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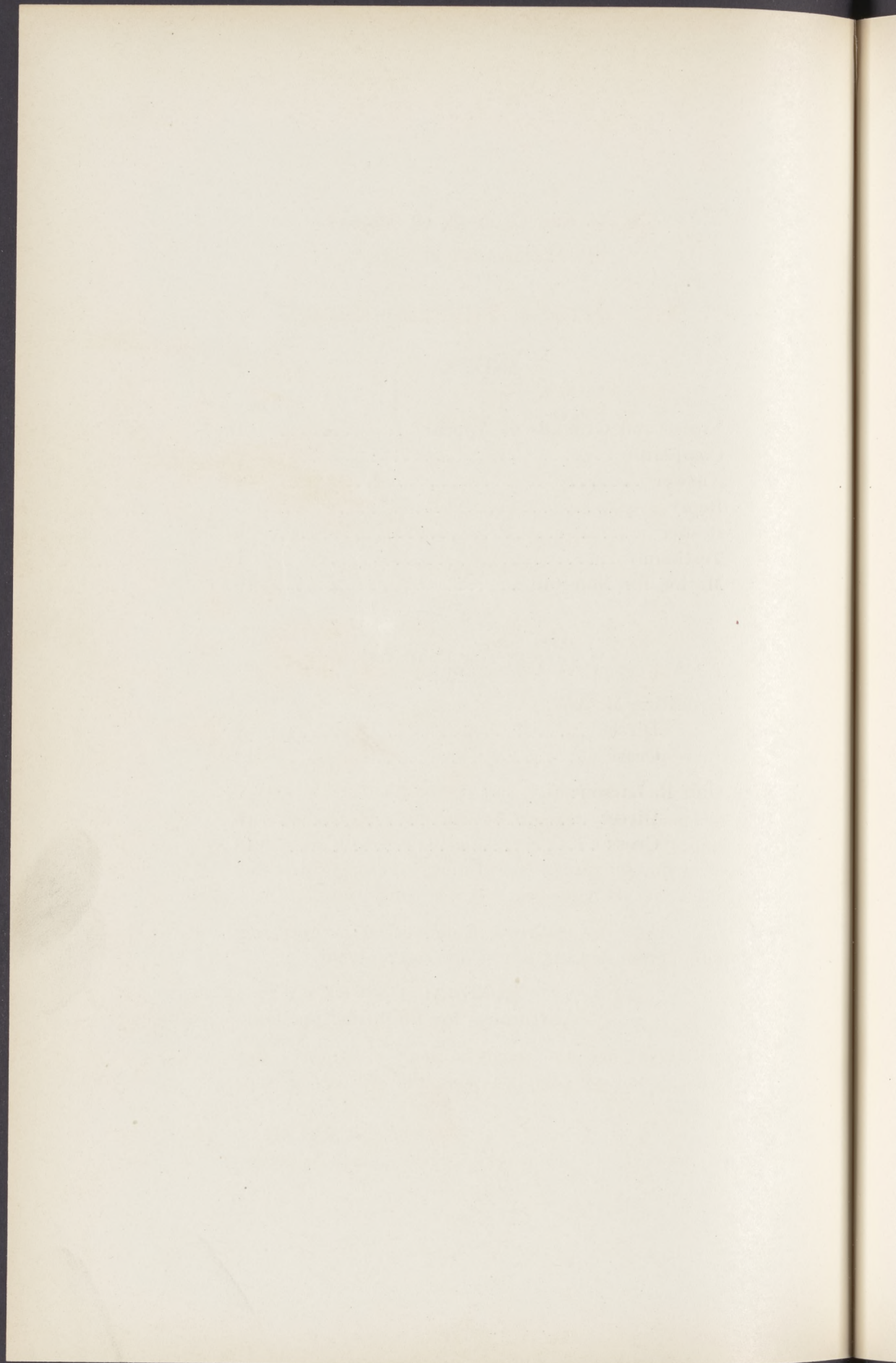
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Notice and Grounds of Appeal.

Filed September 9, 1931.

New Jersey Supreme Court

ERNESTINE M. ABT, Plaintiff-Appellant,	}	10
vs.		Action at Law.
LEEDS & LIPPINCOTT Co., a cor- poration, Defendant-Appellee.		Notice of Appeal and Grounds.

To: HEINE & LAIRD, ESQS.,
Attorneys for Defendant-Appellee,
27 Washington Street,
Newark, N. J. 20

Gentlemen:

Please Take Notice that the plaintiff in the above
entitled cause appeals to the Court of Errors and
Appeals in the last resort in all causes in New Jer-
sey from the judgment of the Supreme Court en-
tered in this cause on the following ground: 30

1. That the Supreme Court erred in granting
defendant's motion to non-suit the plaintiff.

ROSSBACH & CRUMMY,
Attorneys for Plaintiff-Appellant.

Service of the above notice of appeal and
grounds hereby acknowledged this 3rd day of Sep-
tember, 1931.

HEINE & LAIRD, 40
Attorneys for Defendant-Appellee.

Complaint.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10	ERNESTINE M. ABT, Plaintiff,	}	Action at Law.
	vs.		
	LEEDS & LIPPINCOTT Co., a cor- poration, Defendant.		Complaint.

20 Plaintiff, Ernestine M. Abt, residing at No. 116 Fairmount Avenue in the City of Newark, County of Essex, and State of New Jersey, says that:

30 1. On the 29th day of December, 1926, and for a long time prior thereto, the defendant, Leeds & Lippincott Co., a corporation, owned, conducted, maintained and managed a hotel in the City of Atlantic City, County of Atlantic, New Jersey, known as the Chalfonte-Haddon Hall, and on the said day the plaintiff was a guest in said hotel, so conducted and managed by the defendant.

2. Said hotel was equipped with a large stairway about 12 feet in width and about 30 feet in height, running from the lobby of the hotel on the ground floor to the second floor, and having about 40 treads, each approximately 9 inches in height. At the top or head of the staircase there was a landing. Both the staircase and the landing were constructed of hard wood.

40

Complaint.

3. The defendant made and caused said staircase and the treads thereof to be made highly slippery by the application of a polishing substance, so that the same became dangerous to walk upon and to alight and descend upon the stairway, which condition was well known to the defendant, or should have been known by the exercise of reasonable care. There was no runner, guard, or protection of any kind upon said stairway against slipping and falling. 10

4. On the 29th day of December, 1926, while a guest in said hotel and without notice or warning of the dangerous condition thereof began descending said stairway from the second floor to the ground floor, and while upon said staircase as a guest of the hotel, she slipped and fell because of the slippery and dangerous condition of the stairway, falling to the bottom or foot of the same. 20

5. As a result thereof, the plaintiff ruptured a ligament in her left knee, she received other bodily injuries, underwent great pain and suffering, has been forced to pay out large sums of money for medical treatment and other expenses incident upon her injuries, and she has been permanently injured. 30

Plaintiff demands as damages the sum of Twenty Thousand Dollars (\$20,000.00).

ROSSBACH & CRUMMY,
Attorneys for Plaintiff.

Answer.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10	ERNESTINE M. ABT, Plaintiff,	}	
	vs.		
	LEEDS & LIPPINCOTT Co., a cor- poration,		
	Defendant.		

Action at Law.

Answer.

20 Defendant, Leeds & Lippincott Co., a corporation of the State of New Jersey, answering plaintiff's complaint says that:

1. It denies so much of paragraph one as is not admitted: it admits that on December 29, 1926, it owned and operated a hotel in Atlantic City, New Jersey, known as the Chalfonte-Haddon Hall.
2. It admits paragraph two.
3. It denies paragraph three.
- 30 4. It denies paragraph four.
5. It denies paragraph five.

DEFENSE.

1. Whatever injury Ernestine M. Abt, the plaintiff, received was due to her own negligence and carelessness which was the proximate cause of said injury. Whatever may have been the condition of the stairway of the Hotel, it was open and

Answer.

plain to the plaintiff, who could have discovered the condition and avoided the accident had she exercised ordinary care.

COLE & COLE,
Attorneys of Defendant.

10

Reply.

Filed September 23, 1930.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

ERNESTINE M. ABT,
Plaintiff,

vs.

LEEDS & LIPPINCOTT Co., a corporation,
Defendant.

Action at Law.

Reply.

20

The plaintiff denies every allegation in the answer.

ROSSBACH & CRUMMY,
Attorneys for Plaintiff.

30

40

Postea.**NEW JERSEY SUPREME COURT,****ESSEX COUNTY.**

10	ERNESTINE M. ABT, Plaintiff, vs. LEEDS & LIPPINCOTT Co., a corporation, Defendant. } Action at Law. Postea.
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20 This case came on to be tried before Honorable William A. Smith to whom it was referred for trial, and a jury on Monday, September 22, 1930, and Judge Smith granted a judgment of non-suit in favor of the defendant and against the plaintiff.

WM. A. SMITH,
Circuit Court Judge.

30

40

Testimony.

NEW JERSEY SUPREME COURT,

ESSEX CIRCUIT.

Monday, September 22, 1930.

ERNESTINE M. ABT,

Plaintiff,

vs.

LEEDS & LIPPINCOTT

Defendant.

Action at Law.

10

Before—HON. WILLIAM A. SMITH, *J.*, and a jury.

APPEARANCES:

20

For Plaintiff appear ROSSBACH & CRUM-
MY (by ANDREW B. CRUMMY).

For Defendant appear HEINE & LAIRD (by
JOHN A. LAIRD).

A jury is called and sworn.

Mr. Crummy opens for plaintiff.

Mr. Laird opens for defendant.

30

ERNESTINE M. ABT, plaintiff, sworn in her
own behalf.

Direct-examination by Mr. Crummy:

Q. Miss Abt, what is your profession? A.
Trained nurse.

Q. Registered nurse? A. Registered nurse.

40

Ernestine M. Abt—Direct.

Q. Where are you employed? A. Newark City Hospital.

Q. How long have you been employed in the Newark City Hospital? A. I have been there ten years, but approximately seven years employed there.

10 Q. What is your position there now? A. Assistant superintendent of nurses and instructor in practical nursing.

Q. Did you register at the Haddon Hall Hotel in Atlantic City on the 27th of September, 1927? A. Yes, sir.

Q. How long were you there? A. Two days.

20 Q. Will you tell the Court and jury what happened on the 29th? A. I left my room at about ten o'clock in the morning. The room was on, I think, the second floor above the main floor. I walked to the elevator and rang the bell, waited a few minutes, and there was no response, so I decided to walk down the stairs. I walked down one flight of carpeted stairs, very narrow, and then walked down a wide, highly polished staircase. I thought they were waxed—

Mr. Laird: I ask that that be stricken out.

The Court: Strike it out.

30 Q. You came to the top of the wide staircase?

A. Yes.

Q. And you walked down the staircase? A. Yes.

By the Court:

Q. Were these stone stairs? A. No, sir.

Q. Wood? A. Wooden stairs.

By Mr. Crummy:

40 Q. Go on. A. I got to the sixth step.

Ernestine M. Abt—Direct.

Q. Then what happened? A. My foot slipped forward and I landed on my knees; and the manager of the hotel came to my assistance.

Q. The manager of the hotel came to your assistance? A. Yes.

Q. What did he do? A. He helped me to get up and I turned around and I saw a mark on the step. It was on the level where I was standing. 10

Q. What kind of a mark was it? A. It was a deep, broad mark. I saw it twice.

Q. What sort of mark was it? Was it a scratch or a smudge, or what? A. It was smudge.

Q. Where did you go after that? A. He brought me to the ladies' room and the maid assisted me and she gave me a glass of water. She said she was surprised someone else had not broken their neck coming down the stairs, because they were so highly polished. 20

Q. Did you go back and look at the stairs again? A. The second time I walked by and noticed this mark.

Q. What was on the stairs? A. I said wax before—

By the Court:

Q. Was it waxed or did you think it was wax? A. As far as I know— 30

Q. That isn't the question. If you know that it was wax, say so; if you do not know, say so. A. It made a mark like wax. I didn't see anyone wax it, but it made a mark like wax.

Q. You didn't ascertain it to be wax, but you thought it was wax? A. Yes.

By Mr. Crummy:

Q. In your experience at the City Hospital, do 40

Ernestine M. Abt—Direct.

they wax floors there? A. Yes, they do, in the new addition.

Q. Did the floors in the Newark City Hospital look like the stairs down there at the hotel? A. Yes.

10 Q. Did you see any smudge and marks on the floors in the Newark City Hospital like the steps at Haddon Hall Hotel? A. Yes.

Q. Where did you go after you left the hotel? A. I got on the train and went home with considerable help. I limped. I took the train to Newark and the Pullman conductor and the porter assisted me to the Pennsylvania station, where they assisted me into the cab, and the chauffeur assisted me into the hospital.

20 Q. Did you go to the private ward for nurses in the Newark City Hospital? A. Yes, sir, the alumni room.

Q. How long were you confined in the ward? A. Twenty-eight days in the ward.

Q. Did Dr. Holden attend you at that time? A. Yes, he did.

Q. I show you a brace and ask you whether that is the brace that was prescribed for you by Dr. Holden. A. Yes.

30 Mr. Crummy: I offer the brace in evidence.
Mr. Laird: No objection.

(The same is received in evidence and marked Exhibit P-1).

Q. Who made the brace for you? A. Pomeroy & Company.

Q. How much did they charge you for it? A. I think I paid \$14.50, with the nurses' discount.

40 Q. That was \$14.50 net? A. Yes.

Ernestine M. Abt—Direct.

Q. How long did you wear the brace? A. Six months, without taking it off in the evening when I went to bed, and the other six months on and off when my knee was tired and pained me.

Q. Do you have any trouble with your knee yet?

A. Just when I make a complete round of the hospital or have been on my feet all day, or when the weather changes. 10

Q. What has been your work at the hospital?

A. For the past five years I have been supervising all the wards in the hospital.

Q. Does that require your going from floor to floor? A. Yes. We sometimes use the elevator, but usually we walk to save time. It is five flights.

Q. Can you describe the staircase to the Court and jury as to the width and height and how it looked? A. The stairs I fell from? 20

Q. Yes. A. It is about 12 feet wide, I should judge, and very highly polished. That is all I can say. It was very slippery.

Q. And they ran from the main lobby to the second floor of the hotel? A. Yes.

Q. How high were they? Approximately how many treads high? A. I really couldn't say.

Q. Would you say it was about 40 treads high? A. I couldn't say about the steps. 30

Q. They were about 12 feet wide, you say? A. Yes, they were very wide.

Q. As to the injury: Did you suffer much pain from it? A. Yes, I did, considerably pain.

Q. How long did the pain last? A. On and off, unless I was given sedatives. It kept up sometime, especially at night, all night long, unless I was given something to quiet the pain.

Q. And they gave you something to quiet the pain? A. Yes. 40

Ernestine M. Abt—Cross.

Q. Is this a wide open staircase they have there?
A. Yes, with the banisters, of course, along the sides.

Q. I show you a photograph and ask you whether that is the picture of the stairway that you fell from. A. Yes, it is very similar to it.

10

Cross-examination by Mr. Laird:

Q. This accident happened in December, 1926. That is right, isn't it? A. No, the accident happened on December 29th, the day I left. It happened at ten o'clock in the morning and I left on the two o'clock train.

Q. It was the latter part of December, was it not? A. Yes.

20

Q. On the particular day that this accident happened, as I understand it, you were coming down this stairway at about ten in the morning, or thereabouts? A. Yes, ten o'clock.

Q. Had you gone up or down those steps previous to that time? A. No, I had not. I had been down to breakfast and went up in the elevator.

30

Q. When you came to the head of the stairs and looked down, did you observe anything unusual about the stairs at that time? A. Except that I noticed it was glossy, which, of course, would attract attention.

Q. Were you using the hand rail as you went down? A. No, sir, I never had.

Q. After noticing that the stairs were glossy, didn't you think it was advisable to exercise caution by holding onto the railing?

Objected to.

Objection overruled.

40

Ernestine M. Abt—Cross.

A. I don't know. I have been so used to walking up and down stairs that, naturally, I did not think I was going to slip.

Q. As I understand you, you are accustomed to walk up and down stairs at the Newark City Hospital. A. Yes.

Q. You have already told us that the floors and stairs in the Newark City Hospital were finished with wax. 10

Objected to on the ground that the witness testified that some of the floors were waxed but not that the stairs were waxed.

(Question withdrawn).

Q. It was the floors in the Newark City Hospital you referred to? A. Two floors in the new annex. They are waxed two or three times a week. They have a special machine. 20

Q. So that if you were to fall on the floor of the Newark City Hospital you would consider that the hospital was negligent in the way that they kept those floors?

Objected to.

Objection sustained.

Q. At any rate, the floors in the Newark City Hospital were in the same condition, so you say, as the stairs in this hotel in Atlantic City, is that correct? 30

Objected to.

Objection overruled.

A. At that time the marks were the same—similar to the marks that were on the stairs.

Q. And that led you to the conclusion that the stairs in the Atlantic City Hotel were finished the 40

Ernestine M. Abt—Cross.

same way as the floors in the new annex of the City Hospital? A. Yes.

Q. Had you ever complained to the authorities in the Newark City Hospital that the floors in the new annex were dangerous?

Objected to.

10

Objection sustained.

Q. Approximately how many steps were there in this particular staircase? A. Well, I think about six. I wouldn't swear to it, but I could see the top of the stairs.

Q. You mean six from the place where you fell to the bottom? A. Yes.

Q. How many steps were there in all from the floor where you started from to the floor where
20 you intended to finish? A. I don't know.

Q. Have you any idea? A. I don't know.

By the Court:

Q. Had you gone down more than half way, do you suppose? A. I thought I had gone down more than half way, as far as I remember.

Mr. Laird: I understand that the witness has identified the photograph. I will offer
30 it in evidence.

(The same is received in evidence and marked Exhibit D-1).

By Mr. Laird:

Q. I understand you to say that after you fell you made an observation of the stairway and noticed a mark or some marks on it. A. I noticed a mark, but I said I would not swear—I said approximately the sixth, I wouldn't swear to that, as
40

Ernestine M. Abt—Cross.

far as I remember, because I never went back there again.

Q. Did you identify that mark as being on the steps where you had fallen? A. That is what I thought.

Q. In other words, it was your understanding that the mark was one that was occasioned by your fall. Is that it? A. Yes. 10

Q. Had you ever had any trouble with your knee before this time? A. No.

Q. Or with your ankle? A. I have sprained either ankle at times. That was years ago, but I never had any trouble with them.

Q. Isn't it true that even a few moments after the happening of the accident you told one of the maids at the hotel that came to your assistance that either your knee or your ankle had given way? 20
A. Not that I remember.

Q. But the fact is, as I understand your testimony—you say when you came to the top of the staircase and looked down you saw that the steps were glossy. A. Yes.

Q. And you went down without holding onto the hand rail, and went to within the sixth step from the bottom, approximately, before you fell. A. Yes. 30

Q. Do you recall what kind of shoes you had on? A. I always wear a modified Cuban heel. I don't wear any other.

By the Court:

Q. Rubber heel? A. No, sir; on duty I do.

By Mr. Crummy:

Q. What did you say to the maid when you went to the ladies' room? 40

Oluf R. Larson—Direct.

Objected to.

Objection sustained.

OLUF R. LARSON sworn in behalf of plaintiff.

10 *Direct-examination by Mr. Crummy:*

Q. What is your business, Mr. Larson? A. Carpenter and general contractor.

Q. Have you been a stair builder during your contracting experience? A. Yes, I have done considerable stair work.

Q. Have you built hard wood stairs? A. Many of them.

20 Q. Have you done a great deal of polishing of stairways? A. I have.

Q. Have you polished them both with varnish and with wax? A. I have.

Q. How long have you been a carpenter and builder? A. I have been a carpenter for 12 or 12½ years.

Q. Will you tell us what sort of a mark would be left on a varnished board if a person should slip on it?

30 Objected to on the ground that it is not within the scope of the witness' knowledge as an expert stair builder.

The Court: There is no claim that it was varnished.

Mr. Crummy: I wanted to get the different marks that would be left on a stairway as to varnish and wax.

The Court: You will have to confine yourself to wax.

40

Oluf R. Larson—Direct.

Q. If a person should slip on a waxed hardwood step, what sort of mark would be left on the surface?

Objected to on the ground that it does not require expert testimony, and on the further ground that if it does, this witness is not qualified.

10

The Court: You have not found out whether slipping on a wax surface would make an impression. You had better find out what his knowledge is first.

Q. If a person should slip on a waxed hard surface, do you know what sort of impression or mark it would leave on that surface? A. I do.

Q. What sort of mark or impression would it leave on that surface if a person should slip on it?

20

A. On a waxed surface it would leave a dull smudge, as though the wax had been smeared off. The wax remains soft all the time. If you drag anything hard—a heel, or even a rubber heel, across the wax surface, it will leave a dull smudge.

Q. Will a hard wood that is waxed be slippery?

A. Yes, it will.

Q. What is generally done to prevent a stairway or a hardwood floor from being slippery? A. A stairway or a hardwood floor that was waxed would certainly be slippery, regardless of what was done, unless there was a covering put over it, like a carpet or rug or rubber mat.

30

Q. What is ususally put on a polished surface to prevent anyone's slipping on it? A. Mat or rubber runner or rubber mat or rubber tread.

Q. Is an abrasive substance sometimes put on a stairway to prevent slipping?

40

Objected to.

Oluf R. Larson—Direct.

Objection sustained.

Q. Will you kindly describe what is the nature of a rubber mat or carpet that is put on a stairway to prevent slipping?

Objected to.

10 The Court: I don't think that is a matter of expert testimony.

Q. What is the character of the tread that is put on to prevent slipping?

Objected to.

Objection sustained.

Cross-examination by Mr. Laird:

20 Q. How old are you, Mr. Larson? A. Twenty-nine.

Q. You have been a carpenter for twelve years, you say, building stairs? A. Yes, twelve years—twelve and a half years.

Q. And you have built many hardwood stairs? A. Yes, sir.

Q. Have all that you have built been covered with carpet? A. No, they have not.

30 Q. So that you are acquainted with the fact that it is common practice to use hardwood stairs without any covering over them. A. Yes, it is common practice.

Q. And those stairs are frequently finished in wax, and frequently finished with varnish, is that true? A. Frequently finished with varnish, but in my experience, rarely waxed.

40 Q. Does your experience go far enough to tell us how often the wax has to be renewed to keep them in proper condition? A. It depends on the amount of use the stairway has. If it is used con-

Oluf R. Larson—Cross.

stantly by a number of people, possibly once a week would be necessary to renew the finish.

Q. Would cleaning and washing a stairway tend to remove the wax finish? A. Washing with a soap solution will remove the wax, but water will not.

By the Court:

10

Q. Use of the stairs will remove the wax, will it not? A. Yes, in time it will.

Q. In other words, if you have a waxed surface, it is usual to re-wax it if you want to maintain the finish? A. Yes, sir.

By Mr. Laird:

Q. And the use of water and a soap solution is customary practice in both wax and varnish finishes in order to clean it, is it not? A. No. On a wax finish it would not be the customary thing to wash it with a soap solution.

20

Q. But on a varnished finish it would? A. On a varnished finish it would.

Plaintiff Rests.

Defendant's counsel moves that plaintiff be non-suited on the following grounds:

30

1. That nothing has been shown other than the fact that this stairway was smooth;
2. That the plaintiff, by her own statement, was guilty of contributory negligence.

The Court: The second ground would negative the first ground.

Mr. Laird: I will make it on the first ground only.

40

Defendant's Motion for Non-Suit.

10 The Court: (After argument). It seems to me that where the case fails is in the proof as to this staircase being negligently slippery. The plaintiff said that she slipped on the stairs and there was a mark on the stairs where she slipped, but there is no proof here that the stairs were negligently slippery, that is, that there was anything unusual with reference to the polish on the stairs. We all know that a smooth surface may be slippery, but there is testimony here that she slipped forward on the sixth step, as she recalls it, and that it was waxed. There is no proof here that that waxing was a negligent waxing; there is no proof that it is improper to wax stairs. There is also
20 no proof as to who put any wax on, when it was put on, nor any notice to the defendants as to this being waxed, and there is no proof that there was improper waxing or that the wax was highly slippery. I will therefore grant the motion for non-suit.

 Plaintiff's counsel prays an exception to this ruling of the Court.

 Exception noted as ground of appeal.

30

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New Jersey Court of Errors and Appeals

ERNESTINE M. ART, Plaintiff-Appellant, vs. LEEDS & LIPPINCOTT Co., a corporation, Defendant-Appellee.	}	Action at Law. On Appeal from Supreme Court, Essex Circuit.
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APPELLANT'S BRIEF.

Statement of Facts.

The plaintiff in the above entitled cause registered December 26, 1926 as a guest at Haddon Hall Hotel, owned by defendant, and remained there as such guest up to and including December 29, 1926 on which day while walking down a broad wooden staircase leading from the second floor to the main lobby, slipped and fell on the sixth step (State of Case, p. 8, l. 40) from the foot or lower landing of the said stairway and fell to the bottom and was injured (State of Case, p. 14, l. 15). The manager of the hotel came to plaintiff's assistance (State of Case, p. 9, l. 1) at which time plaintiff turned round and saw a smudge mark on the step (State of Case, p. 9, ll. 10-13), (State of Case, p. 15, l. 3) on which she slipped and from which she fell.

The plaintiff-appellant relies on the following:

ARGUMENT.

POINT I.

The Trial Court erred in granting a non-suit on the ground that nothing had been shown other than the fact that the stairway was smooth.

The court in the case of

Iaconi vs. D'Angelo, 104 N. J. Law 506—
142 Atl. 46

stated:

“This court decided in *Barry v. Borden's Farm Products Co.*, 100 N. J. Law 106, 125 Atl. 37, that a motion for a nonsuit, in effect, admits the truth of the evidence and every inference of fact that can be legitimately drawn therefrom which is favorable to the plaintiff, but (only) denies its sufficiency in law; and where such evidence or inference of fact would support a verdict for the plaintiff, such motion must be denied. See, also, *Hunke v. Hunke*, (N. J. Err. & App.) 137 Atl. 419.”

“It is settled law that the court will not grant a nonsuit if there is any testimony tending to show there was negligence on part of the defendant.”

Nightingale v. Public Service, etc., 7 N. J. Misc. 1006; 149 Atl. 526-527 (Sup. Ct. 1930).

The plaintiff testified that she walked to the elevator, rang the bell, got no response, so decided to walk down the stairs. “I walked down one flight of carpeted stairs, very narrow and then walked down a wide, highly polished staircase” (State of Case, p. 8, ll. 20-25). “It (the staircase)

is about 12 feet wide I should judge and very highly polished. That is all I can say. It was very slippery" (State of Case, p. 11, l. 21). The court (State of Case, p. 9, l. 30) took over the questioning of the plaintiff in an endeavor to ascertain what was on the stair that caused the plaintiff to slip:

"Q. Was it waxed or did you think it was wax? A. As far as I know—

Q. That isn't the question. If you know that it was wax, say so; if you do not know, say so. A. It made a mark like wax. I didn't see anyone wax it, but it made a mark like wax.

Q. You didn't ascertain it to be wax, but you thought it was wax? A. Yes."

The plaintiff testified (State of Case, p. 9, l. 40) (State of Case, p. 10, ll. 1-10) that some of the floors in the hospital where she is employed have waxed floors and that the smudge marks on the floors are similar to the mark left on the step where she slipped in defendant's hotel.

The foregoing clearly shows that the wooden stairway was highly polished and very slippery and in view of defendant's motion for a non-suit the most favorable interpretation must be given plaintiff's case. The court erred in stating (State of Case, p. 20, l. 23) "* * * there is no proof that there was improper waxing or that the wax was highly slippery". Plaintiff's testimony clearly shows that it was highly slippery and the following testimony will clarify the immediate point in issue (State of Case, p. 9, l. 16):

"Q. Where did you go after that? A. He (Hotel Manager) brought me to the ladies room and the maid assisted me and she gave me a glass of water. She said she was surprised someone else had not broken their neck coming down the stairs, because they were so highly polished."

This testimony was not objected to and remains in the record.

The court in dealing with the defendant's motion to non-suit clearly gave this testimony no consideration and thereby fell into error prejudicial to plaintiff's rights.

The court (State of Case, p. 20, l. 20) says, "There is also no proof as to who put any wax on, when it was put on, nor any notice to the defendants as to this being waxed * * *". This case is not one where a third party created a dangerous condition on the premises of another. There, we agree, that notice must be brought home, either actually or constructively, to persons sought to be held. Counsel for defendant rests his motion for a non-suit not on the ground of notice, or lack of notice, but on the ground of absence of negligence.

The staircase was waxed. The court expressly found that there was evidence that it was waxed, "We all know that a smooth surface may be slippery but there is testimony here that she slipped forward on the sixth step, as she recalls it, and that it was waxed" (State of Case, p. 20, ll. 12-17).

The court thereupon after referring to the testimony as to the floor being waxed decides the case on the ground that the waxing was not done negligently (State of Case, p. 20, ll. 18-20). But it is respectfully submitted that the affirmative act of waxing itself resulting in a highly polished and slippery staircase is the crux of this action and not the manner in which the waxing is done. The waxing may have been done in the most approved and scientific manner, yet if the staircase became slippery and dangerous because of the waxing what difference does it make how it was done? Indeed it might be argued that the more perfect the application of the wax, the more the polish and slipperiness. Because the very object of the wax is polish and necessarily slipperiness.

The stairway was owned and under the management of the defendant (State of Case, p. 2, ll. 20-40). Plaintiff's testimony shows the very slippery condition of the highly polished stairway, which condition was brought about by some affirmative act of the defendant's servants which was known or should have been known by the defendant. The defendant must be bound by the consequence of its own act, and can not escape liability for its own act if it be negligent, on the theory that knowledge of its own malfeasance was not brought home to it.

The case is distinguishable from the line of case of which

Schnatterer v. Bamberger, 81 N. J. Law
558; 79 Atl. Reporter 324

is the leading example. In the *Schnatterer* case the condition of the defective stair nosing was brought about by the continual use of the stairway and the condition was not the product of any affirmative act on the part of the defendant, Bamberger Co.

The present case is also different from the case of

Garland v. Furst Store, 93 N. J. Law 127

in which case it was held that mere proof that the plaintiff fell on a slippery floor did not constitute a cause of action. This case is also readily distinguishable from the present case for the reason that in our case the stairs upon which the plaintiff slipped were rendered slippery by reason of the wax. In the *Garland* case the opinion by the Chancellor pointed out that no foreign substance such as oil or grease was on the floor, when and where the plaintiff fell. The facts in the present case expressly show that the stairs were waxed, for the lack of which very facts the Court of Errors and Appeals held that there should have been a non-suit in the *Garland* case.

The instant case is very similar to the case of

Isaac Benesch & Sons Inc. v. Ferkler, 139
Atl. Rep. 557 (Maryland Court of
Appeals 1927).

The defendant, Benesch & Sons Inc. conducted a department store in which the plaintiff while walking slipped and fell. The plaintiff testified that immediately after the fall and before she was lifted and taken to a rest room in the store she saw that the floor was "dark and mucky and smeary, like an oiled floor would be where the oil was not dried", and that "the oily condition of the floor", caused her to fall. The court at page 559 states as follows:

"The plaintiff's (appellee's) first prayer contained a recital of facts testified to, upon which she relied for recovery and submitted the appellant's contention of contributory negligence as favorably as did its prayers. To this prayer the appellant specially excepted on the ground that there as no legal sufficient evidence 'that said floor had been oiled and that the said oil applied to the floor as not dry at the time of the plaintiff's said injury'. The court overruled this exception, for the reason that appellee had testified that immediately after she fell the floor looked 'dark and mucky and smeary, like an oiled floor would be when the oil as not dried and that this is what caused her to fall. These were facts from which the jury might conclude that the appellant had been negligent. It is not the mere fact that the floor was oiled and the appellee fell that entitled her to recover; it was the condition in which the floor was left as a result of the oiling that was submitted to the jury, and took it out of the rule laid down in the case of *Speckernagle v. Woolworth*, 236 Pa. 496, 84 Atl. Rep. 909, Ann. Cas. 1914 A, 1932, so strongly urged by the appellant."

Paraphrasing the statement made by the Maryland Court with reference to the facts in the present case

"It is not the mere fact that the stairs were waxed and the appellant fell that entitles her to recover; it was the condition in which the stairs were left as a result of the waxing that should have been submitted to the jury."

The Court of Appeals of Kentucky in the case of
Majestic Theatre Co. v. Lutz, 275 S. W.
 Reporter 16 (1925)

had before it a matter analogous to the case at bar. Verdict and judgment were rendered for the plaintiff from which the defendant appealed. Judgment was affirmed. Plaintiff was leaving defendant's theatre, slipped and fell on the marble steps leading from the promenade to the first floor injuring herself. Plaintiff instituted her action to recover damages on the ground that the marble steps were in a highly polished, glazed, slick and slippery condition which rendered them dangerous and which slippery condition was the proximate cause of her fall and injury. Defendant's "chief insistence", was that the trial court should have sustained its motion for a directed verdict in its favor.

The Court in disposing of this question on appeal has reported much of the testimony in the case which seems most helpful. In answer to the question as to whether she went to the front steps of the promenade in pursuance to instructions from the usher she said:

"A. Yes, sir, went to the front steps and when we got there we stopped for a few minutes, because there was an awful crowd coming up and down. I stepped down on the second step; both of my feet slipped from under me, because they were slippery and highly polished, and I fell all the way down on my left side and tried to stop myself. I hit my knee and landed on the landing, and some gentleman coming up the steps picked me up and helped

me down all the way down the steps; and my girl friend took me in the rest room, and then I stayed there until I was able to stand up."

In answer to the question as to what caused her to fall on the steps, she said:

"A. Highly polished marble.

Q. How do you know that that caused it?

A. I know that is what caused me to fall.

Q. Do you know that that is what caused you to fall and hurt you, just that? A. I know that is what caused me to fall.

Q. How do you know? A. Because they looked very glossy, and when I slipped on them they were very, very slippery and polished very glazed, they looked like they were polished very highly.

Q. How do you know; when did you see them before that day? A. Before I stepped on them.

Q. You saw that they were very highly polished and glazed when you stepped down there on them? A. Yes, sir.

Q. And that is what caused your fall is that slippery condition? A. Yes, sir.

Q. There was no other substance there that you saw? A. No, sir.

* * * * *

Q. Don't you realize that when steps are highly polished and in a glazed condition you are liable to fall? A. No, sir.

Q. You didn't realize that? A. No, sir.

Q. You looked down on the steps as you started down? A. Yes, sir.

Q. You saw they were slippery, smooth and in a glazed condition? A. Yes, sir.

Q. And went on down? A. Yes, sir.

Q. Although people were coming up by the side of the rail on both sides? A. Yes, sir.

Q. You were not afraid that you would fall? A. No, sir.

Q. Why weren't you afraid? A. Well I was very cautious about going down.

Q. Well, if you were very cautious about going down why didn't you wait until these

other people got through coming up by that rail, and come down by the rail? A. Because I did not want to wait there very long for other people to come up and down; they were coming up and down all the time, I couldn't wait that long.

Q. You at any rate came down in the center of them? A. Yes, sir.

Q. Seeing that they were slick, smooth and polished? A. Yes, sir.

Q. And took your chance? A. Yes, sir."

Majestic Theatre Co. v. Lutz (supra).

Plaintiff called on her behalf Oluf R. Larson, a carpenter, who testified as follows (State of Case, p. 17, ll. 17-39) :

"Q. If a person should slip on a waxed hard surface, do you know what sort of impression or mark it would leave on that surface? A. I do.

Q. What sort of mark or impression would it leave on that surface if a person should slip on it? A. On a waxed surface it would leave a dull smudge, as though the wax had been smeared off. The wax remains soft all the time. If you drag anything hard—a heel, or even a rubber heel, across the wax surface, it will leave a dull smudge.

Q. Will a hard wood that is waxed be slippery? A. Yes, it will.

Q. What is generally done to prevent a stairway or a hardwood floor from being slippery? A. A stairway or a hardwood floor that was waxed would certainly be slippery, regardless of what was done, unless there was a covering put over it, like a carpet or rug or rubber mat.

Q. What is usually put on a polished surface to prevent anyone's slipping on it? A. Mat or rubber runner or rubber mater or rubber tread."

The above testimony clearly shows that the waxing of hard wood would make the surface slippery.

The case should have been left to the jury under the court's direction as was pointed out in

Traction Co. v. Scott, 58 Law 682 and 685.

"As stated by Mr. Justice Magie in delivering the opinion of this court in *Newark Passenger Railway Co. v. Block*, 26 Vroom 605: 'In performing this function the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred therefrom by the jury'. In applying this general rule to the examination of facts, it must be remembered that 'negligence is not a fact which is the subject of direct proof, but an inference from facts put in evidence'. 'Now negligence', says Dr. Wharton, 'may be disputed when the facts are undisputed, and the question in such case, where the dispute is real and serious, is eminently one for the jury, under the direction of the court.' Whart. Neg. 3420."

The Supreme Court in the case of

Bennett v. Busch, 75 N. J. Law 240; 67 Atl. 188,

held that:

"Where fair-minded men might honestly differ as to conclusions to be drawn from the 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."

Finnegan v. Goerke Co. (E. & A.), 1929; 147 Atl. 442.

We respectfully cite the following authorities for the information of the court:

"Where the public are invited it is not reasonable to expect that the same degree of attention on the part of the plaintiff should be bestowed upon the placing of feet as would properly be required outside, upon the public highway."

Bloomer v. Snellenburg, 221 Pa. 25; 69 Atl. 1124,

cited with approval in

Branch v. Klatt, 165 Mich. 666, 131 N. W. 107;

Andre v. Mertens, 88 N. J. Law 628.

"Whether a woman is negligent in not holding to a banister rail in descending a stairway is a question for the jury."

Hahner v. Bender, 101 N. J. Law 102; 127 Atl. Rep. 202 (E. & A. 1925).

We respectfully submit that the Trial Court erred in granting defendant's motion for a non-suit, and the judgment in ~~favor~~^{favor} of the defendant should be reversed and a new trial granted.

Respectfully submitted,

ROSSBACH & CRUMMY,
Attorneys for Plaintiff-Appellant.

ADAM J. ROSSBACH, *AJ. Rossbach*,
Of Counsel with Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

ERNESTINE M. ABT,
Plaintiff-Appellant,

vs.

LEEDS & LIPPINCOTT Co., a
corporation,
Defendant-Appellee.

Action at Law.

On Appeal from
Supreme Court,
Essex Circuit.

BRIEF OF DEFENDANT-APPELLEE.

Statement of Facts.

Plaintiff, Ernestine M. Abt, a guest at a hotel owned by the defendant, slipped while descending the stairs leading from the second floor to the main lobby and brought the above entitled action to recover for injuries suffered in said fall. At the conclusion of the plaintiff's case the Trial Judge ordered a non-suit from which ruling the plaintiff has brought this appeal. The defendant-appellee will contend that the plaintiff was properly non-suited and that the plaintiff introduced no evidence in the case which should have been properly submitted to a jury.

ARGUMENT.

The plaintiff was properly non-suited by the Trial Court.

Plaintiff, Ernestine M. Abt, testified that the stairway which she was descending when she fell was highly polished (S. of C., p. 8, l. 25), that it was very slippery (S. of C., p. 11, l. 23), that it

was glossy (S. of C., p. 12, l. 31) and that she thought that there was wax on the particular step on which she fell (S. of C., p. 9, ll. 32-37). The only other evidence in the case having any possible bearing on the defendant's negligence is the testimony of Oluf R. Larson who qualified as a carpenter and general contractor (S. of C., p. 16, ll. 11-12) and then proceeded to state that as a customary thing a covering like a carpet or mat was placed over a waxed floor to prevent slipperiness (S. of C., p. 17, ll. 29-37). It is submitted at the outset that the testimony of the witness Oluf R. Larson is without probative force with respect to the usual custom of covering waxed floors since this witness was offered as an expert and qualified as a carpenter and general contractor. In *Kuttner vs. Central R. R. of N. J.*, 80 N. J. Law, p. 11, 77 Atl. Rep., p. 470, Chief Justice Gummere on page 14 discussed the admissibility or inadmissibility of certain testimony by medical experts. The Chief Justice stated that the testimony under discussion in that case was properly excluded since the questions asked called for an opinion on matters outside of the line of the witness' special knowledge and said (on p. 15) that the testimony, if given, would have been without probative force. As a matter of fact plaintiff, Ernestine M. Abt, admitted that the stairs at the Newark City Hospital where she had been employed for a period of seven years were in the same condition as the stairs at the hotel where she fell. Her testimony on this point is as follows (S. of C., p. 13, l. 30; p. 14, l. 2):

“Q. At any rate, the floors in the Newark City Hospital were in the same condition, so you say, as the stairs in the hotel in Atlantic City, is that correct?”

Objected to.

Objection overruled.

A. At that time the marks were the same—similar to the marks that were on the stairs.

Q. And that led you to the conclusion that the stairs in the Atlantic City hotel were finished the same way as the floors in the new annex of the City Hospital? A. Yes.”

The plaintiff's real contention in the case, therefore, is that she had proved a case worthy of jury consideration if she had merely established the fact that she fell while descending a stairway that was glossy, slippery, polished and waxed. It is submitted that proof of such facts is certainly not sufficient to justify an inference of negligence on the part of the defendant who maintained the stairway. In *Garland vs. Furst Store*, 93 N. J. Law, page 27, plaintiff slipped on a tile floor. There was testimony that the floor was very slippery (see p. 129) and in many respects this case is quite similar to the case at bar. The Court in rendering its decision spoke as follows:

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

“The mere fact that Mrs. Garland fell on the floor of the Furst store, without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the owner, and the doctrine of *res ipsa loquitur*, which is only applicable when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply.”

The Court held that a non-suit should have been allowed. In *Walker vs. F. & W. Grand 5, 10 and 25 Cent Stores*, 5 Misc., page 541, and 137 Atl. Rep., page 563, affirmed in 140 Atl. Rep., page

922, it was proved that the plaintiff had fallen while descending a stairway and that the edge of each step was encased in a brass metal nosing which had become worn by use. It was inferable that the plaintiff had slipped on one of these worn metal nosings. The Appellate Court, however, sustained a non-suit.

The only possible distinction between the case at bar and the two cases above cited is that in the case at bar the plaintiff thought there was wax on the particular step on which she fell. There was no proof at all, however, that the waxing was done in a negligent manner or that it was done in such a way as to constitute a nuisance; there was furthermore, no proof that the waxing of stairways as such is improper. There was also no proof as to who put the wax on the stairway, when it was put on, nor that the defendant had any notice as to the condition of the stairway. As a matter of fact there was no testimony that the stairway as an entirety had been waxed, but the proof extended no further than to show inferentially that there was wax on the particular spot on the particular step where the plaintiff fell and, furthermore, there was no actual proof that there was wax on this particular step but merely the plaintiff's testimony that she thought it was wax because the heel of her shoe made a certain type of smudge on the step (S. of C., p. 9, ll. 12-15).

In other states recovery has been denied in somewhat similar instances. In *Schaefer vs. De-Neergaard* (1921), 196 App. Div., page 654, 188 N. Y. Supp., page 159, the mere fact that a customer in leaving a store slipped on a wet platform was held not to show negligence on the store proprietor's part in the absence of any evidence that the slipping was due to the wet condition of the platform. Recovery was also denied in *Rosen-Steinsitz vs. Wannamaker* (1915), 154 N. Y. Supp.,

page 262, in which case the plaintiff's fall was occasioned by slipping on an unfastened rubber mat on the marble step of defendant's store. In *Spickernagle vs. Woolworth* (1912), 236 Penn., page 496, 84 Atl. Rep. 909, the Court said in effect that a customer who slipped on an oiled floor in a store could not recover for resulting injuries where she does not know how long before the accident the floor had been oiled; that the substance used thereon was unusual or improper; nor that it was oiled in an improper manner. The Court is also referred to *Kipp vs. Woolworth*, 150 App. Div., page 283, 134 N. Y. Supp. 646, to the same effect (appeal dismissed in 206 N. Y., p. 628).

In *Mona vs. Erion* (1928), 223 App. Div., page 526, 228 N. Y. Supp., page 533, the Court said that the existence of a small spot on the floor in the aisle of a store does not establish a cause of action against the proprietor of a store in favor of one who may have fallen thereon without evidence to show how or by whom the oiled spot was created or how long it had existed. And again in *Dimarco vs. Cupp Grocery Co.* (1926), 88 Penn. Sup. Ct., page 449, the Court said that it was not negligence *per se* to have an oiled floor in a store or to apply an oil dressing to a floor if it were done in a proper manner.

It is therefore submitted that the Trial Court was correct in non-suiting the plaintiff.

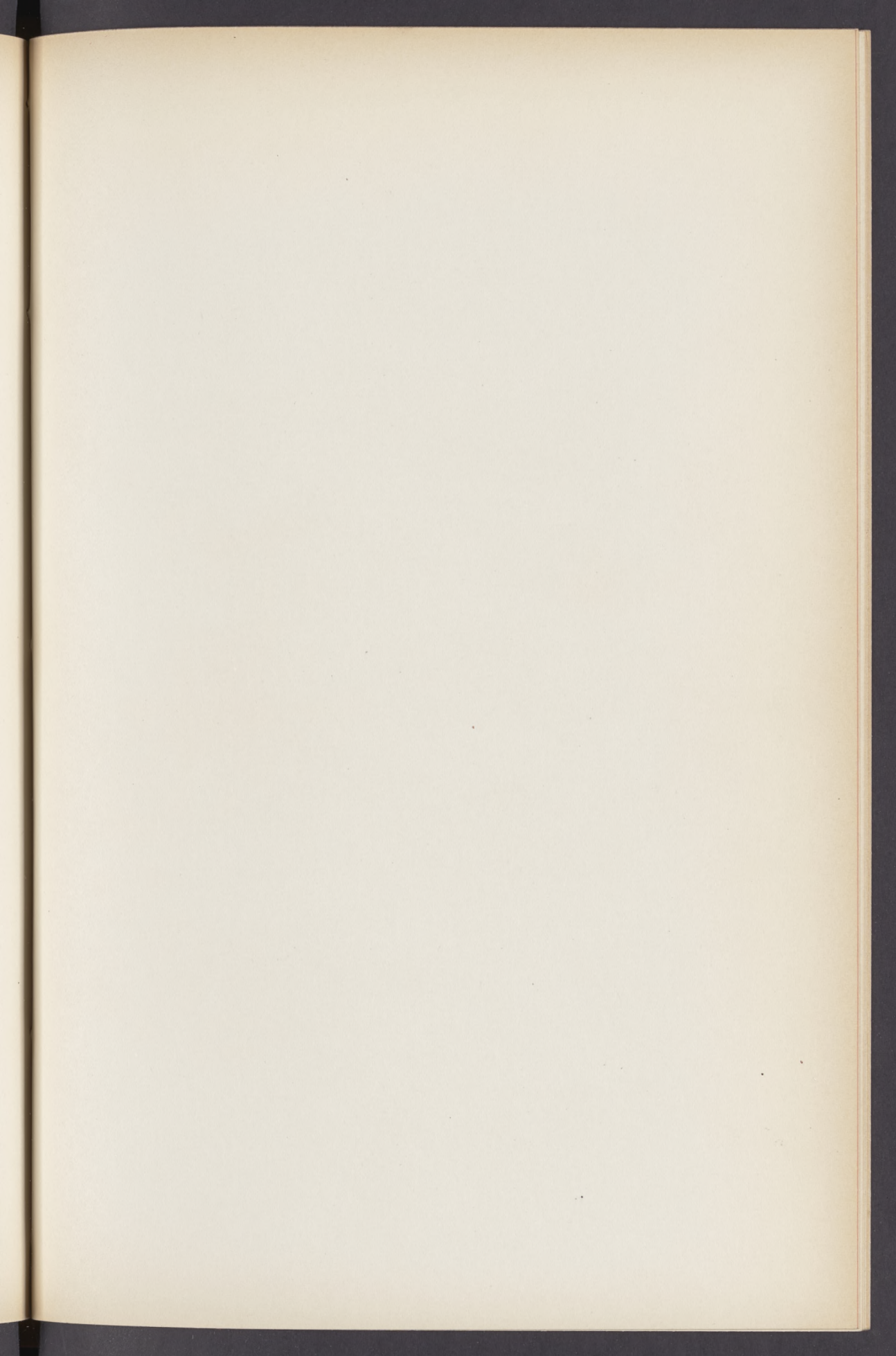
Respectfully submitted,

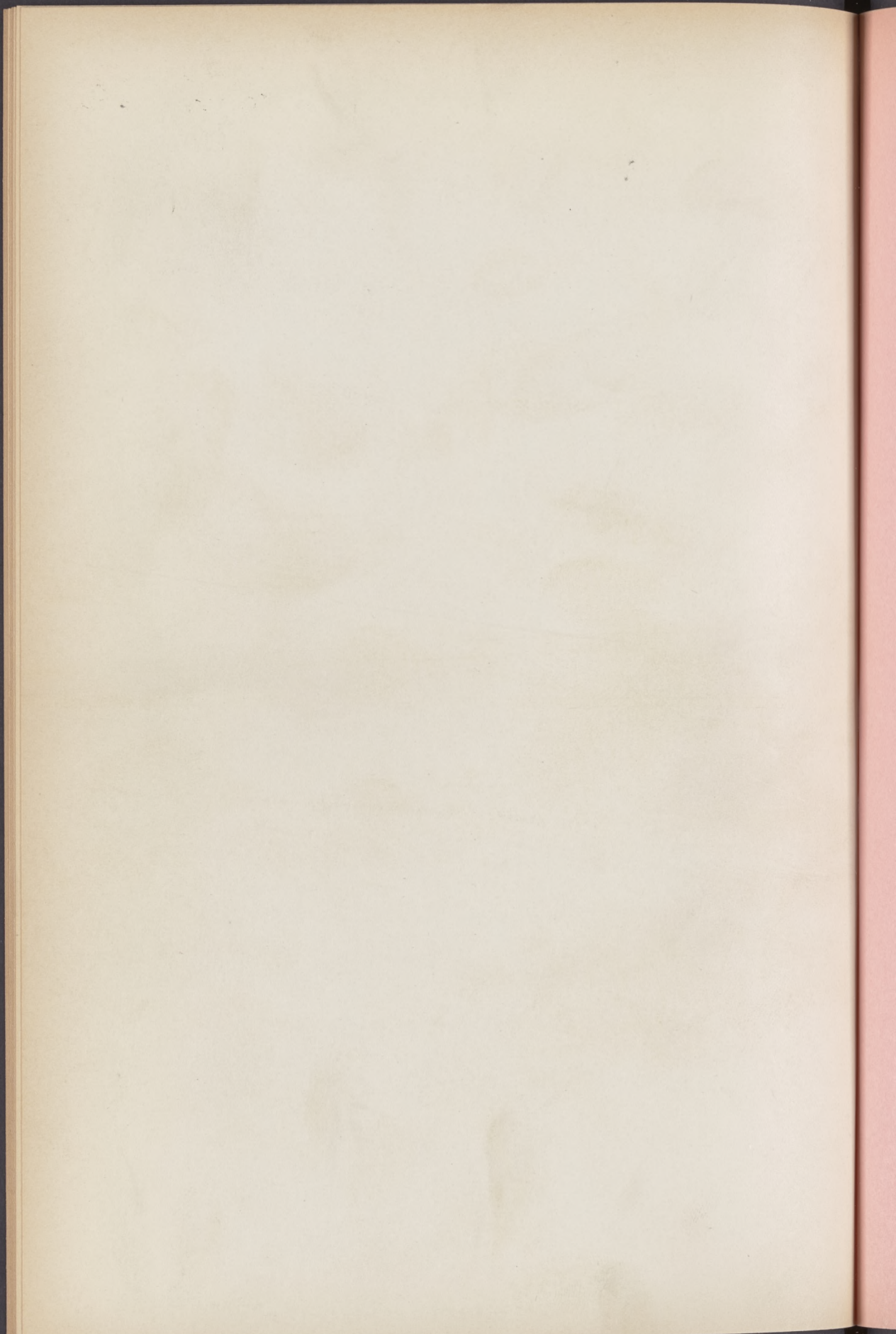
HEINE & LAIRD,

Attorneys of Defendant-Appellee.

John A. Laird
Charles J. Molloy

JOHN A. LAIRD and
CHARLES J. MOLLOY,
Of Counsel.





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