

N. J. Court of Errors and Appeals.

HENRY RANKEN and JOHN D. MEYER.	} On Writ of Error to Supreme Court. — In Case.
vs.	
AUGUST INGWERSEN.	

BRIEF OF PLAINTIFF IN ERROR.

This case was tried in 1882, and a verdict rendered for the defendants below. It was then carried to Supreme Court on rule to show cause, and a new trial granted, because of error in Judge's charge below. (For opinion see 18 Vr. part 1, p. 18.)

The case was again tried, judgment rendered for plaintiff below, and now comes up on exceptions.

This suit was brought by the defendant in error, tenant, against the plaintiffs in error, landlords, for certain alleged injuries arising from the flow of water upon said tenant's premises from the apartments above, which flow of water the tenant claimed obliged him to vacate the premises.

It is claimed by plaintiff below that the water came from certain defective pipes or plumbing work in or leading from the saloon above his premises, leased by one Owen Markey, and that during the existence of said alleged nuisance and with notice thereof, the plaintiffs renewed Markey's lease, and thereby became chargeable for said alleged nuisance. Upon

this point largely rests defendant's case, as Markey by the terms of both his leases was obliged to make all repairs.

See Exhibits. p. 151 and 153.

It is admitted that defendant's premises were in good condition when he entered them, and there is no evidence in the case that there was any defect in the building or any part thereof, or any nuisance therein, when defendant leased his apartments, or at the time of Markey's first lease.

In view of these facts and of the fact that Markey was obliged to repair, in order to hold the landlords liable in this case, it must be shown that they had knowledge of a positive nuisance, a nuisance *per se* on the premises, or of a condition of things which would necessarily create a nuisance at the time of the renewal, and that such nuisance was really a part of the premises.

Gandy v. Jubber, 5 B. & S. 87.

Nelson v. Liverpool Brewery Co., L. R. 2
C. P. 311.

O'Brien v. Capwell, 59 Barb. (N. Y.) 497.

Fish v. Dodge, 4 Denio, 311.

Addison on Torts, vol. 1, p. 247.

In Gandy v. Jubber, Justice Compton, speaking as to liability of landlord for nuisance created by tenant on renewal of lease, says, "But to bring liability home to the owner, the nuisance must be one which is in its very essence and nature a nuisance at the time of the letting, and not merely something which is capable of being thereafter rendered a nuisance by the tenant."

If the water came from defects in Markey's plumbing, it must at least be shown that at the time of the lease the landlords knew of defects in the plumbing which must necessarily produce a nuisance.

There is no such evidence.

Plaintiff's testimony went no further than to show that the water came from overhead of the premises leased to the plaintiff. It was not directly traced to defects in Markey's plumbing, although loose inferences to that effect may be drawn.

The only witness produced by defendant to testify as to plumbing, Joseph Zumbusch, printed case (pp.86-92), said that he examined the pipes under Markey's floor in 1880-1881, (after the renewal of Markey's lease), and that they were in good condition and not leaking.

It was indeed shown that the water was dropping before and after the renewal of Markey's lease, but there is no evidence showing that the water came from the same source during its alleged continuance. The defendants say that they did not know where it came from.

The water may have come at one time from a temporary leakage in the pipes, and at another time from negligent use of wash basin, water-closet or ice box in Markey's saloon.

In the absence of positive knowledge of landlords at time of the renewal, that the water came from defects in Markey's plumbing, they should not be held liable.

Neither plumbing work, a water-closet, a urinal, nor an ice-box is a nuisance *per se*. If they become a nuisance by neglect in using them by tenant, the landlords cannot be held liable.

Shearman and Redfield on Negligence,
§ 513, and cases above cited.

"If a landlord demises tenements and premises which are not in themselves a nuisance, but may or may not become a nuisance according to the mode in which they are used by

the tenant, the landlord cannot be made responsible for a nuisance created upon them by the tenant."

Addison on Torts, Vol. I. p. 247.

To the same effect :

Fish vs. Dodge, 4 Denio. 311.

Leonard vs. Storer, 115 Mass. 86.

Markey being under obligations to repair by both leases under which he held, and especially in view of the fact that the plumbing was owned by Markey, the landlords were not obliged to enter said premises at the time of the renewal to see if there was any nuisance there, unless they had knowledge of a nuisance, which they were bound to correct, that is of a nuisance which was legally a part of the premises.

In a recent English case,

Pretty vs. Bickmore, L. R. 8 C. P. 401,

It was held that the obligation to repair being by the lease cast upon the tenant, the landlord was not liable for an accident caused by defect in the leased premises, even though said defect existed at the time of the demise.

This case was approved by

Gwennell v. Eamer L. R. 10 C. P. 658.

In view of the facts and law, we submit that the plaintiff below should have been non-suited, and the Court erred in denying motion to non-suit.

ADMISSION OF TESTIMONY.

The Justice below admitted testimony from printed book of former trial (see assignments of error 1, 2, 3 and 4) which was no part of any admissions which the defendant below put in from testimony of witness August Ingwersen ; it had no relation to that, and was in effect allowing counsel to prove the admissions of his client.

This raises a question which it is important to settle. The ground of the ruling of the Court was, that inasmuch as the defendants offered some of the evidence of the plaintiff in the other case as admissions, that counsel of the plaintiff had a right to put in evidence anything else that the plaintiff had sworn to on the other trial. This ruling was certainly a great surprise. The plaintiff had been sworn on this trial, but instead of examining him fully in regard to some matters, his admissions or statements, as plaintiff on the other trial were offered. Thereupon the right to put in all his examination was claimed, and the counsel of the plaintiff was permitted to put in such parts of it as he chose. There is no analogy between a mere affidavit or document, and the whole of an examination given upon the stand. We do not deny the right to put in whatever is relevant to the inquiry made of the witness on direct examination, and whatever he may have said upon that subject, but we deny the right of the counsel of plaintiff to get in all the statements of his client, whatever they may be, which he made in the other case. The question, as a rule of evidence is squarely presented, and we submit that the ruling at the Circuit was erroneous. There is no reason, particularly in these days of stenographic re-

porting, when evidence has become cumbersome, that this sort of examination should be allowed. Certainly it cannot be, that the mere admission of something that a party has said in a long examination, can justify the other side in making evidence for himself in this way and introducing matters irrelevant to the particular inquiry.

THE CHARGE.

As to that part of the charge set forth in assignment of error No. 7.—

The landlord would be liable for “smelting works” under the circumstances stated, only when the “smelting works” would necessarily prove a nuisance. If they became so from neglect of tenant the landlord would not be liable.

The rest of that part of the charge is not good law according to

Pretty v. Bickmore, and
Gwennell v. Eamer, above cited.

As to 8th assignment of error:—

As to notice of nuisance, the cases require that the landlord should have notice of a positive nuisance, or of a state of things that would necessarily create a nuisance. See cases cited above.

The Justice charged “that it is enough to show an adjoining owner, or to the landlords in this case, that from the premises which they had control of, there came to the plaintiffs premises a specific injury; that the defendant’s premises were the source of the

injury to the plaintiff; and that when that notice is shown it becomes the duty of the landlord to find it out and stop it."

This certainly is not the law, if the injury came from neglectful use by tenant of things lawful in themselves. The landlord could not prevent the tenant from using such things, and could do no more than request the tenant to be careful.

As to assignments of error Nos. 9, 10, 11, 12, 13 and 14, the cases above recited apply, and also reasons given above as to the charge and question of non-suit.

REQUESTS AND REFUSALS TO CHARGE.

Third Request.

The plumbing work was owned by the tenant Markey.

In view of the testimony in the case, and of the law as to knowledge of landlord as to nuisances created by tenants, and his liability therefore, the Court should have instructed the jury as requested.

Fourth Request.

If the water came from the waste pipe, wash basin or water-closet owned by Markey, the landlords should have knowledge or reason to believe that the water came from these sources.

The cases (cited above) require that the landlord should have knowledge of a positive nuisance.

In this case, if the landlords are to be held liable for defects in plumbing owned by tenant, concerning the quality of which they could have no knowledge

without careful examination, they should have had positive knowledge of defects in said plumbing, so that neglect to remedy the evil would amount to misfeasance, and so the Court should have instructed the jury.

The same reasons apply to the eighth request; also to the third.

We desire to emphasize the following part of the case :

The premises let to Markey consisted of a vacant floor, which Markey fitted up for a bar and cigar store. The plumbing was all put in by Markey and belonged to him and was taken out by his successor after his death. Ranken and Meyer had no interest whatever in the plumbing, the same being the fixtures of Markey.

Evidence in part on this subject will be found.

Page 95-6, 127 Ranken.

“ 115 &c. 127 John D. Meyer.

“ 126-7 Blaney.

“ 122 Mahnken.

“ 56 Markey.

The leak could only have occurred from the ice box or the bar sink or tank or from the waste pipe leading from the wash basin or urinal to the water closet; of this there can be no doubt in fact. All of these fixtures belonged to Markey. It is possible that at sometime or other the waste pipe from the urinal to the water closet may have leaked. It was discovered by Joseph Zumbush in 1881 or 1882 to have been soldered up, where it had been gnawed &c.—See his evidence page 86, &c. On page 91 folios 25 the word *basement* should be *basin*. This waste pipe from the evidence is the only possible place from which any leak could have come except from the bar sink or ice box. These fixtures were in no legal sense a part of the premises. They be-

longed to the tenant and he could take them away. They were as much his personal property as his beer pump, soda fountain, or his hose or any other contrivance in the carrying on of his business. As between landlord and tenant these fixtures did not attach to the realty; would the landlord then be liable to a third person for renting premises to a tenant, when the question is one of mere manner of use of the fixtures by the tenant?

Suppose the landlord had discovered that the tenant had not carefully used his own fixtures; does the law compel the landlord to refuse to renew a lease to avoid the risk of like careless use for the future? Remember that the doctrine laid down at the Circuit does not permit the landlord even to protect himself by a covenant for careful use by the tenant; it requires him to refuse to renew, or be liable for any recurrence of like carelessness by the tenant. We find no case to sustain such a principle.

If a tenement has become dilapidated or in such a condition during the tenancy as to be *per se* a nuisance, there may be more reason in preventing the landlord from protecting himself by the tenancy; but when the tenement as rented is in proper condition, and the difficulty of which a third party complains, arises only from the manner of use by the tenant of his own fixtures or property, there would seem to be no reason why the tenant should not alone be responsible. The landlord ought not to be prevented from a renewal, or bear the risks of the tenants wrongful acts in the future, if he does renew.

The ninth request to charge, p. 134, should have been granted as made. The eighth also.

The second request, p. 133, should have been charged without qualification. See charge thereon, p. 143. We were entitled to it as requested.

The third request, p. 133, we submit is according to law, and should have been charged just as it was asked.

The fourth request, we also insist, should have been charged exactly as requested, without any modification.

WILLIAM A. LEWIS,
Attorney of Pltffs. in Error.
JOSEPH D. BEDLE,
Of Counsel.

N. J. COURT OF ERRORS & APPEALS

HENRY RANKIN AND JOHN D. MEYER,

Plaintiffs in Error,

vs.

AUGUST INGWERSEN,

Defendant in Error.

In Case.

Points of Defendant in Error

Seventeen errors have been assigned for the reversal of the judgment in this case. They may all be grouped under three heads :

First—Was there error in the Judge's refusal to non-suit ?

Second—Did the Court err in admitting any part of the plaintiffs' testimony given on a former trial, to be read in his behalf from the printed book, when other parts of it (from the same book) had been read in evidence in behalf of the defendants ?

Third— Did the Court err in charging the jury, that a re-letting of the premises by the defendants to Markey, with a nuisance upon them, made them responsible for its condition ?

First.—Was there error in refusing to non-suit ?

The proof was that in the summer or fall of 1876, Ingwersen had rented of the defendants the basement of the Commercial Building in Jersey City until May 1, 1876. At that time it was clean, light and dry, and well adapted to the use for which he hired it.

In February, 1876, the premises still remaining in the same condition they were when first taken, he took

another lease of them for five years, from May 1, 1876. to May 1, 1881, at an annual rent of \$500.

Some time in the summer of 1876, after the commencement of the five years' term, the water from the premises overhead commenced dropping and running down upon him, so as to damage his stock to the amount of six or seven hundred dollars. This continued during the whole remainder of his term, without cessation or abatement. In consequence of this he was obliged to vacate the premises. He could neither keep his stock or do the work which he had to do there. He moved everything out in the spring of 1877, and rented for his own use other premises. A small part of this basement, where the water did not flow, he partitioned off, and sublet as best he could, at one time to a shoemaker, at another time to a Chinaman, receiving as rent for the whole four years, while the premises were not occupied by him, \$282, while for the same period he paid to Ranken & Meyer \$2,000.

When the water first came down upon him, he went to New York to see Mr. Meyer about it, and informed him of the trouble. Mr. Meyer referred him to their agent in Jersey City, and directed him to go for redress to him. Ingwersen then went to the agent and informed him of the condition of things, and he said he would see about it. But he did nothing to stop the flow of water. One agent after another would come and look at the premises and wondered where the water came from, but nothing was ever done to remedy the evil during the whole term of Ingwersen's lease.

At the time of the commencement of Ingwersen's five years lease, Owen Markey, occupied the floor immediately above this basement as a saloon, and had it leased to May 1, 1877. While the water was still flowing down upon Ingwersen, Ranken & Meyer gave a new lease to Markey, from May 1, 1877, to May 1, 1879.

That part of the building above Markey's saloon was occupied as lawyers offices, and was leased from year to year by the tenants.

It was supposed at first that the water came down

upon Ingwersen from the ice-box or urinal or wash basin in Markey's saloon, and that he was therefore responsible for it. But upon a careful examination the floor in his saloon, about these places, was always found to be perfectly dry, or at least, so free from dampness, that the water could not possibly come from that source. It was clear that it did not come from the premises of the tenants above Markey's saloon.

The water did not flow down in one uniform, continuous stream. Sometimes it dropped slowly, sometimes rapidly, and sometimes it flowed in streams. The ceiling over the basement was of narrow boards, and the water spread over them, and came down wherever it could find a crack or an opening. It usually came down more in the night time than in the day time.

After Ingwersen's term had expired and the premises were let to other parties, then the repairing was attended to in earnest. Then the floor of Markey's saloon was taken up. Then there was discovered a place in the waste pipe, leading from the wash basin and urinal, where this pipe had been gnawed by the rats, and had been soldered and tied up with rags to make it tight.

There was discovered the secret and the cause of this whole difficulty.

This waste pipe was out of repair and had evidently been so for years. Whenever the urinal or wash basin was used the waste water passing through this pipe could escape from this place where the rats had gnawed it, and spread itself over the ceiling, and run down in Ingwersen's basement. When the basin and urinal were much used then the water flowed in large quantities below. When they were used but little and seldom, then the water came down in less quantities and dropped and trickled through the ceiling. At night time when laboring men from the railroad, and the factories and workshops in the vicinity, congregated in the saloon, the water flowed more copiously than in the day time when there were comparatively few people about.

This was the testimony, and this was the plaintiffs' theory of the cause of the trouble, and this the jury believed to be true.

Clearly here was evidence from which a jury would be warranted in coming to this conclusion, and it seemed to us that they could not reasonably come to any other.

Unless, therefore, some principle of law stood in the way of the plaintiffs' recovery on this state of facts, there was no ground whatever for a non-suit.

Whether any such principle did stand in the way is embraced in another exception to the Judge's charge, and will be considered when we come to that.

Second.—Did the Court err in admitting any part of Ingwersen's testimony given on a former trial to be read in his behalf from the printed book, when other parts of it from the same book had been read in evidence in behalf of the defendants?

The defendants offered and read from the testimony of Ingwersen on the first trial. The book was used simply as a matter of convenience, without objection, rather than calling the stenographer and have him testify from his notes. The plaintiff then offered other parts of Ingwersen's testimony given at the same time upon the same subject matter.

The defendants claim that this was error in the Court, in admitting any part of this to be read in the plaintiffs' own favor.

The law upon this subject is clearly stated in Wharton on Evidence, vol. 2, secs. 1103, 1104, 1105; Greenleaf on Evidence, vol. 1, secs. 201, 202; Phillips on Evidence, vol. 1, pages 406, 407, 408; Taylor on Evidence, vol. 1, pages 615, 616, 617.

Third.—Did the Court err in charging the jury that a re-letting of the premises by the defendants to Markey, with a nuisance upon them, made them responsible for its condition?

The law upon this question was settled, so far as it can be done, by the judgment of the Supreme Court, in this case before that Court on rule to show cause.

The opinion is reported in 18th Vroom, page 18.

There is no error, and the judgment should be affirmed.

JOHN LINN.

Attorney of Defendant in Error.

N. J. Court of Errors and Appeals.

*HENRY RANKEN and JOHN
D. MEYER.*

v.

AUGUST INGWERSEN.

*On Writ of
Error to Su-
preme Court.
In Case. 10*

WRIT OF ERROR.

[Retble. June 30, 1885.]

NEW JERSEY, ss. The State of New Jersey to the 20
Chief Justice and other Justices
[L.S.] of our Supreme Court of Judica-
ture, greeting :

For as much as in the record and proceedings,
and also in the giving of judgment in a certain plaint,
which was in our said Supreme Court of Judicature,
before you, between August Ingwersen, plaintiff, and
Henry Ranken and John D. Meyer, defendants, in a
plea of trespass on the case, manifest error hath in-
tervened, to the great damage of the said Henry 30
Ranken and John D. Meyer, as it is said ; we being
willing that the error, if any there be, should in due
manner be corrected, and full and speedy justice
done to the parties aforesaid in this behalf, do com-
mand you, that if judgment be thereupon given, and
affirmed, then you distinctly and openly send, under
your seal, the record and proceedings aforesaid, with
all things touching the same, to our Judges of our
Court of Errors and Appeals in the last resort in all 40
causes, at Trenton, on the thirtieth of June, inst.,

together with this writ ; that the record and proceedings aforesaid, being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and, according to the law and custom of the State of New Jersey, ought to be done.

10 Witness, Honorable THEODORE RUNYON,
our Chancellor and President Judge
of our said Court of Errors and Ap-
peals, at Trenton aforesaid, the tenth
day of June, in the year of our Lord
one thousand eight hundred and
eighty-five.

HENRY C. KELSEY,
Clerk.
WILLIAM A. LEWIS,
Attorney.

20 The answer of the Justices of the Supreme Court
of New Jersey within named, the record and pro-
ceedings whereof mention is within made, with all
things touching and concerning the same, we do cer-
tify to the Court of Errors and Appeals in a certain
Schedule to this Writ annexed, as within we are
commanded.

M. BEASLEY, [L. S.]
C. J.

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NEW JERSEY SUPREME COURT.

AUGUST INGWERSEN,
 vs.
 HENRY RANKEN
 and JOHN D. MEYER.

In Case.
On Postea,
&c. 100

John Linn,
Attorney.

As yet of the twenty-eighth day of
 June, A. D. eighteen hundred and
 eighty-two.

Witness :—MERCER BEASLEY, Esquire. 200
 Chief Justice.

BENJ. F. LEE,
 Clerk.

Hudson County, ss.

Henry Ranken and John D. Meyer, the defendants
 in this suit were summoned to answer unto August
 Ingwerson the plaintiff therein, in a plea of trespass,³⁰⁰
 on the case, &c., and thereupon the said plaintiff, by
 Linn & Babbitt, his attorneys, complains :

For that, heretofore, to wit, on the ninth day of
 February, eighteen hundred and seventy-six, in the
 County of Hudson, aforesaid, by a certain indenture
 of lease, made by and between the said defendants
 of the first part, and the said plaintiff of the second
 part under their hands and seals respectively, the
 said defendants let and leased to the said plaintiff,
 and the said plaintiff did lease and take of and from⁴⁰⁰
 the said defendants, all of the basement story under

the two stores numbers thirty-four and thirty-six Montgomery street in the City of Jersey City and County of Hudson aforesaid, to be occupied as a paint store, for the term of five years, commencing the first day of May, eighteen hundred and seventy-six, and ending on the first day of May, eighteen hundred and eighty-one, at the yearly rent of five hundred dollars in equal monthly payments during the said term.

10 And the plaintiff saith that afterwards on the first day of May, eighteen hundred and seventy-six, he entered and took possession of said premises under and according to the terms of said lease, and became seized and possessed of the term mentioned in said lease, and bound to pay said annual rent of five hundred dollars during the continuance of said term, and that he did pay the said annual rent of five hundred dollars from time to time during the continuance of said term until the whole of said annual rent was
20 finally paid—to wit, on the first day of May, eighteen hundred and eighty-one, in the County of Hudson aforesaid.

And the plaintiff further saith that the said defendants on said ninth day of February, eighteen hundred and seventy-six, and from thence during the continuance and until the expiration of said lease, were the owners, and by their tenants occupied and possessed the residue of said building, numbers thirty-four and thirty-six Montgomery
30 street, of which the said premises so as aforesaid leased by said plaintiff were a part.

And the said plaintiff further saith that by reason of the carelessness and neglect of said defendants in the use and occupation of the upper part and residue of said buiding, of which the premises so leased by said plaintiff formed a part, and by reason of the carelessness and neglect of said defendants in having the plumbing work done and keeping the same in
40 repair in the upper part of said building, and by reason of the insufficient and defective plumbing

done by said defendants in the upper part of said building, the water introduced into the upper part of said building was caused and allowed to flow down to, in and upon said basement story so leased and occupied by said plaintiff, and into and upon the oil, paints, brushes and painters' supplies kept by said plaintiff in said basement, so as to injure, damage and destroy the same, and so continued to run and flow—to wit, from the first day of August, 10
eighteen hundred and seventy-six, until the termination of said lease, and the said basement was thereby rendered wet, damp and unfit for use or occupation as a paint store by said plaintiff, and the said plaintiff was thereby obliged to remove his goods from said basement and to rent another store for the keeping of the same; and he was obliged to leave said basement and entirely abandon the use of the same, and the same became and was of no use or value whatever to said plaintiff and so continued 20
and remained until the expiration of his said lease.

And the plaintiff saith that by reason of the premises he has been injured and sustained damages to the amount of five thousand dollars, and therefore he brings this suit, &c.

And the said defendants, Henry Ranken and John D. Meyer, by William A. Lewis, their attorney, come and defend the wrong and injury when, &c., and say that they are not guilty of the said supposed griev- 30
ances (in the new or amended declaration) above laid to their charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against them. And of this they, the said defendants, put themselves upon the country, &c., and the plaintiff doth the like.

Therefore let a jury thereupon come before the Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court 40
to be holden at Jersey City, in and for the County of

Hudson, on the first Tuesday of April, in the year of our Lord one thousand eight hundred and eighty-five, by whom, &c., and the same day is given to the parties aforesaid, there, &c.

And now, at this day, to wit, the second day of June, A. D. eighteen hundred and eighty-five, before our said Supreme Court at Trenton, comes the said plaintiff, by his attorney aforesaid, and the Justice
10 before whom, &c., having sent hither his record had before him in these words, to wit :

Afterwards, to wit, on the twenty-first day of April, in the year of our Lord eighteen hundred and eighty-five, at the Circuit Court holden at Jersey City, in and for the County of Hudson, by the Honorable Manning M. Knapp, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, according to the form of the statute in such case made and provided, come as well the within
20 named August Ingwersen, as the within named Henry Ranken and John D. Meyer, by their respective attorneys within mentioned, and the jurors of the jury whereof mention is within made being summoned also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oath say that the said defendants are guilty of the premises above laid to their charge in manner and form as the plaintiff hath above com-
30 plained against them ; and they assess the damages of the said plaintiff, by reason thereof, over and above his costs and charges by him about his suit in this behalf expended, at the sum of eleven hundred and sixty dollars.

Therefore it is considered that the said plaintiff do recover against the said defendants his said damages by the jurors, in form aforesaid, found to be one thousand one hundred and sixty dollars, and also one
40 hundred and eight dollars and ninety-seven cents for his costs and charges, aforesaid, by the court now

here adjudged to the said plaintiff, and with his assent, which said damages, costs and charges, in the whole, amount to one thousand two hundred and sixty-eight dollars and ninety-seven cents.

Judgment signed this second day of June, A. D. eighteen hundred and eighty-five.

M. BEASLEY, Ch. Jus.

I, Benj. F. Lee, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment in above stated cause as the same remains of record in my office. ¹⁰

In testimony whereof I have hereto set my hand, and the seal of said court at Trenton,
 [L.S.] this thirteenth day of June, A. D. eighteen hundred and eighty-five.

BENJ. F. LEE, Clk.

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NEW JERSEY SUPREME COURT.

HUDSON CIRCUIT, APRIL TERM, 1885.

10	AUGUST INGWERSEN,	}	<i>In Case.</i>
	vs.		
	HENRY RANKEN and JOHN D. MEYER.		

Mr. Justice KNAPP, presiding.

Mr. McGRATH, attorney, and Mr. LINN of counsel with plaintiff.

20 Mr. LEWIS, attorney, and Mr. BEDLE of counsel with defendants.

On this 21st day of April, A. D. 1885, this cause was moved for trial, whereupon a jury was empaneled; the plaintiff stated his cause of action, and evidence was offered as follows:

30 AUGUST INGWERSEN, the plaintiff, sworn on his own behalf, testifies as follows:

Q. What is your business?

A. House and sign painter.

Q. Did you lease of the defendants the basement of the building called Commercial Building in 1875?

A. I rented it until May, 1876.

Q. Did you take possession of it?

A. Yes.

40 Q. What condition was the premises in when you rented them?

A. In a very good condition ; very nice and clean and light ; I had a great deal more light than I used to have at my old place.

Q. What did you keep in the apartments ?

A. Paints, brushes, oils, colors and painters' materials.

Q. A large stock on hand ?

A. Yes, from \$5000 to \$7000 on hand.

Q. Did you take another lease of the premises afterwards ? ¹⁰

A. I did ; I took a lease in February, 1876, from May, 1876, for five years, to May, 1881, at \$500 a year.

Q. When you took the second lease, what was the condition of the premises up to that time ?

A. Up to the time I took the lease they were in first rate condition.

Q. What difficulty arose afterwards, and when ?

A. So far as I can remember, it was in August, ²⁰ 1876, if I remember right ; we had a big Centennial sign in the shop, and one morning I come down and the whole sign, which was ready completed to be shipped, was all spoiled ; I found water standing on the floor and dropping down from the ceiling ; the ceilings overhead were narrow board ; the water was dropping down in different directions.

Q. What did you do then ?

A. I reckoned it was from Markey's ice box, or the urinal or water closet ; I went up to Markey's ³⁰ place ; I said, " Markey, here, this won't do — "

Interrupted by objection.

Markey showed me ; I looked in the ice box and underneath the ice box, and underneath the counter and in the water closet and urinal ; I could see no sign of water ; the floor was perfectly dry, still the water was dropping down into my apartments ; I then went right over to see Mr. Meyer in New York ; ⁴⁰ he said that they had employed an agent, and that I

had to go for redress to him ; that was David W. Stone, the agent ; he told me to go to see him about it ; I went and saw the agent, and he said that he was going to see about it.

Q. Did he stop the water running ?

A. He never stopped the water running.

Q. How long did that water continue to run and drop in that way ?

A. Off and on, some days worse, some days less ; it
10 kept on all the time.

Q. Up to what time ?

A. Up to the full extent of my lease—1881.

Q. Could you remain in those premises with the water leaking that way ?

A. It was utterly impossible.

Q. When did you leave ?

A. I left in April, 1877.

Q. Was there any damage done to your materials
20 from the water running down there ?

A. Yes ; there was a good deal of damage done.

Q. To what materials and to what extent ?

A. In oils and brushes, dampness and dry colors, fine colors ; damage done to all painters' materials, dry colors chiefly.

Q. What amount of damage, as near as you can estimate ?

A. I made a careful figure, and the reason why I
30 did so, I was sued for rent ; I refused to pay rent, and I made a careful figure at that time to use as an offset for rent, and the figures were \$650 to \$700.

Q. And that was a careful estimate at that time as to the damage to the materials ?

A. That was a careful estimate for materials damaged up to that time—not the goods that were entrusted to me in the shop—that was not included—such as signs, blinds and things we took there to be painted ; they were damaged.

40 Q. After you left the premises, what did you do with them ?

A. After I left the premises, I put signs up and tried to rent it, the best I could, if I remember right I had a shoe maker in first.

Q. When did you rent the premises, or any part?

A. I rented it February 1st, 1878, and May 1st, 1879, to Joice & Brothers, shoemakers, for \$24.

Q. The whole premises?

A. No, only part of it, I partitioned it off.

Q. Go on?

A. Then I got fifty dollars, seventy-four dollars in¹⁰ all; then from November 1st, 1879, to June 2d, 1882, to another shoemaker, named Eagan, I got \$35 dollars out of him; I had to put him out, I could not collect the rent; then I had a Chinaman in there, named Jim Lee, from July 18, 1878, to April 30, 1881, for \$135; then I rented the back apartments to Joseph Meyer, a tobacconist for \$18; that was all the money I got out of it, \$18.

Q. This part you rented to the shoemaker and the Chinaman, were the front part, fronting on Montgom-²⁰ery street?

A. Yes.

Q. Did the water run there?

A. No, the water didn't run in there.

Q. It didn't go so far front as that?

A. No.

Q. During the time, at different times after you left there yourself, and you were trying to rent it, did you go into the saloon to see what the condition³⁰ of the saloon was above?

A. Yes, I often went in there.

Q. Did you ever find any water running on the floor there?

A. No, sir; I never found any water running on the saloon whatever.

Q. When the water was running down dropping from the ceiling overhead, what was the condition whenever you examined it or the floor in Markey's saloon?

A. Dry.

Q. Did you try to rent the premises after you left?

A. Yes, to a good many.

Q. Did you have people there to look at them for the purpose of renting?

A. Yes; a good many.

Q. What was the difficulty that you could not rent it?

10 A. They would not take it on account of the basement being so wet and damp.

Q. Did you pay the rent to Ranken & Meyer for the whole term, \$500 a year?

A. Yes.

Q. They sued you for some of it?

A. I refused to pay it on account of the condition of the place; I was obliged to pay it, and did pay it.

20 Plaintiff offers in evidence the five years' lease.

Cross-examination by Mr. LEWIS:

Q. Your business was that of a house and sign painter?

A. Yes, sir.

Q. You have been in that business how long?

A. 33 years, going on.

Q. You are in that business now?

30 A. Yes.

Q. Previous to your taking these premises of Ranken & Meyer where did you occupy?

A. 47 Montgomery street; that was my own building, and I own it now.

Q. So that you were your own landlord?

A. Yes.

Q. You occupy the basement part of it?

A. A basement.

40 Q. Previous to your moving from your own building into this building, what kind of a business were you doing?

A. The same business I am doing.

Q. Wholesale or retail?

A. Wholesale and retail both.

Q. How long had you been doing a wholesale business?

A. Ever since I am in business; I am doing it today.

Q. Didn't you state on the former trial that you never did a wholesale business for more than two years? 10

A. I don't remember.

Q. When you told us on the former trial that you never engaged in a wholesale business for more than two years in your life, what did you mean?

A. I mean if anybody wants to come to buy wholesale they can come in my store and I can supply them any amount of colors they want at any time. If I did so state, at the trial before, I made a mistake. 20

Q. What you mean to say is, that if anybody comes and makes an order on you for any amount you can supply it?

A. Yes.

Q. You don't keep the material on hand?

A. Not so many materials as that.

Q. Doesn't that constitute a wholesale business?

Plaintiff objects to the question as immaterial. 30

Q. Doesn't that constitute a wholesale business, keeping a sufficient quantity of goods on hand to answer any reasonable demand—a wholesale demand?

A. Yes.

Q. You had no such amount at any time on hand?

A. Yes; often.

Q. Of what goods?

A. White leads, oils and varnishes. 40

- Q. How much white lead at any one time did you have on hand?
- A. I could not remember.
- Q. How much varnish at any one time?
- A. I don't remember.
- Q. How much dry colors?
- A. I can't remember.
- Q. Do you remember how much of any material was on hand while you were in the Ranken & Meyer building?
- 10 A. I don't.
- Q. How many tanks of oil?
- A. We had about five, I remember, so far as I can remember.
- Q. How large were they?
- A. They would hold about three to three barrels and a half, three of them at least, the others were smaller.
- Q. You had then about the same quantity of material that any first-class painter keeps in Jersey City?
- 20 A. Yes, I guess sometimes more.
- Q. Stock about equal to Chamberlain's?
- A. I don't know how much he keeps.
- Q. Stock about equal to Mr. Steffen's?
- A. I don't know what he keeps.
- Q. Please tell us the size of these apartments you rented?
- 30 A. If I remember right, the size of the apartments were forty feet on Montgomery street and seventy to seventy-five feet along Greene street, or it may be eighty.
- Q. So the premises you occupied really constituted two basements?
- A. Yes, 34 and 36 Montgomery street.
- Q. From front to rear, there was a partition wall between the two?
- A. No, there was a part of a partition once; there were arches and the arches were partitioned off
- 40 probably in the winter time to keep the cold out.

Q. What did you keep in the front basement, on Greene street?

A. I kept the most of the material, brushes and such stuff as that, dry materials.

Q. What did you keep in the basement, next west?

A. Dry colors and such stuff—barrels and such.

Q. Where did the water come down?

A. The water came down in the basement on the Greene street side, 34. 10

Q. The front basement, that is, the one next to Greene street?

A. Yes.

Q. And in the rear of that, didn't it?

A. About in the middle, the middle and rear.

Q. From the middle to the front, what distance was it?

A. I should guess about 18 or 20 feet.

Q. Wasn't it more than that; the water that you would see dropping through was mostly under the bar and ice box of Mr. Markey, wasn't it? 20

A. It was all over; it came sometimes more in the back, sometimes more in the front, and in different directions.

Q. That water didn't drop down from the ceiling; from the front, Montgomery street, clear back?

A. It did; it could not help it.

Q. Do you mean to say that water dropped down in the front part of the basement? 30

A. No, it didn't drop down in the front part; we don't talk of the front part; it didn't drop down from the front part.

Q. Where were your dry colors?

A. Off the front part; for 20 feet there was plenty of room to put the dry color; I don't remember exactly where they were.

Q. Don't you know the dry colors that were in jars were in front.

A. The dry colors were in barrels and boxes. 40

Q. You had dry colors in jars in the front of that basement?

A. No; I never did, on the front part of Montgomery street.

Q. Where did you have them?

A. I don't remember exactly where we did have them.

Q. Why didn't you put the jars in your front basement?

10 A. I had to have a place for people to come in to see what I had to sell.

Q. The entrance on the Greene street side was about midway of the basement?

A. Yes; about midway.

Q. The best part of your basement floor was front, wasn't it; from midway to the front?

20 A. The lightest part was not exactly; on the Montgomery street side we hadn't the light that we had on the Greene street side, so we did the best part of it on the Greene street side, because we had more light.

Q. How were these dry colors which you keep in jars injured?

A. The water came in and created a dampness; it was damp there morning to night, and the dry colors in the jars didn't receive so much injury to them as other colors in barrels. The jars where we had the dry colors in, we put them so that they could not be damaged.

30 Q. Water did not run into those jars?

A. In some there was.

Q. You didn't say so on the last trial?

A. I could not tell what I said on the last trial.

Q. Why did you tell us on the last trial that no water ran into the jars?

A. I have not said no water ran into the jars; I could not remember; I think they did.

40 Q. Then why did you tell us at the last trial that no water ran into those jars?

A. I could not tell, it is so long ago; I remember,

all what I do remember is the time I was sued for rent I made a careful set off for damages.

Q. Do you remember telling us at the last trial that you had it in your books?

A. I think we had it that time—a copy of the books, yes.

Q. That you had the damages in your books?

A. Yes.

Q. Do you remember my asking you why you didn't bring the books? 10

A. Yes.

Q. And telling me that nobody told you to bring them?

A. Yes.

Q. Didn't you have an opportunity on the next day to bring them?

A. When I looked, I could not find the statement?

Q. Did you not have an opportunity to bring them the next day? 20

A. It was on a scratch book, and I could not find the books or I would fetch them.

Q. The reason you didn't bring it was, because you couldn't find it?

A. Yes; it was five or six years previous to that time that the entry was made.

Q. Where were the barrels of dry materials?

A. All over the shop.

Q. Don't you remember that those barrels were in the basement that was the farthest from Greene street? 30

A. I don't remember.

Q. Don't you remember that your tanks were in the rear of the front basement?

A. Yes, I remember the tanks were in the rear; they were stationary, but the barrels were not.

Q. What were the damages sustained by your dry colors?

A. I don't remember. 40

Q. How do you arrive at any damages on those dry colors ?

A. It is now ten years ago. At that time I made a statement of colors that were damaged so that I could not use them ; since that time I could not tell ?

Q. You cannot tell to what extent they were damaged.

A. The colors were damaged to the extent of at
10 least \$650 to \$700.

Q. Did you not tell us on the last trial that perhaps these dry colors might be damaged to the extent of \$20 to \$30 ?

A. Some of them might be to that extent.

Q. Didn't you swear to that at the last trial ?

A. No.

Q. Don't you remember swearing to it ?

A. No.

Q. When I asked you this question, "How much
20 were your fine colors damaged," didn't you answer, "I don't believe I was over \$28 or \$30 injured ;" is that true or not ?

A. I think I swore to that at that time.

Q. How did you arrive at that damage ?

A. I could not tell. It is utterly impossible. I could not tell how I arrived at it. I had the bill made out that time, and I have no guide. I didn't want to tell the jury some guess work.

Q. What was the damage to your brushes ?
30

A. I don't remember.

Q. Were they new brushes ?

A. Yes ; new brushes.

Q. Are not brushes put in water ?

A. Yes, when they are used, but not when you want to keep them for sale.

Q. You say they were injured by dampness and thus damaged ; how damaged ?

A. They bursted. The binding which is made on
40 with a machine so tight that when a brush gets damp it splits out and bursts the binding.

Q. Isn't it the custom with the trade that when these brushes burst their binding while new, and before sold, to take them back and rebind them without expense to you?

A. They do that; if you keep them in a proper place, if you have a dry place, but when the brush manufacturers sees you in such a place that is wet, they would not do it.

Q. Did you have any brush manufacturer to this place to look at it? 10

A. I had the brush man over here, and I complained of the brushes, and if I had one or two brushes to fix he would have done it, but when I come there with brushes which were damaged through dampness to such an extent, I could not expect him to make it good.

Q. Give us the name of any brush man you asked to repair your brushes and who refused?

A. There is a brush maker, I don't know his name, over in New York, I think it was. 20

Q. What brush man did you ask to repair your brushes who refused?

A. I think it was Bowick from Boston.

Q. Do you remember asking any man to repair brushes for you, who refused, brushes that were injured through dampness?

A. I did often in my business, when brushes were damaged.

Q. Did they refuse to repair them? 30

A. They repair them but you have got to pay for it.

Q. Didn't they repair them without pay?

A. One or two brushes, but when you have a dozen or two dozen—the custom is, if you have a brush so much damaged by dampness they repair it, but when I come with so many brushes, I could not ask anybody to repair them for nothing.

Q. Then you didn't ask them to repair them for nothing? 40

A. I paid them.

Q. To what extent do you claim these brushes were damaged?

A. I don't remember.

Q. Do you remember you swore to the amount at the last trial?

A. I remember when you read it.

Q. Do you remember swearing at the last trial that those brushes were damaged to the extent of \$75 by the bursting of the string?

10 A. That might be so; I think it is so; that time I went more into details.

Q. How do you arrive at that amount of damage to these brushes?

A. I don't remember.

Q. You don't remember whether you sold them for less?

A. It may be the case.

Q. How was your oil damaged by water?

20 A. We had big tanks and they were covered with water drifting in, and oil and water don't mix, and when the man draws off the water out of the tank, where it was half full of water, it is not the oil that was damaged, but I was damaged in my reputation by the man using inferior stuff.

Q. Do you know to what extent you were damaged in your reputation?

A. That is impossible to know.

30 Q. Did any man you worked for cut down your bills because of it?

A. I don't remember.

Q. Did you have these tanks covered?

A. Yes, I had them covered.

Q. Then it was carelessness that let the water get into them?

A. No.

Q. How could the water get in through the covers?

40 A. The covers is tin, and the water would come on top of it, and the water would go through cracks and openings.

Q. Couldn't you have covered up those tanks so the water would not have got in?

A. Probably it might be done, but when you are inside of a place you don't make preparation for that.

Q. What was the varnish kept in?

A. In cans.

Q. And it was kept in barrels?

A. Yes, we received the varnish in barrels, and afterwards drew it off into the cans. 10

Q. Didn't you sometimes transfer it from one barrel to another?

A. No.

Q. How did you get it out of a barrel?

A. Through the bung hole; run it into a can that held 20 to 25 gallons.

Q. Until the bung was removed the barrel was water tight?

A. Yes.

Q. When you put it in the cans, the water could not get into the cans, could it? 20

A. No.

Q. Then how could the water which dropped from the ceiling injure the varnish?

A. We had covers on the cans and it would find its way through the edges, through the covers of the cans. The cans would hold twenty to twenty-five gallons.

Q. Two men could very readily lift one? 30

A. Yes.

Q. Plenty of room in the front part of that basement without setting it under the drips?

A. We had a particular place for each can, and the men wanted to know where things were.

Q. How many of these varnish cans had you that would hold 20 gallons?

A. Two.

Q. Is it possible that you could not have found a place in that basement to have stood these varnish 40

cans without setting them in the rear under these drips ?

A. I could.

Q. Tell us how much damage you sustained because of the water dropping upon the varnish can ?

A. I can't remember.

Q. Did anybody cut down your bill because of it ?

A. I don't remember.

10 Q. You say it was damp there ; this dropping commenced in the summer of 1876 ?

A. Yes.

Q. And in May, 1877, you moved ?

A. In April.

Q. Did you have a fire in your place during the fall and winter of 1876—1877 ?

A. Yes, stoves.

Q. Kept it in during the day ?

A. Yes ; and let it down at night.

20 Q. Wouldn't the stove have a tendency to prevent dampness in a closed up place in the winter time ?

A. It would have some effect.

Q. For what did you use the basement chiefly, farthest west, farthest from Greene street ?

A. Dry colors and materials in barrels, oils, turpentine and turpentine barrels.

Q. Do you use ladders in your business ?

A. Yes, step ladders, and long ladders.

Q. Many of them ?

30 A. Yes ; and ropes and tackling.

Q. All the paraphernalia that a painter must use to paint houses from top to bottom, inside and out ?

A. Yes.

Q. During the time you occupied these two basements, what did you do with those things ?

A. I had them, generally, stored in that basement, west.

Q. You used that basement, west, chiefly for that purpose ?

40 A. Not for long ladders ; the long ladders were outside, the short ladders were inside and the ropes and the tackling and the step ladders.

Q. The basement farthest west, was a dark basement?

A. Yes.

Q. It was not suitable for your trade?

A. It was for storing goods.

Q. Didn't you rent these premises chiefly for the purpose of carrying on the wholesale paint business, the wholesale business in paints, oils, etc.?

A. Yes, I did.

Q. You rented it for that purpose? 10

A. Yes.

Q. And you didn't carry out that purpose, did you?

A. Yes, I did.

Q. You didn't carry it out one year, did you?

A. It was a little over a year.

Q. You say you rented that for the purpose of carrying on the wholesale business in paints, etc., and that you had from five to seven thousand dollars worth of material there, now tell us how many men you had there through the day, each day, during the time you occupied it, remaining there as salesmen? 20

By Mr. LINN. I don't see what possible difference it makes.

WITNESS. I had my son there and a man, two men and myself.

Q. You were not there much of the time?

A. I was there mornings, noon and evening.

Q. During the day you were out, superintending your work where you had it? 30

A. Yes.

Q. Together with your workmen you had?

A. Yes.

Q. Perhaps a mile away from the place of business?

A. Yes, and more too.

Q. And you left some one person as a rule in charge of the store during the day?

A. My son and a man.

Q. And oftentimes only one? 40

A. Yes, sir; oftentimes only one man in the shop.

Q. You left there in the spring of 1877, because as you say it was impossible for you to remain there longer?

A. Yes.

Q. Didn't you go to your present place in Washington street, because you found it much more advantageous to your business as a painter?

A. No, sir.

10 Q. Do you pretend to say that your store in Washington street above ground, before you changed it into a saloon, was not more advantageous for a painter's business, than a place in a basement?

A. No, because this was a corner.

Q. But it is very near the ferry?

A. Yes.

Q. It is not central in the city. Is not Washington street more central in the city?

20 Question objected to.

Q. Didn't you tell one or more persons that you had a better place for business in Washington street, and that you left for that purpose, and not because this place was untenable?

A. No, sir; I left it because it was not tenable.

Q. How do you make up your stock of five to seven thousand dollars, which you say you kept in these premises?

30 A. It consisted of white lead, oils, varnishes, brushes, dry stuff, etc., whatever is kept for painters' supplies.

Q. Give us an estimate of how you make up the five to seven thousand dollars?

A. I could not do that at the present time.

Q. Why do you state it at so much?

A. The bills showed that much.

Q. Where are your bills?

A. I haven't got them here.

40 Q. Don't you know where you purchased?

- A. Yes.
- Q. Couldn't you get duplicate bills?
- A. Yes; we might get duplicate bills; we purchased from three or four different houses.
- Q. You say that when you first saw these droppings you went up stairs to examine what the trouble was?
- A. Yes.
- Q. What did you find up stairs? Did you find the bar and ice box? 10
- A. Yes, a bar, an ice box, a water closet and urinal, a tank under the bar.
- Q. You say you looked around and saw the floor was dry, you didn't see any water running from there?
- A. Yes.
- Q. You looked under the ice box?
- A. Yes.
- Q. How could you?
- A. I kneeled down and looked under, and felt the floor, whether the floor was wet? 20
- Q. Didn't the ice box stand upon the floor?
- A. If I remember right, there was a bottom and you could feel underneath of it?
- Q. That is your present impression?
- A. Yes, I could not see any water around there.
- Q. Your recollection is that that ice box stood up from the floor on pegs or legs and you looked under it?
- A. I don't remember exactly whether there were legs or pegs. 30
- Q. But it stood up from the floor?
- A. I looked in the ice box and looked under it.
- Q. You say that ice box stood up from the floor and you looked under it?
- A. Yes, I think I did.
- Q. You didn't see any water under it?
- A. No, sir.
- Q. (By Mr. BEDLE.) You mean to say the ice box stood up from the floor, and you looked under it? 40

A. I can't remember how the ice box was situated; I don't remember whether it stood by pegs or legs, or whatever they call it, from the floor, that I can remember.

Q. (By the COURT.) How large was the ice box?

A. About five feet by eight in size?

Q. Wasn't it eight by eight by nine feet high?

A. It may be; I never measured it.

10 Q. If you don't know whether the ice box stood on the floor or not, why did you so glibly tell us that you looked under it and saw no water?

A. I looked in the ice box and I looked around it, and it is so long ago I know there was no water around it; I looked even under the counter and I could not find any water, because I was mad about the water coming down so heavy.

Q. What did you see in the ice box?

A. I don't remember what I seen in it.

20 Q. Was there any ice in it?

A. Yes.

Q. How much?

A. I could not tell.

Q. Did you see any water in it?

A. There may be; I think there was a pail in at that time.

Q. Any water in the pail?

A. I could not tell; I don't think there was.

30 Q. You don't know whether there was any pail in it or not?

A. I think there was a pail in it when I looked in it.

Q. (By the COURT.) Was it a lined ice box?

A. Lined with zinc, if I remember right.

Q. When was this?

A. In 1876.

Q. The ice box was lined with zinc?

A. Yes.

Q. Was there any outlet of any sort for water?

40 A. There was an outlet; I think it was in the

bottom ; I could not exactly say where the outlet was

Q. (By the COURT.) Where did it discharge its waste water ?

A. I think in a pail or in a tub ; I could not say.

Q. (By the COURT.) Sitting near to the box ?

A. I think it was.

Q. (By the COURT.) On the same level with the box ? On the same floor ? 10

A. That I don't remember.

Q. What did you find under the bar ?

A. I found a kind of trough, what they have wather in to wash glasses, a trough or tank.

Q. Was there water in it ?

A. Yes.

Q. Full of water ?

A. No, not full.

Q. (By the COURT.) Where did the ice lie in this box ? 20

A. On top.

Q. How was the bottom part of the ice box ?

A. It was always clear, the ice was lying in the top shelf of the box.

Q. (By the COURT.) What was the lower part of the box used for ?

A. I don't know.

Q. (By COURT.) Was it open ?

A. They had a door in it.

Q. (By the COURT.) Was it all open under the ice ? 30

A. There were shelves under it for putting things in.

Q. In what part of the room did the ice box stand ?

A. I don't know.

Q. You saw it ?

A. I seen it.

Q. You don't know what part it stood in ?

A. No, I didn't measure.

Q. It didn't stand in front, on Montgomery street part ? 40

A. No.

Q. Where was the bar in this room; what part of the room?

A. In the back part of the room, some of it in the centre.

Q. How long was the bar?

A. I don't know.

Q. Was it as long as this longest table here?

A. Longer.

10 Q. On which side of the room was the bar?

A. Somewheres in the middle, the bar run north and south lengthwise of the room.

Q. What was the distance between the end of the bar nearest Montgomery street and Montgomery street?

A. I don't know.

Q. In reference to the bar, where did the ice box stand?

20 A. I don't remember.

Q. Didn't the ice box stand north of the bar?

A. I don't remember, that is the farthest distance from Montgomery street.

Q. Where was the water-closet on that floor?

A. At the farther end of the room, that is north.

Q. That is the end farthest from Montgomery street?

A. Yes.

30 Q. In what part of that end did the water-closet stand?

A. It stands on the west part.

Q. That was the corner farthest from Greene street?

A. Yes.

Q. Then it was in the farthest part of the room possible, from both Montgomery and Greene streets?

A. Yes.

40 A. I understand that your attention was first called to this dropping, by the damage done to a sign that was prepared for the Centennial?

A. Yes.

Q. Whose sign was that ?

A. It was an India rubber company from New York.

Q. Wasn't that sign being prepared by Mr. Brown to exhibit at the Centennial as his own exhibit ?

A. That sign was being done by Mr. Brown my sign painter.

Q. Did you pay Mr. Brown for doing that sign ?

A. Yes.

Q. Did you intend to exhibit that sign at the Centennial ?

A. For the India rubber parties in New York, it were a large sign.

Q. What damage did you sustain on that sign ?

A. We had to do the whole sign over again.

Q. Answer my question, what damage did you sustain on that sign ?

A. About \$125.

Q. Where is Mr. Brown ?

A. He is here.

Q. Did that sign go to the Centennial ?

A. It did, after we done it over again.

Q. When ?

A. In 1876 ; I don't remember the date.

Q. When was the Centennial ?

A. I think it were in 1876.

Q. What time ?

A. I don't remember.

Q. Was that sign there at the commencement of the Centennial ?

A. No.

Q. When did it get there ?

A. It got there long after the exhibition opened, because we could not get it done.

Q. How soon after the exhibition opened ?

A. I don't remember.

Q. Can you say nearly ?

A. No, I could not.

Q. What was the particular damage which the water did to it ?

A. The whole damage at least \$700.

Q. You were asked what the whole damage to the sign was?

A. \$125 to the sign.

Q. How was the sign damaged?

A. The whole work had to be done over, gilded, &c.

Q. Does water spoil the gilding?

10 A. It makes a spot on it.

The following examination is by Mr. BEDLE :

Q. Tell what that sign was, describe it?

A. It were a big sign ; it took up the entire length of the shop ; it were for an India rubber company, to be sent to Philadelphia on the stand that they occupied there.

Q. What was the name of the India rubber com-
20 pany?

A. I don't remember. I got it through Mr. Spadone.

Q. It went to the exhibition?

A. Yes.

Q. When did you send it there?

A. I don't remember. It were after the Centennial opened.

Q. Do you remember the season of the year?

A. It must have been late in the summer.

30 Q. How far had the sign progressed when water came on it?

A. The sign was completed.

Q. What portion of the sign was gilded?

A. The whole sign was gilded.

Q. Did it have to be gilded over?

A. Yes ; because the water coming down stained it.

Q. Will your books show when that sign went to the Centennial?

40 A. I will look and see ; I think they will.

Q. Won't you look and bring your books here to-morrow?

A. Yes; I will look.

Adjourned for the day.

SECOND DAY'S PROCEEDINGS.

WEDNESDAY, April 22, 1885. 10

AUGUST INGWERSEN takes the stand for *further cross-examination* by Mr. LEWIS :

Q. The premises you rented in Washington street, was it the entire building?

A. Yes.

Q. Then you sub-let portions of it, which you didn't need for the purposes of your business?

By Mr. LINN. What is the materiality of this testimony? 20

Q. How many parties did you let to, this place in Washington street?

A. I don't remember.

Q. Who did you let to, can you remember any one?

A. Yes, I remember some of them.

Q. State those that you remember.

A. I rented to Judge Keese.

Q. Judge Seymour?

A. Not at that time. 30

Q. How many offices up stairs did you sub-let?

By the COURT. What is the object of this line of testimony?

By Mr. LEWIS. I want to find out how many tenants he had, to show that he made a profitable exchange, and that his motive for leaving our premises was for the purposes of gain.

The COURT. It is rather remote. You may show that he rented other premises. 40

Q. You moved in April, 1877, from the Montgomery street basement to the Washington street store?

A. Yes.

Q. At that time you took your stock of goods?

A. That I don't remember.

Q. What did you move in April?

A. I have no memory of all the materials I had.

10 Q. (By Mr. BEDLE.) You moved what you had there?

A. Yes.

Q. After you moved out of these premises, to whom did you first let any part of them?

A. To a shoemaker named Joyce.

Q. How much of the premises did you let him?

A. The Montgomery street portion, about 20 feet deep.

Q. At what rent?

20 A. I don't remember.

Q. For how long a time?

A. Month to month.

Q. How long was he there?

A. I don't remember.

Q. How much rent did he owe you when you went out.

A. One month.

Q. Did you ever collect it?

A. No, sir.

30 Q. What other tenant did you rent to?

A. To another shoemaker; I can't remember his name.

Q. When did you rent to him?

A. I don't remember.

Q. What part did you rent to him?

A. The same premises as the other.

Q. How long did he remain?

A. I don't remember.

Q. How much did he owe you when he went out?

40 A. I don't remember; he owed me some.

Q. Did you ever collect it?

A. No, sir.

Q. Who next did you rent it to?

A. To the Chinaman.

Q. When did you rent to Eagan?

A. That was the name of the shoemaker, I think.

Q. When was that?

A. After the shoemaker went out.

Q. At what time?

A. I don't remember; I think it must be 1880; it¹⁰
may be 1879.

Q. Didn't you tell us yesterday that Jim Lee had
it during that time?

A. I read yesterday from memoranda I had; I
don't remember now.

Q. At what time did you rent it to the Chinaman?

A. I don't remember.

Q. The Chinaman had it a little over three years,
did he?

A. No; the Chinaman had it a little over a²⁰
year.

Q. Didn't he occupy it all the time you rented it
to him?

A. He did.

Q. You stated yesterday, you rented it to him in
July, 1878, to April 20, 1881; that would be over two
years, wouldn't it?

A. There was considerable time fixing it up; I
could not tell.

Q. How much of the place did he occupy? ³⁰

A. The same place the shoemakers occupied about
20 feet deep.

Q. Who next did you rent it to?

A. To nobody.

Q. You have mentioned two shoemakers and a
Chinaman; do you remember a cigar man?

A. Yes; I rented him the back part.

Q. What was his name?

A. Meyer.

Q. The back part of the corner basement? ⁴⁰

A. Yes; the Greene street side.

- Q. When did you rent that?
 A. I don't remember.
- Q. That was the part the water came through?
 A. The most of the water came there ; yes.
- Q. How long did Meyer have it?
 A. I let him stay until the expiration of my term.
- Q. When did he go in there ?
- 10 A. I can't remember ; he was in there a year.
- Q. Who else did you rent to ?
 A. To nobody else, to my knowledge.
- Q. What agent had these premises to let for you ?
 A. I was my own agent ; I had bills up there to let all the time.
- Q. Where is your lease for these premises from Ranken and Meyer ?
 A. The lease is lost.
- 20 Q. Who occupied the premises above you ?
 A. Owen Markey.
- Q. Who occupied above Markey on the next floor ?
 A. I don't remember.
- Q. For what purpose was the building occupied above Markey ?
 A. Chiefly offices, law offices.
- Q. Who occupied the upper floor ?
 A. I don't remember.
- 30 Q. Do you know of Mr. Linn occupying a portion of that corner, above Markey ?
 A. Yes, I think he did.
- Q. Do you know for how long a time ?
 A. I could not say.
- Q. Do you remember some short time after you went into possession of those premises, corner of Montgomery and Greene streets, of the tide coming into the basement upon you and rising above the floor ?
- 40 A. I remember it was in the summer of 1876, at

the end of the summer, if I remember right, the tide came in very strong and rose above the floor.

Q. It came up around some of your barrels?

A. Yes.

Q. Barrels of dry cement?

A. It was not much dry stuff, but what we had in the dark place.

Q. After that did your landlords put in a new floor for you and raise it up?

10

A. Yes.

Q. That was independent of your lease?

A. Yes.

Q. You say that Ranken and Meyer brought suit against you to recover rent; how much rent was due at the time they brought the first action against you?

A. If I remember right it was three months rent.

Q. Wasn't it eight?

A. I don't remember.

Q. Didn't you swear at the former trial that the premises you rented from Ranken and Meyer were about 50 feet on Montgomery street by 75 or 80 on Greene street?

20

A. I don't deny that I swore to that, I might be mistaken in the size, I didn't measure it.

Q. Did you also swear on the other trial, that you discovered this water dropping into your apartment late in August, 1876?

A. I think it is somewhere about that time when I discovered it dropping, as near as I can remember.

30

Q. Didn't you also swear on the former trial, that it came through the ceiling, that where it came from to get there you didn't know?

A. Yes, I didn't know where it come from, all that I see, it come from the ceiling.

Q. Did you or not, swear to that on the former trial?

A. I don't remember, I think I did; it dropped down from the ceiling.

40

Q. You say you didn't know where it came from?

A. I say I don't know where it come from, it come from the ceiling.

Q. Didn't you swear on the former trial, that you may have told some person or persons in the summer of 1876, that the water came from Markey's ice chest?

A. Not that I remember.

10 Q. Didn't you swear at the former trial that you may have told some person or persons that that water that you saw coming through the ceiling came from the ice chest of Markey?

A. I may have done so in the beginning, because I thought it came from Markey's ice chest until I went up and seen it didn't.

Q. Did you serve any written notice on Mr. Ranken or Mr. Meyer to abate this water?

A. Not that I remember.

20 Q. You say you first spoke to Mr. Meyer about that?

A. Yes.

Q. Where?

A. In his place of business, if I remember right, in Cortlandt street, New York.

Q. That was the first time you had spoken to him about it?

A. So far as I remember; yes.

30 Q. Do you remember the number in Cortlandt street?

A. No.

Q. Is he at the same place now?

A. I judge so.

Re-direct examination by Mr. LINN:

Q. Who was the agent for Ranken & Meyer after Mr. Stone ceased to be?

A. George W. Firth was the agent after Mr. Stone.

40 Q. Did he continue to be agent until your lease expired?

A. No; I think he was agent about a year or a year and a half; then another agent named Mahnken was the agent.

Q. Did you ever say anything to Mr. Firth about this?

A. Yes; I had him down there and showed him.

Q. Did you ever go to Ranken & Meyer after you spoke to Mr. Meyer about it?

A. Yes; I have seen them both.

Q. What was their uniform direction about it? 10

Question objected to.

Q. What did you say to them, or what did they say to you, when you told them about the troubles you had?

A. They have given their premises in the hands of an agent, and I should go to him.

Q. You say you did not know at the former trial, nor do you now know of your own knowledge, where²⁰ that water came from, but that it was dropping from the ceiling above?

A. Yes.

Q. Do you know from your examination of Markey's saloon that it did not come from his ice box or his wash basin or the tank in the bar or water closet.

Question objected to.

The COURT. On his direct examination he³⁰ stated his belief and the grounds of it fully; he says he went there and examined them and saw no evidence of it.

Re-cross-examination by Mr. LEWIS:

Q. Who had charge of the water department in Jersey City at the time you rented these premises?

A. I don't remember.

Q. Weren't you a member of the Board of Works⁴⁰ at one time?

A. I was not at that time.

Q. When you were a member of the Board of Works, didn't the Board of Works have charge of the water department and control it?

A. From 1871 the Board of Works always had charge of the water department. I was a member of the Board in 1871.

Q. The members of the Board of Works are also members of the health department?

10 A. No, sir.

Q. Did you ever take off any portion of the ceiling to examine where this water came from?

A. No, sir.

Q. It was a boarded ceiling?

A. It was a boarded ceiling.

WILLIAM C. BROWN, a witness sworn on the part of
20 the plaintiff, testifies as follows :

Direct examination by Mr. LINN :

Q. What is your business?

A. Sign and ornamental painter.

Q. Have you been in the employ of Mr. Ingwersen in that business?

A. Yes, I think about 17 years.

Q. Were you in his employ in 1875 and 1876?

30 A. Yes.

Q. Do you recollect when he first rented the basement of the building corner of Montgomery and Greene streets?

A. Yes.

Q. Before he rented the premises did you go there to look at them with him?

A. Yes.

Q. In what condition did you find them?

A. Very dry, light and cheerful.

40 Q. Then, when did he first go there to occupy them?

A. I don't remember the date, it is so long ago ; I think it was late in the summer time.

Q. Do you recollect when that water was first discovered coming down from above ?

A. No, I don't ; I could not say whether it was that fall late or the beginning of the next spring ; I can't remember.

Q. Do you recollect anything about this sign of which Mr. Ingwersen has spoken, the sign for the Centennial ? 10

A. Yes, it was for some India rubber and hose company in New York, I don't know the name of the firm.

Q. Do you recollect when that sign was finished ?

A. No, my impression is that it was the latter part of June, or the beginning of July, of that year, 1876, as near as I can remember.

Q. Do you recollect that sign being injured by the water coming down ?

A. It was injured. 20

Q. To what extent ?

A. I can't remember, I know I did it over again.

Q. You had to do it all over again ?

A. Yes.

Q. Do you know what the price of that sign was ?

A. I don't.

Q. Do you recollect whether any water had been discovered coming down there, before the time when the sign was injured ?

A. My impression is that it came down before the sign was injured. 30

Q. How long before ?

A. I can't remember ; I have nothing I can fix the date from.

Q. Do you remember when Mr. Ingwersen went out of the premises and went to Washington street ?

A. I recollect that he did leave there, that is all ?

Q. From the time that the water first commenced coming down there, from the time that sign was injured by the water coming down, did or did not the 40

water continue coming down; what was the condition of the premises in regard to water coming down after that time?

A. It was a continual dropping from the board ceiling, sometimes in one spot; for instance, this morning it would be dropping from one spot, and next morning in spots 4 or 5 feet away from the drop of yesterday, so that in my work I had to be shifting around to avoid it.

10 Q. Was the condition of those premises injurious to health, was it unfit to work in, from the dropping of water?

Question objected to.

Q. Was there any cessation of the dropping of the water until Mr. Ingwersen left?

A. I think not from the time it started.

Q. It kept continually dropping?

20 A. I think it did.

Q. What was the effect upon any of the articles which were stored there?

A. I don't know; I just attended to my own business.

Q. Do you know that it did drop on any of the articles and that they were wet?

A. I know it dropped on some of my signs and I had to do them over, but that was my own loss.

30 Q. Were you employed there all the time or only part of the time?

A. Only part of the time, just when I had sign work to do, sometimes half a day, sometimes a whole day, sometimes an hour a day.

Q. Have you seen those premises at different times since Mr. Ingwersen left and went to Washington street?

A. At three or four different times after that, I dropped in to look at them.

Q. What was their condition then?

40 A. They were in a very horrible condition, in a

state of complete decay ; afterwards when I was in there to see them, the floor was rotten and tore up.

Q. How was it with regard to the water ?

A. Dropping constantly.

Q. On those occasions when you went in there, was it during one year or one month or during different years ?

A. I could not say ; I went in three or four different times, but I don't remember, it was at intervals. 10

Q. Do you recollect whether any one was occupying the front of the basement corner of Montgomery and Greene streets when you went there, whether that part was partitioned off and occupied by a shoemaker or laundry, or something of that kind ?

A. I don't remember ; I went in at the Greene street entrance when I went to look at them on these occasions, whether it was partitioned off or not, I can't recall now.

Q. Were the premises, when Mr. Ingwersen left them, suitable for occupation for the purposes for which he needed them, on account of the water coming down ? 20

Question objected to.

The COURT. That is a question for the jury ; he may state the condition of the premises.

Cross-examination by Mr. BEDLE:

Q. The repainting of that Centennial sign, I understood you to say was your own loss ? 30

A. No ; I did not so state.

Q. You remarked that something was your own loss ?

A. Some jobs which had been placed where I considered a position of safety, I found them defaced, and rather than ask Mr. Ingwersen I would go over them again, without making any charge.

Q. When did you commence painting that Centennial sign ? 40

A. I don't recollect.

Q. When did you complete it?

A. I don't recollect.

Q. Do you know how long Mr. Ingwersen had been in this place at the time you completed it?

A. No; I think it was the next year after he moved there, as near as I can remember now.

Q. Do you know what year he moved there?

10 A. No, sir, I don't recollect.

Q. Did that sign go to the Centennial?

A. I don't know; it was taken out of that place.

Q. What time in the year?

A. I could not tell; it is so long ago I don't remember; my impression is it was in July, as near as I can remember.

Q. You spoke of its being finished in the latter part of June or beginning of July?

A. Yes.

20 Q. Was it taken from the place right after that?

A. I think it was, as soon as possible for it to be removed.

Q. The dropping of which you speak was in the northwest corner of the premises occupied by Mr. Ingwersen?

A. That is where it commenced—the northwest corner, down by the oil tank; we had four or five oil tanks there.

Q. Did he move them?

30 A. I don't remember.

Q. About what space in the northwest corner was covered by the dropping?

A. From the time it commenced until about the time I did that sign it had extended quite half way of that basement, as near as I can remember; toward Montgomery street, from the rear.

Q. In width how much?

40 A. I can't remember exactly; possibly half way across the room; that is the basement toward Greene street; there were two basements, really.

Q. Was there a partition running east and west, or north and south?

A. North and south, separating the two basements.

Q. Did the partition run from Greene street across, or did it run from Montgomery street to the north?

A. From Montgomery street to the north.

Q. That made two rooms, didn't it?

A. There were openings of two large arches, you¹⁰ would call it two rooms.

Q. This dropping was in the westerly room, wasn't it?

A. The easterly room toward Greene street.

Q. And near the partition?

A. It began near that partition.

Q. And you think it extended how far in width?

A. About half the room I should judge.

Q. Do you recollect what the width of the room was, the one next to Greene street? 20

A. 20 or 25 feet as near as I can remember now.

Q. How far do you say it extended from the rear toward Montgomery street?

A. About half the length of the basement I think.

Q. Do you remember which way the ceiling boards ran?

A. They run from Montgomery street back.

Q. (By the COURT.) Did the dropping follow a line or did it spread on the ceiling?

A. It followed a line of boards I think. 30

Q. (By the COURT.) A single line, or had it width.

A. It was dropping from different boards, not one particular board.

Q. How far do you say it extended north and south?

A. At the time this Centennial sign was, it had reached half the width of the basement north and south.

Q. That is the easterly room?

A. Yes. 40

Q. What did you do to your sign when you did it over?

A. If I remember right, it was a very long and very expensive sign, it was painted, I think, with a vermillion letters with a margin of gold.

Q. I didn't ask you that. What did you do to it when you did it over?

A. I had to gild all the letters that the water had spoiled by running on the paint and running over the gilding, scraping off the smalt, and re-smalting it, as near as I can remember now.

Q. Where was the sign sitting when it got dropped on?

A. Sitting out of the way of this dropping, as near as it could be.

Q. When this dropping commenced, was it by small degrees or not?

A. Yes.

Q. Did you testify on the trial before, "that the water began to drop from the boards overhead, that it was very small at first, of no particular consequence, but increased gradually and became worse and worse"?

A. I don't remember anything about what I testified to.

Q. Is that the fact?

A. I think it is.

Q. During this time, where was your sign sitting?

30 A. Near the middle of the floor running from Montgomery street back.

Q. How long did it take to injure that sign?

A. One night.

Q. It was all done in one night?

A. All done in one night, yes, sir.

Q. You can't tell when that was?

A. I can't; I have no recollection when it was.

JAMES P. MARKEY, a witness sworn on the part of the plaintiff, testifies as follows ;

Direct examination by Mr. LINN :

Q. Where do you live ?

A. 424 Grove street, Jersey City.

Q. What is your business ?

A. Liquors and cigars ; I keep a saloon at 52
Montgomery street. 10

Q. Was Owen Markey your brother ?

A. Yes.

Q. Do you recollect when he occupied the premises corner Greene and Montgomery streets ?

A. I wasn't there all the time, I was not in his employ ; I used to go there and help once in a while, tend the pool table nights and Sundays.

Q. Do you know in what condition that saloon was kept when you saw it at all times ?

20

Question is objected to unless the time is fixed.

Mr. LINN. At all times when he saw it.

The WITNESS. I always seen it in good condition.

Q. Do you recollect when your brother went there ?

A. About 16 years ago, I guess ; it may be longer, I don't remember. 30

Q. Do you recollect whether he was there the Centennial year ?

A. I guess he was ; he stayed there all the time until he died ; he died November 7th, 1880.

Q. Did he occupy those premises at the time he died ?

A. He was there, yes, sir.

Q. He had them under lease at that time ?

Question objected to.

40

The WITNESS. I could not say.

The COURT. You will have to show the lease if it is material.

Mr. BEDLE. We withdraw the objection.

Q. Do you recollect the time Mr. Ingwersen occupied the basement under your brother?

A. No.

Q. What was the furniture, and what articles were
10 in that saloon?

A. A bar and fixtures, an ice box, a reversible mirror and chairs, pool table, pictures.

Q. Was there more than one ice box?

A. Two ice boxes, a large one and a small one.

Q. Where was the large ice box?

A. The end of the bar.

Q. Have you that ice box in your saloon?

A. Yes.

20 Mr. BEDLE. He occupied all the premises over where the leak was?

Mr. LINN. Yes; he occupied all the premises over where the leak was.

Q. At any time when you were there, either the night or the day, was the water suffered to escape from the ice box, or the the water tank in the bar, or anywhere else in that saloon, so as to run on the floor?

The question is objected to in that shape.

30 Q. After your brother died, who kept the saloon until his lease expired?

A. I kept it afterwards; I had the lease signed over to me.

Q. How long did you occupy it there after your brother died?

A. I guess a year and a half.

Q. During that time when you occupied it, was
40 the water suffered to escape and run on the floor, either from the ice box or from the tank in the bar, or from any other place in the saloon?

A. I saw water coming down from overhead; I never noticed any come out of the ice box, because there was a hose attached and it run down into a tank underneath.

Q. Where did the water run to from the ice box?

A. It run into a vat outside the box—a little zinc tank.

Q. Was that above the floor or on the floor?

A. The tank was raised a little over the floor; sometimes we would put a piece of ice in that to put the glasses in to keep them cool.

Q. How large was the ice box?

A. I never measured it; I should say six or seven feet; it was as broad as it is long.

Q. What kinds of material was it built of?

A. I think it is black walnut—narrow strips; there is a pine bottom in it; I think it is pine.

Q. Any part of it lined?

A. Yes, where you keep the ice; it is lined with zinc.

Q. There is a place for the water to escape from the ice?

A. Yes, there is strips runs across, and it leaks down into the tank, and then out through a hose outside.

Q. Did that water escape on to the floor in the saloon?

A. I don't see how it could.

Q. Did you ever see it?

A. I never noticed it.

Q. You would have noticed it if it had while you were there?

A. Yes.

Q. Was there any other place in that saloon, on the floor of the saloon occupied by you, where the water was running over the floor so it could leak through into Mr. Ingwersen's parts?

A. I haven't noticed anything like that.

Q. You have never seen it?

A. I never seen it.

Q. Could it be there on the floor running down perpetually without your seeing it?

A. No, I could see it if it was there.

Q. There was a tank behind the bar for washing glasses?

A. Yes, the waste pipe, that is the sink where the waste water runs down.

Q. Is there a pipe that runs from that tank?

10 A. Yes, a lead pipe runs into the next building.

Q. And that went to the sewer?

A. Yes.

Q. So there was no chance for water to escape and get on the floor there?

A. No.

Mr. BEDLE. This is all very leading?

The COURT. It is objectionable on that ground.

20 Mr. BEDLE. We ask to have the last answer overruled.

The COURT. It may be stricken out.

Q. What was the condition of the floor behind the bar while you were there, was it kept dry, or was it allowed to be wet?

A. It was kept dry.

Q. What was the condition of the floor all over that saloon, was it wet or was it dry while you were there?

30 A. It was dry.

Q. How long were you there assisting your brother occasionally before he died?

A. I suppose a year and a half, that is nights.

Q. You say you have that ice box now in your present saloon?

A. Yes, the same ice box.

Q. Is it in the same condition now it was when it was in your brother's saloon?

40 A. About the same.

Q. What was the size of the small ice box?

A. About three feet and a half, I guess.

Q. What was kept in that?

A. A large cake of ice and soda water, sarsaparilla, ginger ale.

Q. Did the bottom of that ice box set on the floor, or did it stand on legs?

A. Legs on each corner about four or five inches high.

Q. Where did the water from that escape to?

A. That run into a vat underneath it. 10

Q. Did the bottom of the large ice box stand on the floor, or did that set up?

A. I think it was raised a little up off the floor; the bottom would not set even on the floor, and they put planks on the floor, so it would not rot so quickly, to let the air pass underneath.

Q. What was kept in the bottom of that large ice box?

A. Lager beer kegs.

Q. And the ice was above that in a zinc lined box? 20

A. Yes, just over the lager beer keg.

Q. And the water from that was carried off by a pipe into the tank outside?

A. Yes.

Q. (By the COURT.) And the vat you spoke of was that inside the wooden closet or was it outside?

A. It was outside of it; I believe there was a pail there at that time.

Q. (By the COURT.) What time do you speak of? 30

A. The time my brother was there.

Q. Then there was a pail there that caught the water?

A. Yes.

Q. How was it when you were there after your brother?

A. It was that way a little while.

Q. That pail required to be emptied occasionally?

A. Once in a while, yes, sir.

Q. (By the COURT.) How frequently did it fill? 40

A. That would depend upon how warm the weather was.

Q. How frequently would the pail fill up?

A. Once a day, perhaps twice a day, depending upon the weather.

Q. When it ran over, if it ever did, what became of the water?

A. Wiped it up with a sponge.

10 Q. If you were not there when it did run over?

A. Then the bottom of the box would hold it.

Q. (By the COURT.) You said the ice box was raised up to prevent its rotting, what was the danger from rotting?

A. Where anything lays solid it is more apt to rot, than if it is raised up.

Q. From any dampness that might be there?

A. Yes, it would be damp.

20 Q. (By the COURT.) What sort of a floor was that in the closet?

A. I think it was pine boards; I think they were about two inches thick and about 10 or 12 inches wide. I never noticed the width of them.

Q. Were they tongued and grooved boards?

A. They must be; I only saw the bottom once, when we were moving it away from there, and then it was all in a good condition, nice and dry.

Cross-examination by Mr. LEWIS :

30 Q. When did your brother die?

A. November 7, 1880.

Q. You were with your brother a year and a half before he died?

A. I used to go down nights just to help round.

Q. Nights and Sundays?

A. Yes.

Q. But was not there during the day?

A. No.

Q. You don't know what went on during the day?

40 A. No.

Q. You could not tell when, nor how frequently,

this pail was emptied during the day when you were not there ?

A. I was not there.

Q. Nor how often it overflowed ?

A. No, I could not say.

Q. Didn't you swear at the last trial that that large ice box was about eight feet square and nine feet high ?

A. I don't remember, I never measured it ; it may be that size, I can't tell ; it is a large box. 10

Q. In looking at it, it gives the idea of large ? It is more of a house than a box ?

A. Well, something similar, yes.

Q. Was the bottom of it lined when it was in your brother's place ?

A. It has the same bottom now, a wooden bottom ?

Q. No zinc for lining in the bottom ?

A. Not in the bottom, not where the kegs go.

Q. Half way up the box the ice is put ?

A. Yes. 20

Q. From that bottom midway up the box is a hole or tube to let the water run out ?

A. Yes.

Q. And that ran into a pail ?

A. Yes.

Q. And that pail had to be emptied from time to time ?

A. Once in a while ; I have altered it since.

Q. When you altered it you connected it with the sewer ? 30

A. No.

Q. It was not connected with the sewer when your brother had it ?

A. Not to my knowledge.

Q. Were large quantities of ice kept in there from time to time ?

A. 700 or 800 pounds, I guess.

Q. About where in that room did the ice box stand ?

- A. At the end of the bar, about three feet and a half I should judge.
- Q. Which end of the bar ?
- A. The north end, I guess, the end that was farthest away from Montgomery street.
- Q. The bar ran lengthwise of the room ?
- A. Yes.
- Q. The bar stood up in which part of the room ?
- A. About four or five feet from the westerly wall.
- 10 Q. You say you have that large ice box now ?
- A. Yes.
- Q. Sitting on the floor ?
- A. In just the same position.
- Q. It sits on the floor ?
- A. No, there is three boards under it, one in the centre and one in each end.
- Q. Did you see that ice box when it was first put into your brother's place ?
- A. I don't remember.
- 20 Q. Where did the small ice box set ?
- A. At the other end of the bar, nearest Montgomery street.
- Q. What was the size of that ?
- A. About three feet, I guess.
- Q. Was that divided in the same manner as this, with a partition half way up ?
- A. No, it had a kind of three little lids on it to shut down.
- 30 Q. Very much like the ice boxes used in families ?
- A. It had a cover made of three boards that would double up, the ice box was attached to the bar.
- Q. Did that tank under the bar usually have water in ?
- A. Yes.
- Q. There was a faucet to let the water run into it ?
- A. No, there was a little hole in the center to let it run down into a pail.
- Q. Do you know how many times that tank overflowed during the day that you were not there ?
- 40 A. I never noticed it overflow of any account,

might spill a little pulling it out and then sponge it up.

Q. How was the floor cleaned ?

A. With sawdust, and sweep it up.

Q. Didn't you clean it with water ?

A. No, sir.

Q. Never cleaned the floor with water ?

A. Never.

Q. Never scrubbed it ?

10

A. No, had sawdust on it all the time.

Q. I understood you to testify on direct examination as to water coming down from overhead ?

A. Yes.

Q. You also testified to that at the former trial ?

A. Yes.

Q. When asked at the former trial if that was the year before you, answered yes, that is the time a year ago—that is from the time of the trial, didn't you ?

A. I might have, it was during my time there.

20

Q. This trial was in December, 1882 ; that would make it, if that was your statement, about December, 1881 ?

A. I think that is the time my brother died, and that is the time I went there.

Q. So down to that time, the water came down from above, that you speak of ?

A. Yes, when I saw it.

Q. Didn't you say at the former trial in reference to that water which came down from above in 1881, that it was temporary and not a continuous thing ?

A. I saw it once, I am sure ; it leaked down and I sent out for the agent and he came in and rectified it ; it stopped leaking after a little while.

Q. So that was the last of it, and that was the first year ?

A. But it had leaked there before ; you could see the mark of it on the wall ; it curled the paper off the wall both sides ; it was heavy paper, varnished.

Q. You saw it once and it was stopped after that ?

40

A. Yes.

Q. You occupied the premises how long?

A. A year and a half, I should think.

The following examination by Mr. BEDLE :

Q. Can you tell us with any certainty whether the large ice box was setting directly upon the floor or not?

A. When I lifted up the bottom, there was three
10 boards underneath it.

Q. Could these boards be seen from the outside?

A. They could, if you took away the bottom board.

Q. When you lifted out the ice box you saw these boards beneath?

A. Yes.

Q. There were mouldings on the outside that hid that from view?

A. Yes, a battening that went down to the floor.

Q. You could not see those boards from the out-
20 side?

A. You could from the back end; the boards came within three inches of the edge.

Q. The batten went to the floor?

A. Yes, on some parts of it.

Q. On three sides of it?

A. Two sides of it; the batten behind was off; yes, three sides had batten on it.

Q. The side where there was none, was that out
30 in the room—could you pass between that and the wall?

A. That got broke off; we was rolling a cask through and somebody caught the corner of it and knocked it off.

Q. Was this box against a wall or partition?

A. One side was against the wall.

Q. Was that the side from which the batten was removed?

A. No, the other side, from rolling ale in they
40 knocked the board off.

Q. Which way was the batten?

A. Lengthwise of the box.

Q. When was that done ?

A. I could not say—it has been done two or three times to my knowledge—I used to have it nailed on every once in a while after the death of my brother.

Q. After the death of your brother, the battens were all around, except next to the wall ?

A. I could not say ; yes, I believe they were ; I could not say ; I suppose they got knocked off often. 10

Q. At the time you saw this water coming down from overhead, and you spoke to the agents about it ; wasn't that in the fall of 1881 ?

A. I suppose it was somewhere near that ; I was not long there at that time, I don't think.

Q. How is that ?

A. I don't think I was long there at the time when I saw the water coming down.

Q. Do you think it was in the fall of 1881 ? 20

A. I could not say.

Q. How long had you been there when you saw that water ?

A. I could not say ; I am not sure.

Q. What time of the year was it ?

A. I guess it was around January—it might be.

Q. January of what year ?

A. I could not say.

Q. It was not in the winter time, was it ?

A. I could not say what time it was. 30

Q. Hadn't you been there a year ?

A. I could not say.

Q. (By Mr. LINN.) How fast did the water flow, which came from the melting of the ice—in a stream or in drops ?

A. Sometimes in drops, sometimes a little stream, sometimes a fine stream, just depends upon how warm the weather is.

Q. (By Mr. LINN, showing witness a paper.) Is that the lease under which your brother held there at one time ? 40

A. Yes ; that is his signature.

Q. Who owned the fixtures in that bar-room—the ice box, the tank, the bar fixtures—all the plumbing from the bar ?

A. I suppose they were my brother's ; I don't know.

Q. You know that ; don't you ?

A. I am not certain.

10 Q. You took them away, or disposed of them ?

A. Yes.

Q. You took them away as his property ?

A. Certainly.

THOMAS BARRY, a witness sworn on the part of the plaintiff, testifies as follows ?

Direct examination by Mr. LINN :

20 Q. Where do you live ?

A. 57 Montgomery street.

Q. What is your occupation now ?

A. Policeman.

Q. Were you ever employed by Owen Markey when he kept a saloon corner of Greene and Montgomery streets ?

A. I was for seven months, between 1878 and 1879 I think it was.

30 Q. Do you recollect whether Mr. Ingwersen occupied for a paint store the premises beneath at that time ?

A. Yes.

Q. What was your business in the saloon ?

A. Barkeeper.

Q. Tell us what fixtures there were in that saloon ?

A. A bar, two ice boxes, whiskey barrels, and everything—a urinal, a water-closet, a wash basin.

40 Q. In what condition, while you were there, was the floor of that saloon kept ; was it wet or dry ?

A. It was dry.

Q. Was the water from the ice box allowed to overflow and run on the floor?

A. No; it flowed over once while I was there; it run into a pail, only a few drops; I wiped it up. The ice box was perfectly dry all the time.

Q. How fast would water flow from the ice?

A. It would drop from the ice, melting all the time; a pailful a day or night sometimes; sometimes not.

Q. The small ice box stood near Montgomery¹⁰ street?

A. Yes; attached to the bar.

Q. The large ice box was to the other end of the counter?

A. Yes.

Q. Did any water escape and get on the floor from the small ice box?

A. No; it was lined with zinc.

Q. Where did the water go to that was in the tank²⁰ or box under the bar, the bar trough?

A. It went down to the sewer; a pipe led it down.

Q. Did you ever see those premises underneath the saloon that were occupied by Ingwersen?

A. Yes.

Q. In what condition were they down stairs?

A. The water was always dropping, I used to go down mostly every morning after oil, to fill the lamps, dropping from the ceiling, all along the ceiling.

Q. While the water was dropping from the ceiling³⁰ in Ingwersen's apartments, what was the condition of your floor?

A. It was always dry, never any water from there, we used very often to look to see where the water came from down stairs, it was often flowing down stairs in Greene street, under 34; we didn't know whether the pipes was bursted there; they were bursted very often.

Cross-examination by Mr. LEWIS :

Q. When did you first go into Markey's employ?

A. In the summer time, between 1878 and 1879, if I am not mistaken, around there.

Q. Mr. Ingwersen was not occupying down below there?

A. Before that he was, in 1876 and 1877.

Q. At the time you were in the employ of Mr. Markey was Mr. Ingwersen occupying the basement
10 below?

A. I don't know, I wout be positive.

Q. You were down there each day?

A. Sometimes, sometimes not.

Q. Did you ever see him down there occupying it as a paint store, during the seven months you were then?

A. I don't remember that now, I don't know the year I went to work there?

Q. You say it was 1878 or 1879?
20

A. I won't positively swear to it, it might be earlier; I know he was there when I used to go down there; I never kept date to see what time he went there, or what time he left there.

Q. What did you go down there for?

A. For oil sometimes.

Q. Did Mr. Ingwersen keep oil there?

A. No, we had a barrel of kerosene oil there in the other cellar, right off Mr. Ingwersen.

Q. Wasn't it in Mr. Ingwersen's apartments?
30

A. No, right off Mr. Ingwersen's apartments.

Q. In what part of that basement did you go when you went after oil?

A. Came down the front stairs, back and through Ingwersen's; there was a brick partition went through the door and then out through the bar cellar.

Q. You went out of your apartments at the north?

A. At the north, toward Washington street, and
40 come down the back stairs.

Q. You went out of the rear of your apartments?

A. Yes, and went down stairs toward Washington street, then went into a door at the rear of the basement and went right through into where the oil was,

Q. Did Mr. Ingwersen have oil there at that time?

A. Yes, at the back of the shop in tanks.

Q. Did you see them there when you got oil?

A. Yes.

Q. At the time you were in Markey's employ?

A. Yes, I think so.

Q. In 1878 or 1879?

10

A. I am not positive what year I went to work there; I only worked there for seven months.

Q. What year did Mr. Markey die?

A. I don't know, I think it was in 1881; I worked there about four years before he died.

Q. Do you remember swearing on the other trial of this case, that the water which you saw dropping down there, you didn't know where it came from?

A. I don't remember whether I swore to that or not, I can't say now that I knew where it came from, I saw it coming down, though.

Q. Did you swear at the last trial, that you saw it dropping down?

A. I don't know, I think I did.

Q. Didn't you swear at the last trials, that you did not see it pouring down?

A. At times, it was pouring down.

Q. Didn't you swear at the last trial, you did not see it pouring down?

30

A. I don't know whether I did or not, it is three years ago since the last trial.

Q. Three years ago, your memory was fresher about these matters than it is now?

A. Why shouldn't it be.

Q. What kind of a bottom did this ice box have in it?

A. A big wooden bottom, air tight.

Q. It was not lined with zinc?

A. No, it was packed with oakum.

40

Q. The pail that was in there to catch the water had to be emptied?

A. Yes.

Q. Any other way of getting the water out of the ice box?

A. No.

Q. (By the COURT.) You say the bottom of the ice chamber was packed with oakum?

A. Yes, it was air tight, no water could go through it.

Q. (By Mr. BEDLE.) The bottom was nothing but wood?

A. Wood, certainly.

LOUIS PIEBES, a witness sworn on the part of the plaintiff, testifies as follows :

Direct examination by Mr. LINN :

Q. Where do you live?

20 A. 159 York street, Jersey City.

Q. Were you ever in the employ of Mr. Markey in this saloon, corner Greene and Montgomery streets?

A. Yes, for about eight years, from 1872 up to 1880.

Q. What time of the day were you employed there?

A. Whatever time I liked to get there; sometimes I would get there at 10 o'clock in the morning,
30 sometimes twelve, sometimes one, and then remain until twelve or one o'clock at night.

Q. Do you recollect the large ice box and the small ice box and the bar and the tank under the bar?

A. Yes.

Q. Was there a water-closet and wash-basin there?

A. Yes.

Q. During the time you were there, was the water ever allowed to overflow from any of these places on
40 the floor of the saloon?

A. No, sir.

Q. Was the saloon floor kept dry or allowed to be wet?

A. Kept dry.

Q. Do you recollect when Mr. Ingwersen occupied under there?

A. Yes.

Q. During that time, did you ever see what condition his premises were in below?

A. No, sir, I never looked.

Q. Were you ever down there at all? 10

A. Sometimes.

Q. In what condition were they when you were down there?

A. All right.

Q. You were not there at any time when the water was flowing?

A. Only when Mr. Ingwersen or his son came up and told me there was water running down stairs, and I went down and looked at it; he asked me where it came from; I said I didn't know. 20

Q. Describe what you saw down there?

A. I saw it run down in different places all along, drop down.

Q. (By the COURT.) From where?

A. From up stairs.

Q. (By the COURT.) Where did you see the drops come from, what part of Ingwersen's room?

A. All along in the basement.

Q. (By the COURT.) What part of the room did that drop from? 30

A. From the ceiling, right underneath the saloon, that is the room on the corner.

Q. (By the COURT.) What part of the room did the water come from, what part of the ceiling?

A. I don't know, I never measured it.

Q. Was it the back part or the front part?

A. It was the back part.

Q. Did it drop near Montgomery street?

A. No.

Q. It was nearer the rear part? 40

A. Yes.

Q. Over what extent of the ceiling did the water drop?

A. In different places.

Q. Taking the different places together from which it dropped, as large as where the jury are sitting?

A. Yes, as large as that.

Q. Dropped in different places over that space?

A. Yes.

10 Q. When you saw the water dropping down that way what was the condition of your floor above?

A. All right.

Q. Was it dry?

A. Yes, dry.

Q. No water overflowing at all?

A. No.

Q. Nor hadn't been?

A. No, sir.

20 Q. (By the COURT.) Can you say what was immediately over this place from which the water dropped?

A. No.

Q. (By the COURT.) What was right above that on the next floor?

A. The saloon.

Q. (By the COURT.) What part of the saloon, what thing in the saloon?

30 A. The ice box was right over where the water fell.

Q. The ice box didn't cover the whole place where the water fell?

A. Yes.

Q. (By the COURT.) How is that—did it cover the whole space, or what part of it?

A. It didn't cover the whole space.

Q. (By the COURT.) Was it over a part of the space where the water dropped from?

40 A. Yes; the ice box was about five feet long and about four and a half feet wide.

Q. (By the COURT.) The space from which the

water dropped in Ingwersen's apartments were larger than that ?

A. Yes.

Q. (By the COURT.) Did it extend beyond the position of the ice box on all sides ?

A. Yes.

Q. After Mr. Ingwersen moved out did you have occasion to go down there at any time ?

A. Yes.

Q. In what condition were the premises then, after¹⁰ he had moved out ?

A. The water used to run down ; the water was still coming down the same way.

Q. Do you know how long that continued ?

A. No, I don't ; I left November 12, 1880 ; right after Mr. Mackey was buried ; after that I don't know anything about it.

Q. Up to that time did the water continue the same way ?

A. Yes.

20

Q. (By the COURT.) Did you see it yourself ?

A. Yes ; I saw the water.

Cross-examination by Mr. BEDLE :

Q. You were sworn on the other trial, I believe ?

A. Yes, sir.

Q. Did you swear on the other trial, that you did not go down to see the water after Mr. Ingwersen had moved out ?

A. I don't remember.

30

Q. Are you certain you went down after he moved out ?

A. I went down after he moved out ; and I went down when he was there.

Q. How many times did you go down after he moved out ?

A. I cannot say.

Q. Can you say you were down more than once ?

A. Yes.

40

Q. If you swore on the other trial, that you didn't go down after he moved out, that is a mistake, is it?

A. I don't remember about the other trial?

Q. The water would sometimes escape from the large ice box?

A. No.

Q. Didn't you mop it up with a sponge sometimes?

10 A. Yes, as soon as it overflowed in the box, I took a sponge and wiped it up.

Q. Didn't you wipe it up on the outside of the box?

A. It never run on the outside.

Q. Would you wipe it up on the inside?

A. Yes.

Q. That ice box sat down right upon the floor?

A. Yes.

Q. So you could not see under it from the outside?

20 A. No.

Q. How often did you mop it up?

A. A good many times, I didn't count.

Q. How many bartenders were there there?

A. During the whole time I worked there about four.

Q. How many were there, during the time you were there?

A. There was one beside myself.

30 Q. You would come on duty at different hours?

A. Yes.

Q. Sometimes when you would come on, you would go right to work and mop this up with a sponge?

A. No, sir.

Q. What were your hours as bartender?

A. Whenever I would like to go to work; I had no special hours.

Q. You arranged with the other bartender?

A. He generally went away at one o'clock.

40 Q. Didn't you say at the other trial, you would sometimes come on at 10 o'clock in the morning—

sometimes 12, sometimes one—sometimes you were away evenings, sometimes Sundays you would be away—sometimes you would be off duty a day at a time?

A. Yes.

Q. Who mopped up the water from the overflow, when you were absent?

A. I don't know.

Q. Didn't you swear on the other trial, that the other bar tender had to do that? 10

A. I don't remember.

Q. That is a fact; didn't he?

A. I don't remember that.

Q. The pail that was inside the ice box would overflow sometimes, wouldn't it?

A. Yes.

Q. Where did you empty that pail?

A. Sometimes I chucked it out into the street; sometimes behind the bar in the tank. 20

Q. What sized pail was that?

A. A regular tobacco pail.

Q. As big as a horse pail?

A. Yes.

Q. That you would empty into the tank?

A. Yes.

Q. Where did the tank discharge?

A. Run into a pipe underneath the floor down to the sewer.

Q. Would that go down into the premises below where Mr. Ingwersen was? 30

A. No.

Q. At which end of the bar was that tank?

A. About the middle of the building.

Q. How far from the ice box was the tank?

A. I never measured it.

Q. Can't you give us some idea?

A. About ten feet from the ice-box.

Q. What was the size of the ice-box?

A. About four feet and a half wide, and about five feet long. 40

Q. Show us on this table ?

(Witness shows on the table.)

Q. Then it would bring the ice box about here ?
(Pointing on table.)

A. Yes, and it was about four and a half feet the other way and it would reach to the top of that chandelier from the floor ; that I think is about six
10 feet.

Q. Wouldn't you sometimes get busy and not tend to the pail, and it would overflow ?

A. I was sometimes busy, yes, sir, and sometimes the pail would overflow ; then I would take a sponge and wipe it up again.

Q. Were you not asked this on the other trial—
"Sometimes you would let it overflow,"—and didn't
you answer, "Sometimes I would get busy and I
could not attend to it, and if it was too hot the ice
20 would melt so fast and overflow,"—did you swear to
that?

A. Yes.

Q. And the overflow would go on the floor ?

A. No, sir ; it wouldn't go on the floor, it stayed
in the ice box.

Q. Did you not state in the other trial—"and the
overflow would go on the floor,"—and did you an-
swer, "Yes, but I mopped it up with a sponge,"—did
30 you swear to that?

A. I don't remember.

Q. Isn't it the fact ?

A. No, sir ; it stayed in the ice box, and I took a
sponge and wiped it up, and it never went outside
the ice box.

Q. Didn't you have a pail of water back of the
bar also ?

A. Had a pail back there, but didn't use it for no
water.

Q. Didn't you swear on the other trial when asked
40 "Did you have a pail of water back of the bar," and

did you answer, "Yes;" "a pail where you threw slops?" and did you answer, "Yes;" was that true?

A. Yes, that was true.

Q. That pail was kept there to throw slops in?

A. Yes.

Q. Was that as big as the pail that was kept in the ice box?

A. No, that was a small water pail.

Q. What kind of slops did you throw in?

A. Lemon skins and old papers, that was emp-10
tied into a box or barrel in the street.

Q. The water that you saw come through the ceiling down in the basement was water dropping?

A. Yes.

Q. Give us some idea how it would drop?

A. Sometimes drop slow, sometimes drop fast.

Q. Was it always dropping, dropping?

A. Yes, always dropping.

Q. You never saw it pouring down?

A. Yes, I have seen it pouring down, run down in²⁰
a regular stream.

Q. Any more than once?

A. Different places.

Q. What do you mean by a regular stream?

A. A regular stream.

Q. Coming through the cracks in the ceiling?

A. Yes.

Q. Did you ever see that more than once?

A. Yes.

Q. Did you ever go down the basement, except³⁰
when Mr. Ingwersen asked you?

A. Sometimes to get oil, that was all.

Q. Did you at one time have a bill of sale on Markey's property, an interest in those premises?

A. Yes.

Q. Have you got the original?

A. No, sir.

Q. Do you recollect the date of it?

A. I think it was in March, 1879.

Q. Wasn't it May, 1879?

A. No, sir.

Q. You feel quite confident?

A. Yes.

Q. That bill of sale was recorded here in the clerk's office?

A. Yes.

Q. What makes you think it was 1878?

A. Because he put it in my name a month after his wife died, and his wife died in 1878.

10 Q. There is no room for you to be mistaken about it?

Mr. LINN. What is the purport of this examination?

Mr. BEDLE. This is cross-examination. I can't explain yet.

Q. Was there a list of articles on that bill of sale?

A. I think there was.

20 Q. What became of that bill of sale afterwards?

A. Mr. James Markey has got it.

Q. What was that bill of sale for?

Question objected to.

Q. Was that bill of sale ever settled for?

A. Settled to who; to Markey or to me.

Q. To you; did you get anything for it?

A. I did; yes.

Q. Were you paid the amount of the bill of sale afterwards?

30 A. Yes; he signed it over to me because he was in debt and was in trouble, and he owed me some money.

Q. And he gave you a lien on his goods there?

A. Yes.

Re-direct examination:

Q. You said that the ice-box stood directly upon the floor, so you could not see under it at all?

40 A. Yes.

Q. Do you know whether or not there were three

planks under it, which raised it a little from the floor?

A. The ice box inside was double planked; the whole bottom was double planked.

Q. And then, was there anything under that, between that and the floor, to keep it from the floor?

A. The big ice box stood right flat on the floor, the bottom of the big ice box was a double boarded bottom.

Q. How fast did the water flow from the ice, did it come in a stream or by drops?

A. Generally by drops; in the warm weather it used to drop fast.

THOMAS J. BLANEY, a witness sworn on the part of the plaintiff, testifies as follows :

Direct examination by Mr. LINN :

20

Q. Where do you live?

A. 52 Greene street.

Q. What is your business?

A. Carpenter.

Q. Did you ever see this ice box which Mr. Markey had in his saloon?

A. I did several times.

Q. For what purpose?

A. To rebuild the box.

Q. Describe to the jury just how it was built, and what kind of a box it was?

A. I can't describe it very well, it was 4x5, and 9 feet high.

Q. What material was it built of?

A. Pine and walnut, walnut covering on the outside and had pine inside, double boarded and lined, filled in with sawdust.

Q. Any caulking to make the bottom tight?

A. It was perfectly tight, without caulking; it was air tight.

40

Q. Was the top part lined with anything?

A. No.

Q. No zinc lining in the top?

A. No.

Q. How did that box set upon the floor?

A. Set perfectly flat on the floor.

Q. Was the bottom single or double?

A. The bottom was four inches thick.

10 Q. Was there sawdust between the upper and lower bottom?

A. Yes.

Q. What was the sawdust put in there for?

A. As a non-conductor of heat; mostly to keep the cold in.

Q. Could any water escape from that ice-box, if it was allowed to stand there?

A. No, not very well, not without being seen; the water would come out of the door.

20 Q. If the water should escape through the ice box, where would it necessarily go?

A. On the floor.

Q. Outside the ice box?

A. Yes.

Q. Was there any way by which that water could escape through the bottom of the ice box and get down on the floor beneath it?

A. No, there was no way.

30 Q. Did you ever see the premises occupied by Mr. Ingwersen under that saloon?

A. Yes.

Q. How many times?

A. Only once.

Q. Was that while Mr. Ingwersen was there?

A. Yes, he was there then.

Q. What was the condition of the premises occupied by Mr. Ingwersen then?

40 A. First rate; I should say it was not dry. There was water in them; the water was coming from the sewerage.

Q. No water came from overhead?

A. I don't know of any water coming from overhead ; I didn't see any coming from overhead.

Q. Mr. Ingwersen had his materials all there, his work-shop and everything?

A. Yes.

Q. Was that in 1875 or 1876?

A. I don't recollect the year?

Q. Was that the time when the tide backed up and it came in there?

A. No, the sewer I think had stopped up, and I think the sewerage used to leak through the building ; I think that is the fault of it.

Q. Leak through the building, how?

A. I think the sewer was stopped up, and it used to leak here and there ; can't tell where it used to leak.

Q. What sewer do you speak of?

A. The sewer that would carry the water from the building, the main sewer.

Q. That had gotten stopped up at one time?

A. Yes.

Q. And the water flowed down?

A. Down through the whole building ; it flowed through all the rear part of it, I knew that.

Q. Did that come down into that part of Ingwersen's rooms fronting on Greene street, or was it in the rear?

Objected to as leading.

A. It come down in Ingwersen's place in the rear part of it, I should say.

Q. When you speak of the rear part, do you mean the part farthest removed from Greene street?

A. From Greene street through to Washington, from north to south ; the building run east and west and the leakage come down at the north end.

Q. Do you know what was immediately over that part of Ingwersen's premises, where the water came down?

A. Markey's water-closet, his sink and ice box and bar.

Q. Then the water came down at that time in the front part, fronting on Greene street?

A. No, sir; it came down in the rear part, fronting partly on Greene street, and the rest would run in the building, the north end of the building.

Q. Had Ingwersen's things got wet at that time?

10 A. I would say the things had got wet; I could not say what it was, though.

Q. Do you know whether the pool tables of Markey were directly over this where the water came down at that time?

A. I know the water came down on top of the pool tables; the pool tables were in the rear of 36, it was off from the side of the corner building like an L; that was in the rear of 36, and the water came down on the pool table.

20 Q. Were you ever down there at any time?

A. No, never down stairs; I went down in the basement once or twice; once I went down and got ducked; I went down to get something, and I stepped into a lot of water that was in the basement.

Q. When was that?

A. I can't say when it was; I know I was working at Markey's at the time.

Q. This is this same time?

A. Yes.

30 Q. Do you know how long it would take to fill a pail of water from this ice box?

A. About 24 hours.

Q. The water was allowed to escape from the ice into a pail inside the ice-box?

A. When I first fixed it it would escape into a pail; he moved the box and fixed it again, and it used to run with a hose into the sewer from the ice box.

Q. Whereabouts into the sewer?

40 A. The sewer from the water-closet, quite a distance from the ice box; a large rubber tube all the way from the ice box to the sewer.

Q. Did the rubber hose go to the sewer?

A. Yes, a rubber tubing about an inch in size the tube was.

Q. Can you describe where that sewer was or what it was?

A. No.

Q. The other witnesses have said that when they took the pail out they let it escape into the little tank?

A. There was no tank there when I fixed it. 10

Q. You fixed it so it went to some sewer.

A. Yes.

Q. But can't tell where it was?

A. Yes, in the rear part of Markey's; it would be a water-closet.

Q. What kind of a sewer; what do you mean by a sewer there?

A. It was a two-inch pipe that run into the sewer.

Q. Who put the two-inch pipe in there?

A. Some plumber, Farrier & Garretson, I think. 20

Q. Did they put it in at that time?

A. No, it was in before that.

Q. What was that pipe put there for?

A. To carry the wash water from the wash stand.

Q. When you fixed the ice box the rubber pipe ran from the ice box to the waste pipe leading from the wash-stand?

A. Yes.

Q. That is what you mean by running into the sewer? 30

A. Yes.

Cross-examination by Mr. BEDLE:

Q. Where do you live?

A. 52 Greene street.

Q. Are you ill in any way?

A. Paralysis.

Q. Been so how long?

A. Three years.

Q. Were you so when you were sworn on the other trial?

A. No.

Q. This trial took place in December, 1882, two years last December; were you paralyzed then?

A. I was not paralyzed then; the latter end of that year, about the latter days.

Q. Is your memory affected a little?

A. Yes.

10 Q. Considerable?

A. Not much.

Q. But you are conscious that there is trouble there?

A. Yes.

Q. This ice box you first put in place yourself, did you not?

A. Yes.

Q. It was bought by Markey from somebody?

20 A. Yes; bought from some man in the market.

Q. When you were examined before were you asked, "Q. What was the size of the ice box?" and didn't you answer, "About nine feet high, by ten by eight?"

A. I might have said so and not know it.

Q. Wasn't that the fact?

A. No, sir; it hain't so big as that.

Q. You may have said that?

A. I may have.

30 Q. You repaired the ice box two or three times, didn't you, for Mr. Markey?

A. Yes.

Q. What year was the ice box put in there?

A. I don't recollect, about 1875 or 1876, I should say.

Q. Didn't you swear on the other trial, that you thought it must have been in 1873 or 1874?

A. It might have been.

40 Q. When the ice box was first put in there, it was put farther in the rear of the building?

A. Yes, right against the north wall.

Q. About how much farther in the rear?

A. It stood about eight or ten feet farther back?

Q. Didn't you swear to 15 feet before?

A. I might have, it was all of 15 feet.

Q. Your memory before when you testified was better than it is now?

A. More perfect.

Q. You made a thorough overhauling of that ice box one time, didn't you?

A. Yes. 10

Q. Was that about 2 years before you were sworn on the last trial?

A. I believe it was, I am not sure.

Q. You found the ice box in very bad condition?

A. No, I found it in good condition.

Q. Did you testify before, "You took it all apart," and didn't you answer, "yes?"

A. Yes, I swore to that.

Q. "Reconstructed it," "yes?"

A. Yes, I did. 20

Q. "It was in pretty bad shape," "There was a little dry rot around the top; the box was pretty well worn out"—did you swear to that?

A. There was a little dry rot around the bottom, not around the top.

Q. Is that the time you moved it away from the rear?

A. No, it was afterwards.

Q. You moved it from the rear some length of 30 time before that?

A. Yes.

Q. How close did the door of the ice box come to the bottom of the door?

A. About six or eight inches; that much clear between the bottom and the floor.

Q. If there was a leak in the ice box, and the door was left open, it would come out on the floor?

A. No; the door was about four or five inches higher on the outside than the bottom of the box. 40

Q. Didn't the bottom of the door come down to the floor of the box?

A. No, it didn't.

Q. Were you not asked on the last trial, "If the water overflowed the pail inside, it would go on to the floor of the box, and then run on to the floor of the room;" and did you not answer, "If the wood didn't hold the water, it would run through and on to the floor of the room?"

10 A. I might say so, if the wood wouldn't hold it.

Q. Were you asked on the other trial, "While it was there up against the north wall of the building, how did they get the water out of the box;" and did you answer, "In a pail, setting inside of the box on the ice?"

A. Yes.

Q. And, "If the pail overflowed, what became of the water;" and did you answer, "It went on the floor of the box." Did you testify so?

20

A. Yes.

Q. Did you ever have any occasion to examine the ice box, except when you went there to repair it?

A. No; it was in first-class condition.

Q. You never had occasion to examine it?

A. No.

Q. Did you testify on the other trial, Q. "Did you ever have occasion to go into the ice box, except when you went there to repair it;" and did you answer, "No."

30

A. Yes; I swore to that.

Q. Did you put the pail on the outside of the ice box and make hose connection with the pail?

A. No, made no connection with the pail outside at all; I made connection with the sewer pipe.

Q. When the ice box stood back next to the partition there was a pail inside of it?

A. Yes.

40 Q. Afterwards didn't you put the pail on the out-

side of the box and make a hose connection with the pail?

A. No, I made connection with the ice box and the hose.

Q. Where did the hose connect with the ice box?

A. It connected with a tank over the receiver or cooler.

Q. Was that tank above the ice?

A. No, under the ice, four feet high.

Q. Was it under the whole of the ice or only part of it?

A. Under all the ice.

Q. Wasn't there a pail kept in there then?

A. No, there was a hose to it, and that hose run on the outside into the sewer.

Q. That was the sewer which connected with the wash-basin?

A. Yes.

Q. You put it into that?

A. Yes.

20

Q. That ran down stairs into the basement below?

A. Yes.

Q. When did you do that?

A. At the time I was rebuilding the box, I don't remember the year.

Q. That was about two years before you testified before?

A. Yes, that would be in the winter of 1880 or 1881.

Q. Up to that time they used a pail?

30

A. Yes.

Q. You did all of these repairs for Markey?

A. Yes.

Q. You swore on the other trial you didn't know where the water came from?

A. I don't.

Q. Where did the pool tables stand?

A. At the north end of the building.

Q. How far from the big ice box?

40

A. They stood in the other room inside.

Q. There was no drop from those pool tables below?

A. No, there was drop afterwards.

Q. From the pool tables?

A. Yes.

Q. Did you ever see the pool tables in the condition you speak of more than once?

A. No, only once, and then I saw ice on the top of the pool tables, it was all frozen.

10 Q. There was no drop from the pool tables below then?

A. No.

Q. That is the only time you saw them in that condition?

A. Yes.

Q. Or with a drop on them?

A. Yes.

20

JOHN ANNESS, a witness sworn on the part of the plaintiff, testifies as follows:

Direct examination by Mr. LINN:

Q. Did you ever see these premises which Mr. Ingwersen occupied in the basement of the Commercial building?

A. I did.

Q. During the time that he occupied them?

30 A. He had goods in the place at the time; I presume he occupied them.

Q. Do you recollect what year or years it was that you saw them?

A. I don't; I think it is 6 or 7 years ago.

Q. When you saw them, what goods had he in there?

A. Signs, paints and such things as that, ladders, pertaining to his business.

Q. How many times did you see the premises?

40 A. I think I visited there eight or ten times, probably more. I don't remember.

Q. How did you happen to go there in the first place?

A. In the first place I went there and tried to hire a portion of the premises for storing stoves and heaters, but as soon as I saw the condition of the place, I made up my mind it wasn't a safe place to deposit stoves.

Q. What was the condition of the place?

A. The ceiling was leaking very badly; continual dropping of water through the ceilings; floors all wet; dampness down below.

Q. From how large a place on the ceiling was this dropping coming?

A. It seems to me in the neighborhood of ten, twelve or fifteen feet, all around, might have been more; it is quite a large place.

Q. Was there any change in that condition during any of those times you saw them?

A. No, sir; just about the same condition all the time.

Q. What intervals were there between these times that you saw them?

A. Four or five days to a week; probably two weeks at a time; I don't remember the exact time; I know I went in there several times.

Q. Can you tell the last time you saw them?

A. No, I can't remember that; I think the last time I was there was just after the last trial; I went in there to see about the distance of the water that was running; I don't remember exactly what that was now, it's so long ago; I thought my idea of the matter when I gave my testimony before was about correct.

Q. Were those premises fit in that condition to be occupied for anything?

Question objected to.

A. I should say not.

Mr. BEDLE asks to have the last question and answer overruled.

By the COURT. It may be stricken out.

Cross-examination by Mr. LEWIS :

Q. What part of the premises did you look at?

A. Corner of Montgomery and Greene streets; the entrance was on Greene street.

10 Q. You looked at the part in the rear, that is the north part?

A. I should judge about the center of the building; the leak was about as you entered, and that's about the centre of the building on Greene street.

Q. You say the dropping was 10 or 15 feet apart in different places?

A. It covered a space about that size.

Q. You didn't see it pouring?

A. No, I saw it dropping.

20 Q. Can you not remember when this was?

A. I think it was within a year previous to the other trial.

Q. The last trial was in 1882?

A. Yes; well it was probably two years before the last trial; I don't remember the time.

Q. But it was not more than two years previous to the last trial?

30 A. I don't think it was, still it might have been; it was while I occupied the premises No. 19 Newark avenue, and I was there three years, and whether it was during my first, second or third year, I don't know; it is four or five years since I left there.

Q. As near as you can fix it, you would think it was within two years previous to the last trial?

A. Yes, I should think so.

Q. At that time you say it was not pouring in any place?

A. I never saw it pouring, it was continually dropping water from the ceiling.

40 Q. On the last trial, in answer to the question, "Would the leakage or the overflowing of an ice box

from time to time, from day to day, produce the same effect which you saw there;" did you answer, "It depends altogether upon the size of the ice box?"

A. It depends altogether upon the condition the ice box was in.

Q. Did you answer, "It depends altogether upon the size of the ice box?"

A. I don't think I did.

Q. Were you asked, "Such an ice box as would be in a place like Markey's;" and did you answer, "If¹⁰ the ice box was in a very bad condition, it would?"

A. Yes; I said that.

Q. Don't you think you gave the former answer also?

A. No, sir.

Q. You were asked, "Did you investigate to see where the water came from;" did you answer, "No sir?"

A. That is correct.

Q. You don't know where it came from? 20

A. I do not.

Re-direct examination by Mr. LINN:

Q. When you looked at these premises the last time, do you recollect whether any person occupied the front on Montgomery street?

A. No; I didn't only enter this one room.

Q. Do you recollect that that part of Montgomery street was partitioned off? 30

A. I think there was a partition.

Q. At the time you last looked at it Mr. Ingwersen had some ladders in back there?

A. Yes.

Re-cross-examination by Mr. LEWIS:

Q. At the subsequent time you went to look at it, Mr. Ingwersen wanted you to go to be a witness in the case?

A. No, Mr. Ingwersen asked me to go there, after⁴⁰ the first time I had been there, and refused to hire

the premises for storage rooms; he asked me if I wouldn't step in there occasionally to see the condition of the building and remember it; of course I could draw my own inference from that.

Q. Didn't he tell you he was going to bring suit.

A. No, he did not, I thought he was going to bring suit.

Q. At the time you went to look at the premises there was a partition dividing off the front part from
10 the rear part?

A. No, it was from the room adjoining; I think there was a Chinese laundry where the partition was, at least I heard so, I didn't pay any particular attention; I got all I wanted when I went in there and saw the condition of the place.

Q. You didn't go in the Chinese laundry?

A. No.

Q. It was after the Chinese laundry was there
20 when you examined the premises?

A. I think the Chinese laundry was there when I examined the premises.

AUGUST BIGALKIE, a witness sworn on the part of the plaintiff, testifies as follows :

Direct examination by Mr. LINN :

Q. Were you in the employ of Mr. Ingwersen dur-
30 ing the time he occupied the premises under the Commercial Building?

A. Yes, sir.

Q. When you first went there in what condition were the premises?

A. In very bad condition.

Q. Was there any water leaking from overhead when you first went there?

A. No.

Q. What time of the year did you first go there?

40 A. In the fall of 1875.

Q. Do you recollect when the water first commenced to make its appearance?

A. That was in the fall, a year afterwards.

Q. What did the water come down upon?

A. In the corner in the back room, back of the shop.

Q. Did you see the premises after Mr. Ingwersen moved out?

A. Yes. The ladders were kept in there. I used to go in and get them out. 10

Q. So long as his lease extended he kept the ladders in there?

A. Yes.

Q. Was there any change in the condition?

A. It was getting all the time worse.

Q. Was it ever dry when you went in there?

A. No; it was leaking all the time.

No cross-examination.

20

CHARLES INGWERSEN, sworn on the part of the plaintiff, testifies as follows:

Direct examination by Mr. LINN:

Q. You are a son of the plaintiff?

A. Yes.

Q. You recollect the time when your father had the premises under the Commercial Building? 30

A. Yes.

Q. Do you recollect what condition they were in when he first went there?

A. In a first-class condition when we first went there.

Q. Do you recollect when the water first commenced flowing down from above?

A. I think it was in June, July or August, I forget which, 1876.

Q. How long did that continue and what condition were the premises in from that time on? 40

A. It was untenantable ; could not walk around without getting wet ; the oil would get full of water ; paints and colors we had to shove from one side to the other.

Q. How long did that continue so ?

A. Until we left there.

Q. Do you know whether it continued so up to the time your father's lease expired ?

A. Yes.

10 Q. Did you visit the place from time to time ?

A. Yes.

Q. After you moved out the oils and paints, did you keep anything there ?

A. Ladders and such things.

Q. Did you have to go over there and get them ?

A. Yes.

Q. Was there any change in the condition up to the time when the lease expired ?

20 A. No, sir, there was not.

Cross-examination by Mr. BEDLE :

Q. How old are you ?

A. I am going on 28.

Q. You were sworn on the other trial ?

A. Yes.

Q. Did you swear on the other trial, you thought it was in the fall of 1876, that the water first commenced to make its appearance ?

30 A. I think I did, in the fall of 1876, I am not exactly sure it is so long ago.

Q. Why do you now fix June, July or August ?

A. Because we did a sign there for some rubber company in New York, that I can't recollect the name of the company, and it came down pouring, so that the water injured the sign ; what time it was, I can't tell exactly.

Q. Why, if you swore on the other trial it was in the fall of 1876, do you now swear it was June, July or August ?

40 A. It came down continually, it was in the fall and

in the June month, I am not sure whether it was June or July, I can't tell exactly what month it was in, it is so long ago.

Q. Was it in the fall of 1876, it first appeared?

A. In August, either June, July or August, I can't tell which month.

Q. If you swore on the other trial it was in the fall, what has changed your mind?

A. Nothing has changed my mind in regard to it.

Q. If you said the fall of 1876 before, that is the¹⁰ time now, isn't it?

A. Yes.

Re-direct examination :

Q. What you said before, was what you recollected then?

A. Yes.

Q. What you say now is your impression now?

A. Yes.

Q. You can't tell whether it was June, July or²⁰ August, September or along there?

A. No, sir, not exactly.

Q. Did you ever look into the apartments of Markey overhead to see whether any water came from there?

A. I did.

Q. What condition did you find the floor of Markey's saloon always in?

A. In No. 34 Montgomery street the water come³⁰ down, and I thought it come from Markey's saloon; I went up stairs and saw the floor was dry; Markey showed me the floor, it was dry.

Q. Throughout the whole saloon did you look?

A. Yes, except, perhaps, there might be a few drops of water, something like that, natural as it is in a saloon.

Q. (By Mr. LEWIS.) You swore on the other trial you didn't know where the water came from, didn't you?

A. Yes.

JOSEPH ZUMBUSH, a witness sworn on the part of the plaintiff, testifies as follows :

Direct examination by Mr. LINN :

Q. Where do you live ?

A. 218 Whiton street, Jersey City.

Q. Your business ?

A. Plumber and gas fitter.

10 Q. Did you ever do any work at the Commercial Building for Mr. Mahnken ?

A. Yes, in 1881 and 1882.

Q. What did you do there ?

A. At that time I put in a new sewer through No. 38 ; a new nine-inch sewer.

Q. Can you tell what pipes there are running along under the floor of the saloon occupied by Mahnken, formerly occupied by Markey ?

20 A. Yes, a water-pipe running from 36 through the middle of Markey's bar, and then through to the rear of Mahnken's premises to supply the water-closet, urinal and wash-basin.

Q. You saw that pipe, did you ?

A. Yes.

Q. What condition was that pipe in ?

A. In good condition.

Q. What other pipe was there ?

A. A waste pipe carrying waste water from the 30 bar, from the urinal to the water-closet down to the sewer.

Q. What condition was that in ?

A. That had been gnawed across one of the beams.

Q. Did you repair that ?

A. No.

Q. Who did it ?

A. I don't know.

Q. Somebody else ?

40 A. Probably.

Q. How was it fixed ?

A. I don't know.

Q. Was it soldered up?

A. When I seen it exposed it had been soldered and something wrapped around it to make it tight, it was not leaking at the time I seen it.

Q. Were there any other pipes running under that floor?

A. If I remember right there was a beer pipe running from the rear alongside the water pipe to Markey's bar, his ale was kept in the rear of 24, for carrying ale to his bar. 10

Q. Were there any other pipes?

A. Not between the floor as I seen.

Cross-examination by Mr. LEWIS :

Q. When was this?

A. Between June, 1881, and May, 1882.

Q. What kind of a wall is that first wall that goes up between 34 and 36?

A. A brick wall 12 inches thick, that is in the cellar. 20

Q. How far up does the wall run?

A. Up to the second story ceiling, that is the wall west of 34 and east of 36, it is a partition wall between those two, it runs down to the basement with arches, above the basement it is a solid brick wall all the way up.

Q. What is the next wall west of 36?

A. A twelve inch brick wall from the cellar to the roof. 30

Q. Where was the drain pipe from the upper part of the building, the part above Markey's saloon, that drained the upper portion of the building?

A. In the northwest corner of 36; the drain pipe ran down in the northwest corner of the second basement, No. 36; that was the pipe which took the drainage from the upper portion of that building.

Q. How do you know that? 40

A. Because I made alterations there; I connected

that sewer down below and I had to find out where all the waste pipes run to; I also put a sink in the third story of No. 36.

Q. Could any water from that room have got to Ingwersen's apartments, No. 34?

A. No.

Q. Why?

A. Because there are two brick walls—the brick wall west of 34 and east of 36, and the beams lay
10 across, and there is no partition underneath, consequently the water would settle in the center; if you pour water on the northwest corner of 36, it will settle down towards Montgomery street, it could not go up against the west wall of 36, it could not go through the wall, because the wall is cemented water tight, and if it run down, it would run down into Montgomery street.

Q. How do you know these walls you speak of were brick walls all the way up?

20 A. The walls west of 36 and east of 38 I cut through; the other wall I took my cold chisel and hammer and cut a place away till I seen the brick through from the cellar up to the second story ceiling; then on the third floor I took the floor up, and saw the brick wall there; and it was an eight inch wall.

Q. I show you a diagram which represents the basement of 34, 36 and 38; I find on it a waste pipe in the northwest corner of 36?

30 A. That is correct. That let off all the waste from the upper part of the building.

The COURT. This looks like the introduction of the defendant's case.

Q. Those pipes which you found in Markey's saloon, where did they have their outlet?

A. The water-closet pipe of Markey's run in the northwest corner of 34 down to the cellar where
40 Ingwersen had his paint shop, and so out to the alley way in the rear of the building, and there was

connected with the sewer. The waste of the wash-basin run along the floor and connected in the trap under the water-closet.

Q. The waste pipe which had been gnawed and repaired, is that below the ceiling?

A. Below the floor; the beams had been cut out to allow the pipe to run along the beams.

Q. In your judgment, the water which has been spoken of as dropping down on the ceiling, could that have been produced from any leakage in that waste pipe which bore evidence of having been gnawed? ¹⁰

A. No, sir. The ceiling below was nailed to the beams and they were three inches thick, and any water would have to run through the tight nailed beam. All the water would have to run between the cracks.

Q. The beams ran across and the ceiling ran north and south.

A. Yes. 20

Q. (By the COURT.) What do you say would be the difficulty in having water pass?

A. Every board was nailed tight to the beam, if the water got in between the two beams, it would have great difficulty to find its way through.

Q. (By the COURT.) If water got on the top of this ceiling between the beams, wouldn't it follow the cracks and joints?

A. It would sooner drop through than run along. 30

Q. (By the COURT.) If it didn't drop through at once, would there be any difficulty in running along?

A. It could not run no 20 feet.

Q. (By the COURT.) Why?

A. If the water has room enough to pass through along the plank and everything, it would have just as much opportunity to drop through, because if the boards were apart on the upper side, they would be apart just as much on the under side, and consequently it wouldn't run along, it would drop down. 40

Q. No water was leaking from the pipe at the time you saw it?

A. No, it was dry.

Q. (By the COURT.) When was this?

A. Between 1881 and 1882.

Q. Who was occupying Markey's place?

A. Markey, the one that was on the stand to-day.

Q. Did you examine the water-closet?

A. Yes.

Q. In what condition did you find it?

10 A. Overflowing; it was stopped up by an overdose of paper and rags which I hauled out; as I did that, that stopped the leaking through; the floor underneath there was wet underneath the water-closet; that water-closet was in the northwest corner of 34.

Q. When you removed the papers and rags the thing was remedied?

A. Yes.

Q. That was at the same time?

A. The same time I saw the floor taken up and the pipe exposed.

20 Q. To what extent was the floor wet around the water-closet?

A. Very wet; it had been filled up with sawdust, and the sawdust was wet, too; it was even so underneath the urinal, where they had put in sawdust to keep it dry.

Q. (By the COURT.) You say the bowl had overflowed?

30 A. Yes, the stoppage was in the trap and the bowl overflowed; unless you took the riser away you could not see it; it overflowed inside the box.

Q. You say that from Markey's bar there was a drain pipe that went down along the ceiling, carrying off the waste water from Markey's bar?

A. Yes, it went between the beams above Ingwersen's ceiling and below Markey's floor—between the beams and run through a brick partition, between 34 and into 36, and in 36 it run down into the sewer on the other side of Ingwersen's cellar.

40 Q. It didn't run over the ceiling of 34?

A. Yes, over the ceiling and below the floor, between the beams.

Q. It went from Markey's bar west to the first brick partition wall, and through that; then down under the basement and out into Greene street?

A. Yes.

Q. That was part of Markey's plumbing?

A. Yes, that was Markey's.

Q. None of this was connected with the other part of the Commercial Building? 10

A. No, sir.

Q. Who did you do this work for when you cleared out the papers and the rags?

A. I didn't do it for anybody, because I didn't get paid for it; I was asked by Mr. Mahnken to see what was the trouble there; I saw it and it was an easy matter to remove it and I did it; I made no charge for it.

Q. Was there any difficulty at all in clearing out the paper and rags? 20

A. No, sir; the discharge is complete.

Q. No leaks?

A. No leaks.

Re-direct examination by Mr. LINN :

Q. This pipe which had been gnawed and repaired was a waste pipe, which led from the basement to the water-closet urinal?

A. Yes. 30

Q. If that was open where that repair was, so the water could escape, the water would escape only when they were using it?

A. When they were using the basin or the urinal, just when they were wasting any water a portion of it would probably run out.

Q. That was not a supply pipe?

A. No.

Q. (By Mr. LEWIS.) Whose wash-basin was that?

A. Markey's; he took it away; he took away the 40

urinal, the wash-basin, the water-closet and even the lead pipe that run down into the basement of 36.

Q. (By Mr. LEWIS.) Did he take away the pipe that had been gnawed and repaired?

A. Yes, he took all the lead pipe away.

Q. When you found this water-closet in that condition it could not be used at all?

A. No, sir; only if they stood on it.

Q. It would soon be filled up entirely?

10 A. Yes.

Q. (By Mr. LEWIS.) I understood you to say this pipe that you said had been gnawed by rats, was the waste from the wash basin to the water-closet?

A. Wash-basin and urinal, and went to the water-closet; that was the pipe that had been gnawed by the rats.

Q. Did you say that Mr. Markey took all that pipe away, the waste pipe and all?

20 A. Yes, he didn't leave no lead pipe at all, he took everything away; I was there when he took it away.

Q. When you cleared out the trap of this water closet, you took an old broom handle and pressed it in?

A. I took a piece of hay wire and hauled it up and laid it on the floor; it was an overdose of paper; there was a white rag in it and there seemed to be half a newspaper, and it clogged it up.

30

JOHN D. MEYER, one of the defendants, called on the part of the plaintiff, being sworn, testified as follows:

Direct examination by Mr. LINN:

Q. You and Mr. Ranken were the owners of the Commercial Building when Mr. Ingwersen rented of you?

A. Yes, sir.

40 Q. The whole building, Nos. 34, 36, 38 and 40?

A. Yes.

Q. You had it all rented out to different persons?

A. I suppose so.

Q. Did you pay attention to it personally or leave it to your agents?

A. To my agents—Mr. Stone, Mr. Firth and Mr. Mahnken.

Q. You never gave any personal attention to it at all?

A. Sometimes, as to repairings.

Q. When your attention was called by your agents, 10 then you would do something?

A. Yes, sir.

Q. But you left it in their hands?

A. Yes, sir.

Q. The apartments above, were they rented from year to year, or a series of years?

A. Some were rented from year to year, and others a series of years, but most of them from year to year.

20.

Cross-examination by Mr. LEWIS.

Q. At the time Mr. Ingwersen rented there in 1876, who occupied above Markey?

A. Lawyers Randolph and Talcott in the front part; in the rear, lawyers Haynes and Condict; above them, in front, Mr. Linn.

Q. Did Mr. Linn ever complain to you about water escaping into his apartments?

A. No, sir.

30

Q. Did Randolph and Talcott?

A. No, sir.

LOUIS PIEBES, recalled on the part of the plaintiff, testifies:

Q. During the time you were employed by Markey in this saloon, was the water-closet in condition for use? 40

A. Yes.

Q. Was it used daily?

A. Yes.

Q. Was it kept clean?

A. Yes.

Q. Did they use it sitting down or standing up?

A. Sitting down.

Q. Did the water ever overflow to your knowl-
edge?

10 A. No.

Cross-examination :

Q. When did you first go to work for Markey?

A. In 1872.

Q. Was he with Gen. Ramsey at that time?

A. I don't think he was.

Q. Do you know who put in the wash-basin?

A. No, sir; I don't know anything about it.

20 Plaintiff rests.

30 Defendant moves that the plaintiff be called
and a non-suit entered, on the ground that
there is no sufficient case to go to the jury.
There is nothing shown to hold the defendants
liable. There is no defect in the structure of
the building. No defect in the structure of
the water-closet or any of the plumbing shown
in the case. It is not shown that the de-
fendants committed or permitted a nuisance
on the premises which they were bound to
correct.

The Court reserves the question of non-suit
and will require the defendants to put in their
evidence, and will rule upon the question at a
later stage of the case.

Defendants open their case to the Court and jury and offer evidence as follows:

HENRY RANKEN, one of the defendants sworn for the defence, testified as follows:

Direct examination by Mr. LEWIS:

Q. You and Mr. Meyer are the owners of this Commercial Building? ¹⁰

A. Yes, sir. We purchased it in the spring of 1869.

Q. How was the corner next to Greene street, the first floor, occupied at the time you purchased?

A. As a clothing store.

Q. When Markey rented it who fitted it up, who put in the bar and fixtures and other apparatus for a saloon?

A. I don't know. I suppose Markey must have done it. ²⁰

Q. Did you and Mr. Meyer do it?

A. No, sir. We did not do it. It was not paid for by us.

Q. Did the owners put in any of this plumbing work for Markey in his premises?

A. No, sir.

Q. Did you put in the water-basin or water-closet? 30

A. No, sir.

Q. Did you connect the urinal or any of the plumbing work for him?

A. No, sir, Markey himself must have done it, I understood he took it away when he went.

Q. Took what away?

A. The plumbing work, everything, the wash-basin, water-closet, urinal, the ice box and all the bar fixtures.

Q. This pipe spoken of as being defective in 1881 or 1882, did you put that in? ⁴⁰

A. No, sir.

Q. It was no part of your property?

A. No, sir.

Q. Was that taken away by Mr. Markey?

A. I suppose it was taken away with the rest of the things; I didn't see it taken away.

Q. Is this sketch which I show you a fair representation of three of the buildings known as Commercial Building, at the time Ingwersen occupied?

10 A. Yes; there is one more building that is not shown, that is the most westerly building.

Q. What are the dimensions of the cellars of 34 and 36?

A. I should say about 37 to 40 feet; the whole building is 85 feet on Montgomery street, and 60 feet on Greene street; there is an area of five feet in the rear, making the premises 65 feet.

Q. Is the one on the corner larger than the others?

20 A. I think it is a little larger, still I haven't measured it.

Q. At the time Ingwersen was there, how many ways were there of getting into the basement?

A. Two entrances, one on Montgomery street and the other on Greene street.

Q. Could you locate Markey's ice box and his water-closet and urinal on the floor above?

A. I don't believe I ever was in his place.

Q. Take the third floor, calling the street the first
30 one—where is the outlet for the water coming from those floors, and sewerage?

A. There is a dark room here (pointing), and it is in that west corner of No. 36; the northwest corner of No. 36.

Q. Is there any other escape or sewerage pipes for the upper part of the building above Markey's place, or west of it, that goes down east of that second wall, other than this one in the northwest corner of No. 36?

40 A. I never knew of any.

Q. Did Mr. Ingwersen ever complain to you of the water coming through ?

A. Not to me.

Cross-examination by Mr. LINN :

Q. You don't know anything about the plumbing of that building except what you have been told ?

A. I do not.

Q. You rely upon what you have been told ? 10

A. Yes, that is all I know about it.

Q. Who occupied these premises before Markey went there ?

A. A man named McCoy, I think, had a clothing store in the corner.

Q. Did General Ramsay have it for awhile ?

A. I don't know.

Defendant offers the map in evidence.

20

HENRY STEFFENS, sworn on the part of the defendant, being duly sworn, testifies as follows :

Direct examination by Mr. LEWIS :

Q. Where do you reside ?

A. Jersey City.

Q. What is your business ?

A. Painter.

Q. How long have you been in that business ? 30

A. About 20 years ; my store is 65 York street.

Q. Acquainted with Mr. Ingwersen ?

A. Yes.

Q. Do you know these premises ?

A. Yes.

Q. Do you know about what time Mr. Ingwersen went into them ?

A. I believe about 1876.

Q. Do you know what time he moved into Washington street ? 40

A. Not exactly.

Q. At the time he went into these premises, what did he tell you about going into the wholesale business?

A. I don't recollect that he had any special conversation with me in regard to that, merely said he will take that corner store and carry on the wholesale and retail business.

Q. Did he give you any reason for going to Washington street?

10 A. I don't think I ever had any conversation with him about that.

Q. I understand that you did some work as painter in Markey's saloon; when was that and what was it?

A. It was after Mr. Markey left the premises and Mr. Mahnken took possession, I renovated the whole place, that was after Markey had moved out, I cleaned up the whole walls and ceilings.

Q. What was on the walls?

20 A. Paper; the ceiling was papered and the side walls were papered.

Q. What was its appearance as to age, did it appear to have been there a long time?

A. It was dirty enough to be on there for twenty years.

Q. Was there any trouble in getting it off?

A. Yes, it stuck fast.

Q. Did you find the wall under the paper firm?

A. Yes.

30 Q. The side walls and ceilings?

A. Yes, except where they had tore off some wooden shelving and things.

Q. Did you find the wall water soaked?

A. No.

Q. Intact you found it?

A. Yes.

Q. Did you repaper it?

A. I did.

40 Q. And paint it?

A. I did.

Q. Was Markey's ceiling, board or plaster?

A. Plaster ceiling.

Q. Was that ceiling intact?

A. I can't recollect, I think it was.

Q. And the side wall?

A. Yes.

Q. The wall that separated Markey's apartment from the one west to it was that a brick wall?

A. I believe it is a brick wall, I would not be certain. 10

(No cross-examination.)

Adjourned for the day.

THIRD DAY'S PROCEEDINGS.

THURSDAY, April 23, 1885. 20

SAMUEL D. HAINES, a witness sworn on the part of the defendant, testified as follows:

Direct examination by Mr. LEWIS:

Q. You are an attorney and counsellor-at-law practising in Jersey City?

A. Yes.

Q. At one time you were a tenant of Ranken and Meyer in the Commercial Building? 30

A. Yes; from 1877 to 1879.

Q. Tell us what part you occupied?

A. We occupied the two rooms on the north corner of the building fronting on Greene street, second floor, counting the street the first floor, the northeast corner.

Q. Then, you occupied the floor just over Markey's saloon?

A. Nearly so; that is the rear of the saloon. 40

Q. Please point out on this map the premises you occupied?

A. (Indicating on map.) There is a partition wall in the centre of the room, making two. We occupied both rooms from the spring of 1877 up to November, 1879.

Q. Were those two offices dry while you occupied them?

A. Yes.

10 Q. No water coming down the wall or ceiling of those offices at any time?

A. I saw none.

Q. On the floor?

A. No, sir.

HENRY V. CONDUCT, sworn on the part of the defendant being duly sworn, testified as follows:

Direct examination by Mr. LEWIS :

Q. You are an attorney-at-law located in Jersey City?

A. Yes, sir.

Q. Were you at one time a tenant of Ranken and Meyer in the Commercial Building?

30 A. Yes, I commenced in December, 1877, and was there until May, 1881, I think; I occupied the offices corner of Montgomery and Greene street, the second floor; Owen Markey's saloon was under me, I was across the hall from Mr. Haines; up above me was Mr. Linn, when I first went there.

Q. How many rooms were there used for offices in that corner?

A. Three rooms.

Q. Who occupied those offices with you?

A. Randolph and Talcott.

40 Q. Were those offices dry?

A. Yes.

Q. Did you ever see any water coming down the walls or ceilings?

A. I don't recollect ever having seen any.

JOHN OLENDORF, sworn on the part of the defendant, testified as follows:

Direct examination by Mr. LEWIS:

Q. You are an attorney-at-law?

19

A. Yes.

Q. Did you at one time have a claim for collection for Ranken and Meyer against August Ingwersen?

A. I did.

Q. When?

A. About February, 1878; it was for eight months rent of the premises, the basement corner Greene and Montgomery.

Q. You brought suit for it?

20

A. I did.

Q. Did you collect it?

A. Yes.

Q. From when to when?

A. I think from July, 1877; eight months on from that, including that July.

Q. Did you have a claim subsequently for collection against Mr. Ingwersen for rent?

A. About a year afterwards, in February, 1879, I commenced another suit for 12 months' rent, commencing with and including March, 1878.

Q. Did you collect it?

A. Yes.

Cross-examination by Mr. LINN:

Q. In those suits, did Mr. Ingwersen set up any claim for damages?

A. He did in the first suit.

Q. And it was not allowed by the Court?

A. It was overruled by the Court.

40

Q. The Court would not allow damages to come in against the rent?

A. No, sir.

Q. And he paid the judgment?

A. He paid the judgment.

It is admitted that this suit was commenced in June, 1882.

10 It is admitted that the trial of this cause before was in December, 1882.

HENRY E. NIBLETT, sworn on the part of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. LEWIS :

Q. What is your business, and where do you live?

20 A. Builder and carpenter ; I live in Jersey City.

Q. Do you remember putting in a floor in the basement of the Commercial Building for Ranken and Meyer ?

A. Yes, in about 1876, I think it was ; Mr. Ingwersen was occupying the basement as tenant at that time.

Q. Do you remember swearing on the former trial it was in September, 1876 ?

30 A. No, I don't think I was called at the former trial.

Q. You were.

A. Then I have forgotten it I was under the impression that I never was sworn in this case before.

Q. What did you do ?

40 A. In the basement corner of Greene and Montgomery streets we took up two floors ; Mr. Ingwersen was occupying the basement, we took up the old floor and took out all the old debris, such a lot of wood, mud and stuff that was collected under the old floor, and, if I remember right, we put down chestnut sleepers, put in new floor and filled in be-

tween the timbers with stone chips; David W Stone was the agent for Meyer and Ranken; I raised the floor up a little, I forget how much; I was told the tide had been in there, and it looked so.

Q. Where were the things moved to while that floor was being but in?

A. Part of them was moved off one floor on to the other, while we laid one, then they were moved back again; if I am not mistaken some were taken out of the place. 10

Q. (By Mr. LINN.) Do you recollect whether when you were at work there, there was any water dropping down, or had there been any from over head?

A. I don't recollect seeing any.

ROSWELL A. RANDALL, sworn on the part of the defendants, being duly sworn, testified as follows:

20

Direct examination by Mr. LEWIS:

Q. Tell us where you live and what is your business?

A. I live in Jersey City; I am in the saddle and harness business; I know Ranken and Meyer and Mr. Ingwersen; I know of Mr. Ingwersen occupying the basement corner Greene and Montgomery street; I occupied a store on the first floor in No. 36; I am now in No. 38; I have been in that building about 8 years I think. 30

Q. About the time Mr. Ingwersen took the basements, 34 and 36, did you have any conversation with him about it or he with you?

A. Yes.

Q. Did he complain to you about any water coming into the basement?

A. No, sir; I never heard of any until this suit was commenced.

Q. Did he tell you what he had taken that business for? 40

A. Yes, for a paint store, and was going to keep a stock to sell wholesale.

Q. Do you know why he did not continue that wholesale business?

A. I don't know from him, only I heard from his son, that they didn't make a success of it.

Q. When he took the premises, did he tell you whether he was pleased with the premises or not?

10 A. Yes; he thought he had got a very cheap rent.

Q. Did you frequently see him after he took the premises?

A. Yes; every day.

HENRY THOMPSON, a witness sworn on the part of the defendants, testified as follows:

20 *Direct examination by Mr. LEWIS:*

Q. You are a merchant in Jersey City?

A. Yes; 48 Montgomery street; I have been there over 25 years.

Q. How far is that from the Commercial Buildings?

A. A couple of hundred feet.

Q. You are acquainted with Mr. Ingwersen?

A. I have been 13 or 14 years; yes.

30 Q. Do you recollect having a conversation with Mr. Ingwersen at one time in regard to Ranken and Meyer having sued him; if so, state when it was?

A. I should think it was probably five years ago, previous to 1880.

Q. What did he say?

A. He wanted me to examine the cellar to see how the water was coming down on him.

Q. Did you go?

A. I did not go.

40 Q. What else did he say about what he was going to do, if anything?

A. He told me it was not fit to live in it, or to do business in; "it was not tenantable at the time, there was so much water coming down on him;" I told him he was foolish to pay rent so long as it was not tenantable; he said he was sued and was compelled to pay, but intended to get it all back, and wanted me down as a witness if the suit came up; so I didn't go down at the time.

Q. Did he tell you where the water come from?

A. He didn't say, he said something about an ice box, but I can't recollect much about it; I had an idea that he said it come from Markey's ice box, but I am not positive, it is so long ago; but I recollect something about an ice box.

Cross-examination by Mr. LINN:

Q. Do you recollect what you swore to on the former trial?

A. I don't know, it is so long ago; I think I have only the one story to tell.

Q. I will call your attention to this and see if you recollect it; you were asked, "Did he tell you where the water came from," and did you answer, "I have an idea that he made the remark that it came from Markey's," did you say that?

A. Yes.

Q. "What impresses that upon your mind," and did you answer, "He made the remark that they were drowning him out from up stairs?"

A. Yes, drowning him out from up stairs.

Q. You knew Markey was overhead?

A. Yes.

Q. You knew Markey was over him?

A. Yes.

Q. You thought that meant from Markey's, of course?

A. He didn't say he was drowning him out but he said the water came from up stairs; but he spoke of Markey's ice box.

Q. You were asked, "Did he speak of Markey's

ice box," and did you answer, "No, I don't believe he did; but he made the remark that the water came from up stairs," did you swear in that way on the former trial?

A. I don't recollect just exactly that; he made the remark they were drowning him out from up stairs; he said the devils up stairs were drowning him out.

10

GEORGE W. FIRTH, a witness sworn on the part of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. LEWIS:

Q. Were you a real estate agent here in Jersey City in years gone by?

A. I was, from 1865 until 1881.

Q. Were you agent for these premises at one time?

20 A. Yes, from May 1, 1877, until May 1, 1880.

Q. At the time you took the agency of these premises, who was a tenant by lease from the owners, of the basement?

A. Mr. Ingwersen.

Q. Of how much of the premises was he the tenant by lease?

A. The basement of 34 and 36 Montgomery street.

Q. Who occupied over the basement, corner of Montgomery and Greene streets?

30 A. Owen Markey.

It is agreed that the pool tables were not where this leak complained of was.

Q. Who occupied above Markey?

A. In the front of the building Ranolph & Talcott and Mr. Condict, and in the rear Scofield & Haynes; the floors above that were occupied as offices for a short time; they were afterwards changed to ten-

40 ants.

Q. What division is there, by wall or otherwise, between the two basements that were rented by Mr. Ingwersen?

A. Brick or stone; solid partition.

Q. It ran up through the building?

A. Yes, up to the second floor; that is, up to the floor occupied by offices.

Q. Didn't it run to the third floor?

A. It may; I never saw it taken down.

Q. What was the next division running north and south?

A. Between 36 and 38 a brick partition.

Q. The next division running north and south?

A. Brick.

Q. Did you put a claim for rent in the hands of Mr. Olendorf to sue?

A. Yes, it was for 8 months rent, I think it commenced the month of July, 1877.

Q. After that suit was commenced, what did Mr. Ingwersen say to you about the suit or the claim?

A. He said it was unjust, we had no business to sue him, and he asked me to go down in the basement and see the condition of things, and I did go down; he went along with me.

Q. What did you see there?

A. I saw water coming down through the rear part of the basement; I said to him I would find out if I could where it came from, see what the cause of it was.

Q. Did he tell you where it came from?

30

A. No, he wanted me to find out.

Q. What did you do?

A. I went up stairs into Markey's saloon, and I told Markey there was trouble from water coming down stairs on to Ingwersen, and asked him if he knew what the cause of it was; he said no, he didn't know the cause of it; says I, does it come from your premises? Says he, you can look and see, I don't know where it comes from; I looked around and every-
thing was all clear enough to all appearances; I

40

looked in the ice box and on the floor of the ice box was wet, all around on the inside was all soaked and I concluded it came from that.

Q. Was there anything in there to catch water?

A. Yes, there was a pail, a rubber tube running into the pail, leading from where the ice was up above; this was in the morning, probably 10 o'clock, the pail was within half an inch or so of being full to the top.

10 Q. What did Markey say about it?

A. He said that was only a temporary arrangement, he was going to have it connected with the sewer, then there would be no further trouble; I asked him if the pail ever overflowed, he said, "Yes, sometimes, if you forget about it, it overflows."

Q. Did he inform you whether he would have it stopped or not?

A. He did, he said he would have it altered and would have it connected with the sewer.

20 Q. Did you look behind his bar?

A. I did.

Q. Was there a water tank there?

A. A tank set in the lower part of the bar.

Q. From what you saw in that ice box, taking the size of it and its uses, in your judgment would the overflowing of that pail from time to time being neglected, cause the difficulty complained of?

30 Question objected to and overruled.

Q. Suppose that pail had overflowed, how would that water have got through the floor?

A. Soaked through.

Q. Was there any lining in the bottom of the ice box?

A. None visible.

Q. How was the floor in the ice box?

A. It looked as if it was narrow pine, it was wet and all soaked.

40 Q. What was the location of this ice box as to the

trouble below; was it or not over the part where the water came through below?

A. Directly over.

Q. About when was this, as near as you can fix it?

A. Either the very latter part of May or the early part of June, 1877.

Q. Had Ingwersen moved out before that time?

A. Yes.

Q. Had he moved out before you had taken the agency of the building? 10

A. Yes.

Q. What was the size of the tank in the bar?

A. As near as I can remember now, a foot and a half wide and perhaps three feet long.

Q. How near full of water was it when you saw it?

A. I don't remember; there was water in it, but I can't say how much.

Q. Suppose that tank overflowed where would the water run to? 20

A. Down on the floor, right underneath the bar.

Q. If that continued, would it work its way through the floor?

A. Yes.

Q. Look at this map and see if that represents the portion of the building fairly, which it is intended to represent at the time you took the agency?

A. Yes; it does.

Q. Tell us whether that description marked "Bar" on the diagram represented the whole bar or whether it represents also something else? 30

A. The store was divided off by a slat partition and the front part was occupied as a cigar store—cigars and tobacco exclusively; then on the other side of the partition the continuation of that counter was the bar; the front portion was in the front room and was the cigar counter.

Q. So that the bar occupied about what position on the floor? 40

A. About the centre of the west side of the floor.

Q. Was it nearer the partition wall than it was Greene street?

A. Yes; considerable.

Q. Where was the water carried off from that portion of the building which was above Markey's saloon?

A. Carried off to the northwest corner of No. 36, shown on this map, on the first and second plotting
10 on the left of the diagram. (Points to 1 and 2 on the diagram.)

Q. So far as you know, did the plumbing work connected with Markey's apartments, his bar, etc., have any connection with the drainage from the upper part of the house, the parts above Markey's?

A. I never heard of its having any.

Q. Did the landlords, so far as you know, ever have any plumbing work in Markey's apartments?

A. None whatever, that I know of.

20 Q. Did they put any in there to your knowledge?

A. There was none put in while I was agent of the premises.

Q. Who furnished the money to pay the water rents that were charged on Markey's saloon?

A. Owen Markey, during the whole time I was agent.

Cross-examination by Mr. LINN:

30 Q. Do you know how this ice box was constructed, of what material it was made or how tight it was made?

A. I do not.

Q. Do you know that the bottom of that ice box was as tight as a bell?

A. I don't.

Q. Do you know that it could leak at all?

A. I only saw a door in front of me, and I saw the bottom of it; it looked like yellow pine flooring, and
40 that it was wet.

Q. There was no water on the floor outside?

A. No.

Q. But the bottom of the ice box was wet ; was the water standing on it ?

A. It was wet and damp.

Q. And there was a pail in there to catch the water that came from the ice ?

A. Yes, sir.

Q. And that pail was not full ?

A. No, sir.

Q. Do you know whether, after that some time,¹⁰ Markey did have the discharge from the ice box connected with another pipe outside ?

A. I don't know.

Q. You never went there but once to look at it ?

A. That is all—once ; that is, in that part of his premises.

Q. Over what space was the water dropping down from above in Ingwersen's ?

A. Just back of the Greene street entrance.

Q. Give us the distance—the size of the place ? ²⁰

A. Probably eight by four feet—eight feet running along toward Greene street and four feet extending across the basement.

Q. Did you ever go in that basement and examine it more than once ?

A. Only that once—only that time Mr. Ingwersen went with me ; I think I was in there once or twice afterwards on some other matters, but I didn't pay any attention to that. ³⁰

Q. Do you recollect whether the water was dropping down at the times you were in there afterwards ?

A. I don't think it was ; my recollection is not very straight on that.

Q. Do you recollect whether this tank under the bar had an overflow pipe, so that if it filled with water it would not run over on the floor, but would run out in the overflow pipe ?

A. I don't know anything about that.

Q. How was the tank under the bar supplied with⁴⁰ water ?

A. By a faucet.

Q. Do you know how the water got out of the tank when they wanted to empty it?

A. I do not; I didn't examine it.

Q. (By Mr. LEWIS.) Give us some idea of the length of the bar?

A. I should think it would extend from the side of the court room to the middle of the first table.

10

JOSEPH MEYER, a witness sworn on the part of the defendants, testified as follows :

Direct examination by Mr. LEWIS :

Q. What is your business?

A. Cigar and tobacco business, corner Greene and Montgomery streets, retail store; I hired at one
20 time the basement of Mr. Ingwersen for storage of leaf tobacco; that was from 1880 to 1881, as near as I can recollect; it may be that it commenced in the latter part of 1879, but I think it was about May, 1880 or 1881.

Q. What part did you rent of Mr. Ingwersen?

A. I rented the rear part, commencing about 25 feet from Montgomery street, and running along Greene street, the rear of premises 34.

Q. Before you rented it, had you been to look at
30 it?

A. Yes.

Q. When you went to look at it, before you rented it, did you see any water coming down?

A. I did not.

Q. How long after you occupied it was it before you saw any water coming down?

A. I think some water come down through the ceiling the first month we were in there.

Q. Did that continue right along every day?

40 A. No, sir.

Q. How long did you occupy?

A. About a year.

Q. How many times during the year did you see anything coming from the ceiling?

A. I guess it was about 3 or 4 times.

Q. Did you discover anything else coming through besides water?

A. Nothing that I know of.

Q. Did you discover beer coming through?

A. I could not tell if it was beer or water, it was wet. 10

Q. Did you smell any beer coming through, or slops?

A. I don't know, it smelt sometimes a kind of sour, I don't know if it was beer or anything else, I never tasted it.

Q. Who occupied the front of the basement while you were there?

A. I think it was a Chinaman or a barber shop; I don't recollect who it was. 20

Cross-examination by Mr. LINN :

Q. How long did you occupy the premises?

A. About a year.

Q. What rent did you pay for it?

A. I agreed to pay \$8 a month. I paid the first month's rent, and after that I made an agreement with Mr. Ingwersen and I paid him three boxes of cigars for the balance of the year because the place was not in a fit condition to be occupied—the water come down upon the tobacco. I tried to keep it out of the way by moving it round and made the best use of it I could. 30

Q. You said the premises were not fit to be occupied?

A. Yes. I could not occupy the whole place at a time, because the water come down in different places at several times.

Q. Did it always come down in the same quantities?

A. Sometimes less and sometimes more; it gene- 40

rally come down more through the nights than in the daytime, and then in the morning we would have to move our tobacco.

Q. It would continue to drop a good part of the day?

A. Until that was dropped away, then it would stop.

Q. Did that continue from time to time all the time while you were there?

10 A. Three or four times, maybe five or six times—all the time I was there.

Q. Wasn't there a good many times that you didn't keep any account of?

A. Yes.

Q. Did you threaten to sue Ingwersen for the damage?

A. I told Mr Ingwersen after I was the first month there, I should hold him responsible if that is not
20 stopped for the damage done to my tobacco.

Q. Then you made a bargain about the cigars?

A. Made a bargain for three boxes of cigars for the rest of the year, and I done the best I could with it.

JOHN D. MEYER, one of the defendants, called on the part of the defence, testifies as follows :

30 *Direct examination by Mr. BEDLE :*

Q. About what year did Owen Markey first become your tenant in that place?

A. About 1873.

Q. He would get his leases from time to time, at what periods of time?

A. About two or three years.

Q. Counsel has offered in evidence a lease running from 1877 to 1879, I show it to you; now then, the
40 lease previons to that, was for how long?

A. Generally two years.

Q. Did you put any plumbing work in there for a urinal and water-closet and wash basin?

A. No, sir.

Q. Did you take them out?

A. No, sir; I understood Markey's brother took them out.

Q. When the premises were first rented to Markey what had they been occupied for before?

A. In the first place there was a clothing store in there; then they were fitted up as a cigar store only, then afterwards fitted up as a cigar store and saloon; at last a saloon was put in the rear of it.

Q. When did you go to carry on business in Courtlandt street, New York?

A. In January, 1877, at No. 46; I had two places in Courtlandt street.

Q. Is Mr. David W. Stone dead?

A. Yes.

Q. He was your agent before Mr. Firth?

A. Yes.

Q. Who is your present agent?

A. Mr. Mahnken; he has been our agent since 1880.

Q. Please give us the exact size, how many feet on Montgomery street, and how many on Greene street in the basement?

A. Both basements are about 36 feet front and about 60 feet deep—that is about 18 feet each were the basements.

Q. Mr. Ingwersen has stated that he spoke to you once in regard to these leaks or drops, where was that?

A. In his basement.

Q. How did you happen there?

A. I come there in his basement on some business?

Q. Did Mr. Ingwersen ever complain to you more than once about it?

A. I saw it once more thereafter.

Q. The first time was in the basement?

A. Yes.

Q. Tell us what occurred at that time in the basement?

A. I came to his basement on some business and he called my attention to the dropping through in the rear of the basement; I asked him why he didn't see Markey about that, he said, "I don't like to have any hard feelings with my neighbors;" I told him then, if you don't care I do care for my ceiling, and I will have this stopped; and I went over to Mr. Stone immediately and reported this, and told him to have it stopped.

Q. Did you see Mr. Stone after that?

A. In a couple of days thereafter.

Q. What did he report to you?

Plaintiff objects to the question.

Defendant offers it on the question of knowledge on the part of the defendant. We claim this difficulty came from the ice box, and the information this witness had was to that effect, and he was relying upon that.

Mr. LINN. It is entirely immaterial who told him that it came from the ice box.

The COURT admits the testimony and allows plaintiff an exception.

Q. My question was about your seeing Mr. Stone afterwards; now, what did Mr. Stone tell you with reference to it?

A. He said he spoke to Mr. Markey about it, and had it stopped.

Q. In that first conversation with Mr. Ingwersen, did Mr. Ingwersen tell you where the water came from?

A. He told me he believed it rane from the ice box; says I, why do you think so? says he, the ice box is immediately above the leakage; he showed me where it was.

Q. Did you tell Mr. Stone what Mr. Ingwersen had said?

A. I told Mr. Stone all that I heard and saw there believing myself it was so.

Q. You spoke of another time when Mr. Ingwersen saw you, when was that?

A. He came to my store in Cortlandt street; that must have been after May, 1878, and he wanted me to stop the suit; that was after we had sued him, and after he had moved out.

Q. What time in 1878 was it?

A. It must have been after the first of May. I¹⁰ only moved into this store on the first of May, 1878.

Q. Do you know anything about any defective plumbing of any kind with reference to the wash-basin and the water-closet?

A. No, sir.

Q. Where is your residence?

A. Hoboken.

Q. How long have you lived there?

20

A. About 11 or 12 years.

Q. Where does Mr. Ranken live?

A. New York.

Q. How long has he lived there?

A. Always as long as I know him.

Cross-examination by Mr. LINN :

Q. When Mr. Ingwersen came to you after May, 1878, and wanted you to stop the suit, did he tell you the water was coming down still?

30

A. He used merely as an argument why he should not pay rent; he said the water was coming down still, and I should stop the suit.

Q. He told you the condition of the premises at the time?

A. Yes.

Q. Did you do anything after that to stop the water?

A. No.

Q. Did Mr. Ingwersen call upon you in the store?

40

which you occupied previous to moving to your second one?

A. No, sir; I had no store; they were lofts only.

Q. Didn't he call upon you prior to this time when he wanted you to stop the suit?

A. No, sir.

Q. You had not seen him upon this subject of the suit, except the time you were in the basement and he spoke to you there?

10 A. No, sir.

Q. Do you know what the condition of the room occupied by Markey was, when you purchased the premises?

A. No, sir.

Q. Do you know whether there was any water-closets or wash-basin or urinal, or anything of that kind in there, when you purchased the premises?

A. I was in there several times, but I didn't see any.

20 Q. Do you know whether there were any or not when you bought the building?

A. I haven't seen any; I was in there a couple of times, but I didn't see them.

Q. You never paid much attention to the building any way?

A. I looked it all through and I have often been in the building and examined it.

30 Q. Do you know as a fact of any water-closet, wash-basin and urinal?

A. No.

Q. Did you ever see it?

A. I think I did; I have been in there I know since Markey occupied it.

Q. Do you recollect of having seen those things there?

A. Not positive.

Re-direct examination:

40 Q. McCoy occupied those premises as a clothing store after you bought?

A. Yes.

Q. Was there any water-closet or wash-basin in there at that time?

A. I haven't seen them.

Q. Who was in there after McCoy?

A. General Ramsey.

Q. What did he keep?

A. Cigars and tobacco; after he left, Markey come.

10

THEODORE KIRSCHGESTNER, sworn on the part of the defendants, testified as follows:

Direct examination by Mr. LEWIS:

Q. Where do you live?

A. West Hoboken.

Q. What is your business?

A. Carpenter and builder.

Q. Did you repair a piece of a floor for Mr. Mahnken corner of Montgomery and Greene streets, Jersey City?

A. I did; it was about three years ago the first of May, or after the first; I don't remember exactly; it was corner of Montgomery and Greene streets, on Mahnken's saloon floor.

Q. Did you put in an entire floor?

A. I put in about eight or ten feet in the rear part.

Q. In what condition did you find the floor that you took up?

A. I found the floor in a bad condition; it was rotten.

Q. Do you know where the ice box stood?

A. Yes.

Q. Do you know whether it was on this floor that you took up?

A. Yes.

40

Cross-examination :

- Q. Do you know where the ice box stood in Markey's saloon when Markey occupied it?
- A. Yes.
- Q. You were in there while Markey was there?
- A. I was in once or twice.
- Q. You recollect from that where his ice box stood?
- 10 A. Yes, I know it.
- Q. How many ice boxes had he?
- A. I only saw one.
- Q. Where did you see that one?
- A. On the left hand side as you come in from Montgomery street, about sixteen or eighteen feet from Montgomery street.
- Q. You put down a part of the floor of that saloon for Mahnken in about 1882?
- A. Yes; about two years ago.
- 20 Q. What amount of flooring did you put in?
- A. Yellow pine flooring, eight or ten feet, about one-quarter of the whole floor.
- Q. Did that flooring you put in extend from the side nearest to Greene street to the other side of the room?
- A. No, it was from the left-hand side wall against Greene street.
- Q. You commenced putting in the floor at the back part?
- 30 A. Yes.
- Q. How far did it extend out into the room?
- A. Not quite half the room—about half.
- Q. Then how far did it extend back?
- A. About half way across the whole room.
- Q. That floor which you took up was rotten?
- A. Yes.
- Q. What kind of flooring was it you took up?
- A. I can't tell exactly; I didn't take it all out myself; I had some workmen there; I was there when
- 40 it was done all the time, and I helped do it; some pieces was good and some was rotten.

Re-direct examination :

Q. Do you remember seeing a partition across that room?

A. Yes, a screen; it was not a regular partition—more of a screen.

Q. Are you not mistaken when you say it was 15 feet from Montgomery street—did you not have reference to that partition?

A. I can't tell exactly.

Q. Do you know what is the depth of the whole floor?

A. No.

Q. Which side of the partition is the ice box?

A. North of the partition.

Q. Was the ice-box in the rear part of the room or front part?

A. I guess it was in the middle, right behind the partition.

Q. That would make it in the rear part, wouldn't it?

A. Yes.

HENRY MAHNKEN, sworn on the part of the defendants, testified as follows :

Direct examination: by Mr. BEDLE :

Q. You live in Jersey City?

A. Yes, sir.

Q. Did you become agent of Ranken and Meyer?

A. I did, the 1st of February, 1880.

Q. Did you also become a tenant of part of these premises which we call Markey's?

A. Yes, on the 1st of May, 1882, I succeeded Markey's brother.

Q. Who collected rent of James Markey?

A. I did.

Q. Do you recollect the time James Markey left?

A. Yes.

Q. What did he take away with him as to fixtures?

A. Everything that was in there.

Q. Including the ice-box?

A. Yes.

Q. Tanks?

A. Yes, everything; left nothing but bare walls.

Q. Water-closet and wash-basin?

A. Yes, and the plumbing connected with them; even the sewer pipe, the urinal; I found nothing there after he left.

Q. Did you fit up the place?

A. Yes.

Q. How was the place divided while Markey was there?

A. When you enter on the Montgomery street door there was a cigar store; then there was a part screen and part fly door—a door that swings both ways; through that door you were in the bar-room; the bar was in the rear of that upright partition.

Q. What is the length of that bar?

A. About 20 feet.

Q. The big ice box in the rear of the bar?

A. There was about three feet from the edge of the bar to the ice box.

Q. How far did the ice box set away from the rear partition?

A. About 12 feet from the wall.

Q. Did you put down a new floor in any part of that rear room?

A. I did; Mr. Kirschgestner, the last witness, did the work for me.

Q. Did you employ him as agent or for yourself?

A. For myself, and paid him myself.

Q. How much floor did he put in there?

A. About 16 feet from the rear in length, excepting one or two boards which he ran farther, and about 7 or 8 feet wide and more, near to the rear wall, a kind of triangle shape.

Q. Where was the floor put with reference to where Markey's ice box stood?

A. Right where Markey's ice house had stood.

Q. What was the condition of that floor when it was taken up where the ice box stood?

A. Bad. The floor was all rotten; you could not walk over it; rotten from dampness.

Q. It was not a dry rot, was it?

A. No, sir.

Q. Were you there when the ice house was taken¹⁰ away?

A. I could not say that positive.

Q. Did you see it about the time it was taken away?

A. Yes.

Q. Did you see the bottom of it?

A. No, sir.

Q. What was the size of that ice box, about?

A. About 5x6 feet.

Q. Do you know whether either of the Markeys²⁰ connected the ice box with the sewer?

A. Not to my knowledge.

Q. How was the floor behind the bar?

A. All right, with the exception of one board; I took that out and put a new board in.

Q. What had rotted that from appearances?

A. I presume spilling.

Q. Do you recollect at one time of Markey or some plumber taking out some rags and some papers³⁰ from the waste pipe while Markey was there?

A. I do; that was between 1880 and 1881.

Cross-examined by Mr. LINN:

Q. Who was the plumber that took out the rags?

A. Joseph Zumbush.

Q. How do you fix the time when he did it?

A. He says it was between 1881 and 1882; it was somewhere about that time; it was after I had the agency, and before James Markey went out. 40

Q. Did you ever measure this ice house of Markey's there?

A. No.

The defendant offers in evidence for the purpose of contradiction from the printed book, page 50, testimony of Louis Piebes, as follows:

10 "Q. Did you ever go down there on purpose to look at it?"

"A. Only when he came up stairs after me."

"Q. Was that while he was occupying or after he left?"

"A. While he had it."

"Q. Did you ever go down to see it after he had moved out?"

"A. No."

20 Mr. LINN. What does this contradict?

Mr. BEDLE. The witness was asked if he had thus testified on the other examination. He swore that he went down afterward and saw it, and it was in that connection that I asked him that question.

Mr. LINN. He has made no statement now that you contradict?

30 Mr. BEDLE offers in evidence from the printed book of the testimony of James A. Markey, page 44, folio 34.

"Q. How large was the ice box?"

"A. About 8 feet square and 9 feet high."

Also testimony of Mr. Ingwersen on the other trial from the printed book, page 7, folio 10.

"Q. Do you know just where the water did come from?"

40 "A. It came through the ceiling, but where it came from to get there I don't know."

"Q. Describe how the water appeared above?"

"A. It came through the ceiling, sometimes in the middle of the ceiling, and sometimes at the end of the ceiling, and in different places. It came clear down to the floor and created a dampness, so that we could not stay in the place through the day."

Mr. LINN. Now we will offer in evidence the whole of the testimony of the witnesses referred to, bearing upon the point and in any way explanatory of what has been offered by the other side.

Mr. BEDLE. My offer is only of that which has reference to the condition, as to what the witness said about the condition of the place. (Reading :) "I don't remember any trouble in the front part of it." The intention is to offer, not the opinion of Mr. Ingwersen—

Mr. LINN. We offer it as part of the testimony which he gave.

Mr. BEDLE. Now, on page 8, folio 38: "We had plenty of room, and didn't use all the room; the partitions were there; it was kind of half partitioned; the partitions were not in our way."

On page 15, folio 12: "Q. When did you first discover this water running into your apartments? A. Late in August, 1876.

"Q. How soon after it had commenced to run in did you discover it? A. I discovered it the first morning I came into the shop, from the overflow of water."

Now, page 27, folio 32: "Q. You never told anybody that any water came from Markey's ice chest? A. I may in the beginning have said so, that is, in the late summer of 1876, but then I didn't know where the water came from."

Then on page 29, folio 35: "Q. Did you ever take any of the ceiling up to ascertain

“ where the water came from? A. No; it
 “ was a wooden ceiling; I didn't take any off.”

JOHN D. MEYER, recalled on the part of the defend-
 ants, testified :

Q. When was it that that new floor was put in the
 basement?

10 A. September, 1876.

Defendant offers in evidence the lease from
 May 1, 1879 to 1882, to Markey.

Also the lease from 1877. I suppose the
 leases were of the same kind.

HENRY RANKEN, recalled on the part of the defend-
 ants.

20 Q. Did you know anything about any defective
 plumbing in Markey's place at all?

A. No, sir.

THOMAS J. BLANY, recalled by the defendants, testi-
 fies :

30 Q. Do you know who put the wash-basin, the uri-
 nal and water-closet in Markey's premises?

A. Yes, a man named Barry.

Q. Who did he put them in for?

A. For Markey.

Q. When was it done?

A. I don't know the year; it was done a long while
 before the rest was done.

Q. What do you mean by that?

A. Done quite a while; I guess it was done three
 or four years before I was working there.

40

Cross-examination :

Q. How do you know when it was put in ?

A. Because I used to go in and out there a great deal.

Q. You saw Barry putting it in ?

A. Yes.

Q. What year was it you were working there ?

A. About 1876 or 1877.

Q. You think it was done three or four years before that ?

A. Yes.

Q. What is Barry's first name ?

A. I don't know ; he is dead.

Q. Do you know what was there before this wash-basin was put in ?

A. There was nothing at all there.

Q. No wash-basin ?

A. No wash-basin, no water-closet, nothing.

20

HENRY RANKEN, recalled by defendant :

Q. Was Barry called by you to do this work or not ?

A. No, sir.

JOHN D. MEYER, recalled for defense :

30

Q. Was Mr. Barry employed by you to do this work spoken of by the last witness or not ?

A. No, sir.

Defendants rest.

40

Plaintiff offers in evidence from the printed book of the former trial, the testimony of Mr. Ingwersen, page 5, as follows:

“ You occupied under this lease from the 1st of
 “ May, 1876? A. Yes, sir. Q. What occurred dur-
 “ ing that summer as to the condition of these prem-
 “ ises? A. About the end of July or beginning of
 10 “ August the water came on me; flowing constantly
 “ to such an extent that it was almost impossible to
 “ leave our goods where they were placed; I had
 “ to shift them around in order to save them
 “ from being damaged. Q. What did you do
 “ when the water came down upon you? A. I went
 “ to Mr. Meyer’s store, in New York, and complained
 “ about it, he said that they had an agent, and I
 “ must go to his agent, Mr. Stone. I told Mr. Meyer
 “ the condition of things, and then I went to Mr.
 20 “ Stone and told him the condition of it; he said he
 “ was going to see about it.”
 “ Q. Did it get any better after that? A. No, it
 “ might be for a day or two, but afterwards it was
 “ just as bad as it was before.”

30 Mr. BEDLE objects to this testimony as it is
 no part of any admissions that the defendants
 have put in from the testimony of the witness
 and plaintiff, Ingwersen; it has no relation to
 that, and that it is in effect allowing counsel
 to prove the admission of his client.

The COURT will permit the testimony to
 stand, and allow the defendant an exception:

To which ruling permitting the testimony to
 stand, counsel for the defendants prays a bill
 of exceptions, which is signed and sealed ac-
 cordingly.

M. M. KNAPP, J. S. C. [L.S.]

The plaintiff offers in evidence from page 6,
line 26, as follows :

“ How long did you stay in the building? A. Until
“ May, 1877; then I went out, because it was almost
“ impossible to stay there; it was so damp, and the
“ water was coming down all the time; we could not
“ do our business there.”

The defendant objects to the last.

The COURT permits it in evidence and al-10
lows defendant an exception.

To which ruling, permitting this evidence,
the counsel for defendants pray a bill of ex-
ceptions, which is signed and sealed accordingly.

M. M. KNAPP, J. S. C. [L. S.]

Plaintiff offers in evidence, and reads from
page 18, line 38 :

“ Q. How much water in any one day came through²⁰
“ into your premises and not from the river?” A.
“ I cannot say; sometimes more, and sometimes
“ less.”

On page 19: “ Q. You could not discover where it
“ came from? A. No; I never was able to discover
“ where it came from; when I went into Markey’s
“ we never could find any water on the floor. Q.
“ Did you go up to the apartments occupied by your
“ counsel, Mr. Linn? A. Yes, but not for that pur-30
“ pose; I went there with the agent one day—Mr.
“ Firth; then the water was running; a man wanted
“ to hire the place of me, and he would take it if I
“ would make it dry; then I went to Mr. Firth to
“ get him to have it fixed; that was in 1880; because
“ I had a good tenant I was very anxious to rent it
“ —to get all the money out of it that I could.”

By Mr. BEDLE. We object to this as before
—to the whole of it—and particularly to such⁴⁰
parts as have no relation to any of the offers

made by us as to admissions on the part of the defendant. We object for the reasons before stated.

The Court permits the testimony to stand and allows defendant an exception.

To which ruling, permitting the testimony to stand, the counsel for the defendants pray a bill of exceptions, which is signed and sealed accordingly.

10

M. M. KNAPP, J. S. C. [L. S.]

Mr. Bedle objects separately to the following:

“Q. How much water in any one day came through into your premises, and not from the river? A. I cannot say; sometimes more, sometimes less. Q. Did it pour through? A. It looked to me sometimes as if it rolled through
20 “like a waterfall.

“Q. How much did you stand and watch it in that way and see it run at a time? A. We could stand some time; until we got tired. Q. You could not discover where it came from? A. No; I never was able to discover where it came from; when I went into Markey’s we never could find any water on the floor.”

The Court permits the testimony to stand and allows defendant an exception.

30

To which ruling permitting the testimony to stand, counsel for the defendants prays a bill of exceptions which is signed and sealed accordingly.

M. M. KNAPP, J. S. C. [L. S.]

Mr. BEDLE also objects especially to the following:

40 “Q. Did you go up to the apartments occupied by your counsel, Mr. LINN?

“A. Yes, but not for that purpose ; I went there
 “with the agent one day, Mr. Firth ; then the water
 “was running ; a man wanted to hire the place of
 “me, and he would take it if I would make it dry ;
 “then I went to Mr. Firth to get him to have it
 “fixed ; that was in 1880 ; because I had a good ten-
 “ant I was very anxious to rent it, to get all the
 “money out of it that I could.”

The Court permits the testimony to stand¹⁰
 and allows defendant an exception.

To which ruling, permitting the testimony
 to stand, counsel for the defendants prays a
 bill of exceptions, which is signed and sealed
 accordingly.

M. M. KNAPP, J. S. C. [L. s.]

AUGUST INGWERSEN, the plaintiff recalled on his²⁰
 own behalf, testifies :

Q. Have you measured this ice box since this suit
 has been in progress ?

A. Yes, and I took a note of the measurements ;
 the ice box measures four feet six inches, and 5x7
 feet high.

Q. You said in your testimony that you saw under
 the ice box ; there has been some evidence here that
 the ice box stood on the floor flat ; what part did³⁰
 you see ?

Defendant objects to the question on the
 ground that it is not rebuttal of anything
 brought out on the part of the defendant.

Mr. LINN. I overlooked it. I intended to
 ask it and forgot it.

Q. Tell what you saw ?

A. When I saw it first the ice box was not stand-
 ing exactly to the floor ; there was some inches from⁴⁰

the original box to the floor, but there was a base put on three sides and one of them bases was off.

Q. (By Mr. BEDLE.) That was after you left, wasn't it ?

A. No ; that was right in the beginning, the first time.

LOUIS PIEBES, recalled on the part of the plaintiff :

10 Q. Were you there when the ice box was taken down and taken out ?

A. Yes.

Q. What was the condition of the bottom of it ?

A. It was in good condition.

Q. Was there anything rotten about it ?

A. No, sir.

Q. What was the condition of the floor right under it ?

A. That was in good condition.

20 Q. Was there at this tank, under the bar, an overflow pipe to it ?

A. Yes, sir.

Q. So the tank would not overflow ?

A. Yes, sir ; Mr. Blaney made that pipe.

Q. (By Mr. BEDLE.) What do you mean by overflow pipe ?

A. So the tank could not get full and the water would run down in the pipe ; it never could overflow.

30 Evidence closed.

The COURT. There was a motion to non-suit that was held.

Mr. BEDLE. Yes.

The COURT denies the motion to non-suit and allows defendants an exception.

To which ruling of the Court denying the motion to non-suit, counsel for the defendants prays a bill of exceptions, which is signed and sealed accordingly.

40

M. M. KNAPP, J. S. C. [L. s.]

The defendants request the Court to instruct the jury as follows :

1st. There can be no recovery in this case for any damages to oils, paints, or other property of the plaintiff previous to May 1, 1877.

2d. If the water complained of came from the ice box or the bar tank, or both, there can be no recovery in this case. 10

3d. If the waste pipe from the wash-basin was a part of the property, or fixtures of the tenant, then there can be no recovery in this case for any damage by reason of water therefrom, or on account of defects therein.

4th. If at the dates of the term of renewal of the lease, to wit, May 1, 1877, the defendant had no knowledge or reason to believe, that the water complained of came from the waste pipe, from the wash-basin, or from the water-closet in Markey's, then no liability can arise on the part of the defendants, by reason of said renewal. 20

5th. No liability can exist in this case on the part of the defendants, from any neglect or carelessness on the part of either of the Markeys in the use merely of the water-closet. 30

6th. No liability can exist in this case on the part of the defendants, for any neglect or carelessness on the part of either of the Markeys in the use, merely of the wash-basin and the waste pipe therefrom.

7th. There can be no recovery in this case for any damages resulting from the condition of the waste pipe from the wash-basin or from the water-closet, 40

previous to May 1, 1877, the beginning of the second term.

8th. If the plumbing in question belonged to the tenant, and not to the defendants, and if by reason of defects therein, the damage resulted, then there can be no recovery in this case against the defendants.-

10 9th. The renewal of the Markey lease from May 1, 1877, created no other duty or liability on the part of the defendants than such as existed during the existence of the lease or tenancy of Markey, immediately prior to the renewal.

20 GENTLEMEN OF THE JURY—This suit is to redress grievances alleged to be the result of a nuisance erected or continued by the defendants. Damage it is claimed, was done to the stock of goods of the plaintiff in the store that he had leased from the defendants ; and he also claims that the value of his leasehold interest was depreciated. The fact that the plaintiff was tenant of the defendants in the premises, is in this case of very little significance. If
 30 the source of injury complained of had existed in the premises which the defendants had demised to the plaintiff, then the relation of landlord and tenant would be of more significance, and the plaintiff would not be entitled to recover, because by the terms of his leasing as well as by rules of law in the absence of contract, a tenant is bound to keep in repair premises which he hires. It is not alleged, nor is there anything in the case to indicate, that the cause of
 40 complaint here has its source in anything that was let to the plaintiff. It came from elsewhere. The defendants were the owners of the entire premises,

four buildings, corner of Greene and Montgomery streets, Jersey City; they let these premises to various tenants, and each one is to be regarded as a separate tenement. The landlords, if they parted with all their interest in all the tenements, so that their right of possession passed from them to others, so long as that right of possession continue in those others, the landlords are strangers to the premises, outside of it, and have not liability, except under circumstances that I will indicate. So far as they bear relation to the plaintiff in this case they stand exactly as adjoining owners of property would stand. Now, under what circumstances can liability arise? If the owner of premises adjoining yours puts into these premises anything that is noxious and injurious to you, he is answerable for the consequences of that wrong, and even though he lets out those premises to another person, he does not thereby excuse himself even though the actual injury comes from the use of that illegal thing which he has put in. A man may build premises beside yours and put in smelting works, he don't propose to run it himself, but lets to somebody else to run it; if smelting works are a nuisance, the builder becomes as much liable as the man who runs it; therefore, if he puts into his building a thing that is illegal, or anything lawful in its nature, but so badly constructed that it becomes hurtful, then he is liable. If he lets it out to another, this liability continues; for the reason that when he had power to remove the nuisance, he failed to make such removal, but passed it over to another, and he cannot delegate the right to one to do wrong any more than he can claim to himself the right to do wrong. But, when a landlord lets out his premises in good order for a term, without reserving any control in them, or without charging himself with the duty of putting in and keeping in repair during the term, for the time being he is as much a stranger to the uses it is put to during the term as if he were not the owner. And

the tenant who in possession erects structures out of which injury results to others, creates a nuisance, he, the tenant alone, is liable for that nuisance. Now, a tenant may put in the demised premises structures in their nature permanent; the man who rents your property may himself put in smelting works and he may in their use create a nuisance, the landlord would not be liable because he did not do the wrongful act, but the tenant would be liable because he did, and so long as the term continues which withholds the possession from the landlord or the owner, the tenant alone is answerable, and the landlord is a mere stranger, but when the term expires and the landlord comes into legal possession of his premises, he must before re-letting remove all noxious erections, if he has notice or knowledge that they exist. He has adopted the wrongful condition of things on the property coming back to him and he stands just as if he had erected it himself and had let it out to a stranger. The difference, you see, between the two cases is that in the one case where he erects it himself he has knowledge of what he does, in the other case where it is erected by the tenants he may not have knowledge, and the general rule is that one who merely continues a nuisance is not liable to action unless he has been given notice of it, and requested to remove it. The cases are somewhat at variance upon the precise application of the rule where a tenant has erected an injurious structure, and the term has expired and the landlord has re-let, as to whether notice is necessary to be given to the landlord. Some hold him answerable for the condition of his premises and bound to know; other cases say he may be innocent entirely, and ought to have some notice. I think the inclination is in our State to hold under these circumstances of re-letting, that in order to hold liability there should be notice brought home to the landlord, that the thing which he is re-letting

has in it noxious qualities. What should that notice be?

It should be notice of the fact of a nuisance springing from the premises which the landlord owns, nuisance to somebody; he should have some knowledge of its character, so that he can fairly be directed to the source of injury to others, and thus be enabled to correct it. Let us take this case as an illustration of the rule.

I do not take it to be necessary to a legal notice that the party injured should point out to the defendant just where the source of the water was that came down and damaged his premises; it is enough to show an adjoining owner, or to the landlords in this case, that from the premises which they had control of, there came to the plaintiff's premises a specific injury, that the defendant's premises were the source of the injury to the plaintiff. When that notice is shown, I think it becomes the duty of the landlord to find it out and stop it. If I have water coming upon my land from my neighbor, I may not go on the neighbor's land to ascertain its source, but I may know my neighbor has purchased that property long after the water began to flow, and I know it is, therefore, in him a mere continuance of a nuisance, then I should give him notice that there is a nuisance to my premises from his, by flow of water, and he must look up the cause and stop it. When one lets premises that has on it defective structure, even though that structure has been put up by another, and his attention has been so called to the injury that he ought in reason to have discovered and removed it, he becomes liable for the consequences of it, even though the actual injury is because of the tenant's use of the defective structure. A defective pipe from the water-closet or from the sinks, which when used would leak water upon somebody else, but harmless, of course, when not used, if he lets out such premises with notice of such defect he is answerable for its

use by those he puts there to use it. Both tenant and landlord may be liable, and may be sued together.

Now, these statements, gentlemen, contain all the general legal principles involved in this case. All the rest is matter of fact for you. Did the defendants, by themselves or through their authority, erect upon these premises anything that was injurious in itself, or after letting the premises did their tenant
 10 erect anything that was injurious in itself, and in the condition it was, did defendants subsequently, with notice given them that ought reasonably to have indicated its existence, relet it to tenants. If they did, they adopted the consequences that result from such ill condition of their property.

I have to speak of another question that has been discussed here. The defendants claim there can be no liability in this particular case, if the injury resulted from the water-closet or the urinal or the
 20 basin, for this reason: they say that the tenant of the defendants, Markey, put in all these structures of his own will, for his own benefit, regarding it as his own property and that he took it away, therefore, although in its use, it became ruinous and damaging to others, and although the term expired and the possession was cast upon the defendants, and they re-let, yet no liability attached to them by reason of the ownership in the tenant
 30 Markey. I think that makes no difference. I think a structure like that, a water-closet or a urinal, or a basin put in by a tenant and attached to the premises as these were, and which comes to be ruinous, a thing that is constantly in use, and annexed to the premises, even though there by an agreement, that the tenant may in the end, take the thing away and appropriate it as his own property, sever it from the freehold, while it is there and in use and becomes a nuisance and it comes back in the possession of
 40 the landlord and is re-let by him, it is so far a re-letting of that thing with the premises, an adoption of

the thing let, and he becomes responsible for its condition. There is another class of liability which may arise for nuisance for the uses to which property is put. What I have said all relates to structure, things annexed or attached to the freehold which the landlord lets. The landlord may be liable for a nuisance when he lets premises for an illegal use. Where one lets premises for the purposes of keeping a disorderly house, there it is mere conduct of the premises, but if the landlord lets it for that purpose he becomes liable. If he lets it for an innocent purpose, and it is turned into a disorderly house afterwards and without any discontinuance in the use, he re-lets it, presumptively he does it for the same purpose, then he becomes liable for a continuance of the nuisance. That principle has application to the illegal use of property aside from defects in structure. If I should let premises to one for the purpose of running a forge, and the use of the forge gave out smoke and annoyance to the neighborhood, and did injury, I would be liable for that because I had let it for that purpose. If I let it to a tenant without knowing the purposes for which it is leased, and the tenant puts into it the same forge and during his term continues its uses and thus creates a nuisance, during all that time he is liable, and I as landlord not, but if at the end of his term I take back my title and re-let it to him for the same nuisance, then I adopt his acts, and on the principle that the landlord is liable when he lets property for illegal purposes I then would be liable. The plaintiff claims that principle to be applicable to another part of this case, that is, the leak supposed to come from the ice box. I think before a liability can be imposed upon a landlord through any such condition of things as the leak from such a box, it must appear that the landlord countenanced its being there, that is, by re-letting it with knowledge that it was permanently there, and that of necessity in its ordinary use it would

leak and be offensive to others. Quite specific notification that an ice box in a house was injurious to others, would seem to be essential, to liability in a landlord, and unless it appears that of necessity the use of the ice box created a nuisance to the plaintiff, injury resulting from that source ought not to be counted against these defendants, but should be charged to the negligent conduct of the tenant in its possession and use. Any structure to be of such illegal character that the landlord is liable for injury to others, the injury resulting must be not from the manner of its use, but it must necessarily result from the condition of the thing let. To illustrate : a water-closet, I take it, to be a legal structure in the house ; it was a legal structure in the bar-room of Markey, and so the basin, and so the urinal. When properly constructed they are innoxious in a legal sense. Now, if Markey, or those about him, carelessly used either the urinal or water-closet, allowed it to get stopped up and the pipes to run over, that is not the fault of the landlord, because that was not necessary ; that was really the negligence of the tenant ; and, for that alone the tenant is liable ; therefore, the rule, that in order to hold the landlord liable in virtue of such considerations, the thing itself when let, must necessarily have the objectionable quality. If when the pipe was put in, it was defective, or afterwards decayed, or had been gnawed by rats, the landlord letting such premises would be liable for the injury resulting from it, because necessarily it must escape water, and if injury resulted from that, he would be answerable. But if from negligence in use by mere overflow, some neglect of the tenant, injury resulted, the landlord would have nothing to do with that, because they have no right of control over the tenants.

Now, there is no evidence in this case to show that any of the structures complained of—I mean the permanent structures complained of—were detrimental

or doing any injury at the time when the plaintiff here first leased these premises, there is no evidence of it. The plaintiff himself said when he went there the premises were all right, and the first indication was after he had been there some little time. He rented it by parole from June, 1875, to May, 1876, and just after took the lease for five years in May, 1876; some time in July or August this leakage began to show itself. Before the renewal of the lease to Markey in 1877, the plaintiff had gone out of his premises. The defendants could not by any possibility have become liable for any condition of things, so far as we have any proof here, until they gave a new lease to Markey. I assume on the proof here the water-closet and everything was up to 1876, in the summer, in good condition. Now, then, there was a term running; Markey had a term running from 1875, and the fault if any must have arisen during that term. The defendants could not become liable for that, until they renewed the lease of Markey, which was May 1, 1877. Then, assuming that the premises were in bad condition, that the landlords knew it, then they may become liable, but before that time the plaintiff had gone out. This touches the claim of damages for injury to his personal property; that all occurred before the lease of 1877, and there is no evidence to connect these defendants with any liability prior to that time, prior to the removal; so the claim for injury to the sign and injury to the personal property that he removed should be excluded. After that if the defendants are liable, then the injury would only be that to the plaintiff's estate under the lease to him. He agreed to pay \$500 a year; that may have been too much or too little.

It is the only evidence we have in the case of the value of the premises that he rented. If he was injured through the act of the defendants in the value of these premises, the amount of that injury would

be the measure of damages. That would be so much as the value of the premises were reduced by the act of the defendants ; how much was the value for the whole term without that injury existing, then how much was it reduced by that injury ; that would be the measure of damages, so as to embrace in reduction that which he actually got. The question would be, what was his loss and damage naturally and necessarily, loss on the thing itself? Now, it is
 10 quite obvious, gentlemen, to turn generally to the facts in the case, that in order to apply the rules I have given you, you ought to know something about the source of the injury to the plaintiff.

I would not mean by that to say, that it must necessarily have been hunted out to an absolute certainty; that, of course, is not the measure of evidence required, but at least you should be able to say with reasonable certainty where this injury came from. How else can you determine upon the liability
 20 of the defendants? You must not start with the notion that the defendants are insurers against the injury that the plaintiff suffered ; the defendants are only liable for the injuries which they in law caused. We know that they did not intentionally do any injury to the plaintiff ; their liability is in virtue of a legal wrong, if it exists at all. Now, I have said they are liable if they created an injurious structure, or if they continued one by letting premises of their
 30 own after such a structure had been put in ; they would be answerable then, as well as the tenant, for the injury that resulted. Now, to determine whether they are liable, you should understand where this injury came from, to see whether the defendants are answerable for it. If you can find evidence in the case that convinces you of the source of the injury to the plaintiff, and that that source is under any of the rules that I have stated chargeable upon the defendants, then you will be in condition to say that the
 40 plaintiff is entitled to recover.

The damage, as I have indicated, would be the

difference in the value of the property unaffected by such an injury, and its value as affected by the injury—how much was it reduced?

I have been requested by the defendants to charge you certain matters which have been discussed in the case. As to the first request, I think I have charged that specifically.

As to the second request: "If the water complained of came from the ice box or the bar tank or both, there can be no recovery in this case"—I am¹⁰ not inclined to charge that to the extent of the request. There may be such an adoption by a landlord of a continued and permanent use of such structures as would be proof of a letting on his part for purposes that embraced such illegal use, and then in that view, he might become liable. But I ought to say as to that, as against these defendants, there is very little proof in this case. I simply mention that in qualification of the request to charge. As to the third request, I refuse to charge that, farther²⁰ than I have charged on that point.

As to the fourth request, "If at the dates of the term of renewal of the lease, to wit, May 1, 1877, the defendants had no knowledge or reason to believe that the water complained of came from the waste pipe from the wash-basin or from the water-closet in Markey's, then no liability can arise on the part of these defendants by reason of said renewal;" I have substantially said that it was not necessary that the³⁰ plaintiffs should show the defendants had actual knowledge of the source, the specific source from which the nuisance arose, provided he had knowledge that it was on their premises and in their control. So I cannot charge this as requested. The fifth request is, "No liability can exist in this case on the part of the defendants for any neglect or carelessness on the part of either of the Markeys in the use merely of the water-closet," that undoubtedly is the law. I think I have charged you that the use of these structures, any of them, that in them-

selves were proper and safe, is chargeable to the user. It is only when the thing they use, for which the landlord is answerable, is necessarily bad in its use.

The sixth and the seventh I have charged substantially. The eighth request is only a variance of another, and I refuse to charge further than I have charged upon that. I refuse to charge the ninth request.

Counsel for defendants prays a bill of exceptions to certain parts of the charge, as follows :

1. To that part of the charge which illustrates the
 20 question by "smelting works," or, if the builder or
 owner "puts into his building a thing that is illegal,
 or anything lawful in its nature but so badly con-
 structed that it becomes hurtful," that "he is liable
 if he lets it out to another," and also if the "tenant
 puts upon the demised premises, structures in their
 nature permanent," which would create a nuisance,
 that the landlord when the term expires "must be-
 fore reletting remove all noxious erections, if he has
 notice or knowledge that they exist," and that in
 30 such event "he has adopted the wrongful condition
 of things on the property coming back to him, and
 stands just as if he had erected it himself and had
 let it out to a stranger": To which part of the charge,
 according to the language used by the Court, a bill
 of exceptions is signed and sealed accordingly.

M. M. KNAPP, J. S. C. [L.S.]

2. To that part of the charge which dealt with the
 40 question of knowledge, and more particularly where-
 in the Court states, that "it is not necessary to a le-

gal notice, that the party injured should point out to the defendant, just where the source of the water was that came down and damaged his premises; that it is enough to show an adjoining owner, or to the landlords, in this case, that from the premises which they had control of, there came to the plaintiff's premises, a specific injury; that the defendants premises were the source of the injury to the plaintiff; and that when that notice is shown it becomes the duty of the landlord to find it out and stop it." 10
To this part of the charge and the language of the Court, a bill of exceptions is signed and sealed accordingly.

M. M. KNAPP, J. S. C. [L. s.]

3. And also to that part of the charge which states: "When one lets premises that has on it a defective structure, even though that structure has 20 been put up by another, and his attention has been so called to the injury that he ought in reason to have discovered and removed it, he becomes liable for the consequences of it, even though the actual injury is because of the tenant's use of the defective structure. A defective pipe from the water-closet or from the sinks, which, when used, would leak water upon somebody else, but harmless of course when not used, if he lets out such premises with notice of such defect, he is answerable for its use by 30 those he puts there to use it." To this part of the charge and the language of the Court, a bill of exceptions is signed and sealed accordingly.

M. M. KNAPP, J. S. C. [L. s.]

4. Also to that part of the charge which states as follows: "Did the defendants, by themselves or through their authority, erect upon these premises 40 anything that was injurious in itself, or after letting

the premises, did their tenant erect anything that was injurious in itself, and in the condition it was, did defendants subsequently, with notice given them that ought reasonably to have indicated its existence, relet it to tenants. If they did, they adopted the consequences that result from such ill condition of their property." To which a bill of exceptions is allowed and signed and sealed accordingly.

M. M. KNAPP, J. S. C. [L. s.]

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5. Also to that part of the charge which states as follows: "I have to speak of another question, that has been discussed here. the defendants claim there can be no liability in this particular case, if the injury resulted from the water-closet, or the urinal, or the basin, for this reason: They say that the tenant of the defendants, Markey, put in all these structures of his own will, for his own benefit, regarding
 20 it as his own property, and that he took it away; therefore, although in its use, it became ruinous and damaging to others, and although the term expired and the possession was cast upon the defendants, and they relet, yet no liability attached to them by reason of the ownership in the tenant Markey. I think that makes no difference. I think a structure like that, a water-closet, or a urinal or a basin put in by a tenant and attached to the premises as these were, and which comes to be ruinous, a thing that is
 30 constantly in use, and annexed to the premises, even though there be an agreement, that the tenant may, in the end, take the thing away and appropriate it as his own property, sever it from the freehold, while it is there and in use and becomes a nuisance, and it comes back in the possession of the landlord and is re-let by him, it is so far a re-letting of that thing with the premises, an adoption of the thing let, and he becomes responsible for its condition." To which a bill of exceptions is allowed and signed and sealed
 40 accordingly.

M. M. KNAPP, J. S. C. [L. s.]

6. Also to that part of the charge in reference to the illustration of the forge, and that a re-letting under those circumstances carries with it a liability. To which part of the charge and the language of the Court, a bill of exceptions is allowed, and signed and sealed accordingly.

M. M. KNAPP, J. S. C. [L. s.]

7. To that part of the charge with reference to the¹⁰ leak supposed to come from the ice-box, in which the Court says: "I think before a liability can be imposed upon a landlord through any such condition of things as the leak from such a box, it must appear that the landlord countenanced its being there, that is, by re-letting it with knowledge that it was permanently there, and that of necessity in its ordinary use it would leak and be offensive to others": subject to whatever qualification the Court made upon that subject in the charge. To which part of the²⁰ charge upon that subject matter a bill of exceptions is allowed, which is signed and sealed accordingly.

M. M. KNAPP, J. S. C. [L. s.]

8. Also to that part of the charge which states as follows: "If when the pipe was put in it was defective, or afterwards decayed, or had been gnawed by rats, the landlord letting such premises would be liable for the injury resulting from it, because necessarily³⁰ it must escape water, and if injury resulted from that he would be answerable": subject to such qualification as the Court made in reference thereto in the charge. And also to that part of the charge which allows any recovery by the plaintiff by reason of the renewal of the lease of Markey. To which a bill of exceptions is allowed, and signed and sealed accordingly.

M. M. KNAPP, J. S. C. [L. s.]

9. Also to the declination of the Court to charge each one of the requests to charge as requested that were not charged as requested, and also to the charge of the Court as charged upon each of the requests, this exception being applicable to each request and to each declination and charge thereto. And a bill of exceptions therefore is signed and sealed accordingly.

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M. M. KNAPP, J. S. C. [L. S.]

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PLAINTIFF'S EXHIBITS.

1. LEASE for five years,
by Ranken and Meyer to Ingwersen, as follows :

THIS AGREEMENT, made this ninth day of February, 10
eighteen hundred and seventy-six, Between Henry
Ranken and John D. Meyer, of the first part, land-
lords, and Augustus Ingwersen of the second part,
tenant, Witnesseth, that the said landlords have
agreed to let, and hereby do let, and the said tenant
hath agreed to take, and hereby doth take, All of
the basement story under the two stores, numbers
(34 and 36) thirty-four and thirty-six Montgomery
street, situate in Jersey City, in the County of Hud-
son and State of New Jersey, to be occupied as a 20
paint store, known as No. 34 Montgomery street, in
said city, for the term of five years, commencing the
first day of May, eighteen hundred and seventy-six,
and ending the first day of May, eighteen hundred
and eighty-one, at ten o'clock in the forenoon of
that day, at the yearly rent of five hundred dol-
lars in equal monthly payments, monthly in ad-
vance, on the first day of each and every month
during the said term, and it is further agreed that
the tenant shall keep said premises in good repair, 30
at his own cost and expense. And should the
building become injured on account of the widen-
ing of Montgomery street, or should the same be
sold by the landlords, then this lease shall cease,
and the landlords shall not be held liable for any
damages on account of the same.

This Agreement is upon the following conditions,
all, and every of which the tenant agrees to perform
and keep. That he will pay the rent at the times 40
aforesaid. That he will not let, sell, underlet or as-

sign the premises, or any part thereof, and that he will not use them, nor permit any part thereof to be used for any business or purpose extra hazardous, without the written consent of the landlords. That he will permit the landlords or their agent, to enter the said premises at reasonable hours in the day-time, to examine or make such repairs and alterations therein as the landlords shall deem necessary for the preservation thereof, and to exhibit them to
 10 persons and to put notices For Sale or To Let on the walls thereof. Also to construct water and waste pipes for the use of water in the upper part of the building.

If the premises, or any part thereof, shall become vacant or deserted during the said term, the tenant authorizes the landlords or their agent to re-enter, either by force or otherwise, without being liable to any prosecution therefor, and to re-let them, and receive and apply the rent first to the payment of the
 20 expense of re-entering, and then to the payment of the rent due by these presents. To preserve the said premises and surrender them at the time aforesaid, in as good condition as the proper use thereof will admit, damages by the elements excepted. And it is agreed that this instrument, on the breach of any of its conditions, shall, and at the option of the landlords may be rescinded, and that they may recover immediate possession of the premises, "for
 30 holding over after the expiration of the term," without any other than this notice of the intention of the landlords to re-enter.

In witness whereof, the parties hereto have set their hands and seals the day and year first above written.

JOHN D MEYER, [L. s.]

A. INGWERSEN, [L. s.]

HENRY RANKEN, [L. s.]

Executed and delivered }
 40 in the presence of }

HENRY SEEDORFF.

2. LEASE—

May 1st, 1877, to May 1st, 1879, by Ranken and Meyer to Owen Markey, as follows :

THIS AGREEMENT, made this tenth day of April, eighteen hundred and seventy-seven, between Henry Ranken and John D. Meyer of the first part, landlords, and Owen Markey, of the second part, tenant, witnesseth, that the said landlords have agreed to let, and hereby do let, and the said tenant hath¹⁰ agreed to take, and hereby doth take, All of that certain store in the Commercial Building, situate on the northwesterly corner of Montgomery and Greene streets, in Jersey City, in the County of Hudson, and State of New Jersey; the part of the store fronting on Montgomery street to be occupied as a segar store; (The wooden building situate between the rear of the Commercial Building and the building heretofore known as the Commercial Hotel, fronting²⁰ on Greene street, is not included in this agreement,) known as No. 34 Montgomery, in said city, for the term of two years, commencing the first day of May, eighteen hundred and seventy-seven, and ending the first day of May, eighteen hundred and seventy-nine, at ten o'clock in the forenoon of that day, at the yearly rent of fifteen hundred dollars, in equal monthly payments, monthly in advance, on the first day of each and every month, during the said term. The tenant also agrees to pay all extra water³⁰ rates for bar, water closet, urinal and soda fountain, or any other extra water rates that may be assessed on said premises during the said term, and also to keep all of the plumbing work in good repair at the tenant's own cost and expense.

This Agreement is upon the following conditions, all, and every of which the tenant agrees to perform and keep. That he will pay the rent at the times aforesaid. That he will not let, sell, underlet, or assign the premises, or any part thereof, and that he⁴⁰ will not use them, nor permit any part thereof to be

used for any business or purpose extra hazardous, without the written consent of the landlords. That he will permit the landlords or their agent, to enter the said premises at reasonable hours in the day time, to examine or make such repairs and alterations therein as the landlords shall deem necessary for the preservation thereof, and to exhibit them to persons and to put notices For Sale or To Let on the walls thereof.

- 10 If the premises, or any part thereof, shall become vacant, or deserted during the said term, the tenant authorizes the landlords or their agent to re-enter, either by force or otherwise, without being liable to any prosecution therefor, and to re-let them, and receive and apply the rent first to the payment of the expense of re-entering, and then to the payment of the rent due by these presents. To preserve the said premises and surrender them at the time aforesaid, in as good condition as the proper use thereof will
- 20 admit, damages by the elements excepted. And it is agreed that this instrument, on the breach of any of its conditions, shall, and at the option of the landlords may be rescinded, and that they may recover immediate possession of the premises, "for holding over after the expiration of the term," without any other than this notice of the intention of the landlords to re-enter.

In witness whereof, the parties hereto have set their hands and seals the day and year first above

30 written.

HENRY RANKEN, [L. S.]
 JOHN D. MEYER, [L. S.]
 By their Attorney in fact,
 DAVID W. STONE,
 O. MARKEY. [L. S.]

Executed and delivered }
 in the presence of }

DEFENDANTS' EXHIBIT.

1. MAP.

— —

2. LEASE, 10

by Ranken and Meyer to Owen Markey, from
May 1, 1879, to May 1, 1882, as follows :

THIS AGREEMENT, made this twenty-third day of April, eighteen hundred and seventy-nine, Between Henry Ranken and John D. Meyer by Geo. W. Firth, agent, of the first part, landlords, and Owen Markey, of the second part, tenant, Witnesseth that the said landlords has agreed to let, and hereby does let, and the said tenant has agreed to take, and hereby does take, all of that certain store in the Commercial Building being the corner of Greene and Montgomery street (not including the space between the rear of said building and the building heretofore known as the Commercial Hotel), and by the street number situate and known as No. 34 Montgomery street in Jersey City, Hudson County and State of New Jersey, for the term of three years, commencing the first day of May, eighteen hundred and seventy-nine, and ending the first day of May, eighteen hundred and eighty-two, at ten o'clock in the forenoon of that day, at the yearly rent of fifteen hundred dollars in equal monthly payments in advance, that is to say, the sum of one hundred and twenty-five dollars on the first day of each month during said term. 20

This Agreement is upon the following conditions, all, and every which, the tenant agrees to perform and keep. That he will pay the rent at the times aforesaid. That he will not let, sell, underlet, or assign the premises, or any part thereof, and that he 40

will not use them, nor permit any part thereof to be used for any business or purpose, extra-hazardous, without the written consent of the landlord. That he will permit the landlords or their agent, to enter the said premises at reasonable hours in the day time, to examine or to make such repairs and alterations therein as shall be necessary for the preservation thereof; and to exhibit them after the first day of February, 1882, to persons and to put notices "For
 10 Sale or To Let" on the walls thereof. If the premises, or any part thereof, shall become vacant, or deserted, during the said term, the tenant authorizes the landlords or their agent to re-enter either by force or otherwise, without being liable to any prosecution thereof and to re-let them, and receive and apply the rent first to the payment of the expense of re-entering, and then to the payment of the rent due by these presents. To preserve the said premises,
 20 and surrender them at the time aforesaid, in as good condition as the proper use thereof will admit, damages by the elements excepted. Any damage done by bursting of water pipes from freezing, or overflow of wash-basins, sinks, wash tubs or bath, shall be made good by said tenant at his expense. And it is agreed that this instrument, on the breach of any of its conditions, shall, and, at the option of the landlord may be, rescinded; and that he may recover immediate possession of the premises; "for
 30 holding over after the expiration of the term," without any other than this notice of the intention of the landlord to re-enter; the tenant also agrees to pay all extra water rates for bar, water-closet, urinal and soda fountain or any other water rate that may be assessed on said premises during said term, and also to keep all of the plumbing work in good repair at the tenant's own cost and expense.

In witness whereof, the parties hereto have set

their hands and seals the day and year first above
written.

GEO. W. FIRTH, Agent. [L. s.]
OWEN MARKEY. [L. s.]

Executed and delivered }
in presence of }
ROBERT B. SMITH.

10

3. LEASE

by Ranken and Meyer to Owen Markey, from
from May 1, 1877, to May 1, 1879.

See page 151 ante, for copy.
[Same Exhibit offered by plaintiff.]

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ASSIGNMENT OF ERRORS.

Afterwards, that is to say, on the 30th day of June, in the year of our Lord one thousand eight hundred and eighty-five, in the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey, come the said Henry Ranken and John D. Meyer, by William A. Lewis, their attorney, and say that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict and the judgment aforesaid, there is manifest error:

1st. In this, that the said Justice before whom the said cause was tried below, admitted in evidence from the printed book of the former trial, the testimony of Mr. Ingwersen, page 5, as follows: "You
 20 "occupied under this lease from the 1st of May,
 "1876? A. Yes, sir. Q. What occurred during that
 "summer as to the condition of these premises?
 "A. About the end of July or beginning of August
 "the water came on me, flowing constantly to such
 "an extent that it was almost impossible to leave
 "our goods where they were placed; I had to shift
 "them around in order to save them from being
 "damaged. Q. What did you do when the water
 "came down upon you? A. I went to Mr. Meyer's
 30 "store in New York, and complained about it; he
 "said that they had an agent, and I must go to his
 "agent, Mr. Stone. I told Mr. Meyer the condition of
 "things and then I went to Mr. Stone and told him the
 "condition of it; he said he was going to see about
 "it. Q. Did it get any better after that? A. No;
 "it might be for a day or two, but afterwards it was
 "just as bad as it was before."

2d. And also there is error in this, that the said
 40 Justice admitted in evidence, from the said printed
 book, the testimony of Mr. Ingwersen, from page 6,

line 26, as follows: "How long did you stay in the building? A. Until May, 1877; then I went out, because it was almost impossible to stay there; it was so damp, and the water was coming down all the time; we could not do our business there."

3d. And also there is error in this, that the said justice admitted in evidence, from the said book, the testimony of Mr. Ingwersen, from page 18, line 38: "Q. How much water in any one day came through 10 into your premises and not from the river? A. I cannot say; sometimes more, and sometimes less." On page 19: "Q. You could not discover where it came from? A. No; I never was able to discover where it came from; when I went into Markø's we never could find any water on the floor. Q. Did you go up to the apartments occupied by your counsel, Mr. Linn? A. Yes, but not for that purpose; I went there with the agent one day—Mr. Firth; then the water was running; a man wanted 20 to hire the place of me, and he would take it if I would make it dry; then I went to Mr. Firth to get him to have it fixed; that was in 1880; because I had a good tenant I was very anxious to rent it—to get all the money out of it that I could."

4th. And also there is error in this, that the said Justice admitted in evidence, from the said book, the testimony of Mr. Ingwersen, as follows: "Q. How much water in any one day came through 30 into your premises, and not from the river? A. I cannot say; sometimes more, sometimes less. Q. Did it pour through? A. It looked to me sometimes as if it rolled through like a waterfall. Q. How much did you stand and watch it in that way and see it run at a time? A. We could stand some time, until we got tired. Q. You could not discover where it came from? A. No, I never was able to discover where it came from; when I went into Markey's we never could find any water on the 40 floor."

5th. And also there is error in this, that the said Justice admitted in evidence, from the said book, the testimony of Mr. Ingwersen, as follows: "Q. Did you go up to the apartments occupied by your counsel, Mr. Linn? A. Yes, but not for that purpose; I went there with the agent one day, Mr. Firth; then the water was running; a man wanted to hire the place of me, and he would take it if I would make it dry; then I went to Mr. Firth to get him to have it fixed; that was in 1880; because I had a good tenant I was very anxious to rent it, to get all the money out of it that I could."

6th. And also there is error in this, that the said Justice denied the motion to non-suit plaintiff, and refused to allow a non-suit to be entered.

7th. And also there is error in this, that the said Justice, in his charge to the jury, illustrated the question by "smelting works," and charged the said jury, that if the builder or owner puts into his building a thing that is illegal, or anything lawful in its nature but so badly constructed that it becomes hurtful, he is liable if he lets it out to another; and also if the tenant puts upon the demised premises structures in their nature permanent, which would create a nuisance, that the landlord, when the term expires, must, before re-letting remove all noxious erections, if he has or notice knowledge that they exist, and that in such event he has adopted the wrongful condition of things on the property coming back to him, and stands just as if he had erected it himself and had let it out to a stranger.

8th. And also there is error in this, to wit, that part of the charge of the Court which dealt with the question of knowledge, and more particularly wherein the said Justice states and charges that it is not necessary to a legal notice, that the party injured should point out to the defendant just where the source of the water was that came down and damaged

his premises; that it is enough to show an adjoining owner, or to the landlords, in this case, that from the premises which they had control of, there came to the plaintiff's premises a specific injury; that the defendants premises were the source of the injury to the plaintiff; and that when that notice is shown it becomes the duty of the landlord to find it out and stop it.

9th. And also there is error in this, that the said Justice charged the said jury that when one lets premises that has on it a defective structure, even though that structure has been put up by another, and his attention has been so called to the injury that he ought in reason to have discovered and removed it, he becomes liable for the consequences of it, even though the actual injury is because of the tenant's use of the defective structure. And if a defective pipe from the water-closet or from the sinks, which, when used, would leak water upon somebody²⁰ else, but harmless of course when not used, if he lets out such premises with notice of such defect, he is answerable for its use by those he puts there to use it.

10th. And also there is error in this, that the said Justice charged the said jury: Did the defendants, by themselves or through their authority, erect upon these premises anything that was injurious in itself, or after letting the premises did their³⁰ tenant erect anything that was injurious in itself, and in the condition it was, did defendants subsequently, with notice given them that ought reasonably to have indicated its existence, re-let it to tenants. If they did, they adopted the consequences that result from such ill condition of their property.

11th. And also there is error in this, that the said Justice charged the said jury: I have to speak⁴⁰ of another question that has been discussed here.

The defendants claim there can be no liability in this particular case if the injury resulted from the water-closet, or the urinal, or the basin, for this reason: They say that the tenant of the defendants, Markey, put in all these structures of his own will, for his own benefit, regarding it as his own property, and that he took it away; therefore, although in its use, it became ruinous and damaging to others, and although the term expired and the possession was cast upon the defendants, and they re-let, yet no liability attached to them by reason of the ownership in the tenant Markey. I think that makes no difference. I think a structure like that, a water-closet, or a urinal or a basin put in by a tenant and attached to the premises as these were, and which comes to be ruinous, a thing that is constantly in use, and annexed to the premises, even though there be an agreement, that the tenant may, in the end, take the thing away and appropriate it as his own property, sever it from the freehold, while it is there and in use and becomes a nuisance, and it comes back in the possession of the landlord and is re-let by him, it is so far a re-letting of that thing with the premises, an adoption of the thing let, and he becomes responsible for its condition.

12th. And also there is error in this, that the said Justice, in his charge to the jury, in reference to the illustration of the forge, charged the said jury that a re-letting under those circumstances carries with it a liability.

13th. And also there is error in this, that the said Justice charged the said jury: I think before a liability can be imposed upon a landlord through any such condition of things as a leak from such a box, it must appear that the landlord countenanced its being there, that is, by re-letting it with knowledge that it was permanently there, and that of necessity in its ordinary use it would leak and be offensive to others.

14th. And also there is error in this, that the said Justice charged the said jury: If when the pipe was put in it was defective, or afterwards decayed, or had been gnawed by rats, the landlord letting such premises would be liable for the injury resulting from it, because necessarily it must escape water, and if injury resulted from that he would be answerable. And also there is error in that part of the charge which allows any recovery by the plaintiff by reason of the renewal of the lease of Markey. 10

15th. Also there is error in this, that the said Justice refused to charge the said jury as he was requested by the counsel for the defendant, below, each one of the requests, and as requested; this assignment being applicable to each of the requests.

16th. Also there is error in this, that the said Justice refused to charge the second, third, fourth, 20 fifth, sixth, seventh and eighth requests as requested, and charged thereon in reference to each of said requests, as the same appears in his charge upon each of said requests, (pro ut the charge thereon upon each request.)

17th. And also there is error in this, that the judgment aforesaid, in form aforesaid, was given for the said August Ingwersen against the said Henry Ranken and John D. Meyer; whereas, by the law of 30 the land, the said judgment ought to have been given for the said Henry Ranken and John D. Meyer against the said August Ingwersen.

And the said Henry Ranken and John D. Meyer pray that the judgment aforesaid, for the errors aforesaid, and for other errors in the said proceedings being, may be reversed, annulled, and altogether holden for nought, and that the said Henry Ranken and John D. Meyer, plaintiffs in error, may be re-40

stored to all things they have lost by occasion of the said judgment.

WILLIAM A. LEWIS,
Attorney for Pltffs. in Error.

JOSEPH D. BEDLE,
Of Counsel with Pltffs. in Error.

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Joinder in error, in usual form.

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