Evidence—Admissibility of Evidence of Subsequent Accident to Prove Dangerous Condition—[Minnesota].—Plaintiff sued for damages sustained when she fell on defendant's waxed linoleum floor, which had become wet and slippery. The trial court excluded evidence of another person's fall in nearly the same spot fifteen minutes later. *Held*, the exclusion was error. The subsequent accident may be used to show the dangerous condition of the floor. *Taylor v. Northern States Power Co.*, 256 N.W. 674 (Minn. 1934).

The use of similar accidents as evidence of a dangerous condition presupposes a case where it is not obvious that the condition is dangerous, for if it is obvious, the evidence will be excluded because it is unnecessary, even though it may be relevant and of high probative value. There is a split of judicial authority on the question of using similar accidents as evidence. See 65 A.L.R. 380. The conflict is traceable to three sources:

(1) The case of *Collins v. Dorchester*, 60 Mass. 396 (1850), established an absolute rule of exclusion, instead of leaving the matter open for the court to decide whether, in various situations, the probative value of the evidence was disproportionate to any prejudice it might cause. Twenty-two years later a contrary trend was started by *Darling v. Westmoreland*, 52 N.H. 401 (1872), which repudiated the Massachusetts rule of absolute exclusion. However, the influence of *Collins v. Dorchester* is still alive. See 1 Wigmore, Evidence (2d ed. 1923), § 458. In *Mathews v. City of Cedar Rapids*, 80 Iowa 459, 45 N.W. 894 (1890), for example, the court decried the precedent it felt itself obliged to follow. A reason sometimes given for the exclusion is that evidence of other accidents will raise collateral issues which the defendant is not prepared to meet. *Temperance Hall Ass'n v. Giles*, 33 N.J. L. 260, (1869); *Hoyt v. Des Moines*, 76 Iowa 430, 41 N.W. 63 (1888); McKelvey, Evidence (4th ed. 1932), 196. But the argument that collateral issues are raised has not been considered especially persuasive. *Quinlan v. City of Utica*, 11 Hun (N.Y.) 217 (1877), aff'd in 74 N.Y. 603 (1878). And the objection of surprise can be urged no more strongly here than against almost any other type of evidence. A defendant should be prepared to meet any proof of his negligence. 1 Wigmore, Evidence (2d ed. 1923), § 443.

(2) A second source of the conflict in the cases on this point lies in the failure of courts to distinguish clearly between the two uses of such evidence. It is important to note that evidence of similar accidents may be used to prove (a) existence of a dangerous condition: *Scott v. New Orleans*, 75 Fed. 373 (C.C.A. 5th 1896); or (b) notice: *Yates v. Covington*, 119 Ky. 228, 83 S.W. 592 (1904). Some courts, see *Aaronson v. New Haven*, 94 Conn. 690, 110 Atl. 872 (1920), mention a third use—actionable negligence; but it is difficult to see what they mean since the only actionable negligence there can be must arise either from the creation of a dangerous condition or from notice.

(3) Courts tend to use the ambiguous term "other accidents," not specifying whether they were prior or subsequent, or the use to which the evidence of "other accidents" is to be put. This leads to confusion, since a subsequent accident could not be used to prove notice of a dangerous condition. See *District of Columbia v. Armes*, 107 U.S. 519 (1882); *Nye v. Dibley*, 88 Minn. 465, 93 N.W. 524 (1903).

A majority of courts now admit evidence of accidents prior to the one actually being sued for, to prove the existence of a dangerous condition. But there is less agreement on the use of subsequent accidents to prove the same thing. See *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N.W. 955 (1892); 65 A.L.R. 380.

It is submitted that whether the similar accident occurred before or after the one in suit should be immaterial, if the similar accident is being used to prove a dangerous condition. *Cook v. New Durham*, 64 N.H. 419, 13 Atl. 650 (1887); *Masters v. Troy*, 50 Hun (N.Y.) 485 (1888), aff'd in 123 N.Y. 628, 25 N.E. 952 (1890); *Freidman v. New York*, 63 Misc. 310, 116 N.Y.S. 750 (1909); but see *Davis v. Alexander City*, 137 Ala. 206, 33 So. 863 (1902). In any event, however, it must of course appear that both the main and the similar accident occurred under substantially the same conditions. *Griffith v. Denver*, 55 Colo. 37, 132 Pac. 57 (1913); *City of Aurora v. Plummer*, 122 Ill. App. 143 (1905). See *Gillrie v. Lockport*, 122 N.Y. 403, 25 N.E. 357 (1890), where, in an action against a town for injuries sustained by slipping on a defective sidewalk, evidence that another person slipped at the same place two years before was held inadmissible for any purpose, since it was not shown that the earlier accident was caused by a defect in the sidewalk. The instant case undoubtedly reached a sound result. The subsequent accident was of considerable probative value in showing the dangerous condition of the floor. Moreover, the subsequent accident was shown to have occurred only fifteen minutes after the main one, and while conditions were practically the same

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Federal Procedure—Review of Order to Remand—[United States].—Plaintiff, a citizen of Texas, brought suit in a Texas state court against two contractors and the city of Waco, Texas, for damages caused by a street obstruction. The city, under the Texas practice, vouched in a surety company by cross-action. The surety company, a Maryland corporation, removed the entire suit to the federal district court on the ground of diversity of citizenship, asserting that a separable controversy existed as to it. On plaintiff's motion to dismiss the cross-action and remand, the district court held that the controversy was separable, and over-ruled the motion to remand; that the surety company was an unnecessary party to plaintiff's suit and granted the motion to dismiss the cross-suit; and that the cross-suit having been dismissed, there no longer was any diversity of citizenship to give the federal court jurisdiction, and remanded the suit to the state court. The city appealed the dismissal order, but the Circuit Court of Appeals dismissed the appeal, holding that the district court's dismissal could not be reviewed, since an order to remand is not reviewable. *City of Waco, Texas, v. United States Fidelity & Guaranty* Co., 67 F. (2d) 785 (C.C.A. 5th 1933). The Supreme Court *held:* the order of dismissal, if not reviewed, is conclusive on the city's rights. Hence, even though the order to remand is not reviewable the Circuit Court of Appeals erred in not passing on the merits of the dismissal. *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934).

The Supreme Court reasoned that while the action can no longer be tried as a unit in the federal court, still, the entire action can be tried by the state court if the dismissal order is overruled. The Circuit Court of Appeals evidently felt the same result was reached by its decision since it states that both the cross-action and the main suit were pending in the state court, and the dismissal of the cross-action would not be *res adjudicata*.

Since the passage of § 28 of the Judicial Code (36 Stat. 1094 (1911), 28 U.S.C.A., § 71 (1927)) providing that no appeal or writ of error will be allowed from an order or remand, only once has a federal court negatived such an order. *Travelers' Protective Assn. v. Smith*, 71 F. (2d) 511 (C.C.A. 4th 1934). There, after the defendant had properly removed the case to the federal court, the plaintiff remitted all damages over