INDEX.

TESTIMONY.

JOSEPH E. BERNSTEIN.

PATRICK J. HAMMILL, M. D.

Hudson County Circuit Court

HELEN GARLAND,
Plaintiff,
vs.
THE FURST STORE, A CORPORATION,
Defendant.

COMPLAINT.

The plaintiff, Helen Garland, residing at No. 192 Mercer street, in the City of Jersey City, County of Hudson and State of New Jersey, says that:

First Count.

1. At the time herein stated, defendant owned and controlled a department store, known as the Furst Store, located at No. 129 Newark avenue, in the City of Jersey City, County of Hudson and State of New Jersey.

2. At the time defendant maintained a slippery tile floor in the basement of the said department store, which from its very nature and from its negligent manner of construction, was dangerous to persons walking upon the said floor, as the defendant well knew.

3. On May 20th, 1916, while plaintiff was walking upon said tile floor as she lawfully might, she was precipitated to the ground by reason of the slippery condition of the said floor, due to the negligence of the defendant, when her left hip was fractured and she was otherwise severely injured, suffered great pain and was prevented from pursuing her occupation of saleslady, and was made a

cripple for life. Plaintiff was obliged to spend $100.00 for medicine and medical care and attendance.

Plaintiff demands $20,000 damages on the first count.

Second Count.

1. Plaintiff reiterates in this paragraph the matters set forth in the first paragraph of the first count.

2. At that time defendant maintained a tile floor in the basement of the said department store which it negligently suffered to become slippery and dangerous to persons walking upon said floor, as defendant well knew.

3. Plaintiff reiterates in this paragraph the matters set forth in the third paragraph of the first count.

Plaintiff demands $20,000 on the second count.

DOHERTY & KINKEAD,
Attorneys for Plaintiff.

Filed Clerk's Office,
Jan. 16, 1917,
Hudson County, N. J.
JOHN J. McGOVERN,
Clerk.

ANSWER

HUDSON COUNTY CIRCUIT COURT.

HELEN GARLAND, *Plaintiff*, *vs.* THE FURST STORE, A CORPORATION, *Defendant.*	*Action at Law.*

ANSWER.

The defendant says:

Answer to First Count.

1. It admits the allegations and facts set forth and contained in paragraph one of the first count.

2. It denies all the allegations contained in paragraphs two and three of the first count.

Answer to Second Count.

1. It denies all the allegations and facts set forth and contained in the second count of the complaint filed herein.

DEFENSES.

1. The said alleged accident set forth in the first and second count of the complaint filed herein, resulted solely from the negligence of the plaintiff.

2. At the time of the happening of the said alleged accident set forth in the first and second counts of the complaint filed herein, the said plaintiff was guilty of contributory negligence.

RUNYON & AUTENRIETH,
Attorneys for Defendant.

Filed Clerk's Office,
Jan. 19, 1917,
Hudson County, N. J.
JOHN J. McGOVERN,
Clerk.

REPLY.

The plaintiff for a reply to the answer herein filed says:

It denies all the allegations sets forth and contained in the first and second paragraphs of the defenses in the answer.

DOHERTY & KINKEAD,
Attorneys of Plaintiff.

Filed Clerk's Office,
Jan. 22nd, 1917,
Hudson County, N. J.
JOHN J. McGOVERN,
Clerk.

RULE FOR JUDGMENT

HUDSON COUNTY CIRCUIT COURT.

HELEN GARLAND, *Plaintiff*, *vs.* THE FURST STORE, a Corporation, *Defendant.*	*Rule for Judgment on Verdict.*

The action was tried before Judge Willard Cutler, with a jury, in the presence of counsel for the respective parties on January 9, 1918.

The cause having been heard and submitted to the jury, they returned their verdict in the favor of the plaintiff and against the defendant, in the sum of two thousand ($2,000) dollars.

Whereupon it is ordered on this eighteenth day of January, 1918, that judgment final be entered in favor of the plaintiff and against the defendant for the sum of two thousand ($2,000) dollars, and costs of suit to be taxed.

WILLARD CUTLER,
Judge.

Rule actually entered this 18th day of January, 1918.

On motion of
DOHERTY & KINKEAD,
Attorneys of Plaintiff.

NOTICE OF APPEAL

HUDSON COUNTY CIRCUIT COURT.

HELEN GARLAND, *Plaintiff*, *vs.* THE FURST STORE, a Corporation, *Defendant.*	*Action at Law.* *Notice of Appeal.*

To Messrs. Doherty & Kinkead, Attorneys for Plaintiff:

Please take notice that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause upon the following grounds:

1. The Court committed error in refusing defendant's motion to non-suit.

2. Because the Court committed error in refusing defendant's motion to direct a verdict.

3. Because the evidence does not disclose any negligence on the part of the defendant.

4. Because under the evidence there was no negligence proven and no inference to send the case to the jury for their consideration.

5. Because the plaintiff did not make out a cause of action, and it was, therefore, error to permit the jury to pass upon the evidence.

RUNYON & AUTENRIETH,
Attorneys of Defendant-Appellant.

HUDSON COUNTY CIRCUIT COURT.

HELEN GARLAND, *vs.* THE FURST STORE.	}	*Action at Law.*

Tried January 9, 1918, 10.00 A. M., before Hon. Willard W. Cutler, J., and a jury.

Messrs. DOHERTY & KINKEAD (by Robert H. Doherty, Esq.), for plaintiff.

Messrs. RUNYON & AUTENRIETH (by Jos. F. Autenrieth, Esq.), for defendant.

Jury sworn 11:20 A. M.

HELEN GARLAND, sworn.

Direct examination by Mr. Doherty.

Q. Mrs. Garland, where do you live? A. 194 Mercer street, at the present time.

Q. On or about May 20, 1916, were you present in the Furst Store, Newark avenue? A. Yes, sir.

Q. What time was it that you were present there? A. I got in about twenty after five.

Q. About twenty after five? A. Yes, sir.

Q. What did you do in the store; what were you doing there? A. I was shopping.

Q. Shopping; how long had you been in the store? A. I was in the store from about twenty after five until a quarter to six.

Q. Where did you go when you went into the store first? A. On the second floor.

Q. After you were finished on the second floor,

did you have occasion to go to the basement? A. To the basement to buy shoes.

Q. Did you buy shoes? A. Yes, sir; I bought the shoes.

Q. What particular part of the basement was it that you bought the shoes? A. In the back of the store, back part of the basement; that was the shoe department.

Q. Shoe department? A. In the rear.

Q. And after you purchased those shoes, where did you go to from there? A. After I bought the shoes and she gave me the package to me, she handed me the shoes and two slips and I had a slip from the purchase I got upstairs, and I took the two slips and I went to the desk where they give out the stamps.

Q. You went to the desk? A. Where they give out the green stamps.

Q. At this particular department of the store where they sold the shoes, did you notice the appearance of the floor at that point? A. Well, at that time I did; I noticed the floor was clean.

Mr. AUTENRIETH—I object to anything more than the answer that she noticed it.

Mr. DOHERTY—Yes.

Q. Did you notice the floors? A. Yes, sir; I noticed the floors.

Q. What material was the floor made of?

Mr. AUTENRIETH—I object to that unless the witness is qualified.

Q. Was it a wooden floor or a tile floor? A. It was a tile floor or marble, whatever you call it.

Mr. Autenrieth—What was that answer?

(Answer read by the stenographer.)

Q. Was there any carpets on the floor at that point? A. Where the shoes was sold there was runners on the floor.

Q. Where did that runner go that runs from that department? A. It didn't run to where I was to get the stamps.

Q. Where did it go? A. Out along where the shoe department.

Q. Now, when you started from this particular point where you bought the shoes to the desk where you were to take this slip, did you walk on the carpet or on a bare floor? A. Bare floor.

Q. What was the nature of that floor; was it stone or wood or what was it?

Mr. Autenrieth—I object to that.

A. It was stone; it was marble, I mean.

Q. Was it the same construction as this floor here (indicating floor of the Court room)? A. No, not like that; more slippy, it seems.

Q. What happened to you, if anything, while you were walking from the shoe department up to this other counter? A. I just walked along from where I got the package to the stamp desk, and as I got to the side to go to hand my slip my two feet was taken and I had slipped down on my left hip.

Q. At any time while you were in the store, did you notice the condition of this particular passage-way that lead from the point where you purchased shoes to the point where you fell? A. I noticed that it was clean, nice and clean; I even passed a remark to my girl how clean—

Mr. AUTENRIETH—I object to the remark.

Q. Not the remark; I want you to tell us just what you saw; did you take any notice—

Mr. AUTENRIETH—She said it was nice and clean.

Mr. DOHERTY—She didn't finish her answer.

Q. Did you finish your answer? A. Did I notice—

Q. What happened to you after you fell down? A. After I fell down?

Q. Yes. A. I wasn't able to get up; I know that

Q. Well, were you knocked unconscious? A. Not quite unconscious.

Q. How long did you lay there? A. Well, about five—seven minutes.

Q. Do you know who picked you up, if anybody? A. Some man picked me up; my girl was with me, but she was not able to pick me up.

Q. What happened after that? A. Then the girl asked them to get me a drink of water—

Q. Where did you go? A. (Continuing)—and they got me smelling salts off the counter; they got a chair and let me lean against the high chair, as I was not able to stand and I wasn't able to sit; there was nothing to sit on and they got a high stool—a high chair—and let me lean against it; and the kept me there with smellings salts and kept me up; and they brought some man, I don't know who he was, but after I found he was a doctor, it was Dr. Dixon.

Q. Did he attend to you there? A. No, he just took me by the arms and asked me to raise —I wasn't able to raise,—I was leaning against the chair, so

—I don't know what he said, but about half an hour after they had an ambulance for me, and I didn't want to go in the ambulance; I wanted to go home to my children—

Q. Did you go home? A. About half an hour or an hour after that I got a coach and sent me home, took me home.

Q. What time did you get home? A. I got home after eight o'clock.

Q. When you got home did you call in a doctor? A. They had already telephoned for Dr. Hammill; Dr. Hammill came to me at nine o'clock; he said he—

Q. Did he treat you? A. He said he couldn't do nothing for me in the house, that I would have to be sent to the hospital.

Q. Did you go to the hospital? A. When the ambulance come at eleven o'clock, it took me to the hospital.

Q. Did Dr. Hammill treat you at the hospital that night? A. Not that night.

Q. Did Dr. Hammill see you afterwards at the hospital? A. Yes, sir; he saw me afterwards at the hospital?

Q. When? A. About Tuesday or Wednesday.

Q. How many days after the accident was that? A. About—

Q. What was the day of the accident? A. The day of the accident was Saturday.

Q. And he saw you the following—A. Tuesday.

Q. Did he treat you the following Wednesday? A. He ordered the hospital doctors to attend to my leg.

Q. I mean did he treat you? A. No, he didn't treat me then.

Q. Did he ever afterwards treat you at the hospital? A. The following Wednesday he examines

my leg again, and then he had them to have the X ray on it.

Q. What doctor was it that treated you at the hospital? A. I didn't know the doctor's name; there were several doctors—Dr. Mooney was one.

Q. Did Dr. Hammill take any part in the treatment of your injuries while you were at the hospital? A. Then his time was up in that hospital; his month was up and after it was Dr. Mooney.

Q. How long were you in the hospital? A. Two months.

Q. Did Dr. Hammill ever come in and examine you after that? A. No, he was not allowed in because I was not paying.

Q. I mean, during the last of the two months. A. No, he was not.

Q. Did you have occasion afterwards to consult Dr. Hammill at your home? A. Yes, when I come home, two months after, when he started to treat me again; why Dr. Hammill was called in that night when I come home and he examined my leg and he said my leg—

Mr. AUTENRIETH—I object—

Q. Don't tell us what he said. How many calls did Dr. Hammill make after this? A. He came every day for five weeks after I got home.

Q. Four or five weeks? A. Yes, sir; my knee in in a plaster cast.

Q. When did you last see Dr. Hammill? A. I seen Dr. Hammill—

Q. I mean as far as treatments of your injury. A. I seen him about six months ago

Q. At the time of this accident, Mrs. Garland, were you employed any place? A. Yes, sir.

Q. Where were you employed? A. J. W. Greene furniture store.

Q. What were you doing there? A. Cleaning.

Q. How long had you been working there? A. Six years.

Q. Six years? A. Yes, sir.

Q. What wages were you receiving? A. Eight dollars a week at that time.

Q. Had you worked steadily for the six years? A. Yes, sir.

Q. How much time had you lost? A. I didn't lose many days—maybe a day in six months.

Q. Have you worked any since the date of the accident? A. No, sir; I haven't been able to.

Q. Just what have you been able to do since the accident? A. I haven't been able to do much; I haven't been able to do anything around the house, just limp around when I can go about the home, with a cane.

Q. Have you been out— A. No, sir; I haven't been out since October; this is the first day since October.

Q. This is the first day since October? A. Yes, sir.

Q. When you are walking around the house you say you have to use a cane? A. Yes, sir.

THE COURT—Anything further?

MR. DOHERTY—That is all.

THE COURT—Cross-examine.

Cross-examination by Mr. Autenrieth.

Q. Had you been working in Greene's on this day of the accident? A. Yes, sir.

Q. What are your hours? A. My hours were from six in the morning until five o'clock.

Q. Until five o'clock? A. Yes, sir.

Q. And after you got through— A. That was on Saturdays, on Saturdays.

Q. And after you got through with your work at Greene's you went around to the Furst Store to do

some shopping? A. Yes, sir; my girl met me outside at Greene's and she wanted to get some things—

Q. You went around to the Furst Store and did some shopping. A. Yes, sir.

Q. Now, you mentioned, I believe, that there was some carpets on the basement floor; do you mean a strip of carpet that ran in front of the bench where people have their shoes tried on? A. There was runners all over the floor.

Q. But they ran in front of the bench? A. There was a little in front of the bench where I was sitting.

Q. Where people have their shoes tried on? A. Yes, sir; all over that shoe department.

Q. Shoe department; that is what you said, isn't it? A. Yes, sir; shoe department.

Q. How long have you lived in Jersey City? A. I have lived about twenty-five or twenty six years.

Q. You have been in the Furst Store many, many times, have you not? A. Not many times; no, sir.

Q. How often? A. I cannot say how often.

Q. Once a week? A. No, I don't think so.

Q. Were you ever in it before this day? A. Yes, sir; I was in it a few times.

Q. A few times? A. Yes, sir.

Q. How many—how often were you in the basement? A. I wasn't in the basement any of the time—I went in just for a few times; I didn't go in the basement all of the time.

Q. Were you ever in the basement before? A. I think I was in once or twice before.

Mr. AUTENRIETH—I think that is all.

Re-direct examination by Mr. Doherty.

Q. When you say there were runners in that department of the store (so that I can get myself

straightened out on this) were there any runners from the point where you left the department where you purchased the shoes up to the cage? A. No, sir; there were no runners there.

Mr. DOHERTY—That is all.

(Witness excused).

HELEN GARLAND, sworn.

Direct examination by Mr. Doherty.

Q. Miss Garland, were you with your mother in the basement of the Furst Store on or about May 20, 1916? A. I was.

THE COURT—Talk a little bit louder, miss.

THE WITNESS—I was.

Q. Could you tell us the construction of the floor in the basement there, as far as you were able to observe, that is whether it was wood or stone or what material it was made of? A. It was of stone, tile, I think you call it.

Q. That is, you would call it tile? A. Yes.

Q. Did you notice the construction of the floor in the shoe department in the basement? A. It was all the same.

Q. The floor was all the same; did you notice any runners or these carpet runners, they call them, in the basement? A. Yes, sir; in the shoe department there was—there was some kind of a carpet right in front of the stairs—you mean to the bottom of the stairs?

Q. Now, just tell us where these runners were in the basement, around about the points where you were? A. I know there was a carpet right in front right near the bottom of the stairs, and then down in the shoe department; there was runners—carpet.

Q. Now, how far was the foot of the stairs from the point where you were? A. What do you mean, to get around to the shoes where we were?

Q. Yes, where you were buying the shoes? A. Well, it was—it was from—we were sitting about where my mother is sitting now, and the runner was down along that line there you see, and this was the end of the stairs and we came down here, (indicating) right there is the carpet; we went over there upon the carpet; we went down the stairs, went over that way (indicating) along that carpet there; there is where we got our shoes (indicating); and we came back again and we went along this floor here (indicating); there was nothing there.

Q. Were you following your mother at that point that you indicated there (indicating)? A. Yes.

Q. Did you have occasion to notice the floor in the basement there at any time; did you notice its general condition? A. Yes, sir; I always knew it was slippery.

Mr. AUTENRIETH—I ask that that be stricken out; I could not anticipate the answer to that question.

Mr. DOHERTY—I consent to have that struck out.

Q. Miss Garland, just describe the condition of the floors you observed; did you observe the condition of the floor in the basement?

Mr. AUTENRIETH—That I object to, do you know?

THE COURT—(To the witness.) Answer "yes or no."

Q. Did you observe the condition of the floor in

the basement while you were purchasing shoes? A. Yes.

Q. Or at any other time yourself; what did you observe? A. I noticed that it was very slippery.

Q. What just do you mean by that? A. I mean that anybody could slide along the floor.

Q. Did you slide along that floor? A. Not that day; I didn't.

Q. When did you slide along that floor? A. I know when I was a kid, I often went down there and slid along that floor; used it for—as a sliding pond.

THE COURT—When was that last?

(Latter portion of answer read by the stenographer.)

Q. Now, did you see your mother fall? A. I did.

Q. At what point on the floor between the place where you purchased shoes and the counter did you notice your mother fall; how far away from the stand was she? A. She was right at the end of the stand, but you had to go over to the other side where the girl was to get the stamps.

Q. How close to the stand was she when she fell? A. She was right near the stand.

Q. Right near the stand? A. Yes, sir.

Q. Did you observe whether she was falling—how close were you—strike that last out—how close were you to your mother as you were walking along there? A. I was right in back of her, at least, not exactly on the side of her, but right near her.

Q. How far away, could you touch her? A. Yes, sir; I believe I could touch her.

Q. Did you see your mother when she fell, that is, in the act of falling? A. (No reply.)

Q. Did you see her as she fell? A. Yes.

Q. What way did she fall; did she fall forward, to the side or to the back, or what just was the fact, if you observed it; how did she appear to you as she fell? A. Oh, she fell like her two feet went under her and she fell right on her hip.

Q. Two feet went from under her and she fell on her hip? A. Yes.

Q. Did you talk to your mother after she fell down; was she conscious? A. Well, she said—she could not say—

MR. AUTENRIETH—I object;don't tell us what was said.

Q. Did you talk to her? A. When she fell I only said, "Oh, mamma!"

Mr. AUTENRIETH—I object to what was said by this witness.

Mr. DOHERTY—I think it ought to go in as part of the res gestae.

Mr. AUTENRIETH—I object; why, she is not the party; she is a witness.

THE COURT—I do not think it would throw any light on the subject.

Mr. DOHERTY—No, it doesn't make any difference.

THE COURT—It may be competent to be part of the res gestae; but still it does not throw any light on the subject.

Q. How long did your mother lie there before any help came? A. About five or seven minutes.

Q. Did you try to raise her? A. I did, but I couldn't lift her up.

Q. What effort did you make? A. I took hold of her from the side she fell to lift her up.

Q. You tried to lift her up? A. Yes.

Q. Did you succeed? A. No.

Q. Who did come and lift her up? A. Well, there was some man, he was a salesman in the shoe department, I believe; he helped her up.

Q. Where was your mother taken, if you know? A. Well, they got a chair—a stool—and she couldn't very well sit on it, she was leaning against it, and I had hold of her arm, so finally they got one of those wheeling chairs.

Q. Yes. A. And they put her in that.

Q. And what happened then? A. Well, before she was put in that they sent for Dr. Dixon.

Q. Miss Garland, what happened after your mother was still there for five or ten minutes, as you say—

Mr. AUTENRIETH—Five or seven.

Q. Five or seven; excuse me. A. The chair—a round stool was brought, and she couldn't very well sit on it, so she leaned against it, and I had hold of her arm; somebody got a glass of water and gave mother a drink; and then I believe they sent for Dr. Dixon; he came in and he tried to make my mother stand on her feet and she couldn't stand; so I believe they went over and said something to Mr. Bernstein, so then they got one of those chairs—wheeling chairs—and they put mother sitting in that chair.

Q. Where did they bring her, if they brought her any place? A. So they brought her down in the back and then the ambulance came and I didn't want her to go in the ambulance and she didn't want to go herself, and she wanted to go home to my brothers and sisters, so she says to me, told me—

THE COURT—(To the witness) No, not what your mother said; just tell what you did.

A. She told me to bring back the shoes and get the money for them and then I could get a coach to take her home.

By Mr. Autenrieth.

Q. Who had the shoes, was your mother holding the shoes?

By Mr. Doherty.

Q. At the time she fell? A. No, I had them.

Q. Did you bring the shoes back? A. No.

Q. Did you hire the coach? A. I didn't, no; one of the men, they told my mother that there was a coach outside, waiting for her, so they wheeled her down the back and brought her down the elevator —that was on the Railroad avenue side—and she was brought home from the Railroad avenue door.

Q. What happened when your mother got home? A. When she got home?

Q. Did she call in a doctor? A. She called in Dr. Hammill.

Q. Did Dr. Hammill do anything for her? A. He said he couldn't do anything home, she would have to go to the hospital.

Q. Did your mother go to the hospital? A. Yes.

Q. Did you visit your mother while she was at the hospital? A. I did, Sunday morning.

Q. Called Sunday morning; were you ever at the hospital while Dr. Hammill was there? A. No, sir.

Q. How long did your mother stay in the hospital? A. She was in there about two months.

Q. Two months; when she came home did you notice your mother's condition, that is, her physical condition, such as her walking; did you notice her condition, could she walk? A. She couldn't walk.

Q. Oh, she didn't walk, have you noticed—when

did your mother first start to walk? A. When she was in the plaster cast.

Q. And she walked around then? A. After she had it on a while, I don't know how long.

Q. Did she walk very well? A. Oh, no, she had crutches, and she couldn't walk very far, just around the room.

Q. Just around the room; does your mother walk around the house now without any assistance? A. She can, but she has to use a cane.

THE COURT—Anything further?

Mr. DOHERTY—That is all.

THE COURT—Cross-examine.

Cross-examination by Mr. Autenrieth.

Q. How often, Miss Garland, had you been in the Furst Store before this day of this accident. A. I had been in the Furst Store quite often, but not down in the basement. I never had any reason to go down in the basement.

Q. How often had you been in the basement, before the day of this accident? A. I don't know just exactly how many times.

Q. Can't you give us any idea; once or twice, was it? A. Oh, no; about eight or ten times, I guess.

Q. Eight or ten times; was that the most that you had been there in the basement before the day of this accident? A. Yes, sir.

Q. You had been in the Furst Store, you say, a number of times? A. Yes, sir.

Q. You didn't live far away from the store, did you? A. Well, not so far.

Q. And these runners, these carpet runners that you mentioned down in the shoe department? A. Sure.

Q. They were in front of the seats where the people sat to try on shoes, were they not? A. Yes, sir; they were, but there is quite a number of seats and the aisles down that space were not very wide.

Q. But the carpet runners were at least there so that when a person took his shoes off the stocking didn't rest on the stone or tile floor but rested them on the carpet runner, isn't that the case? A. Certainly.

Q. And you have seen people walk all round this basement when you have been there on other occasions, haven't you? A. Why, yes.

Q. And you say that the floor is either stone or tile or whatever you call it; is it stone or is it tile; do you know the difference between the terms? A. It is tile, I believe.

Q. Is it like this floor here (indicating floor of the Court room)? A. No.

Q. What do you call this floor? A. It is stone, marble, isn't it?

Q. I don't know; I am asking you; what do you think it is? A. I think it is marble.

Q. You think this floor is marble? A. Yes, sir.

Q. By a tile floor do you mean that it had the little square or block designs in it? A. Yes.

Q. Laid in small pieces or was it one large piece? A. It was of small pieces.

Q. Or was it one large section with mottled design in it? A. No.

Q. Did you ever go into the Union Trust Company Building in Jersey City? A. No, I don't believe so.

Q. You never saw the floor in there, did you? A. No.

Q. Did you ever go into the Commercial Trust Bank Building? A. No.

Q. Did you ever see a floor like this anywhere else? A. No, I don't believe I had.

Mr. DOHERTY—Floor like this?

Mr. AUTENRIETH—The floor like the one in the Furst Company, I refer to.

THE WITNESS—Why, no.

Q. You haven't seen many floors in your lifetime, have you? A. It seems that way, doesn't it?

Q. How long had you been in the basement of the Furst Store before this accident happened? A. How long was I in there?

Q. Yes, you and your mother? A. Well, we got in there about twenty after five and the accident happened about a quarter to six.

Q. Before the accident happened, I understood you to tell Mr. Doherty, you had noticed the floor as you walked around. A. Yes, not only then, but I have noticed it—

Q. On many other occasions? A. Yes.

Q. As I understood you to say you used to slide on it? A. Certainly.

Q. You can slide on the sidewalk, too, couldn't you? A. Maybe you can, but you can't very easy.

Q. You can slide on this too, can't you (indicating the floor of the Court Room)? A. No, I don't believe you can.

Q. Don't you think so? A. No.

Q. Your mother walked right across from where she was standing, across the tile floor, over towards this desk; that was her destination, wasn't it, this desk where she usually gets stamps? A. Yes.

Q. You had been walking around the basement for about how long before the accident happened? A. We were not walking around at all; we come—

we were up on the second floor and we come down to the basement, and then we went in and got the shoes.

Q. I understood you to say that when you were a child you used this as a sliding pond? A. Yes.

Q. How many years ago is that? A. How many years ago?

Q. That you slid on that floor? A. I couldn't just exactly say how many years ago.

Q. You cannot say? A. Well, when I was about twelve.

Q. About twelve years old? A. Huh-huh.

Q. That cannot be ten years ago, can it? A. No.

Q. Was that as many as ten years ago? A. No, it is not ten years.

Q. Tell us how many; I don't want you to tell us your age, but tell me how many years ago that was you slid on this floor?

By the Court.

Q. About as near as you can tell us? A. About seven years.

By Mr. Autenrieth.

Q. About seven years? A. Yes.

Q. You were going in there with your mother, I suppose, and while she was doing some purchasing you would slide around, is that the idea? A. I would go over there to slide on that floor.

Q You went in there, I suppose, to have a good slide, is that what you mean? A. Yes.

Q. Wouldn't it surprise you, if I told you, Miss Garland, if I should tell you that the floor that was there when your mother met with the accident, that it had been there only about three years, and was a new floor? A. I think it was there longer than that.

Q. You think it was just the same floor that was there at the time you would slide on it? A. Yes.

Q. You are sure of that, are you? A. I think so.

Q. Now, are you positive of it; what have you to say, come on. A. I cannot exactly say; I am positive.

Q. You did not take very much notice of it, anyhow, did you? A. Notice of what?

Q. Notice of the floor? A. Certainly, I did.

Q. Did you expect your mother to fall? A. No.

Q. Then, why should you pay any particular notice to the floor? A. Why, anybody could take notice of it.

Q. You didn't go in there to look at the floor; you went in there to buy shoes, didn't you? A. Certainly.

Mr. AUTENRIETH—I think that is all.

Re-direct examination by Mr. Doherty.

Q. When you say, Miss Garland, that you were in the habit of skating over this floor, you don't—

Mr. AUTENRIETH—Skating?

Q. (Continued) Sliding or skating, or whatever you do, you don't mean to fix that time accurately? A. No.

Q. How much latitude do you want to give to that seven years; did you mean exactly seven years? A. I don't think it was exactly seven years.

Q. To the best of your recollection, it was around seven years; is that what you mean; you mean to the best of your recollection, as you recall years?

Mr. AUTENRIETH—Now, don't you tell her.

A. No, it was about three or four—

HELEN GARLAND—Re-cross

By Mr. Autenrieth.

Q. What is that? A. Three or four years ago.

By Mr. Doherty.

Q. When you say seven years, Miss Garland, you mean seven years as you recollect years; that was seven years ago, is that the idea?

Mr. AUTENRIETH—She don't; she just said three or four years now.

Q. Was it three or four years or seven?

Mr. AUTENRIETH—It was about three or four.

Q. What do you mean by seven years; I am not cross-examining you; you say it is seven years ago and Mr. Autenrieth says it had been—if that is so—that it had been only three years—

Mr. AUTENRIETH—Now, that is no question, is it?

Mr. DOHERTY—I will withdraw that.

Mr. AUTENRIETH—All right.

Q. When you say, seven years, Miss Garland, could you tell us whether you mean anything different from what is ordinarily understood by seven years, or do you mean seven years. A. Oh, I—

Q. If you do, say so; if you don't— A. No, I don't mean exactly seven years, but between that—

Q. Between that and what? A. I mean about three or four years ago.

Mr. DOHERTY—That is all.

Re-cross examination by Mr. Autenrieth.

Q. How old are you now, Miss Garland; I have to ask you now? A. I am nineteen.

Q. Nineteen? A. Yes.

Mr. AUTENRIETH—That is all.

Mr. DOHERTY—That is all.

(Witness excused.)

Mr. DOHERTY—I would like to read in evidence, if the Court please, interrogatories propounded by the plaintiff in this case, as well as the answers of the defendant, sworn to by the proper officers of the corporation. (To Mr. Autenrieth.) Have you a copy.

Mr. AUTENRIETH—I have a copy; go ahead.

(Interrogatories and answers to same read to the jury by Mr. DOHERTY.)

Mr. DOHERTY—I am in a peculiar position now; Dr. Hammill was to be here, he had a medical meeting down at the City Hall at half past eleven, and he said he would be here surely by twelve o'clock.

THE COURT—Have you any other witnesses?

Mr. DOHERTY—That is the only witness I have in the case.

The COURT—Well, cannot you proceed with the rest of the case, and put him on later?

Mr. AUTENRIETH—Yes, sir; I am willing.

(To Mr. DOHERTY.) I understand you rest, except for Dr. Hammill?

Mr. DOHERTY—With the exception of the testimony of the doctor; yes, sir; I rest.

(Plaintiff rests.)

MR. AUTENRIETH—If the Court please, I move for a non-suit upon the ground that it does not appear that there was any negligent act of the defendant proven in the case. The mere fact that the plaintiff fell on the floor does not indicate that the defendant did not exercise ordinary and reasonable care to maintain its premises in a reasonably safe condition.

(Followed by argument.)

THE COURT—I think it ought to go to the jury; I will refuse your motion; you may take your objection to the ruling.

Mr. AUTENRIETH—Your Honor will allow me an objection?

THE COURT—Yes.

AARON KURNICKI, sworn.

Direct examination by Mr. Autenrieth.

Q. Where do you live, Mr. Kurnicki? A. 510 West 176th street, New York City.

Q. Did you ever work for the Furst Store? A. I did, sir.

Q. How many years ago? A. About a year and a half ago; about a year and four months ago.

Q. You do not work for them now? A. Sir?

Q. You do not work for them now? A. No, sir.

Q. Do you recall an accident to Mrs. Garland in the Furst Store on May 20, 1916? A. Yes, sir.

Q. Where were you at the time? A. About five feet from where the accident happened.

Q. Were you standing on the same floor that Mrs. Garland claimed she fell on? A. Yes, sir.

Q. How long prior to the date of this accident had you worked in the Furst Company? A. A little over two years.

Q. During that two years, was your employment in the basement? A. Yes, sir.

Q. Where this accident happened? A. Yes, sir.

Q. In the basement there is what, what department? A. The china and house furnishing department which I had charge of at the time—

Q. And the shoe department? A. —was at the the other end.

Q. Was at the other end? Which department was it that was in the part of the store where Mrs. Garland fell? A. Right at the china department.

Q. China department? A. Yes, sir.

Q. What kind of a floor is the floor in this basement? A. Concrete.

Q. Concrete? A. Yes, sir.

Q When you say "concrete" do you mean one of these composition concrete floors? A Yes, sir.

Q. How long had it been there? A. Before I came there.

Q. Before you came there? A. Yes, sir.

Q. You say you were about five feet away from Mrs. Garland when she fell? A. Yes, sir.

Q. Did you see her fall? A. Yes, sir.

Q. Describe just what you saw; tell that to the jury. A. I was standing in the alleyway side, to the center of that table, to the centre where you have that, just about there (indicating), on a table similar to that table; now at this end Mrs. Garland and around it came this aisle, and Mrs. Garland was just turning that corner in the middle of the alleyway, and just as she was turning down she sunk on the floor; she didn't slip or slide or anything else;

just slipped right down, sunk like that, and I was facing this way and I saw the fall.

Q. Then what did you do? A. I immediately came around and helped pick her up; as I picked her up I asked her could she walk, and I was told she would be all right in two or three minutes; so the daughter asked for a drink and I immediately went around back and got a chair for her to sit down on; then we immediately called to Mr. Bernstein.

Q. Did you ever see anybody else slip or fall on that floor? A. No, sir.

Q. Was the floor slippery? A. No, sir; no more so than any other ordinary floor.

Q. Well, just come down and try this floor here in this Court room, and run your feet on it and see how that is. A. (The witness does so.)

Q. Was that floor in the First Company any different than the floor in this Court room? A. About on the same order.

Q. About on the same order? A. Yes, sir.

Q. I suppose you had this floor cleaned occasionally, didn't you? A. Once a week.

Q. Once a week? A. Every Tuesday morning.

Q. On when? A. On Tuesday morning.

Q. What day was it that this accident happened? A. Saturday before.

Q. Saturday is a busy day, I presume? A. Yes, sir; very busy day.

Q. You do not have any cleaning done on Saturday, do you? A. No, sir; too busy for that; at least for floor cleaning.

Q. That is for floor cleaning; do you sweep the floor out more than once a week? A. The night man sweeps every night.

Q. Now, when Mrs. Garland had fallen, you say

you went right around and tried to assist her? A. I did assist her.

Q. Did you look at the floor then? A. Yes, sir.

Q. Was there anything the matter with the floor? A. No, sir.

Q. Did you see any substance on the floor that she could have slipped on? A. No, sir.

Q. Was the floor at the place where she fell any different than the floor at any other part of the basement? A. No, sir.

Q. Who does the cleaning in that store, or, who did the cleaning; by cleaning, I mean the carpet or floors? A. Scrubbing of the floors?

Q. Yes. A. Why, the scrubbing, with the scrubbing women.

Q. That, you say, was done on a Tuesday morning? A. Yes, sir.

Q. Early? A. Why it took to about one to two o'clock in the afternoon.

Q. All of the store? A. Why, the basement on Tuesday.

Q. Now, what kind of a cleaning material do they use, as far as you know? A. That I cannot answer; I would never pay any attention to that.

Q. That was not under your immediate supervision? A. I know they used some kind of substance, but I didn't follow that up at all.

Q. You do not know that of your own personal knowledge? A. No.

Q. How long did you work at the Furst Company store after this accident? A. I would judge about three to four months.

Q. Three to four months? A. Yes, sir.

Q. Was the floor the same during that period as it had been before? A. Yes, sir.

Q. You never saw this young lady come in there

and use that as a sliding pond, did you? A. No, sir.

Q. Did you ever see anybody use that as a sliding pond? A. It was not allowed.

Q. Well, did you ever see anybody use that as a sliding pond? A. No, sir.

Q. Have you seen the floor in any of the bank buildings in Jersey City? A. Yes, sir.

Q. I call your attention to the floor in the Union Trust Company Building— A. Yes, sir.

Q. Is the floor in the Furst Company any different than that? A. Well, I believe that there is a tile floor and that is a concrete floor.

Q. It is a tile? A. Small tiles.

Q. Small tiles over the entire floor or only on part of it? A. I do not recall that.

Q. You do not recall that? A. I didn't pay enough attention to that.

THE COURT—Anything further?

MR. AUTENRIETH—That is all.

Cross-examination by Mr. Doherty.

Q. You say you never saw this girl go in there and slide on that floor? A. No, sir.

Q. You were in your department there at all times, were you? A. Except when my duties carried me to New York to purchase goods or when I went out—

Q. You went to New York quite often, did you? A. About once or twice a week.

Q. You had been working there about two years before the accident happened? A. Over two years.

Q. Have you the supervision of cleaning those floors down in the basement? A. No, sir.

Q. You don't know what sort of cleansing material is used there at all, do you? A. No, sir.

Mr. AUTENRIETH—He said not of his own personal knowledge.

Mr. DOHERTY—Not of his personal knowledge.

Q You do not know whether soapsuds was used there, do you? A. I said I have no idea about what the substance was.

Q. Was that an answer to the question, you did not know anything about it? A. No, sir.

Q. If you said soapsuds—swore to that, you don't know anything about that, did you? A. If I did make an assertion and I swore to it, it was true.

Q. If you did make such a statement and swore to it, it was true, wasn't it? A. Yes, sir; if I would make the assertion I would know it to be true.

Q. You do not say that there is any difference whatever between this particular point where Mrs. Garland fell and any other part of the store? A. The only difference on that floor would be between any other sections and the shoe department; the shoe department has a carpet on.

By Mr. Autenrieth.

Q. What did you say? A. The shoe department is the only difference on the floor, and that is on account of the runners, that is at the shoe department.

By Mr. Doherty.

Q. You do not mean to tell this Court and jury, that at the time this Mrs. Garland fell on that floor at that particular point, that there was no difference between that part of the floor than at any other place on that floor? A. Same thing exactly.

Q. How many days before that was that floor washed? A. It was washed on Tuesday morning, and the accident happened Saturday before.

Q. You are sure of that fact, that it was washed Tuesday morning? A. Positive.

Q. You swore to these interrogatories, did you; is that your name, Aaron Kurnicki? A. Yes, sir.

Q. Did you have these interrogatories read to you? A. Yes, sir.

Q. You did not know how many days before the accident that the floor had been washed at the time that these interrogatories were propounded to you, did you? A. I think I did.

Q. You think you did? A. Yes, sir.

Q. Would you say that you were unable to state exactly how many days prior to the 20th day of May, 1916, the said floor was scrubbed and washed? A. Yes, sir; I knew what day of the month, twentieth of May was on, but I didn't know the day of the week, but I do now.

Q. You didn't take the trouble to see on what day the 20th of May, 1916, was, did you? A. No, nor was I asked that question.

Q. You say you were five feet away from Mrs. Garland when she fell? A. Just about.

Q. And you say that you were standing at about this point and Mrs. Garland around the table, and you saw her fall? A. Yes, sir.

Q. She didn't slip or slide; just fell? A. Just fell or sunk there, I would call it; I would say sinking would be the best way to describe it.

Q. She went down as though she had been hurt? A. Why, it was just like her knee or some part of her limb gave way, because she fell down like that, actually dropping.

Q. What were you doing at the time? A. Just standing at that table looking in that direction as it happened, you know.

Q. You were taking particular notice of Mrs.

Garland as she walked along? A. No, sir; I was not.

Q. You happened to take particular notice of the fact that she went right down on her side? A. Yes, sir; on account of the fact that it happened that way, I had to see it.

Q. You say you immediately went to her assistance? A. Yes, sir.

Q. And the floor there in the Furst Store is exactly as it is here in the Court, is it? A. No, sir.

Q. You say it is about the same? A. No, sir; I did not say that.

Mr. AUTENRIETH—He said it was about the same as this to walk on.

Q. As far as the slippery condition is concerned, it is about the same as this floor here? A. Yes, sir.

Q. You are positive about that? A. Yes, sir.

Q. And yet the method of the construction of the two floors is entirely different, isn't it? A. Yes, sir; entirely different.

Q. You are not an expert on floors; you don't pretend to that? A. No, sir.

Mr. DOHERTY—That is all.

Mr. AUTENRIETH—That is all.

(Witness excused).

By the Court.

Q. Was that cement floor, or, you say concrete floor; was that one solid floor or put in in blocks? A. One solid floor.

Q. Not put in in blocks? A. No, sir.

By Mr. Autenrieth.

Q. It is a composition concrete I understood you to say? A. Yes, sir.

Mr. AUTENRIETH—That is all.

(Witness excused).

JOSEPH E. BERNSTEIN, sworn.

Direct examination by Mr. Autenrieth.

Q. Mr. Bernstein, you reside in Jersey City? A. I do.

Q. About May 20, 1916, what was your connection with the Furst Company? A. I was the treasurer of the company.

Q. Do you remember the time of this accident to Mrs. Garland? A. I do.

Q. Did you go down to the basement that evening to look over the floor? A. I did.

Q. How soon after the accident? A. Possibly about ten or fifteen minutes.

Q. Did you notice the place where she fell? A. I did.

Q. Did you see any fine, oily, greasy substance there?

Mr. DOHERTY—I object.

THE COURT—What is the objection.

Mr. DOHERTY—I object on the ground that what was found by this man after was immaterial; if the question states, what did he see at the time of the accident or immediately after, I consent.

THE COURT—He may state the condition of the floor at that time; physical condition.

Mr. AUTENRIETH—That is what I want.

THE WITNESS—The physical condition of that floor then was what it is to-day.

Q. And what was that? A. Perfectly smooth, the same practically as you would say of this floor here.

Q. What is the construction of this floor? A. It is called the mosaic floor, such as they have in bank buildings.

Q. Such as they have where? A. Such as they have in bank buildings.

Q. What is that, a concrete composition? A. It is cut up at places.

Q. Is the floor any different to-day in that basement than it was at the time Mrs. Garland fell? A. No different to day than it was then.

Q. Same identical floor? A. Same identical floor.

Q. Any particular way of cleansing it other than washing it? A. Nothing.

Q. Did you at that time find any substance on the floor at the place where she fell? A. Absolutely nothing.

Mr. DOHERTY—I object to that.

THE COURT—I suppose that is irrelevant.

Mr. AUTENRIETH—Well, the slippery feature of it, if anything?

THE COURT—He states there is absolutely nothing.

Q. This floor on this particular occasion, is it uniform over the entire basement or was it changeable? A. It is uniform over the entire basement.

Q. In the shoe department, I understand, there were runners? A. Just some part of the floor, ex-

cept that part of the floor when we—like carpet on stairs.

Q. Where is that carpet? A. That carpet that is in the shoe department; it is not all over.

Q. I mean in relation to the seats where the customers sit down to have shoes shown to them, where are these runners? A. Right underneath those seats.

Q. That is to put their feet on, I suppose, to keep them off the stone floor? A. That is right.

Q. Now, do you know when this floor was cleaned? A. I do.

Q. Was there any regular time for cleaning the basement floor? A. There is.

Q. At the time of this accident, was there? A. Yes, sir.

Q. What day was that? A. On Tuesday.

Q. What time of the day, in the morning or afternoon? A. Tuesday, they usually start between nine to ten in the basement.

Q. In the morning? A. In the morning.

Q. Now, do you know what material they used? A. They used hot water; they used borax, some gold dust, and things of that sort.

Q. Dutch cleanser, I suppose, and things of that— A. Using the same as we have been told to use by many others, who have tile floors of that sort; that is what we are using.

Mr. DOHERTY—What was that first?

Mr. AUTENRIETH—Hot water, cleanser, gold dust, and so on.

Q. Have you any idea how many people use this floor during the day? A. I do.

Q. What is your estimate of the number of people that walk over this—

Mr. DOHERTY—How?

Q. What is your estimate of the number of people that walk over this portion of the floor during the day? A. At any time?

Mr. DOHERTY—I object.

THE COURT—I will hear your objection.

Mr. DOHERTY—I do not see where there is any relevancy in this question, the number of people that walk over this floor in a day.

THE COURT—Isn't that proper to show his knowledge of the facts and conditions, to show whether it is a great number or just a few people that use this floor?

MR. DOHERTY—But whether a thousand people passed through there, over that part, what difference would it make?

THE COURT—Isn't it a fact that the jury may take into consideration in determining whether or not it was dangerous or not?

Mr. DOHERTY—I do not think so.

THE COURT—I will allow it.

Q. Answer the question? A. Week days, Mondays, Tuesdays, Wednesdays, it is from five hundred to seven hundred fifty.

Q. Per day? A. On Saturday, over a thousand.

Q. Per day, you mean? A. Per day.

Q. Walk through this basement? A. Yes, sir.

Q. Over that floor? A. Yes, sir.

Q. Have you ever seen anyone slip on that floor?

Mr. DOHERTY—I object; incompetent.

A. I have not.

THE COURT—I will leave that stand.

Mr. DOHERTY—Save my exception.

Q. What was the answer?

(Answer read by stenographer.)

Q. As I understand, Mr. Bernstein, the floor to-day is in the same condition as it was at the time of the accident? A. Same condition; not changed.

Mr. AUTENRIETH—That is all; cross-examine.

Cross-examination by Mr. Doherty.

Q. Would you say that the floor to-day is the same as it was in May 20, 1916? A. The same floor without any repairs whatsoever.

Q. When did you see the floor last? A. This morning.

Q. You saw it this morning? A. Yes, sir.

Q. You say that you have personal knowledge of the cleaning materials used on this floor? A. I have.

Q. And they used borax? A. They use hot water, borax—

Q. They do not use any soap, do they? A. They use gold dust.

Q. Did they use any soap? A. And they used something in the line of composition; what it is, I do not know.

Q. You will swear that they did not use soap? A. I beg pardon?

Q. You will swear that they did not use soap? A. They use a composition which cleans, whether it is soap, I do not know; but it is some composition

that they are using in all of those floors where they have tile floors.

Q. You have gone around investigating these different stores to see what they use? A. The Union.

Q. How do you know they use the same things that you do? A. The Union Trust Company.

Q. Did you go down to inquire whether they used the same thing? A. I have been in there and they have told me.

Q. You say that that is a mosaic floor? A. Yes, sir.

Q. Mosaic floor is uniform throughout its construction? A. Yes.

Q. There isn't any small parquets in the make-up of this floor? A. Little small chips.

Q. Are they cemented together? A. Yes, sir; all cemented.

Mr. DOHERTY—That is all.

Re-direct examination by Mr. Autenrieth.

Q. One question I wanted to ask you, Mr. Bernstein. Did you ever see Miss Garland use that floor for a sliding pond? A. No.

Q. Did you ever see anybody else use it for a sliding pond? A. It is not there for that purpose.

Q. I understand that.

By the Court.

Q. When was that floor put down? A. In 1912; summer 1912.

By Mr. Autenrieth.

Q. It has been in use ever since? A. It has been in use ever since 1912.

MOTION FOR JURY TO INSPECT SCENE OF ACCIDENT

By the Court.

Q. What kind of a floor was there before that? A. Wooden floor.

Mr. AUTENRIETH—That is all I have.

Re-cross examination by Mr. Doherty.

Q. Mr. Bernstein, you do not pretend to say that you are around the store there all of the time in the basement? A. I beg pardon.

Q. You do not pretend to say that you are in the basement at all times of the day? A. I am there possibly fifty times a day.

Q. You are all over the store? A. Yes, sir.

Q. How many floors in that store? A. Five.

Q. It is your business to go over every one of those floors? A. Yes.

Mr. DOHERTY—That is all.

Mr. AUTENRIETH—That is all.

(Witness excused.)

Mr. AUTENRIETH—Now, I have no more witnesses at the present time, but I will have one more after one o'clock; but I want to move for permission to have the jury go down and look at that floor. The testimony shows that the floor is not in the same condition as it was at the time Mrs. Garland claims she fell on it; it is the same to-day as it was then. I suggest that we adjourn now, and the jury might, during the noon hour, examine the floor and be here at two o'clock, and I can put on my other witness and close.

MOTION FOR JURY TO INSPECT SCENE OF ACCIDENT

Mr. DOHERTY—I cannot see any use of the jury going down; the jury have all of the facts before them; the defendant stated that this floor is to-day, with the possible exception that it is six years old now, in the same condition as it was when put down.

THE COURT—The objection is to their seeing the condition of the floor.

Mr. DOHERTY—The condition of the floor to-day will be no criterion of what the condition was two years ago when this woman fell; the condition as far as the material that was used at that particular time may be different than it is to-day; there may be more people walking there to-day; the conditions on the floor, in the arrangement of counters and tables, etc., may be different to-day than it was then.

THE COURT—Your case as it stands now depends upon the construction of the floor; you haven't shown anything that would go to show that there was any defect in the floor; we simply have the construction.

MR. DOHERTY—But we have shown further that they have used a substance on this floor which it is for the jury to decide whether it might be dangerous to people to walk in there.

THE COURT—I do not think so.

Mr. AUTENRIETH—I understand the Court did not pass on that?

THE COURT—You would have to show that,

that is for you to show, that they used something on the floor—that would be for the plaintiff to show.

Mr. DOHERTY—You cannot show positive; it is a question for the jury to decide from the facts they have before them; the plaintiff cannot produce positive proof.

THE COURT—The burden is upon you.

Mr. DOHERTY—I know it is upon me throughout this case to show that there was negligence; of course, if the Court believes that the jury can be enlightened, I am willing that they go down.

THE COURT—I am willing to allow this jury to go there under the care of an officer to view the premises, and you may each select your man; of course you cannot discuss the question with the jury.

Mr. AUTENRIETH—No, there will be no discussion.

THE COURT—I would rather have counsel go because once you get somebody else, even with the very best intentions, they may ask questions and you are very apt to answer.

MR. AUTENRIETH—I suppose the Court will instruct the jury that they are not to talk to counsel or to have anything to do with us.

THE COURT—We will adjourn until a quarter after two; that will give you, gentlemen of the jury, time to get through lunch. (To counsel) After they have viewed it they will return here at a quarter after two. (To the jury) Now, gen-

tlemen, you are going down to view these premises, and you are not to discuss it or ask these gentlemen any questions; they will point out the floor and you can look at the situation; they will point out the place where this lady fell and the place where she was going in the shoe department; but after you look at the floor, do not ask counsel any questions and do not let counsel talk to you about it. Be back at a quarter after two.

(Noon Recess.)

January 9, 1918; 2:15 P. M.

Court met pursuant to adjournment.

PATRICK J. HAMMILL, M. D., sworn.

Direct examination by Mr. Doherty.

Q. Doctor, you are a practising physician in this state? A. Yes.

Mr. AUTENRIETH—I will admit the doctor's qualifications to save time.

Q. On or about May 20, 1916, did you have occasion to treat Mrs. Helen Garland for injuries, doctor? A. Yes, sir.

Q. Would you kindly state to the Court and the jury what you found upon examining Mrs. Garland at that time? A. She had what we call an infracapsular fracture of the hip joint; that is a fracture at the upper end of the right of the thigh bone.

Q. A fracture at the upper end? A. Yes, sir.

Q. Where was this examination held, doctor, do you remember? A. At St. Francis Hospital.

Q. At St. Francis Hospital; did you call on Mrs. Garland at her home, if you remember? A. She stayed in the hospital about two months and then went home, and after that I treated her for about two months at her home.

Q. Did you treat her, doctor, during the period of time that she was at the hospital? A. A part of the time, the service down there is a month at a time, and she stayed there two months, so I treated her partly and another doctor treated her.

Q. What did you find further, doctor, if anything? A. She did not heal up very rapidly, and up to the time that I left her, why she seemed to be in a very much weakened condition. The treatment itself is rather painful and annoying; you have to have the patient pretty well tied down; that undoubtedly had something to do with her weakened condition.

Q. Was Mrs. Garland's case a serious case as understood by practitioners? A. Yes, a fracture of the infracapsular—or a fracture at the top of the thigh bone is a serious case anyway; there is quite a percentage of the cases die, particularly in the aged, due generally to constitutional conditions that sometimes we cannot account for; and in her case the general constitutional effect seems to have been the condition of weakness; in a more aged person, it has the general constitutional effect sometimes of sending them out of their head completely; just exactly why, we do not understand, except that it will be a serious injury and a serious shock attending it.

Q. Did you ever have occasion to treat Mrs. Garland before this accident? A. Yes.

Q Were you their family physician? A. I was her family doctor.

Q. How long had you been treating her; how long had you been the family physician, rather? A. I do not remember that positively, but as long back as I can remember, I think it is about seven or eight or maybe nine years.

Q. What have you to say as to Mrs. Garland—have you had occasion to observe Mrs. Garland's general health since the accident? A. Since the accident, while I was treating her, but I have not seen Mrs. Garland for the last six months or a year anyhow.

Q. The last time you observed Mrs. Garland, what was her general health condition? A. The general condition was one of weakness, and as I recollect her, every time I went there I insisted on tonic treatment.

Q. What was Mrs. Garland's condition before this accident? A. Good; she was able to go out to work every day, besides taking care of the family at home.

Q. Well, doctor, did you examine Mrs. Garland other than for this injury, that is, examine her heart or to see what— A. I have a recollection of it.

Mr. AUTENRIETH—Before or after the accident?

Q. After the accident? A. After the accident. Well, I cannot say that positively, it is so far back, but as a routine procedure the hearts of patients are examined because of the possibilities of anæsthesia, or having to give them ether or chloroform at the time.

Q. The last time that you observed Mrs. Garland, six months ago, what was her condition as far as this leg is concerned? A. The leg was short and it

showed up in her walking. That is about all there was; as far as the union, actual hardening of the bone was concerned, I think there was even some question of that; the lack of union or the lack of hardening of the tissue that binds the ends of broken bones together; that lack can be caused, and is usually caused, by a person's general condition; for instance, extreme weakness will cause that; alcoholism will cause it or diabetes will cause it; in her case I laid it to weakness.

Q. And how much shorter, doctor, do you know, is this one leg than the other? A. I cannot say that positively, I do not recall it; but I would say that it is at least two inches shorter.

Q. In your opinion, doctor, in your observation of this patient, Mrs. Garland, would you say that that condition, the shortening of the leg, was the result of an accident? A. The fracture was the result of the accident,and it is one of the bad effects of the accident. You can put two bones together, but in a good many cases you may not be able to get them to unite. That is what occurred in her case; the two ends of the bones were put together but they did not unite with the same rapidity that other bones would unite.

Q. And that is the cause of the shortening of the limb? A. Yes, I think I would lay that as the cause of it.

Mr. DOHERTY—That is all.

THE COURT—Cross-examine.

Cross-examination by Mr. Autenrieth.

Q. You did get a good union, didn't you, doctor, ultimately? A. Ultimately?

Q. Yes. A. Well, I think yes.

Q. And where is it shortened, it is a matter of

com non knowledge, isn't it, that even persons who have not met with injuries do not have both of their legs of exactly the same length? A. Well, yes; that is a possibility.

Q. I mean no two persons have both legs exactly the same length; there is a slight variance in the normal person? A. Yes, there can be a slight variance.

Q. And Mrs. Garland's condition now is good, her general condition of health, I mean? A. I haven't had occasion to examine Mrs. Garland lately; this is the first time I have seen her now in about six months.

Q. She looks much better than she was at the last time you saw her, doesn't she? A. Yes, she does look better.

Mr. AUTENRIETH—I think that is all, doctor.

Re-direct examination by Mr. Doherty.

Q. When you say that no two persons have legs alike, you do not mean to say that in the normal man there would be a difference of two inches? A. No, no.

Mr. AUTENRIETH—I didn't ask him that; I said that there was a variance between the legs of a man.

MR. DOHERTY—That is all, doctor.

Re-cross examination by Mr. Autenrieth.

Q. That is apt to be, that shortening, a difference of as much as a half inch, isn't it? A. Well, I do not remember ever measuring normal legs to find that fine distinction; the only ones that I am concerned with is where there are abnormalities.

Q. But it is a medical—it is a fact known to medical men that legs do not measure up equally? A.

Well, I had better not say yes to that because I haven't any concern in that.

Q. Well, isn't that the rule laid down in text books? A. Yes, the right leg is a trifle longer than the other; that is, just as the right arm is in a great many cases longer than the other, due to our habits of using the right side of our bodies more.

Q. And that happens in a normal person that has never met with injury to be as much as half an inch in a leg? A. Yes, but that doesn't show anything.

Q. Oh, I say, doctor, you cannot notice that in a leg, can you? A. No, sir.

Mr. AUTENRIETH—That is all.

Re direct examination by Mr. Doherty.

Q. Did you observe Mrs. Garland walk before the accident? A. Yes.

Q. She didn't limp in walking as you observed her walk; she didn't limp that way before the accident, as you have observed she does now? A. No, sir.

MR. DOHERTY—That is all.

Mr. AUTENRIETH—That is all.

(Witness excused.)

THE COURT—That is your case, then.

Mr. DOHERTY—Yes, sir.

THE COURT—Have you got your expert here?

Mr. AUTENRIETH—He is not here, so I will close without him.

THE COURT—I was responsible for the doctor being late at noon.

Mr. AUTENRIETH—I now renew my motion for a non-suit on the same grounds as I have heretofore expressed; and also movefor a direction of a verdict

upon the ground that it now appears beyond question that reasonable care was used in the using of this floor. It appears without contradiction that the floor has been down since 1912, four years prior to the accident, without change or disturbance of any kind. The plaintiff's case, as it now stands, is based solely on the question of its construction, and it stands in the case without contradiction that five hundred to a thousand people walked over this floor daily, that it had been used that way for four years prior to the accident, and neither the officers of the company nor the man who had charge of that floor had seen anyone slip on the floor or fall on it prior to the time of Mrs. Garland's fall; that the floor is of the type and kind that is used by banks and other buildings, approximately being the type of floor that is generally used, and the construction was the same as it appears in banks and other buildings and had been in use for four years, and all of that stands without contradiction. Now, in that case, there must be a verdict for the defendant, because there is no disputed questions of whether that used reasonable care in constructing a floor of that kind and in its maintenance; and, for the purpose of the record, I move for a direction of the verdict on the ground that negligence has not been proven and that the burden has not been sustained here by the plaintiff.

THE COURT—I will refuse your motion.

Mr. AUTENRIETH—Your Honor will allow me an objection.

THE COURT—Yes, note your objection.

Counsel for the defendant summed the case to the jury.

Counsel for the plaintiff summed the case to the jury.

JUDGE'S CHARGE.

The Court then charged the jury as follows:

GENTLEMEN OF THE JURY:

It is not disputed in this case or denied that on the particular day mentioned in the complaint the plaintiff was injured by a fall in the store of the defendant.

If she is entitled to recover anything in this case, she is entitled to recover such sum as will compensate her for the injury which she received, and that would be a matter for you to determine, governed however, by certain principles of law which affect cases of this kind.

She would be entitled to such sum as you gentlemen consider would be fair compensation for the pain and suffering which she underwent, is under going at the present time and may undergo in the future by reason of this accident; and there, that is up to you for your determination.

There is no rule by which you may gauge it by a test of days or hours, but you are to say from all of the evidence in the case, taking into consideration the evidence of the doctor, what, in your opinion, would be a fair compensation for her injury and for her suffering.

She is entitled to any amount that she paid to the doctor; but, as I recall it, there has not been any evidence as to the amount that she paid the doctor or the amount that she became obligated to pay; if there is, you will remember it and you will allow her that.

She would also be entitled to recover for perma-

nent injury, if her limb is shortened, (if permanently injured), and for any loss of money which she has sustained by reason of this accident.

These items, taking them together, would be the sum that she would be entitled to recover for her injury, provided she is entitled to recover anything.

The mere fact that this lady was injured in the manner in which she has described would not, of itself, entitle her to recover against this defendant. She cannot recover in this case unless the defendant was negligent in some duty that it owed to her as one of the persons that it had generally invited to visit this store in the course of business. The defendant occupied this store and conducted its place of business therein, and she came there on the general invitation and she had a right to visit that store.

It was the duty of the defendant, having invited the general public to visit this store, to keep that store in a reasonably safe condition and to exercise reasonable care to keep this store in that condition.

Now, something has been said about soapsuds.

You will recall that in this case there was nothing on the floor; the plaintiff says she looked on the floor, and there was nothing on the floor, that it was clean.

So the question for you to determine is whether or not the defendant in this case, in maintaining a floor of the character that was there, used reasonable care in doing so. If the defendant did that, that is all that it was required to do.

But, before the plaintiff can recover, she must go further than that; the plaintiff must show that this defective floor had been brought to the previous

notice of the defendant in this case, or that it had existed for such a space of time before the accident as to have afforded the defendant sufficient opportunity to make a proper inspection to ascertain its condition as to safety and to repair defects, if there were any.

You have a right not only to take into consideration what you saw yourselves at the store, but you should take into consideration all of the evidence in regard to the condition of this floor, the evidence that it has been used daily by many people for three or four years and that there had been no accidents, and that no one had slipped thereon, in determining the question of the liability of this defendant.

It need hardly be added that the company was not an insurer of the safety of its customers against accidents happening to them while walking around on the floor of this store. The law does not make the defendant an insurer against accidents. Its duty to this plaintiff was satisfied when it had used reasonable care to maintain the floor of the building in a reasonably safe condition for the use of its customers.

If it did that, gentlemen, there can be no recovery in this case by the plaintiff; if it did not, then the plaintiff is entitled to recover, for the basis of this action is the negligence of this defendant, and if the defendant has not been negligent in its duty of using reasonable care to maintain this floor in a reasonably safe condition for its use by the plaintiff, then the plaintiff is not entitled to recover. If the defendant was negligent, then the plaintiff is entitled to recover.

It is not a question of whether you think some other kind of floor would have been a better floor,

but whether the use of that floor, in the manner in which it was used, showed a lack of reasonable care on the part of this defendant. If it did, then the plaintiff is entitled to recover; if not, then she is not entitled to recover and your verdict would be for the defendant.

With that, gentlemen, you may take the case and decide it under these rules as I have given you and from the evidence as you have heard it from the witnesses on the witness stand.

(Officer sworn.)

(Jury retires.)

Which was all the evidence offered or received and other proceedings had on the trial of said cause.

OPINION OF SUPREME COURT

NEW JERSEY SUPREME COURT.

February Term, 1918.

HELEN GARLAND,
Respondent,
vs.
THE FURST STORE, A CORPORATION,
Appellant.

Submitted March 21, 1918; decided June 5, 1918.

Appeal from Hudson Circuit Court.

Before Gummere, Chief Justice, and Justices Parker & Kalisch.

For the Appellant, Runyon & Autenrieth.

For the Respondent, Richard Doherty.

Per Curiam. Plaintiff sustained serious injury by falling on a tiled floor in the basement of defendant's store. She was concededly there by invitation, having just purchased a pair of shoes and being on her way to the trading stamp booth when she fell. The negligence alleged was in maintaining an unusually slippery floor. The only points made for error are the refusals to nonsuit and to direct a verdict.

If there was evidence for the jury on the ground of negligence alleged, there could not have been a non-suit or a direction. Where the duty of reasonable care is owing, we see no substantial difference between this case and a defective and dangerous staircase, as in Schnatterer v. Bamberger, 81 N.J.L. 558, in which the owner was absolved only because

he time of continuance of the dangerous conditiont did not appear, or a slippery trapdoor in the sidewalk, as in Kelly v. Lembeck & Betz Co., 86 N.J.L. 471, 87 N.J.L 696. Hence the inquiry was whether there was any evidence of the existence of an unusually slippery condition; the notice thereof to the owner, if it existed, not being a contested point.

It is argued for appellant, and with much force, that the floor was of a standard material, in general use for the purpose, and that there was no evidence of any lack of ordinary care in using and maintaining it. But the difficulty about adopting this line of reasoning is that the jury went to examine the floor, at the instance of the defendant's counsel, who asserted that it was in the same condition at the time of trial as it was in when plaintiff sustained her injury. The jury came back and returned a verdict for the plaintiff. What they saw, or felt, or both, does not appear in the printed case; and we cannot tell but that their observation disclosed a condition which, if referred back to the time of the accident, was persuasive of negligence on defendant's part.

The judgment will be affirmed.

NOTICE OF APPEAL

Filed July 2nd, 1918.

NEW JERSEY SUPREME COURT.

HELEN GARLAND, *Appellee*, *vs.* FURST STORE, A CORPORATION, *Appellant.*		*Action at Law.* *On Appeal.* *Notice.*

To Messrs. Doherty & Kinkead,
Attorneys for Appellee.

Please take notice, that the defendant hereby appeals to the Court of Errors and Appeals, from the whole of the judgment entered in this cause, upon the following grounds:

1. Because the Trial Court committed error in refusing defendant's motion to direct a verdict.

2. Because the Trial Court committed error in refusing to direct defendant's motion to non-suit.

3. Because the evidence did not disclose any negligence on the part of the defendant.

4. Because under the evidence there was no negligence proven, and no inference of negligence could be lawfully found by the jury from the evidence, because the plaintiff did not make out a cause of action, and it was erroneous to permit the jury to pass upon the evidence.

5. Because the affirmance of said judgment by the Supreme Court was erroneous.

RUNYON & AUTENRIETH.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

New Jersey Court of Errors and Appeals.

HELEN GARLAND, Appellee, vs. THE FURST STORE, a corporation, Appellant.	**Action at Law.** **On Appeal from Supreme Court.**

BRIEF FOR APPELLANT.

Statement of the Case.

This is an action at law for alleged negligence resulting in personal injuries. It was tried before Judge Cutler and a jury in the Hudson Circuit Court, and upon the trial, on motion of the appellant (hereinafter mentioned as the defendant), the jury were permitted to view the scene of the accident. Motions to nonsuit and to direct a verdict were denied, the jury rendered a verdict for the plaintiff, and upon appeal to the Supreme Court the judgment was affirmed. The case is now before this Court upon a second appeal.

The complaint alleges that the defendant, conducting a department store on Newark Avenue, Jersey City, "maintained a slippery tiled floor in the "basement, which from its nature and from its "negligent manner of construction was dangerous "to persons walking upon" it. In the second count it is alleged that the floor was negligently permitted

to become slippery, but this count was eliminated because there was no proof that there was any slippery substance on the floor, and the case proceeded on the theory of negligence in the construction of the floor.

It appears that the plaintiff, on May 20, 1916, about 5:30 P. M., went to the store of the defendant and into the basement where the shoe department is (Case, p. 8, line 2). The floor, according to the plaintiff's testimony, was tile or marble, and in front of the benches where the shoes were sold were strips or runners of carpet (p. 9). The plaintiff made purchases and then proceeded to walk across the floor to the Stamp Desk, and (using her own words) "I just walked along from where I got the "package to the Stamp Desk, and as I got to the side "to go to hand my slip my two feet was taken and "I had slipped down on my left hip" (p. 9, line 30). The plaintiff testified that at the spot where she fell the floor was clean. She said: "I noticed the "floor was clean" (p. 8), and again: "I noticed that "it was clean, nice and clean" (p. 9, line 38). The plaintiff was accompanied at the time by her daughter. Just what caused the plaintiff to fall does not appear from her testimony; she does not say that any foreign substance, such as oil or grease, caused her to slip.

The defendant showed that the floor was perfectly smooth, made of solid concrete and in good order; that it had been traversed by thousands every week in the four years since its construction, and that no one had ever been known to slip there before.

Grounds of Appeal.

The grounds of appeal are the refusal to nonsuit, the refusal to direct a verdict, and the affirmance of these refusals in the Supreme Court.

BRIEF OF ARGUMENT.

I.

No negligence was proved as to the construction of the floor.

The floor where the plaintiff was injured was "perfectly smooth" (Case, p. 37, line 3); was made of solid concrete composition "such as they have in bank buildings" (p. 35, line 35; p. 36, line 2; p. 37, line 13); was in the same condition at the time of the trial as at the accident (p. 40, line 13); was "uniform over the entire basement" (p. 37, line 38), except for carpet runners in the shoe department for customers to rest their feet upon (p. 38, line 10). It was built in the summer of 1912 (p. 41, line 35) and the accident occurred four years later, in May, 1916. It was used by from 500 to 1,000 persons per day (entire, p. 39), and on the day of trial was in the same condition as at the accident "without any repairs whatever" (p. 40, lines 10-15). The facts thus recited are uncontradicted.

In brief the floor was of a construction and material in common and approved use and nothing will be found in the case intimating even the slightest suggestion to the contrary.

II.

There is no proof whatever that the floor was slippery, and there is no proof of any act or omission of defendant in connection with the alleged condition of slipperiness.

As to the floors being slippery, Mr. Bernstein and Mr. Kurnicki for defendant said they had never seen any one slip on it (p. 39, line 38; p. 30, line 15), and there is not as much as one word of testimony to show that any one, except the plaintiff, had ever slipped on it in the four years between the time of its construction and the accident. The only suggestion of proof on this point was given by the plaintiff's daughter, a girl of nineteen, who said that when she was about twelve years old (about seven years before the accident) she had used the floor to slide on (p. 17, lines 1 to 15). She said the floor was "very slippery", but she explained that she meant by that "that anybody could slide along the floor" (p. 17, line 10).

On cross-examination it came out that this young woman had used the floor to slide on when she was twelve years old (seven years before) (entire p. 24); but the floor had been built only four years (p. 41, line 35). This witness, under the suggestive questioning of her counsel, made an effort to explain away this discrepancy by stating that by saying seven years she meant about three or four years. A reading of page 26 shows her testimony in the regard to be disingenuous. This leaves nothing in the case to show that the floor was slippery, except the statement of the plaintiff that the floor was "more 'slippy' than the floor of the court-room where the trial took place" (p.

9, line 25). The word "slippery" or "slippy" occurs nowhere else in the testimony of the plaintiff. She said that the floor was nice and clean (p. 8, line 26; p. 9, line 39). There is no mention of defective conditions of the flooring or of oil or grease or water, or any foreign substance, upon the floor to account for the plaintiff's slipping.

Kurnicki, a witness for defendant, saw the plaintiff fall. He said that the floor was no more slippery "than any other ordinary floor" (p. 30, line 16). He looked at the floor and saw no substance on it "that she could have slipped on" (p. 31, line 10). The floor where she fell was not different from the floor in any other part of the basement (p. 31, line 13). Mr. Bernstein, who saw the floor fifteen minutes after the accident, also failed to find any foreign substance on it (pp. 36, 37). The plaintiff herself does not make it clear that she lost her footing in a way to indicate that she slipped in the ordinary sense of the word. Her only description of the accident is in these words: "I just walked "along from where I got the package to the stamp "desk, and as I got to the side to go to hand my "slip *my two feet was taken and I had slipped down "on my left hip*". Her daughter says: "Oh, she fell "like her two feet went under her and she fell right "on her hip" (p. 18). Kurnicki says: "Mrs. Garland "was just turning that corner in the middle of the "alleyway, and just as she was turning down *she "sunk on the floor; she didn't slip or slide or any-"thing else; just slipped right down, sunk like that,* "and I was facing this way and saw her fall" (pp. 29, 30). On the day of the accident Mrs. Garland had been working from six o'clock in the morning and the accident occurred about half past five (p. 13), so that it seems a probable conjecture that her fall was caused by a sudden turning of the ankle or some sudden relaxation of the muscles from fatigue.

The case differs from *Schnatterer* vs. *Bamberger, 81 N. J. L. 558,* in which a brass nosing upon a staircase was out of place, which showed the step to be in a dangerous condition. It differs also from *Kelly* vs. *Lembeck & Betz Eagle Brewing Co., 86 N. J. L. 471,* because a smooth iron cellar door is one of the most slippery footings that can possibly be used. That is a matter of common knowledge. There is no comparison between a smooth iron cellar door and a solid concrete composition floor, such as is used in bank buildings.

Thus we have it that the plaintiff slipped or sank down on a floor of concrete construction in use for four years, perfectly smooth and clean, in perfect order and traversed by thousands of persons every week; that no testimony is offered to show that the floor was anything but one of approved construction in accepted use or that any grease, oil or other substance, caused it to be dangerous; or that any other person had ever slipped on it. If the court believes the statement that the plaintiff's daughter had used the floor to slide on some years before, such an act of child's play certainly does not tend to prove that the floor was unsafe for pedestrians.

If such a state of facts constitutes a *prima facie* case, then the liability in this class of accidents must depend upon the doctrine of *res ipsa loquitur,* and it would be futile to attempt to reconcile such a state of the law with *Schnatterer* vs. *Bamberger,* or with *Kip* vs. *Woolworth Co., 134 N. S. Supp. 646; Spickernagle* vs. *Woolworth Co., 84 Atl. 909; William Lauric Co.* vs. *McCullough, 174 Ind. 477; Crocheron* vs. *North Jersey, &c., Co., 56 N. Y. 656,* or any other leading case on this topic.

III.

The defendant had no notice of the alleged slippery condition.

In the Supreme Court opinion occurs the following remark:

> "Hence the inquiry was whether there was any evidence of the existence of an unusually slippery condition; *the notice thereof to the owner, if it existed, not being a contested point.*"

This would seem to be an inadvertence, because it will be seen by a glance at page 51 of the Case that the defendant's counsel had moved for a direction of verdict upon the ground, among others, "that "500 to 1000 walked over this floor daily; that it "had been used that way four years prior to the "accident, and neither the officers of the company "nor the man who had charge of that floor, had seen "any one slip on the floor or fall on it prior to the "time of Mrs. Garland's fall."

The only way in which notice of the slippery condition complained of could be given to defendant was by seeing someone else fall. The floor was not alleged to be slippery because of the presence of a foreign substance, or because of a defect in construction, so that the remark of the Supreme Court is manifestly injurious to the position of the defendant-appellant.

It has always been held that notice, either actual or constructive, that a floor has become dangerous must be shown in these cases.

Schnatterer vs. *Bamberger, 81 N. J. L. 558;*

McDermott vs. *Salloway, 21 L. N. S. 456* (an exhaustive annotation);

Larkin vs. *O'Neill, 119 N. Y. 221;*

Reeves vs. *Fourteenth St. Store, 96 N. Y. Supp. 448;*

Toland vs. *Paine Furniture Co., 175 Mass. 476; 56 N. E. 608.*

IV.

The fact that a jury has viewed the scene of an accident is no reason for refusing to order a nonsuit or direct a verdict, or for refusing to review the judgment.

In the opinion of the Supreme Court it is said:

> "It is argued for appellant, and with much force, that the floor was of a standard material, in general use for the purpose, and that there was no evidence of any lack of ordinary care in using and maintaining it. But the difficulty about adopting this line of reasoning is that the jury went to examine the floor, at the instance of the defendant's counsel, who asserted that it was in the same condition at the time of trial as it was in when plaintiff sustained her injury. The jury came back and returned a verdict for the plaintiff. What they saw, or felt, or both, does not appear in the printed case; and we cannot tell but that their observation disclosed a condition which, if referred back to the time of the accident, was persuasive of negligence on defendant's part."

So far as our examination of the authorities has gone this opinion is not supported by any other decision, and in the exceedingly few cases in which the point has been raised, the opposite doctrine has been maintained.

In *Tully* vs. *Fitchburg, 134 Mass. 499* (1883), which was an action for personal injuries, it was said:

> "It is contended by the plaintiff, that as the jury had taken a view, they may have had some knowledge of important facts, which they might regard as evidence in the case, which were not within the knowledge of the court;

and that the judge could not properly have ruled that there was not sufficient evidence to sustain the plaintiff's case, when he could not be sure that he knew the whole evidence.

Views by the jury may be allowed in all cases, civil or criminal. Pub. Sts. c. 170, s. 43; c. 214, s. 11. And, in some cases, the jury have the right to take a view, or either party to require it. Pub. Sts. c. 49, s. 49. Views are allowed even in capital cases. Commonwealth *v.* Knapp, 9 Dick. 495, 515; Commonwealth *v.* Webster, 5 Cush. 295.

In many cases, and perhaps in most, except those for the assessment of damages, a view is allowed for the purpose of enabling the jury better to understand and apply the evidence which is given in court; but it is not necessarily limited to this; and, in most cases of a view, a jury must of necessity acquire a certain amount of information, which they may properly treat as evidence in the case. Parks *v.* Boston, 15 Pick. 198. Though the knowledge acquired by a jury from a view may be such, in some cases, as to embarrass a court in passing upon the question of the sufficiency of the evidence to warrant a verdict for the plaintiff or upon a motion for a new trial, for the reason that the verdict is against the evidence, or that the damages are excessive, yet a judge must, in each case, determine, from the circumstances of that case, whether he is so far in possession of all the material evidence as to enable him to act intelligently. The fact that the jury have had a view presents no insuperable obstacle to the granting a new trial, on the ground that the verdict is against the evidence, or the damages excessive. Harding *v.* Medway, 10 Met. 465; Fitchburg Railroad *v.* Eastern Railroad, 6 Allen, 98."

The question has been raised rarely, it would seem, because the practice of centuries sufficiently shows that appellate courts are not deterred from an examination of judgments below by the fact that the jury have been permitted to take a view. Aside

from cases in condemnation, where views are commonest, a view by the jury is a frequent and a useful aid in the trial of criminal cases, and of a multitude of civil cases where a local condition is a relevant fact. If the taking of views by juries introduced an unknown element of proof, such as should preclude a re-examination of their decisions, such a doctrine must have been announced frequently in the past, and the absence alone of such a doctrine is the strongest answer to the novel contention in the Supreme Court's opinion.

V.

If the reasoning of the Supreme Court's opinion is correct, no trial court has the right to nonsuit or direct a verdict in a case where the jury have been permitted to take a view.

The decision of the Supreme Court goes upon the theory that the view by the jury affords evidence which cannot be presented to the appellate court, and that the taking of the view automatically removes the case from consideration because the court would be dealing with unknown factors and could not intelligently review the jury's finding.

If this is a sound theory there can be no possible discrimination between the right of the trial court to nonsuit or direct a verdict and the right to review such action on appeal. The court's ignorance of the unknown factor is the same in both cases. But this reasoning attributes to the knowledge obtained by the jury upon the view an effect which has been almost universally denied to it, for the knowledge thus obtained is and must remain personal and undisclosed. Each juror carries away

from the view his own personal impression and knowledge, which cannot, under our theory of jury trial, become evidence in the cause, because facts known to a juror do not become evidence unless he is sworn and examined upon them as a witness.

DeGray vs. *N. Y. & N. J. Tel. Co., 68 N. J. L. 454.*

"The power of the courts in respect of granting a view or an inspection, and the mode of conducting it has been elsewhere considered. The purpose of this action is a consideration of the operation and effect of a view, and on this branch of the subject decisions relating to view in criminal prosecutions, and in condemnation proceedings, are excluded because elsewhere considered in this work. There is considerable lack of harmony in the decisions. The rule which prevails in many jurisdictions is that when a view or inspection is permitted to the jury, what they may observe cannot under any circumstances become evidence; and that while they are entitled to use the results of their observation for the purpose of enabling them to better understand the matter in controversy between the parties, and to better understand and apply the evidence given in the case, this is the sole use to which the results of such observation can be put. They are not authorized to consider any fact bearing upon the merits of the controversy derived from such view, nor does it authorize them to ignore physical facts or disregard settled rules of law. The reasons assigned are usually those given for the general rule that jurors must disregard all personal knowledge of the case and give a verdict based on evidence regularly produced in the course of the proceedings. Where this doctrine prevails instructions which authorize or direct the jury to consider as evidence their own observations derived from the view are of course erroneous. But it is proper to instruct the jury to consider the evidence in the light of the knowledge obtained by their inspection. And

a request for an instruction directing the jury to disregard everything they saw and every impression they received from the view is properly refused. In a number of states the view prevails, and it is perhaps the one more consonant with reason, that the result of the juror's observation on a view is evidence which in making up their verdict they may consider in connection with evidence regularly produced before them in court. Where this view prevails, it is proper to give the jury instructions to this effect, and erroneous to instruct the jury to disregard evidence obtained by the view. Nevertheless the jury cannot arbitrarily disregard evidence regularly admitted in the trial of the cause and base their verdict solely on the result of their observations. The verdict must be supported by other evidence than that derived by the jurors from the view; and instructions which inform the jury that they may reach a verdict on the result of their observations, without regard to the testimony or in opposition thereto, are fatally erroneous."

Cyc., "Trial", Vol. 38, pp. 1840, 1841 and 1842, and cases there cited.

"If the rule were otherwise, the jury might base its verdict wholly on its own inspection of the premises, regardless of an overwhelming weight of evidence to the contrary, and the losing party would be without a remedy by motion for a new trial. It would be impossible to determine how much weight was due to the inspection by the jury as contrasted with the opposing evidence, or (treating the inspection as in the nature of evidence) whether it was sufficient to raise a substantial conflict in the evidence. The cause would be determined not upon evidence given in court, to be discussed by counsel and considered by the court in deciding a motion for a new trial, but upon the opinions of the jurors founded on a personal inspection, the value or the accuracy of which there would be no method of ascertaining."

Wright vs. *Carpenter, 49 Cal. 607, 610.*

VI.

It is not to be assumed that the jury drew any inference, one way or the other, from what they saw when they viewed the scene.

The Supreme Court seems to imply the contrary. Its reasoning seems to be that because the jury found adversely to the defendant it must be taken that the evidence obtained by the view caused this adverse inference. But this is a faulty deduction. Whether or not the jury had made up their minds when they took the view it is impossible to ascertain. They may have been of opinion that the evidence of the witnesses alone warranted their finding, and the view may have added nothing to their conviction upon the question of the defendant's liability. They may even have been led to regard the plaintiff's claim less favorably by what they saw and have decided for the plaintiff notwithstanding.

VII.

The unknown element of proof introduced by the taking of a view does not differ from any other unknown element of proof introduced by the presentation of "real evidence" upon the trial.

The theory of appellate review does not require a complete representation of all the facts and incidents resulting in the verdict and judgment below. The basis of consideration upon appeal is the

record, which, however it may be enlarged by the certificate of exhibits, must needs remain incomplete. The jury and the trial court must receive many impressions of high probative value from the proceedings at the trial which can never be reproduced in the appellate court. But this circumstance has never been supposed to be a reason for denying the right of review. Otherwise no award in condemnation could be re-examined. Views of land and of scenes of accidents and crimes; personal observation of the demeanor and physical condition of parties and witnesses; observation of experiments in the court room such as sketching on black-boards, handwriting tests, musical performances, and the handling of machinery; and many other forms in which "real" or demonstrative evidence is presented, give to the trial court and the jury an opportunity for the ascertainment of truth which is nearly always precluded by the conditions of presentation on appeal.

See

Gaunt vs. *State, 50 N. J. L. 490.* (*Opinion by Garrison, J.*)

Thayer's Cases on Evidence, Title "Real Evidence", pp. 713, et seq.

Brown vs. *Foster, 113 Mass. 136.*

But the character of the evidence cannot affect the authority of a court of appeal to re-examine the determination of fact at the trial.

As was said by Chief Justice Shaw in *Davis* vs. *Jenney, 1 Met. 221* (Mass. 1840):

> "We have no doubt that the verdict, in this case, is open to the inquiry, whether it was against the weight of evidence, and liable to be set aside on that ground. The authority of the court to set aside a verdict does not depend upon the nature and quality of the evidence, upon which the jury have found it; though it often happens, that the character of the evidence is such as to afford the jury much

> better means of judging of it, than the court can have of reviewing it; as where much depends upon localities, and the jury have a view; or upon minute circumstances, and there is conflicting testimony; or upon the credit of a witness, who is strongly impeached by one set of witnesses, and supported by another. In all such cases, the consideration, that the jury had means of judging of facts, which cannot afterwards be laid before the court, in their complete strength and fulness, will always have a prevailing and often a decisive influence upon the judgment of the court, in support of the verdict."

With similar reasoning it was said by Chief Justice Cartwright in *Seaverns* vs. *Lischinski, 54 N. E. 1043 (181 Ill. 358)*:

> "Aside from questions of fact, which we are not permitted to review, the only complaint made is that the appellate court refused to consider appellant's assignments of error, merely because the rope, which was produced in the trial court by him and exhibited to the jury, was not contained in the bill of exceptions. In the absence of anything in the record showing that fact, it will not be presumed that the appellate court adopted such a rule, or refused a hearing and consideration of the assignments of error for such a cause. It has never been held in this state that a jury might return a verdict upon their own knowledge, unsupported by other evidence, whether such knowledge was acquired in or out of court, by a view or otherwise, and a verdict based exclusively on knowledge so acquired would be set aside for want of substantial evidence to support it. A verdict unsupported by sworn testimony, upon disputed facts, has always been successfully challenged, whether there was a view or not, and if a jury has disregarded such evidence, or there is none which a reasonable person might believe and act upon, the verdict should be set aside. To allow jurors to make up their verdict upon a

disputed fact from their own individual observation would be most dangerous and unjust. In the very nature of things, it is ordinarily impossible to put in a bill of exceptions persons, places, or things exhibited to a jury; and it would be absurd to construe the certificate that the bill contains all the evidence as including such things. Rules of practice are adopted in furtherance of justice, and not as pitfalls for litigants, nor to enable a court of review to put out of court a party who feels himself aggrieved by a judgment and asks for a consideration of his complaints. The sense in which a bill of exceptions is understood, and the only reasonable meaning to be given to the certificate used, is that the bill does contain all the evidence if it contains that which was presented at the trial, although objects, persons, or scenes of which the jury may have had a view are not contained in it. And such is the rule. Railroad Co. *v.* Bowen, 40 Ind. 545. A court of review would not refuse to consider whether a verdict was sustained by substantial evidence because a wound or injury had been exhibited in court to the jury to permit them to see its character or extent, or personal marks had been exhibited in a case of personal identity where they were relevant, or a view of the scene of a crime had been permitted, because the person or the place was not attached to the bill of exceptions. Cases where a view has been permitted which the jury might consider in arriving at their verdict, either as evidence or to enable them to construe and apply the testimony, may stand on a somewhat different footing than when there has been no such view, but a verdict cannot be based alone upon seeing a rope or a building or the evidence of the scenes. Thomp. Trials, Sections 901, 902."

To the same effect are the cases cited in *Cyc.* under the title *"New Trial", Vol. 29, p. 831; Note 55.*

VIII.

The ruling of the Supreme Court is equivalent to a denial of the right of review.

The Court's opinion below intimates a doubt of the propriety of permitting the case to go to the jury. But this doubt is resolved against the defendant by the fact that a view had been taken. This amounts to deciding a case, not upon the known evidence, but upon the unknown evidence that may have resulted from the view. The appellant is told not that he has failed to show a proper case upon appeal, but that because he moved for a view by the jury he must stand or fall by the verdict ensuing. The Court says, in effect: "You "may still have an appeal, but it will be impossible "to adjudge the appeal because we cannot know "the effect of the view upon the jury." This is equivalent to denying the right of appeal.

IX.

Views are an ancient and a useful incident of legal procedure, and they should not be discouraged.

If the doctrine of the Supreme Court in this case is sustained no careful advocate will ever advise a client to have a view by a jury, because he will be thereby barred from relief by appeal. This would not promote justice for, in the words of Chief Justice Robertson of Kentucky, "The best "and highest proof of which any fact is susceptible

"is the evidence of our own senses. This is the "ultimate test of truth, and is, therefore the first "principle in the philosophy of evidence."

Gentry v. *McMinnin, 3 Dana 382, 386, 387.*

Moore on Facts, Vol. I, Sec. 159.

It is therefore respectfully submitted that a nonsuit or a direction of verdict should have been ordered and that the judgment below should be reversed.

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