

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

---

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

\$3000. The district court remanded the case, holding that it had been divested of jurisdiction since the jurisdictional amount was no longer involved. The Circuit Court of Appeals refused to review the order on the ground that the order to remand not being a final judgment was not reviewable. It did, however, allow a petition to be filed for mandamus to compel the district court to try the case pointing out that the order to remand had been made, not under § 28 on the ground of improper removal, but under § 37 of the Judicial Code, which did not prohibit review, on the ground that the case was not in the jurisdiction of the District Court. 36 Stat. 1098 (1911), 28 U.S.C.A. § 80 (1927). See 48 Harv. L. Rev. 512 (1935).

Other attempts to secure review of orders of remand seem to have been unsuccessful. See *In re Pennsylvania Co.*, 137 U.S. 451 (1890); and *Ex parte Matthew Addy Steamship & Commerce Corp.*, 256 U.S. 417 (1921), involving refusal grant mandamus; *McLaughlin Bros. v. Hallowell*, 228 U.S. 278 (1913); *Yankaus v. Feltenstein*, 244 U.S. 127 (1917), which came up on writs of error from state courts after the issues following remand had been decided; *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440 (1916); *Missouri Pac. Ry. v. Fitzgerald*, 160 U.S. 556 (1896). Prior to the *Travelers'* case the nearest approach to review of a remanding order was the vacating of a remand order by a court on its own motion. *Empire Mining Co. v. Propeller Tow-boat Co.*, 108 Fed. 900 (C.C.S.C. 1901). But it has been held that it is improper for a district court to have anything further to do with a case after a remanding order has been entered. *St. Paul & Chicago Ry. Co. v. McLean*, 108 U.S. 212 (1883); *Ausbrooks v. Western Union Telegraph Co.*, 282 Fed. 733 (D.C. Tenn. 1921); *Mead Morrison Mfg. Co. v. Marchant*, 29 F. (2d) 40 (C.C.A. 2d 1928), cert. denied, 278 U.S. 655 (1928).

The *Travelers'* case seems to stand alone for the proposition that there is a distinction between orders of remand entered because the case was improperly removed (under § 28) and orders of remand where the removal was proper but the jurisdiction of the court (under § 37) was subsequently lost. The instant case disregards this distinction. The court lost jurisdiction only by virtue of an order entered after the removal. Although the distinction in the *Travelers'* case may complicate the law unnecessarily, it does not necessarily follow that the decision in the principal case is desirable. As the principal case stands, should the Circuit Court of Appeals, in complying with the Supreme Court's order, find that the cross-action was improperly dismissed, an anomalous situation will result. The remand, which is not reviewable, has been ordered solely on the basis of an erroneous decision on another point. And although the error has been corrected, the remanding order must stand. It would seem that § 28 would not be violated, if the district court is allowed to re-examine the propriety of the remand where the remand is entered only because of the court's decision on a reviewable question and that decision is reversed.

---

Labor Law—Validity of Collective Bargaining Agreement—[New Jersey].—Plaintiff, labor union, sought to enjoin the defendant upholstering company from violating a "closed shop" agreement by which the defendant had promised to hire only members of the union if they could be furnished, and if they could not, to hire non-union men only on condition that they first apply for membership in the union. *Held*, the contract is part of a general plan to unionize the whole industry in the metropolitan area, and being monopolistic is therefore opposed to public policy and void. *Upholsterers', C. & L. M. I. Union v. Essex Reed and Fibre Co., Inc.*, 12 N.J. Misc. 637, 174 Atl. 207 (1934).