over the door. We have not been able to find this evidence but find that one of the doors flew up and hit the plaintiff, knocking him to the ground and that he fell on his arm and broke it (pp. 10 and 14 S. C.).

We also wish to call attention to the picture of the doors, Exhibit P. 1 (p. 40 S. C.) and we also desire to call attention to the fact that the defendants admitted that Scoles went down to the cellar with their consent and opened the door,

or at least with their implied consent (p. 24 S. C.).

And it is also thought advisable to call the Court's attention to the fact that after the accident the plaintiff saw a Mr. Scoles come up from the cellar (p. 15 S. C.).

POINT I.

The owners of the premises were under an absolute duty for the proper protection of the opening in the sidewalk.

It was said in *Durant v. Palmer*, cited by the defendants, that:

“For a nuisance arising from the structure of the building, the landlord is liable. The street and every part of it, by force of the common law, is so far dedicated to the public that any act or obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance.

The traveling public have a right to suppose that there is no dangerous impediment or pitfall in any part of it, without a light placed to give warning of it or a suitable railing to protect from it.”

Durant v. Palmer, 29 N. J. L., pp. 544, 547, 548.

and the principle was more strongly enunciated as follows:

“The difference between this case and the present case seems to us to be that in the *Durant v. Palmer* case the owner had erected as a part of the premises a nuisance per se, as the area in the sidewalk was the same as a coal hole or elevator doors in a sidewalk, for the proper protection of which the owner and occupier are under an absolute duty.”

McKeown v. King, 99 N. J. L., pp. 251, 258.

and again it was said:

“Permanent encroachments upon the highway, such as front door steps, hitching posts, awning poles and this elevated railroad structure itself, are incidents of the highway of which the traveling public must take notice; but merely temporary obstructions to travel, such as an open area or coal chute, the piling up of building materials, a lowered arc light or a sign or awning suspended so low as to impede travel, are matters as to which, in the absence of knowledge or of actual warning, the presumption is that no such obstructions to travel will be encountered.”

Matheke v. U. S. Express Co., 86 N. J. L. 586 at 589.

“It is well settled that one who places an unauthorized obstruction within the limits of a highway as laid out is liable to an action at the suit of any person who is thereby specially damnified, and this although the obstruction or other nuisance may be without the limits of the traveled way.” *Opdycke v. Public Service Ry. Co.*, 78 N. J. L. 576 at 583.

and also

“* * * The erection of a public nuisance affords no ground for an action at the suit of a private individual; but when a private individual has suffered some special injury from a public nuisance, his right to maintain an action to recover his damages, at once attaches.” *The Temperance Hall Assoc. of Trenton v. Maria Giles*, 33 N. J. 260,

and from other states, we may quote the following:

“The movable coverings of a coalhole opening were retained in the walk by the Manhattan Company to the extent of their proper use only, and in exercising its privilege in this regard was involved the mani-

fest duty to maintain them properly guarded, or protect them by such practicable and reasonable means as would prevent their use from being a menace and trap to travelers on the sidewalk, who had a right to pass thereon; and, if it failed to exercise ordinary care in this respect, the permission which it gave to the coal company to remove the covers ought not and could not relieve it from legal responsibility for accidents which might arise from its negligence. Had there been no public interest involved, or had the coal been delivered upon the private property of the Manhattan Company, an injury would not probably have resulted, and a liability would not have arisen from Anderson's act, except, perhaps in the case of a trap or pitfall; but, upon the public thoroughfare, under the plainest principles of common prudence, there was a duty of protection incumbent upon the owner of the building, which it could not shirk or decline to recognize." *Ray v. Jones & A. Co.* (Minn.), 11 A. L. R., pp. 571, 572.

and in *Hart v. McKenna* (1905), 106 App. Div. 219, 94 N. Y. Supp. 216:

"the evidence showed that before the performance of the contract was commenced, the defendant had vacated the house; that her attention was not directed to the cover while the repairs were being made; that she had no knowledge that it had been opened or used by the contractor; that she passed by the premises several times while the work was in progress, but had no recollection of seeing the coalhole open or in use on such occasions; that the contractor furnished all materials and labor required; that she had nothing to do with the work from the time she vacated the building until it was completed; and that she did not direct the work in any way; and it was held that, as it could not be said as a matter of law that the defendant was free from liability under the

circumstances, the complaint had been improperly dismissed by the trial judge. The court argued thus: 'The coalhole * * * was an obstruction interfering with the use of the sidewalk by the public (*Clifford v. Dam* (1880), 81 N. Y. 52), and liable at any time, through negligence in properly securing and fastening the cover, to cause injury to persons lawfully using and passing over the sidewalk. The contractor did not create the obstruction. It existed on the property when he commenced work under this contract, and was an instrumentality made use of by him to get his materials from the street into the building to be repaired. His use of it was connected with making repairs and doing the work contracted for by the defendant. His negligence was in the maintenance and restoration of the coalhole after use, not its construction, and consisted of failure to guard and protect the rights of the public by omitting to fasten or secure the cover so that it would not, on contact with the foot of a pedestrian fly off and result in injuries similar to those sustained by the plaintiff. This duty rested upon the defendant, who had acquired a special privilege, acceptance and enjoyment of which had charged her with the special duty to the public of maintaining the coalhole at all times in a safe condition and properly guarded; she could not avail herself of this privilege without discharging the duty; the two were at all times coexistent, and she could not absolve herself from the liability thus created by delegating the performance of the duty to another.'

The evidence of duty as between a city and an abutting owner with respect to a coalhole in a sidewalk is shown by the following statement taken from *Canandaigua v. Foster* (1898) 156 N. Y. 354, 41 L. R. A. 554, 66 Am. St. Rep. 575, 50 N. E. 971, 4 Am. Neg. Rep. 441 affirming (1894) 81 Hun. 147, 30 N. Y. Supp. 686: 'The implied duty assumed when the hole was cut and the grate placed

over it required reasonable precaution on the part of the owner to protect the public as long as he remains the owner and is in possession of any part of the building on the abutting land. He cannot cast the burden of maintenance on the public any more than he could have cast upon them the burden of original construction, for the grate is wholly for the benefit of his property. Nor can he relieve himself of the duty without parting with the entire possession of the property benefited, for the safety of the public requires that the owner, as long as he is in possession of any part of the property, should be compelled to keep his structure in the sidewalk in a suitable condition for use as a part of the sidewalk.''' *Hart v. McKenna*, 11 A. L. R. 573, 574.

and it has also been stated

"In *Anderson v. Caulfield* (1901), 60 App. Div. 560, 69 N. Y. Supp. 1027, where the plaintiff fell into the coalhole of a tenement house rented by the defendant to various families, the evidence showed that he retained control of the coalhole. On the occasion in question one of the tenants had procured the key of the vault to which the hole gave access in order to bring wood into the house for his personal use, and the liability of the defendant for the negligence of his tenant or his servants in leaving the hole unguarded was affirmed on the following grounds; 'If the defendant had given up the possession and control of the entire property to tenants, it may very well be that he would be held absolved from all duty in the maintenance of a safe sidewalk for the use of public pedestrians. That is not the question presented for determination. Having retained the control of the sidewalk and the coalhole constructed by him therein under a municipal license which carried with it the duty of seeing that the hole was properly guarded and protected, he could not exercise the privilege without discharging the duty. And

that this duty could not be so delegated as to relieve him from liability for nonperformance is well settled by the authorities.' And see *King v. Herby* (1899), 18 Ohio C. C. 41, 9 Ohio C. D. 797, wherein the court distinguished the cases in which the entire premises are put into the possession of a lessee or the control of an independent contractor for the purpose of repair or construction of some building or other structure on the premises, and held that, notwithstanding the contract for the delivery of the coal, the abutting owners still owed a duty to properly guard and protect a traveler on the highway from the dangers incident to its use. And that the lessor of a building is liable for injuries to a pedestrian resulting from the failure of one delivering coal to the tenant to properly guard the opening through which the coal was being delivered, see opinion of William, J., in *Pickard v. Smith* (1861), 10 C. B. N. S. 470, 142 Eng. Reprint 535, 4 L. T. N. S. 470." *Anderson v. Caulfield*, 11 A. L. R. 574, 575.

It may be said that in the words of Mr. Justice Katzenbach (see above, *McKeown v. King*, 99 N. J. L. page 251, 258) there was an absolute duty to the public on the part of the owner, and as shown above, this duty could not be delegated. There was no carelessness implied or shown on the part of the plaintiff. The whole thing happened without his fault. There is no suggestion on the part of the landlords that they used any care to discharge their duty whatsoever. They seek to excuse themselves, simply because they let a tenant use the passageway, a passageway that opened on the sidewalk by doors flush with the sidewalk with no method of warning the public, when they were going to be opened; with no method of throwing any guard around them as they were opened, and opened from underneath and of which the plaintiff could not possibly have had any warning.

The whole question at issue is as to whether the landlords having created this dangerous instrumentality to passersby, can escape all liability because they permitted their tenants to use the basement to which the passageway led and to use the passageway: their tenants paying them for their use of the premises.

It is not a case where the landlord used due precaution to guard a dangerous instrumentality and harm resulted to a third party in spite of that danger, but in this case, he actually permitted (and it is a fair presumption for something included in his rent), the use of the dangerous instrumentality and did not provide any warning and the very use which he permitted was reckless, careless and negligent as alleged in the complaint. That the passageway would be used in the manner in which it was used was clearly evident to the landlords and they took no precaution whatsoever to stop it, but, on the contrary, actively admit that they permitted it. (See State of the Case p. 24, l. 29.)

In the case of *Giberson v. Skidmore*, it was said by this court,

“The evidence tended to show that the plaintiff was on the premises as assistant to the librarian of the association, to whom the owner had rented the front room; that when injured she was using part of the back room which, under the lease, the tenants had a right to use, in common with the owner, for access to the rear entrance and sink in that room; that, as she was in the act of taking her coat and hat from a hook in the wall, she fell through an opening in the floor, of which she had no knowledge, the trap door of which had been raised by defendant after she had placed her hat and coat there.

Now, the rule is that an owner or occupier of premises, who by express invitation or by

invitation to be implied from acts and conduct, induces a person to make use of the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes. *Phillips v. Library Co.*, 55 N. J. L. 307." *Giberson v. Skidmore*, 99 N. J. L. p. 131 at pp. 132, 133.

It further appeared in that case, as in the present case, that there was a common way for the use of all the tenants. That a visitor to one of the tenants was injured in the common way. In the instant case, all the same facts are true, excepting that the plaintiff was not a visitor but was a pedestrian passing over the public sidewalk in front of the premises; and the Court further stated:

"The gist of the liability, where it exists in cases such as this, consists in the fact that the injured party did not act merely on motives of her own, to which no act or sign of the owner or occupier contributed; but that she entered the premises because she was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which she used them, and that such use was not only acquiesced in, but was in accordance with the intention or design for which the way or place was adapted and prepared or allowed to be used. *Nolan v. Bridgeton and Millville Traction Co.*, 74 N. J. L. 559; *Phillips v. Library Co.*, 55 *Id.* 307."

Giberson v. Skidmore, 99 N. J. L. page 131 at 133.

In the present case, the raising of the door was done by one of the tenants, but surely the placing of the condition was done by the landlords. The invitation to the public was undoubted because it was a public way. No precaution was taken to guard. The photograph (Exhibit P. 1, p. 40, S. C.), clearly shows how harmless it looked to

pass over these doors from above and what a dangerous instrumentality the landlords maintained in such doors when they permitted them to be opened from beneath, without warning. The photograph itself seems sufficient proof of the condition which the landlords permitted to exist and its danger to the public.

POINT II.

The fact that the landlords permitted the tenants to use the passageway did not release the defendants from their responsibility to third parties.

The building owned by the defendants was not leased as a whole but the stores to one or more firms and apartments to other persons. The owners, through their agent, exercised control and management of the whole place, inspected the premises from time to time, hired one of the tenants to act as janitor, saw to it that the belongings of the tenants were properly stored in the cellar compartments (p. 22, S. C. l. 34 *seq.*). The agent was the husband of one of the owners and occupied an apartment in the building, which was under his management (p. 21, S. C., ll. 17 and 18). The heating of the building was controlled by him from his apartment (p. 22, S. C., ll. 14 and 15).

The general rule is so well settled, that I will make but one reference:

“Of course, where a landlord lets out portions of a building to several tenants, retaining in his own possession or control the passageways and stairways for the common use of the tenants and those having occasion to visit them, he is under the responsibility of a general owner of land who holds out

an invitation to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for such use. *Siggins v. McGill*, 72 N. J. L. 263.”

Buda v. Dzuretzko, 87 N. J. L., p. 34, at 35.

In the last cited case, it will be noted that the injury was to a visitor of one of the tenants.

If, as is the settled law, the landlord is under the duty, as enunciated in the last cited case, to see that reasonable care is exercised to have the passageway and stairway reasonably fit and safe for the use of a visitor to one of the tenants, *a fortiori* he has a duty to a pedestrian on the sidewalk in front of his premises, part of which he has appropriated to his own use for doors flush with the sidewalk, which by their very construction may be opened suddenly and without warning from beneath. (See *Rooney v. Siletti*, 96 N. J. L., p. 312; *Gilvan v. Reilly*, 50 N. J. L., p. 26.)

The case of *Muller v. Baskowitz*, Vol. 10 N. J. Misc. Reports, page 5, which is cited in the defendants' brief, is not identical or even parallel with the present case. There, the defendant, evidently, exercised no control over the premises, while in the present case there was constant supervision by the owners. That opinion suggests that where proper precautions are taken, the negligence of a tenant would not be attributable to the landlord, but it must be noted that our Supreme Court in that case stated:

“It most conclusively appears that the happening was not caused by any structural defect in the cellarway or that it was the

result of the neglect of the defendants because of any control over the way.”

Muller v. Baskowitz, Vol. 10 N. J. Misc. Reports, p. 4.

but in the present case, there was structural defect, in that the doors were designed, as clearly appears from their appearance (Plaintiff's Exhibit P. 1, p. 40 S. C.), to afford a dangerous instrumentality, in that they could be raised without warning from underneath, and there was neglect of the defendants because throughout the case they did not in anywise show that they used any precaution whatsoever to protect the public or the passersby, from injury, in the event that the said doors were raised from underneath, without warning; and that, too, when the doors were under a part of the sidewalk. The absolute duty to use due care toward the public was not fulfilled. In fact, no care was used by the landlords to prevent such an accident as actually occurred. In fact there existed a continuous danger of which the landlords were charged with knowledge.

The defendants cite the case of *Warner v. Davis*, 159 Atl. 817, which I have been unable to find in our State Reports, which seems to refer to a case where the questions were whether or not there was any relationship between the landlord and the person who caused the injury, and whether or not, if he were an agent of the landlord, the act was done within his authority. But in the present case, the whole question is not in the act itself, but in the means for doing the act which were supplied to and given to a third party in violation of the landlord's duty to use care.

POINT III.

The doctrine of "res ipsa loquitur" applies.

"This principle is that when through any instrumentality or agency under the management or control of a defendant or his servants there is an occurrence, injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords prima facie evidence that there was want of due care. See Thomp. Negl. Nos. 15, 7635; Smith Negl. *246; *Skinner v. Railway Company*, 5 Exch. 787, 789 (1850); *Scott v. London Dock Co.*, 3 Hurlst & C. 596, 601 (1865); *Excelsior Electric Co. v. Sweet*, 28 Vroom 224, 227, 229 (1894); *Sheridan v. Foley*, 29 *Id.* 230, 232, 233 (1895); *Consolidated Traction Co. v. Thalheimer*, 30 *Id.* 474, 476 (1896); *Bergen County Traction Co. v. Demarest*, 33 *Id.* 755, 756 (1898); *Shay v. Camden and Suburban Railway Co.*, 37 *Id.* 334, 335 (1901); *Paynter v. Bridgeton & c. Traction Co.*, 38 *Id.* 619, 625 (1902)."

Mumma v. Easton and Amboy R. R. Co., 73 N. J. L. p. 653 at 658.

In the instant case, no motion was made for a non-suit. The occurrence of the event alone was shown. No negligence appeared on the part of the plaintiff. We realize there was still a jury question, but the case was submitted to the jury and it was nowhere contended by the defendant that plaintiff had not made out a prima facie case. That being so, the case made out by the plaintiff called for explanatory evidence. *Sheridan v. Foley*, 29 Vroom (1895) (at pp. 232, 233); *Trenton Passenger Railway Co. v. Cooper*, 31 *Id.* 219, 221 (1897); *Bergen County Traction Co. v. Demarest*, 33 *Id.* (1898) (at pp. 756, 757).

And it was said in the case of *Burns v. Lehigh Valley R. R. Co.*, in our Supreme Court:

“The case presented to the jury’s consideration, therefore, in each of the extracts, is that of a plank loosened in the course of making repairs upon a public bridge and left loose while a member of the public is using the bridge as a footway; the loosened plank, at the same time, not being apparent to him and being left as a hidden danger, without barrier or other guard, and without warning to the traveler of the danger.

“Under such circumstances it is commonly said that he who is in charge of the repairs of the bridge, or responsible for its condition, is bound either to guard the place by a barrier or otherwise or else to warn approaching foot passengers. *Freeholders v. Hough*, 26 Vroom 628; 5 Cyc. 1101. This judicial rule has doubtless been formulated because the judicial mind has failed to conceive of any other precaution that reasonable care could suggest in such a juncture for safeguarding the traveler. So long as a hidden pitfall is permitted to remain in a traveled way or bridge while the public are using that way for passage, reasonable care has, we believe, thus far devised only two measures to prevent injury to the traveler—one is to debar the traveler’s approach to the pitfall by a barrier or other guard, and the other to give him warning of the danger.

“This duty is imposed upon a party who is repairing a bridge with respect to hidden dangers created in the course of such repairs, where such party is under a duty to make the repairs. If the party repairing be a mere volunteer, the responsibility results *a fortiori*. Indeed, in that event, the creation of any hidden danger in the traveled way would be the creation of a public nuisance.”

Burns v. Lehigh Valley R. R. Co., 74 N. J. L. p. 120 at 124.

The said decision was affirmed by this Court in 75 N. J. L. p. 940.

We realize that the case is not exactly analogous but the principle^{is} that where a hidden pitfall is permitted there are two ways devised to give notice to the passerby, that is (1)—“to debar the traveler’s approach to the pitfall by a barrier or other guard and the other (2) to give him warning of the danger,” and the court leaves it open to devise a proper method of warning a passerby.

In the present case, there was no method used to guard and the pitfall was maintained by the landlords. No warning was given and its use was not in anywise restricted, but, on the contrary, was allowed by the landlords for a compensation to be included in the rent.

POINT IV.

The charge of the complaint fully apprised the defendants of the injury complained of and was sufficient to put them to their proof that the accident occurred, in spite of due care on their part.

There was no demurrer in this case in the form of a motion to strike, or an objection to the form of the complaint to be heard on the trial. There was no suggestion of failure to apprise the defendants of the acts complained of, prior to the close of the evidence. The only question raised on appeal is that the Court failed to direct a verdict in favor of the defendants.

The particular means whereby the defendants caused the door to be raised or permitted the door to be raised carelessly, recklessly and without warning was not known, and in the nature of

things, could not be known to the plaintiff. In truth, the door was raised carelessly, negligently and without warning, as the jury found, without fault of the plaintiff, and the defendants kept control over the door and the way from the inside leading to it, and they did, in fact, according to the verdict, permit the door to be recklessly, carelessly and negligently, and without warning, violently raised. They permitted it because they supplied this means and this method to their tenants. They permitted it because they acquiesced in it, as they admitted on the trial, and they permitted it because they failed to prevent it, and they failed to use due care to prevent it, that is care commensurate with the danger, which must be apparent to anyone who knows the situation of the door on the sidewalk, and the passage underneath from which it is designed to be raised, and that, too, without any adequate provision for warning pedestrians.

In the text book known as "Words and Phrases," the following definition of the word "permit" occurs:

"Affirmative action implied.

'Permit' is in one sense synonymous with 'suffer' or 'allow,' but is also equivalent to 'give leave,' 'license,' or 'authorize,' and as used in a complaint for damages for personal injuries, alleging that defendant caused or permitted the sidewalk to become obstructed, and caused and permitted a quantity of wire to remain there, was not used in the sense of 'passively suffered,' but charged the defendants with affirmative action in creating or giving permission to continue a nuisance. *Coon v. Froment*, 49 N. Y. Supp. 305, 306, 25 App. Div. 250."

"Allow and suffer distinguished.

'Webster in referring to the words "permit," "allow," and "suffer," says: "Per-

mit'' is the most positive, denoting a decided assent.' *City of Chicago v. Stearns*, 105 Ill. 554, 558.

The words 'permit' and 'suffer' are pseudo synonyms. There is a shade of difference between their meanings. The word 'permit' seems to convey the idea of affirmative action, more than the word 'suffer.' *City of Ft. Wayne v. DeWitt*, 47 Ind. 391, 394, 395.

As distinguished from 'allow' or 'suffer,' 'permit' is more positive, denoting a decided assent, either directly or by implication. 'Allow' is more negative, and denotes only acquiescence or an abstinence from prevention. 'Suffer' is used when our feelings are adverse, but we do not think best to resist. *Board of Education v. Board of Education*, 3 Ohio Dec. 70, 71."

Vol. 6 of Words and Phrases, page 5315.

And in *The Century Dictionary and Cyclopaedia*, one of the meanings of "permit" is:

"1. To suffer or allow to be, come to pass or take place, by tacit consent or by not prohibiting or hindering; allow without expressly authorizing." * * *

"2. To grant leave, or liberty to by express consent; allow expressly; give leave, liberty, or license to: as, a license that permits a person to sell intoxicating liquors."

Where no demurrer was interposed at the common law, and it was attempted to raise a question under a general demurrer as to pleading, the general demurrer was only considered to be directed toward a matter of substance. Thus at the common law.

There was no motion to strike out equivalent to the special demurrer and there was not even a motion to strike out the complaint at the trial upon the ground that it disclosed no cause of

action at the time, but by indirection, the defendants attempted to interpose what was equivalent to a general demurrer by a motion to direct a verdict. The distinction between the two is carefully pointed out in the case of *Savage v. Public Railway Service Co.*, in an opinion in the Court of Errors and Appeals by Chief Justice Gummere, in which this language is used:

“The question upon which the determination of this appeal depends is whether the complaint could have been successfully attacked by a general demurrer, upon the ground that it disclosed no cause of action; and we think that it must be answered in the negative. In the case of *Central Railroad Co. ads. Van Horn*, 38 N. J. L. 133, 138, the defendants interposed a demurrer to the second count of a declaration, which showed merely that the plaintiff was in one of the cars of the defendant company under a duty by it to carry her safely, and while there that she was, ‘through the negligence, carelessness and misdirection of the defendant and its agents and servants, thrown from and under the coaches of the said defendant.’ It was held by the Supreme Court that, although this averment was so uncertain and insufficient in detail as to afford the defendant little, if any, information as to what the specific act of negligence was, or what agency of the company was responsible for it, it was clearly good on a general demurrer, the defect being one of form and not of substance. In *Breese v. Trenton Horse Railroad Co.*, 52 *Id.* 250, 253, a count which stated in general terms that by the careless management of the car in a public street by the agents of the defendant it thereby ran over the body and arm of the plaintiff, was held good on general demurrer. In *Race v. Easton and Amboy Railroad Co.*, 62 *Id.* 536, a count in a declaration simply averring, in effect, that by reason of the negligent and improper running of defendant’s railroad

train, and blowing of the whistle on its locomotive, a horse which was being driven on the highway by the plaintiff became frightened and overturned the wagon, and that plaintiff was thereby thrown out and injured, although not specific enough for a proper pleading was permitted to stand as against a general demurrer. *Ferguson v. Western Union Telegraph Co.*, 64 *Id.* 222, is to the same effect. In *Minnuci v. Philadelphia and Reading Railroad Co.*, 68 *Id.* 432, it was declared that an averment in a declaration which stated that the plaintiff's injuries were caused solely by the negligence of the defendant, without more, although it did not fulfill the requirement of the rule of pleading that the certainty of the statement of the plaintiff's case must be such as in a reasonable measure to apprise the defendant of the case to be made against him, was good on general demurrer.

“The opinions referred to are those of the Supreme Court; but the soundness of the judicial declarations has never been challenged, * * *”

Savage v. Public Service Railway Co., 95 N. J. L., p. 432, at 433, 434.

In the present case, the only question that then would arise would be as to whether the proofs on the part of the defendants, the doctrine of “*res ipsa loquitur*” being applied, show that the accident occurred in spite of due care on the part of the defendants. This, they did not show, but merely said, in substance, for a consideration we let somebody else do it. The defendants do not deny that they used no precaution whatsoever in the use of such a dangerous instrumentality.

It might have been sufficient in any case to simply have alleged that the defendants carelessly, negligently and recklessly permitted the

door to be raised without warning, for after all, the permission was either through their own agents or by failing to prevent or acquiescing in the careless, reckless and negligent operation of the doors on part of the public highway, which the defendants were using for their own purposes in letting tenants use them for the defendants' own gain.

In the case of *Newark Electric Co. v. Ruddy*, 62 N. J. L., p. 505, at 507, opinion by Mr. Justice Collins, the following quotation was used and Justice Collins declared it to be fairly satisfactory:

“Where it is shown that the accident is such that its real cause may be the negligence of the defendant, and that, whether it is so or not, it is within the knowledge of the defendant and not within the knowledge of the plaintiff, the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant. Baron Channell in *Bridges v. North London Railway Co.*, L. R., 6 Q. B. 377, 391.”

And it may be noted that it is said that the plaintiff may give “the required evidence of negligence,” and in the present case he did testify and charge that the door was permitted to be opened in the manner above described. The case of *Newark Electric Co. v. Ruddy* was affirmed in 63 N. J. L., p. 357.

It does not seem that it can be necessary or required for a plaintiff to allege more than it is necessary for him to prove.

The statement that the plaintiff should have said that the doors "were in a defective condition" or "were not of standard construction" instead of that the defendants "carelessly, negligently and recklessly and without warning, permitted the said plates to be violently raised upon their hinges from beneath, striking the plaintiff with great force and throwing him to the ground and severely injuring him in body" is to ask the plaintiff to charge something that was in the knowledge of the defendants, if it existed, and not in the knowledge of the plaintiff and when the plaintiff did charge the facts it was a sufficient statement of a cause of action. The plaintiff could only assume that defendants had opened the doors, or permitted them to be opened in the manner set forth in the complaint, and it became the duty of the defendants to show that they had used due care.

And if the right to have the judgment below affirmed rests alone, upon the phraseology of the complaint, the reviewing Court still has power to amend the pleadings to support the judgment.

See

Klie v. Hollstein, 98 N. J. L. 476, 477;
Levesnon Wrecking Co. v. Gattie McQuade Co., 93 N. J. L., pp. 185, 186;
Kapherr v. Schmidt, 98 N. J. L., pp. 804, 805, and
Giardini v. McAdoo, 93 N. J. L., pp. 145, 149.

So that, the ultimate question seems to be, not as to matters of form, not as to the particular words used in pleading, but as to whether or not it is the law that a landlord may maintain a passageway, common to his tenants, over which he

retains control, leading from his cellar to a sidewalk used by the public generally, having doors set flush in the walk, which doors leading to the passageway may be opened from underneath, without warning, and not be responsible if a tenant, in opening the door from beneath, without warning, injures a careful pedestrian.

The judgment of the Supreme Court should be sustained for the reasons set forth in the foregoing points.

Respectfully submitted,

JACOB STEINBACH, JR.,
Attorney for and of Counsel
with the Plaintiff-Appellee.

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announced for the reasons set forth in the fore-
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