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Complaint.

(Filed March 30, 1928.)

New Jersey Supreme Court 10
HUDSON COUNTY.

ANNIE E. ELY and FREDERICK C.
ELY,
Plaintiffs,

v.

THE MARBLELOID COMPANY, a cor-
poration, and HAHNE & Co., a
corporation,
Defendants.

Action at Law.
Complaint.

20

The plaintiffs, Annie E. Ely and Frederick C. Ely, both residing in the City of Newark, State of New Jersey, say that:

FIRST COUNT:

The plaintiff, Annie E. Ely, says that: 30

1. At all the times herein mentioned, the defendant, The Marbleloid Company, was and is a domestic corporation.

2. At all the times herein mentioned, this defendant was engaged in the business of constructing, laying and repairing floors.

3. At all the times herein mentioned, the defendant, Hahne & Co., was and is a domestic corporation. 40

Complaint.

4. At all the times herein mentioned, this defendant owned the department store, known by that name, on Broad Street, in the City of Newark, County of Essex and State of New Jersey.

10 5. At said time, this defendant operated, managed and controlled the said store.

6. On or about August 22nd, 1927, the defendant, The Marbleloid Company, was engaged in constructing or repairing a part of the main floor in the said building.

7. At said time, the defendant, Hahne & Co., was supervising and directing the said work.

20 8. At said time, a young lady, in the employ of the defendant, Hahne & Co., was stationed at the point of the said construction work, for the purpose of protecting persons in the vicinity, and especially, patrons of the store.

30 9. At said time and place, this plaintiff was a patron in the said store and was walking in the aisle, near the point where the said repair work was being done, when she was precipitated into an opening therein, where the said repair work was being done, receiving the injuries hereinafter set out.

10. The injuries received occurred solely through the fault and carelessness of the defendants.

40 11. The defendants were negligent in that, the work was being improperly done; no guard device or other contrivance was provided to protect persons nearby from falling into the opening or excavation; said work was being done at a time when the store was crowded with persons, so that the

Complaint.

same constituted a menace to the life and limb of all persons in the vicinity, and especially, to this plaintiff; defendants failed to give sound, signal or warning to the plaintiff of the damage at hand, well knowing of the presence of this plaintiff at that place; the defendants, or either of them, provided a young lady, whose duty it was to guard persons at that point from falling into the excavation and carelessly and unlawfully caused, allowed and permitted this young lady to leave the place where she was stationed, so that as the result thereof, this plaintiff was caused to fall into the excavation; the said construction work was then and there being conducted, managed and supervised by both of the defendants contrary to and in direct violation of the Building Ordinances of the City of Newark and of the laws of the State of New Jersey.

12. As the result of the accident, this plaintiff sustained the following injuries: Her right hand was severely and permanently injured; both legs were bruised and injured; she suffered and still suffers intense pain; her back and nervous system were permanently injured and she was otherwise injured, internally, externally and permanently, in and about the body.

SECOND COUNT:

The plaintiff, Frederick C. Ely, says that:

13. At all the times herein mentioned, this plaintiff was and still is the husband of the co-plaintiff, Annie E. Ely, living with her and entitled to her services and companionship.

14. This plaintiff re-alleges with the same force and effect, as if fully set out at length herein, all the allegations set forth in the First Count.

Answer of Hahne & Company.

15. As the result of the premises, this plaintiff has been deprived of the services and companionship of his wife.

10 16. As the result of the premises, this plaintiff has expended and will continue to expend various sums of money for medical treatment administered to his wife.

Plaintiff's demand damages as follows:

For the First Count, Twenty Thousand (\$20,000) Dollars;

For the Second Count, Five Thousand (\$5,000) Dollars.

20 KENT & KENT,
Attorneys for Plaintiffs,
45 Church Street,
Paterson, New Jersey.

Answer of Hahne & Company.

(Filed May 22, 1928.)

30 The defendant, Hahne & Company, a corporation, with its principal office in the City of Newark, County of Essex and State of New Jersey, for answer says that:

FIRST DEFENSE TO FIRST COUNT.

1. It does not answer Paragraph 1, inasmuch as it does not refer to this defendant.
2. It repeats its answer to Paragraph 2.
3. It admits Paragraph 3.
- 40 4. It has no knowledge or information sufficient to form a belief as to Paragraph 4.

Answer of Hahne & Company.

5. It denies Paragraph 5.
6. It repeats its answer to Paragraph 1.
7. It admits Paragraph 7.
8. It denies Paragraph 8. 10
9. It denies Paragraph 9.

10. It denies that the injuries received occurred through the fault and carelessness of this defendant.

11. It denies all of that part of Paragraph 11 which refers to this defendant.

12. It has no knowledge or information sufficient to form a belief as to Paragraph 12. 20

FIRST DEFENSE TO SECOND COUNT.

13. It admits Paragraph 13.
14. It repeats its answers to all the allegations set forth in the First Count.
15. It has no knowledge or information sufficient to form a belief as to Paragraph 15.
16. It has no knowledge or information sufficient to form a belief as to Paragraph 16. 30

SECOND DEFENSE TO EACH COUNT.

At the time of the alleged accident set forth in the complaint the plaintiff, Anna E. Ely, was guilty of contributory negligence in that she failed to use reasonable care for her own safety.

THIRD DEFENSE TO EACH COUNT.

At the time of the alleged accident set forth in the complaint the plaintiff, Anna E. Ely, was guilty 40

Judgment.

(Entered October 25, 1929.)

NEW JERSEY SUPREME COURT.

ANNIE E. ELY and FREDERICK C. ELY, <i>Plaintiffs,</i> <i>v.</i> HAHNE & Co., a corporation, <i>Defendant.</i>	}	Action at Law. On Postea. KENT & KENT, Attorneys.	10
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\$2000.00 A.E.E. 300.00 F.C.E. <hr style="width: 100%;"/> \$2300.00 94.84 <hr style="width: 100%;"/> \$2394.84	Judgment entered this twenty- fifth day of October, A. D. nine- teen hundred and twenty-nine, against the defendant and in favor of Annie E. Ely, plaintiff, for the sum of two thousand dollars damages, and in favor of Frederick C. Ely, plaintiff, for the sum of three hundred dollars damages and ninety-four dollars and eighty-four cents costs.	20
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WM. S. GUMMERE,
C. J. 30

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the Judgment entered in above-stated cause which said Judgment is recorded in this office in Vol. 31 of Judgments, page 371.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-fifth day of July, A. D. nineteen hundred and thirty. 40

FRED L. BLOODGOOD,
Clerk.

(Seal)

Case.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

Before—HON. HENRY E. ACKERSON, JR., Justice, and
a jury.

10

ANNIE ELY and FREDERICK C. ELY,
Plaintiffs,

v.

MARBLEOID Co., and HAHNE & COM-
PANY, a corporation,
Defendants.

20

Jersey City, N. J., Oct. 23, 1929.

APPEARANCES:

KENT & KENT, Esqs., by SAMUEL KENT, Esq.,
for the Plaintiffs.

CAREY & LANE, Esqs., by GEORGE MOSER,
Esq., for the Marbleoid Company.

COLLINS & CORBIN, Esqs., by CHARLES BROAD-
HURST, Esq., for Hahne & Company.

30

(A jury was duly impanelled, found satisfactory
and sworn.)

40

Mr. Broadhurst: I desire to make a motion to
amend the defendant Hahne & Company's answer
in this case to deny paragraph seven of the com-
plaint, instead of admitting it as the present
answer stands. The admission is clearly a mis-
take on the part of the defendant. The facts are
that Hahne & Company is the owner of a depart-
ment store and is sued here by the plaintiff, who
was a customer in the store. The other co-defend-

Case.

ant is the Marbleoid Company. The written contract between the parties which has been subpoenaed by the plaintiff and is here in court will show exactly who had supervision and control of the work, and the manner in which the work should be done, and we do not desire to be bound by the inadvertent admission in the answer, when it seems to me in truth, and in justice, the facts will show to the contrary. In other words, the way it stands now, the plaintiff on my admission, which is erroneous, would be entitled to offer no evidence at all in an endeavor to prove on the case that there was supervision and directing of the work. I might say we have been favored with interrogatories which have been answered and will show the manner in which the work was done.

10

20

Mr. Kent: I object to it because my investigation of the case indicates what the fact was, and as answered in the interrogatories under oath. The case has been prepared on that theory and the plaintiff will present his case on that theory. I object to any amendment at the time. If I wish to have them read into the record as part of the plaintiff's case, I believe I have a right to do it. The defendant now says he has been in error about it.

30

The Court: He merely wishes to put himself in that position. The amendment will stand.

Mr. Kent: I do not understand his position, but in that case I cannot have any objection to it.

(Opening to the jury by Mr. Kent.)

(Opening to the jury by Mr. Moser.)

(Opening to the jury by Mr. Broadhurst.)

40

Mr. Kent: I want to be sure I understand the

Agnes Woldsen, direct-cross.

opening of counsel. Mr. Moser who represents the Marbleoid Company says that if there is any fault in connection with this accident it is the fault of Hahne & Company, or their servants.

10 Mr. Broadhurst representing Hahne & Company says the responsibility is not his, but the responsibility for the accident is with the Marbleoid Company. Is that correct?

Mr. Broadhurst: What is the purpose of the interrogation? That is what I have said. I do not understand that that is not the fact in regard to this case.

AGNES WOLDSSEN, sworn for the plaintiff.

Direct examination by Mr. Kent:

20

Q. Where do you live? A. Perth Amboy.

Q. What is your address? A. 99 Broad Street.

Q. 99 Broad Street, Perth Amboy? A. Yes.

Q. Are you employed by Hahne & Company at Newark, now? A. Yes.

Q. Were you employed by them on August 22nd of 1927? A. Yes.

Q. Were you there at the day of the accident to Mrs. Ely? A. Yes.

30

Mr. Kent: That is all.

Cross examination by Mr. Broadhurst:

Q. Did you see the accident happen at the time you were there that you said?

Mr. Kent: I object. The witness was not called for that purpose.

The Court: I do not care for what purpose she was called. You asked her whether she was there at the time of the accident.

40

Annie E. Ely, direct.

Q. Were you there on the day that the accident happened?

Mr. Kent: I object to that.

The Court: I overrule your objection.

Mr. Kent: May I point out to your Honor that this is an antagonistic witness called only for the purpose of identification. 10

The Court: I do not understand what the purport of her testimony is.

Mr. Kent: The plaintiff will identify a certain party and for the purpose of the record I want the witness sworn who will be identified, and that party is Miss Woldsen.

Mr. Broadhurst: That only means she has to wait and we will recall her in her regular turn. 20

(Witness Excused.)

ANNIE E. ELY, sworn on her own behalf.

Direct examination by Mr. Kent:

Q. Where do you live? A. 393 Seventh Avenue, Newark, New Jersey.

Q. You are one of the parties who are suing in this case? A. Yes. 30

Q. You were hurt, were you not, on August 22nd, 1927? A. I was.

Q. While in the Hahne Department Store building on Broad Street, Newark? A. On Broad Street, yes.

Q. What time was it that you went to that store? A. Around eleven o'clock.

Q. Did you enter through the Broad Street entrance or another entrance? A. The Halsey Street entrance. 40

Annie E. Ely, direct.

Q. That is the street at the rear of the store? A. Yes.

Q. Tell me what you did from the time you went in the store. A. Well, I went upstairs and bought some things, then I came down and bought some lining for a coat.

Q. And when you say you came downstairs, do you mean on the first floor? A. Yes. I came down on the first floor. I was up on the second floor, and the accident was on the second floor.

Q. The accident was on what floor? A. The first floor.

Q. When you came down to the first floor you say you made a purchase? A. Yes.

Q. What part of the store was that? A. Right opposite the elevator, or silk counter.

Q. And can you tell us in what part of the store that was? That is, north, south, east, or west? A. It was at the north.

Q. The north part of the store? Toward the rear or front? A. Well, it was nearer to the front than the back.

Q. That is where you made your purchase, you say? A. Yes.

Q. Of what? A. Silk.

Q. At one of the counters there, I assume? A. Yes.

Q. Then tell me from that point on what you did. A. I went back and got my stamps and then was coming right out.

Q. When you say you went back and got your stamps, where did you go? A. At the back of the store.

Q. On the first floor? A. Yes.

Q. Then what did you do? A. Well, I was coming out and coming down between the aisle and

Annie E. Ely, direct.

the table, there was some neckwear on it, and I stopped to look at that.

Q. Then you came back? A. Toward the front to come out.

Q. And you looked at what? A. Some neckwear on the table. 10

Q. Now, do you see this mark we have indicated here (indicating on diagram), which is the entrance or exit at the north end? Can you place that neckwear counter for me with reference to that entrance in point of feet? About how far away in feet was that counter? A. I could not just say how many feet.

Q. Approximately. A. Oh, I should judge it was nearer the front than the middle of the store. 20

Q. That does not help us very much. Of course, we do not know the depth of the store. Can you give us that dimension?

Mr. Broadhurst: I do not know it.

The Court: Is there anything in this room that you can indicate about how far it was from the front?

The Witness: About the end of that table I should judge. From me to the end of that.

Mr. Broadhurst: Twenty-five or thirty feet? 30

The Court: No.

Mr. Kent: That is about fifteen feet.

The Court: It is just twenty feet from the witness stand to the railing.

Q. So, as I understand you, from the necktie counter to the entrance of the store is about sixteen feet or so? A. Yes.

Q. Now, then, the aisle at that point where you were walking, is that the main aisle there at that 40

Annie E. Ely, direct.

section or not? A. There was a main aisle and a table.

Q. But, where you were walking at that point was the main aisle? A. Was the main aisle.

10 Q. Did you purchase at that counter? A. No.

Q. After doing that, what did you do? A. I went to walk around the table and I took a header off this place that was on an incline.

Q. When you left that counter was it with the intention of continuing on that main aisle to go out of the store?

Mr. Broadhurst: I object to her intentions.

Mr. Kent: I withdraw the question.

20 Q. After you left that necktie counter, where were you bound for? A. The street.

Q. When you say to the street you mean to the exit? A. The north exit.

Q. So that you were bound, as far as you got, in a straight line through the main aisle out that exit? A. Yes.

Mr. Broadhurst: That is leading.

The Court: Don't lead, but let this stand.

30 Q. Tell me again what you did. A. I had to make a turn to go around the end of the table between the end of the table and the counter that came out. The counter came down and turned like this (indicating) and the table was here, and I had to go between the table in order to get to the door, and there is where I fell.

40 Q. Then what did you say happened? A. I fell full length. I went to step around, not looking, I was looking at something on the table, and down I went, and there was nothing there.

Annie E. Ely, direct.

Q. Was there any sign or warning of any kind at the point of the necktie counter with reference to that point where you fell? A. Nothing.

Q. Was there any enclosure of rope or anything of a similar nature? A. Nothing.

Q. Was there anything present there to give you any warning at all with reference to it? A. No. 10

Q. Did you know that there had been construction work going on at that aisle? A. I did not.

The Court: You made a turn, did you?

The Witness: Yes.

The Court: Then you said you were going straight out?

The Witness: I came down from the aisle, and the counter was—here is the counter just like this and the table was here, and I had to make a turn to go around the table. 20

The Court: That would lead you into a cross aisle?

The Witness: No, that was straight out to go out out to the street.

The Court: It could not be straight if you made a turn.

The Witness: After I made the turn I had to go straight out. 30

The Court: You were going on the cross aisle to go into the turn?

The Witness: Yes.

Q. What part of your body did you strike when you fell? A. I went down on both knees and my hand. I had my packages, as they always request you carry small packages, and when I—

Q. Tell us what you did? A. I had nothing to save myself, and I wrenched that knee, the right 40

Annie E. Ely, direct.

knee—and my left knee and my right knee was all black and blue, but that was not permanently injured.

Q. Now, were you conscious or unconscious?

A. I was dazed.

10 Q. But were you unconscious?

Mr. Broadhurst: Please don't lead her.

The Witness: No, I was not entirely unconscious, but I was dazed.

Q. Who came to the spot right after you fell?

A. Two of the clerks picked me up, and they yelled and said they knew this—

Mr. Broadhurst: I object.

20 The Court: Not what was said.

Q. When you say clerks, do you mean the clerks in the store? A. The clerks in the store.

Mr. Moser: I object. Describe who they were.

The Court: Strike out "clerks in the store." You may tell us what their appearance was and what they were apparently doing.

30 Q. Was there anything about their clothing or uniform that you could see that identified them to you? A. No.

Q. Not at that time? A. Yes, there was.

Q. What was there about them? A. Why, they had on the Hahne uniform.

Mr. Moser: I object. That is a conclusion.

40 The Court: Yes. Strike it out. Describe what the uniform was that you say they wore. How were they dressed?

Annie E. Ely, direct.

The Witness: They were dressed in dark clothes.

The Court: Different from the ordinary dress?

The Witness: No, just the same the girls wore. The plain dresses in the store. 10

The Court: What do you mean by that? Like the other girls that wait on people in the store?

The Witness: Yes.

The Court: Wait a minute. That waited on people in the store or other girls in the store there being waited upon?

The Witness: No; by the girls in the store waiting on customers. 20

The Court: Was it a distinctive dress?

The Witness: Yes.

The Court: Describe its appearance.

The Witness: They were just plain, dark dresses as near as I remember two years ago.

Q. Did you see Miss Woldsen who testified before you on the stand this morning? A. They sent for her.

Q. Did you see Miss Woldsen? A. No. 30

Mr. Kent: I withdraw that question.

Q. Did you see the young lady who testified on the stand just before you in court this morning? A. Yes, this morning, yes.

Q. Do you remember seeing her that day at the store? A. Yes, they sent for her.

Q. How soon after the accident did you see her? A. Right away. They sent for her.

Q. And then what happened? A. She took me upstairs to a nurse. 40

Annie E. Ely, direct.

Q. Did she have any distinctive dress about her?

A. She had a badge with "Information" on it.

Q. Did you have a conversation with her?

Mr. Broadhurst: Answer yes or no.

10 The Witness: Going up in the elevator.

Q. Will you please tell us what was said by her and by you?

Mr. Broadhurst: That is objected to.

The Court: The objection will be sustained.

Q. Then, you were treated by the nurse upstairs?

A. By the nurse.

20 Q. And what did that nurse do for you? A. She bandaged my hand and strapped up my knee.

Q. What was the condition of that hand at that time as far as you know? A. Why, it was all swollen, and the knuckle was bruised.

Q. When you say it was swollen, can you describe the extent of that swelling? A. It was all puffed up like that.

Q. What did she do for your knee? A. She bandaged it and put some stuff on it.

30 Q. What did she do for your knee? A. She bandaged it and used some stuff on it that they had there.

Q. What knee was that? A. The left knee.

Q. Then, I understand you were taken home?

A. Yes; I went home in a taxi.

Q. Did you receive further treatment from the medical clinic at the Hahne's store after that? A. I went two days afterwards, my hand and knee pained me, so I went down to see the nurse.

40 Q. Was it the same nurse? A. No, the regular nurse had returned and I saw her.

Annie E. Ely, direct.

Q. The young lady sitting next to myself was the woman in the clinic who treated you the first or the second time? A. No, the second.

Q. After you received that treatment, did you receive any further medical treatment? A. My doctor. 10

Q. Who was that? A. Dr. Siegel.

Q. How many times did he treat you? A. Why, he treated me until October.

Q. The accident happened on August 22nd. I wish you would tell us a more definite time in October. A. The last of October.

Q. The latter part of October? A. Yes.

Q. About how many visits did he make, as far as you recall? A. He was over to my home twice, and sometimes three times a week. 20

Q. Was he paid for that treatment? A. He was.

Q. How much a visit? A. Two dollars a visit.

Q. Now, after Dr. Siegel stopped treating you in the latter part of October, did you receive any further medical treatment? A. Yes, I went up to the Orthopedic Hospital.

Q. Where is that? A. That is up in East Orange.

Q. That is after October, I assume? A. Yes.

Q. What did they do there? A. They took an X-ray. 30

Q. Of what? A. Of my knee.

Q. Which knee? A. Both knees, and then they strapped them up, and the first thing the doctor asked me was—

Mr. Broadhurst: I object.

The Court: Not what was said, madam.

Q. Was there any treatment of your hand there? A. No, I kept using Dr. Siegel. 40

Q. How many times did you go to the Ortho-

Annie E. Ely, direct.

pedic Hospital? A. I went up there about eight trips.

Q. Over a period of how long? A. Well, two months.

Q. Did you pay for the treatment there? A. Yes.

10 Q. How much? A. Well, it being a clinic, of course, they did not charge me, so I gave it to those other cripples.

Q. How much did you pay? A. I paid a dollar.

Q. How much? A. A dollar a treatment.

Q. After you finished your treatment at the hospital, did your condition clear up or not? A. My hand has cleared up, only I can't use it to open a can of goods or anything like that to strain it.

20 Q. You keep house, do you not? A. Yes.

Q. An apartment? A. Yes.

Q. How many rooms? A. Five rooms.

Q. You keep house yourself? A. I did up until the accident.

Q. On account of your condition, has there been any change in your running of the apartment since that time? A. I have to have the janitress do my work while I was laid up two months with my hand strapped. I still have to have a woman for I can't get down on my knees to do any work.

30 Q. What is the difficulty? Why can't you do it? Just explain to the jury what your difficulty is. A. The minute I kneel on it—I can't sleep at night—it pains and aches and it turns black and blue.

Q. I wish you would step down on the floor and then walk up again, Mrs. Ely. A. (Witness demonstrates.) That is the only way I can go downstairs.

Q. Let me see you walk up. A. (Witness demonstrates.)

40 Q. I notice you walk up taking one step at a time and then bringing up the other leg. A. Yes.

Annie E. Ely, direct.

Q. Will you please walk up?

Mr. Kent: I would think it would be more fitting for Mrs. Ely to walk up a flight of steps.

The Court: No. They can see the way she walks. 10

Q. What is your difficulty about the left leg, Mrs. Ely? A. I can't bend my weight on it. It pains.

Mr. Broadhurst: I assume counsel will connect up these conditions with this alleged injury. I would like to reserve the right to strike it out if not connected.

The Court: Did you have this condition before the accident? 20

The Witness: No.

The Court: How soon after the accident did you notice it?

The Witness: Right away.

The Court: What is the trouble?

The Witness: The truth is, my knee--I can't use it. I cannot do my work.

Q. What happens when you try to use it? A. It pains and aches extremely. 30

Q. Did you have that trouble at all before this accident? A. No, sir.

Q. Did you have any trouble with your leg? A. No, sir.

Q. Did you have any difficulty about walking upstairs before this accident? A. No.

Q. Did you ever, before this accident, have to walk up as you do now dragging the left leg on to the same step with the right? A. No, sir.

Q. That has only happened since the accident? A. Since the accident. 40

Annie E. Ely, direct.

Q. Now, did you have any difficulty before the accident doing your housework, as you say? A. No, sir, I always did my own work.

10 Q. Did you ever have a lady in your house before the accident? A. Never, except at house-cleaning time. I had to have a woman clean and I have my laundry done out.

Q. Did you ever have your laundry sent out before the accident? A. No, sir.

Q. What does that laundry cost you to send out a week? A. Two dollars.

Q. What other expenses, if any, have you had for household work since the accident that you did not have before? A. I have to pay someone four dollars a day.

20 Q. How often does she come? A. Well, she comes every week.

Q. One day a week? A. One day a week.

Q. And this work you didn't have done before? A. I never had it.

The Court: What did she do, clean house?

The Witness: Cleaning.

The Court: Sweeps and scrubs?

30 The Witness: Scrubs and cleans and goes down on the woodwork and the floors which I cannot do.

Q. If I understand you correctly, you did not have to do that before the accident? A. I did not.

Q. Now, you were telling us something about your right hand. What is the difficulty with that now? A. Well, my right hand is all right, only when I go to open anything, to use much pressure, why it will swell up and pain me.

40 Q. Is that the condition that arises often? How

Annie E. Ely, cross.

often a day or week does that occur in your house work? A. Whenever I want to open a can or lift anything heavy.

Q. Well, can you lift the same weights that you could before? A. No.

Q. How is your grip or grasp now? A. I have not as good a grab as I had. 10

Q. Take something specifically. Can you use an iron or can't you? A. Yes, I can't use an iron today anything like I did before, but I can't iron anything heavy.

Q. Well, what happens? A. It pains me.

Mr. Kent: That is all.

Cross examination by Mr. Moser:

Q. When you came in the Halsey Street entrance of the door, do you recall some work being done on the floor in the back of the store? A. Yes, sir. 20

Q. And in that part of the store they were laying a new floor, is that correct? A. Yes, sir.

Q. And that was quite a distance from the scene of this accident, was it not? A. Yes, sir.

Q. So that you had come in the store and also saw this condition and you had gone up in the store, made your purchase and so forth and had come downstairs, is that correct? A. Yes, sir. 30

Q. Now, when you had gotten to the point with reference to where this alleged accident happened were there not counters right around there? A. Counters?

Q. Counters, yes. A. Yes, sir.

Q. And did they have goods on those counters? A. Yes, sir.

Q. And will you tell us, if you can recall, just what goods were on the counters there? A. Well, 40

Annie E. Ely, cross.

the aisle that I came down, right where the accident happened, was neckwear on both sides.

Q. And then right up a little further they had some toilet articles and some perfume? A. I don't remember. I did not go that far.

10 Q. Now, as you walked in the general direction toward the front of the store were you on the new flooring, or on the plain board flooring? A. On the new flooring.

Q. And as you reached this point where the table was, is that what I understand, there was a space there to your left to the next counter, is that correct? A. Yes.

20 Q. And was there anything in the nature of a counter or a table or anything in between that space? A. No.

Q. And that was an opening to some other place, is that correct? A. That is correct.

Q. And then just beyond that flooring there was a plain wooden flooring, isn't that correct, the old floor? A. Well, I couldn't just tell you, because I went down and I was so dazed I was hurt and in pain, and they took me upstairs and that is all I know.

30 Q. But there was not anybody working around there at the time on either the new floor or the old floor? A. No one.

Q. You are quite positive of that? A. I am positive of that.

Q. But, on the contrary, at this particular point there were counters with goods on them and doing the ordinary business of the store? A. Yes, sir.

Cross examination by Mr. Broadhurst:

40 Q. Mrs. Ely, I wonder if you could draw for us a little diagram there on a piece of paper or on this

Annie E. Ely, cross.

blackboard showing us the aisles, and so forth? Do you think you could? A. I will try.

Q. Well, if you will. A. (Witness leaves stand and draws diagram).

Q. That will represent the first floor of the store and Mr. Kent has put in the name so we get the relative terms. This is Broad Street, and Halsey Street would be at the top. This "I" shaped strip, what is that, a counter or an aisle? A. That is a counter, this is the aisle.

10

Q. Where? A. This is the counter (indicating).

Q. This counter was L-shaped? A. Yes.

Q. It was an L-shaped counter with the foot of the L toward the front of the store? A. Now, then, you have also marked another object in the diagram. A. That was a table.

20

Q. Then the aisle that you referred to as walking down, is that the space between this L-shaped counter and the table? A. Right.

Q. About how wide, if you can tell us, was the aisle between this L-shaped counter and the table? How wide a space? A. About two feet as you pass I should judge by going sideways. It would not be enough for ordinary people to pass shoulder to shoulder.

30

Q. You are speaking about the space between the table and the counter? You say that would not be wide enough for two people to pass without touching? A. Yes.

Q. So that the space between the L-shaped counter and the table, was that marbleoid or wood? A. Marble.

Q. Now, then, this counter had what on it? What type of goods? A. Neckwear.

Q. Suppose I mark that n w for neckwear. And the table had what? A. The table had neckwear, too.

40

Annie E. Ely, cross.

Q. Now, as you come down from the back toward the front of the store before the accident happened, do I understand that you walked down the aisle so as to come between this L-shaped counter and the table? A. Yes.

10 Q. And was it at the counter or the table you looked at the neckwear? A. I was looking at the table.

Q. Was that a long table or not? A. It was not as long as the counter.

Q. Well, would it be as long as the table right in front of you or another? A. Well, I should judge almost as long as this table (indicating).

20 Mr. Broadhurst: That would be perhaps five feet, Mr. Kent?

Mr. Kent: Yes.

Q. And did the L-shaped counter come down nearer the front of the store, further than the end of the table? A. Just space enough just to walk around.

Q. I think I see what you mean now. You mean that the space between the end of the L-shaped counter and the space in here was wide enough (indicating). A. Only room enough for one there.

30 Q. Now, this aisle, as you came down there to look at the neckwear, you then turned to your left, I take it, to go around the end of that table? A. Yes.

Q. Now, did the aisle continue, after making a turn, down straight to the front of the store? A. Down to the front, straight.

40 Q. In other words, this main aisle took a turn to the left around the end of that table, and you would then turn again to the right to go straight down to the street? A. Yes.

Annie E. Ely, cross.

Q. Where was it with reference to your making the turn that you fell? Had you started to walk after you turned to the left? A. I looked at something on the table and turned around at the end of the table and that is where I fell.

Q. Now, was the balance of the aisle going to the front of the store marble or wood? A. That was wood. 10

Q. So that the situation then was that this marble came down to a point near the end of that table and then stopped? A. Yes.

Q. And it was when you made your turn to the left that you stepped off the marbleoid onto the wood flooring and fell? A. Yes.

Q. Down in the front here (indicating) do you recall whether there were counters in the front? A. There was. 20

Q. But I suppose you don't remember exactly? A. I don't remember because they took me back to the elevator and upstairs.

Q. Do you remember when you were examining the neckwear on this table whether you were standing in the space between the side of the table and the side of this counter, or were you examining it at the end of the table? A. The side. 30

Q. And can you give us any idea about how far on the side from the end you were as you stood there examining the goods? A. The middle of the table.

Q. Then, after you got through examining them, you then walked toward the front of the store and when you came to this point (indicating) you made a left-hand turn? A. Yes.

Q. Have you any idea about how close to the end of that table you were when you made your left-hand turn? In other words, as you came down 40

Annie E. Ely, cross.

this way (indicating) after looking at the goods here you came down and made your turn. Can you give us any idea about how far from the edge of this table you were? A. I came right around the end of it.

10 Q. Now, can you give us any idea about how far you walked from this side of the table where you had been examining the goods, how far you had walked to the left when you fell? A. I had just walked about two steps when down I went.

Q. Now, did you examine the place where you fell after accident happened? Did you look at the place where you had fallen? A. No, I did not. I felt too badly.

20 Q. But you did know it was wood? A. I know it was wood, yes.

Q. But you did not examine it in detail so as to be able to describe it to us? A. No.

Q. Did you observe it close enough to be able to tell us how wide the marble floor was above the wood flooring at the place where it happened? A. Well, I should judge it was about two inches above, about like that that I went down.

30 Q. Do you give us that estimate from the manner in which you fell or from your actual observation at some time subsequent? Do you understand what I mean? You say you judge the distance was about two inches? A. Yes.

Q. Well, isn't that your judgment from the manner in which you fell at the time? A. Yes.

Q. Not from observation that you made after the accident? A. I did not see it after the accident.

40 Q. And by that you mean you were disturbed from your injuries? A. I certainly was.

Q. And you say that the place where you fell—

Annie E. Ely, cross.

I think you said the end of this table—you say the end of this table was about as far from the end of this table to you from the entrance of the door?

A. I should judge so. It might be a little farther.

Q. About how far—I withdraw that question. When you had come down from the second floor of the store to the ground floor, how did you descend? By the elevator? A. Yes.

10

Q. And that elevator would bring you where, with reference to these counters? Near them? A. No, over to the right.

Q. To the north? A. Yes.

Q. You came down on the side of the building? A. Yes.

Q. And in order to get there you would walk south over towards this aisle? A. I went right straight to the back of the store.

20

Q. Back along the side of the building? A. Over to the other side.

Q. And how did you get back there? Did you walk around, or did you cut across? A. I cut across the store.

Q. When you came across from the elevator to go to the southwest corner of the building, when you came along, did you use this aisle that had been covered with marbleoid to get to that southwest corner? A. I did not use that aisle. I went right directly back.

30

Q. And when you walked over the north side of the building to that southwest corner, you had to cross the aisle in which this marble was laid? A. Yes.

Q. Now, when you walked across at that time you observed the marbleoid, didn't you? A. Yes.

Q. And you observed that you had to step up

40

Annie E. Ely, cross.

from the wooden floor? A. No, from the elevator that I came down there was no wooden floor.

Q. What was at the elevator? A. The marbleoid, and I walked right along until I got to the back.

10 Q. In other words, there was marbleoid from the elevator to this aisle and all the way back? A. No; they had some ropes at the back where you had to go around.

Q. And you observed they were working laying this floor in the back? A. Yes.

Q. At some point on your trip from the north side of the building to the southwest corner, you had to step off the marble or onto the floor, didn't you? A. Yes.

20 The Court: This place where you fell, that did not have marbleoid on it?

The Witness: No.

The Court: That was wood?

The Witness: Wood.

The Court: And that was below the marble?

The Witness: Yes, sir.

The Court: You saw it?

The Witness: Yes, sir.

30 Q. What kind of day was it? A. What kind of day was it?

Q. Yes. A. It was a fine day.

Q. And it was light, was it? A. Yes.

Mr. Kent: You might get this in. The accident happened about eleven o'clock.

Mr. Broadhurst: She said so.

40 Q. It was a bright, clear day, and things were light in there? A. Yes, sir.

Annie E. Ely, redirect.

Redirect examination by Mr. Kent:

Q. Were you walking alone down this aisle, or were there others in that aisle? A. There was not no one there just at that time, but someone came after me.

10

Mr. Broadhurst: I object to what happened to them.

Q. When you fell at that point, was there any other person around you at the time you fell? A. Well, there were other persons around in the store.

The Court: When you fell?

The Witness: Yes.

20

Q. Who was there? A. I don't know, but they were customers in the store.

Q. As you were coming down here, down this aisle (indicating), toward the place where you fell, were there any other people walking down with you? A. No, there was one just back of me.

Q. You say there was a person behind you? A. Yes.

Q. When you fell, what happened to that person?

30

Mr. Broadhurst: I object.

The Court: The objection will be sustained.

Q. How close to you was that person when you fell? How many feet from you was that other person? A. Well, as I went down—

The Court: How many feet away?

Q. Tell us how many feet away that other person was when you fell. A. She was behind me. I could not tell you how many feet.

40

Annie E. Ely, redirect.

The Court: Close to you?

The Witness: Close, yes.

Mr. Kent: Does your Honor object to my showing what happened to that other person?

10 The Court: Yes. This is not a nuisance case, this is a negligence case.

Mr. Broadhurst: Simultaneous events would not have any bearing on it.

The Court: That is not the purpose. It is to show a dangerous condition.

Mr. Kent: I pleaded it, and I think I have the facts to prove it.

20 The Court: That is not nuisance. You are referring to paragraph eleven, and you start out and say, "The defendants were negligent—"

Mr. Kent: It is our common practice to plead nuisance. That was my intention.

The Court: You allege that the work was improperly done.

Mr. Kent: My purpose is that that condition was not only dangerous to Mrs. Ely, who was hurt, but to other persons.

30 The Court: That might be if you were basing your case upon a charge of nuisance.

Mr. Kent: I say I am.

The Court: I say you are not. I sustain your objection.

Q. You were telling us, Mrs. Ely, of the depression where you stepped off. You say that the part where you fell was a wooden floor? A. Yes.

40 Q. Are you sure it was just plain wooden flooring, or is that the general description? A. I can't say.

Annie E. Ely, redirect.

Mr. Broadhurst: I object to the question, that is, the manner in which it is framed. It starts out with the statement that she had testified to some depression.

Mr. Kent: I withdraw the question.

The Court: Are you sure of the condition there, as to the place where you say it was wooden? Are you sure of that? 10

The Witness: I am sure it was a wooden floor. It was not the marbleoid.

The Court: Which you stepped into?

The Witness: Yes.

Mr. Kent: The answers to the interrogatories, which I shall soon read, coming from the mouths of both defendants state differently. 20

The Court: I call your attention to the fact that I asked her if that was wood where she fell, and she said yes.

Mr. Kent: She had probably been misled. Where she was walking was marbleoid. Where she stepped down was not marbleoid, and the answer states that there was wooden flooring underneath, and they were working there, and there was cement on top of the wooden flooring, but not yet the marbleoid. 30

The Court: Tell us whatever you observed about this place.

The Witness: I tell you just when I fell I went right off the marble down onto this wooden floor.

Q. Did you fall on plain wooden flooring, or was there something other than wooden flooring that you fell on, if you know? A. I don't know just what I fell on. 40

Annie E. Ely, redirect.

The Court: It was not marbleoid?

The Witness: It was not marbleoid.

Q. Was it plain wooden flooring or something else, if you know? A. I don't know.

10

Mr. Kent: I would like to read these interrogatories to the jury.

Mr. Moser: I object to the reading of any interrogatories on the ground the Marbleoid Company are not a party to them.

Mr. Broadhurst: I assume that is not so.

20

The Court: They will be received only with the understanding that any interrogatories, or any admissions made by Hahne & Company would not be at all binding and could not be considered by you in deciding any question of liability against the Marbleoid Company. And the same would apply to any interrogatories answered by the Marbleoid Company against Hahne & Company. You see, they could not admit a co-defendant's case out of court. You cannot consider any admission made by one when it comes to consider the case of the other insofar as these interrogatories which are now proposed.

30

Mr. Kent: May I explain to the jury under our practice Mrs. Ely has a right to exercise that right by asking certain questions of both companies, which those companies have answered under oath?

Mr. Broadhurst: Which interrogatories are you going to read?

40

Mr. Kent: The questions directed to the Marbleoid Company.

Mr. Kent: (Reading interrogatories to jury.)

Annie E. Ely, redirect.

“Q. What is the general business of this defendant? A. General contractors and manufacturers of floor covering.

“Q. On or about August 22nd, 1927, was that defendant doing any work in a department store commonly known as Hahne & Company at 609 Broad Street, Newark? A. Yes.

10

“Q. If the answer is in the affirmative, please state

“(a) The name of the person, firm or corporation for whom this work was being done.

“A. Hahne & Company.

“(b) Was Hahne & Company, a corporation, and a co-defendant herein the other contracting party?

20

“A. Yes.

“(c) Was the said work done pursuant to a written or oral agreement?

“A. Written.

“(d) If by written contract annex a copy of the same.”

I have subpoenaed the contract and I am informed by the attorneys they are present in court.

30

Mr. Moser: I did not inform you they would be used. I still contend they are immaterial.

The Court: They would be material on the question of whether or not it is an independent contractor.

Mr. Kent: (Continuing reading to jury.)

“(e) If oral, state the substance of the agreement, setting forth the names of the

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Annie E. Ely, redirect.

parties, the manner in which the work was being done; the location in the store of said work; and any particular setting forth the nature of the work being done at or near the aisles leading to the entrance of the store.”

10

The answers are in two parts.

“A. They were laying three-quarter inch marbleoid travertine terrazzo.”

The second answer is:

“A. On the first floor of Hahne & Company.

“Q. What work, if any, was this defendant, the Marbleoid Company, doing in said store on or about August 22nd, 1927, being the date of the alleged accident to the plaintiff Annie E. Ely? A. Laying the floor on the main floor of Hahne & Company’s store, Newark, New Jersey.

20

“Q. State whether any work was being done on the main floor at or near the aisle leading to the north entrance? A. Yes.

“Q. State whether or not any flooring was in the process of being laid at that time. A. Yes.

“Q. Was this defendant (the Marbleoid Company) doing the said work itself or through a sub-contractor? If it was a sub-contractor state the name and address. A. Itself.

30

“Q. Describe the process of tearing up the old floor, laying the foundation for the new floor and laying the new floor. A. A steel wire mesh was first nailed down on the old floor, cement was put over same, and marbleoid was put on top of that. The work was done in sections of two thousand square feet. Said sections were designated daily by Hahne & Company.

40

Annie E. Ely, redirect.

“Q. Describe the work done by this defendant at or near the said entrance at the time and place of the alleged injury to the plaintiff Annie E. Ely. A. Placing new flooring on the old flooring.

“Q. State the size of the said depression, giving the approximate distance—”

10

Mr. Moser: What about number eight?

Mr. Kent: I have a right to take the questions I want, but I see that number eight has to be read in connection with nine, so I will read it.

“Q. Was there a depression from the level of the flooring at the point where the said work was being done? If the answer is in the affirmative state the approximate depth of said depression in terms of inches. A. No.

20

“Q. State the size of the said depression, giving the approximate distance in feet of the width and length. A. Three-quarters of an inch by approximately two thousand square feet in area.”

I am not going to read number ten.

Now, the interrogatories propounded to the defendant Hahne & Company:

“Q. State the name and address of the owner of the department store commonly known as Hahne Department Store, located at 609 Broad Street, Newark, New Jersey, on or about August 22nd, 1927. A. The Associated Drygoods Corporation, 17 East 39th Street, New York City.

30

“Q. Did this defendant (referring to Hahne & Company) own the said store on or about August 22nd, 1927? A. Yes.

“Q. Did this defendant operate, manage and control the said store on said date? If the answer

40

Annie E. Ely, redirect.

is in the negative state the name and address of the person or firm who did. A. Yes.

“Q. On said date was any work being done in the said store with reference to repairing or re-laying of the floor or floors?”

10 (No answer to that.)

“If the answer is in the affirmative state the name and address of the firm doing said work. A. Marbleoid Company.

“Q. State whether or not it was being done by the Marbleoid Company, a corporation? A. Yes.

“Q. The name of the person or firm for whom said work was being done? A. Hahne & Company.

20 “(d) Whether or not it was being done for this defendant (referring to Hahne & Company)?

“A. Yes.

“(e) Was said work done under a written or oral contract?

“A. This defendant refuses to answer this interrogatory as it is not a proper one.”

30 Mr. Broadhurst: I will withdraw the refusal and agree it was done under a written contract. I do not know why it was refused.

Mr. Kent: “(f) If so, annex a copy of the contract.”

Mr. Broadhurst: I will withdraw the refusal and give counsel the original copy if he wants it.

Mr. Kent: “If oral, state the substance, etc.?”

“A. (No answer.)

40 “Q. Was any such work being done on or about August 22nd, 1927, being the date of the alleged

Annie E. Ely, redirect.

accident to the plaintiff Annie E. Ely, at or near the floor leading to the aisle near the north entrance? A. Yes.

“Q. State whether or not any flooring was in the process of being laid at the time? A. Yes.

“Q. Was the co-defendant, the Marbleoid Company, a corporation, doing the said work, or was it being done by a sub-contractor? If by a sub-contractor state the name and address? A. Marbleoid Company.”

10

Mr. Kent: I am not going to read number 9; not going to read number 10; not going to read number 11.

“Q. Give the date when the last bit of the reconstruction work was done on the main floor at or near the north entrance? A. October 27.

20

“Q. Did this defendant Hahne & Company maintain any guard or lookout at the place of the said repair work? If the answer is in the affirmative state the name of said person, where she was standing, and whether she was stationed there at the time of the accident?”

I will repeat the first part of that question.

“Q. Did this defendant maintain any guard or lookout at the place of the said repair work? A. No.

30

“Q. State whether or not first aid treatment was administered to this plaintiff by the said defendant? If the answer is in the affirmative state the nature of said treatment. A. Yes; the usual first aid treatment.”

In regard to the answers to interrogatories with reference to the ownership, oper-

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Motions for Nonsuit.

ation and control of the store by the defendant Hahne & Company—

10 Mr. Broadhurst: We straightened that out. We had some difficulty as to who had the control and ownership. Hahne & Company are operating and controlling it. Hahne & Company is the proper defendant.

Mr. Kent: I now accept the statement of counsel that Hahne & Company at the time of the accident operated and controlled that store.

Mr. Broadhurst: No question about that.

Mr. Kent: The plaintiff rests at this time.

20 Mr. Moser: May I move for a nonsuit on behalf of the defendant Marbleoid Company, on the ground that at the present state of the case there is no evidence of negligence on the part of the Marbleoid Company. The evidence of the plaintiff is that there were no workmen around that portion of the place where she fell. A number of workmen were in the back of the store in another place. They were working, and there was an iron or rope around that particular location. She knew that. There were counters around this particular place, and the Marbleoid Company was not at that particular place where Mrs. Ely fell. I submit there is no evidence in the case of any negligence on the part of the defendant Marbleoid Company.

30

The Court: I deny your motion.

Mr. Moser: May I have an exception?

The Court: Yes.

40

Mr. Broadhurst: On behalf of Hahne & Company I wish to move for a nonsuit on several grounds.

Motions for Nonsuit.

First, on the ground that the testimony produced by the plaintiff discloses that the flooring was being laid by an independent contractor; that the work had not been completed. The answers to the interrogatories show that the work was not completed until October; that any negligence that there might be on the part of the contractor in fixing the difference in the level between the level of the floor on which it was working and the level of the marbleoid would not be chargeable against Hahne & Company, because, they being an independent contractor and there being no proof of any incompetency on their part, and the work still going on, progressing, that that would be their responsibility and not ours.

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20

I also wish to move for a nonsuit on the ground that it seems to me that on the undisputed evidence in the case—even assuming that Hahne & Company could be charged with the condition that existed—assuming that the independent contractor is out—that all that the evidence discloses is that there was a difference in the height of the flooring from the place where she stepped to the place where she fell, of some inches. Now, then, that in the last analysis is nothing more than a type of construction, and it has been held frequently that the defendant is not obligated to have in its store or in its railroad station any particular type of construction. For example, cases in which I have defended the Hudson & Manhattan Railroad Company at the Summit Avenue Tube Station, recovery has been sought due

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Motions for Nonsuit.

to the fact that in building a platform there was such a drop as we have here, and there are several cases in the Court of Appeals, one of which—

10

The Court: This is not a question of construction. It is incompleated construction, as I understand it. The interrogatories disclose that this marbleoid was going to resurface the entire floor.

20

Mr. Broadhurst: Your evidence is up in the air as to just exactly how much of the floor they were to cover. It appears that they had covered a certain strip up to the end of this counter, and that from there on it was floor space. Now it is assumed for the moment that that was going to be the entire job. There is no evidence it was going any further. Assuming that that was the entire job, that we conceded nothing more than that this flooring was to go to a certain point, and there would be stopped, the same as this railing was here.

30

The Court: This is not a case of where the floor was defective.

Mr. Broadhurst: Mr. Kent tried to inject in there was some work going on at that time.

The Court: In answer to my question, she said she fell on the wooden floor.

40

Mr. Broadhurst: Later on, in answer to his question she said she did not know whether she fell on the wooden floor or not. Now, that would get us down to the fact that the defendant's construction is being questioned, and there being no proof of any standard of construction upon which the

Motions for Nonsuit.

Court or the jury can say that this defendant deviated from the standard and therefore was negligent, can we speculate as to whether this was a negligent condition of construction, or was it a careful one? For example, I had a case that went to the Court of Appeals we tried before Judge Cleary, where the skylight upon the top of a roof was attacked on the ground it did not have hinges on it. I contended there that unless there was some proof of the standard of construction the mere fact that the defendant may charge us with the changes to the construction of its flooring or steps in a particular manner, and a person falls, that that does not prove the defendant is negligent, and the Court of Appeals in a number of cases—

The Court: I admit it all, but that is not this case.

(Argued.)

Mr. Broadhurst: I also wish to move for a nonsuit on the ground that under the evidence in the case the plaintiff was guilty of contributory negligence. It was a latent condition which was obvious, and it was daylight, and it was open and obvious to her.

The Court: I deny your motion for the present, reserving the right to reconsider it.

Mr. Broadhurst: So I won't forget, I will note my exception now.

Mr. Moser: The defendant the Marbleoid Company rests.

Joseph W. Bird, direct.

JOSEPH W. BIRD, sworn for the defendant,
Hahne & Company.

Direct examination by Mr. Broadhurst:

10 Q. Mr. Bird, what is your address? A. 550 Pros-
pect, Maplewood.

Q. Are you employed by Hahne & Company?
A. I am.

Q. In what capacity? A. I am the treasurer.

Q. Were you subpoenaed by Mr. Kent in behalf
of the plaintiff to produce the original contract
between the Marbleoid Company and Hahne &
Company, of July 9, 1927? A. I was.

20 Q. By whom is the contract signed on behalf of
the Marbleoid Company? A. By Robert W. Page,
President.

Q. What is the date of the contract? A. July
9th, 1927.

Q. By whom is the contract—

Mr. Kent: Before we go any further I
have not objected. I do not want to lose
my right to object.

The Court: I do not see how you could
object.

30 Mr. Kent: I do not see what bearing this
has at all.

The Court: It has a very material bear-
ing as far as the Court is concerned.

Q. By whom was the contract signed for Hahne
& Company? A. A. J. Jennings, President.

Q. Are you familiar with his signature? A.
I am.

40 Q. How long have you been associated with him
in business? A. Four years.

Mr. Kent: If Mr. Broadhurst states to me

Joseph W. Bird, direct.

this is the contract, I will concede that is the contract.

Mr. Broadhurst: I offer the contract in evidence to show the relationship between Hahne & Company and the contractor. You subpoenaed him to court and I want to prove the relationship existing between the parties. May I state again what this offer is for?

10

The Court: Yes.

Mr. Broadhurst: In order to prove the relationship between Hahne & Company and the Marbleoid Company, in order to show the character of the work to be done and the manner in which it was to be done, and the extent of it.

Mr. Kent: If I view the situation correctly, this is a claim of joint tort against Hahne & Company and Marbleoid Company. Whatever rights either of these parties may have against somebody else other than themselves is certainly not a part of this.

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Mr. Broadhurst: I am not offering the contract for that purpose.

The Court: If he is to prevail upon one of his defenses, namely, independent contractor, he has to show that relationship.

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Mr. Broadhurst: Mr. Kent is worried about certain provisions in the contract which deal with the Marbleoid Company and ourselves. I am not offering it for that purpose.

The Court: If it is in there, that does not dispose of any rights as between the defendants, nor does it prejudice the plaintiff's rights.

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Mr. Kent: If the contract is being offered

Joseph W. Bird, direct.

for that limited purpose, I have no objection.

Mr. Moser: I object to it as immaterial. It is not properly pleaded, and is not proper on the part of the defendant Hahne & Company.

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The Court: Why exclude it, if you yourself admit that was being done?

Mr. Moser: Not at this particular place where the accident happened.

The Court: That is one of the reasons it is important to me, and the reason Hahne & Company says it was a subcontractor. It will be admitted.

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Mr. Moser: May I have an exception?

The Court: Yes.

(Received and marked in evidence, Exhibit D-1.)

The Court: This agreement will be admitted except paragraph—the last three paragraphs on the second page, and the jury will disregard them entirely.

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Mr. Kent: May I respectfully except to your Honor's ruling in that respect on the ground that those paragraphs referred to may affect the degree of care and responsibility exercised by the respective parties, in so far as the duty that was owed to the plaintiff.

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The Court: Well, we will admit the whole contract, with the understanding, gentlemen, that these three paragraphs I have mentioned—page 2, the last three paragraphs, will have no bearing in this case so far as affecting the question of the rights as between these parties as to who was to in-

Joseph W. Bird, cross.

dennify. That is not the question here, as to who is responsible as between them for damages. The purpose it is offered for, as you will recall, is to show the relationship between these parties as to whether they were independent contractors, and also to show the work which was to be done, and that is the only purpose that the court has admitted it for. 10

Mr. Kent: May I have an exception?

The Court: Yes, except that I am allowing this in to assist you. Of course you are entitled to an exception.

Mr. Kent: I want to have it if there is any rule in effect—

The Court: My only point is for the purpose of this defense of independent contractor, and also of showing the scope of the work to be done by the Marbleoid Company, and the manner, of course, in which the work was to be done. 20

I understand there is no objection to the fact that this was the contract?

Mr. Kent: No.

The Court: Therefore proof of the contract is dispensed with. 30

Cross examination by Mr. Moser:

Q. What position did you hold with Hahne & Company in 1927? A. The same position, as treasurer.

Q. And were you there when this work was being done? A. I was.

Q. Now, this work that was being done, or was to be done, did not cover the entire surface of the floor, did it? A. It did not. 40

Joseph W. Bird, cross.

Q. In other words, it covered the aisle and up to and including the counter, so that between the counters where your employees worked there was plain wooden flooring? A. That is correct.

10 The Court: I think the contract clearly shows that.

Q. Do you know where Mrs. Ely fell? A. I do not.

Mr. Broadhurst: I do not think that is proper cross examination. This witness was not brought as an eye-witness to it.

The Court: I think that is so.

20 Q. Now, did you allot to the Marbleoid Company the two thousand feet of space? A. Not I personally, no.

Q. Well, did Hahne & Company? A. Hahne & Company did, yes.

Q. Within your knowledge? A. Yes.

Q. On the day in question the Marbleoid Company were working on this two thousand feet that was allotted to them in the store?

30 Mr. Broadhurst: I object to that as not proper cross examination.

The Court: I sustain your objection.

By Mr. Kent:

Q. Were you present in the store on the day of the accident?

Mr. Broadhurst: I object.

The Court: I sustain the objection. It is not proper cross examination.

40 Q. Referring to the terms of the contract, do you know of your own knowledge that the method of

Joseph W. Bird, cross.

laying the floor, that is, the marbleoid floor, was to lay a wire mesh, going over the wooden floor, and then it was cemented, or concreted.

Mr. Broadhurst: Objected to.

The Court: I sustain the objection. The contract speaks for itself. 10

Mr. Kent: I now offer in evidence, if your Honor please, that portion of the contract which did not go into evidence.

The Court: It is all in. I admitted it all. It is all in evidence, with the limitations I put on it, and I will also tell the jury not to pay any attention as to the agreement between these parties as to settlement.

Mr. Kent: Then I offer it for a general purpose. 20

Mr. Broadhurst: I object.

The Court: Sustain the objection.

Mr. Kent: May I have an exception?

The Court: Yes.

Mr. Broadhurst: Hahne & Company rest.

Recess until 2 P. M.

AFTER RECESS, 2 P. M. 30

Mr. Moser: Before we go into the medical testimony, Miss Woldsen was on the stand and Mr. Broadhurst gave us the impression he was going to recall her. Since he has not recalled her, I would like to reopen. Mr. Broadhurst did not examine her because the cross examination was objected to and I believe your Honor sustained it.

Mr. Kent: For what purpose do you propose to recall her? 40

Agnes Woldsen, direct-cross.

Mr. Moser: To show the situation as it stands there at the present time.

The Court: If there is no objection you may reopen your case.

10 (There being no objection the case was reopened.)

AGNES WOLDSSEN, recalled.

Direct examination by Mr. Moser:

Q. Can you tell us the condition of the floor with reference to the alleged accident at the present time? What is there now? A. In the same condition that there was when Mrs. Ely fell. The counter has been extended down to the corner where Mrs. Ely fell.

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Cross examination by Mr. Kent:

Q. At the time of the accident were you the girl that was assigned to the section where the accident happened?

Mr. Broadhurst: I object to that as not proper cross examination.

30 The Court: I think that is true. I sustain the objection. The direct examination was only pointed to a condition existing after this accident occurred.

Mr. Kent: That is all.

Mr. Moser: In behalf of the Marbleoid Company I move for a direction of a verdict on the ground that now it is fully established that the Marbleoid Company is not guilty of any negligence. Under the contract that is in evidence it was to cover the whole space. It is fully estab-

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Case.

lished that there were no men of the Marbleoid Company working at the time that this accident happened; that immediately after, or sometime after this accident happened, the counter was moved up; that where this accident happened was not in fact aisle space, so that this accident happened at a point not covered by this contract, because the papers in evidence show that the floor was only partially covered with aisle space. Behind the counters, where the counter is at the present time is just a plain wooden flooring that this person is alleged to have fallen on.

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The Marbleoid Company had finished and completed its contract with reference to that area which was assigned to them under the contract, and the undisputed evidence in the case is that at the time that this accident happened the Marbleoid employees were working in another part of the building or had been on the same aisle in the back of the store at or near the Halsey Street entrance. That is the plaintiff's testimony, I believe, and it is also the testimony of Mr. Bird.

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Then, on the ground that this plaintiff was guilty of contributory negligence and that neither one of these defendants violated any duty that they owed to this plaintiff. Here she was walking on the floor there, and we owed her no more than just what we did give to her at that time.

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The Court: The difficulty with your motion is that it presents itself to the court for ruling as to whether or not it is a court question. It is imperative I leave it to the jury for the very reason that your contention that this was not an aisle is disputed by the plaintiff, who says that she continued on an aisle, made a turn and continued on an aisle out to the door.

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Case.

Mr. Moser: I merely mentioned the aisle feature in accordance with this contract to establish that our work called for aisle space, and that in fact now that point where Mrs. Ely fell is—

10 The Court: It would make no difference what it is now, the question is what it was then. Under the contract to which you refer the contractor was to provide and maintain sufficient protection for its work at all times until finally approved and accepted, and I find no evidence making it a court question that this work had been completed and accepted by the owner.

20 Mr. Moser: There is no evidence that it was not accepted by the company. The only thing before your Honor is that we had moved on from that particular point to another place in that building and were doing our work there.

The Court: If you had left a portion which was yet to be done, I think that is for the jury to say.

Mr. Moser: There is no evidence that we had anything to do. There is evidence today that it is in exactly the same condition now as it was then.

30 The Court: It does not require any argument. The contract was to do the aisles of this store. If there was part of an aisle you had not done and there was something you had to do which was not finished, that is a jury question.

I might say it is a jury question as to whether or not you had completed the work in accordance with the contract and whether or not this was not an aisle to be covered by you, and whether by leaving it as you did you exercised reasonable care for customers who had a right to use the place as it was.

40 Mr. Moser: Miss Woldsen said the condition today—

Case.

The Court: I am not interested in what the condition is today. The question is what was it at the time of the accident?

Mr. Moser: That goes to establish that our contract was absolutely finished.

The Court: But what was to prevent Hahne & Company moving over the counter from the place where this woman fell? According to her testimony it was part of an aisle. According to your inference, but no testimony, it was not part of an aisle. That is, if I understand your position. So, I will deny your motion and allow you an exception. 10

Mr. Moser: I respectfully ask an exception.

The Court: You may have it. 20

Mr. Broadhurst: I desire to move for a direction of the verdict on behalf of Hahne & Company first, on the ground that this work was being performed by a sub-contractor. There is no evidence Hahne & Company in anywise exercised any control over the work or that the contractor was incompetent. 20

It seems to me under the case of Sarno *against* the Gulf Refining Company, and that line, that the defendant would not be responsible for any negligent act of the Marbleoid Company in leaving the aisle—if there is evidence of it—in an unfinished or incompleated condition. 30

Secondly, on the ground there is no evidence of any negligence on the part of Hahne & Company in the manner in which its floor was laid, and that involves the principle which I argued in my motion for a nonsuit, whether or not one part of the floor was raised slightly above the other. Unless there is some proof that that was a violation of some standard, it would not constitute negligence. 40

Case.

Thirdly, on the ground that the evidence in this case is the plaintiff walked in broad daylight along the floor and failing to observe a mere drop of an inch or an inch and a half in the floor, the fall was due to her own negligence.

10 I might say so far as negligence is concerned, we have the same situation as in the court house at the entrance to the building where we have, for instance, rubber mats put down an inch or three-quarters of an inch above the flagging. A person falling by stepping from one to the other, unless there was some proof that there was a violation of some standard of construction, it seems to me, would be for the jury to say whether or not the particular construction was negligent.

20 The Court: The only thing, Mr. Kent, in this case is whether or not there is proof here that this condition had existed long enough to justify the inference the storekeeper knew of that condition.

Mr. Kent: I think the proof shows, and that the case still resolves itself mainly around the answers to the interrogatories. The only inference you can draw from those answers which are in evidence is that they were there for some time, and the inference so far as construction is concerned—

30 The Court: Just show me wherein you refer to the interrogatories.

Mr. Kent (quoting from interrogatories): "On said date was any work being done in said store with reference to repairing or relaying floor or floors?"

The answer is: "Yes, done by the Marbleoid Company."

40 "Was any such work being done on or about August 22nd, 1927, being the date of the alleged accident?"

Case.

The answer is: "Yes."

"State whether or not any work was being done on the main floor leading to the north entrance?"

The answer is: "Yes."

"State whether or not new flooring was in the process of being laid at the time?" 10

The answer is: "Yes."

"Give the date when the last bit of reconstruction work was done at or near the main entrance."

The answer is: "October, 1927."

That in conjunction with the contract now in evidence, and the fact that this woman was an invitee; she was there shopping, and had been since eleven o'clock in the morning; that the accident happened in the line of her walk near a point where she could not see unless she looked around at right angles, certainly in my mind indicates there is enough proof as to whether it becomes a question for the jury. 20

The Court: That is not the point. How long did it remain there, and whether the defendant Hahne & Company exercised reasonable care under the circumstances? Hahne & Company's failure to exercise reasonable care would hinge on whether the condition existed there sufficiently long to put them on notice. 30

Mr. Kent: The pleadings show that.

The Court: Of course, the pleadings have now been offered in evidence.

Mr. Broadhurst: What part of the pleadings does Mr. Kent refer to that deals with admission and notice?

Mr. Kent: The sixth paragraph: "On or about August 22nd, 1927, the defendant Marbleoid Company was engaged in constructing or repairing part of the main floor in the building." 40

Case.

The Court: Apparently number seven: "At said time the defendant Hahne & Company was supervising and directing"—that was amended and that is now a question for the jury.

10 The pleadings have been offered in evidence with the amendment to the effect that you now deny it was under your supervision and control. It was offered for the purpose of showing that there was supervision and control, and, of course, of that there was later a denial. It is a jury question whether or not there was supervision and control at that time.

20 The Court: In disposing of your motion, Mr. Broadhurst, I have in mind the rule respecting independent contractors. I do not have in mind any precedents in this State directly to the effect that the independent contractor rule will not take a storekeeper out of the operation of the rule that he must exercise reasonable care, where a customer is concerned, to have his place reasonably safe. But by analogy you may go to the landlord and tenant case where a stairway is used in common, and, in order that this may be properly presented
30 in the event this case should go up on appeal, I think that the reasoning as used in that case is applicable to the case of a storekeeper. The landlord and tenant case I refer to is *Hicks v. Smith*, in 158 Appellate Division 299, 143 New York Supplement 136, where it is said that the duty which the landlord owed to his tenant in respect to the stairway was a duty that could not be delegated. See also *Hussey v. Long Dock R. Co.*, 126 Atl. Rep. 314.

40 I have in mind also a line of cases in this

Case.

State starting with the case of *Bush against Margolies*, which was a sidewalk case where an independent contractor was doing work on the sidewalk, and where it was held that it not being a nuisance in itself, the owner of the property was not responsible for the negligent performance of the work. Also the case of *Mann against Max*, which was another sidewalk case, where a scaffold had been put up on the sidewalk in the process of the building. Also the *Sarnoff case*, 124 *Atlantic Reporter*. I have in mind all those cases.

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I make a distinction for this reason:

In the cases last mentioned there was no duty on the part of the defendant, irrespective of the particular thing which was being done, to keep the sidewalk in a reasonably safe condition for persons who might travel along it; but there is a duty expressly cast upon a storekeeper as well as on a landlord, where there is a common passageway, and more particularly where there is an implied invitation for customers to come in and use the store, and for that duty with respect to the condition—not in the negligent performance of the work, but in that condition—if there is any negligence, the storekeeper would be responsible. That is one of the reasons I am denying this motion, the duty cannot be delegated.

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I quite agree that if this was a question of type of construction there is no evidence to justify me in leaving to the jury the question as to whether it was proper construction, but I am not leaving that question to them. The question is as to whether or not this was part of an incompleated construction, after which there was to be a smooth-surfaced floor. In other words, whether or not there was construction going on, or whether the

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Case.

10 thing which it is claimed caused the damage was
a permanent condition or intended to be a per-
manent condition. If there had been a short step
there, or there had been a graduated incline or
decline in the floor, whether or not that was proper
construction would require some proof as to how
other stairs were constructed and whether or not
that was proper construction. But in this case
there is evidence which will require me to leave
it with the jury to say whether or not this was part
of the work which was yet uncompleted, and that
is the reason I deny your motion on that phase of
it. Upon the question of contributory negligence,
having in mind a line of cases culminating in the
one where an individual went up and looked in a
20 store window and paid no attention to an open
alley-way that was underneath, I think the ques-
tion is for the jury.

I have gone to such length in order that my rea-
sons for denying the motion may be made more
clear.

I deny your motion and will allow you an ex-
ception.

30 Mr. Broadhurst: Your Honor will allow me an
exception?

The Court: Yes.

(Summation of counsel.)

The Court's Charge.

The Court thereupon charged the jury as follows:

On the morning of August 22nd, 1927, Annie E. Ely was in the store of Hahne & Company, in Newark, and she claims that as she was walking along an aisle on the main floor of that store she fell because of improper flooring there, in that she claims that there had been a linoleum, so to speak, laid on a portion of this flooring, and that the remainder of the floor had been left uncovered, and that in stepping from one level to another she fell, and she charges that Hahne & Company were negligent. She further charges that the contractor who was doing this work, namely, the Marbleoid Company, was also negligent. She has brought this suit against both of these companies as defendants.

Now, gentlemen, the mere fact, if it is a fact, that she fell on the floor of Hahne & Company's store in Newark, standing alone by itself, is not of itself alone negligence, and it would not justify you in bringing in a verdict in favor of the plaintiff here and against either one of these defendants. The plaintiff has the burden first, of establishing to your satisfaction by a fair preponderance of the evidence in this case that these defendants, or one of these defendants, was negligent with respect to some duty which that defendant owed to this plaintiff, and that such negligence was a proximate cause of the accident. Failing to prove those two elements as against either one of these defendants would entitle such defendant to a verdict against the plaintiff of no cause of action.

Gentlemen, you see, the important thing in this case to decide—aside from the manner in which this accident happened—is whether or not there

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The Court's Charge.

was any duty owing to this plaintiff by the defendants, or either of them.

10 Let us take up first the case of Hahne & Company. It is conceded that Hahne & Company owned this store where this accident is said to have occurred, and the normal obligation in such a case is—where an invitation, express or implied, is extended to patrons to use portions of a store—that a storekeeper is under a duty to use reasonable care to see that those portions of the store are rendered reasonably safe for the purposes for which patrons were invited to use them.

20 In this case it appears that there was an independent contractor engaged to lay down this resurfacing. The contract is before you and may be read by you, but the important thing in the case to decide first is where this woman fell. Did she fall in an aisle, as she claims she did? You see, she cannot put the place of her injury at some other point than is pleaded. She claims she fell while being in an aisle. Now, if she did, it is important for you to determine whether or not this condition which existed there was a permanent condition in the sense as to whether or not it was a finished product of construction. Is that the way
30 the floor was to be left? Were there to be two levels of floor? Because, if there were to be two levels of floor, there has been no evidence offered here to show that this was an improper kind of a floor to have in this store. But that is not the charge here. The charge made by this plaintiff is that there was work progressing in the store at the time to resurface, if not the whole floor at least the aisles of this store, and if that is a fact, gentlemen, and you find it to be a fact, then you may
40 proceed to consider what duty there was owing to

The Court's Charge.

this plaintiff under the rule that I am about to give you, as to whether or not there was negligence.

If it is a fact that a portion of the floor had been resurfaced by the Marbleoid Company, and that it was the intention under their agreement to come on and resurface that portion where it is claimed this woman fell, so as to make a level job all along there—if that was not a completed construction—then this question that I referred to before as to whether or not that was to be the completed condition, thereby raising the question whether or not it was the proper method of construction, would not apply. Then, gentlemen, under such circumstances, in view of the fact that it is conceded that Hahne & Company was doing business on this main floor at the time that this accident occurred, if you find this woman was invited to be where she was when she said she fell—and it would not have to be an express invitation—you understand that persons who come into stores where goods are displayed for sale are called in there either by implied or express invitation—and if this woman was in a place where she was invited to be, it would make no difference whether the Marbleoid Company was operating under contract or not. In the case of *Hussey against The Long Dock R. Co.*, 126 Atlantic Reporter 314, the Court said: "The duty with respect to a condition where an invitation is extended cannot be delegated to an independent contractor." While the opinion to which I allude was one where it was a question, as I recall it now, of landlord and tenant, the same rule would apply between a storekeeper and his patrons. So, the duty under such circumstances would be for Hahne & Company to use reasonable care to see that the part of the store where this woman fell, if she was

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The Court's Charge.

invited to be where she was, either expressly or impliedly, was reasonably safe for the purposes for which she was invited to use that particular portion of the store, and if the premises were reasonably safe for that purpose, and reasonable care had been exercised in that respect, there would be no negligence at all. But, gentlemen, if you should find that this woman was invited—either expressly or impliedly—to be where she was on this occasion by Hahne & Company—remembering the duty rests upon the plaintiff of proving negligence against this defendant, and of proving she was invited to be where she was on this occasion, and also that she fell there because of the negligence of this particular defendant, and furthermore, that it was an uncompleted construction—proving those things to your satisfaction by a fair preponderance of the evidence—if you find all those things to be present, you cannot impose liability upon this defendant unless and until it has been proven to your satisfaction by a fair preponderance of the evidence that that condition, if there was an unsafe condition there at that time, had existed for so long a time as Hahne & Company in the exercise of reasonable care should have known of it, or that they had notice of it. In other words, if this condition had immediately arisen just before this accident so that in the exercise of reasonable care Hahne & Company could not have known of it, why, you see, it would be unfair to impose liability upon them if they had not had an opportunity of knowing of the condition and remedying it.

If you find that those conditions are present, then you will have to determine whether or not under those conditions Hahne & Company was negligent. If Hahne & Company was negligent,

The Court's Charge.

then you will have to determine whether or not such negligence was a proximate cause of the accident. By proximate cause we mean that cause which naturally and probably led up to and might have been expected to bring about the thing that happened. It is the moving, efficient cause of the accident without which the accident would not have happened. If it should turn out that this woman was where the duty to which I have alluded arose, and that this defendant was negligent with respect to that duty, but that nevertheless, such negligence was not a proximate cause of this woman's fall and injury, then again you should bring in a verdict in favor of the defendant Hahne & Company, and against this plaintiff, a verdict of no cause of action.

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But, gentlemen, if you find that Hahne & Company was negligent, that its negligence was a proximate cause of the accident, then you will have to proceed to consider whether or not Mrs. Ely was guilty of contributory negligence. Now, before I take that up, I am going to deal with the case of the Marbleoid Company.

The Marbleoid Company was laying the floor, resurfacing the floor in the store, and the contract is before you which will give you the conditions under which they were to do this work. If it turns out in this case that the Marbleoid Company had completed its contract with respect to the place where this accident occurred, and it had been accepted by this other defendant here so that it could be said that the Marbleoid Company was through with their work there and Hahne & Company had taken hold there, then, of course, there would be no liability for the work that had been done prior and which had been accepted by Hahne & Com-

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The Court's Charge.

pany and had become part of their general store plan. But, if, on the other hand, you find that that was not the situation, if you find that where this woman fell the Marbleoid Company was to come back and complete beyond where they had ceased
10 work so as to continue on this aisle—if it was an aisle where this woman fell—and that was all they were required to resurface, then, gentlemen, they were required to leave their work in such condition as to render it reasonably safe for persons who might have the right to walk where this woman was walking. They were obliged to use reasonable care to see that the condition which they left there was reasonably safe for the patrons of that store as they walked along where this
20 woman walked, if she had a right to be where she said she was.

If the Marbleoid Company was not negligent, of course, they should have a verdict against the plaintiff, a verdict of no cause of action, and the duty again rests upon the plaintiff of proving negligence as against this defendant, and of proving that such negligence was a proximate cause of the accident by a fair preponderance of the evidence.
30 If this defendant, the Marbleoid Company, was negligent, you will have to take up and consider also whether or not such negligence was a proximate cause of the accident, because if it was not, under the rule I gave you, with respect to Hahne & Company, there could be no verdict against the Marbleoid Company, and you would find in its favor and against the plaintiff a verdict of no cause of action. If you reach the point, gentlemen, in this case, where you find that one or both of these
40 defendants were negligent, then you will have to determine whether or not the plaintiff was guilty

The Court's Charge.

of contributory negligence. Now, the duty rests upon the defendants, since they raise that as a defense, of proving contributory negligence to your satisfaction by a fair preponderance of the evidence in this case. I do not mean just by the witnesses produced on the part of the defendant, but from all of the evidence in the case, considering the plaintiff's testimony, the testimony of her witnesses, and the testimony of the defendants.

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Gentlemen, this woman, although she may have been in that store as a customer of Hahne & Company, was required to use reasonable care for her own safety, and you have to determine from the testimony here what the conditions were under which she walked along that floor. Did she act and did she conduct herself as a reasonably prudent person would have done because—and it is important—if she did not and she thereby contributed in any degree to the happening of this accident, that would bar a recovery by her and your verdict would have to be in favor of the defendants and against the plaintiff a verdict of no cause of action. It would make no difference if you find one or both of these defendants were at the same time negligent if the plaintiff Mrs. Ely was also negligent, even though in the least degree, that would bar a recovery by her and by her husband also, against one or both of these defendants, as the case might be, and your verdict would be for the defendant, or for such defendant as you find there was contributory negligence applying, and against the plaintiff a verdict of no cause of action.

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Gentlemen, by way of résumé, let me say to you that the duty rests upon the plaintiff here of proving negligence on the part of one or both of these defendants, of proving it by a fair preponderance

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The Court's Charge.

of the evidence, and within the charge of negligence alleged in the complaint. It is charged in the complaint in the 11th paragraph "that the defendant was negligent in that the work was being improperly done; no guard, device, or other contrivance was provided to protect persons nearby from falling into the opening or excavation; said work was being done at a time when the store was crowded with persons so that the same constituted a menace to the life and limb of all persons in the vicinity, and especially to this plaintiff."

"The defendant failed to give sound, guard or warning to the plaintiff of the danger at hand, well knowing of the presence of the plaintiff at that place; the defendants or either of them, provided a young lady whose duty it was to guard persons at that particular point from falling into the excavation and carelessly and unlawfully caused, allowed and permitted this young lady to leave this place where she was stationed, so that as a result thereof the plaintiff was caused to fall into the excavation."

That is the whole charge of negligence, and you will easily see, gentlemen, that there is no proof to support all of those charges. You are confined to only such charges of negligence as are alleged in the complaint from which I read, and one of the items I especially call your attention to is that regarding the young lady. There is no proof that there was any young lady placed there for the purpose of warning this plaintiff or any other customers in the store. It is true there was some testimony in the case that there was a young lady that came up in some sort of dress after the accident occurred who took the plaintiff into the dispensary in the store, but I do not understand that

The Court's Charge.

the proof went so far as to show that Hahne & Company or the Marbleoid Company, for that matter, had established any one about this place particularly to warn patrons of that store that there was any condition there that they should avoid. You will confine your consideration to the charges concerning which there has been proof offered here, and only such, because you cannot go outside of the pleadings.

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Gentlemen, if you reach the conclusion after weighing all of this testimony, that one or both of these defendants can be held, then and only then would this woman plaintiff, Mrs. Ely, be entitled to damages, and if she is entitled to your verdict she is entitled to be compensated for the injuries that she personally sustained as the natural and proximate result of this accident. That would include pain and suffering for so long a time as you find she experienced it, if she did. That would include any incapacity to which she was subjected because of this accident. She has told you of her condition immediately after this accident; that she was incapacitated from doing things which she normally and actually did prior to the accident, and as a result of this accident she could not do them thereafter. That is incapacity. She is entitled to be compensated for any permanent injuries she sustained because of this accident. There is some testimony on the part of the doctors here to the effect that there is a restriction in the movement of one of the legs of this woman to the extent of fifteen per cent. One of the doctors said that was the extent of the restriction. If that is true this woman would be entitled to be compensated for that permanent loss, if there was any such loss.

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The Court's Charge.

10 Then, the husband, if he is entitled to a verdict, he is entitled to be compensated for the damages which came to him in consequence of the injuries to his wife. That would include any loss of consortium, the society which a married woman normally gives her husband. He is also entitled to be compensated for any medical or hospital expenses incurred in an effort to cure his wife of her injuries. You heard what the testimony has been on that subject, and I will not attempt to rehearse it or analyze it, but those rules are to be applied by you if you find this plaintiff should have a verdict. If you find the plaintiffs should have a verdict the verdict should be rendered separately and you will say we find for Mrs. Ely and 20 against the defendant or defendants so much money, and for Mr. Ely and against one or both of the defendants so much money.

On the other hand, if you should find at the same time that one of these defendants could not be held under the rules I have given you, but the other could, you would say with respect to the one that could not be held we find in favor of that defendant and against the plaintiff a verdict of 30 no cause of action.

Gentlemen, you are not to be influenced in any way by the fact that the Court has denied applications made first for a nonsuit and then for the direction of a verdict in behalf of both of these defendants. The Court in deciding those motions was merely determining that in this case there were conflicting questions of fact which had to be submitted to you as the arbitrators of the facts for your determination, which could not be done 40 by the Court. The Court is here to give you the rules of law and to conduct the case, to see that

The Court's Charge.

it is conducted according to the rules of evidence, and having performed that duty the decision in this case rests with you and you are to determine the facts, and apply the rules of law that the Court has given you exactly to the facts as you find them. If you follow that procedure your verdict will be a right verdict no matter for which side it may be rendered, or how it may be rendered. Observe the oath each one of you has taken, base your verdict upon the evidence, apply the rules of law the Court has given you, and let the result fall where it may.

10

I might say to you, in the course of summation counsel for the plaintiff referred to the amount of damages, giving his estimation of what he thought those damages should amount to. After he stated it the Court rather vehemently objected to counsel proceeding in that manner. That is not to influence your verdict in any way. You are the judges and not the attorneys of what the damages in this case have been. So, I do not want you to be influenced one way or the other by the fact that the Court asked counsel for the plaintiff to refrain from giving his estimation of what the damages in the case should be.

20

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You may now retire.

(The jury retired.)

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Notice of Appeal.

(Filed October 20, 1930.)

To: Messrs. KENT & KENT,
Attorneys of Plaintiffs.

SIRS:

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TAKE NOTICE that the defendant appeals from the whole of the judgment entered in this cause, to the New Jersey Court of Errors and Appeals.

Dated November 16, 1929.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendant.

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Served Nov. 19, 1929.

KENT & KENT,
Attorneys of Plaintiffs.

Grounds of Appeal.

(Filed October 27, 1930.)

The appellant states the following grounds of appeal:

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1. The trial court erroneously denied defendant's motion for a nonsuit, whereas said motion should have been granted upon one or more of the following grounds:

(a) There was no evidence of any negligence on the part of the defendant which was the proximate cause of the plaintiffs' accident.

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Grounds of Appeal.

(b) Any negligence that may have existed which contributed to the plaintiffs' accident was that of an independent contractor for whose acts the defendant was not legally responsible.

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(c) On the undisputed evidence in the case, the plaintiff Annie Ely was guilty of contributory negligence as a matter of law.

2. The trial court erroneously denied the defendant's motion for a direction of a verdict, whereas said motion should have been granted upon one or more of the following grounds:

(a) There was no evidence of any negligence on the part of the defendant which was the proximate cause of the plaintiffs' accident.

20

(b) Any negligence that may have existed which contributed to the plaintiffs' accident was that of an independent contractor for whose acts the defendant was not legally responsible.

(c) On the undisputed evidence in the case, the plaintiff Annie Ely was guilty of contributory negligence as a matter of law.

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COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Service acknowledged Oct. 23, 1930.

KENT & KENT,
Attorneys of Plaintiffs-Respondents.

40

Answer of Marbleloid Company.

(Filed May, 1928.)

(Printed at Request of Plaintiffs.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

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ANNIE E. ELY and FREDERICK C.
ELY,*Plaintiffs,**v.*THE MARBLELOID COMPANY, a cor-
poration, and HAHNE & Co., a
corporation,

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*Defendants.*Action at Law.
Answer of the
defendant, The
Marbleloid Com-
pany.

The defendant, a corporation having its principal place of business in the City of New York, County of New York and State of New York, answering the complaint says:

FIRST COUNT.

- 30
1. It admits paragraph one.
 2. It denies paragraphs two and three.
 3. It has no information sufficient to form a belief as to paragraphs three and four and leaves the plaintiff to proof thereof.
 4. It denies paragraph five, if it refers to the Marbleloid Company.
 5. It denies paragraph six.
 - 40
 6. It admits paragraph seven.

Answer of Marbleloid Company.

7. It has no information sufficient to form a belief as to paragraph eight and leaves the plaintiff to proof thereof.

8. It has no information sufficient to form a belief as to paragraph nine, and therefore denies. 10

9. It denies paragraphs ten, eleven and twelve.

SECOND COUNT.

10. It has no information sufficient to form a belief as to paragraph thirteen and leaves the plaintiff to proof thereof.

11. This defendant repeats the answers to all the allegations contained in the first count and makes them a part hereof as if stated at length. 20

12. It denies paragraphs fifteen and sixteen.

FIRST SEPARATE DEFENSE:

This defendant says that any injuries occasioned to the plaintiffs or either of them were the direct result of the negligence of some person other than this defendant, its agents or servants.

SECOND SEPARATE DEFENSE:

This defendant says that any injuries occasioned to the plaintiffs or either of them were the direct result of the contributory negligence of the plaintiff in that she proceeded through said store without making any observation for her own safety. 30

Dated April 17, 1928.

CAREY AND LANE,
Attorneys for Defendant,
The Marbleloid Company.

We hereby consent to the filing of the within answer as if in time. 40

Attorneys for Plaintiffs.

Reply to Answer of Marbleloid Company.

(Filed May, 1928.)

(Printed at Request of Plaintiffs.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

10

ANNIE E. ELY and FREDERICK C.
 ELY,
Plaintiffs,

v.

THE MARBLELOID COMPANY, a cor-
 poration, and HAHNE & Co., a
 corporation,

20

Defendants.

Action at Law.

Reply.

The plaintiffs, replying to the answer of the de-
 fendant, The Marbleloid Company, say that:

1. They deny each and every allegation set
 forth in the "First" and "Second" separate de-
 fenses.

Dated May 9, 1928.

30

PENT & PENT,
 Attorneys for Plaintiffs,
 45 Church Street,
 Paterson, New Jersey.

40

*Exhibit D-1.***Exhibit D-1.**

THE MARBLELOID COMPANY
 MARBLEOID FLOORING PRODUCTS.
 909 Pennsylvania Bldg.
 225 W. 34th St.
 New York, N. Y.

10

July 9, 1927.

Re: Alterations to Your Store

Est. 38726.

Hahne & Co.
 Broad St.
 Newark, N. J.

Attention of Mr. Jennings, President.

20

Gentlemen:

We will furnish all material and labor required for the installation of our MARBLELOID TRAVERTINE TERRAZZO flooring laid in two feet by one foot blocks formed by brass strips of a minimum thickness of $\frac{5}{8}$ of an inch, all surfaces to be made level, throughout the aisle spaces of the entire floor of your store in a total area of approximately 50,00 square feet at the rate of EIGHTY THREE CENTS (83¢) per square foot for all said flooring laid and ground during regular working hours. In the event of the grinding of the floor is undertaken during overtime hours, I. E. at night, Saturday afternoons, Sundays or holidays, the price for that portion of the said flooring so ground will be ONE DOLLAR (\$1.00) per square foot. In the event that the laying of the said flooring as well as the grinding is undertaken in overtime hours, the price will be ONE DOLLAR AND SEVENTEEN CENTS (\$1.17) per

30

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Exhibit D-1.

square foot for that portion of the flooring so laid and ground.

10 We are to place all our materials on the space allotted, either before or after store hours, which are from 8:45 A. M. to 5:35 P. M. on all week days except Saturday, and in no event is the time consumed in placing materials to be computed as part of the time incident to the laying and grinding of flooring.

20 The area installed will be measured as completed and any additions or deductions will be charged or credited at the above unit price. In the event you decide to place the treads and platforms of the stairways in our material, platforms will be figured at EIGHTY THREE CENTS (\$.83) per square foot and treads at ONE DOLLAR AND SEVENTY FIVE CENTS (\$1.75) per lineal foot, *installed* during regular working hours.

30 In the event you decide to have us install our plain MARBLELOID floor and 6" sanitary base in our standard red color in the Kitchen of the new Tea Room, this will be placed in regular working hours at the rate of SIXTY CENTS (60¢) per square foot for floor and SIXTY FIVE CENTS (65¢) per lineal foot for sanitary base.

40 Terms of pay for all work to be 85% of the value of material installed in the completed flooring, semi-monthly as work progresses; balance on completion. We will install our material directly over existing floors, except at elevators, entrances, and at the terrazzo in front of the Soda Fountain. At these places, you are to remove the top layer of flooring so that we may finish our material flush with adjoining finished flooring. In the event however, that you do not desire to have the finished flooring level with the surface of the above named

Exhibit D-1.

places, we agree to furnish and finish against suitable strip.

You are to furnish us without charge, with electric power, light, water, elevator service, and are to remove and replace as required all tables, fixtures, etc. We are to furnish all muslin or other temporary partitions if required round those spaces with you allot us to work in, said material to be delivered to us at cost by you if in stock. You are to turn over to us not less than 2,000 square feet of floor space per day in which to lay our flooring; all material to be placed and mixing done in said daily allotment of space.

We guarantee our installation against all defects in material and workmanship, such as disintegrating, coming loose from under-foundation, cracking, or wearing through the top coat, for a period of ten (10) years, from the date of completion. We further guarantee that no defect will occur in our flooring due to dry rot for the said period of ten (10) years, and in the event of the occurrence of any defect in the flooring against which defect said flooring is guaranteed, we agree to replace any defective MARBLELOID TRAVERTINE TERRAZZO FLOORING, including a suitable foundation, within ten (10) days from the receipt of a notice from you so to do, without expense to you, and in the event that we fail to replace said defective flooring, we are to be liable for any and all damages resulting from the use of said defective flooring, or from the interference with your business said defective flooring may cause, together with the cost of replacing the same.

In this connection, it is understood that our guarantee does not apply should cracking occur in our floor which is due to settlement of the building.

Exhibit D-1.

Color, finish, texture of the flooring to be similar in all respects to sample installed by us in your Book Department or Trunk and Bag Department, selection to be made by you before work commences.

10 All flooring to be thoroughly cleaned and washed by us and placed in perfect order for use.

We agree to procure and keep in force a Workmen's Compensation Insurance policy covering all of the men engaged in the execution of the work covered by this contract.

We further agree to indemnify your company against any claim for personal injuries or property damage growing out of any accident or accidents, which may happen during the prosecution to the work, to any person or persons whatsoever.

20 We further agree to procure and keep in force with a reputable insurance company a policy in the sum of \$25,000.00 to \$50,000.00 Public Liability, and \$1,000.00 Property Damage, covering your company and ours, against the risks named in the foregoing paragraph.

The Contractor shall also furnish equipment of all kinds necessary to manufacture, finish, deliver and install the work in this contract, and upon completion, remove all surplus materials, parts, rubbish, etc., from the premises and leave the same and all his work thoroughly clean in all respects ready for use by the Owner.

30 The Contractor shall acquaint himself with the labor conditions in the City of Newark, N. J. and shall provide materials and employ labor in the manufacture and installation of all his work that is acceptable to labor authorities, so there will be no interference to the completion of his work or
40 any other work for these premises.

Exhibit D-1.

All labor employed by Contractor shall be satisfactory to the Owner, and the employment of any and all employees unsatisfactory to the Owner shall be dispensed with at once.

No charge for extra work shall be recognized unless specifically ordered in writing by the Owner, and the cost of any and all extra work shall be determined before work shall commence on same. 10

The contractor shall comply with all State Statutes, City Ordinances, and Codes, and with the rules of all City Bureaus and Departments so far as same relate to matters and works referred to herein; contractor shall pay all fees, fines, defend all suits at law, etc., brought against Owner for violations of same.

Contractor shall provide and maintain sufficient protection for his work at all times and until finally approved and accepted by the Owner. 20

Patents:

The Contractor hereby binds himself to protect and save harmless the Owner from loss of damages caused by suit or claims caused by his infringements of patents for materials or methods used in construction of all work called for in these specifications or schedules. 30

Damage:

The contractor assumes all risk of damage to fixtures while being installed. Any damage to new or present fixtures or building caused by this Contractor shall be satisfactorily repaired or replaced by him without expense to Owner.

We are to commence work on or before the 13th day of July, 1927, and to complete the same on or before the 5th day of September, 1927, provided 40

Exhibit D-1.

10 you allot us to at least 2,000 square feet or space daily, in which to lay and mix our materials, and that total area to be installed does not exceed 50,000 square feet; and in the event that the said flooring is not completed by the fifth day of September, 1927, we agree that the work shall be prosecuted night and day until the same is completed, and that all flooring laid after that date shall be installed at a price of EIGHTY THREE CENTS (83¢) per square foot, with no charge for over-time.

Your acceptance of this letter shall constitute a contract between us.

Yours very truly,

20

THE MARBLELOID COMPANY

By (Sig) ROBT. W. PAGE, Pres.

ROBERT W. PAGE, President

Accepted July 12, 1927

By HAHNE & Co.

By (Sig.) A. J. JENNINGS,

Pres.

To the Marbleloid Company:

30

You are hereby notified that the flooring to be laid pursuant to the terms of the foregoing contract is to conform to the sample as installed by you in our Department.

40

New Jersey Court of Errors and Appeals

ANNIE E. ELY and FREDERICK
C. ELY,
Plaintiffs-Respondents,

v.

HAHNE & COMPANY, a
corporation,
Defendant-Appellant.

On Appeal
from Supreme
Court.

BRIEF OF PLAINTIFFS-RESPONDENTS.

Statement.

This action to recover damages for personal injuries was tried before Judge Henry E. Ackerson, Jr., and a jury, at the Hudson Circuit. The action originally was against two defendants, the Marbleoid Company and Hahne & Company, the present sole defendant. The jury returned a verdict in favor of the injured plaintiff and her husband, against the present defendant, for the sum of \$2,300. There was a verdict of no cause for action against the Marbleoid Company.

The defendant, Hahne & Company, appeals from the verdict and the judgment entered thereon. The plaintiffs-respondents will be referred to in this brief as the plaintiffs, and the defendant-appellant, as the defendant.

Statement of Facts.

At the time of the accident the defendant owned and operated the Hahne Department Store in Newark. The injured plaintiff was a customer in the store. At the time of the accident the main aisle or passageway at the north side of the store was undergoing repairs, which consisted of relaying the aisles or flooring with material known as Marbleoid. The defendant was supervising and directing this work. The aisle had been relaid in a straight line from the rear of the store up to a point near the front, at which point the aisle made a right angle turn to the left. The new marbleoid flooring had been laid only up to the turn. At and beyond this turn, the new flooring had not yet been relaid, and the floor here was still under process of reconstruction. The marbleoid flooring was about two inches higher than the old flooring, so that at this point there was an abrupt drop of approximately two inches in the direction in which Mrs. Ely was proceeding. Both sides of the aisle were lined with counters and tables heaped with merchandise for intended purchase by customers. On the left side of the aisle at the point of the turn was a table heaped with neckwear. Mrs. Ely had stopped at this table, examined some neckwear and was proceeding to make the turn in the aisle to the left, when, as she said she "took a header off the marbleoid floor onto the old floor," injuring her hand, legs and body generally. No person was stationed at this point to warn customers of the danger; there was no sign of any kind; no enclosure of rope or anything else to warn any of the customers. This drop of two inches was right around the turn of the aisle and therefore physically impossible of observation to Mrs. Ely as she was walk-

ing down the aisle. In the rear of the store where new flooring was being laid, and from which part of the store Mrs. Ely had come, the aisles were guarded and roped off. Mrs. Ely herself did not know that reconstruction work was going on in that part of the aisle where she was hurt.

The Marbleoid Company was joined as a party defendant because Hahne & Company made the contract for this reflooring with the Marbleoid Company.

The defendant has assigned the usual grounds of appeal: That there is no evidence of any negligence; that if there was any negligence, it was that of an independent contractor; and that the injured plaintiff was guilty of contributory negligence. The defendant, however, has abandoned in its brief all except the first ground.

We shall argue the case upon the following propositions:

1. There is sufficient evidence to uphold the finding of the jury that the defendant was guilty of negligence.

2. The cases relied upon by the defendant and cited by it in its brief are not in point.

POINT I.

There is sufficient evidence to uphold the finding of the jury that the defendant was guilty of negligence.

The plaintiff, Annie E. Ely, was hurt on August 22, 1927 at 11 A. M. (State of Case, p. 11, ll. 32 to 38). She entered the store through the rear entrance (bottom p. 11) made some purchases on the second floor and then came down to the first floor in the rear (p. 12, ll. 3 to 15). She was proceeding down the aisle on the north side of the store, making purchases en route (p. 12, ll. 15 to 20). Then she stopped at the neckwear counter at the head of the aisle (p. 13, ll. 35 to 38; p. 14, ll. 1 to 9).

“Q. After doing that, what did you do? A. I went to walk around the table and I took a header off this place that was on an incline”
(p. 14, ll. 10 to 12).

The aisle up to that point was straight (p. 14, ll. 24 to 26). Here she had to make a turn around the end of the table to go out (p. 14, ll. 30 to 36). She was looking at something on the table and down she went (p. 14, ll. 36 to 40). THERE WAS NO SIGN OR WARNING, NO ENCLOSURE OR ROPE OR ANYTHING OF SIMILAR NATURE AND NOBODY PRESENT TO GIVE HER WARNING (p. 15, ll. 1 to 15). Where the accident happened, there were counters with goods on both sides (p. 23, ll. 31 to 40). As she was walking toward the place where the accident happened, she was walking on the new flooring and not on the old board flooring (p. 24, ll. 10 to 13). The aisle was about two feet wide (p. 25, ll. 27 to 35).

“Q. And it was when you made your turn to the left that you stepped off the marbleoid onto the wood flooring and fell? A. Yes” (p. 27, ll. 13 to 18).

There was a drop here of about two inches (p. 28, ll. 23 to 28). Where they were reflooring in the rear of the store, the aisles were roped off and you had to go around them (p. 30, ll. 9 to 15).

This constitutes in the main the testimony of the injured plaintiff.

Further proof was adduced as follows: The written contract between the Marbleoid Company and the defendant, which was admitted in evidence (p. 46, l. 21; p. 49, ll. 10 to 19), is set forth at length at pages 75 to 80 of the State of the Case. The agreement provides that the defendant was to *remove and replace as required all tables, fixtures, etc.* (p. 77, ll. 2 to 10).

The pleadings in the action were marked in evidence (p. 56, ll. 9 to 16). Paragraph 7 of the complaint reads as follows:

7. At said time (the date of the accident), the defendant, Hahne & Co., was supervising and directing the said work (constructing or repairing a part of the main floor in said building) (p. 2, ll. 17 to 18).

The answer of the defendant admitted this allegation (p. 5, l. 8). Upon the trial, counsel for the defendant obtained leave to amend this admission in the answer, so that this allegation was deemed denied. This amendment was sought on the ground of mistake in pleading, notwithstanding the fact that defendant's answers under oath to plaintiffs' interrogatories were in line with the admission that the defendant did supervise and di-

rect this work (pp. 8 and 9). The Court allowed the amendment to this portion of the answer (p. 9, ll. 31-32), holding, however, that it would be for the jury to find as a fact from the original admission in the answer and the other proof whether or not the defendant had supervised and directed the work (p. 56, ll. 1 to 18).

It should be noted that notwithstanding the amendment of the answer, the defendant did not offer an iota of proof at any point in the case that it did *not* supervise and direct the work at the place where Mrs. Ely was hurt.

The answers of the defendant under oath, to plaintiffs' interrogatories, supplied proof that at the time of the accident the defendant operated, managed and controlled the store and that at that time the floors were being repaired or relaid by the Marbleoid Company for the defendant (bottom p. 37; p. 38, ll. 1 to 18); that at the time of the accident the flooring was in process of being laid at the aisle near the north entrance (bottom p. 38; p. 39, ll. 1 to 10); that the reflooring at this point was not finished until October 27th; that the defendant failed to maintain any guard or look-out at this place (p. 39, ll. 19 to 33).

The plaintiffs rely upon the decision in the recent case of *Finnegan v. Goerke*, not yet officially reported (8 N. J. Adv. Rep. 1111; Errors and Appeal, decided October 14, 1929; opinion by the Chancellor). The facts in that action, which are analogous to those in the instant case, are as follows:

"Mrs. Finnegan was a prospective customer in the department store of the defendant; she went to the defendant's store to look at or purchase some cretonne; on the floor of the store

where the goods were, was a counter at the end of which was a rattan box about three feet long, one and one-half feet high and fifteen inches wide, flush against the end of the counter. While walking toward the cretonne display she alleges that she struck this box with her foot and fell, striking and injuring her knee, as already stated. At the completion of the plaintiff's case a motion for non-suit was made by the defendant on five grounds (1) no testimony of negligence on the part of defendant; (2) no testimony that plaintiff did not look where she was going; (3) no evidence of nuisance; (4) no evidence that the box was negligently placed; (5) no evidence that defendant did not keep it in reasonably safe condition."

The trial court non-suited. The Appellate Court held that this was error, stating:

"The plaintiff was invited by the defendant to visit its store as a prospective customer. She was therefore an invitee, and this court held in *Kappertz v. The Jerseyman*, 98 N. J. L. 836, that one who invites another upon his premises owes the invitee a duty not only to exercise ordinary care to render the premises reasonably safe for the purposes for which the invitee entered, *but to abstain from any act which may make the invitee's use of the premises dangerous.* (Italics ours.)

and further

"In *Bennett v. Busch*, 75 N. J. L. 240, the Supreme Court held that where fair-minded men might honestly differ as to the conclusions

to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury. And in a conflict of testimony, when the facts found by the jury will sustain the verdict, the court will not set it aside, although in their opinion the jury might, upon the evidence, have found otherwise.

Now, the plaintiff, as already said, was an invitee upon the premises of the defendant, and it not only owed her a duty to exercise ordinary care to render the premises reasonably safe for the purpose for which she entered, namely, shopping, but also to abstain from any act which might make her use of the premises dangerous. How can it be said that it was not a matter of danger to customers in the store to place a rattan box of the dimensions of this one on the floor outside a counter which was in an aisle which ought to be free from obstruction, and was there for over two months. The defendant knew of it and took the risk of injury resulting from it. The plaintiff herself said that she was walking in the aisle behind two people who were only three feet ahead of her, and that they turned just at the box; she went on but could not have seen the box unless she looked down at the floor at her feet to ascertain whether or not there were an obstruction there. She was not required to do that, but had a right to rely upon the aisle or passageway being free from obstruction and safe for pedestrians lawfully there, as she was. Men of reasonable minds could certainly at least draw an inference favorable to the contention of the complainant, and say that there was actionable negligence in the case. The jury had a right to believe

her and the other witnesses who spoke to the facts. And it certainly cannot be said as matter of law that there was no jury question in the cause. On the contrary, that there was one we think is demonstrated."

The facts in the instant case more strongly establish the defendant's negligence than those in the Finnegan case, *supra*: Mrs. Finnegan was a customer in the department store, as was Mrs. Ely. The defendant, Goerke Co. had knowledge of the fact that the rattan box obstructed the aisle. The defendant, Hahne & Co., had knowledge and notice of the defect, because it was supervising and directing this very work. In the Finnegan case, the rattan box obstructed part of a straight aisle. *The defect in the aisle where Mrs. Ely fell was around the turn out of sight.*

The issues necessary to support the plaintiffs' verdict were submitted to the jury as questions of fact, which the jury resolved in plaintiffs' favor. This is not a proceeding on Rule to Show Cause; therefore, the finding of the jury should not be disturbed (*Grannan v. Fox*, 100 N. J. L. 288; Errors and Appeal).

POINT II.

The cases relied upon by the defendant and cited by it in its brief are not in point.

The defendant cites the case of *Garland v. Furst Store*, 93 N. J. L. 127, in support of the proposition that the doctrine of *res ipsa loquitur* does not apply in this case. The plaintiffs have at no time contended that this doctrine did apply.

The defendant contends (Defendant's Brief, p. 7), that there is no proof that the construction of

the aisle was different from ordinary or standard construction and that therefore there was failure of proof of negligence. The defendant cites five cases in support of this proposition. In each of these five cases, the accident happened at a place where no construction work or reconstruction work was in process at the time, everything was completed. In the instant case, *the very basis of the action is that the aisle was in process of construction at the time of the accident.* We submit that the contention of the defendant in this respect is clearly beside the theory upon which the case was tried and upon which it was submitted to the jury. This is evident from the Court's remarks on the motion to direct a verdict:

"I quite agree that if this was a question of type of construction there is no evidence to justify me in leaving to the jury the question as to whether it was proper construction, but I am not leaving that question to them. The question is as to whether or not this was part of an incompleting construction, after which there was to be a smooth-surfaced floor. In other words, whether or not there was construction going on, or whether the thing which it is claimed caused the damage was a permanent condition or intended to be a permanent condition. If there had been a short step there, or there had been a graduated incline or decline in the floor, whether or not that was proper construction would require some proof as to how other stairs were constructed and whether or not that was proper construction. But in this case there is evidence which will require me to leave it with the jury to say whether or not this was part

of the work which was yet uncompleted, and that is the reason I deny your motion on that phase of it."

(P. 57, ll. 32 to 40; p. 58, ll. 1 to 18; Court's Charge, p. 60, ll. 25 to 40; p. 61, ll. 1-2.)

The defendant cites the cases of *Schnatterer v. Bamberger*, 81 N. J. L. 558 and *Garland v. Furst Store*, 93 N. J. L. 127, in support of the proposition that the defendant's liability must be predicated upon knowledge or notice. Assuming that to be so, the plaintiffs' proof showed that *the defendant was itself supervising and directing the reconstruction work*. The defendant, therefore, had both knowledge and notice of the dangerous condition.

The defendant cites the case of *Haddon v. Snellenburg*, 143 Atl. 8 (Supreme Court of Pennsylvania). The action involved an accident that happened *on a step* in a store. The distinguishing features are clear. This step was *completed* at the time of the accident and was not in process of construction or repair, as in the instant case. The excerpt from the decision, quoted in defendant's brief, further shows that liability was based upon the claim of insufficient lighting. The decision specifically distinguishes a step from an aisle:

"It cannot be likened to those involving open elevator shafts, hatchways, or *obstructions in an aisle*. In the latter situation, we do not deal with steps normally appearing in construction."

The defendant cites the case of *Watkins v. Piggly Wiggly Bird Co.*, 31 Fed. (2nd) 889. Here the accident happened at the entrance to the store and

not inside the store. This was also a case of *completed* and not *incompleted* construction. The following excerpt from the decision indicates that the case was decided upon the issue of contributory negligence:

“The proximate cause of her fall and injury was her inattention, and not because the step off was dangerous in itself or in the conditions surrounding it.”

The defendant cites the case of *Hoyt v. Woodbury*, 200 Mass. 343; 86 N. Y. 772; 22 L. R. A. (New Series) 730. This case is clearly distinguishable. It was tried upon the theory of improper construction. There was no such proof. In addition, the construction was completed and not unfinished.

The defendant cites the case of *Albachten v. Golden Rule*, 160 N. W. 1012; 135 Minn. 381. There the plaintiff was injured in falling over a three inch step connecting two halls. A verdict was directed for the defendant, but the decision clearly shows that the situation was far different from that in the present case:

“We are clear that the presence of the step at the entrance of the intersecting hall was not, standing alone, sufficient upon which to predicate a charge of negligence on the part of the defendant or to require a submission of the issue to the jury.”

“There was no showing in the case at bar that the absence of adequate light rendered the place dangerous to those not familiar with the presence of the step or that there were distracting circumstances which threw plaintiff off her guard. * * * *The sole fact appearing is*

the presence of the step. That, we hold insufficient and under the evidence presented, there was no negligence in the failure of defendant to warn plaintiff of its presence." (Italics ours.)

The opinion then refers to two cases and distinguishes the case under discussion from the two other cases. The defendant has not referred to these two cases in its brief. We shall do so.

The first case so referred to is *Polenske v. Lit Brothers*, 18 Pennsylvania Superior Court 474. In that case, the defendants owned the Lit Brothers Department Store in Philadelphia. Small pipes leading to a soda fountain had been laid across one of the aisles and covered with a strip of wood beveled at the edges and rising at the highest point about two inches above the level of the floor. Plaintiff, a customer in the store, tripped and fell over this obstruction. There was a jury verdict for the plaintiff which was affirmed on appeal. The Court said:

"Whether the presence of the obstruction, as described by the plaintiff, upon the floor of the aisle of the store, constituted negligence was left to the jury. It must be conceded that the public, who are invited to visit such stores, as that of the defendant, have a right to expect that the passageways will be kept cleared of unusual or dangerous obstructions. * * * While in the aisles a duty is not imposed, as matter of law, upon every customer to keep his eyes fixed upon his feet and their placement, since his attention is challenged by, and diverted to, the goods which are exposed to view in order to induce purchase."

The other case cited in the Albachten decision, is that of *Bloomer v. Snellenberg*, 221 Pennsylvania 25; 69 Atlantic 1124. The facts were as follows: Plaintiff was a customer in defendant's department store. The Court in its opinion said:

"While walking along one of the principal aisles in the store, she stumbled upon an obstruction or inequality in the passageway, caused by an incline which passed from a floor at a higher level at the left side of the aisle to a point even with the passageway at or near the right side. There was no guard, railing or warning and nothing to indicate to those passing the presence of this obstruction upon the floor, extending nearly across the aisle."

It was held:

"It is certainly true that where the owner or occupier of premises, in the prosecution of his own purposes, invites another to come upon the premises, he cannot with impunity expose the visitor to an unreasonable risk of any sort, as, for example, to an open hole in a passageway, or to a rope, or other obstacle stretched across the aisle, liable to trip the foot."

"The learned trial judge was of the opinion that under the facts established by the evidence, with regard to the location and character of the obstruction, negligence might be inferred from its existence and in a very careful charge pointing out that the defendants were bound to do what people of ordinary good judgment and common sense would do, and to refrain from doing that which people of common sense under all the circumstances would

not do, he left it to the jury to say whether, judged by that standard, the maintenance of the incline in the form in which it was constructed was a careless thing. We think he was right in so doing."

"Customers are invited into a store and to walk along the aisles where goods are displayed upon every hand for the very purpose of catching the eye and attracting the attention of those who use the passageways * * *. The passageway ought to be kept reasonably clear for the use of those who at the time are expected to be, to some extent, using their eyes in the inspection of goods and merchandise spread before them for that purpose."

Judgment for the plaintiff was affirmed.

The defendant cites the case of *Vogt v. Wurmb*, 300 S.W. 278. There the plaintiff fell over a board on a newly painted step. The court in its decision held that this construction was one commonly employed. The Court said:

"But in any event, whatever danger inhered their condition was perfectly obvious."

Recovery was disallowed because of failure of proof of *improper construction* and because of plaintiff's contributory negligence.

The defendant cites the case of *Hertz v. Advertiser Co.*, 201 Ala. 416; 78 So. 794. The decision in that case has no application to the case at bar because the issue presented a *jury question* which was resolved in favor of the defendant, the court holding:

"The only dispute in the evidence was as to whether or not the lights were burning on the

occasion of the accident. Plaintiff's evidence tends to show they were not, while defendant's shows that they were lighted. It was therefore open for the jury to find this question either way."

The defendant cites the case of *Maine v. Leaman*, 294 Mo. 579; 243 S. W. 91. There, the plaintiff, a customer in the store, fell on a step coming out of a toilet. She recovered a judgment which was reversed on the ground that there was *no proof that the step had been improperly constructed*, and further that she was charged with knowledge of the step because she had gone over it on entering, only a minute or two before.

We submit that we have clearly shown that the cases relied upon by the defendant do not support its contention, because they are not in point or easily distinguishable. In fact, the reasoning, dicta or references in the cases cited uphold the contention of the plaintiffs.

CONCLUSION.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

KENT & KENT,
Attorneys for Plaintiffs-Respondents.

SAMUEL KENT,
of Counsel.

Submitted May Term 1931.

New Jersey Court of Errors and Appeals

ANNIE E. ELY and FREDERICK
C. ELY,
Plaintiffs-Respondents,

v.

HAHNE & COMPANY, a corporation,
Defendant-Appellant.

Action at Law.
On Appeal from
Supreme Court.

BRIEF IN BEHALF OF DEFENDANT- APPELLANT.

1.

Statement of Case.

This appeal brings before this Court for review, a judgment of the Supreme Court in favor of the plaintiffs-respondents (hereinafter called the plaintiff), for \$2,300, and against the defendant-appellant (hereinafter called the defendant) (p. 7).

The action was brought to recover damages for personal injuries sustained by Mrs. Ely, August 22, 1927, while she was in the store of the defendant located in the City of Newark. Her husband joins in the action to recover for the loss of services and expenses incurred in effecting a cure of her injuries.

It appears that about a month previous to the accident, the defendant contracted with The Mar-

bleloid Company, to lay in its store a marbleloid flooring. This flooring was to be laid directly on the wooden floor of the store and was five-eighths of an inch thick. It was to be laid throughout the aisle spaces of the entire floor (Exhibit D-1, contract between Hahne & Company and The Marbleloid Company) (pp. 75, *et seq.*). It was while the plaintiff was walking along the aisle of the store that she fell and received the injuries for which the suit was brought. Originally the action was against both The Marbleloid Company and Hahne & Company (pp. 1-4). The Marbleloid Company received a verdict in its favor and against the plaintiff.

At the close of the plaintiff's case and of the entire case, counsel for this defendant, Hahne & Company, moved for a nonsuit and for a direction of a verdict respectively. These motions were denied and exceptions to the ruling of the trial court noted (pp. 40-45; pp. 53-58).

2.

Grounds of Appeal.

The grounds of appeal which will be urged are as follows (p. 70):

The trial court erroneously denied the defendant's motion for a nonsuit and for a direction of a verdict, whereas said motions should have been granted on the following ground:

- (a) There was no evidence of any negligence on the part of the defendant, which was the proximate cause of the plaintiff's accident.

3.

BRIEF OF THE ARGUMENT.

I.

There was no evidence of any negligence on the part of the defendant which was the proximate cause of the accident.

As the legal questions raised by the defendant's motion for a nonsuit and for a direction of a verdict are the same, we are arguing both under this common heading.

Mrs. Ely entered the defendant's store at 11 A. M., August 22, 1927, by means of the rear entrance, to wit, the Halsey Street entrance (p. 11, ll. 20-40). After making some purchases on the second floor, she descended to the first floor and went to the rear of the store to obtain merchandise stamps (p. 12, ll. 1-40). When she entered the store from the Halsey Street entrance, she observed that flooring was being laid at the rear of the store (p. 22, ll. 20-30). After obtaining her stamps she proceeded from the rear of the store toward the front of the store, intending to leave by the front entrance. As she walked to the front of the store she was walking along on the marbleoid flooring. She came to a point where, on her right-hand side, there was a counter, "L" shaped in character, with the foot of the "L" toward the front of the store. To her left and opposite the leg of the "L" there was a table. Both the counter and the table had merchandise upon them consisting of neckwear. The space between the two was about two feet wide (p. 24, ll. 1-40). The table to her left was about five feet long. She walked on the marble-

loid between this counter and table. The foot of the "L" shaped counter extended beyond the end of the table on the left so that a person after walking between the table and the counter, would turn left to go around the end of the table in order to get beyond the leg of the "L" shaped counter. She walked between the two and turned left to go around the table (p. 26, ll. 1-40). She took two steps after turning around the end of the table and then fell (p. 28, ll. 10-20). As the cause of her fall is of crucial importance in the decision of this case, we quote from her testimony on that one feature.

On direct examination she testified:

"Q. After doing that, what did you do? A. I went to walk around the table and I took a header off this place that was on an incline. * * *

"Q. Tell me again what you did. A. I had to make a turn to go around the end of the table between the end of the table and the counter that came out. The counter came down and turned like this (indicating) and the table was here, and I had to go between the table in order to get to the door, and there is where I fell.

"Q. Then what did you say happened? A. I fell full length. I went to step around, not looking, I was looking at something on the table, and down I went, and there was nothing there" (p. 14, ll. 35-40).

The above was the entire testimony on the cause of the fall on direct examination.

On cross examination she testified:

"Q. Where was it with reference to your making the turn that you fell? Had you started to walk after you turned to the left? A. I looked at something on the table and turned around at the end of the table and that is where I fell.

"Q. Now, was the balance of the aisle going to the front of the store marble or wood? A. That was wood.

"Q. So that the situation then was that this marble came down to a point near the end of that table and then stopped? A. Yes.

"Q. And it was when you made your turn to the left that you stepped off the marbleloid onto the wood flooring and fell? A. Yes" (p. 27, ll. 1-20).

"Q. Now, can you give us any idea about how far you walked from this side of the table where you had been examining the goods, how far you had walked to the left when you fell? A. I had just walked about two steps when down I went.

"Q. Now, did you examine the place where you fell after accident happened? Did you look at the place where you had fallen? A. No, I did not. I felt too badly.

"Q. But you did know it was wood? A. I know it was wood, yes.

"Q. But you did not examine it in detail so as to be able to describe it to us? A. No.

"Q. Did you observe it close enough to be able to tell us how high the marble floor was above the wood flooring at the place where it happened? A. Well, I should judge it was about two inches above, about like that that I went down" (p. 28, ll. 10-30).

"Q. And you observed they were working laying this floor in the back? A. Yes.

"Q. At some point on your trip from the north side of the building to the southwest corner, you had to step off the marble or onto the floor, didn't you? A. Yes.

"The Court: This place where you fell, that did not have marbleloid on it?

"The Witness: No.

"The Court: That was wood?

"The Witness: Wood.

"The Court: And that was below the marble?

"The Witness: Yes, sir.

"The Court: You saw it?

"The Witness: Yes, sir.

"Q. What kind of day was it? A. What kind of day was it?

"Q. Yes. A. It was a fine day.

"Q. And it was light, was it? A. Yes" (p. 30, ll. 10-40).

"The Court: Are you sure of the condition there, as to the place where you say it was wooden? Are you sure of that?

"The Witness: I am sure it was a wooden floor. It was not the marbleloid.

"The Court: Which you stepped into?

"The Witness: Yes. * * *

"The Court: Tell us whatever you observed about this place.

"The Witness: I tell you just when I fell I went right off the marble down onto this wooden floor.

"Q. Did you fall on plain wooden flooring, or was there something other than wooden flooring that you fell on, if you know? A. I don't know just what I fell on.

"The Court: It was not marbleloid?

"The Witness: It was not marbleloid.

"Q. Was it plain wooden flooring or something else, if you know? A. I don't know" (p. 33, l. 1, to p. 34, l. 10).

The above is the entire evidence in the case to establish the negligence of this defendant. We contended in the trial court and respectfully urge here, that there was not sufficient evidence to establish that the plaintiff's fall was due to any negligence on the part of the defendant. In the first place the testimony is so vague and uncertain as to the cause of the fall, that the jury would have to speculate as to the cause.

The law is well settled that the mere fact the plaintiff fell does not call upon the defendant for an explanation. The doctrine of *res ipsa loquitur* does not apply in a case of this character (*Garland v. Furst Store*, 93 N. J. L. 127, 131). It was in-

cumbent upon the plaintiff to establish that her fall was due to some negligence on the part of the defendant, and in a case of this character, proof of negligence required the showing of, first, some defect in the flooring of the store at the point where the plaintiff fell; and, secondly, proof that such defect existed long enough to charge the defendant with notice.

We respectfully contend that there was no condition at the point where the plaintiff fell, which could render the defendant liable, and that even assuming the difference in the level of the marble-oid and the wooden floor could be said to be such a condition, there was no proof it had existed sufficiently long enough to charge the defendant with knowledge of its dangerous character and thus render it liable.

It has been established beyond question in this State, that the manner in which a defendant may have constructed its premises in the absence of proof of a standard of construction which it has violated, does not of itself create any liability.

Feil v. West Jersey & Seashore Railroad Co., 77 N. J. L. 502, 504;

Halm v. Freeholders of Hudson, 78 N. J. L. 712, 715;

Kingsley v. Delaware, Lackawanna & Western R. R. Co., 81 N. J. L. 536, 543;

Zebrowski v. Warner Sugar Refining Co., 83 N. J. L. 558, 563;

Raub v. Lehigh Valley Railroad Co., 87 N. J. L. 603, 606.

In *Feil v. West Jersey & Seashore Railroad Co.*, *supra*, this Court, Chief Justice GÜMMERE speaking, said (italics ours) (p. 503):

“The degree of care which it is required to take is that which is exhibited by persons of

ordinary prudence under like circumstances, and, so, the adoption of a method of platform construction which accords with that in general use by well regulated railroad companies, and which is approved by experience, is a due performance of the duty which it owes to its passengers in that regard. * * * There is nothing in the present case to support the conclusion that the defendant company failed to observe the degree of care indicated in the construction of its platform at the Millville station. *There is no proof that it differs in its character from platforms in general use by the defendant and other railroad companies, and no presumption of want of due care arises from the fact that a railroad company, presumably to meet the requirements of its traffic, has constructed its platform in such a way that one portion of it is lower than another, when the difference of level is not greater than the height of an ordinary step. Negligence must be proved, and in a case like the present, that can be done only by showing that the platform is of a design which a reasonably careful judgment would disapprove as being likely to cause accident to persons using it as a way to and from trains. To hold otherwise would be to leave railroad companies to the mere caprice of juries, and subject them to the danger of being found guilty of negligence, no matter what plan of construction they might adopt.*"

In *Halm v. Freeholders of Hudson*, *supra*, the plaintiff was riding in an automobile being operated by his son, which came in contact with a guard rail of a bridge over a body of water that crossed the highway. The guard rail did not extend across the entire road. The plaintiff claimed a right to recover because the guard rail should have extended across the entire road. Justice VOORHEES, speaking for this Court refuting this contention, said (p. 715):

"The ordinary rule must be applied to boards of freeholders regarding the building of bridges, that is, a breach of duty must be demonstrated by proof.

"No proof has been offered that the construction was different from ordinary construction, or that it was not sufficient for the purpose for which it was intended."

In *Kingsley v. Delaware, Lackawanna & Western R. R. Co.*, *supra*, the plaintiff endeavored to hold the defendant responsible for injuries she received while alighting from one of its trains at the Hoboken station, due to her stepping into the space between the step of the car from which she was alighting as a passenger, and the platform of the station. In this case the plaintiff's attorneys realizing that a standard must be proved, attempted to prove the same by construction experts, but failed. Justice MINTURN writing the opinion for this Court said (p. 545):

"In the final analysis, the testimony in the case at bar demonstrates simply a difference of construction between the defendant's car and platform and some of the cars and platforms of other companies; but, upon legal principle, until that difference can be transmuted into a legal generalization indicating a variation from the existence of a standard type, the departure from which by the defendant might be construed as imprudent and negligent, and by which a criterion of duty may be established, the damage incurred under circumstances such as are presented in the case at bar must be held to be *damnum sine injuria* and can impose no liability upon the defendant."

In *Zebrowski v. Warner Sugar Refining Co.*, *supra*, the plaintiff sought to recover for personal injuries while in the employ of the defendant, on the ground that it was the duty of the defendant

to adopt rules and a safe system of operation. The point was made that there was an entire absence of a system governing the work. There was proof in the case that other defendants operated their elevators by the use of a different system, but this Court in sustaining judgment for the defendant said (p. 562):

“Whether a particular rule should be enacted should not be left to the jury arbitrarily to find, but there should be proof that the practice of promulgating such rules in similar manufactories under similar conditions is general. In the absence of proof that it is a general usage of other employers, engaged in similar lines of business, to adopt rules, claimed to be necessary, and that they would be practicable and useful, a master will not be charged with negligence for failure to make them.

“What standard was proved by way of system to which it was incumbent upon the defendant to conform? It cannot be asserted that in a case like this, each jury may say what they deem to be a proper rule, and thus arbitrarily direct the conduct of each manufacturing plant under regulations not general, but special, in their application.”

In *Raub v. Lehigh Valley Railroad Co.*, *supra*, the plaintiff attempted to hold the defendant negligent because a low bridge over the defendant's tracks with which the plaintiff's intestate came in contact, failed to have any illumination upon it. Justice PARKER, writing the opinion for this Court, sustaining a directed verdict for the defendant said (p. 606):

“It may be that under the circumstances of the particular case the life of deceased might have been saved by the extra precaution of lighting the bridge from without; but the test in cases of this class is not whether a particular safeguard would have been better, but

whether similar safeguards were practicable and useful and according to the ordinary usage of railroads. (Cites case.) There was, consequently, no question of negligence to be submitted to the jury."

Assuming for the purpose of this argument, that the difference in the level of the marbleloid and the wooden floor, which according to the contract was five-eighths of an inch, could be said to be a condition which might render the defendant negligent, nevertheless, until the defendant had notice that this condition might reasonably cause the fall of a customer, there would be no liability.

Schnatterer v. Bamberger, 81 N. J. L. 558;
Garland v. Furst Store, 93 N. J. L. 127.

In the first of the above cases cited *supra*, the plaintiff in going down steps leading to the basement of the defendant's store, caught the heel of her shoe in the brass nosing (originally attached to the wooden step to prevent its wear), which was loose, causing her to trip and fall. It was held that the evidence failed to show the storekeeper had not used reasonable care in keeping the store safe for use and for the reason that it had not appeared that the defect had been brought to the notice of the storekeeper or had existed for such a length of time as to charge him with the notice of its existence; and that in the absence of proof of one of these conditions, a *prima facie* case of negligence was not established.

In the second of the above cases, the plaintiff fell on a tile or marble floor in the defendant's store. The testimony showed that in front of a series of benches where shoes were sold, there were strips or runners of carpet. The plaintiff made a purchase and then proceeded to walk across the floor to the stamp desk, and using her

own words: "I just walked along from where I got the package to the stamp desk, and as I got to the side to go to hand my slip, my two feet was taken and I had slipped down on my left hip." The plaintiff testified that at the spot where she fell, the floor was clean. It appeared that the floor was smooth and similar to that used in bank buildings. There was testimony that it was very slippery and anyone could slide along it. The Court of Errors and Appeals held that there was no proof that, even assuming the floor could be said to be slippery, that the defendant had notice of that condition so as to charge it with any responsibility, and that the burden was upon the plaintiff to establish this fact.

In *Haddon v. Snellenburg*, 143 Atl. 8 (Supreme Court of Pennsylvania), the plaintiff fell while walking along a balcony in the defendant's store to a washroom. She inquired of an employee where the washroom was, and upon being directed, took three or four steps and then fell. The cause of the fall was a small step down to a lower level. This small step led from one floor level to another. It was about six inches high. The Supreme Court of Pennsylvania held that a direction of a verdict for the defendant was proper, and said:

"It is not negligence *per se* or negligent construction in a store, a public place, to have one floor at a lower level by a few inches than another. Where such difference in elevation exists, the place should be sufficiently lighted artificially, to enable users to see the step, unless lit by daylight. There is no evidence to show lack of either daylight or artificial light. Unless we hold that defendant was an insurer of the safety of its invitees, we must conclude plaintiff did not make out a case, as there is not a scintilla of evidence to establish negligence."

The United States Circuit Court of Appeals for the Eighth Circuit, in *Watkins v. Piggly Wiggly Bird Co.*, 31 Fed. (2nd) 889, held that it was not negligence to have a street entrance to a store higher than the sidewalk without a step or platform beyond or outside of the doorway, though a screen door, solid at the bottom, when closed, concealed from a person leaving the store, the fact that the sidewalk was at a lower level.

In *Hoyt v. Woodbury*, 200 Mass. 343; 86 N. E. 772; 22 L. R. A. (New Series) 730, the defendant owned a building consisting of two stores on the ground floor, with a stairway leading to the upper floors. The street in front of the building was on grade. To accommodate the entrance to the stores and stairway to the street grade, a rise or step was maintained in front of the building and between it and the sidewalk. The plaintiff stumbled over this rise or step while passing from the lower to the upper store, and brought suit to recover damages for her injuries. The Court said:

“Persons entering this building were charged with knowledge that they were not entering from a perfectly level sidewalk, and that generally the floors of buildings are not of precisely the same elevation as the sidewalk, even where it is level. Customers entering or leaving stores cannot be unmindful of these almost universally prevailing conditions. Owners of buildings have a right to proceed in their constructions in view of this common observation on the part of the public and assume in the actions of those who may frequent their buildings the exercise of ordinary circumspection as to their footing. Steps of greater or less height are the usual, although not the only, means of overcoming such differences in level as existed in this case between the street and the entrance. People cannot expect upon land obviously in private ownership next a street the same condition

that they might anticipate in a public sidewalk. In arranging an approach to the store wider at the street line and converging toward the door and the approach to the upper floors at a conveniently higher level with a low step in ordinary form between, the defendant violated no duty which he owed to the plaintiff."

In *Albachten v. Golden Rule*, 160 N. W. 1012; 135 Minn. 381, it was held that standing alone, proof that there was a slight difference in the level of intersecting hallways in defendant's store will not charge defendant with negligence in the condition of the premises, or require submission of question to the jury.

In *Vogt v. Wurmb*, 300 S. W. 278 (Mo. Sup.), it was held that an owner and storekeeper was not liable for injury to a customer falling over boards placed on a freshly painted step.

Other cases holding to the same effect are:

Hertz v. Advertiser Co., 201 Ala. 416; 78 So. 794; L. R. A. 1918 F. 137;

Maine v. Leaman, 294 Mo. 579; 243 S. W. 91.

From the facts above and the authorities herein referred to, we respectfully contend that the case is positively barren of any proof that the cause of the plaintiff's fall was due to any negligent condition. All that appears is that the plaintiff was walking along an aisle made of marbleloid that was five-eighths of an inch higher than the flooring of the rest of the store; that she turned around a counter, proceeded several steps, and then fell. Where she fell was on the wooden floor. She does not contend that she tripped or that anything was on the marbleloid or the wooden floor, which caused her fall. Even assuming that the difference in the level of the marbleloid and the wooden

floor, namely, five-eighths of an inch, caused her to fall, we respectfully contend that that would not charge the defendant with negligence. This is no different than carpeted aisles, where the carpet would be from a quarter to perhaps a half inch above the surrounding floor, or the maintenance of a rubber mat or other type of mat, as is frequently used on entrances to stores or in aisles of stores. These mats are anywhere from a quarter of an inch to a half inch above the surrounding floor.

We respectfully submit, therefore, that the trial court erred in refusing the defendant's motions for nonsuit and for a direction of a verdict in favor of the defendant.

4.

CONCLUSION.

For these reasons we respectfully submit that the judgment below should be reversed and a *venire de novo* ordered.

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Submitted February Term, 1931.



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