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Notice of Appeal.

(Filed March 22, 1918)

New Jersey Supreme Court.

ANNA V. HIGGINS AND WILLIAM T. HIGGINS, *Plaintiffs,* *vs.* GOERKE-KIRCH COMPANY, *Defendant.*	*Notice of Appeal.*

To John J. Stamler, Esq., Attorney for Plaintiffs.

Sir:

TAKE NOTICE, that the defendant, Goerke-Kirch Company, hereby appeals for the decision of the New Jersey Supreme Court, dated February 25th, Nineteen hundred and eighteen, in the above entitled cause, to the New Jersey Court of Errors and Appeals being the last resort in all causes.

Yours respectfully,

WM. E. HOLMWOOD,
Attorney for Defendant.

Dated at Newark, N. J., this
14th day of March, 1918.

Grounds of Appeal.

(Filed April 13, 1918.)

New Jersey Court of Errors and Appeals

ANNA V. HIGGINS AND WILLIAM T. HIGGINS, *Plaintiffs-Respondents,* *vs.* GOERKE-KIRCH COMPANY, *Defendant-Appellant.*	*Action in Tort.* *On Appeal from Supreme Court.* *Grounds of Appeal.*

Sir:

TAKE NOTICE, that the following are the grounds of the defendant's appeal from the whole of judgment entered in this cause by the New Jersey Supreme Court, dated February 25th, Nineteen hundred and eighteen:

1. Because the said New Jersey Supreme Court reversed a judgment in favor of the defendant herein, which judgment was entered in the District Court in the City of Elizabeth, on the 10th day of July, Nineteen hundred and seventeen.

2. Because the said New Jersey Supreme Court in considering this cause of action on appeal from the District Court of the City of Elizabeth, decided that the plaintiff and respondent herein, Anna V. Higgins, was not guilty of contributory negligence.

3. Because the said New Jersey Supreme Court on appeal from the District Court of the

City of Elizabeth, decided that the defendant and appellant herein was guilty of negligence, upon the facts found by the trial court.

4. Because the decision of the New Jersey Supreme Court imposed upon the defendant and appellant herein a higher degree of care than is required by the law.

5. Because the said New Jersey Supreme Court found that the plaintiff and respondent herein had established by the evidence, a custom of the trade in which the defendant was engaged by the testimony of the plaintiff's witness, Isidor Kutoff.

6. Because the said New Jersey Supreme Court in reversing the District Court of the City of Elizabeth in making a finding as to the custom of trade testified to by the plaintiff's witness, Isidor Kutoff, undertook to decide a question of fact in favor of the plaintiff, which question of fact had been decided adversely to the plaintiff by the trial judge of the District Court.

7. Because the New Jersey Supreme Court, in considering the testimony of the plaintiff's witness, Isidor Kutoff, ignored the finding of facts by the trial judge of the District Court of the City of Elizabeth as to the testimony given by said witness on cross examination.

8. Because the evidence on the part of the plaintiff and respondent herein was insufficient to establish a custom of trade.

9. Because the evidence produced by the plaintiff-respondent herein as to the alleged custom of the trade in which the defendant was engaged is immaterial, irrelevant and incompetent.

Grounds of Appeal.

10. Because the standard of duty imposed upon the defendant by the New Jersey Supreme Court in reversing the District Court of the City of Elizabeth goes beyond the requirement of reasonable care, and exacts an absolute duty to foresee accidents to its customers, and to adopt all possible suggestions and precautions in the display of common household articles, even though such articles are not equipped with safety devices by the manufacturer.

WM. E. HOLMWOOD,
Attorney for and of Counsel with Defendant-Appellant.

To JOHN J. STAMLER, ESQ.,
Attorney for Plaintiff-Respondent.

State of Demand.

Elizabeth District Court.

ANNA V. HIGGINS AND WILLIAM T. HIGGINS,
Plaintiffs,

vs.

GOERKE-KIRCH COMPANY,
Defendant.

The plaintiff, Anna V. Higgins, demands of the defendant the sum of Five hundred dollars for that: That on the twenty-fifth day of March, Nineteen hundred and sixteen, and prior thereto, the said defendant company maintained on Broad street, in the City of Elizabeth, a department store, and among other merchandise offered for sale were ice boxes.

2. That the said defendant company, in the course of their business, invited the plaintiff, Anna V. Higgins, to inspect certain ice boxes, which the plaintiff intended to purchase.

3. That while said plaintiff, Anna V. Higgins, on the day and year aforesaid, was inspecting said ice boxes the said defendant company, through the negligence and carelessness of its agents and servants, permitted one of the ice box covers to fall upon the right hand of the said plaintiff, Anna V. Higgins, seriously injuring her right hand, and thereby causing her, the said plaintiff, Anna V. Higgins, to become

sick, sore and injured from thence hitherto to the damage of the plaintiff, Anna V. Higgins, in the sum of Five hundred ($500) dollars, for which she brings this suit.

SECOND COUNT: That the said plaintiff, Anna V. Higgins, is married and her husband's name is William C. Higgins, and that by reason of the negligence complained of in the first count the plaintiff, William C. Higgins, was obliged to expend divers large sums of money, to wit, the sum of Fifty ($50) dollars in medical aid in the endeavor to heal and cure the said Anna V. Higgins from the injuries she received as aforesaid, and that the plaintiff, William C. Higgins, also, by reason of the negligence of the said defendant, lost the service and society of his wife, Anna V. Higgins, from thence hitherto, and was obliged to expend the sum of Fifty ($50) dollars, employing a domestic for the purpose of doing the ordinary housework that his wife had formerly performed, but by reason of the injury aforesaid, she was unable to perform.

Judgment will be claimed on this count for the sum of Two hundred ($200) dollars.

JOHN J. STAMLER,
Attorney of Plaintiff.

Agreed State of Case.

State of Case as Fixed by Trial Court.

ELIZABETH DISTRICT COURT.

ANNA V. HIGGINS AND WILLIAM T. HIGGINS,
Plaintiffs,

vs.

GOERKE-KIRCH COMPANY,
Defendant.

John J. Stamler, Attorney for Plaintiff-Appellant.

William E. Holmwood, Attorney for Defendant-Appellee.

The action brought was to recover damages for an alleged negligent act of the defendant company as set forth in the State of Demand, a true copy of which is hereto annexed and made a part hereof and marked Exhibit "A."

This cause was tried before the Judge without a jury and the following testimony was given:

The plaintiff, Anna V. Higgins, was sworn and testified as follows: That the defendant company was the owner and conducted a department store in the City of Elizabeth and sold and offered for sale ice boxes among other articles of merchandise;

That on March 25th, 1916, at about 8:15 p. m., I entered the store of the defendant for the purpose of purchasing or looking at ice boxes, which I intended to buy; that I was taken charge of by one of the sales-ladies, who was in the employ of the defendant company, and was thereupon taken

to the floor upon which ice boxes were standing in a row and the lids of the ice chambers of the ice boxes were open.

I thereupon examined one of the ice boxes, first looked at the upper part of it and then I put my hand on the upper edge of the box in order to rest myself for the purpose of looking in at the bottom of the box, and bend down, when suddenly the lid of the ice box dropped on my hand injuring my fingers. Immediately after I was injured, the saleslady said, "The same thing happened this morning." I got somewhat of a fainting spell. The employees of the defendant company put peroxide on my fingers. The injury was to my middle and ring fingers of the right hand, between the first joint and nail. The middle finger was mashed and bleeding. Doctor Froomess came to my house every day for one week (except one day), and thereafter I went to his office five times. I lost one nail. It took two and one-half months to heal. It was very painful for two weeks. I have been nervous since. I was obliged to keep my sister to do the house work for two weeks. I paid three dollars a week to her, and also spent five dollars and fifty cents for washing. I did not as yet pay the doctor's bill. If I bake or wash the middle finger hurts and splits at times. It has done so since the accident at least five or six times. It bleeds and gets sore and then again it takes two or three days to heal. The saleslady put down the lid on the ice box after the accident.

William C. Higgins, the husband, corroborates the statement of his wife, Anna V. Higgins, relative to the injury she sustained, and the pain she has suffered.

Agreed State of Case.

Doctor Froomess, witness on behalf of the plaintiffs, testifies that during the month of March, 1916, he treated the plaintiff, Anna V. Higgins. Two of her fingers were badly crushed; that his bill was Eleven dollars and fifty cents.

Isidor Kutoff, witness produced on behalf of the plaintiffs, testified that: I am a salesman in the store of Miron & Lifson, furniture dealers, and that for eight years I had charge of the ice box department for that firm. That it is the custom of stores where ice boxes are sold to have the lids of the ice boxes closed when they are standing on the floor for display and sale. On cross examination he testified that his business was merely that of a retail salesman; that he was not a buyer and that he had no occasion to visit other stores.

The defendant thereupon made a motion for non-suit upon the following grounds:

1. That no negligence was proven as against the defendant.

2. That the plaintiff, Anna V. Higgins, was guilty of contributory negligence.

The Court reserved decision upon the aforesaid motions and directed the defense to put in its evidence.

Thereupon Miss Stryker testified that she was the cashier of the defendant company in charge of the department where the ice boxes are sold; that she saw Mrs. Higgins rest her hand on the upper portion of the ice box and open the bottom, and as she opened the door the top or lid fell down. "I cannot say if the top of the ice box was open or shut at the time, but I saw that

as she, Mrs. Higgins, opened the bottom door of the ice box the top fell down." "I cannot say if the cover or lid of this ice box and other ice boxes were open or shut."

On cross examination she testified that the covers or lids of the ice boxes had chains.

Mrs. Cassell, witness produced on behalf of the defendant, testified as follows: I was the person who took charge of Mrs. Higgins for the purpose of showing her ice boxes. Mrs. Higgins, when approaching the second ice box that was standing on a platform on the floor, looked into the upper portion of the ice box. The lids were up, chains were on them to prevent the lids from falling backward (and not forward). The lids of the ice box rested back at an angle of about 45° and were supported by chains. She laid her hand on the ice chamber, which is the upper part of the ice box, and she stooped down and opened the bottom door to look into the bottm part of the ice box, and as she did that, she moved the ice box which was standing on a platform, and the top lid of the ice box came down on her fingers.

At the conclusion of the trial the attorney for the defendant moved for judgment upon the same grounds urged for judgment of non-suit.

Upon the aforesaid testimony the Court gave judgment for the defendant.

ABE J. DAVID,
Judge.

Docket Entries of the District Court of the City of Elizabeth.

IN THE DISTRICT COURT OF THE CITY OF ELIZABETH.

STATE OF NEW JERSEY, }
COUNTY OF UNION. } *ss.*

ANNA V. HIGGINS AND WILLIAM T. HIGGINS,
Plaintiffs,

vs.

GOERKE-KIRCH COMPANY,
Defendant.

In an action upon Action-at-Law.

Demand, $500.00.

Attorney of Plaintiffs, John J. Stamler.

A Summons was issued in the above stated cause May 26, A. D. 1916, returnable June 1st, A. D. 1916, at 10 o'clock a. m., and was returned by the Constable as follows:

I served the within Summons May 27, 1916, on the defendant by reading it to Wm. Kelly, clerk in charge of said Co. office in Eliz., N. J., and giving him a copy.

O. Conlen, Constable.

Demand filed May 26, 1918, Adj. from time to time to June 25, 1917. Anna Higgins, William Higgins, Leo E. Frommus, & Isidore Kutiff, were sworn for the plaintiff. Madeline Stryker, & Grace Gazelee were sworn for the defendant.

Court reserved decision for one week. July 10, 1917, court gave judgment in favor of said defendant and against the said plaintiff.

Notice of Appeal and Order for cash deposit filed July 17, 1917.

July 17, 1917—$50.00 in cash deposit in lieu of bond.

STATE OF NEW JERSEY,
COUNTY OF UNION. } *ss.*

I, GEORGE J. SMITH, clerk of the District Court of the City of Elizabeth, do hereby certify the foregoing to be true and correct copies of a certain Summons and Judgment as the same is recorded in Book 57 of Records for said City on page 424.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 8th day of September, A. D. 1917.

[SEAL] GEORGE J. SMITH,
Clerk.

Decision of District Court Judge.

DISTRICT COURT OF THE CITY OF ELIZABETH.

ANNA V. HIGGINS AND WILLIAM T. HIGGINS, *Plaintiffs,*	*Action at Law.*
vs.	*Findings.*
GOERKE-KIRCH COMPANY, *Defendant.*	

This is a most interesting and novel case.

I am unable to find from the reports any case on all fours, but I believe that this case is governed by the principles of law laid down in cases somewhat similar to this case.

The plaintiff, Anna V. Higgins, had two fingers on one hand injured while inspecting an ice box in the defendant's store. The ice box was on a platform and the lid was open and tilted back. Plaintiff had her one hand resting on the edge of the open top of the ice box and while she was opening the door with her other hand, caused the ice box to move and the top or lid fell down on the hand which was resting on the top of the ice box.

It is contended by the plaintiffs that the leaving of the ice box in such a position as to allow the falling of the lid was such an act of negligence for which recovering could be had.

The duty of the defendant was that of the owner of property to a person therein on invitation, and under the law governing such cases,

was bound to use ordinary care and diligence to keep the premises in safe condition for the transaction of business by the person thus invited.

Sherman & Redfield on Negligence, 6th Edition, Section 704.

There is a long line of cases having laid down this rule, among which are the following:

Spicer v. *Boice,* 66 N. J. Law, page 434.

Smith v. *Jackson,* 70 N. J. Law, page 183.

Schnatterer v. *Bamberger,* 81 N. J. Law, page 558.

Vuda v. *Dzeurtzko,* 87 N. J. Law, page 34,

In order to recover, the plaintiffs must establish some act or omission of the defendant in dereliction of the defendant's duty to its customers to exercise reasonable care to keep its store in safe condition for the use of its customers.

Was it incumbent on the defendant to so fasten the cover of the ice box so that it could not fall down while the ice box was being moved or inspected by a customer? I do not think the law involves any such duty.

In this connection, I will cite the language of the Court in the case of *Larkin* v. *O'Neill,* 119 N. Y. Reporter, page 221, "The line must be drawn in these cases between suggestions and possible precautions, and evidence of actual negligence."

In the case before the Court the conditions and situation were obvious to the plaintiff. She could see very readily whether or not the top cover was so fastened that it might fall down in the handling or moving of the ice box just the same as she could see such a condition at her own home.

Decision of District Court Judge.

This case, I take it, is in line with the swinging door cases:

The case of *Pardington* v. *Abraham,* 183 N. Y., 553, is somewhat in line on this point, "Where swinging doors with springs of greater strength than those attached to doors attached to different department stores by which the plaintiff was injured, were proved to be used in numerous like establishments in the same city, and there was no proof that there was anything against their construction or operation to make them dangerous to customers of the store, provided they were used with ordinary care. The constructive arrangement and management of such swinging door was not negligent."

This case is not in line with the cases holding that there is liability where a person is injured through a trap on the owner's premises.

The situation in this case was in full view of the plaintiff.

I can find no negligence in law on the part of the defendant upon which liability in this case can be based.

Judgment will therefore be for the defendant.

Dated July 10th, 1917.

ABE J. DAVID,

Judge of the District Court of the City of Elizabeth.

Decision of Supreme Court.

Filed February 21, 1918.

New Jersey Supreme Court.

(November Term, 1917.)

ANNA V. HIGGINS, *et al.*,

vs.

GOERKE-KIRCH CO.

Appeal from Elizabeth District Court.

Argued November Term, 1917. Decided February Term, 1918.

John J. Stamler, for Plaintiff.

William E. Holmwood, for Defendant.

Argued before Justices Swayze, Trenchard and Minturn..

The opinion of the Court was delivered by MINTURN, *J.*

While visiting the defendant's department store in Elizabeth, for the purpose of purchasing an ice box, the plaintiff was shown by one of the sales-ladies to where a number of ice boxes were standing open for inspection.

The plaintiff while examining one of the boxes, placed her hand on its upper edge for the purpose of enabling her to inspect its lower compartment, and while bending down for that purpose the lid of the box dropped upon her hand, injuring her fingers, the damage to which is sought to be compensated by a recovery in this suit. Immediately after the falling of the lid

the saleslady exclaimed that the same thing happened that morning.

An expert furniture salesman, who had charge of an ice box department for eight years in a store, testified that it was the custom in the business to keep the lids of the boxes closed, when they are displayed for sale.

The testimony on behalf of the defendant presented no substantial variation from that offered for the plaintiff, except to show that the lid was held back by a chain, at an angle of forty-five degrees, to prevent it falling backward.

The inference remained that there was no resistance presented by chain or otherwise, to prevent the lid falling forward, as it did on this occasion. Upon this state of facts the learned trial court ordered judgment for the defendant, from which direction this appeal was taken.

Since there is in the record no dispute upon the material facts, the case does not come within the rule that this court will not upon appeal review the facts, where the only contention is the rule of law applicable to the conceded facts.

An initial objection is made to the introduction in evidence of the declaration made by the saleslady, at the time of the accident, that a similar occurrence happened that morning.

The rule is elementary in this department of the law that to be admissible such testimony must synchronize with the main occurrence, so as to be incidental to, or practically part of it, as *res gestae.*

Greenleaf Evidence, sect. 108.

Blackman v. *West Jersey, etc., R. R. Co.,* 39 Vr. 1, is an instance where such an admission or declaration was rejected.

The *res gestae* in that case was the fall of the plaintiff from a street car. The admission of the conductor while picking her up that the fault was his in failing to observe her signal to stop was held not to be within the rule of *res gestae.*

In *Jennings* v. *Okin,* 88 L. 659, the Court of Errors reversed the judgment of the trial court upon the ground that the testimony of defendant's agent relative to his destination while driving a motor car for his principal was properly part of the *res gestae* in ascertaining whether the proposed trip was undertaken upon his own or his principal's business.

The case *sub judice* seems to fall within a zone of time not paralleled by these two cases. The infirmity of the testimony rests in the fact that it was in no wise related to the fact of the accident, but was essentially an admission of a past occurrence of similar character. It is clearly settled by the rules of evidence that such declarations are not admissible.

Prof. Greenleaf remarks: "It is to be observed that where declarations are merely narrative of a past occurrence they cannot be received as proof of the existence of such occurrence. They must be concomitant with the principal act." 1 Greenleaf 126 and cases cited.

10 R. C. L. 979 and cases.

But it is to be observed that with that declaration excluded there was still testimony in the case upon which negligence could be predicated.

The plaintiff's expert (Kutoff) testified to a custom of the trade of keeping the lids upon such boxes closed, which practice if followed in this instance would have made the accident impossible. There was in addition the conspicuous

fact that the plaintiff was an invitee, which fact cast upon the defendant the duty of using reasonable care for her safety, regardless of any additional care made necessary by the doctrine of scienter, resulting from previous express or implied knowledge of an existing defect as in *Bamberger* v. *Schnatterer,* 81 L. 558.

The test of negligence in such a situation is whether under the circumstances the defendant used reasonable foresight to prevent harm or damage to the defendant lawfully upon its premises.

Kingsley v. *D. L. &W. R. R.,* 52 Vr. 541.

In *Monroe* v. *P. R. R.,* 56 Vr. 691, the Court of Errors held that it was not *ipso facto* negligence for a person lawfully upon a railroad platform awaiting the arrival of a train to walk within three feet of the edge of the platform whereby he was injured, unless the danger incident to the act was inherently obvious in the situation. It cannot be said as a matter of law, in this instance, that the plaintiff's act in grasping the top of the box for the purpose of stooping down and thereby enabling her to examine its interior was *ipso facto* negligence, in the absence of a caution or warning from some one in authority informing her of the danger incident to the act.

Common knowledge and experience of which we must take notice would indicate that such conduct was not *ipso facto* negligence upon her part. The act constitutes the only element of proof in the case, upon which contributory negligence can be predicated. Relieved of that argument against recovery, the case resolves itself into the inquiry whether there is anything in the occurrence to bespeak negligence upon the de-

fendant's part, or at least to cast upon it the onus of showing due care in the presence of the positive testimony of plaintiff's witness, Kutoff, that the situation clearly presented an absence of due care. The falling of the lid itself under the circumstances was not without its importance upon that inquiry. *Res ipsa loquitor* is the maxim applicable to such a situation, and it raises a presumption of negligence, which it is incumbent on the defendant to rebut by an explanation tending to relieve it of the presumption of absence of any or all care.

In the case at bar, no attempt is made by defendant to explain the occurrence from that point, and in the absence of an explanation comporting with the exercise of due care and foresight for harm, a case of *prima facia* negligence is established.

The cases are numerous, and are collected from this and other states in 29 Cyc. 453. In *Scott* v. *London, etc. Docks Co.,* 3 H. & C. 596, falling bags of sugar from a warehouse struck the plaintiff while passing on the sidewalk, it was held that in the absence of explanation the presumption exists that the accident arose from want of due care.

In *Mullen* v. *St. John,* 57 N. Y. 567, plaintiff while on the sidewalk was injured by the falling of a wall, which *ipso facto* raised a presumption of negligence. In *Jager* v. *Adams,* 123 Mass. 26, plaintiff while on the sidewalk was struck by a falling brick, and the same rule applied.

In this court the case of *Sheridan* v. *Foley,* 29 Vr. 230, was decided upon the application of the same principles, and we there held, the present Chief Justice speaking for the court, where a

brick fell and injured a laborer in a building in process of erection, that, "It will be presumed from the mere happening of such an accident, in the absence of explanation by the contractor, that it occurred from want of reasonable care."

In *Bahr* v. *Lombard Ayres,* 24 Vr. 233, Mr. Justice Garrison, speaking for the Court of Errors, in a case where the facts in evidence failed to give rise to the presumption, elucidates the doctrine, and affirms the presumption of negligence, arising from the existence of an abnormal occurrence, causing damage and not clearly chargeable to *vis major* or the interference of an extraneous force.

The principle is also illustrated in *Hughes* v. *Atlantic City R. R.,* 56 Vr. 213, and cases therein cited.

These cases, however, present illustrations of the application of the doctrine in situations where the parties occupy the status of co-licensees, where the relative rights are practically equal. Such a situation is illustrated by the cases of *Dull* v. *Mansfield Plumbing Co.,* 86 L. 582, and *Coyne* v. *P. R. R.,* 87 L. 259.

But the case at bar is distinctly accentuated by the fact that the plaintiff occupies the status of an invitee, to the premises of another, whereby the duty is cast upon the inviter to use reasonable care and foresight to protect one who occupies the status of a guest, from harm, or at least to refrain from careless or indifferent conduct in the management and control of its property, upon exhibition, which may prove injurious to one casually examining it, whether the property be a work of art or a domestic utensil, and which examination presents the conspicuous reason for

the presence of the guest upon the premises. A case not unlike it in principle is the recent case of *Reese* v. *Abele's,* 100 Kan. 518 L. R. A. 1917 E. 747.

Corby v. *Hill,* 4 C. B. U. S. 556; *Southcote* v. *Stantrope,* 1 H. & N. 247, and *Indemaur* v. *Dames,* L. R. 1 C. P. 274, present instances of a concealed trap upon the premises, but the rationale of the rule of liability is not limited by specific instances of entrapment, but pervades the general doctrine of *tort feasance,* produced by the absence of care in its various manifestations.

If it be asked what the defendant did that bespeaks negligence, it may be confidently answered that his *tort feasance* consisted in doing nothing to render reasonably safe for the inspection of its guests an article which confessedly in its situation was dangerous, and which by the exercise of ordinary business foresight it would have known to be dangerous to those invited to inspect it, and who were unconscious of the danger.

We have intimated that the case at bar is barren of explanatory testimony, or of any semblance of it, and in that situation the liability of the defendant upon the uncontroverted testimony, bespeaking negligence, as well as upon the legal presumption arising from the unexplained occurrence becomes manifest.

The judgment will be reversed, and a trial *de novo* will be ordered.

New Jersey Court of Errors and Appeals

ANNA V. HIGGINS and WILLIAM T. HIGGINS, Plaintiffs-Respondents, vs. GOECKE-KIRCH COMPANY, Defendant-Appellant.	On Appeal from Supreme Court.

BRIEF FOR RESPONDENTS.

On March 25th, 1916, one of the plaintiffs, Anna V. Higgins, entered the department store of the defendant for the purpose of inspecting ice boxes with the intention of purchasing and while so inspecting one ice box, the top lid or cover fell upon her hand inflicting the injuries for which she sought to recover damages.

The cause was tried in the Elizabeth District Court and at the conclusion of plaintiff's case, a motion was made to nonsuit on two grounds (a) that no negligence was proven as against the defendant and (b) that plaintiff was guilty of contributory negligence. The court reserved decision, the defense put in its testimony and upon the conclusion of the trial the defendant moved for judgment on the same grounds urged for the nonsuit, and the court gave judgment for the defendant. The plaintiff appealed to the Supreme Court where an opinion was handed down reversing the judgment and awarding a new trial. From this judgment of reversal the defendant appeals to this court and alleges numerous grounds of appeal, and in its brief in support of the appeal, makes seven points which

I will herafter consider in the order in which they are made.

Before considering said points, I desire to urge certain technical objections to the appeal:

(a) Notice of objection to the printed case was given by the respondent to strike out the findings of the District Court Judge on pages 13, 14 and 15, because they were not included in the case before the Supreme Court and it is now insisted that such matter is not properly a part of the case as it was not in the record in the court below.

(b) The case before this court does not show any judgment entered and there is no certificate of the Clerk of the Supreme Court certifying the record which is now attempted to be used by the appellant on this appeal.

(c) Statement of facts.

In the statment of facts on page 1 of appellant's brief, it is said 'that Mrs. Higgins pushed back the ice box." There is no evidence to support that. The evidence of Mrs. Cassell is correctly cited by appellant's counsel on page 2 of his brief.

REPLY TO POINT I.

The doctrine of *res ipsa loquitur* is applicable.

The evidence is: Mrs. Higgins in inspecting the ice box after looking into the top, resting her hand on the top in order to stoop down and open the bottom and while so doing, the lid fell upon her hand inflicting the injury (C. pg. 8). One of the defendant's witnesses, Miss Stryker, said as she opened the door the to por lid fell down (C. pg. 9, l. 39). The other of defendant's witnesses, Mrs. Cassell,

says she stooped down and opened the bottom door to look into the bottom part of the ice box and as she did that she moved the ice box which was standing on a platform and the top lid of the ice box came down on her fingers (C. pg. 10, l. 22, &c.).

It is contended that in placing her hand on the ice box and stooping down to look at the bottom of it, Mrs. Higgins did what the ordinary and prudent person does and did nothing which a careful person would not do. It may be, that as a result of her placing her hand upon the ice box, it moved and thereupon the lid fell, and if that is so, the accident bespeaks the negligence of the defendant. If the lid had been properly or securely fastened, it certainly would not have fallen, and I am content to cite as applicable the decisions cited by Mr. Justice Minturn:

29 Cyc 453;

Scott v. *London, etc., Docks Co.,* 3 H. & C., 596.

Mullen v. *St. John,* 57 N. Y., 567.

Jager v. *Adams,* 123 Mass., 26.

Sheridan v. *Foley,* 29 Vr., 230.

Bahr v. *Lombard Ayres,* 24 Vr., 232.

Hughes v. *Atlantic City RR. Co.,* 56 Vr., 213.

Dull v. *Mansfield Plumbing Co.,* 86 L., 582.

Coyne v. *P. R. R.,* 87 L., 239.

Reese v. *Abele's,* 100 Kan., 518.

L. R. A. 1917 E., 747.

REPLY TO POINT II.

The defendant was negligent while plaintiff was not guilty of contributory negligence.

At the trial in the District Court a motion for nonsuit was made on the two grounds advanced by appellant under Point II. The motion was reserved and the court heard defendant's defense, at the conclusion of which, judgment was awarded for the defendant.

The mere fact that the trial court awarded a final judgment instead of a nonsuit is indicative of the opinion of the trial court that the plaintiff's evidence showed actionable negligence and the want of contributory negligence.

Careful examination of defendant's proof fails to disclose any evidence which would overcome or balance the prima facia case made by plaintiff and therefore it cannot now be said by the court as a matter of law, that there was no evidence of negligence of the defendant or that there was conclusive evidence of the contributory negligence of the plaintiff.

The cases cited by appellant under this point have absolutely no application on the point made by him.

REPLY TO POINT III.

Custom of Trade.

Isidor Kutoff testified to the custom of the trade (C. pg. 9), and there was no contradiction of his testimony.

It is not necessary to determine now whether this evidence was sufficient or not, because on the facts

of the case, outside of the testimony of Kutoff, the Supreme Court decided as a question of law, that there was negligence in the happening of the accident.

REPLY TO POINT IV.

There were no disputed facts before the District Court.

It is conceded that if there were disputed facts before the District Court, its findings upon such facts would not be reviewable before the Supreme Court.

The case was not an attempt to review in the Supreme Court a conclusion of the District Court upon disputed questions of fact. On the contrary, the decision of the Supreme Court was a legal determination that the District Court was wrong in holding that upon the whole case there was no evidence of defendant's negligence.

If, as I have contended under point II, the District Court proceeded to a final determination of the case, its conclusion must have been that the evidence produced by the plaintiff established a prima facia case and that such prima facia case was was either met or overcome by contradictory evidence produced by the defendant.

It is now insisted that the District Court was in error in supposing that there was any contradiction of plaintiff's evidence. The material facts as testified to by the plaintiff are corroborated by defendant's witnesses and therefore there was no question of fact for the District Court to determine. The question resolves itself into a question of law, whether on the evidence in the case it was first sufficient to hold legal negligence chargeable against the defendant and secondly whether there was evi-

dence upon which the court must hold that there was contributory negligence chargeable to the plaintiff.

There is no substantial dispute as to either of these matters so that the whole question resolves itself into the determination of the application of the doctrine of *res ipsa loquitur*. If that doctrine controls as we contend above it does, plaintiff was entitled to a verdict.

The necessary corollary is that if the plaintiff is entitled to a verdict that judgment for the defendant is erroneous and the judgment of the Supreme Court is correct.

REPLY TO POINT V.

What has been said under the reply to Points III and IV answers this point.

REPLY TO POINTS VI AND VII.

The Supreme Court imposed upon the defendant the duty of reasonable care.

Counsel undoubtedly misapprehends what is stated by Mr. Justice Minturn in his conclusion as there is nothing advanced by the plaintiff or by the learned Supreme Court Justice to impose any obligation by reason of the defective construction of the ice box.

Plaintiff's case arises from the negligence of the defendant in the exposing of the ice box in question for inspection and examination, and if the defendant permitted the cover of the ice box to be placed in a position where it would readily fall and injure anyone making an inspection, it would be liable.

If, on the other hand, this ice box was so insecurely placed upon the platform that anyone performing the ordinary acts required to make an examination of it, would cause any motion in the ice box which would result in the cover falling upon their hand, there is likewise negligence of the defendant in exposing this ice box for inspection and examination in that it should have more securely placed the ice box upon the platform so that it would not have moved from its position by the mere act of a customer in placing a hand upon the ice box.

It is respectfully insisted that this lid fell because it was placed in an improper position or that the ice box was negligently placed so that without any force but upon merely being inspected as the plaintiff inspected it, it would move causing the cover to fall.

This is not a case where as counsel says in his statement of facts on page 1, that Mrs. Higgins pushed the ice box. The strongest evidence in the case against Mrs. Higgins is that as she stooped down to look at the bottom of the ice box she moved the ice box. An analysis of this language can lead but to one conclusion and that is, as Mrs. Higgins placed her hand upon the ice box and stooped down to open the bottom door of the ice box, her action caused a motion of the ice box which resulted in the lid falling.

It is insisted that what Mrs. Higgins did would be done by almost every woman who goes into a department store to buy an ice box, and if the defendant permits its customers to be exposed to such danger, it is certainly as a matter of law, negligent, and therefore the judgment of the Supreme Court in so holding is absolutely correct.

The case of a swinging door is not at all parallel to the case at bar. The instrumentality and use of

a swinging door is to swing, while it cannot be said that the lid of an ice box is supposed to fall while a customer is inspecting the ice box. In the case of a door, common knowledge teaches us that it must swing on its hinges and if a person in entering a store pushes the door forward, they must necessarily permit it to swing back into its place. So the case cited by counsel for the appellant on this proposition does not give any aid to the court in the solution of the question now before it.

The correct rule was laid down by this court in the case of *Mumma* v. *Easton and Amboy R. R. Co.*, 73 N. J .L., 658, in which the court said:

> "The first is found in the maxim, "res ipsa liquitur"—literally translated, "the thing itself speaks." This principle is that when through any instrumentality or agency under the management or control of a defendant or his servants there is an occurrence, injurious to the plaintiff which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords prima facia evidence that there was want of due care."

Analyze the principle thus laid down. It cannot be said that anything took place which would not have taken place in the ordinary course of things. The defendant might have done several things to have avoided the cover of the ice box from falling upon the hand of a person who was engaged in inspecting or examining the ice box. It might have had the lid closed, in which event if the person inspecting the ice box had raised it and permitted the lid to fall upon his or her hand, then we would have

had a parallel case with the swinging doors. Again, the defendant might have prevented the lid from falling by the use of a stick or some support. But none of these precautions were taken. The lid was placed in such a dangerous position that upon the plaintiff doing what in the ordinary course of events it might be expected she would do, the accident occurred. Ordinary foresight would have told the defendant that this lid would fall and the defendant had a warning by reason of the occurrence of an accident of the same nature the same morning. (C. pg. 8, l. 14).

A considerable portion of the opinion of the Supreme Court is taken up in reviewing the admission in evidence of the statement of the saleslady "the same thing happened this morning," but it will be noted that there was no objection raised in the trial court to that evidence.

In the case of *Dwyer* v. *Hills Brothers Co.*, cited by counsel for the appellant at the top of page 6 of his brief, the court expressly referred to the fact that the same kind of an accident had not taken place before. Now, in the case at issue we have the same kind of an accident taking place on the morning of the day upon which the plaintiff was injured, and it is respectfully insisted that the defendant through its negligence created a situation which resulted in the injury to the plaintiff; that said injury occurred without any fault of the plaintiff; that there was no substantial disputed question of fact before the trial court; that the evidence of the defendant in almost every respect was similar to that offered by the plaintiff, and therefore, the question which the District Court had to decide, was a question of law, whether the evidence submitted before it constituted a cause of action, and since the doctrine res ipsa loquitur applies, it must

necessarily follow that the judgment of the District Court was erroneous and the judgment of the Supreme Court is correct.

The judgment of the Supreme Court should be affirmed with costs.

Respectfully submitted,

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[2150]

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New Jersey Court of Errors and Appeals

ANNA V. HIGGINS and WILLIAM C. HIGGINS, *Plaintiffs-Respondents,* *vs.* GOERKE-KIRCH COMPANY, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.*

Brief for Appellant.

This appeal brings up for review a judgment of the Supreme Court reversing a judgment given in favor of the defendant-appellant by the District Court of the City of Elizabeth, and awarding a new trial to the plaintiff-respondent.

Statement of Facts.

The plaintiff brought suit to recover damages for injuries sustained by reason of the falling of the cover of a lift-top ice box, while she was examining same upon the premises of the defendant. The boxes were upon a platform and the tops of same were open at an angle of forty-five degrees, and were supported by a chain attachment (testimony of Mrs. Cassell—state of case, page 10). The plaintiff in examining the ice box, pushed same back, causing the cover to fall (testimony of Mrs. Cassell—state of case, page 10).

The happening of the occurrence can perhaps be best illustrated by quoting from the testimony of the plaintiff, Anna V. Higgins, and the defendant's witness, Mrs. Cassell.

Mrs. Higgins said:

"I thereupon examined one of the ice boxes, first looked at the upper part of it, and then put my hand on the upper edge of the box *in order to rest myself* for the purpose of looking in at the bottom of the box, and bend down, when suddenly the lid of the ice box dropped on my hand, injuring my fingers." (Case, p. 8.)

Mrs. Cassell said:

"Mrs. Higgins, when approaching the second ice box that was standing on a platform on the floor, looked into the upper portion of the ice box. The lids were up, chains were on them to prevent the lids from falling backward (and not forward). The lids of the ice box rested back at an angle of about 45° and were supported by chains. She laid her hand on the ice chamber, which is the upper part of the ice box, and she stooped down and opened the bottom door to look into the bottom part of the ice box, and as she did that, *she moved the ice box which was standing on a platform,* and the top lid of the ice box came down on her fingers."

An attempt was made by the plaintiff to establish a custom of trade as to the method of exhibiting ice boxes with the lids down, by the testimony of Isidor Kutoff (case, p. 9), who was a retail salesman in another store.

The Supreme Court by an opinion recently reported in 103 Atl. Rep. 37, reversed the judgment of the District Court and held as a matter of law that the defendant was negligent and that the plaintiff was free from contributory negligence. It is contended that the case falls

within the rule of *res ipsa loquitor,* and also that failure of the defendant to follow the alleged custom, was negligence. Both of these contentions are disputed by the appellant.

POINT I.

The doctrine of *res ipsa loquitor* has no application to the case at bar.

It is respectfully contended that the cases cited by Mr. Justice Minturn in the Supreme Court, *Scott* v. *London, Etc., Docks Co.,* 3 H. & C. 596; *Mullen* v. *St. John,* 57 N. Y. 567; *Jager* v. *Adams,* 123 Mass. 26; *Shendun* v. *Foley,* 29 Vr. 230, and *Bahr* v. *Lombard Ayers,* 24 Vr. 233, are inappliable. In all of these cases the evidence showed an unexplained movement of the article causing injury while same was in the possession of the defendants, or their servants. In none of the cases was the cause of the movement explained, and in all of them the movement was entirely independent of any act on the part of the plaintiffs.

In the case at bar the accident is clearly explained, and was caused by the force applied by the plaintiff herself to the ice box. (Case, pp. 8, 10.)

The ice box cover was tilted back at an angle of 45 degrees. (Case, p. 10, ll. 18-20.) Of a similar nature is the case of *Klitzke* v. *Webb,* 120 Wis. 254. There a detached door was left upon a platform leaning against the front of the defendant's store. Plaintiff, a customer of the store, was injured through the unexplained falling of the door. The Court held that this unexplained was sufficient to place the defendant upon proof, and then continued as follows:

> "The defendants, however, met this presumption by direct and positive proof that

when the door was removed from its hinges on the morning of the accident and placed outside upon the platform its base was placed against a row of head nails in the platform eighteen inches from and parallel with the building, and that it was leaned up against the building with its top just under a gas pipe which ran along on the outside of the building. This evidence was specific and uncontradicted. It is a matter of common knowledge that a door of the size and weight of the door in question, when placed in such a position under ordinary conditions, such as were presented here, will not fall outwards without assistance. The laws of gravitation forbid. Hence when this proof came in, and was undisputed, the presumption of negligence from mere happening of the accident was entirely overthrown, and nothing was left for the consideration of the jury."

POINT II.

The defendant was not negligent and the plaintiff was guilty of contributory negligence.

These questions are raised by the first, second, third, fourth and tenth grounds of appeal.

The important questions in this case are the reciprocal duties of the parties under the circumstances.

In *Sherman and Redfield on "Negligence,"* (6th edition, section 704) the duty of the owner of premises to persons upon the same on invitation is set forth as follows:

> "The occupant of land is bound to use ordinary care and diligence to keep the

premises in a safe condition for the access of persons who come thereon by his invitation, express or implied for the transaction of business, or for any other purpose, beneficial to him; or if his premises are in any respect dangerous, he must give such visitors sufficient warning of the danger to enable them, by the use of ordinary care, to avoid it. The extent, however, of his legal obligation is to use ordinary care and prudence to keep his premises in such condition that visitors may not be unnecessarily or unreasonably exposed to danger; and the mere fact that one is injured while on the premises is no evidence of negligence on the part of the proprietor."

Before getting down to particular cases, the attention of the Court is respectfully called to the fact that the duty of the defendant in the premises was only to use reasonable and ordinary care. The defendant is not bound to make its premises absolutely safe for invitees. *It is assumed that injuries caused through the use of ordinary instrumentalities of life in business, when said instrumentalities are of an ordinary character, and carry no concealed defects or hidden traps, does not of itself create liability for damages.* The use of swinging doors in a department store or office building, and the ordinary display of merchandise falls within this rule. It can be seen that any other rule would work a great hardship upon the small storekeeper and merchant. Recovery is only permitted where the risks of the ordinary use of the article are not obvious, and a hidden trap or pitfall is set for the unwary user.

In *Dwyer* v. *Hills Brothers Co.* (79 App. Div. 45 St.; 79 N. Y. S. 785), the plaintiff as he was leaving the defendant's store, caught his foot in a door mat and fell and sustained injury. There was no evidence that anyone had ever caught his foot in that mat before, although it had been in the same place for several years. It was held that the defendant was not liable.

In *Pardington* v. *Abraham, et al.* (April, 1904, 93 App. Div. 359, affirmed on opinion below in 183 N. Y. 553), the facts were as follows:

While the plaintiff was coming out of the defendant's store another person who preceded him through the door let it swing back and strike him. The proof shows that similar doors with springs of the same or greater strength were used in numerous like establishments. It was held that judgment for the plaintiff should be reversed as plaintiff's injuries could not be attributed to any fault of the defendant, but rather to hasty carelessness of a third person over whose movement the defendant had no control.

In *Larkin* v. *O'Neill* (119 N. Y. 221), the placing of a figure for exhibiting children's clothing upon a staircase near the railing, prevented the plaintiff from making use of the railing at that point. A recovery was denied, the Court using the following language (see pages 225-226):

> "Indeed the only proof of negligence on the part of the defendant that seems to be relied upon by the plaintiff to uphold the verdict is the presence of the figure for exhibiting children's clothing next the railing, and the absence from the steps of foot holds, brass plates or rubber pads. * * * The business that he was conducting was, from its very nature, an invitation to the public

to enter upon his premises. He was bound to use reasonable prudence and care in keeping his place in such a condition that people who went there by his invitation were not unnecessarily or unreasonably exposed to danger. The measure of his duty was reasonable prudence and care. Beck *v.* Carter, 68 N. Y. 283; Larmore *v.* Crown Point Iron Co., 101 *Id.* 391, 395; Bennett *v.* R. R. Co., 102 U. S. 577.

"There was no proof in this case that the defendant neglected any duty that he owed to the plaintiff. She was not exposed to any unreasonable or concealed danger. * * * The language of the court in Crafter *v.* Metropolitan Railway Co. (L. R. 1 C. P. 300), applies: 'The line must be drawn in these cases between suggestions and possible precautions, and evidence of actual negligence, such as ought reasonably and properly to be left to a jury. It is difficult, in some cases, to determine where the line is to be drawn, but here I have no hesitation in saying that there was no evidence of negligence which could properly be left to a jury. There was nothing unusual in the construction of the staircase. The use of brass for protecting the edges of the stairs, and the absence of a handrail, which alone are relied on by the plaintiff, are by no means unusual in staircases of a similar description, where the traffic is great. They were obvious to anyone using the stairs, and were well known to the plaintiff himself. The plaintiff has no right to complain of the absence of accommodation of an unusual kind.'"

The attention of the Court is particularly directed to the quotation from the Crafter case

referred to by the Court in Larkin *v.* O'Neill. The language, "*The line must be drawn in these cases between suggestions and possible precautions, and evidence of actual negligence,*" appears to be peculiarly applicable to the case at bar. It is possible that a number of suggestions or precautions could be suggested as to methods or means of exhibiting the ice boxes in question. Although other means or precautions could conceivably have been used, it does not necessarily follow that the method employed was a careless and negligent method. Surely the placing of the ice boxes upon a platform would indicate to the ordinary mind that the boxes were there for observation and not to be handled. The plaintiff in this case owed some duty of care to the defendant and should have exercised ordinary care to avoid injury. It certainly required a considerable shove to cause a cover which was resting back at an angle of forty-five degrees to overcome that angle and fall forward. It was an obvious danger which a person of average intelligence and using ordinary discretion would have foreseen. *The plaintiff should have known the amount of force she was about to exert upon the box and have anticipated the result.* The owner of premises is not an absolute insurer of persons visiting the same. To allow a claim of this kind, is to open innumerable claims of similar character, and would operate to make the merchant and small shop keeper an absolute insurer of every person entering his shop.

Attention is called to the case of *Hart* v. *Grennell, et al.,* decided by the New York Court of Appeals in 1890 and reported in 122 N. Y. 371. In that case plaintiff went to defendant's store to purchase some oil and followed the clerk who received the order to the rear of the store where

oils and heavy goods were kept. In an open passageway back of a packing counter was a truck used to move goods in the store. After paying for the oil plaintiff in turning around tripped over the handle of the truck and was injured. The store was well lighted, the truck was in plain sight and was seen by the plaintiff. The court below affirmed a judgment in favor of plaintiff, entered upon a verdict, basing its ruling on cases holding that where a land owner invites persons upon his premises "He cannot permit anything in the nature of a snare thereon."

Brown, *J.*, in delivering the opinion of the Court of Appeals in which all the judges concurred, said (p. 734):

> "We are of the opinion that the evidence did not establish the defendant's liability and that the complaint should have been dismissed.
>
> "The general rule applicable to the persons occupying real property for business purposes and who invite and induce others to visit their premises, is that they must use reasonable prudence and care to keep their property in such a condition that those who go there shall not be unreasonably and unnecessarily exposed to danger. The measure of their duty is reasonable prudence and care. (Larkin *v.* O'Neill, 119 N. Y. 221; 10 Allen, 368-373.)
>
> "We think the proof fails to show that defendants neglected any duty that they owed to the plaintiff.
>
> "The judgment should be reversed and a new trial granted, with costs to abide the event.
>
> "All concur. Judgment reversed."

In *Dunning* v. *Jacobs* (N. Y. Com. Pleas), 15 Misc., 85, 89 (1895), plaintiff while changing his seat in the gallery of a theatre, slipped upon something slippery, or stumbled, and fell over two adjoining rows of people and the guard rail, into the body of the house and sustained serious injury. The distance from which he slipped to the guard rail was five and a half feet. Held, that the accident was caused by plaintiff's heedlessness in not looking where he stepped, or was one which could not naturally have been foreseen and provided against.

It is not negligence for a theatre manager to fail to provide a second guard rail for the gallery to prevent such an accident.

A claim of negligence predicated upon the fact that the floor of the gallery sloped at an angle of fifty-five degrees is not available where the fact was apparent and well known to the plaintiff. Bookstaver, *J.*, said:

> "That which never happened before, and which in its character is such as not to naturally occur to prudent men to guard against its happening, cannot, if in the course of years it does happen, furnish good grounds for a charge of negligence in not foreseeing its possible happening and guarding against that remote contingency."
>
> *Hubbel* v. *City of Yonkers,* 104 N. Y. 434, 439.
>
> "The arrangement of this gallery was just as obvious to the plaintiff as it was to the defendant. He had an ample opportunity for observing it and cannot plead in his own behalf his neglect to do so.
>
> "We, therefore, think the complaint was properly dismissed, and that the exception should be overruled and judgment ordered for the defendant, with costs."

In *Collins* v. *Mooney,* 25 App. Div. 187, 189, (First Dept. 1898), a regular customer of a grocery store, familiar with the premises, who, having stepped out upon a platform in front of the store, raised two or two and a half inches above the sidewalk, for the purposes of examining goods displayed thereon, stumbles and falls in an unexplained manner, but apparently because she took no heed to her steps, is not entitled to recover damages against the grocer for injuries thus sustained.

Judgment on verdict was reversed and new trial ordered with cost to appellant to abide event. No dissent.

The case of *Furey* v. *N. Y. Central & Hudson Railway Company* (67 N. J. Law, page 270; 51 Atl. Reporter, page 505), turned principally upon the question of invitation. Mr. Justice Garrison, however, in the course of the opinion, referred to the obvious nature of the risk as another ground upon which the judgment for the plaintiff was invalid.

> "There is another aspect of the case in which, irrespective of the question of invitation, or, rather, upon the assumption that it had been given, the judgment for the plaintiff is legally invalid.
>
> "The danger to which the plaintiff would be exposed in attempting to pass between the standing cars was not only a patent one, but its precise nature was obvious to him. It was that the opening might be closed without notice to him. To pass into such an opening with the understanding that no notice would be given of the movement of the cars would be the taking of a palpable risk. To engage in the same undertaking with a general expectation that some notice would be

given, but without making inquiry as to its nature and extent, would be a scarcely less negligent act. Yet the plaintiff must be treated either as having taken the risk without inquiry, or else he must be charged with such information as inquiry upon his part would have elicited. Had he inquired, he would have learned what the customary signal was, and that no provision for any other notice had been made. The plaintiff must be deemed either to have inquired or not to have inquired. In the former case he would have learned what signal would be given, viz: the signal that was given. In the latter case he had no right to expect any notice, and hence cannot complain that he received none."

In *Schnatterer* v. *Bamberger,* 81 N. J. Law 558, 79 Atl. Reporter, page 324, the Court of Errors and Appeals, laid down the duty of a store proprietor as follows:

"While the rule of law is undoubted that in such cases the defendant company owes the duty to its customer to exercise reasonable care to keep its store in a safe condition for the use of its customers, and if the latter be injured in consequence of the defendant's failure to perform that duty, it is responsible for the consequences, yet what under the undisputed circumstances constituted the exercise of reasonable care by the owner of the premises, was the pivotal question to be solved in this case by the trial court upon the motion to non-suit. * * * It need hardly be added that the company was not an insurer of the safety of its customers against accidents happening to them while walking or running up and down its

> stairways in its store. Its duty to the plaintiff was satisfied when it used reasonable care to maintain them in a condition safe for her proper use."

The Schnatterer case differs from the case at bar in that there was an obvious defect of the stairway; and that case turned upon the question of notice rather than upon the question as to whether or not there was such a defect.

POINT III.

The evidence was insufficient to establish a custom of trade.

The question is raised by the eighth ground of appeal (case, p. 3).

The finding of the District Court Judge as to the testimony of the plaintiff's witness, Kutoff, who was the only witness on this point, was:

> "Isidor Kutoff, witness produced on behalf of the plaintiffs, testified that: I am a salesman in the store of Miron & Lifson, furniture dealers, and that for eight years I had charge of the ice box department of that firm. That it is the custom of stores where ice boxes are sold to have the lids of the ice boxes closed when they are standing on the floor for display and sale. On cross examination he testified that his business was merely that of a retail salesman; that he was not a buyer, and that he had no occasion to visit other stores."

Under this finding it is clear, that the proof went no further than to show the custom of the particular store in which the salesman was employed.

To prove a duty upon the part of the defendant in respect to the observance of a custom, there must be evidence of its general observance in the trade. It must be so generally observed as to amount to standardization. This distinction is pointed out by this court in *Kingsley* v. *Delaware, L. & W. R. Co.*, 52 Vr. 541; 80 Atl. Rep. 327.

POINT IV.

The finding of the District Court upon the facts will not be reviewed.

This question is raised by the sixth and seventh grounds of appeal.

The evidence of the plaintiff's expert, Kutoff, on cross examination was to the effect that he was a retail salesman only, and had no occasion to visit other stores. His testimony clearly confined the alleged custom to the store where he was employed. As to other stores, his knowledge, if he had any, was hearsay.

It is a well-settled rule that where there is any evidence upon which the judgment of a District Court may be based, the judgment of that court sitting as a jury will be upheld.

It is respectfully insisted that the Supreme Court by apparently ignoring the testimony upon cross examination of the witness, has in reality reversed the District Court upon a question of fact.

POINT V.

Failure to follow the alleged custom of trade was not negligence and such custom is immaterial.

This question is brought up by the ninth ground of appeal (case, p. 3).

A custom is established only by long memorial usage. Accustomed use of a path across a railroad may, in certain cases, relieve the user of the *onus* of being a trespasser. *Drelick* v. *Erie R. Co.,* 103 Atl. Rep. 189.

So also, where a system of warnings, or an accustomed use of premises has been established by a master for the benefit and safety of his servants, the failure to give the accustomed signal or to put the property to the accustomed use, may constitute negligence. In this case, however, the workmen have knowledge of the custom, and rely upon its being followed.

In the case at bar there was no proof of any reliance by the plaintiff upon the custom. On the contrary, she knew that the top of the ice box was open. (Plaintiff's statement, case, pages 7, 8.)

Precaution taken by one dealer, or by several, do not furnish the test of the case of the ordinary man. As the New York Court of Appeals said in the Larkin case, *supra,* the line must be drawn between possible precaution and evidence of actual negligence.

It is attempted in the case at bar to convict one shop keeper of negligence, for failing to take a precaution which another shop keeper took.

POINT IV.

The decision of the Supreme Court imposes upon the defendant a higher degree of care than is required by the law.

This question is the subject of the fourth and tenth grounds of appeal. (Case, pages 3, 4.)

In the opinion of the Supreme Court (case, page 17, ll. 10-20), the court commented upon

the fact that there was no device to prevent the lid from falling forward. The defendant was not the manufacturer of the articles which it displayed for sale. There is no proof that the ice box in question was of unusual or faulty construction. Of course, any defects in construction might fasten liability upon the maker, but not upon the dealer.

Suppose the plaintiff had purchased the ice box, and after she had it in her house the accident occurred; would it still be contended that the defendant was negligent in failing to provide a safety device to keep the cover from falling, when force was applied to it? Such a situation would be in line with the folding bed cases, where it has been held that a dealer is not liable to the purchaser for defects in construction or mechanism of the article. Responsibility for such conditions rests upon the manufacturers alone.

See L. R. A. 13 (N. S.), foot note, page 383, citing:

White v. *Oakes,* 88 Me. 367; 32 L. R. A. 592, 34 Atl. 175.

Lewis v. *Terry,* 111 Cal., 39; 31 L. R. A. 220; 52 Am. St. Rep. 146, 43 Pac. 398.

Cox v. *Mason,* 89 App. Div. 219; 85 N. Y. Supp. 973.

The Supreme Court said further (case, page 22):

"If it be asked what the defendant did that bespeaks negligence, it may be confidently answered that his tort feasance consisted in doing nothing to render reasonably safe for the inspection of its guests an article which confessedly in its situation was dangerous, and which by the exercise of ordinary business foresight it would have

known to be dangerous to those invited to inspect it, and who were unconscious of the danger.

We have intimated that case at bar is barren of explanatory testimony, or of any semblance of it, and in that situation the liability of the defendant upon the uncontroverted testimony, bespeaking negligence, as well as upon the legal presumption arising from the unexplained occurrence becomes manifest."

This treatment of the accident as an *unexplained occurrence* in the face of the evidence that the force exerted by the plaintiff upon the box caused the cover to fall, amounts to a finding that the explanation of defendant's servant is insufficient in law. It amounts to a finding that the defendant was under a duty to fasten the ice box to the floor in order that it would be secure for the plaintiff to rest upon it. It is a reversal of the finding of the trial court, sitting as a jury, that ordinary and reasonable care had been exercised.

An expression is used in the opinion (case, p. 22), that it was an article "which confessedly in its situation was dangerous." How can it be said that an ordinary ice box *placed upon a platform* for inspection, is confessedly dangerously placed for that purpose, merely because the cover was open. It was not dangerous when properly handled. The plaintiff is the only person who had any knowledge as to the extent of the force she would apply to it when she rested upon it. The force applied was sufficient to overcome the angle at which the cover was tilted back, and to cause it to fall forward.

POINT VII.

The duty of an owner of premises to an invitee is only co-extensive with the invitation.

The ice box was placed upon a platform for reasonable view and inspection. It was not designed, nor was it so placed, inorder that the customer might lean upon, or rest upon it. The defendant was not bound to anticipate that the plaintiff would put it to a use for which it was not intended. *The invitation extended to her was to make a reasonable inspection, and not to use it to rest upon.*

In *Ryerson* v. *Bathgate,* 67 N. J. L. (38 Vr.) 337; 51 Atl. Rep. 708, the plaintiff entered upon the premises of a butcher at his invitation to deliver to him a cat, which she was giving to him. She told him it would run away unless it was put in a closet. He then opened a door and told her to put it in there. Thinking it was a closet she stepped in and fell down a flight of stairs. It was held that her invitation did not extend any further than to put the cat through the door.

The same principle of law is laid down in *Nolan* v. *Bridgeton, etc. Traction Co.,* 65 Atl. Rep. 992.

It is respectfully contended that *ordinary or reasonable* care did not require any further precaution on the part of the defendant, other than were proven to have been taken, but that such standard of care did require more care and circumspection on the part of the plaintiff than she admittedly did take.

WM. E. HOLMWOOD,
Attorney for and of Counsel with Defendant.

June Term, 1918.