

INDEX

	Page
Notice of Appeal and Grounds	1
Judgment of Reversal	2
Endorsement	3
District Court Summons	4
State of Demand	6
Notice of Appeal	8
Grounds of Appeal	9
Docket Entries & Judgment	10
Testimony	13
Motions for Nonsuit	34, 37
Reporter's Certificate	38
Stipulation	38
Opinion	40

WITNESSES

Plaintiff's:

Dr. Archibald Simson,	
Direct	13
Cross	15
Adeline M. Walker,	
Direct	17
Cross	20
Re-direct	22
Re-cross	23
Elizabeth Halter,	
Direct	25
Harry Tunkel,	
Direct	27
Cross	28
Jessie Baird,	
Direct	30
Cross	33
Benjamin Cohen,	
Direct	36

New Jersey
Court of Errors and Appeals

Notice of Appeal and Grounds. 10

(Filed June 30, 1927)

NEW JERSEY SUPREME COURT

ADELINE M. WALKER, Plaintiff-Respondent,	}	Action at Law	20
vs.			
F. & W. GRAND 5-10-25 CENT STORES, INC., Defendant-Appellant.			

*To McDermott, Enright & Carpenter, Attorneys
of Defendant-Appellant, or to whom it may
concern:*

30

Sirs:

Please Take Notice that the plaintiff-respondent in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

40

Judgment of Reversal

1. Because the Supreme Court erred in giving judgment to the defendant-appellant instead of to the plaintiff-respondent.

Respectfully yours,

10

FRANK COHN,
Attorney of Plaintiff-respondent.

Judgment of Reversal.

(Filed June 24, 1927)

20

NEW JERSEY SUPREME COURT

ADELINE M. WALKER, Plaintiff-Appellee, vs. F. & W. GRAND 5, 10 & 25 CENT STORES, INC., Defendant-Appellant.	}	On Appeal from Eliz- abeth District Court.
--	---	---

30

It appearing that the appeal in the above entitled cause was submitted on brief to the New Jersey Supreme Court and the Court having examined the testimony in said cause and the briefs of counsel and being of the opinion that the judgment entered in the Elizabeth District Court on December 6, 1926, in the sum of \$300 and costs should be reversed:

40

Judgment of Reversal

IT IS ORDERED that the judgment in the above entitled cause entered in the District Court of the City of Elizabeth on December 6, 1926, in favor of Adelaide M. Walker, plaintiff and against F. & W. Grand 5, 10, 25 Cent Stores Inc., defendant, in the sum of \$300 damages and \$20.11 costs be and hereby is reversed and the record remitted to the Court below to be proceeded with according to law and the practice of said Court.

10

Dated June 24, 1927.

On Motion of

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys.

20

Endorsement

I, Edward J. Kelleher, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the Court in the above-stated cause.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this
(Seal) Fifth day of July, A. D. nineteen hundred and twenty-seven.

30

EDWARD J. KELLEHER,
Clerk.

“Filed Jul 6, 1927,
Joseph F. S. Fitzpatrick,
Clerk.”

40

District Court Summons.

NEW JERSEY SUPREME COURT

Union County, ss:

10 THE STATE OF NEW JERSEY, To any Con-
stable of Said County, or the Ser-
geant-at-Arms of the District Court
of the City of Elizabeth.

SUMMON

F. & W. Grand 5-10-25 Cent Stores, Inc.
20 To appear before the District Court of the City
of Elizabeth to be held at the District Court Room
in the Union County Court House in said City,
on the 12th day of August, 1926, at ten o'clock
in the forenoon, to answer unto Adeline M.
Walker in an action Tort. \$500.00 and then and
there have you this writ.

Hereof fail not.

30 Witness, Edward A. McGrath, Esquire,
Judge of said Court at Elizabeth afore-
(Seal) said, the 2nd day of August, in the
year One Thousand Nine Hundred and
Twenty-six.

GEORGE J. SMITH, Clerk.

District Court Summons

Endorsed on back:

No. 2050

BROAD ST. ELIZABETH 10

DISTRICT COURT OF THE CITY OF
ELIZABETH

ADELINE M. WALKER

vs.

F. & W. GRAND 5-10-25 CENT STORES, INC.

Action - - - - \$ 500.00 20
Costs - - - - \$ 3.60
Mileage - - - - \$.08

Issued, August 2nd, 1926.

Returnable, August 12th, 1926.

FRANK COHN Att'y for Plt'ff
80 Broad St. Elizabeth, N. J. 30

State of Demand.

(Filed August 2, 1926)

ELIZABETH DISTRICT COURT

10	ADELINE M. WALKER, <div style="text-align: right;">Plaintiff,</div>	}	In Tort
	vs.		
20	F. & W. GRAND 5-10-25 CENT STORES, INC., <div style="text-align: right;">Defendant.</div>		

Plaintiff, Adeline M. Walker, residing in the City of Elizabeth, County of Union and State of New Jersey, says that:

1. The defendant was and is a corporation maintaining a store located in the City of Elizabeth, County of Union and State of New Jersey.
2. On or about the twenty-first day of December, 1925, the plaintiff was invited into said store by the defendant corporation to purchase of the goods and wares of which the defendant corporation had for sale.
3. While so purchasing said goods, the plaintiff in going from the first floor of said store to the basement of the store, was required to use a staircase provided by the defendant, which staircase was maintained in a very careless and negligent manner by the defendant, by its servants, agents

40

State of Demand

or employees, in that one of the steps was defective.

4. The plaintiff using said staircase, stepped on this defective step unknowingly and slipped and fell down said stairs and was severely injured and was caused great pain and suffering and was compelled to lay out considerable sums of money for medical attention.

5. The defendant corporation had notice of said defect in the staircase and negligently and carelessly refused to repair same.

The plaintiff demands as damages of the defendant the sum of Five (\$500.00) hundred dollars, together with costs of suit.

FRANK COHN,
Attorney for Plaintiff.

10

20

30

40

Notice of Appeal.

ELIZABETH DISTRICT COURT

10	ADELINE M. WALKER, <div style="text-align: right;">Plaintiff,</div>	}	In Tort
	vs.		
	F. & W. GRAND 5-10-25 CENT STORES, INC., <div style="text-align: right;">Defendant.</div>		

To Frank Cohn, Esq.,
Attorney of Plaintiff.

20 Sir:

Take notice that the defendant F. & W. Grand 5-10-25 Cent Stores, Inc., hereby appeals to the New Jersey Supreme Court from the judgment of the Elizabeth District Court, rendered in the above stated action on the 6th day of December, 1926.

30 McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Defendant.

40

Grounds of Appeal.

(Filed January 10, 1927)

NEW JERSEY SUPREME COURT

10	ADELINE M. WALKER, <div style="text-align: right;">Plaintiff-Appellee,</div>	}	10
	vs.		
	F. & W. GRAND 5-10-25 CENT STORES, INC., <div style="text-align: right;">Defendant-Appellant.</div>		

To: Frank Cohn, Esq.,
Elizabeth, N. J. 20

Take notice that the appeal of the defendant, F. & W. Grand 5-10-25 Cent Stores, Inc., will be based upon the following grounds:

1. Because the Court erroneously refused to grant the defendant's motion for a nonsuit at the trial of said cause.

2. Because the Court erroneously refused to grant the motion of the defendant for a judgment in favor of the defendant of no cause for action. 30

3. Because the Court erroneously admitted testimony of the plaintiff, Adeline M. Walker, as to the condition of the steps in the building of the defendant, based upon her observation made approximately six weeks after she claimed to have sustained her injury. 40

Docket Entries and Judgment

4. Because the Court erroneously incorporated in the state of the case the result of an inspection of the stairway in the building of the defendant made by the Court almost one year after plaintiff claims to have sustained her injury.

10

5. Because there is no evidence in the case to show any defect in the stairway on December 21, 1925, which would render the defendant liable to the plaintiff for damages.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Defendant-Appellant.

20

Docket Entries and Judgment.

STATE OF NEW JERSEY, }
 } ss: IN THE DISTRICT
COUNTY OF UNION, } COURT OF THE CITY
 } OF ELIZABETH.

30

ADELINE M. WALKER, }
 } Plaintiff, }
 } Demand \$500.00
 } Att'y of Pl'ff
 } Frank Cohn
 } Att'y of Deft.
 } McDermott,
 } Enright &
 } Carpenter.
 } Defendant. }

A Summons was issued in the above stated cause Aug. 2nd, A. D. 1926, returnable Aug. 12th

40

Docket Entries and Judgment

A. D. 1926, at 10 o'clock A. M., and was returned by the Constable as follows:

I served the within Summons Aug. 3rd, 1926, on the defendant by reading it to a clerk in charge of said Co. and giving her a copy.

10

O. Conlon, Constable.

Demand filed August 2nd, 1926, Adj. from time to time to Sept. 20th, 1926. Archibald Simson, Adeline M. Walker, Elizabeth Halter, Harry Tunkel, Jessie Bear and Ben Cohn was sworn for the plaintiff. Exhibit P-1 was put in evidence by the plaintiff. Court reserved decision.

On December 6th, 1926. Court gave judgment in favor of said plaintiff and against said defendant in the sum of Three Hundred Dollars and Costs. \$300.00

20

Bond and Appeal filed Dec. 21st-1926

Issuing Summons \$ 2.10
Constable, Mileage .08
Listing, Etc. 1.50
Attorney's Fee 15.00

\$18.68

30

Upon the demand of the plaintiff, an Execution was issued Dec. 21st, 1926 against the goods and chattels of the defendant for the aforesaid debt and costs, the Execution being endorsed as follows and placed in the hands of O. Conlon, Constable.

Judgment \$300.00
Costs 18.68
Execution 1.43

\$320.11

40

Docket Entries and Judgment

Endorsement

State of New Jersey, }
 County of Union. } ss:

10 I, George J. Smith, Clerk of the District Court
 of the City of Elizabeth, do hereby certify the
 foregoing to be true and correct copies of a cer-
 tain State of Demand, Summons, also a copy of
 the Judgment as the same is recorded in Book
 85 of Records for said City of Page 228.

20 IN WITNESS WHEREOF, I have hereunto set my
 hand and affixed my official seal, this 31st day of
 December, A. D. 1926.

GEORGE J. SMITH,
 Clerk.

(Seal)

Testimony.

ELIZABETH DISTRICT COURT

A. WALKER,

Plaintiff,

vs.

F. & W. GRAND 5-10-25 CENT
 STORES, INC.,

Respondent.

10

Transcript of stenographic notes of the testi-
 mony taken in the above-entitled matter before
 Hon. Edward McGrath, District Court Judge, at 20
 the Union County Court House, Elizabeth, New
 Jersey, on the 20th day of September, A. D. 1926,
 at 1:30 p. m. in the afternoon.

Appearances:

Frank Cohn, Esq., for the Plaintiff.

Carl S. Kuebler, Esq., for the Defendant.

(McDermott, Enright & Carpenter, Esqs.)

DR. ARCHIBALD SIMSON, a witness on 30
 behalf of the plaintiff, sworn.

Direct-examination by Mr. Cohn:

Q. Dr. Simson, you are a practicing physician
 of the City of Elizabeth? A. I am.

Q. For how long? A. Since last November.

Mr. Cohn: Will you admit his qualifica-
 tions? 40

Mr. Kuebler: I will.

Dr. Archibald Simson—Direct

Q. Doctor, did you have occasion to examine Miss A. M. Walker? A. I did.

Q. Have you your records with you? A. Yes.

Q. Will you tell us on what date you examined Miss Walker? A. The first time I saw her was
10 September 29th, she came to me with the story that she had been—

Q. Don't tell the story, just what dates did you examine her? A. December 29th, January 4th, January 8th, January 12th, January 25th, February 16th. I didn't make a note, but I saw her very recently, a few weeks ago.

Q. You examined her on December 29th? A. Yes.

20 Q. What did you treat her for? A. I treated her for dislocation of her right shoulder.

Q. Dislocation of her right shoulder; any other injuries? A. She had minor injuries on her arm and wrist; bruises, that's all.

Q. But she complained of her arm? A. She did, yes.

Q. What did she complain of? A. Stiffness, shooting pains along the arms.

30 Q. Did she tell you what the cause of her injuries were? A. Yes.

Q. What did she tell you? A. She said she had slipped on some stairs in a big store on Broad Street the week before that.

Q. You have examined her at least 8 or 9 times? A. Yes.

Q. When was the last time you saw Miss Walker? A. I don't remember the date it might have been 2 or 3 weeks ago.

40 Q. Did you give her an examination? A. Yes.

Dr. Archibald Simson—Cross

Q. What was her condition at that time? A. Markedly improved.

Q. Was she able to use her right arm for any length of time—that is not the question; strike it out. Was she deprived of the use of her right arm for any length of time? A. For certain
10 movements she was.

Q. For certain movements, for instance lifting? A. She couldn't lift, no, but she could put her hand behind her head, which is really the test for dislocation.

Q. Did you note from your examination whether she suffered pain? A. Well, we usually have to take the patient's word for pain.

Q. Did you submit a bill, doctor? A. I did. 20

Q. How much was your bill? A. She paid me every time she saw me, she missed paying me just a few times and I sent her a bill for that.

Q. How much did she pay you already? Well, doctor, how much did you charge her for each visit? A. \$2.00.

Q. How many visits? A. 8 or 9, I guess.

Q. That would be approximately \$18.00? A. Yes.

Q. Did you prescribe any medicine? A. I did. 30

Mr. Cohen: That's all.

CROSS-EXAMINATION by Mr. Kuebler:

Q. Doctor, she saw you once in December, four times in January and once in February and you told her in February there was no need of her seeing you again, I suppose? A. Well, told her to come to see me in about a month or two so I
40

Dr. Archibald Simson—Cross

can judge after a period of time how much improvement there really is.

Q. And she never came back until about two weeks ago? A. Two or three weeks ago.

10 Q. Then she came, I suppose, for the purpose of being examined for this trial? A. Well, the trial, she told me, was pending a long time.

Q. What was her condition February 16th? A. She couldn't move her arm very much at that time but it was certainly very improved from the condition from January, but it is always a very slow recuperation after this condition, so far as the usual arm goes.

20 Q. What did you prescribe for her when you last saw her? A. I gave her the exercises to do along the wall (indicating).

Q. How far back could she move her arm? A. She couldn't get the arm to the back of the head at that time.

Q. How near could she get it to the back of her head? A. About this far (indicating).

Q. About six or eight inches from the back of her head? A. Yes.

30 Q. That is all right now, I suppose? A. That is in fair condition now, as good as you can expect it.

Mr. Kuebler: That's all.

Mr. Cohen: That's all.

Adeline M. Walker—Direct

ADELINE M. WALKER, the plaintiff sworn:

Direct-examination by Mr. Cohen:

Q. Miss Walker, where do you live? A. 403 W. Jersey Street, Elizabeth.

Q. Did you have occasion to go into the F. & W. 10 Grand Store on Broad Street, Elizabeth? A. I did.

Q. When? A. On or about December 21st.

Q. What year? A. 1925.

Q. Did you go in for the purpose of purchasing? A. I went in for the purpose of purchasing some paper which was sold in the basement.

Q. In order to go down to the basement what was necessary for you to do? A. In order to go 20 down in the basement?

Q. Yes. A. To go downstairs, I went down very carefully with my hands on the hand rail.

Q. Just answer the question. Did you go down the stairs? A. I went down the stairs.

Q. Did you get all the way down? A. No.

Q. Why not? A. Because I slipped on something when I reached about the 4th step.

Q. You slipped? A. Yes, I slipped.

Q. What was that something you slipped on? 30 A. I imagine it was the metal—

Mr. Kuebler: I object to what she imagines.

Q. Not what you imagine. A. It was the metal binding on the edge of the tread.

Q. Was there anything else on that step that could have caused you to slip? A. Not that I know of. 40

Adeline M. Walker—Direct

Q. Did you see anything? A. I didn't see anything, because—

Q. Just answer the question. A. I didn't see anything, no.

10 Q. You say that the steel binding at the edge of the step caused you to slip? A. Yes, the metal binding, I don't know whether it is steel or not.

Q. What was the condition of that metal binding at the time you slipped? A. Smooth and slippery.

Q. Then what happened after you fell? A. When I found myself slipping I clung to the hand rail, trying to save myself, to prevent a fall.

20 Q. After you slipped, what happened? A. After I slipped, I fell all the way down the stairs and landed right on the landing at the foot of the stairs.

Q. Then tell us what happened. A. When I picked myself up, or was pulled up by one of the clerks or somebody, I felt my shoulder was under my chin. I demanded they send for an ambulance.

Q. Did they send for an ambulance? A. They sent for an ambulance.

30 Q. Where did they take you to? A. I went to the General Hospital.

Q. What did they do for you at the General Hospital? A. They put me on the operating table and set my shoulder in place. That is the muscles that were torn, and then took an X-ray of it.

Q. How long were you there? A. I don't suppose it took more than an hour.

40 Q. You don't suppose it took more than an

Adeline M. Walker—Direct

hour. Then where did you go? A. Then I had the attendant at the hospital call a taxi-cab and took me to my home.

Q. Did you receive any further medical treatment thereafter? A. I was told to come back to the hospital. 10

Q. Did you receive any medical treatment at the hospital? A. Yes, at the hospital once after that.

Q. Any further treatment? A. Through my own doctor.

Q. Who is he? A. Dr. Simson.

Q. The doctor who testified this morning? A. The doctor who testified this morning.

Q. He has been treating you ever since? A. 20 Yes, sir.

Q. What other injuries did you suffer besides the dislocated right shoulder? A. Torn muscles which disarranged the whole nervous system from the beginning of my spine to my hand, which paralyzed my fingers so I wasn't able to hold a pin for two months. When I put a thimble on my finger to exercise my hand a little bit I had to get one three sizes larger.

Q. Do you have the free use of your right arm? 30 A. No—

Q. I withdraw that question. That hand, did that deprive you of the use of the right arm? A. I was totally deprived of the use of the right arm for two months, and it was six months before I could get my hand to the back of my head. That is nine months now, and my hand is still disabled.

Q. Did you have any bruises on your body? 40 A. Yes, I had a gash across my right knee.

Adeline M. Walker—Cross

Q. Did it bleed? A. It bled so that my dress was covered with blood. And that was dressed at the hospital, too.

Q. Were you in that store any time after the accident? A. Just to look at these stairs.

10 Q. When, about when? A. Six weeks, probably, because I wasn't able to go out.

Q. Did you see the stairs? A. I saw the stairs.

Q. What was the condition of the stairs at that time?

Mr. Kuebler: I object to her testifying as to the condition of the stairs six weeks after the accident.

The Court: Objection overruled.

20 Mr. Cohen: I ask an exception. That's all.

CROSS-EXAMINATION by Mr. Kuebler:

Q. You have lived in Elizabeth for some time, Miss Walker? A. I have always lived in Elizabeth.

Q. And been a patron of the F. & W. Grand Stores for some time? A. Yes.

30 Mr. Cohen: Pardon me, if your Honor please, I misunderstood the ruling of the Court on my last question. If your Honor will permit me, I will continue with the further examination of the witness.

The Court: You can do it afterwards.

Q. You've been a patron of the F. & W. Grand Stores? A. No.

40 Q. Ever in there before December, 1925? A. Never in the basement.

Adeline M. Walker—Cross

Q. When you went in the basement on that day which stairs did you use? A. The front stairway on the south side, that is the left side, going down.

Q. The left side as you would come in the front door? If you were coming in from the street and going to the basement it would be the left-hand stairway as you go down to the basement? A. Yes, as I had my right hand on the banister quite naturally—

Q. You claim that you got to about the fourth step? A. Yes.

Q. Then you slipped on something? A. Yes.

Q. Did you go down to look at the stairway then? A. Did I go back? I wasn't in condition 20 to go back.

Q. Just answer the question, yes or no. A. No, I was upset so I had to be taken out of the store, the man carried me upstairs and put me in the ambulance.

Q. Then you didn't see the steps until about six weeks after you fell? A. Yes.

Q. On January 2d you addressed a letter to the F. & W. Grand Stores? A. I dictated that letter to my niece, my nephew's wife. I wasn't able to write it. 30

Q. In that letter you stated, did you not, "On December 21st while shopping at the above store I slipped on something on the stairs leading to the basement." Is that not correct, yes or no? A. That is correct as to the something, but the something—

Q. That is correct? A. That is correct.

Q. After you were taken to the hospital you were taken to your home? A. Yes. 40

Adeline M. Walker—Re-direct

Q. How long did you remain at your home? A. It was a month before I went out.

Q. Before you went out? A. Except I had to call a taxicab once to go to the hospital and once to see my lawyer, and then my doctor was right
10 near me. But I wasn't able to go out of the house for anything, except taking care of my condition.

Mr. Kuebler: That's all.

RE-DIRECT-EXAMINATION by Mr. Cohen:

Q. Miss Walker, when you say you said in that letter you stepped on something on the stairs, what did you mean by that? A. I couldn't say
20 what it was, except it must have been—

Mr. Kuebler: Just a minute.

The Court: It wouldn't make any difference. She slipped, and she doesn't know what she slipped on.

A. I slipped and fell, it was on the metal—

Mr. Cohen: Just answer the question.

The Court: She didn't see what she
30 slipped on.

The Witness: When a person is in such a condition if they fall they don't go back to look.

Mr. Cohen: All right.

Q. Miss Walker, did you have occasion to examine these steps after the accident? A. Yes.

Q. About how soon after the accident? A. About six weeks.

40 Q. After the accident? A. Yes.

Adeline M. Walker—Re-cross

Q. And what was the condition of the steps at that time?

Mr. Kuebler: I object on the ground it has no bearing upon any allegation of negligence in this case. 10

By the Court:

Q. What did you see at that time? A. I saw this smooth metal binding.

Q. Where? A. On the edge of the steps.

Q. Which steps? A. All the steps.

Q. All the steps? A. They are all alike, I should judge, I didn't look at the other steps.

Q. What do you do for a livelihood, Miss Walker? A. I had not been doing anything regu- 20 lar.

Q. What did you do at the time of the accident? A. I was telling stories in a Department Store, entertaining children.

Q. Were you able to continue that work after the accident? A. No, I wasn't able to go out.

Q. Because of your condition? A. Yes.

Mr. Cohen: That's all.

RE-CROSS-EXAMINATION by Mr. Kuebler: 30
Q. Miss Walker, as a matter of fact then, you fell on this stairway on December 21st? A. Yes.

Q. And you fell on something, but you don't know what you slipped on? A. I slipped—

Q. Isn't that correct? A. I slipped on that brass stuff.

Q. That is the conclusion which you reached six months afterward when you went back and 40

Adeline M. Walker—Re-cross

looked at the stairway, is that correct? A. Six months?

Q. I mean six weeks after. A. I know I slipped going down those stairs and the position of the stairs, I saw—

10 Q. You know you slipped on December 21st? A. Yes.

Q. At that time you had no idea what caused you to slip, had you? A. You don't allow me to think; I imagined it was that and I went back to see.

Q. You imagined it was that? A. I wanted to see what condition those stairs were in and I went back to look out of curiosity to see what
20 kind of steps they were.

Q. When you went back six weeks after, you found all the steps in the stairway in the building had smooth metal nosings for edges? A. I didn't look at all.

Mr. Cohen: That isn't the question.

Q. You examined that stairway, didn't you? A. Yes.

Q. You noticed all the steps on that stairway
30 had this smooth metal nose? A. Yes.

By Mr. Cohen:

Q. Miss Walker, at the time you fell, were you able to look and see after if there was any substance you slipped on or any material of any kind? A. No.

Q. Was there any? A. Not that I know.

Q. Did you see any? A. I didn't see any.

Elizabeth Halter—Direct

By Mr. Kuebler:

Q. You didn't look, did you? A. How could I look back, to look when I was so agonized in my heart?

Mr. Kuebler: That's all.

Mr. Cohen: That's all.

10

ELIZABETH HALTER, a witness on behalf of the plaintiff, sworn:

Direct-examination by Mr. Cohen:

Q. Miss Halter, did you have occasion to go into the F. & W. Grand Store on Broad Street, Elizabeth, during November or December, 1926? 20

A. Yes, sir.

Q. When did you go in there? A. I think it was Saturday evening, I think it was around November 7th.

Q. Sometime around November 7th? A. Yes, I think it was that time I went in for dishes.

Q. Just answer the questions, that was before December 21st, 1926? A. Yes, sir.

Q. Did you go down the stairs leading to the
30 basement? A. Yes, sir.

Q. Did you meet with an accident? A. Yes, sir.

Q. What happened?

Mr. Kuebler: I object unless the stairway is specified.

Q. What stairway did you go down, Mrs. Halter? A. I went down always to the left, I went 40

Elizabeth Halter—Direct

all through the store, right to the rear, I went down in the back and I was going down—

Mr. Kuebler: I now object, because it is an entirely different stairway.

10 The Court: Of course, it would have to be the same stairway.

Mr. Kuebler: No, there are three stairways in the store and Mrs. Walker went down the left front stairs.

20 The Court: The point is, defendant must have noted the defective condition, or the defect must be shown to exist so long that they must have noticed and had a reasonable opportunity to repair it. What happened on some other stairway has nothing to do with it.

Mr. Cohen: Even if the stairways are built exactly alike?

The Court: I don't think that has anything to do with it.

(Discussion between counsel.)

30 Mr. Cohen: That's all. I will withdraw this witness then.

40

Harry Tunkel—Direct

HARRY TUNKEL, a witness on behalf of the plaintiff, sworn:

Direct-examination by Mr. Cohen:

Q. Mr. Tunkel, you are a builder in the City of Elizabeth? A. Yes. 10

Q. For how long? A. For about three years.

Q. You had an occasion to build stairways and staircases in your buildings? A. Yes.

Q. Upon my request did you examine the stairways leading to the basement of the F. & W. Grand Store on Broad Street? A. Yes.

Q. How many times did you examine them? A. Twice.

Q. When? A. Once I examined last week, I don't remember the date, whether Monday or Tuesday. 20

Q. When was the other time you examined it? A. This morning.

Q. Did you examine the stairway as you entered the F. & W. Grand Store on the left side leading to the basement? A. There are three stairways, two in the front and one in the rear.

Q. Did you examine the two front stairways? A. I examined all three. 30

Q. You examined all three? A. Of course, I examined the two because—

Q. That is enough, what is the condition of those staircases?

Mr. Kuebler: I object to the condition of any staircases except the left front one of the accident.

Mr. Cohen: All right. 40

Harry Tunkel—Cross

Q. What is the condition of the left front staircase? A. The condition of the stairs as I stated this morning is perfectly good, but the edge of the stairs is very slippery and it is worked off by walking over it, and people without attention
10 walking down are liable to slip off and fall down, as I said this morning.

Q. They are very well worn? A. Oh, yes.

Q. And slippery? A. Yes.

Q. Is each step lined with steel or some sort of metal? A. Yes.

Mr. Cohen: Cross-examine.

20 CROSS-EXAMINATION by Mr. Kuebler:

Q. Mr. Tunkel, you've been in the building business for how long? A. I've been in the building business for 14 years.

Q. What have you been building, houses? A. I've been building for myself, some houses but I used to work for somebody else, on big apartment houses.

Q. Did you build the stairways or sublet the stairways? A. It is not a question whether I
30 built. In the buildings I worked we put the stairways in.

Q. In a good many of those stairways you put noses on, do you not? A. Well, to make is short, from the stairs I put in, wooden ones are the most.

Q. Entirely wooden ones? A. Entirely wooden ones.

Q. Very often, isn't it the custom on wooden stairways to put brass strips of nosing along the
40

Harry Tunkel—Cross

edge of the stairway? A. I used to do it, but corrugated, about three inches in width.

Q. Isn't it very often done in plain brass strips? A. Very seldom, where it is a public place it is very seldom done. Something with
10 smooth edges.

Q. You see them sold day after day in the stores, do you not?

Mr. Cohen: I object to the question.

The Court: You cannot go into the stairways in other buildings, that has nothing to do with it.

Q. You have never built stairways of this type yourself? A. I am a builder, and by trade I used
20 to be a carpenter, so I never made any concrete and iron stairs.

Q. What is the material used in the construction of these stairs in question? A. They are concrete and steel edges, as I notice.

Q. They are stairways very well built, are they not? A. You can carry out heavy loads on those stairs; they are strong built, pretty strong.

Q. The only thing you found was this metal on the stairway was a smooth metal? A. Of
30 course, when you put your foot on it—

Q. Just answer the question; it is a smooth metal, isn't it? A. Yes, it is a smooth metal.

Q. From the very nature of this design, it was designed as a smooth metal? A. No, it was worn off and made smooth.

Q. It was worn off? A. Yes.

Q. Did you notice whether the metal was smooth from one edge of the stairs to the other? 40

Jessie Baird—Direct

A. I noticed it is smooth in the center, where most people walk, on the edges it is black as it was in the beginning.

Q. You are sure of that? A. Positive.

Q. Absolutely positive? A. Positive.

10 Q. Then you say corrugated metal on the edge and smooth metal in the middle? A. On the edges it is uncorrugated; it is black as it used to be when it was new. In the middle, by walking off it is worn off, like the edge of this little fence. The public walks them off and the edge is square.

Q. That is the same kind of metal, then, isn't it? A. It is the same kind of metal, but it is worn off.

20 Q. How far from the side is it worn smooth? A. To my estimation, it starts in from the edge six inches; it is pretty dark eight inches, then it is worn a little, ten inches it is worn more and as you come to the center it is worn more.

Mr. Kuebler: That's all.

Mr. Cohn: That's all.

30 JESSIE BAIRD, a witness on behalf of the plaintiff, sworn:

Direct-examination by Mr. Cohn:

Q. Miss Baird, were you ever employed with the F. & W. Grand people? A. I was.

40 Q. Did you ever have occasion to observe people walking up and down the left hand staircase leading to the staircase? A. I did.

Jessie Baird—Direct

Q. Did you ever see anybody slip on that staircase?

Mr. Kuebler: I object. There is no testimony when she was employed by them, when any such slipping occurred.

Mr. Cohn: I really don't think it necessary to prove the time for this reason: 10 If she saw anybody slip at all as an employee of this place that is notice to them that there was something wrong with this staircase. But I will ask the lady about the time.

Q. During what time did you work for F. & W. Grand? A. 1925; I worked there for a year. 20

Q. Did you work there November, 1925? A. I didn't; I quit in November, the first week in November.

Q. You worked there prior to November, 1925, didn't you? A. Yes, sir.

Q. Did you ever have occasion to see anybody slip on the left hand staircase leading to the basement?

Mr. Kuebler: I object to that. That has reference to a time prior to November, 1925, which in itself was a month and a half before this woman slipped. 30

The Court: It would show notice of a defective condition, wouldn't it?

Mr. Kuebler: Further, anything she observed six weeks before this woman fell wouldn't be noticed to the F. & W. Grand Stores.

The Court: Now, would he bring notice 40

Jessie Baird—Direct

to the F. & W. Grand Stores, how else could they prove the notice?

Mr. Kuebler: Not by the observation made by some one more than six weeks before something occurred.

10 The Court: What did you notice about this stairway at this time you speak of; describe the condition of the stairway?

A. The only thing, they were black stairs and there was a shiny thing along the edge of each stair, it is very shiny. That's all I ever noticed. A piece of iron, I think, or metal.

Q. Some metal? A. Some metal.

20 Q. You saw the people coming up and down these stairs every day? A. Every day.

Q. Did anything happen to anybody as they came up and down those stairs?

Mr. Kuebler: I object on the same ground.

The Court: I will allow it.

Mr. Cohn: Answer the question, Miss Baird.

30 A. I saw one or two slip there.

Q. Do you know whether the manager of the place ever knew those people slipped on the staircase? A. The manager of the place was always there when anyone slipped.

Q. He was notified of it, wasn't he? A. He must have been notified; he was there.

40 Q. He was there; those steps are pretty well used, aren't they? A. Naturally, in a store that big.

Jessie Baird—Cross

Q. You had extensive floor space in the basement? A. Certainly did.

Q. And there is quite a number of people go down those stairs every day? A. Every day.

Mr. Cohn: That's all. 10

CROSS-EXAMINATION by Mr. Kuebler:

Q. When you worked in that store, what department did you work in? A. The basement.

Q. What end of the basement? A. I was from one stairs to the other stairs.

Q. In other words, you went back and forth from one end to the other, in the course of your work? A. One end to the other. 20

Q. There were a good many people went up and down those stairs in the course of a day, didn't they? A. Certainly did.

Q. You left there the first part of November? A. Yes.

Q. Were you discharged at that time? A. I wasn't discharged; they cut my wages and I quit.

Mr. Kuebler: That's all.

Mr. Cohn: That's all.

Mr. Kuebler: Just one more question. 30

Q. What color did you say the stairway was? A. It is dark stone like, cement or whatever it is, very dark stairs.

Q. What was the color of the base of the stairs? A. Between reddish and dark; that's all I know.

Mr. Cohn: That's our case.

Mr. Kuebler; I move a nonsuit, on the ground there is no proof of any negligence 40

Motion for Nonsuit

10 in the case. The testimony simply shows this woman slipped. She says herself she didn't know what she slipped on. She has admitted in a letter to the defendant company that on the date of "December 21st, while shopping in the above store, I slipped on something on the stairs leading to the basement." On something, she says herself she didn't make any observation but six weeks after she came back and she observed that stairway was composed of a sort of cement with a metal stuff which was shiny and looked slippery. That is not a defect in the eyes of the law, and in view of the decision in this State. The complaint is that the staircase was maintained in a careless and negligent manner while she was then using said staircase she stepped on this defective step. Now, their testimony of the expert they put on the stand in this case is that all these stairways are the same. He says the stairways are good but he says the edges are slippery. While I was out this noon, I was in a building on the main street in the City of Elizabeth with the same type of steps—

30 Mr. Cohn: I object to that.

Mr. Kuebler (continuing): I went up a couple of stairs with brass strips across the edge that were practically smooth, just as smooth as the flooring in this court. That is not any reason for holding the defendant for negligence. If the edge is

40

Argument

smooth. If it was worn or broken, or anything to catch the heel on, that would be a different proposition. Thousands of people go up and down these stairs, and the mere fact a few people are in this court at the present time alleging damages because they fell on the stairways, I don't think that is proof in itself of the stairs being in a defective condition. A good many people go up and down those stairs and a few of them are bound to fall from various causes.

The Court: You think maintaining a slippery stairway is not negligent?

Mr. Kuebler: That is my point. It has got to be a defective staircase, in some way. You can't, for instance, have a metal that does not get slippery when people are walking on it all the time.

(Further discussion between counsel.)

The Court: The case is not as strong as the one this morning because in that case there were two witnesses had actually fallen down on the stairs and testified they had notified the management. The evidence in this case is not very strong on the feature of notice.

(Further discussion between counsel.)

Mr. Cohn: If your Honor please, I have still another witness in order to prove they had notice. May I produce him?

The Court: Yes.

40

Benjamin Cohen—Direct

BENJAMIN COHEN, a witness on behalf of the plaintiff, sworn:

Direct-examination by Mr. Cohn:

10 Q. Mr. Cohen, you are employed with the F. & W. Grand Stores of Broad Street, Elizabeth? A. Yes, sir.

Q. In what capacity? A. Assistant manager.

Q. Assistant manager. Were you employed with these people on or about December 21st, 1925? A. Yes, sir.

Q. Do you recall a Miss Walker having fallen on those steps? A. I recall somebody called me as she was falling down.

20 Q. Somebody called you as she was falling? A. Yes.

Q. Did you go there? A. I went there.

Q. What did you do? A. I saw Miss Walker lying down at the base of the stairs and I and another gentleman picked her up.

Q. You have occasion to use those steps every day haven't you? A. Every day I am there.

Q. You used them prior to the time Miss Walker fell? A. Before and after.

30 Q. What is the condition of those steps today? A. Why, as good as they were when Miss Walker fell down.

Q. Are they also as good today as they were the week before Miss Walker fell? A. Absolutely.

Q. They are just as good? A. Just as good.

Q. You are the assistant manager? A. One of the assistant managers.

40 Q. Did it ever come to your attention prior to

*Benjamin Cohen—Direct
Motion for Nonsuit*

December 21st, 1925, that anybody fell on those stairs? A. Not that I recollect, no.

Q. Are you sure? A. I won't swear to it, no.

Q. You won't swear to it? A. Because I couldn't very well remember. 10

Q. You won't swear to whether or not anybody ever called you because somebody fell on those steps? A. Not that I know of, no.

Mr. Cohn: That's all.

Mr. Kuebler: That's all. No questions.

Mr. Kuebler: I renew my motion, of course, after this testimony.

The Court: The whole theory in this case is, 20 this condition of the round metal strips became unusually worn and slippery and caused this plaintiff to fall; is that your case?

Mr. Cohn: Yes.

The Court: You have got to show this condition existed so long the company must have known of it in time to remedy it.

Mr. Cohn: Yes, sir; and I think I have shown it.

The Court: All you have shown is some other 30 people fell on those stairs.

(Further discussion between counsel.)

(Decision reserved.)

Reporter's Certificate.

I hereby certify that the foregoing is a true and accurate transcript of the testimony taken by me at the time, place, date and in the matter hereinbefore set forth.

10

WILLIAM C. O'BRIEN,
Court Reporter.

Stipulation.

ELIZABETH DISTRICT COURT

20

A. M. WALKER,
Plaintiff,

vs.

F. & W. GRAND 5-10 AND 25-
CENT STORES, INC.,
Defendant.

30

It is hereby stipulated that in addition to the foregoing testimony, the state of the case in said cause is as follows: At the close of the trial the attorneys requested the Court to inspect the premises in question before rendering a decision, and as the Court did inspect the premises in question on November 20th, 1926, denied the motion for a nonsuit. The attorneys for the respective parties appeared before the Court again on November 15th, at which time the attorney for the defendant rested without the introduction of any

40

Stipulation

further testimony and moved for judgment for the defendant on the ground that there was no proof of any negligence on the part of the defendant and for the same reasons set forth in the defendant's motion for a nonsuit. The Court asked the attorney for the defendant if he would consent to have the fact of his inspection and the result thereof incorporated in the record as the basis of decision, and the attorney for the defendant stated that he had no objection as to the fact but contended that the result existing at that time had no relevancy. Accordingly the result of such inspection is hereby set forth and certified to be part of the record on which the decision of the court was made, viz., the court found that the stairs in question were nosed with a brass nosing on the extreme edge about 1-inch wide. These strips were smooth and slippery and gave evidence of having been wearing a long time.

10

20

EDWARD A. McGRATH,
Judge.

30

40

Opinion.*(Filed May 21, 1927)*

NEW JERSEY SUPREME COURT

10	ADELINE M. WALKER, Plaintiff-Respondent,	}	On Appeal
	vs.		
	F. & W. GRAND 5-10-25¢ STORES, INC., Defendant-Appellant.		

Argued January term, 1927, before KALISCH,
20 KATZENBACH, and LLOYD, JJ.

McDermott, Enright & Carpenter, of Jersey
City, for appellant.

Frank Cohn, of Elizabeth, for respondent.

PER CURIAM. The defendant appeals from a
judgment rendered against it in the Elizabeth
District Court by the judge sitting without a jury
at the suit of Adeline M. Walker, who claimed to
30 have been injured by a fall due to the faulty con-
dition of stairs in the defendant's store.

The evidence disclosed that the plaintiff visited
the store on the 21st of December, 1925, to make
some purchases, and that as she was going down
a stairway from the first floor to the basement she
fell and sustained injuries. It was proven that at
the edge of each step on all of the stairways in
the store (there were two others) there was a
40 brass metal nosing, about one-inch wide, which

Opinion

had become worn by use, and it is inferable that
the plaintiff slipped on one of these worn metal
nosings. There was a motion for a nonsuit at the
end of the plaintiff's case, and this was denied
and judgment rendered for the plaintiff. The re-
10 fusal of the court to grant the motion for nonsuit
and the rendition of the judgment for the plaintiff
are the basis of the present appeal.

(1) No exception appears to have been taken at
the time the motion for nonsuit was made, and it
is therefore not a ground of appeal. The act of
1916 (P L. p. 109), however, gives to an aggrieved
litigant a right to have reviewed on appeal any
error in the giving of final judgment without the
20 grounds of objection being specifically submitted.

(2, 3) Upon the latter ground we must consider
the case, and as a result we think the judgment
below cannot be sustained. The facts practically
parallel the case of *Garland v. Furst*, 93 N. J.
Law, 129, 107 A. 38, 5 A. L. R. 275, in which the
proofs were identical, except in that case the of-
fending instrument was a smooth, slippery floor,
and in the present case it was a smooth nosing on
the steps. These nosing are such as are com-
30 monly placed on stairways where large numbers
of people are passing up and down. It is com-
mon knowledge that such metals become smooth
when worn, but under the case cited it does not
constitute negligence to permit their continued
use. The tendency of a much used substance of
any sort is to become smooth, and it would be a
hard rule to require that floors, stairs, steps, and
similar constructions should be changed whenever
40 use might smoothen their surfaces.

Opinion

(4) The respondent contends as ground for refusing consideration of the case that there is no state of the case presented in the record. This contention is not well founded. The record discloses that at the end of the book the judge used this language:

“It is hereby stipulated that in addition to the foregoing testimony the state of the case in said cause is as follows.”

This is signed by the judge, and the “foregoing testimony” is the stenographic transcript of the testimony taken in court.

20 The judgment is reversed.

KALISCH, J., dissents.

30

40

65 OCT. 1927

New Jersey Court of Errors and Appeals

ADELIN M. WALKER, Plaintiff-Appellant, vs. F. & W. GRAND 5-10-25 CENT STORES, INC., Defendant-Appellee.	}	On Appeal from Su- preme Court
--	---	--------------------------------------

BRIEF OF FRANK J. BURNS, OF COUNSEL WITH PLAINTIFF-APPELLANT.

This is an appeal by Adeline M. Walker, the plaintiff below, from a judgment of the Supreme Court, which reversed a judgment rendered by the District Court of the City of Elizabeth in favor of plaintiff below.

Statement of the Case.

The case was tried on September 20, 1926, before Hon. Edward A. McGrath, Judge of the Elizabeth District Court, sitting without a jury. The Court rendered a judgment in favor of the plaintiff and against the defendant on December 6, 1926, in the sum of \$300 and costs. That judgment was reversed on appeal to the Supreme Court (Case, pp. 2 and 3) and such judgment of

reversal is now before this Court on appeal from the Supreme Court.

The plaintiff originally instituted suit against the defendant (Case, pp. 6 and 7) alleging that on the 21st day of December, 1925, the plaintiff was invited into the store of the defendant, and while purchasing goods in said store and while going from the first floor to the basement, was required to use a stairway which was maintained in a very careless and negligent manner by the defendant, its servants, agents and employees, in that one of the steps was defective, and that as a result of this defective step, plaintiff slipped and fell and sustained injuries for which she demanded a judgment against the defendant. The state of demand further alleged that the defendant had NOTICE of said defect and negligently and carelessly failed to remedy the defect.

After the introduction of testimony by plaintiff, defendant moved for nonsuit (Case, p. 33, l. 39), decision on which motion was reserved, and the motion later denied. The defendant introduced no testimony whatever (except to request the Court to make an inspection of the stairway in question in the suit—Case, p. 38, l. 32) but after its motion for a nonsuit was denied, rested its case and moved for judgment in its favor, which motion was also denied (Case, p. 38, l. 35, and p. 39).

The grounds of appeal filed by the defendant below are set out at pages 9 and 10 of the printed case.

The ground of appeal filed by plaintiff (appellant) on her appeal to this Court is printed at pages 1 and 2 of the state of the case.

The Issue Involved.

It is respectfully submitted that the true question in this case is not (as is indicated in the opinion of the Supreme Court—Case, p. 40) whether the rule should “require that floors, stairs, steps, and similar constructions should be changed whenever use might smoothen their surfaces,” but whether they should be changed, or repaired, when they have become so defective as to cause *repeated falls of which the owner has notice*; or, in other words, whether the storekeeper is liable to a person injured by reason of defective stairs or steps when he has had *notice* of such defect, and such notice was received a reasonable length of time before the person sustained the injuries by reason of such defective condition.

In order that the precise question for determination may be fully and fairly considered and decided, it is considered essential to draw the Court's attention (at the outset) to the fact that it is appellant's contention that this case is clearly distinguishable from the reported cases dealing with similar facts, in that the element of NOTICE of the defect was alleged and *proved* by plaintiff (appellant) in the case at bar, whereas in the reported cases plaintiffs had not proved, or even attempted to prove, notice, but had attempted, unsuccessfully as they later learned, to rely upon the doctrine of *res ipsa loquitur*. The state of the case, in the instant case, shows throughout that plaintiff below did not seek a recovery on a theory which had been held by the highest court of this state to be not applicable, but had brought her case within the true rule of law announced in the reported decisions with reference to the necessity of proving *notice* to defendant.

POINT I.

There was no error in the Trial Court's refusal to grant defendant's motion for a Nonsuit.

The law governing defendant's liability has been settled in this state in *Schnatterer v. Bamberger & Co.*, 81 N. J. L. 558, which holds that the defect causing the fall must have (a) in fact been brought to the notice of the storekeeper before the accident, or (b) existed for such a length of time as to charge the storekeeper with notice thereof. The doctrine enunciated in that case is followed in *Garland v. Furst Stores*, 93 N. J. L. 127; *Collins v. Central Railroad*, 90 N. J. L. 593; *Buda v. Dzuretzko*, 93 Atl. 83. Plaintiff below, at the trial, brought her case within both classifications; that is, she, as part of her *prima facie* case, proved (a) actual notice of the defect, and (b) that the defect had existed for such a length of time before she, plaintiff, sustained her fall and consequent injuries, as to charge the defendant storekeeper with notice of the defect.

The motion for nonsuit (Case, p. 33) was based on the ground that there was no proof of negligence in the case. Plaintiff's proof showed:

1. That she had sustained injuries;
2. That the stairway in question was defective;
3. That the injuries sustained were directly attributable to and the result of said defective stairway;
4. That the defendant had both actual and constructive notice of the defective condition of the stairway; and

5. That this notice was received by defendant a reasonable time (to say the least) before plaintiff was injured.

Plaintiff argued, therefore, that she had made out a *prima facie* case; and the Court, after consideration (having reserved decision) denied the motion for nonsuit.

No exception was taken to the ruling of the Trial Court on the motion for nonsuit, but as the Supreme Court decided when this case was before it (Opinion, Case, p. 41, l. 15) that the case must, despite the lack of an exception, be considered (for reasons given by that learned Court) appellant here does not press that point, being desirous of submitting the real point at issue to this Court, so that a decision on the merits may be in order.

As to the defect itself, appellant's contention is that it consisted in this:

1. That the brass nosing on the edge of the step was not only smooth but *slippery*.
2. That the steps were *originally* constructed in an improper or defective manner, in that metal strips of the kind shown to have been employed by defendant, are not generally used in stores and other places to which the public are invited.

As to point 1:

The brass nosing on the edge of the step was not only smooth but *slippery*—

There is the testimony of the plaintiff herself. Quotation is made from her testimony, commencing at line 18, page 17, of the printed case:

“Q. In order to go down to the basement, what was it necessary for you to do?

A. In order to go down to the basement?

Q. Yes. A. To go downstairs, I went down very carefully with my hands on the handrail.

Q. Just answer the question. Did you go down the stairs? A. I went down the stairs.

Q. Did you get all the way down? A. No.

Q. Why not? A. Because I *slipped* on something when I reached about the fourth step.

Q. You slipped? A. Yes, I slipped.

Q. What was that something you slipped on? A. I imagine it was the metal—

Mr. Kuebler: I object to what she imagines.

Q. Not what you imagine. A. *It was the metal binding on the edge of the tread.*

Q. Was there anything else on that step that could have caused you to slip? A. Not that I know of.

Q. Did you see anything? A. I didn't see anything because—

Q. Just answer the question. A. I didn't see anything, no.

Q. You say that the steel binding at the edge of the step caused you to slip? A. Yes, the *metal* binding; I don't know whether it is *steel* or not.

Q. What was the condition of that metal

binding at the time you slipped? A. *Smooth and slippery.*”

On re-cross examination (Case, p. 23, l. 30), after much questioning on cross- and re-direct examination as to what caused plaintiff to slip, counsel for the defendant finally obtained this information:

“Q. And you fell on something, but you don't know what you slipped on? A. I slipped—

Q. Isn't that correct? A. *I slipped on that brass stuff.*”

In addition, the Trial Court, at the request of the respective attorneys, made an inspection of the stairway and steps in question in the suit, and has certified the result of that inspection. The Trial Court's certificate is printed at page 38 of the case. The Court says (Case, p. 38, l. 31):

“At the close of the trial the attorneys requested the Court to inspect the premises in question before rendering a decision * * * and as the Court did inspect the premises in question on November 20, 1926, denied the motion for a nonsuit. The attorneys for the respective parties appeared before the Court again on November 15th, at which time the attorney for the defendant rested *without the introduction of any further testimony* and moved for judgment for the defendant. * * * Accordingly, the result of such inspection is hereby set forth and certified to be *part* of the record on which the decision of the Court was made, viz., the Court found that the stairs in question were nosed with a

brass nosing on the extreme edge about one inch wide. These strips were smooth and slippery and gave evidence of having been wearing a long time."

As to the second point. *supra*:

The steps were *originally* constructed in an improper and defective manner, in that metal strips of the kind shown to have been employed by defendant, are not generally used in stores and other places to which the public are invited.

The gist of plaintiff's contention on this point is that the use of metal (especially brass) strips on the *edge* of steps is no longer recognized as good building or construction practice. In fact, such strips are no longer employed, because experience has demonstrated that they are dangerous, in that they tend to cause or contribute to falls rather than prevent or minimize the possibility of them.

The Supreme Court in its opinion says (Case, p. 41, l. 30):

"These nosings are such as are commonly placed on stairways, where large numbers of people are passing up and down."

But, with great deference to that learned Court, there was testimony in the case from which the Trial Court could have found that far from it being common practice to use such strips on stairways in such places, the modern tendency is to eliminate their use.

Harry Tunkel was sworn as an expert for the plaintiff. He testified (Case, p. 27, l. 8):

"Q. Mr. Tunkel, you are a builder in the City of Elizabeth? A. Yes.

Q. For how long? A. For about three years.

Q. You had an occasion to build stairways and staircases in your buildings? A. Yes.

Q. Upon my request did you examine the stairways leading to the basement of the F. & W. Grand Store on Broad Street? A. Yes.

Q. How many times did you examine them? A. Twice."

He then proceeded to explain what he found as a result of his examination. His qualifications were not questioned; and, on cross-examination, counsel for defendant, in attempting to obtain an admission that the use of strips of the kind in question were, or are, generally employed on stairways in stores and buildings of the kind owned and maintained by defendant, elicited this testimony (Case, p. 28, l. 39):

"Q. *Very often*, isn't it the custom on wooden stairways to put brass strips of nosing along the edge of the stairway? A. I used to do it, but *corrugated*, about *three inches* in width.

Q. Isn't it *very often* done in *plain brass strips*? A. *Very seldom—where it is a public place it is very seldom done.* Something with smooth edges."

The certificate of the Trial Court (Case, p. 39, l. 22) shows that the strips in question were only about one inch in width and made of brass. This certificate contains the Court's findings of fact

as to some of the elements in the case, and the inspection which the Court made as indicated in the certificate, was made at the request of the attorneys for the respective parties below.

It appears to counsel, therefore, that there was sufficient evidence of a defect, or defective condition, in the steps and stairway generally; and as there appears to be no denial that plaintiff fell and sustained some injuries, the only question remaining to be considered is the important one of *notice*; that is, the question whether, assuming the existence of a defect, the defendant had *notice* of it, within the meaning of the word "notice" as employed in the reported decisions.

As to this phase of the case, it is respectfully submitted that the case at bar is clearly distinguishable from

Schnatterer v. Bamberger & Co., 81 N. J. L. 558.

Garland v. Furst Stores, 93 N. J. L. 127.

Collins v. Central Railroad, 90 N. J. L. 593.

Buda v. Dzuretzko, 93 Atl. 83,

for the reason that both actual and "constructive" notice were proved by plaintiff below as part of her *prima facie* case; whereas, in the reported cases just cited, "notice" was not proved. Those cases, therefore, are not controlling.

In the instant case, the testimony of Jessie Baird (Case, p. 30, l. 35) is:

"Q. Miss Baird, were you ever employed with the F. & W. Grand people? A. I was.

Q. Did you ever have occasion to observe

people walking up and down the left-hand staircase leading to the basement? A. I did.

Q. Did you ever see anybody slip on that staircase?"

This was objected to because the time was not fixed, and the examination then proceeded:

"Q. During what time did you work for F. & W. Grand? A. 1925; I worked there for a year.

Q. Did you work there November, 1925? A. I didn't; I quit in November, the first week in November.

Q. You worked there prior to November, 1925, didn't you? A. Yes, sir."

It is to be remembered that plaintiff slipped and fell December 21, 1925.

"Q. Did you ever have occasion to see anybody slip on the left-hand staircase leading to the basement?"

Defendant objected to this question on the ground that it had reference to a time *prior* to November, 1925, "which in itself was a month and a half before this woman slipped." The Court properly remarked (p. 31, l. 33), "It would show notice of a defective condition," and permitted the testimony, asking the witness this question (p. 32, l. 10):

"Q. What did you notice about this stairway at the time you speak of; describe the condition of the stairway."

And the witness answered:

"A. The only thing, they were black stairs and there was a shiny thing along

the edge of each stair; it is very shiny. That's all I ever noticed. A piece of iron, I think, or metal."

Counsel for plaintiff then proceeded with the examination as follows:

"Q. Some metal? A. Some metal.

Q. You saw the people coming up and down these stairs every day? A. Every day.

Q. Did anything happen to anybody as they came up and down those stairs?

Mr. Kuebler: I object on the same ground.

The Court: I will allow it.

Mr. Cohn: Answer the question, Miss Baird.

A. *I saw one or two slip there.*

Q. Do you know whether the manager of the place ever knew those people slipped on the stairway? A. The manager of the place was *always there when anyone slipped.*

Q. He was notified of it, wasn't he? A. He must have been notified; *he was there.*"

On cross-examination, counsel for defendant asked (Case, p. 33, l. 23):

"Q. You left there the first of November? A. Yes.

Q. Were you discharged at that time? A. I wasn't discharged; they cut my wages and I quit."

So that this witness's testimony stands unimpeached and, of course (as defendant offered no testimony) uncontradicted.

There was another witness (Elizabeth Holter) who was sworn (Case, p. 25), for the purpose of proving notice, but as the Court did not permit her testimony for the reason that she was about to speak concerning a stairway other than the one on which plaintiff slipped, and as she was withdrawn by plaintiff, counsel does not consider it proper to quote from her testimony, but directs the attention of the Court to it in connection with appellant's claim that the construction of *all* the stairways leading to the basement were *originally* defective. There is *some* testimony in the record (p. 25, l. 32) showing that this witness had also met with an accident about November 7th, which was about a month and a half before plaintiff slipped and fell.

And it is submitted that this testimony may be considered in connection with appellant's claim as to the originally defective installation or construction. As the state of demand (Case, p. 7, l. 15) alleges that defendant had notice, this allegation is broad enough to cover notice based on the theory of an originally defective construction.

However, appellant does not depend wholly on this testimony, or even upon this testimony in conjunction with the other testimony already quoted from. It is respectfully submitted that even without consideration of this testimony at all, there is sufficient evidence in the record to show notice.

The appellant's contention with reference to notice is, therefore, that it was proved by (a) the evidence concerning the previous accidents, and (b) by the evidence of the expert witness Tunkel concerning the originally defective con-

struction. As to these two points, appellant relies mostly upon the first—that is, upon the actual notice gained by defendant as the result of the happening of accidents at a time previous to the time at which plaintiff slipped and fell.

Of course, it is apparent to counsel that the mere fact that persons other than plaintiff slipped and fell on this same stairway is not necessarily proof of a defective condition. These various persons may have slipped as the result of their own negligence, or as the result of many contributing causes—through innumerable causes in fact. But where, in a case of this kind, is the line to be drawn? If in the trial of a supposed case it could be shown, and were shown, that 50 or 60 people had slipped on a step, or some portion of a stairway, previous to the time when plaintiff, in the imaginary case, had slipped, and that defendant had notice of all these various “slippings,” could it be said, not as a matter of formal logic, but as a matter of law—based on justice and considerations of public policy—that plaintiff had not made out such a case of inherent probability as to require an answer? And, more important still, could it be said that plaintiff had not, in such case, sufficiently proved the element of *notice*?

Briefly, then, the contention of plaintiff below is that she had proved the element of notice, and that for that reason at least, the case at bar is distinguishable from the reported cases dealing with facts of a somewhat similar kind.

In *Garland v. Furst Stores*, 93 N. J. L. 127, at 129, the learned Chancellor who wrote the opinion in that case, says:

“It did appear that the floor * * * had been traversed by thousands every week in the four years since its construction, and that *no one had ever been known to slip on it before.*”

But it does not appear, of course, what effect would have been produced in the mind of the learned Chancellor, if it *had* appeared that other persons had slipped on the floor in question “before.”

Further, the Court says, in the same case, at page 130:

“For aught that appears in the case at bar, the defendant had no notice of the alleged slippery condition of the basement floor.”

It is respectfully submitted that in the instant case the defendant did have notice, and that such notice was proved by plaintiff *as part of her prima facie case.*

In the same case, the Court says, at page 130:

“The Supreme Court, in its opinion in this case, remarked that 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 appear to indicate that in the opinion of the Supreme Court, notice to the defendant might be presumed, as it produced no evidence denying that it had received notice. So far as this observation purports to state a principle of law, it is erroneous. It is directly contrary to the

ruling in *Schnatterer v. Bamberger*. There it was held that in the absence of proof that the defect had been brought to the notice of the storekeeper, or had existed for such a length of time as to charge him with notice, a *prima facie* case of negligence was not made out. The rule is, that where liability is made to depend at all upon notice to the defendant, the plaintiff must establish the notice before the defendant is called upon to contest it; in other words, it is not to be presumed."

And in the case at bar, plaintiff below did not ask the Trial Court to presume notice. She proved notice. Evidently being fully aware of what was incumbent upon her in the way of proof of notice, she did not require that presumptions be indulged in, but, by the production of what is respectfully submitted to be sufficient evidence, *proved* the notice, as part of her *prima facie* case.

In the same case (*Garland v. Furst Stores*) the Court said (at p. 129):

"The floor was, undoubtedly, smooth, but, apparently, was not slippery."

In the instant case it may be said that not only were the brass strips on the steps smooth, but, apparently, they were slippery, otherwise persons other than plaintiff would not have slipped on them. Moreover, the Trial Court found, as a matter of fact, after inspection *requested by both parties*, that the strips of metal on the edge of the steps were not only smooth, but slippery (Case, p. 39, l. 23).

Further, in the *Garland-Furst Stores* case, the Court says (near the bottom of page 131):

"Now, in the case at bar, assuming that the floor was smooth, or even slippery, it is obvious that it was not so smooth or slippery as, for that reason, to cause falls, for if it were, there would have been *others besides that of the plaintiff*, both at and before the time of the accident."

In the instant case there was proof of falls by other persons, not at, but before the time of plaintiff's fall. Of course, in the case of a stairway, it is not likely that there would be a fall at the same time as plaintiff's fall, though, of course, it is quite apparent that such a fall might easily occur on a floor of more or less extensive area in a department or other large store.

The facts in the case of *Schnatterer v. Bamberger & Co.*, 81 N. J. L. 558, show that so far as plaintiff's proof therein is concerned, it is clearly distinguishable from the instant case. It is hoped that the Court will overlook the use of italics in the following quotation:

"The plaintiff, in going down steps leading to the basement of defendant's store, caught the heel of her shoe in a brass nosing (originally attached to the edge of the wooden step to prevent its wear), which was loose, causing her to trip and fall, and it was held that the evidence failed to show the storekeeper had not used reasonable care in keeping the stairway safe for use, for the reason that it had not appeared that the defect had been *brought to the notice* of the storekeeper or had *existed for*

such a length of time as to charge him with notice of its existence; and that in the absence of proof of one of these conditions, a prima facie case of negligence was not established."

In the case at bar there was no "absence of proof" of the element of notice, either actual or constructive; in fact, appellant contends there was proof of both—for the reason that, as already pointed out (a) other persons had slipped on this stairway before plaintiff (below) slipped, and (b) the defect must have existed for at least a month and a half before plaintiff slipped, for it was about that length of time before she slipped that the other persons met with their falls, and of these latter falls the defendant had notice, as shown by the testimony, quotations from which appear above; and all this being so, it is submitted that the defect had existed for such a length of time as to charge the storekeeper with notice. In addition, appellant again respectfully reminds the court of the theory of notice because of an originally defective construction, as adverted to above.

In *Kingsley v. Delaware, L. & W. R. R. Co.*, 81 N. J. L. 536, at page 541, Mr. Justice Min-turn speaking for the court, remarked that

"out of a car filled with passengers, none had been produced to testify to the inherent or obvious danger incident to alighting therefrom, or that ANY OTHER accident took place at that time, or at any other period, in the attempt to use the step and platform,"

and that the argument of negligence by the defendant in that case must proceed upon *ad hominem* lines and not upon notice to the defendant FROM THE HAPPENING OF A PREVIOUS ACCIDENT, or from the clear obviousness of danger incident to the maintenance of a dangerous condition.

Plaintiff below showed the happening of a previous accident; in fact, of previous accidents.

Buda v. Dzwretzko, 93 Atl. 83, is not controlling, for the reason that, as in all the other reported cases, plaintiff therein had failed to prove the element of notice. In the case at bar there was abundant evidence of notice.

Collins v. Central Railroad Co., 90 N. J. L. 593, is likewise not controlling. The judgment of the Essex County Circuit Court, in that case, was reversed, because of an error in the Court's charge. The Trial Court had charged:

"If the defendant company had, at ANY time before the accident, either knowledge or notice of a dangerous condition of its premises, it would have been negligence on the part of the company not to have remedied this condition."

And Mr. Justice Bergen, speaking for the Court of Errors and Appeals, said:

"At any time before the accident' includes immediately before, and under our cases defendant was entitled to a reasonable time within which to inspect, discover and repair the defective condition if it existed."

The testimony in the case at bar shows that the "previous accidents" had occurred about a

month and a half before plaintiff sustained her fall, and it is respectfully submitted that, under all the circumstances, defendant had a reasonable time within which to make repairs or remedy the defect in question.

POINT II.

There was no error in the Trial Court's refusal to grant defendant's motion for judgment in its favor.

As the grounds on which the motion for judgment was based are shown by the record (Case, p. 39) to have been the same as those on which defendant below moved for nonsuit, it is considered that appellant's position on this point is sufficiently indicated and set out under Point I above.

POINT III.

There was no error on the part of the Trial Court in incorporating in the record the result of an inspection of the stairway in question.

The record (Case, p. 38, l. 31) shows that the inspection made by the Court was *requested* by the attorneys in the case. Anticipating that defendant may point out that the transcript of the stenographer's notes shows no such request for inspection, appellant submits that (a) the Trial Court's certificate is binding on defendant, and (b) it is presumable that such request was made

during argument, or immediately after the close of the trial, and therefore is not properly a part of the record, under:

Koch v. Costello, 93 N. J. L. 367.

Ippolito v. Ridgefield, 94 N. J. L. 97,
at p. 99.

For the reasons above advanced it is respectfully submitted that the judgment of the Supreme Court should be reversed and the judgment of the Elizabeth District Court sustained. A judgment ultimately in favor of the plaintiff in this case will in no way change or modify the existing law of this state, but rather uphold and strengthen it. Until a party plaintiff brings himself within the requirements as to proof of the various elements in such a case he is not entitled to judgment and cannot expect one in his favor; but when, as in this case, plaintiff produces proof of all the elements necessary to make out a *prima facie* case (with particular reference to the difficult task of proving "notice") reason, as reflected in the reported decisions of the Appellate Courts of this state in similar cases, demands that his rights be recognized and upheld.

Respectfully submitted,

Of Counsel with Plaintiff-Appellant.
> FRANK J. BURNS,

65 OCT. 7. 1927

New Jersey Court of Errors and Appeals

ADELINE M. WALKER,
Plaintiff-Appellant,

vs.

F. & W. GRAND 5-10-25 CENT
STORES, INC.,
Defendant-Appellee.

ON APPEAL
FROM
SUPREME
COURT.

**BRIEF OF McDERMOTT, ENRIGHT &
CARPENTER, FOR APPELLEE.**

This is an appeal from a judgment of the Supreme Court, reversing a judgment rendered by the District Court of the City of Elizabeth in favor of the plaintiff and against the defendant.

Brief Statement of Facts.

The plaintiff instituted suit against the defendant alleging that on the 21st day of December, 1925, the plaintiff was invited into the store of the defendant and that while purchasing goods in said store, the plaintiff in going from the first floor to the basement was required to use a stairway which was maintained in a very careless and negligent manner by the defendant, its servants, agents or employees, *in that one of the steps was defective* and that *as a result of this defective step* the plaintiff slipped and fell down said steps and sustained injuries for which she demanded a judgment against the defendant.

The proof as to the condition of the stairway is based first, upon the testimony of the plaintiff who admitted on cross-examination that she did not see the steps until six weeks after she fell (State of Case, p. 21, l. 26). She did not see anything at the time the accident occurred or immediately after, but contends that she slipped on something which was smooth and slippery and that although she did not observe what it was at that time, she did come back at a later time to examine the stairway and observed the condition which she speaks of in her testimony. She admitted that she dictated a letter to the defendant in which she said:

“On December 21st, while shopping in the above store, I slipped on something on the stairs leading to the basement” (State of Case, p. 21, l. 32).

She admitted also on cross-examination that all of the steps of this stairway at the time she made the examination, six weeks after the accident, had this smooth metal nosing (p. 24, l. 21, etc.).

Harry Tunkel, a builder was called as an expert. The first examination which he made, was one week before the trial, or almost nine months after the accident occurred. He described the stairs as follows: (State of Case, p. 28, l. 1).

“*The condition of the stairs as I stated this morning is perfectly good, but the edge of the stairs is very slippery and it is worked off by walking over it, and people without attention to walking down are liable to slip off and fall down as I said this morning.*”

He described the stairs as being concrete with steel edges. He stated that the steel had worn smooth in the middle, where people walk.

Jessie Baird, a former employee, was called as a witness and testified that she worked prior to

November, 1925, and that she saw one or two parties slip there. On p. 32, l. 14, she testified as follows:

“The only thing, they were black stairs and there was a shiny thing along the edge of each step, it was very shiny. That’s all I ever noticed. A piece of iron, I think, or metal.”

Mr. Benjamin Cohen the assistant manager of the store, was called as a witness on behalf of the plaintiff and testified that he recalled Miss Walker having fallen on the steps and helped pick her up. As to the condition of the steps, his testimony was as follows (p. 36, l. 30):

“Q. What is the condition of those steps today? A. Why, as good as they were when Miss Walker fell down.

Q. Are they also as good as they were the week before Miss Walker fell? A. Absolutely.”

The Court reserved decision on the defendant’s motion for a non-suit and on a later date refused said motion. The case was continued on November 15, 1926, on which date the defendant rested without the introduction of any further testimony and moved for a judgment in favor of the defendant. The Court reserved decision until December 6, 1926, at which time it found for the plaintiff in the sum of \$300 and costs.

The defendant appealed to the New Jersey Supreme Court which reversed the judgment, holding that

“It would be a hard rule to require that floors, stairs, steps and similar constructions should be changed whenever use might smoothen their surfaces.”

From the judgment of the Supreme Court, this appeal is taken by the appellant.

POINT I.

The Supreme Court properly reversed the judgment of the Elizabeth District Court.

A. ARGUMENT OF FACT.

On pages 6 and 7 of the State of Case will be found a copy of the State of Demand. An examination of this reveals that in setting forth the plaintiff's cause of action, she alleged that the staircase was maintained in a very careless and negligent manner by the defendant, its servants, agents or employees, "*in that one of the steps was defective*" (P. 7, L. 1). The State of Demand clearly places the negligence upon one defective step. The accident is alleged to have occurred on December 21, 1925. On January 2, 1926, the plaintiff addressed a letter to the defendant Corporation which she admitted that she dictated to her niece, and in that letter she states that she "*slipped on something on the stairs leading to the basement*" (P. 21, L. 32). The testimony in this case ignores both the record and the State of Demand and the letter of January 2nd. No attempt is made to prove that one of the steps on the stairway was defective, but the testimony is to the effect that all of the steps on all of the three stairways in the building were the same. No testimony was offered to show, as claimed in her letter of January 2nd, that she slipped on something *on* the stairs. The plaintiffs instead rested their case upon proof that the edge of the stairs or the metal nosings had become smooth and slippery.

The only testimony introduced as to the condition of the stairways was that of Mr. Tunkel who testified that he had been a builder in the City of

Elizabeth for three years and, as previously stated, his testimony was based upon an examination made months after this accident is alleged to have happened. He admitted that the stairways were perfectly good, but that the edges of the stairs were very slippery. He did not qualify as an expert on stairs and admitted (P. 28, L. 32), that most of the stairs he put in were wooden ones. The material used in the stairways in question was concrete with steel edges. The testimony does not show that it was improper to have constructed these stairs of concrete with steel edges, and it is a matter of common knowledge to us all that stairways are constantly being constructed in this manner. The stairways to and from the exits of the subways and Hudson and Manhattan Tubes are of similar construction and certainly, it would be hard to find stairways safely carrying more people per day. There is no proof and no allegation that the owner had caused any foreign substance to be placed or to get upon the metal to make it slippery. The condition which they claimed it to be in was a condition of ordinary wear.

Can it be said that where the metal nosing on the stairway becomes smooth or slippery from ordinary use, that such step or stairway is defective in the eyes of the law? It is a matter of common knowledge that brass and smooth metal nosings are very frequently placed on stairways and when so placed, they are smooth and slippery when originally installed. Is, therefore, the stairway defective from the date of installation? We submit that the Supreme Court properly held in the appeal below that when such metals become smooth or worn, it does not constitute negligence to permit their continued use.

The record itself shows that the plaintiff did not have anything to attribute her fall to, other-

wise she would not have alleged in her State of Demand that one step was defective and then proved in her case that all of the steps were the same. If she knew what caused her fall, she would not have written as she did on January 2nd and stated that she slipped on something *on the stairs*, and then returned six weeks after her alleged accident to find that something still *on the stairs*. Her testimony in the State of Case is sufficient in itself. She said she did not get all the way down because she slipped *on something* when she reached the fourth step.

“Q. What was that something you slipped on? A. I imagine it was the metal” (P. 17, L. 30).

It was not until objection was made to her imagination that she finally said it was the metal binding on the edge of the step. Further on she described the condition of the metal binding at the time she slipped as smooth and shiny, although later she admitted that she was in no condition to observe anything at the time she fell, and that she did not observe anything but observed the steps first six weeks after the accident.

The record does not at any point, give any testimony showing what the condition of the stairway was, or in particular the Fourth step, at the time of the alleged accident. In view of the absence of such testimony; the conflict between the allegation in the State of Demand, the proof, and the letter of January 2nd; her testimony based only on imagination and a very late observation, it seems apparent that there is no proof of any defective condition before the Court.

The plaintiff's case could not rest alone, however, upon the proof of defective condition, but it would also be necessary for the plaintiff to prove actual knowledge of that condition on the part of

the defendant before the accident, or that it had existed for such a length of time as to charge the defendant with knowledge of the condition. The testimony does not prove either of these circumstances.

There is certainly no evidence of actual knowledge having been brought to the defendant before the accident occurred. One employee of the defendant, Mr. Cohen, was called by the plaintiff and his testimony does not show any knowledge on the part of the defendant of any defective condition in the stairway.

The plaintiff endeavored to prove knowledge by introducing evidence pertaining to show that other parties had fallen on the stairway prior to the date the plaintiff fell. The first effort was to introduce the testimony of Elizabeth Holter (P. 25) but the only thing her testimony shows is that she fell down one of the other stairways. No cause is given for her fall. Jessie Baird, a former employee of the defendant, was called and testified (P. 32, L. 30) “I saw one or two slip there.” She describes the stairs L. 14 as follows:

“The only thing, they were black stairs and there was a shiny thing along the edge of each step, it was very shiny. That's all I ever noticed. A piece of iron, I think, or metal.”

The mere fact that there was a shiny piece of metal on the stairs and that one or two people slipped on the stairway, certainly cannot bring about a conclusion that they slipped on the “shiny thing” on the edge of the stairs. There is nothing whatsoever in her testimony to show what caused the fall of any person prior to the time when the plaintiff fell. The defendant operated a 5-10-25 cent store visited by a great many people, and it could hardly be expected that some people would not fall in going up and down the stairways. The

appellant realizes this and our conclusion is set forth on P. 14 of the appellant's brief in the first two sentences of the first paragraph. In the balance of the paragraph, the appellant deals with a supposed case, which is certainly not in point with the case at bar. Miss Baird worked there for a considerable time and saw one or two persons fall.

Our conclusions as to the facts are therefore as follows:

1. There was no proof that one of the steps was defective.
2. There was no proof of anything *on* one of the steps.
3. The mere fact that all of the steps on the stairways had worn smooth and slippery is not a defective condition in the eyes of the law.
4. There was no proof that she fell because of the smooth and slippery condition of a metal nosing.
5. There was no proof of improper construction of the stairways.
6. There was no proof that the defendant had actual knowledge of any defect in the stairway before the alleged accident.
7. The evidence does not show that any other person fell, because the nosing on the stairs was smooth or slippery.
8. There is nothing to show that a defective condition existed for so long a period of time as to charge the defendant with knowledge thereof.

B. ARGUMENT OF LAW.

The law governing defendant's liability was settled in this state in the case of *Schnatterer v. Bamberger & Co.*, 81 N. J. L. 558, which held that the defect causing the fall must have (a) in fact been brought to the notice of the store keeper before the accident, or (b) existed for such a length of time as to charge the storekeeper with notice thereof.

This case was subsequently followed by *Garland v. Furst Stores*, 93 N. J. L. 127 which, as pointed out in the opinion of the Supreme Court below in the case at bar, practically parallels our case. In the *Garland* case the complaint alleged

"that the defendant, in conducting a department store, maintained a slippery tiled floor in the basement, which, from its nature and from the negligent manner of its construction, was dangerous to persons walking upon it, and that it was negligently permitted to become slippery."

It appeared that the floor was such as may be found in bank buildings. The testimony did not show just what caused the plaintiff to fall, but no foreign substance was on the floor to show on what and where she fell. The court held:

"It is not perceived that there is any difference in the law of negligence between a person slipping on a stairway or on a floor" and refers to the case of *Schnatterer v. Bamberger Co.*

The court further held:

"That the mere fact that Mrs. Garland fell on the floor of the Furst Store without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the owner, and the doctrine of *res ipsa loquitur*, which is only applicable when the

thing shown speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply."

In the case at bar the plaintiff fell and she finally attempted to attribute it to the smooth and slippery metal nosing. Mrs. Garland attempted to attribute her fall to a slippery floor. Mrs. Garland may have fallen over a chair, stepped on her skirt or turned her ankle, or may have fallen in one or many other ways. Likewise there are many other causes which could have produced the fall of Miss Walker and for all that she knows about it, any one is more likely to have been the real producing cause.

In *Buda v. Dzuretzko*, 93 Atl. 83, the Supreme Court also upholds the doctrine of *Schnatterer v. Bamberger & Co.* In that case the testimony was that the heel of the plaintiff's shoe caught in a tin covering (originally attached to the wooden step to prevent its wear) which was loose, but was not then noticed by him caused him to trip and fall down the stairs. The Court held,

"It is not sufficient to justify a finding that the landlord of the premises had been guilty of any want of reasonable care in keeping the stairway safe for use, unless there is also evidence tending to show that the defect causing the fall either (1) had been in fact brought to the previous notice of the landlord, or (2) had existed for such a space of time before the accident as would have afforded the landlord sufficient opportunity to make proper inspection of the stairway and to repair its defects."

These elements of actual knowledge or notice of the defective condition have been repeatedly upheld. Many other citations might be given. We also cite *Collins v. Central Railroad*, 90 N. J. L. 593 and *Taylor v. Roth & Co.*, 133 Atl. 386.

Our conclusion as to the law is that particularly in view of *Garland v. Furst Stores*, the condition of the stairway as shown by the testimony was not in a defective condition and that in any event defendant did not have actual knowledge of any defective condition before the accident, nor had any defective condition existed for such a length of time as to charge the defendant with notice thereof.

POINT II.

The Trial Court erroneously incorporated improper facts in the State of Case.

This point was raised in our appeal to the Supreme Court and we note is argued in the appellant's brief in this Court.

All the testimony of September 20, 1926, was taken stenographically and is contained in the State of Case. As the attorneys could not agree on what transpired on the subsequent date, it was reduced to writing by the Court as a stipulation and contained in the record (p. 38). The Court states in that stipulation that at the closing of the trial the attorneys requested the Court to inspect the premises before rendering a decision and the Court did inspect the premises in question on November 20, 1926, and denied the motion for a non suit. It will be clearly seen that there is nothing in the testimony taken stenographically on September 20, to show that any of the attorneys requested the examination and the fact that the stipulation shows that the attorneys appeared before the Court again on November 15th, at which time the attorneys for the defendant rested and moved for a judgment for the defendant, shows that no examination of

the premises was made until after the motion for a non suit was decided. Any such inspection, therefore, would not have any effect upon our rights on said motion. The stipulation does show that the attorneys for the defendant objected to the Court incorporating in the stipulation the result of any such inspection and we contend that the incorporation of such inspection was improper, as an inspection was made almost one year after the plaintiff's fall. It will be observed also that the Court describes the nosing as composed of brass, whereas every other witness described it as a steel nosing.

The judge, however, in making such an inspection acted as a jury. In the case of *Garland v. Furst Store*, the jury examined the floor in question and rendered a verdict in favor of the plaintiff. In the Supreme Court, the judgment was affirmed apparently upon the theory that the extent to which the view afforded evidence could not be known, and therefore the verdict could not be over-ridden even if the proof found in the record was insufficient to sustain the jury's finding. This the Court of Errors and Appeals held to be error, holding in its opinion, that the judgment should be reversed if legally unsupported in and by the record under review, notwithstanding a view of the premises by the jury. The view by the jury is mute evidence and not a part of the record under review.

POINT III.

The judgment of the Supreme Court should be affirmed.

For the reasons set forth in the foregoing points, we submit that the judgment of the Supreme Court should be affirmed.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Defendant-Appellee.

CARL S. KUEBLER,
Of Counsel.

