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TESTIMONY.

WITNESSES FOR PLAINTIFF:

WITNESSES FOR DEFENDANT:

Notice and Grounds of Appeal.

NEW JERSEY SUPREME COURT

EMILY STARK, Plaintiff-Appellant, vs. GREAT ATLANTIC & PACIFIC TEA CO., Inc., Defendant-Appellee.	Action-at-law On appeal from Supreme Court

To:

Reed & Reynolds, Esqs.,
Attorneys of Defendant-Appellee.

Sirs:

Take Notice that the plaintiff, Emily Stark, appeals to the New Jersey Court of Errors and Appeals from the judgment entered in this cause on the 17th day of December, 1924, in favor of the defendant and against the plaintiff, because:

The trial Court erred in directing a verdict in favor of the defendant and against the plaintiff.

WEINBERGER & WEINBERGER,
Attorneys of Plaintiff-Appellant.

Dated, November 27, 1925.

Summons.

THE STATE OF NEW JERSEY

To The Great Atlantic & Pacific Tea Co.:

(L. S.) You Are Summoned to answer the annexed complaint of Emily Stark, in an action-at-law in the New Jersey Supreme Court.

And Take Notice that unless you file your answer to the said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after the service upon you of this writ and the annexed complaint, the plaintiffs may proceed in said suit and judgment may be entered against you.

Witness, William S. Gummere, Esq., Chief Justice of our Supreme Court, at Trenton, this 9th day of July, nineteen hundred and twenty-four.

EDWARD J. KELLEHER,
Clerk.

Weinberger & Weinberger,
Attorneys.

Transcript of Pleadings for Trial.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

EMILY STARK,
Plaintiff,
vs.
THE GREAT ATLANTIC & PACIFIC TEA CO., Inc., a corporation,
Defendant.

Weinberger & Weinberger, Attys. for Plaintiff.
Reed & Reynolds, Esqs., Attys. for Defendant.

Summons issued July 9th, 1924.

Complaint.

Plaintiff, residing in the Borough of East Rutherford, in the County of Bergen and State of New Jersey says that:

1. On or about the tenth day of April, 1923, the plaintiff was invited by the defendant company, through its agents and servants to purchase merchandise in defendant's place of business situated on Paterson Avenue, in the Borough of East Rutherford, in the County of Bergen and State of New Jersey.

2. Pursuant to the invitation aforesaid the plaintiff entered the place of business of the defendant to effect a purchase of merchandise.

3. On the aforesaid date it became and was the duty of the defendant to maintain its place of business in a safe condition and to keep the said place of

business in repair so that the premises might be safely used by any one therein invited by the defendant through its agents and servants.

4. Defendant disregarding its duty as aforesaid failed to exercise reasonable care and failed to keep the premises in a safe condition and allowed the floor to become broken, ruined and in disrepair; that defendant attempted to repair same but did so in a negligent, improper and careless manner, permitting the same to remain in a very unsafe and danger condition.

5. By reason of the premises aforesaid, plaintiff, who was lawfully invited therein, fell and injured herself, sustaining the following injuries, to wit, injuries about the limbs, hips and body, scars and lacerations on the head, face, neck and eyes, all of which injuries are permanent in character. Plaintiff was obliged to undergo great pain and suffering and will be obliged to undergo great pain and suffering for some time in the future, plaintiff was also incapacitated from pursuing her daily lawful occupations and by reason of the premises aforesaid was confined to her home and will be confined to her home for a long time in the future. Plaintiff was also obliged to expend divers sums of moneys for doctors, nurses, X-rays, medicinals and other incidentals in an effort to cure and heal her of the injuries aforesaid.

Wherefore plaintiff demands the sum of ten thousand dollars together with costs of suit.

WEINBERGER & WEINBERGER,
Attorneys of Plaintiff.

Filed July 30, 1924.

Answer.

Defendant, a corporation of New Jersey, having its principal office in the City of Jersey City, Hudson County, New Jersey, says:

(1) It denies the allegations of the complaint.

SEPARATE DEFENSE:

(1) The plaintiff was guilty of negligence contributing to the accident.

REED & REYNOLDS,
Attorneys for Defendants.

Filed July 31, 1924.

Reply.

Plaintiff, replying to answer filed by defendant, says:

AS TO SEPARATE DEFENSE:

Plaintiff denies the allegation contained in said defense.

WEINBERGER & WEINBERGER,
Attorneys of Plaintiff.

Filed Aug. 5, 1924.

I, Edward J. Kelleher, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true transcript of the pleadings in the above stated cause as the same remain on file in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this eighth day of August, A. D. nineteen hundred and twenty-four.

EDW. J. KELLEHER,
Clerk.

(Seal.)

Postea.

NEW JERSEY SUPREME COURT.

EMILY STARK vs. THE GREAT ATLANTIC & PACIFIC TEA CO., Inc.	Supreme Court Issue.

This case was tried before Honorable William A. Smith, Circuit Court Judge, to whom the same was referred by Honorable Charles W. Parker, a Justice of the New Jersey Supreme Court, together with a jury at the Bergen Circuit on December 3, 1924. The said Judge directed the jury to return a verdict in favor of the defendant and against the plaintiff and the jury did accordingly return a verdict in favor of the defendant and against the plaintiff.

WM. A. SMITH,
Circuit Court Judge.

On motion of
Reed & Reynolds.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Judgment for Defendant.

NEW JERSEY SUPREME COURT.

EMILY STARK, Plaintiff, vs. GREAT ATLANTIC & PACIFIC TEA Co., Inc., Defendant.	Action at law. On Postea. Reed & Reynolds, Attorneys.

Reed & Reynolds, Attorneys.

Costs $39.10.

Judgment entered this seventeenth day of December, A. D., nineteen hundred and twenty-four in favor of defendant and against the plaintiff for the sum of thirty-nine dollars and ten cents costs.

WM. S. GUMMERE,
C. J.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Case.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

EMILY STARK, Plaintiff, vs. THE GREAT ATLANTIC & PACIFIC TEA CO., Inc., a corporation, Defendant.	Action at law.

Hackensack, N. J., December 3, 1924.

Before: Hon. William A. Smith, Judge, and a jury.

Appearances:

For the plaintiff, Weinberger & Weinberger, Jos. J. Weinberger, Esq., of Counsel.

For the defendant, Reed & Reynolds, Hugh B. Reed, Esq., and John B. Brown, Esq., of Counsel.

A jury was empaneled, accepted and sworn.

Mr. J. J. Weinberger opens the case to the jury on behalf of the plaintiff.

Mr. Brown opens the case to the jury on behalf of the defendant.

EMILY STARK, the plaintiff, sworn as a witness in her own behalf, testified as follows:

Direct-examination by Mr. J. J. Weinberger:

Q. Mrs. Stark, where do you live? A. I live 87 Humboldt Street, East Rutherford.

Q. Will you please talk up loud so they can all hear you, Mrs. Stark. A. I live 87 Humboldt Street, East Rutherford.

Q. And how long did you live in Rutherford? A. I live 14 years in Rutherford.

Q. Are you a widow? A. Yes; I am a widow.

Q. And have you any children? A. I have two grown—two children.

Q. Two daughters? A. Two daughters.

Q. And on the 10th day of April, 1923, did you go to a store of the Great Atlantic & Pacific Tea Company? A. I did.

Q. Where? A. In Paterson Avenue.

Q. Will you just talk up loud so they can hear you, Mrs. Stark. A. Paterson Avenue.

Q. In East Rutherford? A. East Rutherford.

Q. Do you know the number of the store? A. No; that I do not know.

Q. Was it 232 on Paterson Avenue, East Rutherford? A. East Rutherford.

Q. What did you go there for? A. I bought some groceries there.

Q. Some groceries? A. Groceries.

Q. What time of day was it? A. That was between nine and ten.

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

Q. Well now, when you went into the store, what kind of a store is that, what do they sell there? A. They sell groceries, all kinds, all oranges and fruit.

Q. Well now, what kind of a floor have they in that store? Is it wood or brick or tile, or what? A. It is a wooden floor.

Q. A wooden floor? A. A wooden floor.

Q. Are there counters on either side as you go in? A. On this side (indicating).

Q. On which side are you referring to, your right side as you go in? A. On this side, there is the counter; and on this side (indicating) I walk down.

Q. The counter is on what side as you go in? A. Just as I go in, on this side (indicating).

Q. On the right side? A. On the right side.

Q. And on the left side, what is there? A. There is some boxes, cracker boxes.

Q. Cracker boxes? A. Yes.

Q. Uneeda Biscuit boxes? A. Yes.

Q. Now Mrs. Stark, you had been in that store before, had you? A. Oh, sure. I do all my shopping in there.

Q. You do all your shopping. And have done for how many years? A. As soon as when they opened the store, I started right in.

Q. Now, as you went in this day, what happened to you? A. I walked in at the store, and there was a rotten board.

Q. Where? A. Right on the side going in.

Q. Which side going in, toward the counter? A. The left side.

Q. On the left side going in? A. Going in.

Q. Now, whereabouts was this rotten board with reference to the store? A. About the middle.

Q. In the middle of the store? A. In the middle of the store; in the middle.

Q. And what happened to you? A. A splinter knocked—a splinter caught my foot and knocked me right down on the floor, and I fell very heavy. I got the mark here on my face.

Q. Your nose was injured, you say? A. My nose was injured and my head and my knees, and it is injured yet. I have the doctor yet for it.

Q. Now Mrs. Stark, this splinter of the rotten board that caught in your foot— A. Foot.

Q. —who took that out? A. The clerk.

Q. The clerk? A. The clerk pulled it out of my shoe.

Q. Pulled it out of your shoe? A. Yes.

Q. And did you sit down after? A. I sat down a while. I was all dizzy, you know, from the heavy fall, and I sat down a while until I came to.

Q. Well, now, did you talk to the clerk? A. And I talked to the clerk. I says, "I think it is a shame that people comes in here and walks and falls on a rotten board and hurts themselves."

Q. Where did he send you to? A. And he sent me to—he looked at me. He says, "Did you hurt yourself?" And he looked at me. He says, "Why, yes, you did." So, he says, "You go right to the doctor, Brooks, because he is the nearest," and I am going—

Q. He sent you to Doctor Brooks? A. Brooks.

Q. Well now, when you told him, "It is a shame that people fall down on a rotten board," what did he say, in addition to that? A. He said he did report it to the landlord.

Q. He had reported it to the landlord? A. To the landlord.

Q. And he then sent you to Doctor Brooks? A. To Doctor Brooks.

Q. In Rutherford? A. Yes.

Q. Or East Rutherford? A. East Rutherford.

Q. How did you get to Doctor Brooks' office? A. Well, I rest a while, see? And it is only two blocks, and I walk down slow.

Q. Well now, did you go to Doctor Brooks eventually? A. I went—when I went the first time, and he looked at me, he says, "Oh, my, you have a heavy fall." And I took sick. I had the doctor, and he gave me some medicine until I raised up again.

Q. Were you in bed any length of time? A. I was in bed two weeks. He told me, "You go right home and go to bed." And I was two weeks in bed steady.

Q. And were you in the house after you got up out of bed any length of time? A. I was in the house, too, because I wasn't able to go out. You know, I laid down and got up again, the last two weeks.

Q. Why weren't you able to go out? A. Well, I was too sick.

Q. In what way, Mrs. Stark? A. From that fall.

Q. Well now, prior to this accident, what was the condition of your health? A. After?

Q. Before the accident, how was your health? A. Before the accident?

Q. Yes. A. I was very well; there was nothing the matter with me. I was good and strong.

Q. How old are you now? A. I am going to be—nearly 69.

Q. 69. And who did the housework before this accident occurred to you, Mrs. Stark? A. I done it myself.

Q. Who did the household work before the accident? A. I done it all myself.

Q. How many rooms do you occupy? A. Five, and a bath.

Q. Did you have a maid take care of it, or you do the work? A. I do the work.

Q. Well, after the accident, who did the work for you? A. I engaged a lady, a Mrs. Steck.

Q. Mrs. Steck? A. Yes.

Q. And how much did you pay her? A. I paid her two dollars and a half a day.

Q. And how many days did you engage her, and what did she do? A. She done just my plain housework, the same as I would do.

Q. Were you able to do it? A. Before?

Q. Were you able to do it after the accident? A. No, not right after. Not now. I am not able to. I am a nervous wreck now.

Q. Well now, were you nervous before this accident occurred? A. I was never nervous.

Q. How long did Doctor Brooks treat you, Mrs. Stark? A. Well, he treated me every—when I first —when I got the doctor, when I fell down, and he said I should go home and go to bed, then the same week he came twice. And the second time he came once.

Q. The second week? A. The second week he came once. And he always prescribed some medicine for me, some kind of tablets, some pills, and then I got up, and I walked in and out, you know. I did not go out on the street. I couldn't. My face was all black and blue.

Q. Your face was black and blue? A. Black and blue, and my nose, and my face was all swollen so I couldn't go out.

Q. Well now, did Doctor Brooks continue to treat you after the first two weeks? A. Oh, yes, he did.

Q. How much was the bill that Doctor Brooks tendered to you, Mrs.— A. I don't know. I didn't get the bill.

Q. I show you a bill. You cannot read, by the way? A. No, I cannot read.

Q. Is this the bill? Is this the piece of paper that you gave to me with reference to the bill of Doctor Brooks? Do you remember a piece of paper? A. Yes, I did.

Mr. Weinberger: I will prove it by the doctor, unless you want to admit it.

Mr. Brown: I may admit it. Let me see it (referring). We have no objection to that.

Mr. Weinberger: By consent, it is offered in evidence.

The Court: How much is it?

Mr. Weinberger: $29.00.

Bill marked Exhibit P1 in evidence.

Q. You say there is a cut on your nose? A. Yes; right here (indicating).

Q. Is that right across the bridge of your nose? A. Yes. And that nose is always swollen. That bothers me a great deal. I went to the doctor, and he told me that was from—due from the nose, it was swollen.

Q. Prior to the accident, could you hear well? A. I heard good, very good.

Q. How is your hearing now? A. Since I fell, I lost my hearing on the right ear.

Q. Well now, Mrs. Stark, did you have any X-rays taken? A. Yes. I had such pains in my head and my face, so I told the doctor, and he says, "I take you up to the General Hospital and have X-rays taken."

Q. General Hospital in what city? A. In Passaic.

Q. Did you have some X-rays taken? A. Yes, I had.

Q. By Doctor Terhune, the X-ray man there? A. Yes, sir; I did.

Q. How much did they charge you for the X-rays? A. $15.00.

Q. Now, were you bruised in any part of your body with the exception of your face and nose? A. My knee was bruised for five weeks.

Q. Which knee, your right or left? A. The left knee.

Q. Are you able yet, Mrs. Stark, to do any housework around that house? A. No. I am not able to do much; I am very nervous.

Q. Well, who does the work for you now? A. My

daughter. She does it all when she comes home nights; she has to do it, the most.

Q. Your daughter does that? A. (Witness nods head in the affirmative.)

Q. Well, how long a time did you keep this Mrs. Steck to do your housework for you, Mrs. Stark? A. Two weeks, less a day.

Q. It would be two weeks if it had continued for one day more, in other words? A. One day more.

Q. Thirteen days? A. Thirteen days.

Q. And you paid her how much a day? A. Two dollars and a half.

Q. Did you have any medicines, Mrs. Stark, which Doctor Brooks prescribed for you? A. Yes, I did.

Q. About how much was the total of the amount that you paid? A. Well, really, I do not know. I do not know. Was it twenty-four or twenty some—twenty-seven, something like that. I could not tell exactly.

Q. $20.00, or in that neighborhood? A. Yes.

Q. You did not keep track of every penny that you spent? A. No, I did not.

Q. Did you have any other doctor by the name of Doctor Hughes? A. Yes, I did. That was in Passaic, a doctor in Passaic, for my ear.

Q. For your ear? A. Yes. And for my nose. He told me the tube was swollen in the nose, and that gives me the pains. I cannot wear any glasses.

Q. Had you ever been in an accident before? A. Never in my life.

Q. And you are sixty-nine years old now? A. I am going to be, after Christmas, I am going to be sixty-nine.

Q. And after this accident occurred, Mrs. Stark, did you receive any letters from the Great Atlantic & Pacific Tea Company? A. Yes, I did.

Q. You cannot read, though? A. Well, my daughter read it to me.

Q. I show you two pieces of paper purporting to be letters from the Great Atlantic & Pacific Tea Company, and ask you whether you turned these papers over to me that you received from the Great Atlantic & Pacific Tea Company, is that right? A. Yes.

Q. Are these the papers? A. Those are the papers.

Mr. Weinberger: I would like to have them marked for identification at this time.

The Court: You might show them to counsel; they may admit them.

Mr. Weinberger: Well, I do not know whether he will or not (handing papers to counsel).

Mr. Reed: Well, they are answers to a request for settlement, your Honor. That is the only reason we have any objection to them.

The Court: All right.

Mr. Weinberger: Are you going to object to these letters?

Mr. Reed: Yes. I think they are not proper in view of the fact they are dealing with the settlement of the litigation.

Mr. Weinberger: Without prejudice, they are not, Mr. Reed.

Mr. Reed: Well, that is a question.

Mr. Weinberger: Well, I will offer them in evidence now.

Mr. Reed: I object on the ground that they deal with a request for a settlement, and an answer to them, and they are not—

Mr. Weinberger: Your Honor please—

Mr. Reed: —for that reason, competent.

Mr. Weinberger: —I think the letters are competent because it is an admission against interest. It is an offer made on behalf of the Great Atlantic & Pacific Tea Company to settle this case, without prejudice, and, therefore, binding.

The Court: I think offers of settlement ought to be not admissible. I will deny the offer.

Mr. Weinberger: Exception. That is all.

CROSS-EXAMINATION by Mr. Brown:

Q. Mrs. Stark, do you recall on the morning of April the 10th, 1923, when this accident happened, as you walked into that store, just where you were looking? A. I was looking right straight.

Q. Straight ahead of you? A. Sure. I walked just like that.

Q. I see. You were walking straight ahead? A. I was just walking like this (indicating).

Q. Oh, yes. You were looking down at the floor? A. Well, I was walking straight like you would walk in when you walk.

Q. Just where were you looking? A. I was looking down, of course, but I walked ahead.

Q. Looking down at the floor? A. Sure.

Q. Did you see anything on the floor as you walked along? A. When I walked along, I walked along, and I walked on the rotten floor, and the splinter—

Q. You walked right on the rotten floor? A. On the board.

Q. On the board? A. On the board.

Q. And did you see that board before you walked on it? A. I did not see it.

Q. You did not see it before you walked on it? A. No. I did not see it. When I walked ahead, then I fell down; the splinter caught my foot, and I went right flat down.

Q. Well, did you know that that splinter was there before you stepped on it? A. I did not know it.

Q. You did not know it? A. It caught my foot.

Q. I think I understood you to say in your testimony that you had been trading at this store ever since the store opened? A. I did.

Q. Is that right? A. I did.

Q. About how often would you go there, Mrs. Stark? A. Well, in summer, I go there nearly every other day, and I have been there once or twice in the winter, and do my shopping all at once.

Q. Nearly every other day? A. Nearly every other day. I used to get a little; but in winter I used to go once or twice, I stopped in in the winter.

Q. And you walked over this same floor and over this same place? A. Well, you do not walk always the same place right when you go in. You walk sometimes this way, and sometimes you walk that way.

Q. You would walk anywhere on the floor? A. Well, I walked straight, but you do not always go right to the counter; sometimes you go here, and sometimes you go there.

Q. But you had not seen that hole or that splinter in the floor before you fell, did you? A. I did not see it, because I walked right straight into the—to the counter, and it caught me, the splinter caught my foot and knocked me right flat down—

Q. Oh, yes. A. —as hard as it could.

Q. You never saw that splinter, then, on any of the other days that you visited the store, did you? A. Maybe I did not step on that board.

Q. Answer the question, please. A. Yes.

Mr. Weinberger: She has, Mr. Brown.

Mr. Brown: Just a minute. She did not say that.

Q. Did you ever see that splinter before the day that you fell? A. No, I did not; because I—

Q. All right; that is enough. A. —walked right in.

Q. You walked over this floor on an average of every other day, sometimes a little less? A. Yes, sir.

Q. And never saw this splinter until it caught in your foot and knocked you down? A. Knocked me down. I never saw it before.

Q. Now, Mrs. Stark, when you got up off the floor, I suppose you looked around to see what had tripped you, did you not.

Mr. Weinberger: I object to it on the ground the witness has not said she was tripped.

Mr. Brown: I will withdraw the question.

Mr. Weinberger: I thought you would.

Q. When you got up, Mrs. Stark, did you look down at the floor where you had fallen to see what caused your fall? A. Sure, the splinter; and the clerk pulled the splinter out of my heel.

Q. Oh, yes. Now, what was that splinter like? Will you describe that? A. Well, it was pretty—big enough to catch my foot in it.

Q. Well, how large a hole did it leave in the floor? A. Well, about—about that deep (indicating), it left down, right down, into the floor.

Mr. Brown: Would you agree on that being an inch?

Mr. Weinberger: Well, I do not know.

Mr. Brown: She said, about that deep.

The Court: How deep? Show with your fingers again.

The Witness: (Indicating.)

The Court: About an inch and a half, I should say.

Q. About an inch and a half? A. It was a deep hole.

Q. A deep hole in the floor? A. Yes.

Q. About an inch and a half? A. Yes.

Q. And how wide was that hole, how wide this way? A. That was right in the middle of the board.

Q. Yes. But can you indicate the width? A. Well, say this wide (indicating) see?

Q. About an inch?

Mr. Weinberger: I cannot see. She has got black gloves there.

The Court: About the same distance, I should say.

Q. About the same distance, from an inch to an inch and a half wide. Did that hole go all the way through the board? A. It did not go all the way through, but it went a big—a big hole in.

Q. Oh, yes. A. It did not go down to the cellar.

The Court: There was wood below the part that came out?

The Witness: Yes; yes, sir.

The Court: So that if there was a light down in the cellar, you could not see through?

The Witness: You could not see through.

Q. Now, just what part of your foot was it that caught? A. My right foot—my left foot.

Q. It was your left foot? A. My left foot caught, yes.

Q. Well, was it your toe that stubbed that caught in the hole? A. The middle of the sole. I walked along, and all at once I tripped on it heavy; it caught me right in the sole.

Q. In the middle of the sole? A. Yes.

Q. Well, did you— A. And then it went down so far that it caught onto the heel, and the manager pulled it out of the heel.

Q. Well, did you have a hole in the sole of your shoe? A. No. I had good shoes on; there was nothing the matter with my shoes.

Q. Do you know how much you weighed about that time, Mrs. Stark? A. Oh, I was a pretty heavy— I was a stout woman.

Q. You were very stout at that time? A. Yes, very stout; and I am very thin now.

Mr. Weinberger: I did not hear that.

Mr. Brown: She was very stout.

The Court: She is very thin now.

Mr. Weinberger: She is very thin now?

The Witness: Yes, I lost a lot.

Q. How much of that board, Mrs. Stark, would you say was rotten? A. Well, it was a long board. I looked at it. It was a long board, and it was all coming up, splinters and splinters and splinters.

Q. A long board? A. Yes, a long board.

Q. And these splinters were coming up, you say? A. Coming up, and one was where I walked in, and I catched my foot, and it brought me right down flat on my face very heavy, too. I wasn't able to get up. The manager had to pick me up, I fell down so heavy.

Q. When did you first notice these splinters coming up in this board? A. Well, after I fell.

Q. After you fell. Did you say anything then to

the clerk, or the manager of the store, in regard to these splinters? A. I did not say nothing. I was too sick to bother talking. I was shaking.

Q. Yes. A. He looked at it, he seen it.

Q. Yes. A. The manager.

Q. Well, just describe these splinters, will you? How did they come up, Mrs. Stark? A. Well, they came up when I walked along and caught me on the foot, and that is all I can tell you.

Q. That is, do you mean to say, there were several splinters sticking up? A. There must have, there was one big splinter caught me on the foot.

Q. You mean to say that besides the hole that your foot caught in, there was also a splinter? A. It slid me right down and caught me, a big splinter caught my foot, and knocked me down flat on the floor.

Q. Let me see if I understand you. You slid down in the hole first, and then caught on the splinter?

Mr. Weinberger: She has not mentioned the word "sliding" at all, your Honor please.

Mr. Brown: I beg your pardon. She just did.

A. No. I walked, then I caught—the splinter caught my foot, and I lopped right down as heavy as I could fall.

Q. Now, Mrs. Stark, in regard to these other splinters on that board— A. Yes.

Q. —what were they like? Just explain them, please, or describe them. A. Well, they was just laying down, but you could see that they would come up any time.

Q. Were they sticking up then? A. Some was sticking up; otherwise, I would not have fell down.

Q. Did you see any others sticking up besides the

one that you think— A. No. Only the one where I walked on, and one was very thick.

Q. Then there were not any other splinters sticking up besides that one? A. I did not look any further.

Q. You did not see any more than that? A. No. I did not look any further.

Mr. Brown: I think that is all.

RE-DIRECT EXAMINATION by Mr. Weinberger:

Q. You testified that before the accident you were a much heavier and stouter woman? A. Oh, yes, I was.

Q. And that you have lost considerable weight? A. I did.

Q. Outside of this accident, were you ever treated for anything else? A. I was not treated for anything else. I was a well, healthy woman.

The Court: She has testified to that.

Q. You testified, did you not, Mrs. Stark, that the clerk sent you to Doctor— A. To Doctor Brooks. He says that he was the nearest. I should go right to Doctor Brooks.

Q. You called him the manager of the store, did you? Was he the only man in the store at the time? A. He was the only man—only one man in the store at that time.

Mr. Weinberger: That is all.

RE-CROSS EXAMINATION by Mr. Brown:

Q. Are you able now to go down to the store to make your purchases?

Mr. Weinberger: I object to that.

The Court: On what ground?

Mr. Weinberger: On the ground that whether she is able—she does not say she is incapacitated from walking. She is able to come here to the court house.

The Court: I will allow it.

Q. Are you able to go down to the store now to make your purchases? A. What do you mean, purchases? What do you mean?

Q. To buy groceries. When was the last time that you were there?

Mr. Weinberger: I object on the ground it is improper.

A. After my fall, I was not there for a long, long time; for a couple of months I was not there after my fall. I was not there. My daughter done my shopping.

Q. When was the last time you were there? A. That I do not remember.

Q. Were you in that store yesterday? A. Oh, yes; yesterday.

Q. You were there yesterday? A. Yes.

Q. Did you have any conversation with the manager? A. I only looked at the board. I wanted to see, to make sure, how long the board was, and how deep the splinter was. That is what I went in to see.

Q. Did you find that any repairs had been made?

Mr. Weinberger: I object to that.

A. No.

Mr. Weinberger: Just a minute, now.

A. (Continuing.) Just the same.

Mr. Weinberger: Just a minute. Oh, "just the same." Well, I will leave it stand, now.

Q. Did the manager come over and point out the spot— A. Yes.

Q. —to you? A. He pointed out the spot to me, yes, sir.

Mr. Brown: That is all.

Mr. Weinberger: That is all.

By the Court:

Q. How big a splinter was this that you had in your foot? A. It was that big (indicating).

Q. That is about an inch and a half long? A. Long, yes.

Q. And how big around? A. Well, it was—it was kind of pointed, and here (indicating) it was broad, and there it went up narrower.

Q. It went up to a point? A. A point.

Q. And what part of your shoe did it go in? A. It went right in the middle, almost on the middle of the sole.

Q. That is, up through the sole, through the bottom of the sole? A. Yes.

Q. Was there any hole in the sole of your shoe? A. My shoes was all right. There was no holes in them.

Q. Smooth surface? A. Smooth shoes; yes, sir.

By Mr. Brown:

Q. Did that splinter leave a hole in the sole of your shoe? A. Sure. That—that is the reason I fell down. That splinter held me, but I had to fall down. It would not let me go. I tried to throw myself back, and I couldn't. I had to flop right down.

I fell down as hard as I could. I might have lost my life by that fall.

Q. Mrs. Stark, did you save that shoe? A. Oh, I haven't got it no more.

Q. You have not? A. No. I throw it out right away.

By the Court:

Q. Did this splinter stay in your shoe? A. It did stay in my shoe, and the clerk pulled it out.

Q. Who did, the clerk? A. The clerk.

The Court: That is all.

By Mr. Weinberger:

Q. He is the manager of that store, is he not? A. Yes, he is the manager.

Mr. Weinberger: That is all.

FLORENCE STECK, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct-examination by Mr. Weinberger:

Q. What is your name, please? A. Florence Steck.

Q. And where do you reside, Mrs. Steck? A. 140 Uhlandt Street, East Rutherford.

Q. East Rutherford? A. East Rutherford.

Q. Do you know Mrs. Emily Stark? A. Yes.

Q. How long have you known— A. Well, I haven't known the old lady so good. I know her family.

Q. Did you know Mrs. Emily Stark, the old lady, as you call her— A. Yes.

Q. —before the 10th of April, 1923? A. No, I did not know her. I have saw her in the street several times. I met her on and off, but I never visited her.

Q. Well, after the 10th of April, 1923, did you do any housework for her? A. Yes. Her daughter came down and asked me to came up.

Q. Never mind what she said. You are not allowed to tell that. Did you do any housework for her? A. Yes, I did.

Q. What did that consist of? A. Well, I washed the patient, salve, and gave her medicine, and did all the housework.

Q. Did you see her condition? A. Yes. She was very bad.

Q. Will you just describe it to the jury, the condition of her face? A. When I went in to see the old lady, now, she was confined to her bed. Her nose was bleeding. She had a large cut over her nose. She could not use her left knee, it was all bruised. Her face was all discolored. There was only just one little part here (indicating) that seemed to have its natural color. She could not hear well. Then, she was nervous.

Q. How long did you stay at the house and do the housework? A. I was there two weeks.

Q. Two weeks? A. Yes.

Q. And what did you charge each day? A. Two and a half.

Q. Two and a half dollars? A. Yes.

Q. You did the washing as well? A. I did everything.

Q. And from what hours to what hours were you there? A. I got there around eight o'clock, after my boy went away, and I generally got home around eight.

Q. Eight o'clock. You are not related to Mrs. Stark? A. No. I am no relation.

Q. During the thirteen days that Mrs. Stark kept you there, did you have occasion to see the marks on her face, the bruises? A. Yes, every day.

Q. And you applied salves? A. Salves.

Q. And administered the medicines to her? A. Yes.

Q. Were you there when Doctor Brooks called? A. Yes. Doctor Brooks called; the two weeks I was there, I met him about three times.

Q. About three times.

Mr. Weinberger: That is all.

Mr. Brown: No questions.

Mr. Weinberger: That is all.

EMILY STARK, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct-examination by Mr. Weinberger:

Q. Miss Stark, you are the daughter— A. Yes, sir.

Q. —of Mrs. Emily Stark? A. Yes, sir.

Q. And what is your occupation? A. Chief telephone operator.

Q. Will you just talk up loud, please? A. Chief telephone operator at the New York Belting & Packing, Passaic.

Q. You live with your mother? A. Yes, sir; I do.

Q. And you did on the 10th of April, 1923, live with your mother? A. I did.

Q. In East Rutherford? A. Yes, sir.

Q. Prior to the 10th of April, 1923, how was your mother's condition of health? A. It was very good.

Q. Who did the housework in the house? A. Mother did the work.

Q. And what did that consist of, Miss Stark? A. Well, the usual housework, cooking and washing and cleaning.

Q. Did she prepare meals for you? A. Yes, she did.

Q. Prior to the accident. And did she need the assistance of a woman to come in and do her housework prior to the accident? A. No, sir.

Q. With reference to her hearing, did your mother hear well before the accident? A. She did.

Q. Did she ever complain of any pain in her ears? A. Never. She never had the doctor.

Q. And on the 10th of April, 1923, the day your mother met with the accident in the Great Atlantic & Pacific Tea Company Store in East Rutherford, did you have occasion to see her on the night when you came home from work? A. Yes, sir; I did.

Q. Will you just describe to the Court and jury exactly what you saw, Miss Stark, when you came home from business that evening? A. Well, she was in bed, and I asked her what happened, and she told me.

Q. You cannot relate conversations. A. Well, she was very bad bruised up, her face and her knee, and she was in a very bad shape. So I had to hustle out and get somebody to take care of her, because I thought it—

Q. Never mind. Just tell us what you saw and what you did yourself. A. Well, I put hot water on her face and tired to do all I could for her, and she—

Q. Was she in pain? Did she complain of pain? A. Very much, yes. I was up all that night with her.

Q. Could she sleep? A. No. She could not sleep.

Q. Well now, prior to this accident, was she a nervous type woman? A. No. She was no nervous woman.

Q. No. And did all her own shopping and everything else? A. Everything, yes. I had nothing to do. She used to do everything.

Q. And did the cooking in the house prior to that? A. Yes, sir.

Q. Well now, did you see her during the course of the two weeks that she was in bed, approximately two weeks? A. Yes, every night.

Q. And will you just tell the Court and jury what you observed in the way of marks and bruises, and where they were? A. Her forehead was all swollen up. She had a very deep gash across her nose here, and—

Q. Indicating the bridge of the nose? A. The bridge of the nose, yes. And her eyes were all black and blue, and there was just one little mark on her face there that was the natural color. Her face was all bruised up and all swollen.

Q. Did you see her the night before the accident? A. Before the accident, yes.

Q. Did she have any marks like that? A. No, nothing at all.

Q. Or discolorations on her eyes? A. Nothing.

Q. Or a deep gash in her nose? A. Nothing.

Q. Bruises to her knee? A. She was in perfectly good health.

Q. Well now, did you have occasion to go to the store of the Great Atlantic & Pacific Tea Company directly after the accident occurred to your mother? A. Yes, sir. I had to go and do the shopping there.

Q. Will you describe what you saw there? A. Well, I seen this here rotten board, and the splinter was about that long (indicating) that she—

Q. Indicating about how many feet? A. Well—

Q. In your best judgment. A. —eighteen inches, every bit of that, eighteen inches.

Q. All right. A. Where her foot had caught in and thrown her right over—

Q. Yes. A. —on this rotten board—

Q. And was it there— A. —on the floor.

Q. —when you went there? A. Yes, sir. It was there.

Q. What have you to say with reference to whether there was a hole there in the flooring? A. There was a hole in the floor that had caught her foot.

Q. What would you say was the condition of the board, was it good or bad? A. Well, I would say it was very bad, or else she would not have fell over.

Q. Well, with reference to the condition of the wood? A. The wood was rotten.

Q. Now, was there space enough for her foot to get caught in there? A. Yes. Big enough for her shoe.

Q. Will you describe where that portion of the flooring was situated when you enter the store there, on the left or right side? A. On the left side, about in the center of the store.

Q. Did you speak to the manager of the store? A. He asked me how my mother was, and I said she was in pretty bad shape, and he said, "I know she had a pretty bad fall," and he said, "I reported that to the landlord, but he did not fix it."

Q. Did you ask him whether he had reported it before the accident to your mother?

Mr. Brown: That is leading. I object to that.

The Court: I sustain the objection.

Q. When were you there? A. I was there the same week of the accident.

Q. Was it fixed at that time? A. No, sir.

Q. Can you identify the person to whom you spoke, in the court room today? Is he here? Do you know him if you see him? A. Who I spoke to?

Q. The manager of the store. Could you identify him? A. Well, I guess I could, if I saw him.

Q. Is he here? Is that the gentleman— A. Yes, sir.

Q.—who just put up his hand? A. Yes, sir.

Mr. Weinberger: Is he the manager, Mr. Brown?

Mr. Brown: Yes.

Mr. Weinberger: Yes. Indicating the manager. What is his name?

Mr. Brown: Van Lenten.

Q. Mr. Van Lenten. You took care of your mother's correspondence, did you not? A. I did everything.

Q. I show you two letters, one dated April 29th—

Mr. Weinberger: This is for the purpose of the record, your Honor.

Q. —and one June 20th, both of them, 1924, each from the Great Atlantic & Pacific Tea Company, Inc., addressed to Mrs. Emily Stark, 87 Humboldt Street, East Rutherford, New Jersey, and ask you whether or not in the ordinary course of communications, you received these letters from the Great Atlantic & Pacific Tea Company? A. Yes, sir.

Q. Did you open these letters? A. Yes, sir.

Q. Were you the one who wrote to the Great Atlantic & Pacific Tea Company? A. Yes, sir; I was.

Q. And these are the replies you got? A. Yes, sir.

Mr. Weinberger: I now offer them in evidence, your Honor please.

Mr. Reed: The same objection, your Honor please.

The Court: I sustain the objection.

Mr. Weinberger: Your Honor will allow an exception?

The Court: Yes.

Mr. Weinberger: That is all.

CROSS-EXAMINATION by Mr. Brown:

Q. Miss Stark, I was not able to gather a very satisfactory description of that board from the description that you gave. You said the board was rotten? A. Yes.

Q. Was it soft so that you could pull a piece out of it? A. So that you could pick a piece out of the board.

Q. Just what do you mean by rotten? A. Rotten. It was a defective board.

Q. Well, defective in what way? A. Well, it had a hole in it to catch your foot.

Q. Well, of course, if a board has a hole in it— A. Yes.

Q. —it is not necessarily rotten.

Mr. Weinberger: I do not believe in counsel arguing with the witness, "If the board has got a hole in it, it is not necessarily rotten." Is that a question?

The Court: Ask your question.

Q. You say the board also had a hole in it? A. It had a hole in it.

Q. How large was this hole? A. Big enough for

her foot to get caught in and throw her over, and as she did, this big splinter came out.

Q. Just a moment, please. Will you please give us the dimensions or the size, the approximate dimensions of that hole in which you say her foot— A. I should say that was big enough for her shoe to get caught in.

Mr. Weinberger: She describes it as big enough for her shoe to go in.

A. (Continuing.) Large enough for her shoe to go in, and as that shoe went in, that threw her, and this splinter came right out, and it caught her foot, of course.

Mr. Brown: Can we agree on a distance for that; three inches, four inches?

Mr. Weinberger: Your Honor, please, the witness can best tell. She says, big enough for her shoe to go in.

Q. The width of your mother's shoe? A. Well, I should imagine that much (indicating).

Q. Yes. A. That is the way it looked to me.

Mr. Weinberger: How wide would you say in inches that would be? About how wide is that?

The Witness: Oh, that is every bit of five inches, I am sure.

Mr. Weinberger: All right. Let us have it on the record, then, five inches.

Q. This hole, then, was five inches wide? A. Yes.

Mr. Weinberger: She says, about.

Q. About five inches wide. And how long was that hole? A. About that long (indicating).

Q. About eighteen inches— A. About that; yes, sir.

Q. —long? And how deep— A. Deep?

Q. —would you say that hole was? A. Well, about an inch and a half deep, and it tapered off.

Q. An inch and a half deep? A. Deep.

Q. And it tapered from what? A. From the hole.

Q. From the inch and a half? A. From the hole, an inch and a half, and then it tapered right off.

Q. To nothing? A. To this (indicating).

Mr. Weinberger: Indicating how much?

The Witness: Eighteen inches.

Q. Were you there after the accident happened? A. Not the same day.

Q. Since then? A. Friday. Why, no. I have— I know I have been there; but I have to do my shopping now in Passaic. I cannot make time to go to that store.

Q. Did you ever notice that particular spot in the floor after that day? A. After that day?

Q. Yes. A. Yes, I did.

Q. Was there any change in it? A. No, sir.

Q. It has always been the same? A. Yes, sir.

Mr. Brown: That is all.

Mr. Weinberger: That is all. We rest, your Honor, please.

Mr. Brown: Your Honor, please, I move for a nonsuit at this time upon the following grounds:

First, that the evidence produced here this morning is not of such a type as would indicate that there has been any negligence on the part of this defendant. The evidence itself is very contradictory as to just what did cause the accident. The plaintiff testifies that it was a

small thin splinter. The daughter testifies that there was a hole eighteen inches long and more than the width of the shoe, and an inch and a half deep, which caused the woman to fall. That is not the proof that the law requires in order to fasten negligence and a consequent liability on this defendant. On that ground, there has been no evidence produced here to show that the defendant has been negligent.

I move for a nonsuit on the further ground that this class of negligence cases is the class of cases that calls for proof of notice, proof of notice of a defective condition before the time of the accident, to those who are the cause of it or, if not proof of notice, then proof of the existence of that defect for a long enough period to have constituted notice to the defendant. And a case which governs this class of cases is the case of Schnatterer vs. Bamberger, cited in 79 Atlantic 324. Your Honor is undoubtedly familiar with that.

(Argument.)

Mr. Brown: It seems to me that is on all fours with this case.

Mr. Weinberger: But it was proved, notice in this case.

Mr. Brown: The plaintiff herself stated the first time she ever spoke to the manager of the store was after she fell. That is on the record.

Mr. Weinberger: That is true; but counsel forgets a very important and salient feature in that case. I am very familiar with that case, because we tried a case just like it, Buda vs. Dzuretzko, 87 Law, wherein we reversed the Court below, and that case held, as in this case, you must give notice; but here the evidence is

that a conversation took place with the manager, and the manager says yes, he reported that to the landlord, and he has not fixed it yet, before the accident.

Mr. Brown: Pardon me. I object to that.

Mr. Weinberger: That is the evidence in this case, that there was notice to a landlord to fix it, and that he did not do it prior to the accident.

The Court: Say that again, Mr. Weinberger.

Mr. Weinberger: My understanding, your Honor, please, and I think the stenographer will bear me out, is that this woman testified, and the daughter did, that she spoke to the manager of this store when the accident occurred, and he was the one who sent her to the doctor, and she told him it is a rotten shame, it is a shame, that you should have such a rotten board when people come in to buy and fall down as a result of that. He said, "I am sorry, Madam; I reported it to the landlord, and he had not fixed it." And I say, your Honor, please, that there is notice in this case; and that is why the Schnatterer case was reversed.

(Further argument.)

The Court: I will deny your motion.

Mr. Brown: Referring to the question of notice as given in the evidence in this morning, you will recall the plaintiff herself stated that she had not seen that before she fell, and that that was the first time she called the attention of the manager to it. Now, in regard to the notice which my opponent claims was given by the daughter, that conversation took place sub-

sequent to the accident, and the manager at that time did not say that he had reported the condition of the floor prior to the accident. What he said was that he had reported the condition of the floor at the time of the accident, not as of before. So that there was no notice in this case.

The Court: Mr. Stenographer, will you turn back to the plaintiff's testimony where she testified as to her conversation with the manager.

Testimony of the plaintiff, EMILY STARK, on direct-examination, read as follows:

"Q. Well, now, did you talk to the clerk? A. And I talked to the clerk. I says, 'I think it is a shame that people comes in here and walks and falls on a rotten board and hurts themselves.' * * *

"Q. Well, now, when you told him, 'It is a shame that people fall down on a rotten board,' what did he say, in addition to that? A. He said he did report it to the landlord.

"Q. He had reported it to the landlord? A. To the landlord."

Mr. Brown: Then, if you will refer to the cross-examination, she stated that was the first time she spoke about it.

The Court: I know; but this was the plaintiff that was talking with the manager, and she says that the manager stated that he had reported the condition of the board to the landlord, which would indicate that he, the manager, had knowledge of that condition.

Mr. Brown: Then, in her cross-examination, your Honor, please, she contradicts that. She says just the opposite.

The Court: I do not recall she did.

(Further argument.)

The Court: Is that all you have to say?

Mr. Brown: That is all.

Mr. Reed: May I just say a word in regard to that, your Honor, please? My idea was this—

Mr. Weinberger: I might say this: I did not know the rules of law permit two counsel.

Mr. Reed: Well, if you object—

Mr. Weinberger: No. I did not know the rules of law permit two counsel to argue on the question of a nonsuit. The question was raised, and I do not think—

The Court: You object?

Mr. Weinberger: I certainly do. I think one counsel is enough.

The Court: I will deny the motion. I think there is enough here to raise a question of fact for the jury to pass upon the case.

Mr. Brown: Your Honor will allow us an exception?

The Court: Certainly.

The Defendant's Case.

PETER VAN LENTEN, sworn as a witness on behalf of the defendant, testified as follows:

Direct-examination by Mr. Brown:

Q. Mr. Van Lenten, with whom were you working on April 10th, 1923? A. You mean, who was—

Q. Who was your employer? A. Who was my employer?

Q. Yes. A. What, the company, or the—

Q. Yes. A. The Atlantic & Pacific Tea Company.

Q. And where were you working? A. 232 Paterson Avenue, East Rutherford.

Q. Talk louder so the jury can hear you, please? 232 Paterson Avenue? A. East Rutherford.

Q. East Rutherford. In what capacity were you working there? A. As a manager of that store.

Q. Of the Atlantic & Pacific tea store? A. Yes, sir.

Q. Did you have any help with you in the store? A. Yes.

Q. How many? A. One.

Q. Who was that? A. Martin Krom.

Q. Martin Krom? A. Yes.

Q. Do you recall the plaintiff, who has testified here this morning, coming into your store on the morning— A. Do I recognize her?

Q. Do you recall her coming into your store? A. Yes, sir.

Q. On the morning of April 10th? A. Yes, sir; I do.

Q. And what were you doing at the time that she came in? A. I was waiting on another lady.

Q. Waiting on another lady? A. Yes, sir.

Q. What happened to the plaintiff in your store? A. She come walking in the door; she bore a little to the left—

Q. Louder. A. She came in the store, walked in about six feet, when she fell.

Q. Well, did you pick her up, assist her? A. I did. I helped her up, and got her a bench or a box to sit on.

Q. Did you inquire as to the cause of her fall? A. Well, I seen it was a splinter caught in her heel.

Q. Did you pull the splinter out? A. I did.

Q. And how large was that splinter, Mr. Van Lenten? A. Well, the length of it, to give the benefit of the doubt, would be about four inches in length.

Q. About four inches? A. That is giving the other side the benefit of the doubt.

Q. That is giving it the benefit of the doubt? A. The benefit of the doubt.

Q. And how thick was that splinter? A. Why, it tapered from nothing to about an eighth of an inch.

Q. From nothing to an eighth of an inch? A. Yes, sir.

Q. And could you see the place on the floor where this splinter came from? A. Well, I can, yes.

Q. Could you, at that time? A. At that time, yes.

Q. What would you say as to the condition of that board— A. Why—

Q. —out of which the splinter came? A. —it is a good board. It is a pine board, and the grain is what they call a flat grain, or a flower grain, in the pine board.

Q. Well, what was the condition? A. The condition was fair, good.

Q. Did you notice any other splinters— A. No.

Q. —sticking up on that board? A. No, sir.

Q. Were there any? A. No.

Q. Was the board rotten? A. No, sir.

Q. Was it springy? A. No, solid.

Q. How about the rest of the boards around that particular spot? A. They were all solid and good.

Q. Did you say anything to Mrs. Stark when you picked her up? A. I asked her how she was and whether she was hurt. She said she felt badly hurt,

so I said, "As you are hurt, I think the best thing is to get a physician's advice of what to do," and I sent her to Doctor Brooks.

Q. Did she say anything to you? A. Not just then.

Q. In regard to the floor? A. I do not remember her saying anything then. She was kind of dazed, and she had not said anything. She picked up and went out to Doctor Brooks.

Q. Did she mention to you that the floor was rotten? A. Not until after.

Q. When? A. Oh, I should judge about a week or more after. I do not just recollect the time, but it was every bit of a week after the accident.

Q. She did not say anything about it at the time? A. No, sir.

Q. Well, where did you see her a week or so after? A. Well, I seen her that same day at her house.

Q. No. But a week or so after. A. In the store. In the store, a week after.

Q. You saw her a week or so later in your store? A. Yes, sir.

Q. How do you recall the fact that this was a week or so after, Mr. Van Lenten? A. Well, if it come to swearing to the time, I would not say a week, but every bit of a week. It might have been ten days, I know it was not a month after.

Q. Mr. Van Lenten, what are your duties as manager of that store? A. To see that everything is all right there; keep things in good order, keep the floor clean, keep the sidewalk clean.

Q. Do you inspect the store? A. Yes, sir.

Q. How often? A. Why, when there is nothing to do, we are looking around to see what is wrong, if there is anything wrong, to remedy it.

Q. What care do you take of the floor? A. I sweep

it twice daily, and we oil it about every two or three weeks, according to how the oil wears off the boards.

Q. I did not get that last. You oil it? A. Oil it.

Q. Every two or three weeks? A. Yes, sir.

Q. According to the condition of the floor? A. Yes.

Q. What time of the morning did this accident happen? A. I should judge about between nine and ten.

Q. Was the floor swept clean at that time? A. It was swept at half-past six the night before.

Q. When was the floor oiled prior to that time? A. About two weeks.

Q. And how do you oil a floor? What do you use to oil a floor with? A. A felt mop on a handle.

Q. A felt mop on a handle? A. On a handle.

The Court: Did he say when he had oiled it before?

Mr. Weinberger: Two weeks before.

The Witness: About two weeks before.

Mr. Weinberger: I think you said that, didn't you?

The Witness: Two weeks.

Q. What is the method of using this mop in oiling the floor? A. Why, to spread it evenly over the floor, you pour the oil on the floor, and you take this felt mop to spread it evenly.

Q. Do you rub hard or soft? A. Why, you have to put quite a little weight to it.

Q. What is the nature or character of this mop? A. It is soft.

Q. And would it naturally go down into a depression or catch on a sliver? A. Yes, sir.

Mr. Weinberger: I object to that as calling for a conclusion—

The Court: I will sustain the objection.

Mr. Weinberger: —what it naturally did do.

Q. Did you ever know this mop to catch on a sliver or splinter on the floor? A. No, sir.

Mr. Weinberger: Now, won't you please wait until I object, if I want to object?

The Court: Proceed.

Q. After this floor was swept the night before, did you notice any defect in the floor? A. No, sir.

Q. Did you ever notice that particular spot in the floor before this accident happened? A. No, sir.

Q. Nothing that ever called it to your attention? A. Nothing.

Mr. Weinberger: I object to that as very leading, your Honor, please: "Nothing had ever called it to your attention."

Q. If you had found a defect in the floor, or any part of the place under your control, which needed repairing, what would you do? A. I would report it to the vice superintendent.

Q. And who is your vice superintendent? A. Mr. Wesley.

Q. Mr. Wesley. Did you ever report this to Mr. Wesley?

Mr. Weinberger: I object to that as not binding on us. What difference does it make if he did not do it or if he did do it?

The Court: I do not suppose it would make any difference. You mean before or after?

Mr. Brown: I will separate it into two questions.

Q. Did you report this defect, alleged defect, in the floor before the accident, to Mr. Wesley? A. I did not know there was any before.

Q. Did you report it after the accident? A. I did.

Q. How soon after? A. The same morning.

Q. Mr. Van Lenten, have any repairs ever been made on that floor? A. No, sir.

Q. Is the floor in the same condition— A. The very same condition.

Q. —now, that it was then? A. The same thing.

Q. And what is its condition today? A. Good condition.

Q. Is the floor soft or rotten? A. It is a good pine floor.

Q. Are there any splinters sticking up on it? A. No.

Q. Is the place still there where the splinter came out of that caught in Mrs. Stark's foot? A. Yes, there is.

Q. How large a hole would you say that left in the floor? A. It left a strip about four—four inches long, about three-quarters of an inch wide, and the thickest part would be about one-eighth of an inch.

Q. I did not get that last. A. About one-eighth of an inch at the thickest.

Q. Tapering from that to nothing? A. Yes, sir.

Q. You heard the testimony of one of the witnesses that there was a hole in the floor an inch and an eighth—an inch and a half deep, and greater than the width of a shoe, for a distance of eighteen inches, did you not? A. I heard it, yes.

Q. Is that the fact? A. No, sir.

Q. You also heard the plaintiff state in her testimony, immediately after the accident, that she said

it was a shame that people should come into your store and fall over a rotten board? A. I have heard it said here.

Q. And you also heard her testify that she said that you told her that you had reported it?

The Court: To the landlord.

Q. To the landlord? A. I have heard it; yes, sir.

Q. Had you reported this to the landlord? A. I never spoke to the landlord about it.

Q. Did you say that to her? A. No, sir.

Q. Just give us the entire conversation that you had with her? A. When? At the same day?

Q. At that time. A. At that time, I picked her up, and she was complaining about her head and her leg. And so, thinking she was badly hurt, I sent her to Doctor Brooks. She walked there herself. She came back to me and borrowed money to go to the drug store to get the medicine, and then walked home.

Q. After coming back from Doctor Brooks to borrow money to buy the medicine, what did she say at that time? A. She said Doctor Brooks gave her the prescription to go to Mr. Fuller's drug store to get this prescription filled. If I ain't mistaken, it was about fifty cents.

Q. Did she say anything about the floor? A. Not at that time.

Q. When she came back? A. No.

Q. Did you say anything to her about the floor? A. Not at the time.

Q. Or did you say that you had reported it to the landlord? A. No, sir.

Q. You were there when Mrs. Stark came in the store a week or ten days later? A. I was.

Q. Did she purchase anything at that time? A. She did.

Q. Did she mention the accident? A. Yes. She talked about it, and told me how her head hurted her.

Q. What did she say? A. Well, that she had a ringing in the ears, and that her nose up here (indicating) hurted her, and pain in the head.

Q. Did she mention anything about the floor? A. No.

Q. Did you say anything to her about the floor? A. Not then, no.

Q. When did you? A. That same day, about close to two o'clock, when I went over to her house to get her first name, which was needed on the accident report that I sent in to the company, and I told her I reported the accident to Mr. Wesley and Mr. Moore, our superintendents.

Q. That is all you said to her? A. That is all.

Q. Do you remember the daughter, Miss Stark, coming into your store and having any conversation with you in regard to the accident? A. She come in, and I asked her the condition of her mother, and she told me—

Q. When was that? A. Oh, that was a couple of weeks after.

Q. That was after, two weeks after the accident? A. Yes, sir.

Q. Did she mention anything about the floor? A. Why, she asked me all about it, and I showed her the place and showed her the floor, went over there and pointed it out to her.

Q. What did she say? A. She did not say much in return.

Q. Did you say anything to her? A. No.

Q. Did you tell her at that time that you had notified the landlord? A. No, I did not.

Q. Well, what did you say to her? A. All I ever said was, that I notified the superintendents of the accident.

Q. And when you said that you notified the superintendents of the accident, when did you mean that you had notified them? A. After the accident.

Q. How soon after the accident? A. Well, this happened about half-past nine, and I think—yes, about twelve o'clock, when the superintendents came into the store, and I reported it right away.

Q. Now, you say this floor is in the same condition today? A. The very same condition.

Q. That it was then? A. Yes, sir.

Q. Do you recall seeing Mrs. Stark in your store yesterday morning? A. Yes, sir.

Q. And did you have any conversation with her with regard to the floor? A. She said she was looking around to see where the place was she fell, and when I showed her—

Q. She said what? A. She was looking for the place where she fell.

Q. Yes. A. And when I showed her, she thought it was further up in the store.

Q. And you went and showed her the place where she fell? A. I showed her where the impression of the splinter was.

Q. And she said what? A. That she thought it was further in the store.

Q. Was there any further conversation, anything else said, at that time? A. No.

Mr. Brown: That is all.

CROSS-EXAMINATION by Mr. Weinberger:

Q. You have worked how long for the Atlantic & Pacific Tea Company? A. A little over ten years.

Defendant's Witness, Peter Van Lenten, Cross

Q. How long is that place in Rutherford where you are situated at, where this woman met with an accident, in existence? A. Well, I have been manager in that store nine and a half years.

Q. And you know that a woman met with an accident on the 10th of April? A. I do.

Q. By the name of Mrs. Stark? A. Yes.

Q. You filled out an accident report? A. Not me. I reported it to the super, who filled it out.

Q. Don't you fill out an accident report? A. Not me.

Q. As the manager of the store, you do not? A. No.

Q. Don't you report it to somebody? A. I reported it to the superintendent.

Q. Well, what report did you make in this case? A. That the lady fell.

Q. Fell on what? A. On the floor.

Q. On the what? A. Fell on the floor.

Q. From herself, or what? A. From the cause of a splinter.

Q. Through the cause of a splinter? A. Yes.

Q. Didn't you put down, "A rotten board floor"? A. I did not.

Q. Well, wasn't it rotten? A. No.

Q. Well, now, let us see. The splinter was in her shoe, wasn't it? A. It was in her heel.

Q. And you pulled it out? A. I did.

Q. Yes. And you say it was at least four inches long? A. Yes.

Q. And it was part of the floor on which she was walking? A. It was.

Q. And it left quite a depression in the flooring? A. About an eighth of an inch deep at the thickest end.

Q. It left a depression in that flooring? A. Yes. There was an impression there, yes.

Q. Yes. Big enough for a person walking in there now to trip on it? A. No, sir.

Q. What? A. No, sir.

Q. You never touched it or repaired it since? A. I never did.

Q. You want someone else to go in there and do the same thing, is that it? A. There is nobody to go through the hole there.

Q. I see. But you never fixed it? A. Never fixed it.

Q. You knew that a splinter had caught in a woman's shoe that you had to pull out, and you reported an accident, and still you never fixed it? A. It did not need fixing.

Q. I did not ask you that. And still you never fixed it? A. No.

Q. In your opinion, that does not need fixing, is that it? A. That is it.

Q. In your opinion; am I right? A. In my opinion, that board is good.

Q. Yes or no? In your opinion, that does not need fixing? A. It does not need fixing.

Q. Even though you had to pull a splinter four inches in length out of a woman's shoe, that caused the woman to fall, as you say, you think that that is good enough? A. It is a perfect board.

Q. You think it is perfect? A. I do.

Q. Well, now, you take good care of that place? A. I do.

Q. By the way, who is the landlord? A. At that time it was Mr. Vazzoler.

Q. Mr. Vazzoler? A. Yes.

Q. He is in the liquor business, isn't he? A. He was. He is in the graveyard.

Q. In the graveyard now, yes. A. Yes, sir.
Q. Am I right? A. Yes, sir.
Q. Cesare Vazzoler? A. Yes, sir.
Q. Is that right? A. Yes, sir.
Q. Well now, let us see. You were busy that morning? A. Not very busy.
Q. Waiting on a customer? A. One customer.
Q. By the way, who was that lady? A. Well, I really could not tell you her name.
Q. You really could not tell us? A. No.
Q. But you remember distinctly everything that this lady told you? A. I could tell you who she has been.
Q. No. I do not want to know who she has been. I ask you who she is? A. That I cannot say.
Q. That you do not remember? A. I do not know her maiden name.
Q. But you are trying to remember what this woman said to you, am I right? A. Which woman?
Q. Mrs. Stark. A. Trying to remember what she said to me?
Q. Yes. A. That is plain into my mind, what she said.
Q. Plain into your mind. She did not say to you, "It is a shame that a person should get hurt on a rotten board," after you pulled this splinter out, did she? A. She did not say it at that time.
Q. She did not say anything about the floor? A. Not at the time.
Q. She did not say it at that time? A. No.
Q. She did not say anything about the splinter, what? A. Not at that time.
Q. You shake your head? A. Not at that time.
Q. She did not say anything about feeling very badly hurt? A. When I asked her, she told me she felt badly hurt in her head and in her knee.

Q. Where is that splinter that you pulled out, four inches long; where is it? A. I do not know where it is.

Q. Didn't you think it was important enough to save? A. I did save it.

Q. Well, where is it? A. Through taking down the shelves in the little room to make more room, it got lost.

Q. Oh, it got lost? A. It did.

Q. That is your best answer, is it, it got lost? A. It got lost.

Q. You did not put that in an envelope and send it with your accident report to the Great Atlantic & Pacific Tea Company? A. No.

Q. You did not think that was important, what? A. Not at the time, no.

Q. You got some letters from Mrs. Stark's daughter, didn't you? A. Me? No.

Q. Wasn't it given to you, or sent to you? A. It was addressed to the store.

Q. But didn't you open it? A. I did not.

Q. As the manager of the store, you did not open the mail? A. I did not.

Q. What did you do with it? A. I handed it to the superintendent.

Q. Well, now, let us see. You know, though, that she was claiming she wanted to get paid for her injuries; you knew that, as the manager of the store? A. Yes, she told me.

Q. And you thought it was important that you put this splinter that you describe as four inches in length up on a shelf, and your best answer is, it got lost in the shuffle? A. In the shuffle.

Q. And the reason you are so careful about making an inspection, you testified, is you want to know what

is wrong; is that right? Well, does it happen so often that there is something wrong about that place? A. Never anything wrong.

Q. Never anything wrong? A. No, sir.

Q. What? A. Only that one time. There is only that one accident happened.

Q. Only that one accident happened, that you know of? A. That I know of.

Q. What? A. That is for the nine and a half years I have been there.

Q. I say, that you know of? A. Yes.

Q. There is another man there with you, isn't there? A. But I am there.

Q. Isn't there another man with you? A. There was at that time.

Q. Don't you take vacations? A. No.

Q. Never? A. No.

Q. Now, you remember Mrs. Stark coming in there? A. I do.

Q. To look at the place? A. Yes.

Q. And you remember her pointing out the place to you, or you pointing it out to Miss Stark? A. She was looking through there, and she says, "I am looking at the floor." I says, "You want to see where you fell?" And I went around and pointed out the place.

Q. It is not wide enough for a person to fall in, according to you? A. No.

Q. It is not wide—what? A. To fall in.

Q. It is not wide enough to get your foot in? A. A pine board ain't wide enough for anybody's foot to go through.

Q. I see. That is, in your estimation? A. In my estimation.

Q. You testified that the board was in fair condi-

tion. What do you mean by the word "fair"? A. Fair?

Q. Yes. Poor? A. No.

Q. Fairly poor? A. That is a board that is in good condition.

Q. What do you mean by fair? Does fair mean good? A. Well, what I mean by fair, it is a number —what they would call number two pine flooring. It is a second grade of wood.

Q. Well, what do you mean by "fair"? A. As I say.

Q. Was it bad? A. No.

Q. What? A. No.

Q. Fairly bad, do you mean? A. No, I do not mean fairly bad.

Q. Fairly poor, do you mean? A. No.

Q. Rotten? A. Far from it.

Q. Far from it. How far from it? A. So far that if you had to chop a few, you would lose weight.

Q. That is your estimation of it. How thick was the board? A. The pine board is never over an inch and a quarter thick.

Q. It was not over an inch and a quarter. And how deep was this? A. What?

Q. How deep was this splinter? A. One-eighth of an inch.

Q. Did you measure it? A. I did.

Q. You did. Did you make a record of it? A. No.

Q. What? A. I did not. I measured it this morning before I left the place.

Q. Oh, so this morning for the first time since April, 1923, you measured that it is an eighth of an inch now in depth that that splinter was; is that it? A. Yes. And it was then, at that time.

Q. And it was then. Who takes your place while you are here in court? A. Today?

Q. Yes. A. Some fellow that they have on the route.

Q. Don't you ever take a day off? A. I have not had a day off until yesterday.

Q. In nine and a half years? A. In nine and a half years.

Q. You do not work Sundays, though? A. Not Sundays. Then the door is locked, and I got the keys.

Q. Did you look for other splinters on there? A. After the accident, I did.

Q. Why? A. If there was more, I would have reported them.

Q. Oh. If there was more, you would have reported them? A. I would have reported them; but there was no more.

Q. Being there was no more, you would not report it? A. How could I report it if there wasn't any?

Q. I asked you, if there were more splinters, you would have reported it; if there were no more splinters, you would not have reported it, is that right? A. I do not get you.

Mr. Weinberger: Repeat it to him.

Q. (Question read.)

The Court: Do you mean reported the other splinters, or the report of the accident?

Mr. Weinberger: Reported this board.

A. I reported the board for that one. If anybody see more boards, I certainly would have reported them at the same time.

Q. What did you put in your report? A. I put in

my report that Mrs. Stark, entering the store, fell through the cause of a splinter. That is what I gave to Mr. Moore to enter on the report that is forwarded on to headquarters.

Q. Yes. What color shoes did she have on that day, do you know? A. Black.

Q. What kind of shoes, high-heeled shoes? A. Well, I would not call them high-heeled, no.

Q. Well, did she have high heels? A. I should call them about a medium heel.

Q. Wasn't it a flat shoe? A. I would not call it a flat shoe, no.

Q. Wasn't it a flat shoe? A. You mean a flat heel?

Q. Yes. A flat shoe, without any pronounced heel? A. Well, there was a heel on it.

Q. What? A. But there wasn't a high heel.

Q. Wasn't there a hole in her shoe where the wood penetrated? A. The wood did not penetrate the sole.

Q. You remember that distinctly? A. I do.

Q. Did it penetrate the heel? A. It did not.

Q. Where did it catch? A. It caught between the two layers of the sole.

Q. Did it make a hole? A. No.

Q. It did not make a hole? A. No, sir.

Q. And you pulled it out of what? A. I just got a hold of it, and it came right out.

Q. You just got a hold of it, and it pulled out? A. A very slight pressure of pulling.

Q. Slight pressure? A. Yes, sir.

Q. Four inches long. A slight pressure, and it fell out? A. Yes, sir.

Q. She did not claim she slipped on any oily floor, did she? A. No, sir.

Q. What? A. No.

Q. She told you that the cause of her fall was the rotten floor, didn't she? The splinter in the rotten floor? A. She did not say anything about it.

Q. She did not say nothing? A. No.

Q. Not a word? A. She did not say anything about—

Q. Who was it called your attention to take out the splinter out of her shoe? A. I was there, and when I heard the fall, I seen her laying there, and I went and picked her up.

Q. She did not say a word? A. No.

Q. She was unconscious? A. No.

Q. What? A. No, she was not.

Q. You are sure the floor was dry, though? A. The floor was perfectly dry.

Q. And you are sure there was nothing there to cause her to fall except this floor? A. There was nothing on the floor.

Q. And you are sure there was nothing except this bad flooring that caused her to fall, am I right? A. I would not call it a bad flooring.

Q. Well, except the floor in the condition that you say it was in, what caused her to fall? A. What do you mean?

Mr. Weinberger: Repeat it, please.

Q. (Question read.) A. Well, I cannot say it was the floor that caused her—I think it was her—the way she walked that caused that splinter to catch her heel.

Q. Will you tell me how any human being could walk any differently than she walked? Do you know how she walked? A. Some walk with a springy step.

Q. Did you see her walk? A. I did.

Q. What? A. Many a time.

Q. Many a time? A. Well, yes.

Q. Was there anything in her walk outside of the ordinary human being's walk? A. Well, for a lady of her size, no. It is a heavy walk.

Q. A heavy walk? A. Yes. You see it on most heavy people. They kind of walk what you call heavy.

Q. Well, if the floor was in good condition, how do you account for the splinter getting caught in the sole of her foot, four inches long? A. I do not know how to account for it.

Q. You do not know how to account for it? A. No.

Q. Don't you know that that floor was in a bad condition, there was a hole there, and it was rotten, and that you knew of it? A. No.

Q. What? A. No, sir.

Q. Didn't you tell the landlord to fix that floor? A. I did not tell the landlord anything.

Q. Did you ever tell him anything in the nine and a half years you were there? A. No.

Mr. Weinberger: That is all.

RE-DIRECT EXAMINATION by Mr. Brown:

Q. Did you see a hole of any kind in the sole of Mrs. Stark's shoe? A. No, sir.

Q. And you say that she walked—or, how did she walk? Describe her walk.

Mr. Weinberger: He has testified he did not see her walk on that day; he was busy waiting on a customer.

The Court: He has testified to her usual walk.

Q. What was her gait like? A. Well, it is kind of slow, heavy sliding of the feet.

Q. Sliding of the feet? A. Not exactly a sliding over, but raised up slightly, and (witness draws hand horizontally from left to right)—I would not call it a springy step.

Mr. Brown: That is all.

A Juror: A question, please. How do you know this floor was swept on the night preceding?

The Witness: It is a regular duty of the clerk to sweep it twice a day.

A Juror: It was about time to have the floor re-oiled, was it not?

The Witness: It was oiled the Saturday after the accident.

A Juror: Thank you.

Another Juror: How wide was that flooring? You have given the thickness of it. How wide is it?

The Witness: Well, a pine board is very seldom over two and a quarter inches wide.

Another Juror: And this is two and a quarter inches wide?

The Witness: It is. And seven-eighths inch thick.

Mr. Brown: That is all.

MARTIN KROM, sworn as a witness on behalf of the defendant, testified as follows:

Direct-examination by Mr. Brown:

Q. Mr. Krom, where were you employed on April 10th, 1923? A. In the A. & P. Store.

Q. Where? A. Paterson Avenue.

Q. East Rutherford? A. Yes, sir.

Q. In what capacity were you employed there? A. Clerk.

Q. Clerk. What were your duties as that clerk? A. To see that everything was kept in good shape.

Q. Did you have any duties in connection with the floor? A. Yes, sir.

Q. What were your duties? A. Cleaning up twice a day, and oil it up whenever necessary.

Q. And did you clean it twice a day? A. Swept it up at noon, between one and two, and after six-thirty at night.

Q. Before or after the store had closed? A. After the store closed.

Q. Had you swept the floor the day before this accident happened? A. Yes, sir.

Q. The night before? A. Yes, sir.

Q. Did you notice anything out of the ordinary about the floor? A. No, sir.

Q. What was the condition of the floor at that time? A. The floor was all right.

Q. Did you notice any rotten boards in it? A. No, sir.

Q. Did you notice any splinters sticking up? A. No, sir.

Q. What else, or what other care did you take of the floor sweeping the floor twice daily? A. Oil it up about two or three weeks, just as it needed it.

Q. Every two or three weeks? A. Yes, sir.

Q. When had you oiled the floor before the accident happened? A. Well, it was about two weeks before.

Q. About two weeks? A. About two weeks.

Q. And how do you oil the floor? A. With a felt mop.

Q. Describe the mop. A. Well, the mop was on a stick, and we had to put the oil on the floor, and then work it out, forward and backwards.

Q. You had to push the mop forward and backwards? A. Yes.

Q. Do you have to exert any pressure on it? A. Well, a little.

Q. Have you ever noticed the mop to catch on a splinter? A. No, sir.

Q. Have you ever noticed a hole in the floor? A. No, sir.

Q. As described this morning? A. No, sir.

Q. Were you in the store on the morning of April 10th, when the accident happened? A. In the cellar.

Q. And did you come up before Mrs. Stark left the store? A. Yes; I come up later on.

Q. You saw Mrs. Stark in the store before she left? A. I saw her in the store, but I paid no attention to her. I went in the back room, because I did not know what happened upstairs.

Q. Well, did you come out and talk the situation over with Mr. Van Lenten? Did he tell you what happened? A. I do not know. It is so long ago, I do not know what I did after that.

Q. Did you know that Mrs. Stark fell that morning? A. Oh, I heard, after a while, but I did not come right out from the back and ask what happened, see?

Q. Did anybody point out to you the particular spot on which she fell? A. I think we talked it over after a while there, about the splinter.

Q. Did you see the spot? A. Sure.

Q. What did it look like? A. Well, it was about—you mean the splinter, the spot?

Q. No. You saw the splinter? A. I saw the splinter.

Q. Did you see the splinter? A. Yes, sir.

Q. Describe the splinter. A. Well, that splinter

was about—it was close to four inches long, and it was about a half inch wide, and about—well, it was about a sixteenth thick.

Mr. Weinberger: What?

The Witness: About a sixteenth of an inch thick, that is, the splinter.

Q. Did you see the place on the floor where it came out of? A. Yes, sir.

Q. How large a hole would you say it had left in the floor? A. How large?

Q. Yes. A. Well, it was about a half inch wide, and about a sixteenth of an inch deep. It run from—you know, the splinter starts to the end, the thickness is about a sixteenth of an inch thick.

Q. From nothing? A. Yes.

Q. On one end, to a sixteenth on the other? A. Yes, sir.

Q. Was there any hole or depression on the floor anywhere around that spot? A. No.

Q. Was there any rotten board? A. The board is not rotten; no, sir.

Q. Was there any board which was lower than the others an inch and a half? A. One board lower than the other?

Q. Yes? A. No, sir. They are all level.

Q. Was there any part of the floor right in that immediate vicinity which was lower than the other an inch and a half? A. No, sir.

Mr. Brown: That is all.

CROSS-EXAMINATION by Mr. Weinberger:

Q. You saw a hole in the floor, you testified? A. After the splinter was out, yes.

Q. Yes. And you knew the flooring was rotten? A. It was not rotten.

Q. What? A. It is not rotten.

Q. Did you see it, the splinter? A. I sure did.

Q. That you describe as being about four inches in length? A. I sure did.

Q. Did you put it where it got lost in the shuffle? A. No, sir.

Q. Well now, you do not know of your own knowledge, how long that floor was bad, or whether it was called to the attention of the landlord, do you? A. No, sir.

Q. You did not pay any particular attention. You waited until somebody fell, as to the condition of the flooring? A. The floor was all right.

Q. What? A. The floor was all right. I walked over that floor, and I mopped it, and my mop never got caught on it.

Q. So that is the only reason you say your mop never got caught? A. Well, if there is a splinter there, it will get caught on the mop. If it didn't get caught in the mop, you cannot report there is a splinter on the floor.

Q. So you wait until a splinter gets caught in the mop, is that it? A. Well, you cannot report it if the floor is not splintery.

Q. The only way you would report a hole in the floor, or a splinter on the floor, is if it gets caught in the mop, isn't that what you just said? A. Well, how could you report it, otherwise, if it wasn't splintery?

Q. Isn't that what you just said? A. Sure.

Mr. Brown: Well, the stenographer will tell you what he said.

Mr. Weinberger: Well, he just said so.

Q. Did you see a hole in the woman's shoe? A. No, sir.

Q. What? A. No.

Q. Did you see her nose bleeding, a cut on her face or eyes? A. I paid no attention to the woman.

Q. You paid no attention to her? A. I did not know what happened. I was in the cellar at the time it happened.

Q. That was never repaired yet, what? A. No, sir.

Q. And you did not think it necessary to report it even? What? A. It was not up to me to report it.

Q. Don't you have to report to your manager? A. I report to the manager, but then it is up to the manager to report to the superintendent.

Q. Well, did you report it to the manager, that there was a hole in the floor? A. There was no hole in the floor until the woman fell down.

Q. Well, I mean, after she fell down? A. That he saw.

Q. And that has not been repaired yet? Am I right? A. Yes, sure; you are right.

Mr. Weinberger: That is all.

RE-DIRECT EXAMINATION by Mr. Brown:

Q. Mr. Krom, you have seen the floor recently, have you? A. Yes, sir.

Q. It is in the same condition today as it was after the accident? A. The same condition.

Q. And did you rely alone on the mop to discover any defects in the store?

Mr. Weinberger: I object.

A. Why, no.

The Court: I will allow it.

A. (Continuing.) If you see any defects, why, we have to report it.

Q. You use your eyes as well? A. Sure.

Mr. Brown: That is all.

WILLIAM J. WESLEY, sworn as a witness on behalf of the defendant, testified as follows:

Direct-examination by Mr. Brown:

Q. Mr. Wesley, where were you employed on or about April 10, 1923? A. Where?

Q. Yes? A. Why, taking charge of a certain amount of stores for the Great Atlantic & Pacific.

Q. Where were you employed? A. Where?

Q. Yes? A. Why—

Q. With whom? A. With whom?

Q. Yes? A. I don't—I said, the Great Atlantic & Pacific Tea Company.

Q. The Great Atlantic & Pacific Tea Company? A. Yes.

Q. In what capacity? A. Why, part of my work is, take charge of the stores, see if the stores are kept in good condition and things O K.

Q. Do you have a title? A. What is that?

Q. Do you have a title? A. A title?

Q. Yes?

The Court: What are you called?

The Witness: Why, assistant superintendent.

Q. Assistant superintendent? A. Yes.

Q. And where is your office, Mr. Wesley? A. 232 Paterson Avenue.

Q. The same building where this happened? A. Yes, sir.

Q. Do you occupy a part of that store? A. Yes, part of it.

Q. As your office? A. Yes, sir.

Q. Whereabouts? A. In the back room.

Q. In the back? A. Yes, sir.

Q. How do you get into your office? A. Right through the door, the same as everybody else goes through.

Q. You go right through the store? A. Yes, sir; right through the store.

Q. Were you employed with this company on the morning of April 10th— A. I was.

Q. —1923? A. Yes, sir.

Q. Do you recall this accident happening? A. Why, later on, as it come around, of course; I do not know the exact time.

Q. Do you know that this accident happened? A. I know it happened, yes.

Q. How do you know? A. The manager told me.

Q. Who, Mr. Van Lenten? A. Mr. Van Lenten.

Q. Reported it to you? A. Reported it to me.

Q. When? A. Why, I believe it was pretty near around twelve o'clock when I got around, because I have other stores to go to before I get around.

Q. Had Mr. Van Lenten ever reported a defect in that floor to you before? A. No, sir; never.

Q. How many times a day would you go in and out over that floor? A. Why, that particular store, I go from three to six times a day. Other stores, I make accordingly, the amount of time I got, two or three times.

Defendant's Witness, William J. Wesley, Direct

Q. What are your duties, Mr. Wesley, as assistant superintendent? A. Why, taking charge of a certain amount of stores, and see that the stores are clean and kept clean, the floors are O K, and everything else.

Q. The floors O K? A. That is, clean and in good condition.

Q. Do you inspect the stores? A. Well, I go around and look them over and see what we can see. If there is anything wrong, we remedy it.

Q. Did you ever note the condition of this store? A. Never. I walked in and out, and never noticed it.

Q. What? A. I never noticed the condition of the floor, no.

Q. Did you ever observe—

Mr. Weinberger: He says no, he never did.

Mr. Brown: He did not understand me.

Mr. Weinberger: Why should he have answered you, then?

A. What was that?

Q. What was the condition of this particular store? A. What was the condition of it?

Mr. Weinberger: Your Honor please, the witness has answered he never noticed the condition of the store. He walked in and out and never paid any attention.

The Court: I will allow the question.

The Court: Answer the question. What was the condition of the floor of this store?

The Witness: Why, the condition of the store was as good as it could be. It couldn't be any better, I do not think. It was just the same as every morning;

everything was kept nice and clean, the store swept up.

Q. After Mr. Van Lenten reported this matter to you, did you go and inspect the floor? A. Why, I looked at it.

Q. You looked at it? A. Yes.

Q. What did you see? A. Well, just the same thing as Mr. Van Lenten and them explained.

Q. Just describe what you saw?

Mr. Weinberger: I ask that that be stricken out, the same thing Mr. Van Lenten saw.

A. Well, that is the splinter.

The Court: What you saw.

Q. Describe it, just what you saw? A. Oh, a piece out of the floor, of course. But, as I say, it ran from you know, hardly anything at all. That is all I can say.

Q. You saw a piece out of the floor? A. A piece out of the floor, yes.

Q. It left a small depression— A. Yes.

Q. —in the floor? A. Yes.

Q. How large a depression? A. Well, I—I do not think it was much more than an eighth of an inch, I do not believe.

Q. You do not remember? A. Not much more than an eighth of an inch, I do not believe, as far as I could see of it. I did not measure it, or anything.

Q. That is an eighth of an inch deep? A. I think so, about that.

Q. How long? A. How long? Well, I do not know the exact length of it. It probably could be three to four inches. I do not know exactly.

Q. And about how wide was it? A. How wide?

Q. Yes. How wide was this opening that it left in the floor where the splinter was taken out? A. How wide? I cannot recall how wide it was now.

Q. You do not recall the width? A. No, I do not.

Q. This depression that you saw there was an eighth of an inch thick on one end? A. Yes.

Q. How thick on the other end? A. Why, hardly nothing at all, a splinter.

Q. Now, if a floor is found defective and you examine it, what do you do then?

Mr. Weinberger: I object to that. It is not what he does on other occasions. It is what did he do in this case.

The Court: I will sustain the objection.

Q. Did you report this defect to anybody else? A. Did I report this defect to anybody else?

Q. Yes? A. What do you mean? This defect of the lady falling?

Q. When you find a defect in the store, what do you do? A. Why, I will notify Mr. Moore if there is anything wrong, anything turns up, or any place or any time.

Q. You have it repaired? A. Well, I take it up with Mr. Moore.

Q. Who is Mr. Moore? A. The superintendent.

Q. The superintendent? A. Yes.

Q. Did you take this matter up with Mr. Moore? A. Well, I told him—that was, after the accident had happened?

Q. Yes. After the accident happened? A. Yes.

Q. Did you take this up with Mr. Moore? A. Well, about the splinter, the piece coming out, of course.

Q. So you reported it to Mr. Moore? A. Yes, sir.

Q. Are you still employed with the same concern? A. Yes, sir.

Q. Is your office still in the same place? A. The same place; yes, sir.

Q. How many times a day do you pass in and out over that same floor now? A. Oh, about three to six times.

Q. What is the condition of the floor at the present time? A. Well, I think it is all right. I cannot see anything wrong with it. I walk in and out all the time.

Q. Is that same— A. The same—

Q. —depression in the floor today as it was then? A. The same thing there.

Q. Would that depression be apparent to anybody walking into the store?

Mr. Weinberger: I object to what it may be apparent to somebody else.

Q. Is that noticeable as you walk across the floor? A. Well, I won't say it is noticeable there, unless anybody knew it was there; then they could see it.

Q. If you knew it was there, but not otherwise? A. Hardly.

Q. Did you ever consider it serious enough—

Mr. Weinberger: I object to that on the ground that, as far as counsel has gone—

Mr. Brown: Will you kindly wait until I finish my question?

Mr. Weinberger: All right.

Mr. Weinberger (to witness): Do not answer it, then, please.

Defendant's Witness, William J. Wesley, Cross

Q. Did you consider it serious enough to recommend it be repaired?

Mr. Weinberger: I object to it on the ground—

The Court: I will sustain the objection.

Mr. Brown: That is all.

CROSS-EXAMINATION by Mr. Weinberger:

Q. You just walk in, turn around, and walk out again, am I right? A. Walk in? No, I don't just walk in and turn around and walk out again.

Q. What do you do? A. What do I do?

Q. Yes? A. I look around the store.

Q. Look around and see the shelves are filled? A. No. We do not look around the shelves. We do more than that.

Q. Look at the cash register? A. Yes, certainly; that is right.

Q. You are not interested in anything else; only just by way of casual examination? A. We walk around and look around the store.

Q. Even after this woman got hurt and you saw the depression, as you now say, in the floor, you never had it repaired? A. No.

Q. Am I right? A. That is right. It ain't been repaired.

Q. You do not think it serious enough to report it, even now, do you? A. Well, it cannot hardly be noticed, so I didn't—

Q. It can hardly be noticed, is that your answer? Is that right? A. I walk over it myself.

Q. Mr. Wesley, am I right? A. What is that?

Q. You do not think it serious enough now to report it, even, and to fix it? A. Well, I don't—

Q. Yes or no? A. No. I walk over it. I don't—I don't see anything really wrong with it.

Q. You do not see anything wrong with it? You knew that a woman had met with a very serious accident in there? A. Well, I heard of it.

Q. From a part of that board? A. Part of it, yes.

Q. Am I right? A. That is right.

Q. Did you ever have a carpenter there? (No response.)

Q. You shake your head, no? A. No.

Q. Do not shake your head, because he cannot get it. Did you ever see the splinter which you say is about three or four inches long? A. I see it the first day it happened.

Q. You saw it. The wood rotten? A. No, sir.

Q. What? A. No, sir.

Q. You did not tell us anything about the wood. Did you look at it carefully? A. I could see it by looking at it. It was not rotten.

Q. You are sure it was not rotten? A. No, sir.

Q. The hole that you found in the floor was sufficient enough for a human being's foot to get caught in it? A. Now?

Q. What? A. Now, you mean?

Q. At the time of the accident, right after, when you saw it, this hole that you have described, which you reported to Mr. Moore? A. That somebody else could fall over it, you mean?

Q. No?

Mr. Weinberger: Will you just repeat my question?

(Question read.)

Q. Wasn't it? A. The hole was big enough to get caught in it? No.

Q. Don't you honestly think so? A. No. It is not big enough.

Q. You do not think so. What? Well, you did not know how wide it was, did you? A. What is that?

Q. The hole? A. The hole?

Q. Yes? A. Well, not exactly. I did not say it was because I do not know it exact.

Q. That is exactly it. And not being able to say, you do not know? A. Exactly.

Q. You do not know whether it is large enough for a foot to go in? A. I do not hardly think, by the looks of it.

Q. Well, looks are sometimes deceiving, aren't they? A. Sometimes.

Q. What? A. Sometimes they are.

Mr. Weinberger: That is all.

JAMES MOORE, sworn as a witness on behalf of the defendant, testified as follows:

Direct-examination by Mr. Brown:

Q. Mr. Moore, with whom were you employed in April, 1923? A. The Great Atlantic & Pacific Tea Company.

Q. In what capacity? A. Superintendent.

Q. Where were your headquarters? A. 42 Passaic Street, Garfield, New Jersey.

Q. And what are your duties as superintendent? A. General supervision of the stores under my jurisdiction. That is, see that the stores are kept in condition, kept in goods, to be inviting to the general public.

Q. Is the store at 232 Paterson Street, East Rutherford, within your jurisdiction? A. Yes, sir.

Q. Did you have occasion to inspect that store at any time during the month of April? A. Yes. I inspected it.

Q. Were you in that store prior to April the 10th? A. I have been in it. I could not say just what date. Being one of my assistant superintendent's headquarters, I am there frequently, but just what day I could not say.

Q. About what day would you go to that store? A. At least once a week.

Q. Were you in that store during the month of April prior to the accident on April 10th, 1923? A. Just prior to it, I must have been in there because, as a rule—

Mr. Weinberger: I object to, "As a rule."

The Court: What is your best recollection?

The Witness: My best recollection would be that I was there on the Saturday previous to the accident.

Q. The accident having happened the following week? A. The following wek.

Q. And did you have occasion to walk across the floor on which Mrs. Stark fell? A. Yes. I walked through the front door, walked across the floor that everyone walks.

Q. Did you notice the condition of that floor? A. Well, I did not pay any particular attention to the floor, if the floor looked in perfectly good condition walking across it.

Q. It looked in good condition? A. In good condition.

Q. You did not notice any defects in the floor? A. No defects whatsoever.

Q. Was there any report ever made to you of any defect in this floor? A. No, sir.

Q. When was the report of the accident made to you?

Mr. Weinberger: I object to that. What difference does that make?

The Court: I will allow it.

Mr. Weinberger: Exception.

A. Why, on the day of the accident. I had the report given to me about noon hour.

Q. About noon? A. About noon.

Q. Did you, following that report, make an investigation? A. Immediately.

Q. What did you do? A. I got the conditions of the accident from the manager; I looked, just as the floor was at the time of the accident, as Mr. Van Lenten stated, and I saw no grounds for any serious con—

Mr. Weinberger: I object, and ask that be stricken out, what he concluded.

The Court: He has not finished yet.

A. (Continuing.) I investigated the floor and took Mr. Van Lenten's version of the accident, and immediately made out an accident report.

Q. When you inspected that floor, did you find any rotten boards? A. No, sir.

Q. Did you make a thorough inspection? A. Yes, sir.

Q. What condition did you find the floor to be in? A. I found the condition of the floor to be perfect.

Q. Did Mr. Van Lenten tell you that he had taken a splinter out of the woman's foot? A. Yes. He

told me he had taken a splinter out of the woman's heel.

Q. Did he show you the place in the floor where the splinter had come from? A. Yes, sir.

Q. What kind of a mark had that left on the floor? A. Why, if you were not shown the exact spot, it would be very hard to find. Mr. Van Lenten, knowing the spot where this—

Mr. Weinberger: I object to that and ask it be stricken out, what Mr. Van Lenten knows.

The Court: The conclusion about Mr. Van Lenten, I will strike out.

Q. Did you notice any other depressions in the floor anywhere around? A. No, sir.

Q. Did you notice one board depressed below another one an inch and an eighth or an inch and a half? A. No, sir.

Q. For a distance of eighteen inches? A. No, sir.

Q. Did you notice a hole there an inch and a half square, and an inch and a half deep? A. No, sir.

Q. Did you notice anything on that floor which would cause anyone to trip or fall? A. No, sir.

Q. Other than this small depression which you saw? A. Yes, sir. That is all.

Q. Now, Mr. Moore, how deep was this depression? A. Well, I did not measure the depression, but I should judge it would—it could not be—giving it an eighth of an inch, would be giving it the best of it.

Q. Not over an eighth of an inch deep? A. Not over an eighth of an inch, and then you are getting the best of it.

Q. And would you, in crossing the floor, be apt to stub your toe on it? A. No, sir.

Defendant's Witness, James Moore, Cross

Q. In your capacity as superintendent, when these reports are made to you, do you immediately investigate them? A. Yes, sir.

Q. Is it within your province to require repairs, if necessary? A. Yes, sir.

Q. And after you inspected this particular spot on the floor, did you consider it necessary to have it repaired? A. No, sir.

Q. Is the floor in the same condition today that it was then? A. The same condition.

Mr. Brown: That is all.

CROSS-EXAMINATION by Mr. Weinberger:

Q. Do you ever make mistakes? A. Yes, sir.

Q. Might not this be one of them? A. Hardly.

Q. What? You consider this floor in perfect shape? A. Not that my opinion is the best, but I do, yes.

Q. You qualify that by saying now, not that you consider your opinion is the best? A. I am not an expert on flooring.

Q. Yes. I did not think you were, Mr. Moore. You say that this flooring now is perfect? A. If it was not, it would have been—the lessor would have been told its condition.

Q. That is your answer, is it? A. That is my answer.

Q. You consider that a flooring is perfect, knowing that a splinter at least four inches long and an eighth of an inch, as you say, is missing? A. I do.

Q. In length, is missing? A. I do.

Q. And you know that a woman fell as a result of this defective flooring before? A. The flooring has not been proven defective.

Q. I am asking you, did you know that? A. The flooring has not been proven defective.

Q. Won't you please answer my question, Mr. Moore. You understand me? A. I do. I understand you; yes, sir.

Mr. Weinberger: Please repeat my question.

(Question read.)

Q. Is that right? A. The floor, the woman fell—

Q. Do you know that she fell? A. From my understanding, yes.

Q. All right. And, knowing that, you still maintain now before this Court and jury that that flooring is perfect? A. I do.

Q. Well, tell me how she fell; what caused her to fall? A. I do not know.

Q. What? A. I do not know what caused the lady to fall. The lady is an elderly lady.

Q. Oh, I see. Your explanation of this woman's fall is, she is an elderly lady? A. Certainly.

Q. Your explanation is not the fact that a part of this defective flooring caught in her shoe and threw her down, is it? A. I was not there to see it. I do not know.

Q. Well, you cannot, by any human reasoning, figure it out, can you? A. No, no.

Mr. Weinberger: That is all.

Mr. Brown: That is our case, your Honor.

The Court: Any rebuttal?

Mr. Weinberger: No rebuttal, your Honor please.

Mr. Reed: I want to make a motion, your Honor. In the case of Baldwin vs. Shannon (14 Vroom 596), it was said: "In every case, before the evidence is left to the jury, there is a preliminary question for the

judge, not whether there is little or no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon which the onus of proof is imposed." Now, we contend in this case there is none. The only evidence of notice to this defendant is the testimony of the plaintiff that she and the manager had a conversation prior, or about the time of the accident, and that she told him that it was a shame that there should be left that rotten flooring, and he said he had notified the landlord, and it had not been fixed. The daughter also testified, I think, that she had a conversation with him later, but they did not fix the time; that was some time after the accident. That would leave it open to the possibility that notice, if given, had been after the accident and not before.

The Court: I understand it is hinged on the statement of the manager at that time and the answer as to what the plaintiff states.

Mr. Reed: Of course, it is possible, even then, that the notice to the landlord might have been at or about that time, or immediately after the accident, and before his conversation with her; but that is not excluded by her testimony; it might have been immediately before the accident, and not yet time for the repair to be made, conceding that the floor was in the condition that she said it was. This woman testified that she had gone in there every day, or almost every day, every other day, we will say, generally passed over this floor and had not noticed, and did not notice that morning, the condition which she described as being present when she fell. She did not look down that day, perhaps, but she had passed in that day; if there was a condition of the boards such as she describes, it seems as if it must have been apparent to her; it must have been apparent to everyone that there was this rotten board from which a sliver

eighteen inches long and an inch and a half thick at one end had come off. Now, that seems highly improbable that that would not have been noticed. And I say that that fact, taken into consideration with the absolute denial on the part of the manager that he had any such conversation with her, is so potent that the Court should direct a verdict for the defendant, because they have not made it appear that there was notice of this alleged condition. Of course, if we take into consideration the testimony of the defendant describing this flooring in its present condition, and the sliver, and all that sort of thing, and the care which they had taken in going over the floor and watching it, it is apparent that there was nothing to report to them. It is inconceivable that the condition should have existed that they have described; but that may be a conflict of evidence. I say there is no conflict of evidence on the part of notice which would charge this defendant and that, therefore, there ought to be a direction of a verdict for the defendant, because their testimony does not show that there was notice sufficiently long beforehand to have enabled the landlord or the defendant, if it was the defendant's duty, to fix the condition which they allege did exist, and I think that that case of Frank vs. Conradi is a case which more particularly bears on that.

The Court: Where is that reported?

Mr. Reed: 21 Vroom, page 23, at page 25. And there it said: "To ascertain the time or times for making repairs, we must invoke the usual legal implication applicable to contracts indefinite as to the time of performance, that they must be performed with reasonable diligence and promptness. This legal rule applied to the present contract, imposed upon the landlords the duty of properly inspecting the premises and of making such repairs as a due inspection would show to be necessary. But it cannot be stretched so

as to include an obligation to repair what a reasonable examination would not discover to be in need of repair." On that case, I think there should be a direction.

The Court: Well, I will take this under consideration during the noon recess. I will excuse the jury until five minutes of two.

Recess.

1:55 o'clock, P. M.

After recess.

The Court: I have concluded to grant the defendant's motion in this case. There is no proof in this case that any defective condition of the flooring existed for any particular period of time. The rule is that a storekeeper's duty, who, by invitation, express or implied, induces persons to come upon his premises, is to exercise ordinary care to render them reasonably safe for such purpose and to abstain from any act that will make entry upon them or the use of the premises dangerous. Ordinary care is satisfied by a reasonable inspection and repairing within reasonable time of any defective condition.

The defendant maintained an organization that attended to the inspection as applied to this case. The manager would report defects to the assistant superintendent. The clerk went over the floor twice a day and mopped about once every two weeks. A general inspection of the stores was made by the assistant superintendent and the superintendent. This inspections do not disclose any defective condition. It is the duty, however, if the defendant has notice of a defective condition, to repair it. The plaintiff relies,

to prove notice, on the statement which she alleges the manager made at the time of the accident that he had reported the board to the landlord, which statement was denied by the manager. I will pass over the question as to whether or not the defendant is bound by this alleged admission. The statement does not disclose when the report to the landlord had been made, and one of the requirements of proof on the part of the plaintiff is not only knowledge, but reasonable time to repair, that reasonable time to repair had intervened. The statement on this question is silent, and so is the plaintiff's case. Where the facts on the question of reasonable time are undisputed, the question is one for the Court and not the jury. There being no proof as to the time, there is, therefore, not any question to be submitted to the jury. The plaintiff not having maintained her burden of proof of proving notice and failure to repair within a reasonable time, I will grant the defendant's motion and direct a verdict for the defendant.

Mr. Weinberger: Your Honor will allow me an exception to your Honor's ruling?

The Court: I will allow you an exception. The jury will return a verdict in favor of the defendant.

Exhibit Offered but Refused in Evidence by Court.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, Inc.

Sherman Avenue and Peddie Street

Newark Warehouse

In Replying to this Letter
Kindly Refer to Legal Dept.

Newark, N. J. April 29th, 1924.

Mrs. Emily Stark,
87 Humboldt Street,
East Rutherford, N. J.

Dear Madam:

We have received your letter, dated April 16th, with reference to accident which occurred in our store at 232 Paterson Avenue, East Rutherford, New Jersey, on April 10th, 1923.

We have taken this matter up with our attorney who is willing to make settlement of this case for the sum of Fifty ($50.00) Dollars.

Very truly yours,
The Great Atlantic & Pacific Tea Co.
L. O'Brien

LOB:JM

Exhibit Offered but Refused in Evidence by Court.

U. S. Food Administration License No. G08360

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, Inc.

Sherman Avenue and Peddie Street

Newark Warehouse

In Replying to this Letter
Kindly Refer to Legal Dept.

Newark, N. J. June 20th, 1924.

Mrs. Emily Stark,
87 Humboldt Street,
East Rutherford, N. J.

Dear Madam:

We have at hand your letter of June 3rd, and we wish to advise you that as stated in our letter of April 29th, we are willing to settle the matter mentioned therein for Fifty ($50.00) Dollars. Our attorney has again stated that this amount is the only one that we can offer.

Very truly yours,
The Great Atlantic & Pacific Tea Co.
L. O'Brien

LOB:JM

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

EMILY STARK,
Plaintiff-Appellant,
vs.
THE GREAT ATLANTIC & PACIFIC TEA CO., INC., a corp.,
Defendant-Respondent.

On Appeal from the Supreme Court.

BRIEF OF DEFENDANT-RESPONDENT.

The plaintiff is appealing from a judgment entered on a verdict directed in favor of the defendant on December 17, 1924.

The plaintiff-appellant brought this action for damages for injuries alleged to have been received through the negligence of the defendant in its store at #232 Paterson avenue, East Rutherford, N. J., April 10, 1923. The plaintiff-appellant alleged that her shoe caught on a splinter in the floor of said store, causing her to fall and incurring the injuries alleged.

The sole ground of appeal is that the Trial Court erred in directing a verdict in favor of the defendant and against the plaintiff and should have submitted the case to the jury.

POINT I.

The Trial Court did not err in directing a verdict in favor of defendant and against the plaintiff and in refusing to submit the case to the jury.

The power of the Court to grant a non-suit or to direct a verdict needs no reiteration here. Sufficient authorization for this statement is found

in the case of *Baldwin* v. *Shannon,* 43 N. J. Law, p. 596:

> "In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is little or no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon which the *onus* of proof is imposed." * * *

This authority is followed in the case of *Timlan* v. *Dilworth,* 71 Atl. Rep., p. 33, 76 N. J. Law, p. 568.

> DILL, *J.* "In cases of negligence where the Trial Judge is requested to non-suit or direct a verdict for the defendant, his duty is to determine whether any facts have been established by evidence from which negligence may be reasonably inferred. * * * In 1881 Mr. Justice Reed in the Supreme Court after reviewing the decisions in this State and elsewhere denies the doctrine that a mere scintilla of evidence was sufficient to carry a case to the jury."

Justice Dill then quotes the above quotation from Baldwin *vs.* Shannon.

Following the opinions of Justice Garrison and Chancellor Pitney, Dill, *J.,* asserts the following principles:

> "That what is a reasonable time when the facts are undisputed and different inferences cannot be drawn from the same facts, is a question for the court, not for the jury."

Also in the case of *Sefler* v. *Vanderbeck & Sons. Inc.,* 96 Atl. Rep., p. 1009, Trenchard, *J.,* says:

> "Of course, in passing upon a motion for a directed verdict, the court cannot weigh the evidence, but is bound to concede to be true all evidence which supports the view of the party against whom the motion is made,

and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor."

It is a recognized principle of pleading that on a motion for a direction of the verdict, for the purpose of said motion, the party making the motion admits the truth of his opponent's allegations and any inference of fact favorable to his opponent which can be legitimately drawn therefrom, but denies the sufficiency in point of law of the cause of action based thereon. Therefore the facts in the case being undisputed, the only issue involved was one for the determination of the Court, namely, whether there had been a reasonable time after notice, for the defendant to make repairs. The Court found that there had not been such reasonable time to make repairs. No proof was offered in this case that the defective condition of the floor complained of had existed for any particular period of time, the only reference to proof of notice being found in the testimony of the plaintiff, and her daughter. (Case, p. 11, ll. 19 to 24.)

"Q Well, now, when you told him, 'It is a shame that people fall down on a rotten board,' what did he say in addition to that? A He said he did report it to the landlord.

Q He had reported it to the landlord? A To the landlord."

Also (Case, p. 31, ll. 32 to 36, and p. 32, ll. 3 and 4).

"Q Did you speak to the manager of the store? A He asked me how my mother was, and I said she was in pretty bad shape, and he said, 'I know she had a pretty bad fall,' and he said, 'I reported that to the landlord, but he did not fix it.'

Q When were you there? A I was there the same week of the accident."

The daughter frankly admits that the conversation she alleges she had with the manager of the store took place the week of the accident but subsequent thereto.

In her testimony, the daughter alleges that the manager reported at that time that he had reported it to the landlord, but as she did not fix a time prior to the alleged accident at which this report was made to the landlord, this testimony can have no bearing on the question of proof of notice.

Referring again to the plaintiff's testimony as to her alleged conversation with the manager, the plaintiff merely alleges that the manager said that "he did report it to the landlord." (Case, p. 11, ll. 8 to 24.)

> "Q Well, now, did you talk to the clerk? A And I talked to the clerk. I says, 'I think it is a shame that people comes in here and walks and falls on a rotten board and hurts themselves.'
>
> Q Where did he send you to? A And he sent me to—he looked at me. He says, 'Did you hurt yourself?' And he looked at me. He says, 'Why, yes, you did.' So, he says, 'You go right to the doctor, Brooks, because he is the nearest,' and I am going—
>
> Q He sent you to Dr. Brooks? A Brooks.
>
> Q Well, now, when you told him, 'It is a shame that people fall down on a rotten board,' what did he say, in addition to that? A He said he did report it to the landlord.
>
> Q He had reported it to the landlord? A To the landlord."

There is nothing to indicate even from the plaintiff's testimony when the alleged report was made. It might have been made immediately after the accident and before the alleged conversation with the plaintiff.

The manager of the store makes it clear in his testimony that the report to the landlord was made subsequent to the accident. (Case, p. 45, ll. 1 to 10.)

"Q Did you report this defect, alleged defect, in the floor before the accident, to Mr. Wesley? A I did not know there was any before.

Q Did you report it after the accident? A I did.

Q How soon after? A The same morning.

Q Mr. Van Lenten, have any repairs ever been made on that floor? A No, sir.

Q Is the floor in the same condition— A The very same condition.

Q —now, that it was then? A The same thing.

Q And what is its condition today? A Good condition."

Neither is there anything in the evidence to show the existence of the defect before the accident. The plaintiff, herself, states that she did not know of its prior existence. (Case, p. 18, ll. 8 to 10.)

"Q Well, did you know that the splinter was there before you stepped on it? A I did not know it.

Q You did not know it? A It caught my foot."

Neither did the alleged defect become apparent in the course of the inspections made by the said defendant, nor in the course of care of said premises in the exercise of its duty to keep the same in a safe condition for use by the public, was any defect in the floor disclosed. (Case, p. 42, ll. 32 to 42.)

"Q Mr. Van Lenten, what are your duties as manager of that store? A To see that everything is all right there; keep things in good order, keep the floor clean, keep the sidewalk clean.

Q Do you inspect the store? A Yes, sir.

Q How often? A Why, when there is nothing to do, we are looking around to see what is wrong, if there is anything wrong, to remedy it."

(Case, p. 43, ll. 1 to 42.)

"Q What care do you take of the floor? A I sweep it twice daily, and we oil it about every two or three weeks, according to how the oil wears off the boards.

Q I did not get that last. You oil it? A Oil it.

Q Every two or three weeks? A Yes, sir.

Q According to the condition of the floor? A Yes.

Q What time of the morning did this accident happen? A I should judge about between nine and ten.

Q Was the floor swept clean at the time? A It was swept at half-past six the night before.

Q When was the floor oiled prior to that time? A About two weeks.

Q And how do you oil a floor? What do you use to oil a floor with? A A felt mop on a handle.

Q A felt mop on a handle? A On a handle.

The Court: Did he say when he had oiled it before?

Mr. Weinberger: Two weeks before.

The Witness: About two weeks before.

Mr. Weinberger: I think you said that, didn't you?

The Witness: Two weeks.

Q What is the method of using this mop in oiling the floor? A Why, to spread it evenly over the floor, you pour the oil on the floor, and you take this felt mop to spread it evenly.

Q Do you rub hard or soft? A Why, you have to put quite a little weight to it.

Q What is the nature or character of this mop? A It is soft.

Q And would it naturally go down into a depression or catch on a sliver? A Yes, sir.

(Case, p. 44, ll. 5 to 32.)

"Q Did you ever know this mop to catch on a sliver or splinter on the floor? A No, sir.

Q After this floor was swept the night before, did you notice any defect in the floor? A No, sir.

Q Did you ever notice that particular spot in the floor before this accident happened? A No, sir.

Q Nothing that ever called it to your attention? A Nothing.

Q If you had found a defect in the floor, or any part of the place under your control, which needed repairing, what would you do? A I would report it to the vice-superintendent."

(Case, p. 45, ll. 1 to 16.)

"Q Did you report this defect, alleged defect, in the floor before the accident, to Mr. Wesley? A I did not know there was any before.

Q Did you report it after the accident? A I did.

Q How soon after? A The same morning.

Q Mr. Van Lenten, have any repairs ever been made on that floor? A No, sir.

Q Is the floor in the same condition— A The very same condition.

Q —now, that it was then? A The same thing.

Q And what is its condition today? A Good condition."

(Case, p. 60, ll. 8 to 42.)

"Q What were your duties? A Cleaning up twice a day, and oil it up whenever necessary.

Q And did you clean it twice a day? A Swept it up at noon, between one and two, and after six-thirty at night.

Q Before or after the store had closed? A After the store closed.

Q Had you swept the floor the day before this accident happened? A Yes, sir.

Q The night before? A Yes, sir.

Q Did you notice anything out of the ordinary about the floor? A No, sir.

Q What was the condition of the floor at that time? A The floor was all right.

Q Did you notice any rotten boards in it? A No, sir.

Q Did you notice any splinters sticking up? A No, sir.

Q What else, or what other care did you take of the floor sweeping the floor twice daily? A Oil it up about two or three weeks, just as it needed it.

Q Every two or three weeks? A Yes, sir.

Q When had you oiled the floor before the accident happened? A Well, it was about two weeks before.

Q About two weeks? A About two weeks.

Q And how do you oil the floor? A With a felt mop.

Q Describe the mop. A Well, the mop was on a stick, and we had to put the oil on the floor, and then work it out, forward and backwards."

(Case, p. 61, ll. 1 to 11.)

"Q You had to push the mop forward and backwards? A Yes.

Q Do you have to exert any pressure on it? A Well, a little.

Q Have you ever noticed the mop to catch on a splinter? A No, sir.

Q Have you ever noticed a hole in the floor? A No, sir."

There is not one iota of evidence in the entire case to indicate any notice to this defendant

before said alleged accident, and the Court could not have done otherwise than direct a verdict for this defendant in the absence of any proof of notice to the plaintiff before the accident or of proof of the existence of said defect prior to the accident.

Further evidence of the fact that the defect, if any, was not such as would have been revealed by reasonable inspection, is offered in the testimony of the manager of the store as to the peculiar shuffling gait of the plaintiff. (Case, p. 58, ll. 41 to 42.)

> "Q What was her gait like? A Well, it is kind of slow, heavy sliding of the feet."

This testimony, together with the testimony of Krom, in which he stated that his mop had not caught on a splinter in going over that portion of the floor, is evidence of the good condition of the floor, when the splinter could only have been picked up by sliding the feet over the floor.

The rule of law applicable to this class of cases and upon which this direction of the verdict was based, was enunciated in the case of *Schnatterer* v. *L. Bamberger & Co.*, 81 N. J. L., page 558. It is as follows:

> In order to charge a store-keeper for negligence where injuries are alleged to have been caused by a defective condition of his premises, it must appear, first, that the defective condition had in fact been brought to the previous notice of the defendant, or failing in proof of said actual notice, that, second, the defective condition had existed for such a space of time before the occurrence causing the injury, as would have afforded the store-keeper sufficient opportunity to make proper inspection of its premises to ascertain their condition as to safety, and to repair their defects.

Vredenburgh, *J.*, says:

> "In the absence of proof of either, the legal presumption is that defendant had used reasonable care. It need hardly be added that the company was not an insurer of the safety of its customers against accidents happening to them while walking or running up and down its stairways in its store. Its duty to the plaintiff was satisfied when it used reasonable care to maintain them in a condition safe for her proper use."

The rule above stated was evolved as a test for the determination of the liability of the one in possession of premises, based upon his negligence in permitting defective conditions to exist on said premises from which injuries might result to invitees. The rule contains an alternative statement of liability, as, first, where the fact of the defect had been brought to the previous notice of the one in possession of the premises, or, second, where the defect had existed for such a space of time as would have afforded him sufficient opportunity for proper inspection and sufficient opportunity to repair said defect.

The second part of this rule indicates the reason for the rule, namely, that in order to charge the defendant with negligence in this class of cases there must be proof that the defect had existed over such a period of time as would have permitted the defendant to have made a reasonable inspection and reasonable repairs. Where proof is produced of the existence of the defect for such a period of time, as would have permitted reasonable inspection and repair and the defendant failed within that time to make said inspection and repairs, then, under the rule, he is chargeable with negligence. Where, however, the defect had existed for such a length of time and the defendant had made reasonable

repairs and inspection, he is not chargeable, under the rule, with negligence; neither is he chargeable under this rule with negligence where the defect having existed for such a period of time, the defendant had made reasonable inspection and the said inspections had failed to reveal the defect.

The latter part of said rule clearly provides that the defendant shall have a reasonable time within which to discover and repair said defects. This provision also extends to the first part of said rule, namely, that where proof is produced of previous notice of the defect to the defendant, proof is also required of a reasonable time for the defendant to have made repairs. That such is the case is borne out by *Schnatterer* v. *Bamberger, supra,* in which this rule aforesaid was enunciated.

> Vredenburgh, *J.*, says: "The following decisions rendered in this state in actions between landlord and tenant in which the tenant brought suit against his landlord for injuries arising from the failure of the latter to keep in safe repair the rented premises, involved principles analogous to those where the relative rights and duties of customer and store-keeper are at stake, and will be bound to sustain the rules just declared."

Johnson v. *Brewing Company,* 75 N. J. L., page 282, 68 Atl. Rep., page 85; *Timlan* v. *Dilworth,* 76 N. J. L., page 568, 71 Atl. Rep., page 33, and *Frank* v. *Conradi,* 50 N. J. L., page 23, 11 Atl. Rep., page 480.

Referring to the "analogous principles" to which Justice Vredenburgh has referred, we find that "a reasonable time in which to make repairs" is incorporated in both sections of the aforesaid rule in *Schnatterer* v. *Bamberger,* and

that where the plaintiff establishes proof of prior notice, it is equally incumbent upon him to prove that the defendant had a reasonable time within which to make repairs.

Timlan v. *Dilworth, supra,* Dill, *J.,* says:

> "Even assuming that it was the duty of the landlord to use reasonable care to keep the apparatus in question in repair, yet such duty, and the resulting duty of inspection, would be subject to the rule laid down by Mr. Justice Dixon in the Supreme Court, to the effect that: 'To ascertain the time or times for making repairs, we must invoke the usual legal implication, applicable to contracts indefinite as to the time of performance, that they must be performed with reasonable diligence and promptness. This legal rule, applied to the present contract, imposed upon the landlords the duty of properly inspecting the premises and of making such repairs as a due inspection would show to be necessary. But it cannot be stretched so as to include an obligation to repair what a reasonable examination would not discover to be in need of repair. Such straining would deprive the rule of the very element which makes it applicable to contracts in general—the underlying idea of reasonableness.' "

Frank v. *Conradi* (50 N. J. L., page 23, 11 Atl. Rep., page 480), Dixon, *J.,* states:

> "Hence, to ascertain the time or times for making repairs, we must invoke the usual legal implication, applicable to contracts indefinite as to the time of performance, that they must be performed with reasonable diligence and promptness. This legal rule, applied to the present contract, imposed upon the landlords the duty of properly inspecting the premises and of making such repairs as a due inspection would show to be necessary. But it cannot be stretched so as to include an obligation

> to repair what a reasonable examination would not discover to be in need of repair. Such straining would deprive the rule of the very element which makes it applicable to contracts in general—the underlying idea of reasonableness."

The requirement of a reasonable time for inspection and repair, is further emphasized in the case of *Collins* v. *C. R. R. of N. J.*, 90 N. J. L., page 593, following *Schnatterer* v. *Bamberger, supra.* In this case, Bergen, *J.*, gives the following opinion:

> "It is not necessary to determine whether any negligence of defendant was shown, because this judgment must be reversed for error in charge of the court, which was as follows: '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.' '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."

Schnatterer v. *Bamberger & Co.*, 81 N. J. L., page 558. All that is required is reasonable care and ordinary prudence. *Ruane* v. *Erie R. R. Co.*, 83 *Id.* 423.

The sole contention of counsel for plaintiff-appellant is an insistence upon an arbitrary and unauthorized interpretation of the first part of the rule laid down in *Schnatterer* v. *Bamberger, supra,* namely, that mere notice of the defective condition, without any regard to the established requisite of a reasonable time for repairs was sufficient to charge the defendant with negligence. Under this construction, the defendant would be equally liable, where he had had a

year's notice of the defect and the same time in which to repair—and where notice had been given immediately prior to the accident, without sufficient time to repair. The fallacy of such reasoning is apparent and the construction attempted to be given the rule, has been effectually disposed of in the foregoing cases.

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JOHN B. BROWN,
Of Counsel.

New Jersey Court of Errors and Appeals

EMILY STARK, Plaintiff-Appellant, vs. THE GREAT ATLANTIC & PACIFIC TEA CO., INC., a corporation, Defendant-Respondent.	On Appeal from the Supreme Court.

Brief of Plaintiff-Appellant.

This is an appeal from a judgment entered on a directed verdict in favor of the defendant on December 17th, 1924.

The above action was brought by the plaintiff-appellant as a result of an injury which she sustained while entering a store operated by the defendant-respondent, the Great Atlantic & Pacific Tea Co. Inc. at No. 232 Paterson Ave., East Rutherford, New Jersey, on the 10th day of April, 1923.

The plaintiff had entered the store for the purpose of purchasing certain household articles and as a result of the negligence of the defendant, through its agents, the floor of the aforementioned store was kept in a state of disrepair, causing the plaintiff to fall and sustain serious injuries, which necessitated confinement to bed

for a period of two weeks, during which period she suffered great pain and incurred medical expenses.

At the close of the plaintiff's case, the trial court denied the defendant's motion for a nonsuit. Thereafter the defendant introduced its testimony, at the close of which, the Court directed a verdict on defendant's motion for the reason that the plaintiff failed to sustain the burden of proof.

Counsel for the plaintiff-appellant urge that there was error on the part of the Court in so ruling. Only the first ground of appeal is submitted, the remaining two are waived.

POINT I.

The Trial Court erred in directing a verdict in favor of the defendant and against the plaintiff and should have submitted the case to the jury.

The trial Court erred in directing a verdict in favor of the defendant for the reason that the basis of the ruling was the fact that the plaintiff failed to sustain the burden of proving notice to the landlord of the defect within a reasonable time within which repairs could have been made.

The Trial Court said (Case, p. 82, lines 7 to 22:

> "The statement does not disclose when the report to the landlord had been made, and one of the requirements of proof on the part of the plaintiff is not only knowl-

> edge, but reasonable time to repair, that reasonable time to repair had intervened. The statement on this question is silent, and so is the plaintiff's case. Where the facts on the question of reasonable time are undisputed, the question is one for the Court and not the jury. There being no proof as to the time, there is, therefore, not any question to be submitted to the jury. The plaintiff not having maintained her burden of proof of proving notice and failure to repair within a reasonable time, I will grant the defendant's motion and direct a verdict for the defendant."

The rule laid down in the leading case of *Schnatterer* v. *Bamberger* (81 N. J. L., p. 558) reasserted in many cases, among which is one of our own cases, *Buda* v. *Dzuretzko* (87 N. J. L., p. 34), at page 35 where the Court reiterated the rule that there is no liability,

> "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 stairs, and to repair the defects."

The plain import of this language is that there are two distinct methods of proving liability and that they do not in any way overlap.

It would therefore appear that the trial court applied the rule concerning actual notice, but we contend that the additional qualification imposed by the trial court was erroneous, namely, con-

structive notice because of time for reasonable inspection and a reasonable time to repair. In other words, the qualification of the second method of proof was required of the plaintiff. Our search for authorities to substantiate the Court's added prerequisite of proof to impose liability was without avail. Counsel for defendant-respondent will no doubt cite the case of *Collins* v. *Central R. R. of N. J.* (90 N. J. L., p. 593) as holding in effect that a reasonable time to repair is an essential element of liability. However, we contend that this case is not an authority for placing that burden on the plaintiff. No particular mention is made as to who must sustain the burden, but only what facts the jury must find. Neither is there anything to infer that that was a case where actual notice was the method employed to prove liability.

In the case of *Rom* v. *Huber* (93 N. J. L., p. 360) the language of the Court is more emphatic in recognizing the distinction. The Court said on page 361, in expounding the principles of liability of *Schnatterer* v. *Bamberger*:

> "It must appear that the condition which produced the fall had either been in fact brought to the previous notice of the defendant, *or failing in proof of such actual notice,* that the condition had existed for such a space of time as would have afforded the defendant sufficient opportunity to make proper inspection as to the safety of the place."

It seems to us on principle that defendant ought to be afforded an opportunity to repair; but the rule which is followed does not require

the reasonable time to repair to be proved by the plaintiff. A negation of a reasonable time by the defendant could be a defense, but it is not imperative on the plaintiff to so prove the facts.

The plaintiff's proof of notice is based on the statement of the clerk of the store to the plaintiff immediately after she had fallen, that he had reported it (defect) to the landlord. (Case, p. 11, lines 19 to 24.)

> "Q. Well now, when you told him, 'It is a shame that people fall down on a rotten board,' what did he say in addition to that? A. He said he did report it to the landlord.
>
> "Q. He had reported it to the landlord? A. To the landlord."

Considering that this admission was made so soon after the accident, it would be more probable that he had in mind that he had reported *the defect* to the landlord at a time prior to the accident. The jury of twelve men could reasonably, if not properly make the correct inference. With no possible intervening time within which to report the *accident,* the more natural inference would be that the Clerk reported the *defect.* In any event the word "it" used by the Clerk would permit two distinct conclusions, one which would favor liability, and one which would negative it. It follows therefore, that if the plaintiff's burden was only to prove actual notice, a controverted question of fact as to whether or not there was actual notice was raised, and remained as a question for the jury. Where evidence favorable to the plaintiff will support a

verdict for him, a motion to direct a verdict should be denied. *Barry* v. *Borden Farm Products Co.* (125 At., p. 37).

Although it is proper practice for a court to deny a motion for a nonsuit at the close of the plaintiff's case, and thereafter to direct a verdict against the plaintiff at the close of the defendant's case, still we think that the basis for such a change should be considered. The Trial Court in the case at bar indicated that an inference in favor of notice was present. Case, page 38, lines 32 to 40, and at a further point the Court denied the motion for a nonsuit on the ground that there were sufficient facts predicated by the plaintiff to have the jury pass upon the case. (Case, p. 39, lines 25 to 28.)

Assuming that we are incorrectly contending that the plaintiff's burden of proof consisted of only proving notice and not a reasonable time, we maintain that even in that event there is evidence sufficient to go to the jury.

Where the plaintiff fails to sustain the burden of proof, the Court can refuse to grant a motion for a nonsuit and permit the defendant to introduce his evidence and any evidence so introduced which if favorable to the plaintiff's case, can be taken advantage of by the latter to sustain the burden of proof. The effect of the holding in *MacCormack* v. *The Standard Oil Co.* (60 N. J. L., p. 243) supports the above rule, and that is the reason for permitting the practice of trial courts denying nonsuits and then directing verdicts directly contra.

In the case at bar the defendant's witness, Van Lenten denied reporting the defect at a time

prior to the accident. Although this testimony would seem to clearly negative the fact of actual notice within a reasonable time, still this was a question of fact for the jury to determine. The interest and credibility of the witnesses, if unfavorable to the jury would warrant their finding that fact in favor of the plaintiff.

The Court of Errors and Appeals held in the case of the *Second National Bank of Hoboken* v. *Smith* (91 N. J. L., p. 53) citing other authorities from this jurisdiction:

> "The credibility of a witness is for the jury, and where the issue depends upon the fact the existence of which is not admitted even though testified to by a credible witness who is unchallenged, the question is for the jury."

Also quoting from 26 R. C. L., p. 1069:

> "The fact that evidence does not render it undisputed as there still remains the question of its inherent probability and the credibility of the witness or his interest in the result."

Whatever the attitude of the Court toward such testimony, there being two inferences, the Court should have favored the plaintiff and refused to direct a verdict. As the Court said in *Andre* v. *Mertens* (88 N. J. L., p. 626):

> "In passing on a motion for a directed verdict, the court must give the party adverse to the motion the benefit of all the evidence in his favor and all inferences reasonably deductible therefrom."

The doctrine announced in the case of *Dellabello* v. *Central R. Co. of N. J.* (124 A., p. 59) is directly applicable to this contention. It was there held that:

> "If there was any testimony, no matter how meagre adduced on the part of the plaintiff tending to show liability of defendants, and no uncontroverted fact was established by the defendants, which fact as established would constitute an absolute bar to the plaintiff's right of recovery, the defendants were not entitled to succeed on either motion."

In the case of *N. J. School & Church Furniture Co.* v. *Board of Education of Sommerville* (58 N. J. L., p. 646) the Court held:

> "Questions of reasonable time is generally for the jury and always so when it rests upon conflicting inferences as to the mutual effect of the parties to the transactions."

In the present case there is testimony to the effect that oiling of that floor would reveal splinters.

In Case, p. 63, lines 20 to 30, the witness Krom, says:

> "Q. What? A. The floor was all right. I walked over that floor, and I mopped it, and my mop never got caught on it.
>
> "Q. So that is the only reason you say your mop never got caught? A. Well, if there is a splinter there, it will get caught on the mop. If it didn't get caught in the mop, you cannot report there is a splinter on the floor.
>
> "Q. So you wait until a splinter gets caught in the mop, is that it?"

There was further testimony that the floor still remained unrepaired for the reason that he did not consider the floor defective in such a condition, even though there was a splinter which caused the fall of the plaintiff. It follows then that even if the splinter did exist at a time previous to the accident it would never have been reported, yet notice would have been had by the manager for a reasonable time, sufficient to have repaired it. So that the testimony of the defendant's witnesses to the effect that they never reported the defect would permit two inferences, one that there was a defect of which they had knowledge a reasonable time in advance (testimony being that floor was oiled over two weeks prior to the accident. Case, p. 60, lines 32 to 35), the other that there was not one defect which in their opinion would cause injury, but in fact did.

In view of the foregoing authorities and contentions, it is respectfully submitted that the Trial Judge erred in granting defendant's motion for the direction of a verdict in its favor, and of refusing to submit the case to the jury.

And it is further respectfully submitted that the judgment in these regards be reversed and a new trial granted.

Respectfully submitted,

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