

6-299 1047

# Record No. 1612

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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**W. T. GRANT COMPANY, A FOREIGN  
CORPORATION, Plaintiff in Error,**

v.

**EDNA R. WEBB, Defendant in Error.**

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FROM THE CORPORATION COURT OF THE CITY OF NEWPORT NEWS

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“The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements.”

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

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IN THE  
**Supreme Court of Appeals of Virginia**  
AT RICHMOND.

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**Record No. 1612**

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W. T. GRANT COMPANY, A FOREIGN CORPORATION,  
Plaintiff in Error,

*versus*

EDNA R. WEBB, Defendant in Error.

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PETITION FOR WRIT OF ERROR.

*To the Honorable Judges of the Supreme Court of Appeals  
of Virginia:*

Your petitioner respectfully sheweth unto your Honors that it is aggrieved by a judgment entered on the 22nd day of October, 1934, by the Corporation Court of the City of Newport News, Virginia, in favor of Edna R. Webb against your petitioner for the sum of \$1,400.00, with interest thereon from the 22nd day of October, 1934, until paid. The transcript of the record, together with the original exhibits in the case, are herewith presented. The petition is adopted as the opening brief and a copy was delivered to Counsel for Edna R. Webb on the 17th day of December, 1934.

The parties will be designated in this petition as they appeared in the lower court.

FACTS.

This is a suit by notice of motion to recover damages for personal injuries sustained by the plaintiff when she fell in a store operated by the defendant on the 2nd day of Novem-

ber, 1933. The plaintiff went to the store with her mother, who is seventy-two years of age (R., p. 102). At the time of the accident she was standing behind her mother. She describes her fall as follows:

“Q. You turned around and spoke to her?

“A. Yes, sir.

“Q. And your feet at that time were perfectly still?

“A. Yes, sir.

“Q. You just sort of swung your head and body?

“A. Yes, sir, probably threw a little more weight on one foot than the other.” (R., p. 47.)

The plaintiff does not say what caused her to fall. Mrs. Webb weighed 189 pounds and is five feet, six inches tall (R., pp. 33, 45). She was wearing shoes with spike heels  $2\frac{5}{8}$  inches high (R., p. 80). Prior to the accident she had frequently been in Grant's store (R., p. 48) and on this occasion did not see anything unusual about the floor (R., p. 49). “I did not pay any attention to the floor” (R., p. 49). She walked in the store under the assumption that there would be no danger (R., p. 58).

Mrs. Root, her mother, testified that there was some preparation on the floor and it was slippery (R., p. 102). She frankly states that she does not know what caused her daughter to fall. “A. No, I do not know why she fell.” (R., p. 98.)

The nurse who attended Mrs. Webb, when asked the condition of the floor some time previous to the occurrence, stated:

“Well, the floors have always been kept—they are kept dusted. They always seem to be in good condition so far as dust is concerned, and I suppose you will say oiled, well their floors are oiled. I think, in fact I know, that I have noticed that Grant's store seems to have more oil on the floor than any other store in town.”

She also testified that when Mrs. Webb reached home that she and Mrs. Webb examined Mrs. Webb's shoe in order to ascertain what caused Mrs. Webb to fall, and on the bottom of the shoe there seemed to be a deposit of oil, or some oily looking substance (R., p. 87). The witnesses say that they could not tell what the spot on the shoe was (R., pp. 56, 103). This evidence was admitted over the objection of the defendant and will be hereinafter referred to.

The undisputed evidence is that the floor is not treated

with oil, but with a preparation known as Trackless Floor Dressing (R., p. 129½). The last time the floor was treated was on October 21, 1934 (R., p. 108). The floor was then rubbed dry with a dry mop (R., p. 109) and no oil was left on the floor (R., p. 110). Since the floors were last treated they have been swept up every night (R., p. 110) and approximately sixteen hundred customers a day have been in the store between the day of the accident and the day the floor was last treated (R., p. 131). At the place Mrs. Webb fell the floor was not slippery and there was nothing there after she fell to cause her to fall. No liquid or loose oil (R., p. 118, 129).

### FIRST ASSIGNMENT OF ERROR.

After the jury had returned their verdict, the defendant formally moved the Court to set aside the said verdict upon the grounds that the same was contrary to the law and the evidence, and because of improper instructions and error in the admission of certain evidence, but the Court overruled said motion and entered up judgment in favor of the plaintiff against the defendant for the sum of \$1,400, and to this action of the Court the defendant then and there excepted, and assigns this action and ruling of the Court in refusing to set aside the verdict and enter up judgment for the defendant, or not setting aside the verdict and granting a new trial, as error.

### AUTHORITIES AND ARGUMENT.

Mrs. Webb was in the store of the defendant by virtue of an implied invitation. Therefore, the only duty owed by the defendant was as stated in the recent case of *LeCato v. Eastern Shore Ass'n.*, 147 Va. 885:

“The owner \* \* \* must exercise due care in keeping and maintaining his premises in a *reasonably* safe condition for use for those *using the same with due care*, according to the invitation.”

In the recent case of *Turner v. Carneal*, 156 Va. 889, at page 894, it is said:

“While it is true that in Virginia the doctrine prevails that an owner or occupant of land who holds out an invitation to others to come upon his premises must exercise due care in keeping and maintaining his premises in a reasonably safe

condition (*LeCato v. Eastern Shore Agricultural Ass'n*, 147 Va. 885, 133 S. E. 488), *we know of no rule which makes them insurers of the safety of an invitee.*"

In the case of *Spickernagle v. C. S. Woolworth & Co.* (Pa.), 84 Atl. 909, Ann. Cas. 1914A, 132 and note, the plaintiff while in the store to purchase goods, fell. She alleged that her fall was caused by reason of the floor having been oiled, and negligently permitted to remain in an unsafe condition. The Court in sustaining a compulsory non-suit, said:

"The mere fact that the plaintiff was injured while lawfully on the premises of the defendant does not raise a presumption of negligence on the part of the latter; *Stearns v. Ontario Spinning Co.*, 184 Pa. St. 519, 39 Atl. 292, 63 Am. St. Rep. 807, 39 L. R. A. 842; *Huey v. Gahlenbeck*, 121 Pa. St. 238, 15 Atl. 520, 6 Am. St. Rep. 790.

"The burden, therefore, rested on the plaintiff to show some specific act of negligence, in which we are of the opinion she entirely failed. *It is not negligence to oil a floor or to have an oiled floor.* *Diver v. Singer Mfg. Co.*, 205 Pa. 170, 54 Atl. 718."

In *Kipp v. F. W. Woolworth & Co.*, 134 N. Y. S. 646, the Court, in denying a recovery, says:

"The defendant had a right to oil its floors in the usual way. No negligence could be predicated upon that."

In the case of *Tenbrink v. F. W. Woolworth Co.* (R. I., 1931), 153 Atl. 245, suit was brought to recover on account of fall, due to oiling and dangerous condition of the floor. The plaintiff and her companion testified that on arising after her fall she noticed a mark about a foot long and the width of her heel on the floor where she fell. That she saw the mark of oil. The Court, in denying a recovery, says at page 245:

"*It was not negligence per se to oil the floor. It would have been essential to have proven that the oiling was improperly done and there was no offer of proof in this respect. This is not a case where the rule of res ipsa loquitur applies.* *Langley v. F. W. Woolworth Co.*, 47 R. I. 165, 131 A. 194. As the plaintiffs offered no positive proof of negligence, the exceptions to the direction of a verdict in each case for the defendant must be overruled. *Kipp v. F. W. Woolworth & Co.*, 150 App. Div. 283, 134 N. Y. S. 646; *Spickernagle v. C. S. Woolworth Co.*, 236 Pa. 496, 84 A. 909, Ann.



Cas 1914A, 132; and see *Leach v. S. S. Kresge Co.* (R. I.) 147 A. 759."

In the case of *F. W. Woolworth Co. v. Williams*, 41 Fed. (2d) 970, the plaintiff alleged that the defendant allowed some greasy, oily or foreign substance to be and remain upon the floor. She testified that after she fell she noticed an oval shaped spot on the floor, darker than the floor, which was slightly raised. The Court, in denying a recovery, said:

"The defendant is not an insurer against accident to persons entering its store for the purpose of making purchases or otherwise. Until it is established that the accident was occasioned through the negligence of defendant's employees, or as the result of the existence of a condition of which defendant had either actual or constructive notice, there can be no recovery."

In the case of *Mona v. Erion*, 228 N. Y. S. 533, the plaintiff testified that she slipped on a patch of oil. The defendant from time to time oiled the floor. It was shown that the last time the oil was applied was somewhere from two to four weeks before the plaintiff's fall. A number of witnesses testified that there were no pools of oil upon the floor at the time of the accident. The Court said, at page 535:

"Plaintiff was bound to establish that this duty was violated, and we think she failed to do so. Viewing the case as a whole, the verdict is entirely against the weight of the evidence. The existence of a spot of oil such as is described by plaintiff does not, in and of itself, establish a cause of action, notwithstanding she may have fallen thereon. The store had been in constant use since the floor dressing had been last applied, at least two weeks before, and since when it is reasonable to suppose it had been swept as often as once daily. No attempt is made to show how or by whom the oil spot was created, nor as to how long it had existed; so far as appears, it may have come into existence between the time that plaintiff entered the store and when she started to leave, and may have been caused by some person having no connection whatsoever with defendants."

In the case of *Bonawitt v. Sisters of Charity of St. Vincent's Hospital* (Ohio, 1932), 182 N. E. 661, the plaintiff sued to recover for slipping on a waxed floor. She testified that her foot slipped out from under her. That wax or oil, or something, caused her to fall. That wax had been applied to the

linoleum and it was very slippery and smooth. One witness in describing the condition of the floor says:

"It was the same sensation as when you walk on ice, as each step you took you would slide back just a little."

It was shown that the floor had been waxed and polished a day or two before the plaintiff was injured. The Court, in denying a recovery, said at page 662:

"An owner in treating a floor may use wax or oil or other substance in the customary manner without incurring liability to one who slips and falls thereon, unless the owner is negligent in the materials he uses or in the manner of applying them. If a recovery is to be had, something more must appear than that the floor has had such treatment as is ordinarily applied in the care of floors."

And again:

"*Tenbrink v. F. W. Woolworth Co.* (R. I.), 153 A. 245, 30 N. C. C. A. 564, is precisely like the case at bar. In that case it was held not to be negligence for a storekeeper to oil the floor of his store, that a verdict for the defendant was properly directed in the absence of negligence of the defendant in oiling the floor, and that it would be necessary to prove that the oiling was improperly done.

"In *Spickernagle v. Woolworth*, 236 Pa. 496, 84 A. 909, Ann. Cas. 1914A, 132, it was held that a compulsory nonsuit was properly granted where a customer sustained injuries by slipping on a floor which had been recently oiled, there being no proof that the substance used was unusual or improper, or that the floor was oiled in an improper manner, or that it was in any different condition than would have resulted from proper oiling.

"Similar decisions have been rendered in many cases, among which are the following: *Abbott v. Richmond County Country Club*, 211 App. Div. 231, 207 N. Y. S. 183, affirmed 240 N. Y. 693, 148 N. E. 762; *Kerstein v. Goodman*, 130 Misc. 714, 225 N. Y. S. 68; *Kaufman v. Young* (Sup.), 157 N. Y. S. 778; *Curtiss v. Lehigh Valley Rd. Co.*, 233 N. Y. 554, 135 N. E. 915; *Lavine v. United Paper Board Co.*, 243 N. Y. 631.

\* \* \* \* \*

"The duty of the owner is to exercise ordinary care for the safety of those who have occasion to walk on the floor, and

*that duty is not shown to have been violated by merely oiling or waxing and polishing a floor in the usual way, although the floor was rendered slippery thereby."*

It will, therefore, be seen from the above authorities that the defendant is not an insurer of the safety of its customers. The doctrine of *res ipsa loquitur* is not applicable to this type of case. That to sustain a recovery it is necessary for the plaintiff to show that the defendant was negligent in the materials used, or in the manner in which it applied the materials. The duty to exercise ordinary care is not shown to have been violated merely by showing that the floor was rendered slippery.

The sole allegation in the notice of motion is that the defendant "negligently placed a great and unnecessary quantity of oil or some other slippery substance upon the aforesaid floor \* \* \* at the point on your said floor \* \* \* where I was invited by you to examine certain goods \* \* \* ." (R., p. 3-a.)

In the case of *C. & O. v. Heath*, 103 Va. 64, it is said at page 66:

"The party who affirms negligence must establish it by proof sufficient to satisfy reasonable and well-balanced minds. The evidence must show more than a probability of a negligent act. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. This court has repeatedly held that when liability depends upon carelessness or fault of a person, or his agents, the right of recovery depends upon the same being shown by competent evidence, and it is incumbent upon such a plaintiff to furnish evidence to show how and why the accident occurred—some fact or facts by which it can be determined by the jury, and not be left entirely to conjecture, guess or random judgment, upon mere supposition, without a single known fact."

The burden, therefore, was on the plaintiff to prove, (1) that the defendant was negligent in placing, or causing to be placed, an excessive and unnecessary quantity of oil on its floors, and (2), that as a direct and proximate result thereof, the plaintiff fell.

#### NO EVIDENCE OF NEGLIGENCE.

There is no evidence that the floor dressing used on the floor was improper, or that it was applied in an improper



manner, or that the floor was in any other or different condition than would have resulted from a proper treatment with a floor dressing. There was no defect or depression in the floor itself, nor was there any excessive accumulation of oil or other substance at the place where Mrs. Webb fell, and there was no mark on the floor (R., pp. 118, 129). The undisputed evidence is that the floor was last treated ten days prior to the accident and was done in the usual way; that the floor had been swept up since treated every day until the time of the accident (R., p. 110) and that at the place where Mrs. Webb fell the floor was all right (R., pp. 118, 129) and not slippery (R., p. 118). No witness says that the floor was improperly treated, and there is no evidence from which an inference that the defendant was negligent in the treatment of its floors can be properly drawn. Mrs. Webb does not say the floors were slippery. Mrs. Root, who is seventy-two years of age and clumsy (R., p. 101), and who states that she is always watching out (R., p. 102), the only other witness for the plaintiff who was present in the store at the time of the accident, says "I know they had some preparation on them. I didn't notice particularly. I know they were slippery". (R., p. 102.)

"Slippery" is a very relative term, and what would be slippery to a lady who admits that she is clumsy, and is always very careful, we submit does not show, or even tend to show, a condition from which negligence may be inferred. The mere fact that the floors were treated and were slippery to Mrs. Root, we submit does not show any negligence. It is a matter of common knowledge that practically every dwelling house and every public building or store that has wooden floors, of necessity must treat the floors with wax, oil or some other preparation, and that they thereby become, to a more or less degree, slippery. It is certainly not negligence for a storekeeper to treat the floors.

See *Bonawitt v. Sisters of Charity of St. Vincent's Hospital* 182 N. E. 661.

The undisputed evidence is that on an average of sixteen hundred persons a day had been in and out of the defendant's store between the time the floor was last treated and the time of the accident without any mishap. This is very strong, if not conclusive evidence that the floor was reasonably safe.

*Mullen v. Sensenbrenner Mercantile Co.*, 260 S. W. 982.

We submit that the evidence of Mrs. Root is insufficient

to show that the floors at the point where Mrs. Webb fell were improperly treated.

### NO EVIDENCE THAT NEGLIGENCE CAUSED THE FALL.

If it be conceded that the floors were improperly treated, nevertheless we are left entirely to conjecture and speculation as to what caused the plaintiff to fall. No one, from this evidence, can say that the preparation placed on the floor by the defendant on October 22nd was the cause of her fall. Mrs. Root, who was present, says: "A. I do not know why she fell" (R., p. 98). Mrs. Webb nowhere undertakes to say what caused her to fall. If the plaintiff and her only witness, who was present at the time, are unable to say what caused the plaintiff to fall, how can the Court or Jury do so?

The only other evidence of the plaintiff in the case as to the fall, is the testimony of Mrs. Holmes that after Mrs. Webb reached home she, Mrs. Webb and Mrs. Root, in order to ascertain what caused the fall, examined Mrs. Webb's shoe (R., p. 90) and found a dark spot on the sole of the right shoe. This evidence was objected to as being too remote and speculative (R., p. 148-B). The Court, however, overruled the objection, to which action of the Court the defendant then and there excepted, and assigns this action and ruling of the Court as error. From this evidence the Jury are allowed

- (1) To draw the inference that the substance on the shoe was oil,
- (2) That the substance came from Grant's store, and
- (3) That the defendant was negligent because the spot on the shoe came from the store, and
- (4) That this was what caused the plaintiff to fall.

Neither Mrs. Webb, her mother, nor Mrs. Holmes can say with certainty that the substance on the shoe was oil (R., pp. 56, 103, 87). They do not attempt to say, except by way of inference, that it came from Grant's store. They had been in other stores, on the street and in an automobile, and this inference, we submit, cannot stand against the positive testimony of Mr. O'Reilly, and Mrs. Nelson who immediately examined the place where Mrs. Webb fell and says that she tried to slide on the floor; that there was no accumulation of oil or other substance at that point. The mere fact that she fell does not show that she fell because of any negligent act of the defendant. So far as the evidence shows, she might have fallen on something dropped by a customer a few minutes

before the accident. The defendant would, of course, not be liable for this, since there is no evidence of any actual or constructive notice to Grant of any allegation in the notice of motion in regard thereto.

### CAUSE OF ACCIDENT.

Mrs. Webb's own statement as to what occurred, we submit, shows clearly that her own movement caused her to fall. The plaintiff weighed 189 pounds, was 5 ft. 6 in. tall, and was wearing spike heels  $2\frac{5}{8}$  inches high. It would indeed be remarkable if she had not fallen on any kind of floor when making a movement such as she describes. With her feet perfectly still she swings her head and body around, throwing more weight on one foot than the other (R., p. 47), and thus threw herself off balance. This movement, of necessity, lightened the weight on one foot and increased the weight on the outer side of the other foot, thus making it almost impossible for her to balance 189 pounds on a base as small as the heels of her shoes, which were introduced in the evidence. As she says, her foot turned over (R., p. 21).

We respectfully submit that there is no evidence of negligence and no evidence that the plaintiff fell because of anything that the defendant placed on the floor, and that the judgment of the lower Court should be set aside and judgment entered for the defendant.

### THIRD ASSIGNMENT OF ERROR.

The action of the Court in granting certain instructions for the plaintiff, and in refusing to grant certain instructions asked for by the defendant constituted the third assignment of error.

There were only two issues in the case:

(1) Whether the defendant was guilty of negligence in treating its floors, that caused the accident, and

(2) Whether the plaintiff was guilty of contributory negligence.

Yet the plaintiff's attorney requested nineteen instructions and sixteen were granted. This multiplicity of instructions were largely duplications and were very confusing and contradictory. The very number of the instructions granted was sufficient to confuse the jury and to prevent a fair trial on the merits. The various objections to each and every instruction is not in the record for the instructions granted.

Space however, does not allow us to take up all of the errors complained of. We wish, however, to specifically call the Court's attention to several of what we feel were very prejudicial errors:

The first and foremost was the granting of plaintiff's Instruction A (R., p. 150). The following clause in this instruction that "the defense of contributory negligence set up by the defendant will not preclude the plaintiff from a recovery", virtually tells the jury that contributory negligence is not a defense to this cause. The second paragraph of the instruction reading:

*"and the Court further instructs the jury that even though they may believe that the plaintiff was slightly negligent, that such slight negligence on her part will not excuse the defendant from liability under its plea of contributory negligence,"*

allows the jury to weigh the negligence of the defendant against that of the plaintiff, and find for the plaintiff even though the jury may believe that the plaintiff was guilty of some negligence which contributed to the accident, thus instructing the jury that they could apply the doctrine of comparative negligence, or degrees of negligence. The law has long been settled in this State to the contrary.

In the case of *Waynick v. Walrond*, 155 Va. 400, it is said, at page 411:

"But save in some occasional instances under statutes so providing, the doctrine of comparative negligence has never obtained in this jurisdiction."

In the case of *C. & O. Ry. Co. v. Lee*, 84 Va. 642, it is said, at page 645:

"But if there was negligence on the part of the plaintiff which contributed to the injury, the law will not apportion the fault."

See also *Powhatan Lime Co. v. Affleck*, 115 Va. 643.

Plaintiff's Instruction H, to the giving of which the defendant objected and excepted, will be found at page 159 of the transcript. This instruction makes the defendant an insurer. It tells the jury that it was the duty of the defendant to have the floors safe for her use. As shown by the au-

thorities heretofore cited, and especially the Virginia cases of *LeCato v. Eastern Shore Ass'n*, 147 Va. 885, and *Richmond v. Moore*, 94 Va. 493, it is not the duty of the defendant to have the floors safe. The only duty is to *exercise ordinary care* to have the floors *reasonably* safe. In *Richmond v. Moore*, 94 Va. 493, at page 504, it is said:

“He must exercise ordinary care and prudence to render the premises reasonably safe for the visit.”

In Plaintiff's Instruction J, granted by the Court over the objection of the defendant, the same error is again committed. In this instruction it is stated: “to have the floors safe for such use.” The language should have been “*reasonably safe*”. In addition to this, the instruction is very argumentative.

Instruction O, granted for the plaintiff, tells the jury that if the plaintiff slipped as the result of an unsafe condition of the floor which the defendant, by the exercise of ordinary care could have known or anticipated, you shall find for the plaintiff.

There are two different types of cases whereby a plaintiff can recover for an unsafe condition of the premises, (1) where the defendant causes the premises to be unsafe and (2) where some third party causes the premises to be unsafe.

In the first case the question of notice, actual or constructive, is not involved, since the defendant is liable for its own acts, irrespective of notice.

In the second case, where a third party causes the premises to be unsafe, in order to hold the defendant it is necessary to show that the defendant had either actual knowledge of the condition, or that there was a sufficient length of time after the premises became in an unsafe condition for the defendant to have made the premises safe.

In the case at bar there is no allegation in the notice of motion that the act of any third party caused the plaintiff to fall. Therefore, if the jury came to the conclusion that something was dropped on the floor by a customer, the defendant would not be liable, since there was no attempt to prove how long the condition had existed and no allegation in the declaration on this theory. The evidence in this case was very speculative, as to what caused the plaintiff to fall. It is entirely probable that the jury came to the conclusion that some customer of Grant had dropped something on the floor which caused her to fall, and felt that the Grant people

should have removed it. The same error is pointed out in the record in objecting to Instruction No. E (R., p. 154).

The Court refused to grant Instruction 12 for the defendant (R., p. 188) as offered, which told the jury that even though they believed Mrs. Webb slipped on some slippery substance, nevertheless they should find for the defendant unless they believed the substance was placed on the floor by an employee of Grant's. The Court, however, refused to grant Instruction 12 and modified it by inserting the language after the word "floor", "or permitted to remain there, if discovered", thus allowing the jury to say that even if some third party had dropped the slippery substance or material on the floor on which Mrs. Webb fell, that Mrs. Webb could recover, although there was no allegation of this in the declaration, and no evidence that Grant actually knew of the slippery substance or that it stayed on the floor for a sufficient length of time to constitute constructive knowledge.

As heretofore pointed out why and what caused Mrs. Webb to fall is largely speculative and the jury might well have arrived at the conclusion that the treatment of the floor by Grant's employees did not cause the accident, but that something had been dropped on the floor by a third party which should have been removed by the defendant.

Instruction F granted for the plaintiff over the objection of the defendant brings in the doctrine of remote and proximate cause. If the plaintiff was guilty of contributory negligence in failing to exercise ordinary care to look, and this contributed to the accident, then this negligence, as a matter of law, was proximate cause and the jury should not have been allowed to say that it was not.

Instruction T, on the question of damages, allowed the jury to give damages for medical and other expenses which she would probably incur in the future in an effort to be cured. There is absolutely no evidence in the record of any medical or hospital bills or expenses which she will sustain in the future.

For the errors above assigned in instructing the jury as above set forth, and refusing to instruct the jury as requested by the defendant, refusing to set aside the verdict as contrary to the law and the evidence and without evidence to support it, and refusing to enter up judgment for the defendant in accordance with the statutes in such cases made and provided, your petitioner prays that a writ of error and *supersedeas* be allowed in this case, and the judgment and ruling of the trial court may be reviewed and reversed, and judgment entered herein by this honorable court for the defend-



ant, in accordance with the statute in such cases made and provided, or that said case be reversed and a new trial granted.

Respectfully submitted,

W. T. GRANT COMPANY,

By WILLIAMS, LOYAL & TAYLOR,  
Counsel for Petitioner.

I, Leigh D. Williams, an attorney at law of the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion it is proper that the decision in the above-entitled action be reviewed and reversed by this honorable court.

LEIGH D. WILLIAMS.

Received Dec. 18, 1934.

M. B. WATTS, Clerk.

January 15, 1935. Writ of error and *supersedeas* awarded by the court. Bond \$2,000.00.

M. B. W.

## RECORD

### VIRGINIA:

PLEAS before the Corporation Court of the City of Newport News, at the courthouse thereof, on Monday, the 22nd day of October, in the year, One Thousand Nine Hundred and Thirty-four.

BE IT REMEMBERED, That heretofore, to-wit: On the 24th day of September, 1934, came Edna R. Webb, by counsel, and docketed in said Court a certain Notice of Motion for Judgment for Money against W. T. Grant Company, a foreign corporation, which said Notice of Motion is in the words and figures following, to-wit:

In the Corporation Court for the City of Newport News,  
Virginia.

Edna R. Webb, Plaintiff,

v.

W. T. Grant Company, a Foreign Corporation, Defendant.

## NOTICE OF MOTION FOR JUDGMENT.

To W. T. Grant Company, a foreign corporation, conducting a retail mercantile business in the City of Newport News, Virginia:

TAKE NOTICE: That on Monday, September 24, 1934, at ten o'clock A. M., or as soon thereafter as this notice of motion for judgment against you may be heard, I shall move the Corporation Court for the City of Newport News, Virginia, and the Judge thereof, then sitting, for judgment against you, in my behalf, in the sum of TEN THOUSAND (\$10,000.00) DOLLARS for injuries to me and the consequent damages suffered by as the proximate result of your negligence as hereinbelow stated.

That heretofore, to-wit: On or about the 2nd page 2a } day of November 1933, you were conducting a certain retail mercantile store in a certain building in the City of Newport News, Virginia, located on Washington Avenue, one of the main business streets of the City of Newport News, Virginia, a street frequented by a large number of persons in quest of purchases, and otherwise, from you and the other merchants engaged in business thereon; and, at which time, you had the doors of your said store open for the conduct of your said business and invited me and all other customers to come therein to examine and make purchase of your good therein, all of which were then and there on display and offered for sale by you to me and to all of the aforesaid purchasing public; and in accordance with the aforesaid invitation so extended to me by you as aforesaid, I went into your said storeroom to trade with and make a purchase from you of certain of your aforesaid goods then and there on display, by you, for sale, as aforesaid.

Thereupon, it became and was your duty to me to use reasonable and ordinary care to keep your said premises in safe and suitable condition so that I would not be unnecessarily or unreasonably exposed to danger of injury to my person, and in exercising such reasonable and ordinary care, it was your duty to me to provide a suitable and safe floor, or place for me to walk, stand and move upon, for the purpose of examining and negotiating for the purchase of your said goods on display as aforesaid and at all times during my aforesaid mission into your store for said purpose, all of which you, by your invitation to me to trade therein, as aforesaid, informed, represented and held out to and gave me to

understand that you have complied with and done,  
page 3a } and that I would be safe in entering your said  
store, stopping, walking and turning about therein,  
without any probability of any injury occurring to me by reason of your failure to so perform all of your aforesaid duties to me; notwithstanding all of which aforesaid duties to me, you wholly failed and neglected to use such said ordinary and reasonable care to keep the said floor in your said store in a safe and suitable condition, as represented by you to me as aforesaid, but, on the contrary, you, and your agents, and employees acting for you and within the scope of their employment, and at your instance and instruction, negligently placed a great and unnecessary quantity of oil or some other slippery substance upon the aforesaid floor and negligently allowed the same to so remain upon the said floor and especially at the point on your said floor, in your said store, where I was invited by you to examine certain of your goods, which were then and there offered to me for sale;

Whereupon, and without any negligence on my part, and relying upon your aforesaid invitation to me and your duty to provide a reasonably safe floor as aforesaid, and your aforesaid representation that you had so provided such floor, while examining certain of your aforesaid goods upon your aforesaid invitation, I unsuspectingly stepped in and upon the said great and unnecessary quantity of oil or other slippery substance on your said floor, which you had represented to me as aforesaid was not in such place, and as the proximate result of which, without any negligence on my part, I slipped and fell, with great violence, to the floor, whereby I suffered a severe fracture and permanent injury to my left ankle and various and sundry other permanent injuries and lacerations, and was otherwise greatly and permanently injured; and was permanently injured and damaged, in my body, from  
all of which I suffered great physical pain and  
page 4a } anguish, and still do suffer great physical pain and  
mental anguish, and for the rest of my life will so  
suffer, and other damages, all causing me to pay out and expend for hospital and medical treatment heretofore, approximately the sum of Four Hundred (\$400.00) Dollars and for which medical treatment and hospitalization I am still expending money, and will continue to expend for many years to come, in and about an effort to cure my said injuries and relieve me of my said pain and anguish, and whereby I have been forced to lose a great deal of time from my usual occupation in and about my household duties and have been permanently incapacitated therein, all to my damage in the sum

of Ten Thousand (\$10,000.00) Dollars, in which amount I shall ask judgment against you, as aforesaid.

Given under my hand this the 25th day of August, 1934.

EDNA R. WEBB, Plaintiff.

By L. V. SNELL, Counsel.

And at another day, to-wit: At a Corporation Court held for the City of Newport News, on Tuesday, the 16th day of October, in the year, 1934.

Edna R. Webb, Plaintiff,

*against*

W. T. Grant Company, a foreign corporation, Defendant.

On a Motion for Judgment for Money.

This day came the parties, by their attorneys; and the defendant, by its attorney, filed herein its grounds of defense and a written statement of its reliance upon the contributory negligence of the plaintiff, and says that it page 5a } is not guilty of the trespass laid to its charge in the manner and form as the plaintiff against it has complained, and of this it puts itself upon the country and the plaintiff likewise, and issue is joined; thereupon came a jury of seven persons, to-wit: Robert J. McLean, John A. Brimmer, Jr., H. David Peltz, W. E. Colonna, J. M. Willard, W. G. Futrell and James Drummond, Jr., who being elected, tried and sworn the truth to speak upon the issue joined, after having fully heard the evidence, on motion of the defendant, by its attorney, the jury is allowed, in the custody of the Sergeant of this City, to view the premises where the alleged accident occurred, and afterwards were adjourned until tomorrow morning at ten o'clock.

The defendant's grounds of defense is as follows, to-wit:

Virginia:

In the Corporation Court of the City of Newport News.

Edna R. Webb, Plaintiff,

*v.*

W. T. Grant Company, Defendant.

# GROUND S OF DEFENSE.

The defendant says:

(1) It pleads the general issue, and relies on each and every defense which it might use under said plea.

(2) It denies each and every allegation of the notice of motion and calls for strict proof of the same, and further says that the defendant did use ordinary care in providing a reasonably safe premises for customers to walk or stand upon. That it did not negligently place a great and unnecessary quantity of oil, or other slippery substance upon the

page 6a } floor or allow the same to remain upon the floor.  
That it used a proper and approved method in placing a floor dressing on the floor and that the said floors were in a reasonably safe condition for people or persons using the same who were exercising ordinary care for their own safety. That the floor dressing is not slippery. That the said plaintiff was guilty of contributory negligence which was a contributing and concurring cause of the said accident, in that the said plaintiff knew, or by the exercise of ordinary care should have known, of the condition of the said floors which is alleged to have caused the accident, and in that she did not exercise ordinary care in looking and in walking along the said floors of the said defendant. In that she was guilty of negligence in wearing the character of shoes, under the conditions, That the accident was due to the character of heels on plaintiff's shoes. That the plaintiff knew, or by the exercise of ordinary care should have known, the condition of the floor and that she assumed the risk of walking thereon, and the defendant had no knowledge of any unsafe condition either actual or constructive.

W. T. GRANT COMPANY,  
By LEIGH D. WILLIAMS. Attorney.

And at another day, to-wit: At a Corporation Court held for the City of Newport News, on Wednesday, the 17th day of October, 1934.

Edna R. Webb, Plaintiff,  
*against*

W. T. Grant Company, a foreign corporation, Defendant.

On a Motion for Judgment for Money.

This day came again the parties, by their attorneys, and

the jury appeared in Court in accordance with their  
page 7a } adjournment herein on yesterday, and the instructions not being completed, were adjourned until tomorrow morning at eleven o'clock.

And at another day, to-wit: At a Corporation Court held for the City of Newport News, on Thursday, the 18th day of October, 1934.

Edna R. Webb, Plaintiff,

*against*

W. T. Grant Company, a foreign corporation, Defendant.

On a Motion for Judgment for Money.

This day came again the parties, by their attorneys, nad the instructions of the jury being partly argued, this cause is continued until tomorrow afternoon at two-thirty o'clock.

And at another day, to-wit: At a Corporation Court held fr the City of Newport News, on Friday, the 19th day of October, 1934.

Edna R. Webb, Plaintiff,

*against*

W. T. Grant Company, a foreign corporation, Defendant.

On a Motion for Judgment for Money.

This day came again the parties, by their attorneys, and the instructions of the jury being fully argued, this cause is continued until Monday morning at ten o'clock.

And now at this day, to-wit: Being the day and year first hereinabove written: At a Corporation Court held for the City of Newport News, on Monday, the 22nd day of October, in the year, 1934.

Edna R. Webb, Plaintiff,

*against*

W. T. Grant Company, a foreign corporation. Defendant.

On a Motion for Judgment for Money.

page 8a } This day came again the parties, by their attorneys, and the jury appeared in Court, in accordance with their adjournment, and the arguments of counsel being fully heard the jury retired to their room to consider of their verdict, and after some time returned into Court



having found the following verdict to-wit: "We, the jury, on the issue joined find for the plaintiff and assess her damages at \$1,400.00. (signed) W. E. Coleman, Foreman." Thereupon the defendant, by counsel, moved the Court to set aside the verdict of the jury and to grant a new trial herein on the grounds that the verdict is contrary to the law and the evidence and because of errors in the granting and refusing of certain instructions by the Court; and because of admission of certain evidence over the objection of the defendant, which said motion being fully argued the Court doth overrule the same, and to which action of the Court in overruling the said motion, the defendant, by counsel, excepted. Therefore, it is considered by the Court that the plaintiff recover against the defendant the sum of \$1,400.00 with interest thereon to be computed after the rate of 6% per annum from the 22nd day of October, 1934, until payment and her cost by her about her suit in this behalf expended. Thereupon at the instance of the defendant, who desires to present to the Supreme Court of Appeals of this State, a petition for a writ of error and *supersedeas* to the judgment aforesaid, execution of the aforesaid judgment is suspended for the period of sixty days from and after the arising of the Court upon the defendant, or someone for it, entering into bond before the Clerk of this Court, with security approved by said Clerk, in the sum of \$2,000.00 conditioned according to law.

In the Corporation Court of the City of Newport News, Va.

Edna R. Webb

v.

W. T. Grant Company, a foreign corporation.

### RECORD.

Stenographic report of the testimony and other incidents of the trial of the above-entitled cause, tried October 16th, 17th, 18th, and 22nd, 1934, in the Corporation Court of the City of Newport News, Virginia, before Hon. T. J. Barham, Judge, and a jury.

Present: Captain C. C. Berkeley and Miss L. V. Snell, for the plaintiff. Messrs. Williams, Loyall & Taylor (Mr. L. D. Williams) for the defendant.

Phlegar & Tilghman,  
Shorthand Reporters,  
Norfolk-Richmond.

page 1 } BE IT REMEMBERED that the following is a complete and true stenographic report of all the testimony and evidence and other incidents of the trial of the case of Edna R. Webb v. W. T. Grant Company, a foreign corporation, before Honorable T. J. Barham, Judge, and a jury, together with the motions and objections on the part of the respective parties, the action of the court in respect thereto, and the exceptions of the respective parties as hereinafter contained.

page 2 } DR. T. M. WOOD,  
a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Capt. Berkeley:

Q. You are Dr. T. M. Wood?

A. Yes, sir.

Q. You are a practicing physician in the City of Newport News, Doctor?

A. Yes, sir.

Q. How long have you been practicing here?

A. Six years.

Q. Is your office in the Medical Art Building?

A. Yes, sir.

Q. I believe, Doctor, you specialize in taking X-rays. Is that correct, sir?

A. Yes, sir, I do X-ray work.

Q. Well now, have you taken X-rays of the condition of Mrs. Webb's ankle?

A. Yes, sir.

Q. When were the first X-rays that you took?

A. November 20, 1933.

Q. Will you please show us those X-rays and tell us what condition you found there by the X-ray?

A. Mrs. Webb had a fracture.

Q. If you don't mind, come over and show it to the jury, Doctor; they have to see it. Show the X-rays to them  
page 3 } the best you can, if you will, please.

Note: The witness goes to the window and exhibits X-rays to the jury.

A. This picture was taken November 20, 1933. It shows a fracture of the lower end of the fibula about an inch above the ankle joint. There is also a fracture of the internal malleolus, or shin bone. This is somewhat detached.

Q. You mean separated from the main bone?

A. Separated. There is also an injury of the inner surface of the same bone.

Q. I understand then there were two fractures of that main bone, the large bone?

A. Yes, a fracture on the outside and inside.

Q. Which bone is that there, that is the one on the inside of the leg?

A. That is the tibia. That is the one on the inside of the leg.

Q. How about that small bone on the outside of the leg?

A. That is a fracture.

Q. All the way through down into the joint?

A. The lower portion is just above the joint, a quarter of an inch above the joint. This is the fracture here.

Q. That piece was completely detached?

A. Not completely detached, but partly detached, hanging on by the small fragments of bone.

page 4 } By Mr. Williams:

Q. All this in the same foot?

A. Yes, sir, the same foot.

Q. Which foot is it, the right or the left?

A. The left.

By Capt. Berkeley:

Q. Are these the ones taken on November 2nd?

A. November 20th.

Q. These are the ones you took at that time?

A. Yes, sir.

Q. How about these other pictures you have over there, Doctor?

A. No. 2 is the one taken on October 12.

Q. I don't want that one yet. I want those in November first and then we will come to October of this year.

A. Here is the original.

Q. Show the jury on that picture. That is a different view, isn't it?

A. That is with the heel out flat, showing a fracture through here. Here is the same thing right through here. This shows the fracture on the back part of the bone, the inner surface I was telling you about.

Q. Then, that small bone of the ankle, as I understand you to say, the diagonal fracture came practically through the bone down to about the joint?

page 5 } A. Yes. It comes slightly down, down about where the small bone joins on the large bone.

Q. The juncture there of these two bones is not bone, is it? Is it a ligament or tissue or some kind of bone?

A. Between the small bone and the large bone it is more of a ligament attachment. There is very slight play in there.

Q. Some slight play between them?

A. Yes, sir.

Q. You examined her again and I believe had X-rays taken on October 10th of this year?

A. Yes, sir.

Q. When did you take that last one, Doctor?

A. October 12, 1934.

Q. Now, can you show this jury what condition you found there as shown by the X-ray? Will you point it out to them?

A. Now, I better substitute one of the original ones.

Q. Yes.

A. This is the one that was taken here right after the injury when I first saw her on November 20, 1933. This is the one taken the other day, October 12, 1934. This fracture on the inside of the ankle joint right here, shin bone, has filled in considerably there. You can see here. This fracture is extending up on the small bone and has filled in with new bone and the injury on the inside that we were talking about has also healed.

page 6 } Q. That is the present condition that the ankle was in at this time?

A. Yes, sir.

Q. That is the condition the ankle was in on October 12, 1934, when you took the last X-ray?

A. Yes, sir.

Q. You said it was November 20, 1933, that you took the first one?

A. November 20, 1933.

Q. And the last ones were taken on October 12, 1934, this year, a few days ago?

A. Yes, sir. It shows a deformity there and a deformity here.

Capt. Berkeley: If the Court please, we wish to introduce the X-rays.

By Mr. Williams:

Q. Are these marked?

A. There is no mark on these. Here is the envelope.

Q. For instance, you have got some of them marked No. 2?

A. Those were the ones taken on the 12th of October of this year.

Q. The ones marked No. 2 are the new ones?

A. Yes, sir.

Q. And those with no marks on them were taken in November?

A. The 20th of November, 1933.

page 7 } Q. There were just two taken the other day?

A. Three.

Q. Some of them have No. 1 on them?

A. They are the first ones.

Q. As I understand, the recent picture shows that the callus has formed and the bones are united?

A. Yes, sir.

By Capt. Berkeley:

Q. The recent picture there shows a gap in that large bone near the top where the widest portion of the ankle was, doesn't it?

A. Yes, sir, it is not filled in at the upper angle of the small fracture.

Q. And the small one there shows an enlargement of the small bone by reason of the fracture, does it not?

A. Yes, sir.

Q. Those are at the socket of the ankle, aren't they?

A. The fracture extends into the joint surface, yes, sir.

Q. Did you notice the movement of Mrs. Webb's foot at the time you made these second X-rays here, her ability to move her foot?

A. The first films?

Q. The second one.

A. I did not pay particular attention except it was rather painful to move it in various angles and it was somewhat stiff. In other words, she did not have as good a  
page 8 } movement of her left ankle as she had of her right.

Q. She did not have as good movement of her left as she did of her right, and you found it somewhat stiff and apparently painful to move it?

A. That was in the manipulation, putting it in various positions to take the X-rays.

Q. You had to manipulate her foot to get her foot in position to take the pictures, didn't you, to get it in the same position that you had it when you took them before?

A. Yes, sir.

Q. And you had the old pictures to guide you in putting it in that position?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Williams:

Q. Doctor, did you attend this lady?

A. No, sir, I only took the X-rays.

Q. Who did attend her?

A. I don't know.

Q. Who did you take the X-rays for?

A. Dr. Payne referred the case first to me on the 20th of November, 1933.

page 9 }

DR. J. W. SAYRE,

a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Capt. Berkeley:

Q. Dr. Sayre, are you a practicing physician in the City of Newport News?

A. Yes, sir.

Q. Where is your office, Doctor?

A. In the Buxton Clinic.

Q. How long have you been practicing medicine?

A. Ten years.

Q. Do you know this lady, Mrs. Webb?

A. Yes, sir.

Q. When did you see her, Doctor?

A. I saw her on the 12th of November of this year.

Q. You mean October, don't you, Doctor?

A. I mean October, yes.

Q. Where did you see her, at your office?

A. Yes, sir.

Q. Did you make an examination of her left foot?

A. Yes, sir.

Q. Will you tell the jury what condition you found?

A. The foot at that time was swollen. Manipulation—we mean by that moving the foot in this way with your hand—was productive of some pain, particularly when the foot was moved in this direction (indicating).

Q. Would that be the same direction as when  
page 10 } stepping forward off the left foot onto the right?

A. Yes, sir.

Q. In that position then the movement in that way was productive of pain?

A. Yes, sir.

Q. Would that cause one then to take a shorter step with the right foot and to limp?

A. It would cause a limp, yes, sir.



Q. That movement in that direction that you have described to the jury, was it a spring movement or was it—

Mr. Williams: May it please the Court, this is an intelligent witness and it does not seem to me Capt. Berkeley ought to ask such leading questions. I object to them.

Capt. Berkeley: I was going to ask that question in the alternative, which would not be leading. It just suggests to the witness' mind what I want and he can say either way he wants.

By Capt. Berkeley:

Q. The question I asked, was that movement of the toe-off towards the shin bone as free as the other foot or was it stiffer and could it be moved as far?

A. That could be moved as far with the production of pain.

Q. With the production of pain?

A. Yes.

page 11 } Q. Well now, Doctor, go ahead and tell us the result of your examination?

A. Then, in addition to that there was some tenderness to pressure over the portions of the bone that was broken at the time of the accident.

Q. Some what?

A. Some tenderness to pressure. In other words, when I would press over the part of the bone that was broken at the time of the accident.

By the Court:

Q. Tenderness on pressure?

A. Tenderness, or soreness when pressure was made over the site of the injury.

By Capt. Berkeley:

Q. What was the result of that pressure?

A. There was some soreness elicited at the examination when pressure was made there. In addition to that, when the patient walked into my office her gait was affected by a limp. Those are the outstanding things of my examination.

Q. Have you seen any X-rays of her foot?

A. Yes, sir.

Q. With your knowledge of the condition of her ankle, would you or would you not expect a limp under the present condition of her ankle?

A. Yes, sir, I would.

page 12 } Q. Would that be a natural limp?

A. No, I would not say it was natural. It is due to the injury of the joint.

Q. You think it is due to the injury of the joint?

A. Yes, sir.

Q. That is what I meant. I meant in considering the injury of the joint, what you know of it, would you expect a person to limp under those conditions?

A. Yes, sir.

Q. Taking into consideration, Doctor, that this injury occurred on the 2nd of November, 1933, and your examination was made on the 12th of October, 1934, can you state to the jury about how long this condition will exist?

A. In my opinion the recovery of this patient has been slower than the average case with the same type of fracture. We are dealing here with a patient who is in middle life, to begin with. In addition to that, she is overweight and the period of recovery of fractures in weight-bearing bones under those circumstances is always prolonged. On the other hand, if you take the same fracture in a girl sixteen years of age who weighs ninety-five pounds, you would expect a better recovery than you would from this patient, so that I would say the period of recovery has been prolonged and the result to date is not as good as in an average case with a similar fracture.

Q. State whether this injury is or is not in any page 13 } degree permanent?

A. Well, that is always a hard question, certainly for me to answer.

Q. I mean, in your opinion as to this case?

A. There is no way absolutely that one can scientifically arrive at a definite conclusion. The only possible way you can do that is merely on your experience with handling other cases. I do not believe that this joint will ever be absolutely as good as the one that has not been broken. From the standpoint of treatment and repair she has gotten as good a result as one usually gets under those circumstances. We do not expect it to be perfect. There is some damage to that joint that I would consider will always linger with the patient.

Q. That will always linger with her?

A. Yes, sir.

Q. Well, in the condition that you found it on October 12, 1934, and the condition that it was in as shown by the X-rays on November 20, 1933, taking into consideration the amount of swelling that you saw on October 12, 1934, would you in your judgment expect pain to have been suffered between those dates by Mrs. Webb with this injury?

A. Yes, sir, I would.

Q. Then, considering the present condition and your an-

swer to the last question, would you expect a continuation of that pain for any length of time?

page 14 } A. I believe that will gradually get better than it is now but I would not expect any radical improvement over a period of a few months. Perhaps in another year it will be distinctly better than it is now, but after these fractures, patients always give the history that prior to cloudy, rainy weather they have aches in those joints and fractured bones for several or many years.

Q. You commented on the fact that Mrs. Webb was a rather heavy woman. Did you take her weight at that time?

A. Yes.

Q. What did you find her weight to be?

A. She gave me the history that at the time of the accident she weighed 189 pounds. On October 12th this year she weighed 199½ pounds.

Q. Did you have a history of inactivity on account of the ankle, also?

A. Yes.

Q. Would you, or would you not expect an increase in weight from the lack of activity on account of the condition of the ankle?

A. Yes, sir, I would. It is generally conceded that sedentary life is productive of increase in weight.

Q. That increase in weight, would it have a relative or comparatively relative effect on the recovery of the use of that ankle?

page 15 } A. That would make the period of recovery slower.

Capt. Berkeley: Take the witness.

#### CROSS EXAMINATION.

By Mr. Williams:

Q. What is her height, Doctor?

A. I did not take her height.

Q. She is a very short woman, isn't she?

A. In comparison to her size generally, I would say yes.

By the Court:

Q. You said in comparison to her size generally?

A. Yes, sir.

By Mr. Williams:

Q. Is the wearing of high heeled shoes conducive to getting that ankle well?

A. In some cases, yes.

Q. How about in this case?

A. I believe it would help it.

Q. You think it would help her?

A. Yes, sir.

Q. How tall would you say she is without high heeled shoes on?

A. Would you mind stand for me, Mrs. Webb?

Note: The plaintiff stands up.

By Mr. Williams:

Q. You see the size of her heels, don't you?  
page 16 }

A. Yes. Did you say without heels?

Q. Yes, without heels.

A. I would judge about five feet six inches.

Q. And at the time of the accident you say she weighed 189 pounds?

A. Yes, sir.

Q. Doctor, you did not attend this patient, did you?

A. No, sir. I saw her the first time on the 12th of October of this year.

Q. You were employed for the purpose of making this examination and testifying in Court, were you not?

A. Yes, sir.

Q. And, of course, when you spoke of her ankle being tender on pressure, that is subjective, isn't it?

A. Yes, sir.

Q. I mean, you cannot tell anything about whether or not I have got pain?

A. No, not at all.

#### RE-DIRECT EXAMINATION.

By Capt. Berkeley:

Q. However, Doctor, if you found that the ankle was not as pliable, that is not as free as the other ankle in attempting to manipulate it with a degree of force, would you, or would you not expect some pain?

A. Some pain?

page 17 }

Q. Yes.

A. I would expect pain.

Q. And, taking into consideration, which you have testified to, the swollen condition of the ankle at the time you examined her, would that also be evidence that would make you expect some pain?

A. Yes, swelling in any condition in which it occurs. For

example, in inflammation, swelling is the cause of pressure on nerve centers to produce pain; that is the cause of pain in any inflammatory process whether it is one in which the bacteria is the cause of the inflammation or whether it is what we call traumatic injury, such as she has.

Q. Then the swelling, as I understand you to say, was caused by some condition at the point of injury?

A. During the period of recovery in these cases when the extremity is at rest, particularly when it is in a cast, the muscles of the leg usually become soft and flabby, what we call atrophy. The blood vessels lose their tone in such a manner that the circulation in the part is not as efficient as it is in the normal extremity and they are always thereby followed by a swelling.

Q. I mean at the present time, if the cast had been off for many months.

Mr. Williams: Nobody has said that you. If you will state when the cast was off, I will accept it, though.  
page 18 } Capt. Berkeley: I do not know how long it was off, but I think the cast was split by Dr. Vann about six weeks afterwards and then put back on.

By Capt. Berkeley:

Q. I will ask you then, if the cast had been off for six months before you saw her and if the swelling would occur from the use of that limb, would you expect some irritating condition there that caused that swelling?

A. Well, of course, the injury itself is an irritation but that swelling will continue, of course, long after we are able to remove the cast, that is for a long time after the welding of the bone is sufficient to even bear weight upon.

Q. Well, an enlargement of the bone at that point of the fracture, would there or would there not be continuously the same proportionate enlargement of the ankle?

Mr. Williams: I have not heard anybody say enlargement of the bone.

Capt. Berkeley: Dr. Wood testified that. I asked him that very question and he said the bones in the healing process were enlarged at that point.

A. Yes during the process of healing, the bone forms a substance which we call callus in order to bridge over or weld over any crack between the bone and that naturally creates an enlargement at that time. However, after the fracture is

united, that so-called callus absorbs again, slowly over a long period of time. I mean by a long period of page 19 } time perhaps a year or two, but during that period of the convalescence the bones are enlarged and there would naturally be subsequent enlargement of the soft parts, the muscles and facia and so on at that period of recovery.

Q. Well, then, if they are still enlarged at the present time as shown by X-rays taken on the 12th of October of this year, the process of mending or healing has not been gone through with entirely yet, has not been completed, is that the fact?

A. Not entirely.

### RE-CROSS EXAMINATION.

By Mr. Williams:

Q. Doctor, what particular branch, if any, of medicine do you specialize in?

A. In general surgery.

MRS. EDNA R. WEBB,

the plaintiff, being first duly sworn, testified as follows:

Examined by Capt. Berkeley:

Q. You are Mrs. Edna R. Webb, I believe?

A. Yes, sir.

Q. Where do you live, Mrs. Webb?

A. On Hampton Avenue.

Q. Have you lived in Newport News quite a page 20 } length of time?

A. Since I was about ten years old.

Q. What was your age at the time of this injury?

A. Thirty-nine.

Q. Are you married?

A. Yes, sir.

Q. And you have been married for a number of years, have you not, Mrs. Webb?

A. Yes, sir.

Q. Prior to your injury, who lived in the house with you, Mrs. Webb?

A. My mother, husband, and brother.

Q. Who did the housework of that house?

A. I did.

Q. What did the house work consist of?

A. Washing, ironing, cleaning, most everything that goes along with house work.

Q. In other words, you were the housekeeper of that house



and you did practically all the house work in that house. Is that correct?

A. Not practically; I did it all.

Q. You did it all?

A. Yes.

Q. Were you at that time that you did the house work—did you do other things like going to the grocery store, or not?

A. Yes, I did. I was always also quite active in page 21 } the church work and other civil affairs.

Q. Now, Mrs. Webb, what was your physical condition on November 2nd?

A. Very good.

Q. Very good?

A. Yes.

Q. Now, just tell the jury what happened on November 2nd.

A. I had been to Roanoke on a visit and came home Wednesday night. This happened on Thursday around noon. I went over to town to Grant's to buy a pair of gloves and some underwear with mother.

Q. You went there with your mother?

A. With my mother and we just had gotten into the counter. Mother had about picked out the underwear she wanted and I was standing—

Q. You had gotten to the what?

A. To the counter and I was standing just a little behind her when my foot started slipping and in trying to catch myself with my elbow on the side of the counter I did not make any success and landed on the floor. When I did my foot was over this way (indicating).

Q. Can you show us?

A. No, I cannot bend my foot that much.

Q. Turn around where the jury can see. Your foot turned this way, you mean?

A. Right over this way. It was just sticking page 22 } out to the side like that.

Q. Right up to the side over this way?

A. Yes, sir.

Q. And you went right on down to the floor, you say?

A. I was on the floor, yes, sir, flat. Of course, I could not get up. The manager in Grant's came to me and wanted to carry me down to a rest room, I believe, in the basement, where I refused to go because the only doorway that I saw was a very narrow doorway. Finally, one of the clerks suggested that they lay me on some rugs in the back of the store, which they did, and made me as comfortable as possible.

Q. Did they send for the doctor?

A. They asked me who my preference was and I told them to call Dr. Payne. Dr. Payne could not get there so he sent Dr. Poindexter who came and ordered that they send me home or to the hospital and I told him I preferred to go home.

Q. Were you suffering any pain at the time?

A. Yes, sir, great pain.

Q. How did they get you home?

A. In an ambulance. The manager called, I think it was the manager, or one of his clerks, called the ambulance from Mr. Turbyfill, and I was carried home in the ambulance.

Q. You were carried to the ambulance how?

A. On a stretcher.

Q. They put you on a stretcher then and carried  
page 23 } you to the ambulance?

A. Yes, sir.

Q. How did you get home?

A. In the ambulance. And they could not get the stretcher up the stairway so they took me out of the stretcher and set me in a chair. In the meantime I had them call up a trained nurse and she was ready as the ambulance passed her door and she took my foot on a pillow and the ambulance driver and Mr. Turbyfill carried me upstairs in the chair, and she carried my foot on a pillow.

Q. Did anything else occur in the store about anybody trying to manipulate your foot or anything of that kind before you left the store?

A. Some lady came in the store while I was lying there and she asked me if she could not help me.

Mr. Williams: I do not know what the purport of this is, but the conversation between this plaintiff and some other lady is not admissible, I submit.

By Capt. Berkeley:

Q. Was the manager of that store there at that time?

A. I don't remember whether he was there when she put my foot in place, or not, but she grabbed my foot and put it in place.

The Court: I knew you were objecting to what was said, Mr. Williams, but I did not know whether you were objecting to what was done, or not. I just want to get it  
page 24 } straight in my mind.

Mr. Williams: If somebody came in the store whom we have no control over and did something to this lady, certainly we have nothing to do with that. It is totally im-

material so far as Grant's is concerned, both what the lady did and what was said.

Capt. Berkeley: I think, if the Court please, from the time a person is injured she can tell what happened to her foot from that time on. In fact, I think it is rather material. I don't know who asked this woman to do this.

Mr. Williams: And neither do I.

Capt. Berkeley: But I do not think people run around volunteering to put people's feet in place. Anyhow, she certainly can tell what happened, and I am a little surprised at any objection to that. I did not anticipate that she was going to relate any conversation, as your Honor knows, and as counsel knows, between her and this particular woman. I just want her to tell what happened while she was there before the ambulance came there for her.

The Court: I will let her do that if she does not go into any conversation.

Mr. Williams: We note an exception unless it is shown that this lady was some employee of or had some connection with Grant's.

page 25 } By Capt. Berkeley:

Q. Just tell what happened. You were lying on those rugs back there at the back?

A. No, I was lying on the floor where I fell.

Q. Did this gentleman or any of the employees of the store come to you at the time?

A. Yes, sir.

Q. Were any of them around there at the time this lady came?

A. I could not tell you that, Captain Berkeley; I do not remember.

Q. But they were there?

A. They were there from time to time.

The Court: By "they" what do you mean?

By Capt. Berkeley:

Q. When you were lying on the floor, Mrs. Webb, were any of the employees of the store present where you were?

A. In just a few minutes after I fell, they were.

Q. So, this lady undertook to—

A. Yes.

Q. Was that before that?

A. Yes.

Q. And some lady then you say put your foot in place or attempted to put your foot in place?

A. She grabbed my foot in one hand and my ankle in the

other, just twisted it right over until it was set-  
page 26 } ting just about like it now.

Mr. Williams: Your Honor understands I object to that on the grounds heretofore stated.

The Court: I don't know just what the purpose of it is, whether to show that somebody there made a bad job of a condition there.

Capt. Berkeley: Oh, no. I did not have that in mind. I just wanted to show in sequence how it was, and the evidence does show that the manager and other employees were there at the time when she had been injured right there in the store and if she was injured as we allege through their negligence, I think it would be admissible to show that somebody at that time put her foot in place.

By Capt. Berkeley:

Q. Now, they put you upstairs when you got home?

A. Yes, sir.

Q. And who was the trained nurse, Mrs. Webb, with you?

A. Mrs. Holmes.

Q. And she was there with you how long, Mrs. Webb?

A. Eleven days, I think.

Q. What?

A. Eleven days.

Q. She stayed there with you eleven days. Did Dr. Payne come to attend you?

A. Dr. Payne came in a few hours after I got  
page 27 } home and gave me something to quiet me, and he came, as I remember, every other day.

Q. Do you know where Dr. Payne is now?

A. No. He wanted to go to some medical meeting, I believe.

Q. Do you know whether he was summoned here, or not? He wanted to go to some medical meeting, you said?

A. Yes.

Q. Did he tell you where he was going?

A. Boston, I believe.

Q. Going to Boston to some medical meeting?

A. Yes.

Q. Well then, after you got home, where did you stay?

A. I stayed in bed flat on my back.

Q. Flat of your back how long, Mrs. Webb?

A. Nineteen days.

Q. Nineteen days?

A. No, I beg your pardon, until the 19th of November.

Q. Until the 19th of November you stayed in bed flat on your back?

A. Yes, sir. On the 19th of November I sat up for a little while, preparatory to going to have X-rays made the next day.

Q. During that time that you were in bed, what was done to your foot, what was your nurse doing?

A. They put hot epsom salts solutions to it and had it between sand bags.

page 28 } Q. What was that for?

Mr. Williams: She cannot possibly know what that was for. She is not a doctor. She could not possibly know unless somebody told her, and then it would be hearsay.

Capt. Berkeley: I don't know whether it would be hearsay or just a matter of plain intelligence.

By Capt. Berkeley:

Q. Your foot had been put in position—

Capt. Berkeley: I will wait until the Court rules. I don't know how the sand bags were applied.

By Capt. Berkeley:

Q. I will ask you that. How were the sand bags applied?

A. There was one put on either side this way to try to hold my foot in position. It was swelled until it was blue-black.

Q. And you lay flat of your back with your foot in that position, did you?

A. Yes.

Q. Sticking up?

A. Yes.

Q. Between those sand bags?

A. Yes.

Q. Well, now then, how did you get there to have your X-ray taken?

page 29 } A. I went in the back of an automobile with my foot up on the seat on a pillow. Dr. Payne had strapped it as tightly as he could with adhesive tape.

Q. And who took the X-ray?

A. Dr. Wood.

Q. This gentleman who testified this morning?

A. Yes, sir.

Q. Do you know what date that was taken?

A. It was taken on the 20th of November.

Q. Now, what did you do next?

A. When we got to Norfolk—

Q. Well, tell me about getting to Norfolk.

A. Wasn't anything to tell about it, only I laid on the back seat of this car with that foot on the pillow. I sat on the seat, rather, with that foot stretched out on this pillow. When we got to the Medical Arts Building in Norfolk they had two colored men come out with a chair and I sat in the chair and they carried me in in that chair.

Q. To whom?

A. To Dr. Vann's office.

Q. What happened at Dr. Vann's office?

A. Well, I waited quite a while. He was not there when I got there, and after he came he proceeded to put it in a cast.

Q. He proceeded to put it in a cast?

A. Yes.

Q. Well, did Dr. Vann come to see you after that or did you go to see Dr. Vann?

page 30 } A. I went to see Dr. Vann.

Q. How often did you go?

A. I went to Norfolk twice and after that I wrote to Dr. Vann and asked him if it would be convenient for me to come to him in January. My visit was right after New Year's.

Q. Did you still have the cast on?

A. I still had the cast on.

Q. Had the cast been split yet?

A. No, sir.

Q. This was in January?

A. That was in January, and if it would not be convenient I would meet him at the clinic over here.

Mr. Williams: I do not like to keep making objections but certainly what this lady said to Dr. Vann or what she wrote is certainly not admissible in this case against Grant's. It is her own doctor and a self-serving declaration, and hear-say.

The Court: I will have to sustain the objection.

By Capt. Berkeley:

Q. Do not tell the conversation. What did Dr. Vann do, and I want to suggest further, if the Court please, that the defendant has summoned Dr. Vann and summoned him before the plaintiff did.

Mr. Williams: What has that got to do with it?

Capt. Berkeley: You say he is her doctor and  
page 31 } he is your own witness. That is what he has got  
to do with it.

A. I went to Dr. Vann over here at the clinic and he split  
the cast at the clinic.

By Capt. Berkeley:

Q. That was in January?

A. That was in January.

Q. He split the cast?

A. He split the cast and told me to leave it on and have  
my foot exercised, or exercise my foot as much as possible.

Q. From that time on did you exercise your foot as much  
as possible.

A. I did. I tried to do everything just as near as he  
told me as I possibly could.

Q. Have you tried ever since to exercise your foot as  
much as possible?

A. Yes, sir.

Q. Now, during the time, Mrs. Webb, from the time that  
you were first injured, tell us how the foot has affected  
you.

A. Well, it has handicapped me greatly in my house work.  
It pains me when I go to bed at night, I cannot rest. It is  
after one or two o'clock before I can get quiet, I suppose  
after the swelling goes down.

Q. Well, how is it in the morning when you get up?

A. In the morning when I first get up it is fairly good  
for a couple of hours. After that it begins to  
page 32 } pain me greatly again and I just have to stop,  
that is all.

Q. During what time has that been going on?

A. Ever since I got so I could walk at all. I used my  
crutch around the house, one crutch, up until June.

Q. Up until June?

A. When I would be going around with my work I would  
use this one crutch. That is what I tried to do. I did not  
walk with it when I would go out to amount to anything,  
because I did not go any place unless I had to go and I was  
very careful.

By Mr. Williams:

Q. I did not understand that. Did you say you did or did  
not use your crutch when you went out?

A. I did not.

By Capt. Berkeley:

Q. After June, you mean?

A. I used it for a while after May but I did not use it after that when I went out because I did not go out any more than I had to.

Q. That condition existed since that time, I believe is the answer you gave to the question. How is your ankle now?

A. It bothers me a great deal. Last Wednesday I could not walk at all, could not bear my weight on it at all. Sometimes I cannot. Other times I can walk fairly good but there is right here a sensation of something puncturing  
page 33 } into the flesh like you would take a rough stick or pointed stick or something and be puncturing it through the flesh. That is the sensation that is there if I am on it any at all.

Q. When is it swollen most, in the morning or at night?

A. No, at night. When I get up in the morning it is fairly good but by three o'clock in the afternoon it is beginning to bother me a plenty and by the time night comes it is really bad.

Q. Bad in what way?

A. Just pains so that I cannot hardly stand it and I don't get any rest at night.

Q. Has that affected you in any way?

A. Well, I am unusually nervous I should think, not getting your proper amount of rest would have something to do with that.

Q. How much did you weigh at the time this happened?

A. Around 189.

Q. How much do you weigh now?

A. I weighed 199½, I think, at Dr. Sayre's office last week.

Q. Have you been trying to be as active as you could?

A. Yes, sir.

Q. Well now, have you been able to do all your house work like you did formerly?

A. No, sir, not by a long means.

page 34 } Q. Well, what have you done?

A. Well, I have had to employ someone to do it.

Q. You have had to employ someone?

A. I have had to employ a colored woman ever since I was hurt.

Q. What is the employment of that colored woman?

By Mr. Williams:

Q. Who employed her, did you employ her, or your husband?

A. Well, I suppose my husband has to pay her.



By Capt. Berkeley:

Q. Well, how much is she paid?

A. We pay her five dollars a week.

Q. Do you board her, or not?

A. Yes, we board her.

Q. Well, have you got any way of estimating about how much her board costs you a week?

A. Well, that is a pretty hard question. Groceries have gone up considerably. I can see a difference on the grocery bill, too; you will find no one as economical as yourself.

Mr. Williams: I object to that as not a proper element of damage so far as this lady is concerned.

Capt. Berkeley: Why not?

Mr. Williams: She says her husband employed this colored woman.

Capt. Berkeley: She said of course the pay had to come from her husband to pay her.

page 35 } Mr. Williams: It is his loss, not hers.

Capt. Berkeley: I think the Court says it includes all expenses, maintaining and other expenses, or words to that effect plainly. That is the only reasonable interpretation to put on it in my opinion.

By Capt. Berkeley:

Q. How long has this woman been employed?

A. Well, I have had several. I have not had the same one all along.

Q. Now, tell me, Mrs. Webb, about Dr. Poindexter; did he have any relation to this injury?

A. He came to the store and just gave orders that I be taken home.

Q. He is the one that gave orders that you be taken home?

A. Yes, sir.

Q. Do you know where he is now?

A. No, sir.

Q. You do not?

A. No, sir.

Capt. Berkeley: I would like to state with the permission of my friend Mr. Williams that Dr. Poindexter has been in the hospital for an operation. I understand he has been carried home just a day or two ago. He was summoned here but could not come for that reason. As to Dr.  
page 36 } Payne, we will find out after Dr. Vann goes on the stand why Dr. Payne is not here, in one way, but Dr. Payne was finally excused by me. He wanted

to go to Boston to some meeting of medical men that happens but once a year and that would not keep, and I did not know that it made any difference one way or the other, so I finally agreed to let him go.

By Capt. Berkeley:

Q. Well now, do you know what Dr. Poindexter's bill is?

A. No, sir, I do not. I suppose it was included in Dr. Payne's bill.

Q. Do you know what Dr. Payne's bill was?

A. I do not.

Q. Do you know what Dr. Vann's bill is?

A. \$50.

Q. What was the nurse's bill, do you know?

A. \$60.

Capt. Berkeley: Under Section 5134 of the Code under the title of "Property Rights of Married Women", it is stated: "In an action by a married woman to recover for personal injury inflicted on her she may recover the entire damage sustained, notwithstanding the husband being entitled to the benefit of her services about domestic affairs, and no action for such services shall be maintained by the husband." Now, if she can recover the entire damage sustained, notwithstanding the husband may be entitled to the benefit of her services, it does seem to me that it is clear that she can recover whatever expense there is. If the husband had brought this suit, how would he base the value of her services except on what it cost him to supply the difference, fill the gap. That would be one factor in the value of her services. Now, what I want to show is what the damage is. The damage is not only that she could not do this herself as she has testified but there had to be supplied the difference at a certain cost.

The Court: I will allow the question to be answered.

Mr. Williams: We note an exception.

By Capt. Berkeley:

Q. You say, Mrs. Webb, before rations went up. Do you have any way since this woman has been there before rations went up to tell or to estimate how much it cost to feed her in addition to the rest of the family?

A. Well, I noticed an increase in my grocery bill of around \$2.50 a week, I would say.

Q. Around how much?

A. \$2.50 a week.

Q. Have you still got that woman?

A. No, I do not have the same one I had when I was hurt.

Q. I mean, do you still have a woman?

A. I still have a woman, yes.

page 38 } Q. Are these your checks?

A. Yes.

Q. To whom are they payable, Mrs. Webb, and what for?

A. Dr. Payne—

Q. How much is that?

A. Treatment to foot \$26.00; Dr. Thomas Wood for X-ray and Dr. Vann \$50. Dr. Vann has not been paid.

By Mr. Williams:

Q. And Dr. Wood was how much?

A. Dr. Wood's X-rays were \$15 for the first set.

By Capt. Berkeley:

Q. And the last set?

Mr. Williams: I do not think the last set are admissible. They were taken for the purpose of the doctor testifying in this law suit, not to give her any treatment.

Witness: Not necessarily.

Mr. Williams: That is what he said.

Capt. Berkeley: No, he did not say that. It is an examination by a doctor, anyhow, to show the condition here at the present time which would certainly be of medical value to her under the circumstances. Now, as far as the last examination by Dr. Wood—excuse me a minute.

page 39 } By Capt. Berkeley:

Q. This check here is \$30. You say Dr. Wood's bill for the first X-ray was \$15?

A. Yes.

Capt. Berkeley: I do not know whether my friend wants to make a point of that.

Mr. Williams: Do you want to make it?

Capt. Berkeley: Do you want to make it, the second X-ray?

Mr. Williams: No, I do not think it is admissible as an element of damage when you summoned the doctor and had him examine her so as to testify. That is an expense of the law suit.

Capt. Berkeley: We will agree that it was \$15. I don't know whether X-rays like rations have gone up yet or not but anyhow I know it has not gone down. I do not want to bring Dr. Wood back to testify unnecessarily.

Mr. Williams: I have not heard the Court rule on it yet.

Capt. Berkeley: We will ask the Court to rule on it now. I just wanted to get something for the Court to rule on.

By Capt. Berkeley:

Q. This check of February 8, 1934, that you gave for \$30 I understood you to say included \$15 for the X-ray taken of your ankle, and the other portion is for something page 40 } else?

A. Yes.

Capt. Berkeley: Then it is only \$15 really claimed on that bill.

Witness: I think you will notice it is written on the bottom of the check just what it was paid to Dr. Wood for.

Mr. Williams: What is Dr. Payne's bill?

By Capt. Berkeley:

Q. Dr. Payne as of the 26th of February, 1934?

A. That is when I paid him.

Capt. Berkeley: If the Court please, I understand my friends objects here to the last X-ray taken on the ground that it was taken for the purpose of this suit. It was taken for the purpose of Mrs. Webb discovering the present condition of her injury and necessarily to be used in this suit as a fact just like the other X-ray could be used in this suit as a fact just like the other X-ray could be used in this suit to take an X-ray at the present time for the medical treatment of Mrs. Webb but it certainly throws light on her present condition for herself, and the fact that it was taken at this time simply means that it was taken in time to be used in this suit so that she would know exactly what her condition was as shown by the X-ray. Now, I want to put page 41 } that item down \$15, and I am not asking your Honor to rule on it immediately, and, of course, your Honor can at any time rule it out if your Honor is advised that it should be ruled out, but my contention is that it is a legitimate expense growing out of the condition of her ankle, of her injury. It is something that if that were your Honor's ankle would be conducive to your physical well-being in knowing what, after eleven months' time, was your condition. It would be a natural expense which some of us might forego but at the same time we ought not to forego in this enlightened age when we can get information that we formerly could not get about our condition so we can know how to further treat ourselves best. That is all that I have to say on it.

Mr. Williams: May it please the Court, I just want to say this, insofar as Dr. Wood and Dr. Sayre who testified. I submit that is exactly the same as if you had an automobile accident and, in order to bring facts before the jury, you had gone out and had a photographer take pictures and pay the photographer twenty or thirty dollars for pictures to produce before the jury. That was the purpose of these second X-rays. That was the purpose of employing Dr. Sayre, and I submit for your consideration that those items are not proper elements of damage.

Capt. Berkeley: My friend has brought in an-  
page 42 } other illustration. I knew that physical mechanics had gotten down to the point where they like to take X-rays and every intelligent person agrees with them on that, but I did not know we had gotten to the point in automobiles where we have to take pictures of automobiles in order to find out the damage to the automobiles. It is an entirely different proposition, and if that was the method by which we could find out damage, everyone would X-ray things in order to ascertain the damage for the enlightenment of the jury, it would be a necessary expense. If we are going to have automobile illustrations our court has recently said that the repair bill alone is not necessarily the measure of the damage done to the automobile. And the repair bill heré is not necessarily the measure of the damage, the admitted repair bill here is not necessarily the measure of the damage, by a great deal, but anything that may help her from a medical standpoint in an effort to effect a cure would seem to me to be a necessary part of the damage incurred. I don't know whether your Honor wants to rule on it now, or not. That is all I have to say about it one way or the other.

By Capt. Berkeley:

Q. Now, Mrs. Webb, you had to go over to the Medical Arts Building to have your first X-ray taken, didn't you?

A. Yes, sir.

page 43 } Q. How much did that cost you?

A. I went over in an ambulance with Mr. Turbyfill and he has never rendered a bill. That was to the Medical Arts Building here in Newport News to have the X-ray made. I called Mr. Turbyfill's ambulance and went over in the ambulance, and he has never rendered a bill.

Q. Were any bills rendered for carrying you out to your house the first time?

A. No, sir, he has never rendered a bill for either.

Q. You don't know whether anybody has paid him or not?

A. No, sir, I do not.

Q. Now, you went to Norfolk, too?

A. Yes, sir.

Q. To see Dr. Vann?

A. Yes, sir.

Q. Was that any expense?

A. Yes, sir, I paid my own expenses going over and coming back, both trips.

Q. Well, how much was that?

A. Well, you know right now I could not tell you definitely. I kept track of it at the time.

Q. Did you make a memorandum of those for Miss Snell here?

A. Yes, sir, right at the time.

Q. Is this your handwriting with the exception of these pencil notes on here?

page 44 } A. This in ink is, yes, sir.

Q. Will you examine that and see if that will refresh your mind as to what expenses you have been put to in this, and read out the items?

A. I went to Norfolk on November 21st, ferry and lunch for the driver and self was \$4.00, two men to carry me in to Dr. Vann's office was one dollar and \$3.25 I paid Dr. Vann for crutches. My second trip to Norfolk, ferry, lunch for the driver and self was \$3.00. The man to help me in the Medical Arts Building at that time was only fifty cents because I could use my crutches at that time a little bit.

Q. What is this item here?

A. That was prescriptions and medical supplies amounting to \$30.

Q. How long have you had this woman every week there, Mrs. Webb, since you were injured?

A. Part of it this one, but I have had one all the time.

Q. I mean one.

A. Yes, I have had a colored girl all the time.

Q. And you have still got one?

A. Yes, sir.

Q. Are you able to get around any better now than you were a few months ago?

A. I do not see but very little difference.

Q. Well, formerly, did you send somebody else for the groceries, or how did you get the groceries?

page 45 } A. I went myself.

Q. Well, do you go now?

A. No, sir.

Q. Why not?

A. Because I cannot. I cannot walk to amount to any-

thing and if I am on my feet, as I told you before, any length of time it pains me. So, if I want to go to the grocery store I would have to either go on the street car or drive the car, and when I drive the car my ankle is so stiff that I cannot just get out and walk when I get there.

Capt. Berkeley: Take the witness.

### CROSS EXAMINATION.

By Mr. Williams:

Q. Mrs. Webb, what is your height in your stocking feet, if you know?

A. Five feet six inches.

Q. Now, I understand that this accident occurred slightly before noon on November 2nd, 1933?

A. Yes, sir.

Q. And that was a Thursday, was it not?

A. Yes, sir.

Q. Were there a good many people in the store at that time?

A. No, sir.

page 46 } Q. How many would you say were in there?

A. Well, I could not say positively, but there were not very many.

Q. Fifty to sixty?

A. No, I would say there was not that many.

Q. Ten or fifteen?

A. More likely.

Q. I understand also that you went in there with your mother who had some purchases to make?

A. Yes, sir, she did and so did I.

Q. And you had some to make?

A. Yes, sir.

Q. And you went up to a counter?

A. Yes, sir.

Q. And now tell the jury, please, which counter that was?

A. We went in the first door next to 28th Street.

Q. The first door this way?

A. Yes, sir, the door next to 28th Street.

Q. And was it a counter on that first aisle next to 28th Street?

A. On the first aisle but not the one next to the wall, the middle one, I guess you would call it.

Q. And how far towards the rear of the store was it, for example, half way or two-thirds?

A. It was not to the first aisle running across the store.

It was between the door and the first aisle running across the store.

page 47 } Q. And I believe you said you were up to this counter and were standing there?

A. I was standing a little behind my mother who was standing up right close to the counter picking out some underwear and I was just a little behind her.

Q. Were you facing your mother?

A. I was standing side to her. I was standing kind of facing her and facing the glove counter.

Q. And then did you turn as you stood there?

A. I was not moving, just maybe probably throwed more weight on one foot to look and answer a question that mother had asked about the underwear.

Q. Your mother asked you some question. Did you turn yourself without moving your feet?

A. I moved my head; I might have.

Q. You turned around to speak to her?

A. Yes.

Q. And your feet at that time were perfectly still?

A. Yes.

Q. You just sort of swung your head and body?

A. Yes, sir, probably throwed a little more weight on one foot than the other.

Q. How long had you been standing there prior to making that movement?

A. Not but a very few minutes. We knew exactly what we were going to get when we went in there and right  
page 48 } where it was.

Q. And as you made that movement throwing a little more weight, you say, on one foot, the foot went from under you?

A. Yes, sir.

Q. You had been in Grant's store a good many times prior to this accident, had you not?

A. Yes, sir.

Q. You were a right frequent customer there?

A. Yes, sir.

Q. Approximately how many times, Mrs. Webb, would you say you had been in there the week before this accident?

A. The week before I was not in there at all. I was in Roanoke.

Q. How about two weeks before?

A. Well, I was in there once or twice during that week.

Q. In other words, you were in there once or twice within two weeks prior to this accident?

A. Yes, sir.



Q. Did you go in there probably once or twice a week on an average?

A. I did up until that time.

Q. You did not see anything there, any foreign substance or anything on the floor, did you?

A. I was not looking for it.

Q. The floor was apparently just like it usually was when you had been in there on previous occasions.  
page 49 } Is not that correct, Mrs. Webb, so far as you saw?

A. I had not paid any attention to the floor, Mr. Williams. I went in with the specific idea of buying this merchandise.

Q. Of course, in walking from the door to this point you were bound to have seen the floor?

A. Yes, I suppose so.

Q. And you saw nothing unusual about it from what it was the other times you had been in there, did you?

A. No, I do not believe so.

Q. Now, Mrs. Webb, what character of shoes did you have on, on that occasion?

A. I had on a high heel shoe, more of a dress shoe than what I have on now, but the heel a different shape from what I have on but practically the same height.

Q. Capt. Berkeley has handed me this pair of shoes. I assume from his handing them to me that they are the ones you had on; is that correct?

A. Yes, sir.

Q. I do not believe you have worn these since your accident?

A. No, sir.

Q. So that they are in identically the same condition now that they were when the accident happened?

A. Yes, sir.

page 50 } Capt. Berkeley: That is a rather leading statement as to the condition.

Mr. Williams: It was a question which was answered yes, but I have a perfect right to lead her on cross examination.

Capt. Berkeley: You have no right to lead her on a different matter that you brought out. You are making her your witness now. I did not ask her about her shoes or the condition of the floor, or anything.

By Mr. Williams:

Q. I believe you said after you had fallen the manager and some employees of the store came up there and assisted you?

A. Yes, sir, they offered to help me.

Q. And wanted to take you down to the Rest Room, but on account of it being down the basement flight of stairs you did not wish to go, and they took you back and made you as comfortable as they could on some rugs in the rear of the store?

A. Yes.

Q. And requested you for the name of your doctor so they could send for him?

A. Yes, sir.

Q. And they did get Dr. Poindexter when Dr. Payne was not available, and you were carried home in an ambulance?

A. Yes, sir.

page 51 } Q. You then stated, I believe, you stayed until the 19th of November in bed?

A. Yes, sir.

Q. Then you got up and had some X-ray pictures taken and went to Dr. Foy Vann whom Dr. Payne referred you to, didn't he?

A. Yes, sir.

Q. And when you came back did you go back to bed or were you allowed with the cast on, to sit up and go about a little on crutches?

A. They told me it would be better for me to try to set up a little bit, which I did part of the time. I could not set up, of course, all day at first.

Q. And then, after some period of time, you got around with the cast on with your crutches?

A. Yes, sir.

Q. And that continued until, about when was the cast taken off?

A. In January.

Q. In January of 1934?

A. Yes, sir.

Q. That was taken off entirely then?

A. Yes, sir.

Q. When is the last time, other than the other day when you went to Dr. Wood and Dr. Sayre that you had been attended by a doctor?

A. In July.

page 52 } Q. In July, 1934?

A. In July, 1934, I saw Dr. Vann.

Q. You saw him in July, 1934?

A. Yes, sir.

Q. When was the last time that Dr. Payne had seen you?

A. Dr. Payne never saw me after he turned me over to Dr. Vann.

Q. Then Payne turned you over to Vann?

A. As soon as I was able to go to Dr. Vann.

Q. I was trying to get the dates about November 22nd, or something like that.

A. I went over to Dr. Vann on the 21st.

Q. And since then Payne has not seen you?

A. No.

Q. And no other doctor has seen you except Dr. Vann until these doctors examined you the other day?

A. Yes.

Q. I believe that is all. Thank you very much.

### RE-DIRECT EXAMINATION.

By Capt. Berkeley:

Q. When you went in the store was the store open for business, or not?

A. Yes, sir.

Q. Were the goods that you and your mother were looking for displayed on the counter?

page 53 } A. Yes, sir.

Q. Is this store all on one floor?

A. Yes, sir, I think it is. If it is not, I have never been other than on the first floor.

Q. You talked about going down the first aisle and stopping at the first cross aisle. Are there many counters in there?

A. Yes, sir.

Q. And goods displayed on the counters?

A. Yes, sir.

Q. And prices on the goods?

A. Yes, sir.

Q. And what is the ordinary way of dealing in there, do they have different counters for different classes of goods?

A. Yes, sir, different classes of merchandise.

Q. Well, what did you do when you got in?

A. Well, you go and find your merchandise and get a clerk to wait on you, pick out what you want, I would say.

Q. You go to the particular counter then on which they have the goods that you are looking for?

A. Yes.

Q. Is the floor space taken up principally by counters or principally by aisles?

A. Principally by counters.

Q. And all those counters have good displayed on them for sale?

A. Yes.

page 54 } Mr. Williams: Capt. Berkeley, we do not deny but we are perfectly willing to admit that Mrs. Webb came in there for the purpose of purchasing merchandise.

By Capt. Berkeley:

Q. When you went in there you went straight to the first counter, you went to see the one that your mother was to buy some clothes from, as I understand?

A. Yes, sir.

Q. You say your mother was standing at the counter looking at the goods and you said you were standing further behind and on her side?

A. Yes, sir.

Q. Were you facing this way or were you facing this way?

A. Well, the counter ran this way, Capt. Berkeley.

Q. All right then, so your mother was standing here then?

A. The other was this way, the counter mother was standing at.

Q. All right. Which side of her were you on?

A. The other side.

Q. You were standing, you say, sort of behind and on her side. Is that correct?

A. Yes, sir.

Q. How were you facing, were you facing towards the counter or sort of half facing towards the counter?

A. I was half facing towards her and the counter and half facing the counter on the other side.

Q. What do you mean by "the counter on the page 55 } other side"?

A. Say this table was one and this was the other.

Q. Were you facing your mother or your back to your mother?

A. I was facing mother.

Q. You were facing your mother and sort of looking at this counter and the other counter, too?

A. Yes, sir.

Q. And your mother spoke to you?

A. Yes, sir.

Q. And you sort of turned yourself?

A. Yes, sir.

Q. Did you turn towards the left like that?

A. That I could not say.

Q. If your mother was here and she spoke about what were you going to look at?

A. The goods on the counter she was at.

Q. Then you turned this way?

A. Yes, sir.

Q. Then you say your weight seemed to throw on your left foot and your left foot got from under you?

A. Yes, sir.

Q. Did you see that left shoe, Mrs. Webb, after you got home, or at any time?

A. Not until the nurse showed it to me.

Q. Who was that, Mrs. Holmes?

A. Yes.

page 56 } Q. What was the condition of the shoe when you saw it?

A. There was oil on the bottom of it.

Q. On the bottom of the shoe?

A. Yes, sir.

Q. Did the nurse call your attention to it, or did you ask to see it?

A. The nurse called my attention to it. After they had make me comfortable she asked me how I fell at the time. I told her my foot just slipped out from under me and it felt as if there was something soft under it.

Q. Your foot felt as if what?

A. There was something soft and slippery under it, and she got the shoe and brought it to the bed and showed it to me.

Q. And there was oil on the bottom of the shoe?

A. Yes, sir.

Q. Do you know whether it was oil or some other substance?

A. No, sir, I could not say that.

Q. You mean then there was some substance on the bottom of the shoe?

A. Yes, sir.

Q. Was that shoe taken off your foot right there where you were injured?

A. Yes, sir, right in Grant's.

Q. Have you been accustomed to wearing shoes like these, Mrs. Webb?

page 57 } A. Yes, sir.

Q. How many years?

A. About twenty-five.

Q. About twenty-five years you have been accustomed to wearing shoes like that?

A. Yes, sir.

Q. Do you know whether or not that is usual amongst women in the City of Newport News to wear shoes like this, or unusual?

Mr. Williams: I object to that. I do not think Mrs. Webb is an expert on women's wear.

Capt. Berkeley: I asked her whether she knew.

The Court: She may answer if she knows.

A. Well, I see quite a few other women wearing them. My daughter wears them, never wore anything else, and the young people usually keep up with the styles.

Q. Well, you know whether it is usual to wear shoes like that amongst the women in Newport News?

A. Yes, they do.

Q. What kind of customers do you usually find in the Grant store? Are they women, or men?

A. Well, in the day time I think you would find more women than you would men.

Q. You say you were not looking for any foreign substance on the floor and you did not pay any particular page 58 } attention to the floor. Why didn't you do that?

A. Well, I figured and felt that the floor should be safe enough for people to walk on. If I had been over on Jefferson Avenue in some of those stores over there probably I would have looked for something on the floor but I was not expecting it in Grant's on Washington Avenue.

Q. You did not expect to find any dead fish or anything of that kind laying around on the floor in Grant's?

A. No, sir.

Q. Was it a nicely kept place, usually?

A. Yes, sir.

Q. Things usually in order?

A. Yes, sir.

Q. That had been your experience there?

A. Yes, sir, I liked very much to deal there.

Q. And I understand you walked in there on the assumption that there would not be any danger to you on that floor?

A. Yes, sir.

Q. How did you find out you were going over to Dr. Vann?

A. Dr. Payne suggested that I go to Dr. Vann, that there was no orthopedic in Newport News.

Q. No what?

A. Orthopedic; that is what he called it.

Mr. Williams: He specializes in bone injuries.

page 59 } By Capt. Berkeley:

Q. Nobody in Newport News can set a broken bone, you would have to go to Norfolk to get a broken bone set?

A. That is what Dr. Payne said.

Q. Did he suggest that to you just the last day, or did you understand for some time you were going over there?

A. No, some time after I was hurt and was in bed he told me that he could not determine whether it was broken or not, it would have to be pictures made and then he would suggest that I would go to Dr. Vann as soon as I was able to be moved.

Q. Do you know whether he made arrangements for you to go to Dr. Vann's, or not?

A. I think he did.

Q. You were to go on a certain day?

A. Yes, sir.

### RE-CROSS EXAMINATION.

By Mr. Williams:

Q. Mrs. Webb, did your mother ever fuss with you about wearing these high heel shoes?

A. No, sir.

Q. Did your husband?

A. No, sir.

Q. You say a good many women wear them. I see your lawyer has not got them on.

A. Maybe she can wear low heels. It is not everyone that can.

page 60 } Q. They are not what are known as a sensible heel, are they?

A. I could not tell you.

Capt. Berkeley: I think the whole thing material in this case is whether the gentleman who runs this store of the Grant Company knew that women wear these shoes and that women are their patrons, and provide the floor accordingly. It does not make any difference whether her husband objects or does not object. It seems Mrs. Webb has a model husband.

Mr. Williams: I had gotten by that and asked her if that is what women know as a sensible heel.

Capt. Berkeley: I object to that because there are many factors involved in what constitutes a sensible heel. Sensible on one occasion would not be on another. It would not be sensible for any woman to go in a ball room with a low heel on in the present day and generation. I say there are many factors involved in what constitutes sensible. Sensible is a relative thing entirely.

Mr. Williams: May I ask the question?

The Court: Will you tell me what it was now?

Mr. Williams: I asked Mrs. Webb if that heel on that shoe is what is known by ladies as a sensible heel.

The Court: She may answer it. I reckon any of them would answer for themselves if called on.

page 61 } By the Court:

Q. Go ahead and answer the question.

A. Mr. Williams, I could not wear a low heel like Miss Snell has on.

By Mr. Williams:

Q. I did not ask you that question. Is not there a type of heel that is known as a sensible heel?

A. So far as I am concerned, the sensible heel is like what I have got on.

Q. They are not like those you brought here in court?

A. They are the same height but different in shape.

Q. They have a great deal broader bottom?

A. Yes, sir.

Mr. Williams: May it please the Court, Dr. Vann is here from Norfolk. I subpoenaed him here and, according to what Capt. Berkeley has said he subpoenaed him here. Dr. Vann has another subpoena for Court in Portsmouth and it would be a great convenience to him to allow him to take the stand. I intend to put him on unless Capt. Berkeley is going to put him on, and if he is not going to put him on I will ask leave to put him on now.

Capt. Berkeley: All right, sir. No further conversation is necessary, I am perfectly agreeable to it.

page 62 }

DR. FOY VANN,

a witness on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. Williams:

Q. Your name is Foy Vann, is it not?

A. Yes, sir.

Q. And you were subpoenaed here by both the defendant and the plaintiff?

A. Yes, sir.

Q. What line of medicine do you specialize in?

A. Orthopedic surgery.

Q. And what does orthopedic surgery deal with, Doctor?

A. It deals with injuries and deformities of bones and joints of the extremities.



Q. Did you have occasion to examine and treat Mrs. Edna R. Webb?

A. Yes, sir.

Q. How did you happen to treat her, how did she come to you, who referred her to you?

A. Dr. Payne called me up and told me over the phone what sort of problem he had and we decided we would let her lie still for a few days until the acuteness had subsided and then he would send her over to Norfolk, and she came to my office there.

page 63 } Q. At that time, did you or not examine any X-ray pictures or make any examination?

A. Yes, sir, she brought over X-rays that had been taken here.

Q. By whom?

A. Well, I do not know who took the plates.

Q. Would you know them if you would see them?

A. Well, I did not know at that time. I know now who took them, because I have already talked with the man.

Q. Who took them?

A. Dr. Wood took them, or told me he took them, but I did not know at that time who took them. I thought that was what you were talking about. I know now, at least I think I know that Dr. Wood took them.

Q. There is no dispute about that. From your examination and those plates, what was her condition, what did she have?

A. She had fractures of both bones of the leg extending into the ankle joint. I do not recall at this moment which leg it was.

Q. It was the left leg. Were those fractures displaced?

A. Displacement at first, apparently, but Dr. Payne had put on some snug adhesive and when she came to me she had on adhesive.

Q. Now, Doctor, what did you do for her?

page 64 } A. They required some manipulation, not much, and I put her in a cast. She was on crutches.

Q. What instructions did you give her in regard to coming back to see you or taking care of it, or what?

A. I did not do all I wanted to do that day, the first time, with respect to the position of the foot. The next time she came, a month later, November 21st was the first time I saw her. She came back a month later and I changed the position of the relationship of the foot to the ankle like I wanted it, and then she wore that cast for another additional month. Then that cast was removed. She was already on crutches. She continued on crutches for the first month with no weight-

bearing, but practicing movement when she would sit down and when she would lie down. I saw her over here at 34th and Huntington Avenue at the Kiwanis Clinic that I work in. All visits except the two have been made there. It was three months before I permitted her to do anything in the way of weight-bearing. After then, gradual weight-bearing, roughly we will say twenty per cent or a third or a fourth. The next time I added more as she progressed and as it responded to her use I added more from time to time. I saw her every month over there until the first of this month. She failed to come back the first of this month.

Q. When you say "over there", you are speaking of over here in Newport News?

A. Over here at the Kiwanis Clinic, yes, sir. The last time was the first Friday of this month, and she page 65 } did not show up. If she did, I did not see her.

I remember she asked the time before the last, "Do you want to see me any more?" and I said, "Yes, I would be glad to see you along until this thing is finally finished up". She had during her convalescence rather considerable swelling in that leg. She is rather heavy. If she had not been schooled on crutches before we turned her loose I think it would have been longer than it is now. The swelling persisted and came out slowly according to her manner of walking on crutches. The last time she was there, there were no crutches and I do not think she was walking with a stick. I think she had abandoned that, although there was swelling in the joint, in the leg and especially around the ankle. She had not gained the full power and strength in the leg and she had not regained the full range of ankle motion, but she had made nice progress up to that time.

Q. Now, Doctor, I saw Dr. Wood hand you some X-rays, which I assume were the X-rays which were put in evidence here, the pictures taken in the last few days of this lady. What condition do they show?

A. They show a lot of things. The straight view taken from the front backwards shows a restoration of the position of the ankle, shows firm bone healing. The laterals show the same thing, that is taken at forty-five degree angles show a rather distorted viewpoint, but all in all, they page 66 } show the proper relationship of the foot to the ankle. The angle mortise is in its normal position, a firm healing.

Q. You stated a moment ago that the last time you saw her she had not gained power or full motion of the foot?

A. She had not reached the peak of her recovery the last time I saw her. My directions were to subsequently return.

I did not feel like I was quite done with her. I feel like I am in a position to advise and to help her along some more yet. We are still in the middle of the stream, so to speak. I do not think she has gotten to the point that she can give herself to her own directions.

Q. Assuming, Doctor, that she continues in the care of a competent man, will that motion come back, or not?

A. Well, if it does not clear up, I know no reason that I can state at this time to prevent it from clearing up and giving her a useful ankle in keeping with somebody of her age and her station in life and the activities that you would expect her to follow. Now, I would be doubtful that she will have an ankle that is sufficient for active athletic stresses like a young person.

Q. When you say athletic stress, what have you reference to, running, jumping?

A. Football, baseball, anything that a person would expect to use it for in athletic games. I mean the strenuous type of athletics.

Q. For a lady of her age will she have a useful page 67 } foot?

A. I think so, and what I am thinking about is walking, standing, going up and down the steps, and things of that sort.

Q. Will she cease to have the pain that she complains of now on exercising?

A. I do not quite understand you.

Q. She complains now that when she exercises this ankle she has pain.

A. I hope she does. That is a normal accompaniment of convalescence.

Q. Will that continue forever or will that clear up?

A. I see no reason to anticipate that is going to continue forever.

Q. Doctor, will you tell the jury, if you can, in what period of time with proper treatment and proper care this ankle will be such as to cause no trouble and be a useful ankle?

A. She has been a little impatient. I told her "Lady, this kind of thing is a two years' proposition. The next time you will know. You have got to realize that you are a slightly heavy somebody". And she had quite considerable swelling, quite a good bit of hemorrhage and a whole lot of elephantiasis, and in the convalescing that is the thing we struggled along with. I realized I would like to have gotten her on

her feet, weight-bearing, a little earlier, but I did  
page 68 } not feel like subjecting a heavy person to that particular type of risk. She might fall, she might do

anything. It is slow, but as long as it is not particularly worrying you at all—we have run into the same problem where it was two years but they had gotten so they ceased to notice things of that sort. In fact, I remember one that was two years and a half. There were complications in that case outside of the fracture that impeded the convalescence.

Q. Do I understand from that the probabilities are that in approximately another year it will be all right?

A. I think so. To me it has made just the type of progress you would expect with the background you have. I see nothing unusual in the progress she has made up to this time.

### CROSS EXAMINATION.

By Capt. Berkeley:

Q. Doctor, in an injury of this joint, you say that these bones I understand were fractured down to the joint, was that the expression?

A. Yes, sir, they were fractured into the joint and the articular surface of the joint was broken along with the bone, the smooth part of the articular surface.

Q. Was the fluid of the joint released, in that?

A. Oh, yes, bound to be.

Q. Isn't that more severe as far as the injury is concerned than when it is not released?

page 69 } A. Do you mean spilling of the joint fluid?

Q. Yes.

A. No, that don't make any difference at all for this reason: Your joint fluid or your fluid of your joint is on the same level of the pressure of your body fluid. Fluid is not in the joint, put in there like a grease cap and staying, it is constantly flowing in and flowing out. It is like the tears in your eyes, very much like it.

Q. In an injury to a joint like that, would you anticipate that throughout the remainder of her life she is liable to have pain in that joint from the use of that ankle, a woman of her age?

A. I do not think pain would be in the joint, assuming that you have pain, and some of them do. It can come from various types of soreness. You can have pain that is noticeable at change of weather, and those kind of things. That is the scar tissue upon the outside of the joint. That is the kind of pain you have when you have a corn that aches when bad weather comes on. The other type of pain in your convalescence is the pain that you are stiffening up old, injured and torn tissues. That is not so bad if you can start them

moving early. I would like to have started moving her earlier. It is something you have got to go through with during your convalescence.

Q. Doctor, did you know that, in addition to the fracture of these bones, this left foot had been turned to  
page 70 } the side and the foot had been put out of joint as it were, what we commonly know as out of joint, and had to be pulled back in?

Mr. Williams: I do not recall any such testimony as that.

Capt. Berkeley: She testified it was and said that this woman caught hold her ankle and her foot and pulled it back in place. She testified her foot was out of place at the left side like that (indicating), and this lady caught hold of her ankle and caught hold of her foot and pulled it back in place.

A. Did I know that?

Q. Yes, sir.

A. Well, no, I did not know that. I did not see it. I imagine there was rather much distortion there because the bones of the leg controlling the ankle joint were knocked loose. There was nothing to keep it from flaring in all sorts of directions.

Q. Are not there some ligaments around the joint, the ball and socket or whatever it is, that hold them together?

A. Are there ligaments around the ankle?

Q. Yes, sir.

A. There are.

Q. To hold them together?

A. Yes.

Q. In order to put it out of joint, as it were, like I described a minute ago, would those ligaments have  
page 71 } to be torn or stretched?

A. Well, there is more ligamentum tear with a dislocation than with a fracture because the fracture turns loose your ligaments. I imagine she had ligamentum tears, capsule tears.

Q. If she had a fracture in this joint she would have ligaments torn just as well or a little more probably than without the bone being broken?

A. No, you are wrong in that. In a dislocation with no fracture, your ligaments entirely give way. Now, if your bone gives way you have them, but your bone is the thing that gives way instead of your ligaments. You can have both and I think with fractures extending into your joints you do have both.

Q. Is not it a fact that joints of that kind have recurrent

aches, even where they occur to a young person in the pink of health, a condition that will cause them great discomfort at times?

A. I think they sometimes do and I tried to explain that a while ago under the definition of pain, that there are scar tissue pains. Those pains come from where your ligaments have healed with scarring, and that can be quite as true with a dislocation as it is with a fracture.

Q. I mean, Doctor, after they are supposed to be healed. Sometimes you walk about for a few minutes all right, and the time comes when you very effectively recall the page 72 } trouble?

A. I have heard of those things happening where a person would say, "My leg is a good barometer of when it is going to rain. I can tell by the feeling of my leg when it is going to rain". I have never been called on to treat that kind of trouble. I have heard about it frequently. I have heard it more in courtrooms than any other place.

Q. You have never heard of it from old football men?

A. Not from the standpoint of being called on to treat that kind of things.

Q. No, normally a man's leg is all right during most of the time and he only has these pains, and he knows he is going to continue to have them, there is not anything for him to go to a physician to treat. Experience of years teaches him he is going to have them at times, whether it rains or don't rain, barometer or no barometer, it is certain systematic conditions that you get into that might produce them?

Mr. Williams: Is that a question?

By Capt. Berkeley:

Q. I say, he would not go to a doctor, would he?

A. I don't know whether he would or not.

Q. Of course, you never had that experience yourself. You never had severely injured joints yourself, did you, Doctor?

A. Have I?

Q. Yes.

page 73 } A. No, sir.

Q. And, of course, you would not know what a man in that position would be likely to do?

A. Only he would come to me with his problems and give me an opportunity of trying to investigate the problem. I have heard people say that those things happen.

Q. Then, you think that at times you would expect that she would have, a woman forty years old, taking this long to heal

up, that she would have recurrent pains there even later on in life?

A. No, I would not expect that. I would not venture to put that down as a suspicion. I have seen nothing so far to indicate that that would be true.

Q. Well, does it normally take a young, healthy person as long as—you say she is now in the middle of the stream, as it were, and do you think it would be another year before you would expect entire results?

A. The middle of the stream in her convalescence. They are not all alike. I think she has run along about what my experience has been in her particular type of fracture and the complications which she has had with it. I said a moment ago I would have been very delighted to have been able to start her motion quicker and not keep it fixed so long.

Q. If you could have gotten hold of her the day she was injured?

A. No, I do not think it was that end of it, but page 74 }

she had fractures, she is a heavy individual and I was afraid to turn her loose, afraid she would do it over again, and I kept her up. I would have liked to have started her movement in six weeks instead of ten, and when she was out I did not want her to do anything in the weight-bearing line for four more additional weeks, and that gives ten, and that puts us terrifically behind in convalescence. That is the way it appears to me.

Thereupon a recess was taken for lunch.

page 75 }

#### AFTERNOON SESSION.

Met at close of recess.

Present: The same parties as heretofore noted.

LOUIS EISEMAN,

a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Miss Snell:

Q. You are Mr. Louis Eiseman?

A. Yes.

Q. Mr. Eiseman, are you a resident of Newport News?

A. I am.

Q. How long have you lived here?

A. Thirty years.

Q. What business are you in, Mr. Eiseman?

A. Shoe repairing.

Q. How long have you been in the shoe repairing business?

A. Fifteen years.

Q. Has that been in Newport News?

A. In Newport News.

Q. What kind of shoes do you repair, Mr. Eiseman?

A. All kinds, men, women and children.

Q. You don't specialize in any particular class. Will you please tell the court and jury what your experience shows you as the type of shoes that women as a whole wear at this particular time, within the last year or two years?

page 76 } A. What do you mean by type?

Q. Well, I mean the shoes that they wear?

A. Well, the construction or shape or what?

Q. Just tell us everything you know about it, the construction and the kind of heel it has?

Mr. Williams: May it please the court, is not that a matter of common knowledge just as much to the jurors as it is to the shoe repairer?

Miss Snell: If the court please, I submit a man who has been in the shoe repair business for fifteen years will be an expert on the kind of shoes that are generally worn. If there is one man who will get the various types of shoes, it seems to me it is the shoe repair man and I think Mr. Eiseman is fully qualified to testify as an expert witness.

The Court: I will let him answer it.

Mr. Williams: We note an exception.

The Court: I don't know whether I am expert enough myself to say whether it is or not, so let the evidence be heard.

By the Court:

Q. Go ahead, Mr. Eiseman.

A. Infants' shoes—

By Capt. Berkeley:

Q. We are talking about women's shoes?

A. I thought you said you wanted them all and I page 77 } would start at the children and go on up.

By Miss Snell:

Q. If you will just tell the type that young and old women wear?

A. We will say the majority of women from fourteen years to the grave wear—

Q. What kind of heel is that you are speaking of?

A. What we call a spool heel, a wooden heel, rather small, in height from sixteen-eighths to twenty-one-eighths. That



is the height of the heel from sixteen to twenty-one-eighths. Of course, twenty-one-eighths is right high but there is a lot of them worn nevertheless. That is the wooden heel. I will say that eighty-five per cent of the women's shoes worn are of that type heel. The other about fifteen per cent I would say would be the common sense or Cuban heels.

Q. And what is that type?

A. That is a wider heel, most of wood but some of leather, what is known as the commonsense heel. For instance, the commonsense heel is such as you wear and that would be about fifteen per cent of the shoes that I repair.

Q. About like I wear?

A. Yes, about fifteen per cent.

Q. Would they be as low as I wear or higher?

A. Well, some of them are very little higher of the fifteen per cent and I would say eighty-five per cent will run like this heel here (referring to Plaintiff's Exhibit No. page 78 } 1) on this shoe in the shape, and from sixteen-eighths to twenty-one-eighths. I would say that this heel is about nineteen-eighths height heel.

Q. The heels are the same on that pair of shoes?

A. The heels come in the same height.

Q. It the same heel on those shoes, both heels?

A. Yes, they are both the same height, the same shape and the same size.

Q. That is what you call a spool heel?

A. That is what we call the spike heel. The spool heel designates the wood and the spike is the shape, small through here.

Q. That has what sort of foundation where the walking surface is?

A. That has a leather foundation. That is about the only thing you can use.

Q. I believe you said just now but I did not understand you, what is that heel?

A. This height is what I would say is about a seventeen-eighths heel.

By Mr. Williams:

Q. You said nineteen a few minutes ago?

A. Well, seventeen to nineteen. If you want the exact measurement on it I would have to go to the shop and get a pair of heel measurers and put them on there. They run from nineteen to seventeen-eighths.

page 79 } By Capt. Berekeley:

Q. One-eighth means one-eighth of an inch, doesn't it?

By Mr. Williams:

Q. The measurement is made from here, that would be two and a half inches?

A. I will stick to the eighths.

Q. Don't you know what seventeen-eighths are?

Capt. Berkeley: Counsel does not seem to know.

By Miss Snell:

Q. You say about eighty-five per cent of the women wear that heel during the last year or two?

A. About eighty-five per cent of women will wear that shape heel.

Q. Did they wear that heel a year ago?

A. They have been wearing that heel for the past three years.

Q. What age women wear that kind of heel?

A. I will say from sixteen years old to the grave.

Q. Would you say it is a matter of common knowledge that that is the heel that women wear today as a general proposition?

A. Yes.

Capt. Berkeley: A woman is only a woman but a good cigar is a smoke.

Miss Snell: You take the witness, Mr. Williams.

page 80 }

### CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Eiseman, what is the width across the bottom of that heel?

A. That I don't know, sir, without putting a rule on it.

Q. Well, you have given us an approximation of the height of it?

A. Well, I can give you an approximation of this.

Q. All right?

A. I should say it is about three-quarters of an inch.

Q. And that is the widest part?

A. That is across here.

Q. Now, across this way?

A. Pretty near the same.

Q. So there is a round bearing surface of approximately three-quarters of an inch, that is correct, isn't it?

A. Yes, sir.

Note: The Sergeant hands Mr. Williams a ruler.

By Mr. Williams:

Q. Measure it from there to there, can you read that?

A. Yes, sir. Two and five-eighths inches according to this.

Q. From there to there, can you read that?

A. Yes, sir, two and five-eighths inches according to this.

Q. It is a two and five-eighths inch heel?

A. Right. And one inch across the ball and  
page 81 } inch or seven-sixteenths you might say the other  
way.

Q. What do you give the greatest width?

A. Seven-eighths of an inch length and one inch across.

Q. What do you say the height is?

A. Two and five-eighths.

Q. That is a right small surface to put 190 pounds on,  
isn't it?

Capt. Berkeley: There is no evidence here that the whole  
190 pounds was put on that heel.

Mr. Williams: She said she turned and put her whole  
weight on it.

Capt. Berkeley: On her foot. She did not say on that  
heel.

Mr. Williams: I will ask the question, anyhow, if the court  
will permit me.

Capt. Berkeley: There is no evidence that any 190 pounds  
ever was put on the heel. In the first place it is apparent  
from the shape of the shoe itself that the bulk of the weight  
is other than on the heel.

Mr. Williams: Who is doing the testifying now, you or the  
witness?

Capt. Berkeley: I am not doing any testifying but I am  
commenting on the evidence which is before the jury in plain  
view.

page 82 } By Mr. Williams:

Q. Mr. Eiseman, do you sell shoes?

A. No, I repair shoes.

Q. The heel on that shoe is worn down, isn't it?

A. No, I would say that heel is in far better shape than  
the majority of them that come into us for repair.

Q. How many shoes did you repair in a month?

A. In a month it is a matter of record. I would figure it  
out. I can let you know because we always keep a record  
of every repair job we do and I could let you know if that  
is of any value to you.

Q. I was just wondering whether or not you got those fig-

ures just from your judgment or whether you got them from any kind of record?

A. What figures, sir?

Q. This eighty-five per cent of women wearing shoes of that type?

A. Well, we can go into it if you want it as a matter of record.

Q. I do not want you to go into anything, what I want to know is whether or not that is just a guess on your part based on what you have seen coming into your shop without any particular record?

A. We do not keep a record of any particular type shoe that comes in there but we do have a record of this, that we will buy a great many more pieces of leather that go on the bottom of that heel of that size than we do of the page 83 } larger size heels.

Q. They wear out very quickly?

A. We put three or four to one of that size piece of leather.

Q. Those small pieces of leather wear out very quickly, don't they, in comparison with ordinary flat heel shoes?

A. They are about the same as to ordinary wear.

Q. Do you mean to say that little disk on there will wear as long as a flat heel shoe like Miss Snell has on?

A. On the back, yes, sir. The majority of wear is on the back of the shoe, that whets off.

Q. And of course a great many of those shoes are evening shoes, are they not, for evening wear?

A. We get a very small proportion of evening shoes as compared with street shoes.

#### RE-DIRECT EXAMINATION.

By Miss Snell:

Q. What kind of shoes are these, evening shoes or walking shoes?

A. I would say they are just between street shoes and evening shoes.

Q. Where is the bulk of the weight on that?

A. The bulk of the weight is balanced between the ball of the foot and the heel.

page 84 } Q. Balanced between?

A. It is supposed to balance. If the shoe does not balance, it will show it pretty quick.

Q. Can you give us an approximate estimate of how many pairs of shoes you repair during a month? Probably it would be better to state a week?

A. That would be easier. I will put it moderately. I do not want to stretch it. Say 180 pair a week.

Q. What percentage of that is the women's shoes, if you have any idea, approximately, without your record?

A. I would say of that six pair out of ten would be women's shoes. Maybe a little more. It may run as high as seven because of the fact that we fix so many of the heels. The heels are the first thing that wear out on the shoes. The average sole on a woman's shoe of that size will wear out three, four, or five pair of lifts to a sole, maybe more.

Q. What do you mean by a lift?

A. The leather part that goes on the wood of the heel.

Q. The wearing surface of the heel?

A. Yes.

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MRS. MABEL HOLMES,

a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Capt. Berkeley:

Q. Your name is Mrs. Mabel Holmes?

A. Yes.

Q. Mrs. Holmes, what is your occupation?

A. Registered nurse.

Q. You are a registered nurse?

A. Yes, sir.

Q. Where do you live?

A. 1213 25th Street, Newport News.

Q. Are you acquainted with Mrs. Webb here?

A. Yes.

Q. Did you see her on November 2nd last year?

A. Is that the day she was hurt?

Q. That is in the evidence that is the day she was hurt?

A. I saw her on that day.

Q. Just tell the jury the circumstances under which you saw her?

A. I got a telephone call from Grant's store saying that Mrs. Webb was injured and would be by my house in an ambulance and they would pick me up and wanted me to nurse her.

Q. Do you know who sent you that telephone message?

A. No, I don't.

Q. Did she come by your house shortly after that?

A. Yes.

page 86 }

Q. Well, then, was she in an ambulance?

A. An ambulance, yes, sir.

Q. Did you go in the ambulance with her?

A. Yes, sir.

Q. Where did you go?

A. To her home on Hampton Roads Avenue

Q. What was the matter with Mrs. Webb?

A. She had an injured limb, sprained ankle, I understood.

Q. Had what?

A. She had an injured limb, had sprained her ankle or had hurt her ankle.

Q. Had hurt her ankle?

A. Yes, sir.

Q. Did you stay with Mrs. Webb for any length of time?

A. Eleven days, twenty-hour days duty.

Q. Eleven days twenty hours a day?

A. Yes, sir.

Q. What was her condition during that time, did she suffer any?

A. A great deal of pain.

Q. When she reached you, Mrs. Holmes, did she have both of her shoes on her feet or did you see her shoes, or at any time at the house?

A. Mrs. Root had one shoe in her hand. I don't know whether she had one.

Q. Mrs. Root?

page 87 } A. Mrs. Root, her mother, was in the ambulance with her and Mrs. Root had the shoe to the injured foot in her hand, and I don't know about the other shoe.

Q. Did you examine the shoe to the injured foot?

A. Yes, sir.

Q. What condition did you find it in?

A. There seemed to be a deposit of oil or some oily looking substance on the ball of the foot of the sole of the shoe about the size of a dollar, I think.

By Mr. Williams:

Q. I did not hear you?

A. About the size of a dollar, probably that large (indicating).

By Capt. Berkeley:

Q. You stayed with Mrs. Webb then for the next eleven days?

A. Yes, sir.

Q. Had you been in Grant's store as a patron of that store shortly prior to this occurrence?

A. Yes, I go in there quite often. I don't know just how often but nearly every time I am in town I go in there. I buy a great deal from Grant's.

Q. Would you say what condition the floor of that store was in during that time?

Mr. Williams: During what time?

Capt. Berkeley: Just shortly prior to this.

Mr. Williams: I object to the question unless it page 88 } is made to some extent definite. Shortly prior might cover one day or one month.

By Capt. Berkeley:

Q. Well, about how long had you been going in there before the accident, say the first month or so before the accident?

A. Oh, I was in there the week before I am sure because I had been buying little things to work on for Christmas.

Q. Well, had you been going in there prior to that time?

A. Yes, I was in there I know a week before and maybe less time than that.

Q. I did not catch that?

A. A week before November 2nd I was in the store several times trying to match some thread.

Q. At what times prior to that did you go to Grant's store from time to time?

A. I have been going there for years.

Q. Did you see anything to indicate how the floors had been treated in that Grant's store during that time?

Mr. Williams: Which time, the years or the week before?

By Capt. Berkeley:

Q. Up to the week before?

A. Well, the floors have always been kept—they are kept dusted. They always seemed to be in good condition as far as dust is concerned, and I suppose you will say page 89 } oiled like other stores are oiled. I think, in fact I know, that I have noticed that Grant's store seemed to have more oil on the floor than any other store in town.

Q. Of course you keep your house yourself, do you not?

A. Yes, sir.

Q. What is this oil used for, do you know?

A. It is to allay dust, I think.

Q. Is the oil supposed to be put on and then supposed to be wiped off, or is it supposed to be put on the floor and then left on the floor?

A. When I put oil on my floors I usually polish them afterwards.

Q. You what?

A. When I put oil on my floors I polish them afterwards, take it off.

Q. You say it is to allay dust. At what time do they sweep after they put the oil on?

Mr. Williams: Are you talking about what Grant does or what this lady does?

Capt. Berkeley: No, I am talking about the usual use of oil that is put on the floor.

A. Ask the question again.

By Capt. Berkeley:

Q. You say it is to allay dust?

A. Yes, sir, you put oil on the floor to clean and cleanse and to keep the floors from giving up the dust or  
page 90 } accumulating dust, but then you put the oil on and then you usually polish it afterwards; I do.

Q. What does the polishing process do?

A. Takes up the oil and the dirt.

Q. That takes up the oil and the dirt?

A. Yes, sir.

Q. Takes up the dirt that is already there in the oil and that keeps the dust from flying around all over everything too, is not that the idea?

A. Yes, sir.

Capt. Berkeley: Take the witness.

### CROSS EXAMINATION.

By Mr. Williams:

Q. Mrs. Holmes, when did you first notice this substance on the bottom of the shoe?

A. As soon as Mrs. Webb got in her home we took her upstairs and put her to bed and I said to her, "You slipped down if the floor was oiled", of course I was not at the store but she said, "I slipped down in Grant's"

Q. She said she slipped down?

A. Yes, she said she fell in Grant's store. I said, "There must be something on your shoe. If you stepped in something slippery maybe there is something on your shoe. Let's look at your shoe". And I got the shoe lying on a little cedar chest by the window, upside down, that Mrs. Root  
page 91 } had laid the shoe down as she walked in. I picked the shoe up and examined it.



Q. In other words, she did not know what had caused her to fall?

A. She said she slipped.

Q. And you suggested she might have stepped on something and to examine the shoe to see if there was something on it?

A. She said she slipped, she stepped on oil, I suppose, and that made her slip, whatever made her slip.

Q. You did not know what she fell on, did you?

A. Except she was injured.

Q. Except that she slipped?

A. Yes, sir.

Q. And in order to try to find out what she slipped on you examined her shoe?

A. Yes, sir.

Q. That was what time, that night sometime?

A. No, that was just a few minutes after I had gotten her comfortable in bed.

Q. Was her mother there at that time? I assume from the fact that you examined the shoe that she did not know what she had slipped on there, did she?

A. I did not ask her.

Q. She did not suggest when you were discussing it, what made her fall?

A. I did not ask her.

page 92 } Q. Did she suggest when you were discussing it with Mrs. Webb?

A. I don't understand you.

Q. Did Mrs. Root, Mrs. Webb's mother, make any suggestion as to what caused her to fall when you were discussing it with Mrs. Webb?

A. There was quite a lot of discussion but I could not recall what was said.

Q. When it first came up nobody knew what caused it until you found this substance on the bottom of her shoe?

Capt. Berkeley: She did not say that. You cannot put words in the witness' mouth that the witness did not say. She said Mrs. Webb said she had slipped down.

A. I was doing it just for my own information.

By Mr. Williams:

Q. Here is what I asked you, Mrs. Holmes: As I understand, Mrs. Webb told you that she had slipped. That is correct, isn't it?

A. Yes.

Q. And there was some discussion as to what caused her to slip and you went to see if there was anything on her shoe. Is that correct?

A. No. I said if you did fall there must be something on your shoe to show that you did fall.

Q. So, until you examined the shoe, neither Mrs. page 93 } Webb nor her mother knew what had caused her to fall, did they?

A. I don't know about that.

Q. Was not that the purpose of examining the shoe, in order to find out?

A. The purpose of examining the shoe was to find out for myself if there was any evidence on there of why she fell.

Q. From what she told you about falling, which made you examine the shoe, did not she state that she did not know what caused her to slip?

A. No.

Q. Why did you examine the shoe if she knew what had caused her to slip?

A. Because she had fallen and I wanted to see for myself if I could determine why she fell.

Q. I believe you also stated that the floors there are like the floors in the other stores?

A. Well, I would say more oily than the others.

Q. Is that because they are a little more darker?

A. It is greasy like or oily looking.

Q. You never have slipped on them, have you?

A. No, I don't think I ever have.

Q. How many times did you say you have been in there?

A. Lots of times, oh, hundreds of times.

Q. You were in there several times just the week before this lady fell, were you not?

A. Yes.

page 94 } Q. And hundreds and hundreds of people go in there every day, don't they?

A. Yes, some of them fall, too.

By Capt. Berkeley:

Q. What did you say?

A. Some of them fall too. Mrs. Webb is not the first one I have known about to fall, that I have seen. I saw a lady in a black dress. I don't know who she was.

Q. What did you say?

A. I saw a lady fall with a black dress on.

Q. When?

A. I don't remember when but I was in the store when she fell. It has been sometime ago, maybe a year or two.

By Mr. Williams:

Q. Whereabouts?

A. In Grant's store.

Q. What part?

A. I don't know but you just asked me if I had known of anybody falling.

Q. What part of the store?

A. I don't remember exactly what part of the store.

Q. Do you remember how long ago it was prior to this accident?

A. A couple of years before, or maybe more, but I suppose they use the same method in oiling floors now that they did then.

page 95 } Mr. Williams: I don't reckon you know much more about it than I do and I don't know a thing. I am not interested in what happened a couple of years ago, Capt. Berkeley.

Witness: You asked me.

Mr. Williams: I was speaking to Capt. Berkeley.

Witness: Oh, pardon me.

By Mr. Williams:

Q. These floors are more or less in the same condition, aren't they, now as they were then?

A. No, sir.

Q. They are not?

A. No, sir.

Q. They still oil them, don't they?

A. I was on duty with Mrs. Webb and very much interested about her falling and I taken particular notice of Grant's store. I hardly ever go in Grant's store that I do not think about the floors and the condition they are in, and they are positively different. I would say decidedly different. I have not noticed them being oiled since Mrs. Webb fell, and I did notice it before.

page 96 } RE-DIRECT EXAMINATION.

By Capt. Berkeley:

Q. Mr. Williams asked you whether the same condition existed now. I just want to know if you understood him to mean since Mrs. Webb fell when you said the floors were very much more improved now, less oil on them than formerly did you mean since Mrs. Webb fell?

A. Yes.

Q. You had been noticing them since then because you were

interested in Mrs. Webb's case, did I understand you correctly?

A. Yes.

MRS. E. D. ROOT,

a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Capt. Berkeley:

Q. You are Mrs. Webb's mother?

A. Yes, sir.

Q. You have been living here sometime, haven't you, Mrs. Root?

A. About twenty-five years.

Q. You live with your daughter Mrs. Webb?

A. Yes, sir.

Q. How long have you been living with her, Mrs. Root?

A. About eighteen months.

page 97 } Q. About eighteen months. During that time, who kept house there at your daughter's?

A. Well, she always had somebody, first one and then the other. No, she did not, excuse me. She kept house herself.

Q. What?

A. She kept house herself.

Q. What did she do, Mrs. Root, in keeping house, what kind of work?

A. Well, she done the cooking, the sweeping, the washing and ironing, everything.

Q. She did everything?

A. Yes, sir.

Q. You were there then before she was injured, were you not?

A. Yes, sir.

Q. Before that time she did everything in the house?

A. Yes, sir.

Q. What does she do now?

A. She don't do much of anything.

Q. What has she done since she was injured?

A. Well, she sews and embroiders and things like that, but she is not on her feet much.

Q. What is the reason for that?

A. Well, it pains her so, she does not sleep at night.

Q. You are there with her constantly?

A. Practically all the time.

page 98 } Q. Do you know whether she suffers or not from her foot and her ankle?

A. Very much.

Q. And you say she is not on her foot much because she cannot be on it?

A. Yes, sir.

Q. What does she do, how does she get the work done?

A. Well, she keeps a maid now all the time.

Q. She keeps a maid to do it all the time?

A. Yes, sir.

Q. Has she done that ever since she was injured?

A. Ever since.

Q. Ever since she was injured?

A. Yes, sir, she has had help ever since.

Q. Is that necessary to get the house work done?

A. It certainly is because I am not able to do it.

Q. I believe you were in the Grant store on this particular day with your daughter, Mrs. Webb, when she fell. Do you know why she fell?

A. No, I do not know why she fell. I asked her to go with me in there to get some merchandise because I never go alone. She is constantly with me when I go out.

Q. You have right much difficulty in getting around yourself, don't you?

A. Yes, sir.

Q. And you don't go alone, you like to have her page 99 } go with you?

A. I very seldom go out alone.

Q. Well, do you recall the time that she fell?

A. Yes, sir. She was standing right behind me. I did not see her fall but she was just behind me and I spoke to her about the merchandise I was buying and just at that she fell.

Q. Well, did you see the condition of her foot after she fell?

A. Yes, I saw it was crooked, but somebody pulled it in place.

Q. Do you know whether any of the people who were working in the store came there where she was before she was moved?

A. Well, I don't know whether they were there before her foot was straightened out or not, but they did some of them come around her after that.

Q. Did she have a shoe on that foot?

A. Yes, sir.

Q. What became of the shoe?

A. When the nurse pulled it off I picked it up.

Q. The nurse, who do you mean by the nurse?

A. The lady that pulled her foot in place.

Q. That was not Mrs. Holmes, was it?

A. No, it was not Mrs. Holmes. It was some lady that was in the store and said she was a nurse.

Q. Some lady who was in the store and said  
page 100 } she was a nurse?

A. Yes, sir.

Q. You picked the shoe up?

A. Yes, sir.

Q. Did you keep the shoe in your possession until you got home?

A. Yes, sir, right in my hand, and her pocketbook.

Q. Did she drop her pocketbook?

A. I had the shoe and the pocketbook.

Q. You picked those up?

A. Yes, sir.

Q. Did you go out in the ambulance with her?

A. Yes, sir.

Q. Did you hold possession of the shoe all the way out?

A. I certainly did.

Q. What did you do with the shoe after you got to the house, do you recall?

A. I don't recall exactly. I laid it down, in the confusion, somewhere on the couch or somewhere until we got her upstairs.

Q. Until you got her upstairs?

A. Yes, sir, then we went back and hunted for it.

Q. For the shoe?

A. Yes, sir.

Q. Had you noticed the shoe before you carried it out there, had you noticed whether there was anything on  
page 101 } it or not?

A. No, sir, I did not until we went to investigate and see whether it was the same shoe, the same foot.

Q. Do you remember anything found on it at that time?

A. Yes, sir, there was a spot of oil on it.

Q. You say it is a little difficult for you to get around?

A. Well, I can get around fairly well but I am liable to fall. I am clumsy. My eyesight is bad and I do not see how to get around so well.

Q. Did you move cautiously on that occasion?

A. Yes, sir.

Q. Do you know what caused your daughter to fall, Mrs. Root?

Mr. Williams: May it please the court, that question has been asked and answered. She said she did not see her fall.

Capt. Berkeley: I do not recall that.

Mr. Williams: The stenographer will bear me out.

Capt. Berkeley: I am quite confident I have not asked her that question before. If we can find that I have asked her that I have no recollection of having asked her did she know what caused her daughter to fall.

Note: The reporter then read the question and answer as follows:

“Q. I believe you were in the Grant store on this particular day with your daughter, Mrs. Webb, when she fell. Do you know why she fell?  
page 102 } A. No, I don't know why she fell. I asked her to go with me in there to get some merchandise because I never go alone. She is constantly with me when I go out.”

By Capt. Berkeley:

Q. Did you notice the condition of the floors in there?

A. Well, I noticed they had some preparation on them. I did not notice particularly. I know they were slippery.

Q. You know they were slippery?

A. Yes, sir.

Q. Why did you notice that particularly?

A. Well, I am always watching out for things like that.

Q. Why?

A. Well, I don't walk so well any more and I have to look where I go.

Capt. Berkeley: Take the witness.

### CROSS EXAMINATION.

By Mr. Williams:

Q. Mrs. Root, what is your age?

A. Seventy-two.

Q. You do not wear any such shoes as these, do you?

A. Well, not quite so small but my heels are pretty near as high as that (exhibiting shoes).

Q. Did you ever get after your daughter for wearing such high heels?

A. I never did.

Q. Have you ever?

page 103 } A. Never.

Q. What you could see from that floor, not seeing very well, your daughter could see, couldn't she?

A. She was not looking at the floor like I was.

Q. How do you know where she was looking?

A. Well, I do not, that is a fact, but I don't imagine she was.

Q. What?

A. I don't imagine she would be watching where she was walking like I did.

Q. Is she in the habit of walking along and not watching where she walks?

A. Well, I don't know about that either. I am not watching her, she is watching me.

Q. Do you go into Grant's quite frequently?

A. Well, I go there say once a month.

Q. And you had once a month prior to the accident?

A. Well, maybe not quite that often, maybe not quite so often.

Q. You say that when you got home you saw a spot on the bottom of her shoe?

A. Yes, sir.

Q. You could not undertake to tell the jury what that spot was, could you?

A. I could not because I did not examine it right at the time. I was more interested in her.

page 104 } Q. It has all gone now, hasn't it?

A. Yes, sir, evaporated, so it was something that would evaporate.

Q. Water would do that, wouldn't it?

A. Well, I don't think it was water.

Q. All you can say is there was some kind of a dark spot on the bottom of her shoe?

A. Well, it looked like it was wet.

Q. Where had you and your daughter been to just before you went to Grant's?

A. Well, we had been in several of the stores.

Q. A good many of the stores?

A. Not a good many, but we had been paying bills most of the morning.

Q. What store had you been in just before you went into Grant's?

A. I don't remember which one.

Q. Had you been in two or three of them?

A. Had been in several.

Q. Had you been across the streets?

A. I had not crossed the street at all.

Q. What is the street that Grant's store is on the corner of?

A. 28th.

Q. Hadn't you crossed 28th?



page 105 } A. No, we had our car right around the corner.  
Q. Had your daughter been driving the car?  
A. Yes, sir, she drives.

## RE-DIRECT EXAMINATION.

By Capt. Berkeley:

Q. How far back in the store had you walked from the door, do you think, Mrs. Root?

A. I don't think it was quite half way back where the counter was where we were.

Q. Did you notice that oily condition, did you mean it was just at the one place or over the whole floor?

A. We was only on the one aisle. They carried her right back that aisle.

Q. Right back through that aisle?

A. Yes, sir.

## RE-CROSS EXAMINATION.

By Mr. Williams:

Q. It was about the same all up and down that aisle, was it?

A. Well, pretty slick all along.

page 106 } MASON W. WEBB,  
a witness on behalf of the plaintiff, being first  
duly sworn, testified as follows:

Examined by Miss Snell:

Q. Mr. Webb, you are Mr. Mason W. Webb, aren't you?

A. Yes, ma'am.

Q. What relation are you to the plaintiff in this case, Edna R. Webb?

A. Husband.

Q. Can you tell the jury anything about the physical condition of your wife since the accident which occurred on November 2nd, 1933, in Grant's store?

A. My wife suffers almost continuously and she is awful nervous.

Q. Before she had the accident, Mr. Webb, who did the house work?

A. My wife.

Q. Did she have any help before that?

A. No, sir.

Q. Since then who has been doing it?

A. We have had a maid all the time.

Q. What about your wife's rest? Does she get an adequate amount of rest now?

A. No, she does not. She suffers after midnight.

Q. What makes her suffer?

A. Her ankle gives her a great deal of pain.

Q. Has Mrs. Webb's activity, aside from her page 107 } household duties, been curtailed because of her injury?

A. Right much. Lots of times we have to take her places that she could have gone herself if it had not been for that.

Q. Does it interfere with her driving a car at all?

A. Right much.

Miss Snell: Take the witness.

### CROSS EXAMINATION.

By Mr. Williams:

Q. You say it interferes with her driving an automobile right much?

A. Yes, sir.

Q. Does she drive one at all now?

A. She drives some.

Q. She does?

A. When she has to.

Capt. Berkeley: That is the plaintiff's case.

page 108 } HERMAN POWELL,  
a witness on behalf of the defendant, being first  
duly sworn, testified as follows:

Examined by Mr. Williams:

Q. Mr. Powell, tell the jury please your name?

A. Herman Powell.

Q. And by whom are you employed at the present time?

A. Charles Stores Company.

Q. Whereabouts?

A. Rocky Mount, North Carolina.

Q. What is your age?

A. I am twenty years old.

Q. During November of 1933, who were you employed by?

A. W. T. Grant Company.

Q. Whereabouts?

A. Newport News, Virginia.

Q. And what was your position with that company?

A. Stock man.

Q. During 1933 who had occasion to and who did put on floor dressings on the floors in Grant's store?

A. I did.

Q. Will you tell the jury please when the last time was that you put on floor dressing prior to November 2, 1933?

A. It was October 21st, the Saturday night, after the store closed.

Q. Now, tell the jury please, just how you put on that dressing?

page 109 } A. Well, after the floor is swept, we take some in a bucket with a scrubbing mop and put it on there and scrub it and then take a dry mop and rub it up dry.

Q. And that was done, you say, on Saturday night, October 21?

A. Yes, sir.

Q. Then, what do you do on Mondays, Tuesdays, Wednesdays, and so forth?

A. Well, sometimes we use some of this sawdust like stuff, I reckon you call it, on the floor at night when they sweep up.

Q. You say you put on the oil on Saturday nights only?

A. Yes, sir.

Q. What do you do after the store closes on the other nights that you do not put on oil?

A. I sweep up the floor and sometimes put on that stuff something like sawdust; I don't know exactly what you call it.

Q. Is it put on before you sweep?

A. Yes, sir.

Q. What is the purpose of that, to keep the dust down, or do you know?

A. Yes, sir, to keep down dust.

Q. As you sweep?

A. Yes, sir.

Q. And do you or not sweep every night after page 110 } the store closes?

A. Sweep every night.

Q. So, from the 21st day of October until the 2nd day of November you had swept the floor every night?

A. Yes, sir.

Q. Now, Mr. Powell, have you been to that store today?

A. Yes, sir.

Q. How did the floors compare today as they were on or about November 2, 1933?

A. I would say they are practically the same as it was then. I do not think there is very much difference.

Q. After you finished with those floors on the 21st of October, did you leave any of this oil dressing or floor dressing around on the floor?

A. No, sir, not on the floor, no, sir; we cleaned it all up with a dry mop.

### CROSS EXAMINATION.

By Capt. Berkeley:

Q. You say you would put the oil on the floors every Saturday night?

A. No, sir.

Q. Well, what did you say about that?

A. I said on that particular Saturday night, October 21st, we put the floor dressing on.

Q. You never had put any on there before that?

page 111 } A. Yes, sir.

Q. What was the regular time? Did not I understand you to say to the jury a minute ago that Saturday nights was the time that the particular floor dressing or oil or whatever it was was put on the floor and during the rest of the week you swept it up?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. That is right then. I do not misunderstand you.

Mr. Williams: You do. He put it on, on a Saturday night.

Capt. Berkeley: You are going to testify for him now, are you? I think it would be a good idea to let him do the testifying. He answered the question.

Mr. Williams: I do not need to. The jury heard what he said.

Capt. Berkeley: All right, then, evidently you did not.

By Capt. Berkeley:

Q. Then, on Saturday nights, you would put this oil on the floor?

A. Yes, sir.

Q. Were you supposed to do that? Was that the time you cleaned up at the end of the week?

page 112 } A. Yes, sir.

Q. And you started your cleaning up at the end of the week by putting this oil down?

A. Well, not every week we did not put this oil down, I mean the floor dressing.

Q. Why didn't you do it every week?

A. It was not necessary that often.

Q. It was not necessary to do it often?

A. Not that often, not as often as every week.

Q. How do you know that you put it down on the 21st? There was another Saturday in there just before the 2nd of November. November 2nd was a Thursday and there was another Saturday in there on the 28th of October, how do you know it was not the 28th of October instead of the 21st, a year ago?

A. Well, I kept it in mind good so I could tell the distance.

Q. What did you say?

A. I kept it in mind good so I could tell how often we put it on.

Q. You kept it in your mind so you could tell how often you put it on?

A. Yes, sir.

Q. When did you leave Grant's store?

A. I left yesterday three weeks ago.

Q. Yesterday three weeks ago?

page 113 } A. Yes, sir, I stopped working then. I was there two weeks and then was when I said I was stopped by the company. I got injured.

Q. You got injured where?

A. I got injured in the store, and I was there a couple of weeks.

Q. You got injured in the store?

A. Yes, sir, but I told Mr. O'Reilly I was quitting yesterday three weeks ago.

Q. That you were quitting yesterday three weeks ago?

A. Yes, sir.

Q. And you went down to North Carolina?

A. Yes, sir.

Q. Rocky Mount?

A. Yes, sir.

Q. You did not keep any record or books of when you put the oil down on the floor?

A. No, sir.

Q. And yet you can remember now, eleven months back, that it was on the Saturday night of the 21st of October that you put that oil down on the floor, and not the Saturday night of the 28th?

A. Yes, sir. It was Saturday night of the 21st.

Q. How can you remember that, Mr. Powell?

A. Well, when this happened I thought about that and I kept it in mind.

page 114 } Q. I see. When this happened, you thought about it?

A. Yes, sir.

Q. What did you think about the oil?

A. We were thinking about the last time it was put on the floor.

Q. Why were you thinking about the last time you put oil on the floor?

A. Well, I don't know of any special reason, in other words, I just thought of that myself.

Q. You just thought of that yourself?

A. Yes, sir.

Q. Mrs. Webb did not say anything to you about oil, did she?

A. No, sir.

Q. Didn't anybody for Mrs. Webb say anything to you about oil, did they?

A. No, sir.

Q. But you just thought about that oil yourself and you commenced to think about it and you thought it was the 21st the last time you put oil on the floor?

A. Yes, sir, the 21st.

Q. In other words you were wondering whether it was that oil that had thrown Mrs. Webb, was that the reason you thought about it?

A. No, sir.

Q. Why did you think about oil?

page 115 } A. Well, when it was said she slipped on the floor and I was looking at the floor and happened to think about it.

Q. And then you happened to think about it?

A. Yes, sir.

Q. You looked at the floor and happened to think about the oil?

A. Yes, sir.

Q. What time did you put it on before the night of the 21st?

A. I don't remember exactly.

Q. You don't remember exactly?

A. I would say two months; I imagine it was two months before that.

Q. You imagine it was two months before, but you cannot give us the date?

A. No, sir, not exactly.

Q. How long after that was it before you put it on?

A. I don't know the exact date on that.

Q. You cannot give us the date on that?

A. No, sir.

Q. Do you know whether the Charles Store Company in

Rocky Mount, North Carolina, whether that is a Grant store or not?

A. I beg your pardon.

Q. Do you know whether the store you work for in Rocky Mount, is that a Grant store?

page 116 } A. No, sir.

MRS. GAY NELSON,

a witness on behalf of the defendant, being first duly sworn,  
testified as follows:

Examined by Mr. Williams:

Q. Mrs. Nelson, will you tell the jury please your name?

A. Gay Nelson.

Q. And whereabouts do you live?

A. 109 30th Street.

Q. And how long have you been working for Grant's in Newport News?

A. Three years.

Q. Were you working for Grant's store on November 2nd, 1933?

A. Yes, sir.

Q. What is your position with the store?

A. Cashier.

Q. And where do your duties necessitate your being?

A. In the office.

Q. And whereabouts is the office located?

A. Right above the store. It is in the store, in the rear.

Q. Sitting there at your desk can you see out over the store?

page 117 } A. Yes, sir.

Q. What was the first thing that called your attention to the fact that an accident or something unusual had happened?

A. I heard some one holler and of course the commotion when she fell, and I looked.

Q. And what, if anything, did you do after you saw that someone had fallen?

A. I went to get the accident report because Mr. O'Reilly, the manager, had gone down. I took the accident report and went down to get her name and see that she was all right.

Q. Is that a part of your duty, to give a report on any accident that happens in the store?

A. Yes, sir.

Q. When you got there who was there?

A. Mr. O'Reilly and our assistant, Mr. Smith.

Q. Had they got her up?

A. No, she was still lying on the floor.

Q. And what did they do, if anything, for her, to help her?

A. They picked her up and carried her back and put her on the rugs in the back of the store so she would be more comfortable.

Q. Now, Mrs. Nelson, did you or not look at the floor at that point where she had fallen?

A. I did.

Q. What was the condition of that floor? Tell the jury that?

page 118 } A. Well, I did not see anything unusual on the floor whatsoever. It was just like it is now or any other time, just the regular floor.

Q. Was there any liquid or loose oil or anything like that there?

A. No, sir.

Q. Was the floor at that point slippery?

A. No, sir, it was not slippery because I tried to slip. I noticed the floor very carefully.

Q. You tried it?

A. Yes, sir.

Q. Now, Mrs. Nelson, there has been some talk here in regard to a floor dressing that is used on the floor. Do you know what was the last time or when was the last time that any floor dressing was put on that floor prior to November 2, 1933?

A. I cannot give the exact date because I don't know but I know we put it on over a week-end, and Hallowe'en being the last of October I do not think we put it on that week-end, so it must have been about two weeks before the accident.

Q. Do you put it on every Saturday night, or not?

A. No, sir, about once a month.

Q. About once a month?

A. Yes, sir.

Q. Did you, at my request, make up a tabulation as to the number of people who purchased in that store goods each day?

A. We took a customer's count from a week ago last Tuesday until this morning.

Q. Tell the jury please what you mean by customer's count?

A. The amount of sales that are rung up in the register. It could not be the exact number because one customer could buy more than one article but that is the number of sales taken in on each register. That was seven thousand from Tuesday until this morning.

Q. Seven thousand in five days?



A. Yes.

Q. How would that compare with the crowd or with the number of people that would enter that store in November and October of 1933, how could it compare?

A. It would compare about the same.

### CROSS EXAMINATION.

By Capt. Berkeley:

Q. Now, I want to see if I got you correctly. I understood you to say when you were asked when was the last time that the oil was put on that floor prior to November 2nd, that you said we put it on every week-end but Hallowe'en was at that week-end and I don't know whether we put it on or not. Did you say that?

page 120 } A. I did not mean to say that.

Q. I understood you to say that.

A. That means that we did not put it on that week. It must have been two weeks before, but we do not put it on every week.

Q. That does not answer my question. Didn't you say we put it on every week-end and Hallowe'en was the week-end, and I don't know whether we put it on that week-end or not?

Mr. Williams: Let the stenographer read it back.

Capt. Berkeley: I will ask the stenographer to read it.

Note: The reporter then read the answer as follows:

"A. I cannot give the exact date because I don't know, but I know we put it on over a week-end and Hallowe'en being the last of October I do not think we put it on that week-end, so it must have been about two weeks before the accident."

By Capt. Berkeley:

Q. Then, Mr. Williams asked you a question as to how often you put it on and you said about once a month, didn't you?

A. Yes, sir.

Q. Who did you report the accident to?

A. I sent one report into the insurance people, one to Mr. Stillwell in New York, and I kept one for the files.

Q. Who did you report to directly?

A. Do you mean the report of the accident?

page 121 } Q. Who did you have to report to directly, to the manager, or not?

A. To the manager.

Q. Well, the manager was the one you reported to, wasn't it?

A. Yes, sir, but I sent the report into the insurance—

Q. Never mind. You were the cashier, were you not?

A. Yes, sir.

Q. Are you still employed there?

A. Yes, sir.

Q. Do they sell ladies' shoes in Grant's place?

A. Yes, sir.

Q. I thought that was twenty-five cents, fifty cents and a dollar?

A. Well, they are a dollar.

Q. Do you sell them for a dollar?

A. Yes, sir.

Q. Do you sell shoes like you have got on there for a dollar?

A. No, sir.

Q. Do you sell them with heels like that?

A. Not this high. We sell them with a Cuban heel.

Q. It costs about a dollar and a quarter to get them higher than that?

A. (Witness laughs.)

Q. Your principal customers there are women, are they not?

page 122 } A. Mostly, yes.

Q. Are those street shoes you have got on?

A. Yes, sir.

Q. Do you wear those around the street?

A. I wear them all the time.

Q. Do women wear shoes like that?

A. Most of them do.

Q. Most of them do?

A. Yes, sir.

Q. Do you mean in Newport News?

A. I should think everywhere most young people do. I don't know about the older people. I imagine they wear Cuban heels.

Q. How can you tell a young lady from an old one now?

A. (Witness laughs.)

# RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. Mrs. Nelson, how much do you weigh?

A. Ninety-two pounds.

Q. How old are you?

A. Twenty.

page 123 } MRS. BELLE McCOY,  
a witness on behalf of the defendant, being first  
duly sworn, testified as follows:

Examined by Mr. Williams:

Q. Tell the jury please your name?

A. Belle McCoy.

Q. And whereabouts do you live?

A. 1126 28th Street.

Q. Who do you work for at the present time?

A. W. T. Grant Company.

Q. And whom did you work for in November, 1933?

A. W. T. Grant Company.

Q. Were you present on November 2nd when Mrs. Webb  
fell?

A. Yes.

Q. Whereabouts were you at that time in the store?

A. Well, I was at that time waiting on the elderly person that was with Mrs. Webb.

Q. You were waiting on the elderly person?

A. Yes, she was standing there by her.

Q. That is her mother, the older lady?

A. Yes.

Q. At the time Mrs. Webb fell, were you looking at her,  
or not?

A. No.

Q. What was the first notice you had that she had fallen?

A. Well, I heard some one kind of holler, and then I turned  
and she was on the floor.

page 124 } Q. On the floor?

A. Yes.

Q. How far were you from her?

A. I would say about as far as you are from me, about  
that distance.

Q. You say as far as from you to me, how many feet do you  
guess that is?

Mr. Williams: I would be very glad for your Honor to  
designate the distance, if you will.

Capt. Berkeley: Let her say how far she thinks that is in  
feet.

By Mr. Williams:

Q. How far do you guess that is in feet? Your guess is  
as good as anybody else's?

A. I do not have any idea. I was just judging by the  
way the distance looked.

Q. Had you seen the floor as it was before she fell?

A. Before she fell?

Q. Yes.

A. I had been by there quite a few times.

Q. What was the condition of that floor as to any foreign matter of any kind on there?

A. Right at that point I do not think there was anything on there.

Q. How did the floor at that time compare with the condition of the floor at the present time?

page 125 } A. About the same, the same thing.

### CROSS EXAMINATION.

By Capt. Berkeley:

Q. What did you look at the floor for?

A. Well, I had been going by there quite a few times and I had not seen anything, but I had seen the floor.

Q. You did not look at it especially to see whether there was a super-abundance of oil on it?

A. I was speaking of the floor as a whole.

Q. I cannot hear you?

A. I was speaking of the floor as a whole going by there two or three times in two or three minutes, I would say.

Q. I understood you to say you had looked at the floor at the place where Mrs. Webb fell. Do you mean you did not look at it or specially examine it but as you went by looked at it as you would any other part of the floor?

A. I just noticed it like I would any other.

Q. Just as if walking around you would see that there was a floor there to walk on but did you take pains to look at that particular place to see what condition it was in, or not?

A. Not at that particular place.

Q. Then, you did not do it. Are these street shoes you have on?

page 126 } A. No, they are not the kind I wear to work all the time and not the kind I wear on the street all the time, sometimes if I am going to special places.

Q. If you are going somewhere you put them on?

A. Yes, sir.

Q. You wear them out on the street?

A. Yes, sir.

Q. They are not especially for dancing or anything of that kind?

A. No.

Q. Do women wear shoes like that?

A. Why, yes, unless they are walking, going shopping, or something.

Q. Do women come in to the Grant Stores wearing shoes like that?

A. I have not noticed particularly just what kind of shoes different ones have on that come in there, but there are some high heel shoes.

Q. Women generally wear shoes about like that, don't they, when they go anywhere?

A. Sure, as a rule they wear them.

Q. You know that?

A. Sure, as a rule they do wear them.

Q. The manager of Mr. Grant's store knows that, doesn't he?

A. I don't know.

page 127 } Q. You don't know whether he knows that much  
or not?

A. I know he should.

Q. Everybody else knows it, don't they?

A. I guess so.

#### RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. Mrs. McCoy, this section of the floor that this lady fell on is right at your counter, isn't it?

A. It was right at the counter I was working at that morning.

Q. Working there all the morning?

A. All the morning.

Q. You had been back and forth by that place how many times?

A. I could not count them.

#### RE-CROSS EXAMINATION.

By Capt. Berkeley:

Q. You are usually behind the counter, aren't you?

A. No, we wait on some over in front of the counter.

Q. At that time, though, you were that distance from Mrs. Webb when she fell?

A. Yes, sir.

page 128 } FRANK EDWARD O'REILLY,  
a witness on behalf of the defendant, being first  
duly sworn, testified as follows:

Examined by Mr. Williams:

Q. Tell the jury please, your name?

A. Frank Edward O'Reilly.

Q. And what position do you occupy with W. T. Grant Company in Newport News?

A. Manager of their local store.

Q. How long have you been manager of that store?

A. It will be two years this coming January.

Q. You started there then, January 1, 1933?

A. Yes, sir.

Q. Were you in the store when this accident of November 2nd, 1933, occurred?

A. Yes, sir.

Q. Whereabouts were you in the store?

A. At the time of the accident I was in the office.

Q. What relation does the office bear to the rest of the store?

A. It overlooks the entire store except the back end, which is under the office.

Q. Did you have a view of the rest of the store from the office?

A. The balance of the store, except the part that is right under the office.

Q. What was the first you knew about this  
page 129 } accident occurring?

A. When I heard a cry and commotion like something falling.

Q. What did you do then?

A. I left the office to go down where the accident was to see what it was.

Q. When you got there what did you find?

A. I found Mrs. Webb on the floor and shouting to get the doctor, she was hurt, and I remember her mother asking if we could not do something for her at the time I got down there.

Q. You gave what assistance you could and got hold of a doctor?

A. Yes, sir.

Q. Did you or not try to ascertain what, if anything, caused her to fall?

A. I did. Immediately after the accident and at the time she was there I looked to see if there was any obstruction on the floor.

Q. What was the condition of the floor at the time where she fell?

A. It was clear and nothing there I could see what would cause a person to fall. There was nothing there I could see that would actually cause a person to fall unless it was some undue pressure or something that they might have an accident like they would on the street or anywhere else.

Q. Was there or not any excessive oil at that point?

A. No, sir, there was not. We do not use oil on the floor.

Q. What do you use?

A. A dressing compound that is to prevent slipping.

Q. And what is the name of that dressing compound?

A. Trackless Floor Dressing.

Q. And where is that preparation purchased?

A. In Missouri.

Q. What is the preparation made up for?

A. To keep the floor clean and hold the dust down and keep from getting your merchandise dusty, soiled.

Q. Is it used by other stores?

A. I would not say positively but this compound is used by other stores. It is used by all of our stores, compulsory.

Q. All of your stores throughout the country?

A. The entire chain.

Q. Now, Mr. O'Reilly, how frequently is this trackless floor dressing put on the floor?

A. Well, during the summer months it is put on an average of once a month. During the winter sometimes it goes six to eight weeks without being put on. It depends on the weather and the dryness of the air.

Q. Can you tell the jury please, if you know, when was the last time prior to November 2, 1933 that this dressing was placed on the floor?

A. I feel positive it was October 21st.

Q. Now, there has been some statement here about oil. When did you begin to use this trackless floor dressing which you say is not oil?

A. Well, it has been used in this store ever since I have been here. Previous to that, I don't know how long. I found three-fourths of a container of this trackless fluid in the store when I came here so they had been using it some time previous to that. I know that throughout the chain there had been an order to go out some time in the early part of 1933 that it would practically be a manager's job if he was caught putting oil on any of his floors.

Capt. Berkley: I do not think that is evidence. It is hearsay, to start with.

Mr. Williams: It was a direct order to him what to do.

The Court: I overrule the objection.

By Mr. Williams:

Q. I understand in 1932 they stopped using oil entirely and began using this trackless floor dressing?

A. Yes, sir.

Q. Can you tell us, Mr. O'Reilly, from your sales, approximately how many people come into that store during a month or week or over a period, say from January 1, 1933 to November 2, 1933?

page 131 } A. Somewhere I would say around ten thousand and to fifteen thousand people enter the store in a week.

Q. How do you arrive at that figure?

A. By taking customer counts at certain times during the year.

Q. And you say approximately ten thousand a week?

A. Yes, sir.

Q. Now, from January 1st, 1933 to November 2, 1933 would be approximately ten months, wouldn't it?

A. Yes, sir.

Q. And if there were ten thousand a week, there would be something over forty thousand a month and that would be about four hundred thousand people coming into that store in that period of time?

A. Yes, sir.

Q. And out of that four hundred thousand people from January 1st, when you took charge, until November 1st, 1933, a period of ten months, how many people or how many persons slipped or fell in any way in that store?

Capt. Berkeley: If the court please, Mr. Williams is the one who asked Mrs. Holmes about whether anybody slipped in there or not.

Mr. Williams: I beg your pardon. She volunteered that information. I did not ask her anything of the kind.

Capt. Berkeley: I beg your pardon. You page 132 } asked her if she ever knew of anybody slipping in there and she said yes.

Mr. Williams: No. I asked her if she had ever slipped in there and she said no, but she had seen other people.

Capt. Berkeley: And then you followed it up and asked her about it.

Mr. Williams: I had to then; I was caught.



Capt. Berkeley: That was your affair. I do not think that has anything to do with this case nor do I think the number of people that come in there has anything to do with this case except the fact that the people who do go in there, the kind of shoes that they wear because my friend Mr. Williams made complaint about the lady wearing shoes of this kind, and said so in his grounds of defense, and made it a part of his defense, and that therefore he put me upon proof that that is what the ladies do and necessarily Mr. O'Reilly, would know that fact and Mr. Grant or the Grant Corporation would know the fact that the people who patronize that place wear shoes of this kind. The question here is whether that floor was slippery at that place, and of course the condition itself is in evidence, and whether they had exercised ordinary care in preparing a place and making it safe for their customers who come in there, when in the exercise of ordinary care, when their customers were in the exercise of ordinary care. Now, that is the question in this case and applies to the people that went in and out, at that point, at that time and at that place and not to people who paraded all over the store at other places. Of course it is not in evidence yet, but that is a fifty or seventy-five foot front, I don't remember which, running back one hundred feet, and we are not looking after every spot in that store. There were evidently safe places in that store for people to walk on even during the year gone by. It is what the situation was there on that particular day at that particular place. Now, it is no defense for him to come here and say he could not file a plea in this case and say, why, every other place in the store is bound to be perfectly safe and has been safe because ten thousand people a week have walked over every other place in the store, and some of them might have walked over this, and not fallen down, without falling down. How many people have slipped up all over that store certainly cannot be evidence in this case, or how many have not. We have referred to this particular place where Mrs. Webb stood and we have the evidence of exactly how she stood. She is the only one that can give

page 133 }  
 page 134 } any evidence as to how she stood, and she started to turn and her foot kept sliding out from under her and she tried to catch herself on the counter at that point. We are not concerned about other places in this store or how many people walked over other places in this store. It need be only one square foot there, and if that store is one hundred feet by fifty feet, that would be right many square feet in there. How much of it is aisleway and

how much of it is counterway, I don't know. I object to his going into all of that. I did not object to it at first but I ask that all that be stricken out.

Mr. Williams: May it please the court, my view about this evidence is this: That it has been testified here by Capt. Berkeley's witnesses that this floor was oiled by the Grant people and he draws the inference from the fact that there was some black spot on the bottom of this shoe, that this lady slipped in the oil. Mrs. Root testified, as I recall her testimony that that entire aisle that they walked down was slippery, that the whole thing was about the same all up and down. Mrs. Holmes, the nurse, went on the witness stand, under the questioning of Capt. Berkeley stated that she had

been in there two or three months prior in the  
page 135 } store generally, and three or four weeks prior  
to this accident, and that she noticed that there  
was more of this substance on the floor in that store than in  
other stores. Now, that is the testimony which I submit that  
this evidence is proper to rebut. But, irrespective of that,  
as my friend has suggested, the sole question in this case  
is whether or not the W. T. Grant Company had exercised  
ordinary care to keep the floor in a reasonably safe condition,  
and that I submit is the only duty the storekeeper owes,  
ordinary care to keep the premises in a reasonably safe condition.  
Now, they have alleged in their notice of motion that  
there was too much oil on these floors. They do not allege  
that there was a banana peel or some stuff that was dropped  
down there, about which we would have to have notice before  
they would be entitled to recover, but they allege that on  
account of the way we treated our floors, that this was negligence.  
Now, what better proof as to what is ordinary care  
can there be than to show that over a period leading up  
to this accident, of ten months, which is the only period we  
have, because that is the only time that Mr. O'Reilly was  
there, that thousands and thousands of people of all character,  
shapes and descriptions have gone over this floor generally  
without any accident or with so many  
page 136 } accidents, as the case may be, and I submit that

has a very material bearing as to whether or  
not the store was in a reasonably safe condition for people  
to use who were using ordinary care for their own safety.

Capt. Berkeley: Now, if the court please, I want to say  
in reply to this, by way of illustration. I stepped outside  
of the lobby to the entrance upstairs at the bank, the other  
day, and somebody had spilled some oil, had evidently dropped  
a vial and broken it, that had oil in it, and had stood it up  
around the corner. A lady came out of the bank, stepped

in the oil and fell. Now, we are not concerned about the people who did not fall down in this store and how many thousands of people have gone up and down Washington Avenue for years on end on the concrete and have not fallen. Is it any argument to say that there could not have been something there that threw her on this particular occasion because thousands of people have walked up and down Washington Street for years on end? The evidence of this case is the oil was on that shoe and oil remained on that shoe until it evaporated. Mr. Williams asked whether it was water or not and she said no it was not water. It was on that shoe and remained there until it evaporated, which naturally it

would do in a short course of time, reasonably  
 page 137 } short course of time, relatively short course of  
 time, I expect is more correct. Mr. Williams  
 wants to show something about every square foot of that  
 floor in there at different times covering the year that has  
 no bearing to this particular point. Now, the treatment of  
 that floor right there at this particular point, because they  
 claim they treat the whole floor the same way, they put it  
 down and they rub it up, whatever it is. They might have  
 rubbed it up everywhere else and did not rub it up at that  
 place. There was something there at that place that made her  
 slip. They have attempted to show there was nothing at that  
 point. One lady said that she looked and could not see any-  
 thing and the other one was rather glib about it and said she  
 had not made any special examination of it for that pur-  
 pose. Now, we did not talk about anything but oil, and every-  
 body thought it was oil until Mr. O'Reilly got on the stand,  
 even the boy who had been using it, he never gave us the  
 slightest idea that it was anything but oil. We talked about  
 oil and he talked about oil, oiling the floor. He did not say  
 it was some other substance besides oil. Now, it is a special  
 preparation of some kind but nobody yet has said it has not  
 got any oil in it, whatever it is. But it all relates to that  
 one spot on that one occasion at that time, and  
 page 138 } it does seem to me that as we are going to do

that, the same way you can come in here and  
 prove statistics of the number of people that walk up and  
 down Washington Avenue last year and they did not fall,  
 nobody knew about them falling, and no report of falling,  
 and if this lady slipped down and got up and went on—

Mr. Williams: Did not you prove, Capt. Berkeley, by Mrs. Holmes, the trained nurse, the condition of the floor in that entire store over a period beginning back a month or two or three or four months prior to this thing?

Capt. Berkeley: That is a fact.

Mr. Williams: It seems to me when you proved that, it let in this.

Capt. Berkeley: I proved they appeared to have more oil than other stores in town, and the contradiction to that must be directly without going into statistics as to the number of people that walked over it. He can say they did not have more oil on them.

The Court: What was the question?

Note: The reporter then read the question as follows:

“Q. And out of that four hundred thousand people from January 1st, when you took charge until November 1st, 1933, a period of ten months, how many people or how  
page 139 } many persons slipped or fell in any way in that store?”

The Court: I will let it be answered. Of course I am not passing on the weight of that evidence because I am right much at sea.

By Mr. Williams:

Q. Mr. O'Reilly, answer that question, please sir?

A. One person.

Q. How does the condition of those floors today generally and at the point where this accident occurred, compare to the condition they were in on November 2nd, 1933?

A. I would say just about the same, sir, about at the same period of our preparation we use on the floor again as we were at that time, and we have not changed any of our dressings and are doing it just the same way as we were doing it a year ago. Maybe we have not got quite as much actual dust as we had last year. The floor was blacker last year and that is due to coal dust from the C. & O. which we sweep out every morning, not oil, but coal dust.

### CROSS EXAMINATION.

By Capt. Berkeley:

Q. This was on November 2nd last year. Was there much coal dust blowing in there at that time?

A. We have record of pretty dirty weather two weeks previous to that, lots of winds, and every morning cleaning up. I opened the store and I know what it is.

page 140 } Q. You say you only put this on once a month?

A. Sometimes less than that, sometimes six weeks.

Q. Sometimes six weeks?

A. And during the holiday season it goes eight weeks.

Q. What is the purpose of that?

A. Hold the dust and dirt down; this railroad smoke blowing in there, cinders and stuff. If you sweep out without any dressing, it goes up on your counters.

Q. So this holds it?

A. No, it keeps it down so when he sweeps it does not throw it up.

Q. How often do you sweep in there?

A. Every night, sometimes twice a day, it depends on the dirt on the floor.

Q. So, you put enough of this to last six weeks and there will be enough of it to absorb the dirt and the dust that falls on the floor, even after it has been swept up every night?

A. Yes, sir, the floors will not dry out in that length of time.

Q. It will keep the floors, then, moist in that length of time?

A. Not moist or wet. It keeps them in condition that wood should be kept at to keep it from being dusty or drying and split.

Q. Dust is pretty dry, isn't it, or it would not  
page 141 } come in there. It blows in on the oil?

A. It has got a lot of oil in it, too, the dust you get from this coal, it is kind of sooty.

Q. And it takes a whole lot of oil to absorb four weeks or six weeks of dust that comes in off the street or comes off the feet of people that bring it in off the street and off the skirts of women who bring it in there?

A. No, I don't know. I am not an expert on that, how much oil it takes to clean that dirt.

Q. But you are telling us your practical experience of what you put on that floor just prior to that accident for as much as four to six weeks at a time, isn't it?

A. That is right.

Q. It takes care of it?

A. Yes, sir.

Q. And you put it on so it does last four to six weeks at a time?

A. We put it on, on regular instructions, not any certain way. We have got a practical way of doing it.

Q. It is called a floor dressing?

A. Yes, sir.

Q. Do you know what it is composed of?

A. No, sir, I don't.

Q. You don't know whether it is a viscolized oil, do you?

A. No, sir, I tried to find out, but I cannot find out at the present time.  
 page 142 } Q. Do you sell it in there?

A. No, sir.

Q. The last time you say it was put on was the 21st?

A. Yes, sir.

Q. Well, as a matter of fact, along about that time of the year you would not want to put it on any more until about the 21st of December, would you?

A. I would put it on after December 21st. I would not put it on until January.

Q. And what you put on, on October 21st you expected to last until January?

A. I did.

Q. And absorb all the dust that blew in there, the wood was to retain sufficient of it so that even if swept out every night, with the accumulations of dirt that it had, so as to keep it from flying around, that had taken up this stuff, in other words, the dirt had absorbed it rather than it having absorbed that, that all the dirt in there could be swept out without making any dust until the 21st of January, and you had that much on the floor on the 21st of October?

A. No. I did not say it would hold it down.

Q. What did you put it there for?

A. I put it there to prevent dust, but there are occasions and times of the year when you will do that. We will take the dust and let the dust settle in the store in place of putting the dressing down during the holiday season of the  
 page 143 } year; and any store in the city will tell you that same thing. They do not use it in the holiday season.

Q. Do you do that on account of you are afraid somebody might fall?

A. No, on account of everybody working at night tracking it up. You have got to get merchandise on the floor and get your counters fixed every night from now to Christmas and we do not put the compound on for the simple reason that we are working Saturday nights, and Sundays all day.

Q. It is because you are working that you do not do it?

A. Yes, sir.

Q. Six weeks would run it up to the first of January, anyhow?

A. Just about.

Q. It was so potent that there would still be some of it left there to be absorbed five weeks after the 21st of October?

A. Not necessarily.

Q. You say you put your merchandise down on the floor at nights and rearranged your counters?

A. Yes, scatter it all over the floor.

Q. And you would not put this on your floor because you do not want to mess up your merchandise that you put on the floor?

A. Right. If I had water on the floor I would not lay merchandise on it.

page 144 } Q. Why?

A. I don't want it to get it wetted down nor to get it soiled, don't want it to get damp. If I put it on there Saturday night and put the merchandise on there, it would absorb it.

Q. Dust absorbs it?

A. The merchandise would absorb it, too, for the same reason.

Q. And the merchandise would absorb it, too?

A. Yes.

Q. And that is the reason you do not want to lay that down there?

A. Yes, sir.

page 145 } Mr. Williams: May it please the court, that is our case, and we would like the jury to go down and look at the place, take a view of it.

Capt. Berkeley: I will state to your Honor I do not object to the jury going there to view the situation of the counters, but as to the place I would like to have evidence as to the width of the counters, and the same kind of counters that were there, and everything of that kind.

The Court: The jury, in viewing it, will know that everybody admits the counter is not the same as it was some time back.

Mr. Williams: The counter itself is the same. This lady was purchasing underwear, but on that counter now there is some other class of goods. The physical counter and width of the aisles and so forth are the same.

Capt. Berkeley: I think it is all right for them to do that subject to my objection which I can take up when the jury comes back. In order to save time I am perfectly willing for them to do that.

I will ask Mr. O'Reilly a question before they go.

FRANK EDWARD O'REILLY,

a witness on behalf of the defendant, being recalled for further cross examination, testified as follows:

By Capt. Berkeley:

Q. You counted the number of customers by the number of sales, did you not?

page 146 } A. Yes, sir.

Q. If I come in and flit from counter and buy eight or ten things you count me as eight or ten customers?

A. If you pay for each one of them.

Q. I have to pay for them?

A. Ordinarily they go from counter to counter two or three times.

Q. I thought you paid the girl at every counter?

A. Lots of times.

Q. I come in and make purchases at each counter?

A. That is our policy.

Q. I thought you expected me to do it?

A. We expect you to do it.

Q. That is what most people do. They come in, buy an article and pay for it?

A. And there are a lot of people not counted, that just come in and do not buy a thing.

Q. Come in and take a look?

A. Yes, sir.

Note: The jury then left to view the premises, returned to the jury box, and were adjourned until ten o'clock tomorrow morning.

page 147 } MOTION TO STRIKE OUT PLAINTIFF'S  
EVIDENCE.

Mr. Williams: The situation in this case, the plaintiff has failed to make out any case for consideration by the jury, and, for that reason, I wish to make a motion to strike out the plaintiff's evidence on the ground that there has been no negligence shown on the part of W. T. Grant Company which was the proximate cause of this accident, and, second, that the plaintiff herself was guilty of contributory negligence as a matter of law.

The motion was then fully argued by counsel.

The Court: I will overrule the motion to strike.

Mr. Williams: We note an exception on the grounds stated in making the motion.

Thereupon an adjournment was taken until tomorrow morning October 17th, 1934, at 10 o'clock A. M.



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## SECOND DAY.

Newport News, Va., October 17th, 1934.

Met pursuant to adjournment from yesterday.

Present: Same parties as heretofore noted.

Thereupon the jury was excused from the Court Room, and counsel for plaintiff presented and argued to the Court plaintiff's instructions, and counsel for defendant noted his objections thereto, and at 5 o'clock p. m. an adjournment was had until 10 o'clock tomorrow morning, October 18th, 1934.

## THIRD DAY.

Newport News, Va., October 18th, 1934.

Met pursuant to adjournment from yesterday.

Present: The same parties as heretofore noted.

Thereupon the jury was excused from the court room.

Mr. Williams: May it please the court, about these instructions, the first thing I wish to do in order to keep the record clear, as I argued in my motion to strike out plaintiff's evidence, it is my view that the evidence in regard to this spot on the sole of this shoe is not sufficiently connected up with the accident to be admissible, and therefore I move to strike out the evidence of the plaintiff and her witnesses who testified that some four or five hours after the accident there

page 148b } was a spot on the bottom of the left shoe which  
that there is no evidence to show that that spot was picked up in the store. It might have gotten on the shoe at any place, and your Honor can rule on that, and then we can go on with these instructions. I practically made that in the motion to strike, that is the oil could have gotten on the shoe two months prior. If I look on my shoe now and here is a spot on it, that is no evidence that I got it on there in this court room. That is all the evidence here, that sometime after this accident there was a spot on the ball of the shoe. I say it is equally as probable that that spot was gotten out on the street and was on the shoe before she came into the store as that it was gotten in the store.

Captain Berkeley: If the court please, when we consider any particular circumstance it is of course considered in the background of all the surrounding circumstances. This lady went into this store, and Mrs. Root, by extraordinary precaution, observed that it was very slick from this substance which was on the floor, which, from all the circumstances, we know was oil of some kind. Mrs. Webb's left foot, when she started to turn, slid out from under her; that is the evidence. The shoe was immediately taken off on the floor at that place. Mrs. Root picked up her pocketbook and the shoe and had it in her hand until it got to the house; she carried page 148c } both when in the ambulance. That is the testimony. When they got to the house the shoe was put on a cedar chest. The nurse was picked up on the way out there, so there was no sending for the nurse, or anything. When they got her upstairs and put her on a bed and got her in a comfortable position, Mrs. Holmes, the nurse, wanted to see the shoe, and she picked up the shoe and there was oil on the shoe, on the ball of the foot, about the size of a dollar. She was the first one whose mind was directed to that. Now, I take it that that is evidence for the jury to consider as to where that occurred. That was the foot that slipped out at that point. There was no evidence of any oil on the bottom of the other shoe, but on the left shoe. Now, it does seem to me that they are so coupled together and the short length of time, that it is a matter for the jury to consider. It does seem to me that it is the flightiest and most far-strained thing that I know anything about to talk about eliminating that one circumstance, that one fact in the background of all the other circumstances with which it is consistent; the slipping of the foot; that one shoe came off her foot; that was taken off of her foot right there, right at the store; picked up off the floor, immediately off of that floor by Mrs. Root and, with the pocketbook, carried in her hand all the way; placed by her on this cedar chest; taken off of the cedar chest, and it was the only one that had oil on it. I never heard a more strained contention. To ask page 148d } the court to eliminate that from the jury, it does seem to me is a rather far-fetched contention. There wasn't any three or four hours between; it was probably not more than half an hour's duration under all these circumstances. We most earnestly insist that that evidence should not be eliminated. There was no objection made to it at the time it was introduced, no objection. It went in and the defendant did have full opportunity for cross examination of the witnesses, did cross examine the witnesses on that very point without any reservation whatsoever; got the advantage

of the cross examination, whatever advantage he might have had or thought he might have had at the time. The fact that the cross examination did not turn out not to be satisfactory to him to this late minute, and to talk about now eliminating that from the evidence, it seems to me would be entirely improper. I don't think he has the right to make the motion.

Mr. Williams: How could I tell whether you were going to connect it up or not, until the evidence was all in?

Captain Berkeley: It was already connected up. And it don't take me but six minutes at twenty miles an hour—and I am allowed twenty-five most of the distance—to come from my house and come down Washington Avenue and turn around and park, which is just two miles from my page 148e } house. You can readily see that at twenty miles an hour I can make it in six minutes, and I am entitled nearly all the way to go twenty-five miles an hour and it takes me just six or seven minutes to park my car. It is over half a mile further that I have to go at the other end, and so it don't take ambulances any great time to get there nor to get out where they were going.

The Court: I overrule the motion.

Mr. Williams: I want to note an exception on the grounds stated.

Thereupon counsel for defendant presented and argued to the court defendant's instructions, and counsel for plaintiff stated her objections thereto.

At 12:25 p. m. the Court stated that he desired further time to consider the instructions, and an adjournment was taken until 10 o'clock tomorrow morning October 19th, 1934.

#### FOURTH DAY.

Newport News, Va., October 19th, 1934.

Met pursuant to adjournment from yesterday.

Present: The same parties as heretofore noted.

page 149 } The jury was excused from the Court room and the Court retired to his office to consider the instructions.

At 4:26 p. m. the Court returned to the Bench and the jury returned to the jury box and were adjourned until 10 o'clock a. m. Monday, October 22nd, 1934.

Mr. Williams: May it please your Honor, I find that one of the instructions requested by the plaintiff has not been marked by your Honor either granted or refused, and one instruction requested by the defendant that is not marked by your Honor as granted or refused.

Note: The court then considered the two instructions which had not been marked, and 5 o'clock p. m. an adjournment was taken until 10 a. m. Monday, October 22nd, 1934.

#### FIFTH DAY.

Newport News, Va., October 22nd, 1934.

Met pursuant to adjournment from Friday, October 19th, 1934.

Present the same parties as heretofore noted.

Note: The jury was then excused from the jury box, the Court handed the instructions to counsel, marked granted or refused, and counsel noted their exceptions thereto on the record, as follows:

page 150 } PLAINTIFF'S INSTRUCTIONS.

Thereupon the plaintiff offered her instruction No. A, as follows:

#### PLAINTIFF'S INSTRUCTION A (GRANTED):

"The Court instructs the jury that the plaintiff at the time she was injured is presumed to have been acting with ordinary care and not negligently, and that if they believe from all the circumstances appearing in the evidence that the defendant was guilty of negligence in the manner or method of treating the floor at the place where the plaintiff fell, which resulted in an injury to the plaintiff, that the defense of contributory negligence set up by the defendant will not preclude the plaintiff from a recovery, but in order for the defendant to escape liability on his plea of contributory negligence, the burden is on the defendant to establish by a preponderance of the evidence, or it must otherwise appear from all the evidence in the case, that the plaintiff was not in the exercise of ordinary care at the time of the occurrence, which resulted in the injury complained of. And the Court further instructs the jury, that even though they may believe that the plaintiff

was slightly negligent, that such slight negligence on her part will not excuse the defendant from liability under his plea of contributory negligence."

Which said Instruction A was granted by the Court, to which action of the Court in granting said In-  
 page 151 } struction A the defendant objects and excepts on  
 the ground that it does not correctly state the law,  
 as the defense of contributory negligence if proved will prevent the plaintiff from recovering, and therefore the following words in the instruction should be erased therefrom: "That the defense of contributory negligence set up by the defendant will not preclude the plaintiff from recovering;" and on the further ground that there is no such thing as "slight negligence" or comparative negligence in Virginia; if the plaintiff was guilty of any negligence which contributed to the accident, then there can be no recovery. This brings into the case the comparative negligence doctrine which is not applicable in a case of this kind. Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon the plaintiff offered her instruction B, as follows:

#### PLAINTIFF'S INSTRUCTION B (REFUSED):

"The Court instructs the jury that the defense of contributory negligence presupposes negligence on the part of the defendant, and further that there can be no contributory negligence without negligence on the part of the defendant concurring and running with it. The Court further instructs the jury that the burden of proving plaintiff's contributory negligence is on the defendant and that the de-  
 page 152 } fendant must prove plaintiff's contributory negligence by a preponderance of the evidence; and if the jury believe from the evidence that the negligence of the defendant was the proximate cause of the injury complained of—then they should find their verdict for the plaintiff, even though they may believe the plaintiff was also to some degree negligent—provided they also believe such negligence on her part was remote to the efficient cause."

Which said Instruction B was refused by the Court.

Thereupon the plaintiff offered her Instruction D as follows:

PLAINTIFF'S INSTRUCTION D (REFUSED):

"The Court instructs the jury that if they believe from the evidence that the defendant at the time of the plaintiff's injury had followed the custom of putting enough oil or other slippery composition on the floor of the store, at one time, to take care of and allay the dust and dirt which gathered there from about 10,000 customers tramping over it each week for a period of four to six weeks, and from other natural sources, and sufficient to permit the floor being swept every night during such period, and that such a quantity of such substance was likely to cause a slippery surface, for a period of as much as twelve days or more, and that the defendant on or about the 21st of October, or later, put such composition on the floor in sufficient quantities to perform page 153 } such function for such length of time or more, and that such quantity created a dangerous condition, from which it might have been reasonably anticipated that someone might be caused to fall, which was the proximate cause of the plaintiff slipping and falling, while using ordinary care in a movement on the floor, from which she suffered the injury complained of, you will find for the plaintiff."

Which said Instruction D was refused by the Court, to which action of the Court in refusing to grant said instruction the plaintiff objects and excepts, which Instruction D, the plaintiff understands the Court rejected on the ground that it is argumentative.

Thereupon the plaintiff offered her Instruction E as follows:

PLAINTIFF'S INSTRUCTION E (GRANTED):

"The Court instructs the jury that if they believe from the evidence that there was a dangerous condition of the floor of the store where the plaintiff fell, which caused her to fall, which the defendant's agents could have prevented by the exercise of ordinary care and prudence in the method of treating the floor, and the defendant, or its duly authorized agents knew, or by the exercise of ordinary prudence and care ought to have anticipated that such dangerous condition would likely arise from such method of treatment, that it owed to

the plaintiff, as its customer, the duty of notifying her of such likely dangerous condition, and if it failed to do so, such conduct on the part of the defendant was negligent.”

Which said instruction was granted by the Court, to which action of the Court the defendant objects and excepts on the following grounds: This instruction has no part in this case; this is not a case where there is any evidence that a dangerous condition was created, and the question of notice and lack of notice which would come in where it was created by someone else. In other words, there is no question in this case of any notice or lack of notice. If the defendant put down oil in a negligent manner which caused the floor to be dangerous and the plaintiff was not guilty of contributory negligence, the defendant is liable. There is no question of any notice or lack of notice. Under that instruction the jury might figure that defendant had failed to sweep up this floor as much as it should, or something of that kind, but there is no evidence of any breach of any duty of that kind. The instruction is not applicable to the facts in the case. There is absolutely no allegation in the notice of motion of any failure to warn, and there has been no evidence adduced along that line. Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon the plaintiff offered her Instruction F, as follows:

#### PLAINTIFF'S INSTRUCTION F (GRANTED):

“The Court instructs the jury that even though they believe from the evidence that the plaintiff failed to view the floor of the store with ordinary care upon entering, if they further believe that such did not cause her to fail to discover any danger on the floor at the place where she fell; yet, if they believe from the evidence that there was a dangerous condition there due to the failure of the defendant to exercise ordinary care and prudence, in its method of treating the floor, which caused her to fall, and that such condition was the immediate and proximate cause of her injury and her failure to observe such dangerous condition, the remote cause, they will find for the plaintiff.”

Which Instruction F was granted by the Court, to which

action of the Court the defendant objects and excepts on the ground that there is no case here of any remote and proximate cause; that if this lady failed to exercise ordinary care to look, the jury finds that she failed to exercise ordinary care to look and that if by looking she could have seen this condition but nevertheless walked into it, walked on it and turned on it, that is bound to be a contributing cause of the accident. There is no question like in ordinary damage suits,

of last clear chance where there is remote and proximate cause. The instruction says "If you believe the plaintiff failed to view the floor with ordinary care and further believe that such did not cause her to fail to discover any danger"—there is no evidence on which to base any such instruction as that. According to plaintiff's view of the case the floor was open and obvious to everybody and if she had observed it she was bound to have seen the condition. There is absolutely a failure of any evidence to support this instruction; if the facts are not disputed in that case the question of proximate cause becomes a question for the Court. In this particular case the plaintiff and her mother came into the store and walked along in the store together and got to a certain point in the store at which plaintiff fell. Plaintiff's mother, who was right along with her the entire time, says that she noticed the floor was slippery and she was very careful as they walked along, the entire time. She does not say it was slippery at the particular point plaintiff fell but she says, generally speaking, the floor was slippery. If that is true, then plaintiff owed the duty to exercise ordinary care to look after her own safety, she had the same opportunity to see that the mother had to see, and if she failed to exercise that opportunity, then it is for the jury to say whether that was contributory negligence. If it was contributory negligence it is bound to have contributed to the accident because plaintiff would have been bound to see

as well as her mother. To say where a thing is perfectly open and obvious to everybody that if she had looked she might not have seen it, seems to me to be frivolous. In other words, it is not a latent defect which defendant had knowledge of. Plaintiff had just as much opportunity to see if the floor was dangerous as defendant had. There is no evidence to sustain any instruction on remote and proximate cause on the question of contributory negligence and primary negligence in this case. Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.



Thereupon the plaintiff offered her Instruction G, as follows:

PLAINTIFF'S INSTRUCTION G (GRANTED):

"The Court instructs the jury that if they believe from the evidence that the plaintiff entered the store at a time it was open for business and goods were on display for sale, that she had the right to assume that she was not exposed to any danger which could come to her from the floor being unsafe by reason of the defendant's failure to use ordinary care and prudence in its treatment, and that there was no duty on her part to exercise extraordinary care in moving on the floor or looking out for anything thereon, which may have existed on account of any neglect of the defendant, if any there was."

Which said Instruction G was granted by the Court, to which action of the Court the defendant objects page 158 } and excepts for the reason that this instruction practically instructs the jury that there is no duty on this plaintiff to do anything. In other words, it instructs the jury as a matter of law that the defense of contributory negligence is no defense. For the Court to say that the plaintiff has the right to assume that the floor was in good condition, is the same thing as saying that she does not have to use her eyes to look. The whole gravamen of this action is that this oil was on there and that defendant should, by the exercise of ordinary care, have seen that it was a dangerous situation. That is the whole burden of plaintiff's case. If defendant should have seen it, it is certainly within the province of the jury to say that plaintiff owed the duty to exercise ordinary care to use her faculties to see it, and if she could have seen it and that contributed to the accident, she is guilty of negligence. This instruction takes away from the jury the right to find the plaintiff was guilty of contributory negligence. It says she has the right to assume the place was safe so she does not have to look at all, and defendant submits she does not have the right to assume that. The Supreme Court, in numerous cases, has held that no one has the right not to exercise care in blind reliance upon the unaided care of another. In this case the plaintiff's whole contention is that this oil was so thick and so much of it that defendant should have seen it and remedied the page 159 } defect, and according to plaintiff's own version of this accident it was a patent situation, open and obvious to such an extent that they charge defendant with

negligence because defendant did not know it was there and did not remove it. If it was open and obvious to that extent, as plaintiff claims under her whole evidence, certainly it was open and obvious to other people and the jury ought to be allowed to so find. Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon the plaintiff offered her Instruction H, as follows:

**PLAINTIFF'S INSTRUCTION H (GRANTED):**

"The Court instructs the jury that it was the duty of the defendant to have the floor of the store in such safe condition that a customer therein would be safe in using it in a manner consistent with ordinary care, without danger to herself, and that the plaintiff had the right to assume that the defendant had taken precaution to see that the floor of the store was safe for her to use it with ordinary care, and his failure to do so was negligence."

Which said Instruction H was granted by the Court, to which action of the Court the defendant objects and excepts on the following grounds: That it was not the page 160 } duty of the defendant to have the floor in safe condition. The only duty being to exercise ordinary care to have the floor in reasonably safe condition. The instruction should have inserted after the word "to" in the second line, the words "Exercise ordinary care" and after the word "such" in the third line, the word "reasonable", so that the instruction would read: "The Court instructs the jury that it was the duty of the defendant to exercise ordinary care to have the floor of the store in such reasonably safe condition that a customer therein would be safe in using it in a manner consistent with ordinary care, without danger to herself". Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon the plaintiff offered her Instruction I, as follows:

## PLAINTIFF'S INSTRUCTION I (GRANTED):

"The Court instructs the jury that negligence is a question of fact to be determined by the jury, and that all facts, in the trial of a case may be established by circumstantial evidence, and that they may take into consideration all the facts and circumstances of the case as disclosed by the evidence and all of the natural inferences from the evidence in arriving at their conclusions, as to any material fact in issue."

page 161 } Which said Instruction I was granted by the Court, to which action of the Court the defendant objects and excepts on the grounds that the instruction does not correctly state the law in that it tells the jury they can find a verdict on circumstantial evidence. The usual and customary term is "You must believe by a preponderance of the evidence, all the facts proven, and any natural inferences that may be drawn therefrom", but to say to a jury that they can believe that this case has been proved by circumstantial evidence would be inviting the jury into conjecture and speculation. Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon plaintiff offered her Instruction J, as follows:

## PLAINTIFF'S INSTRUCTION J (GRANTED):

"The Court instructs the jury that if they believe from the evidence that the store was open for business and goods were on display for sale, that there was no duty imposed upon the plaintiff to suspect that the floor was not safe, nor to be especially looking out for lurking dangers thereon, but on the contrary, while in the exercise of ordinary care, such as other customers of ordinary prudence would naturally do under the same circumstances, there was no occasion for it to even be suggested to her mind that the defendant had not taken all reasonable precaution to have the floor safe for such use, and that she had the right to presume that he had."

page 162 }

Which said Instruction J was granted by the Court, to which action of the Court the defendant excepts on the ground that this instruction is already covered by other instructions granted for the plaintiff, that it brings up the presumption again and brings up whether the floor has to be safe or rea-

sonably safe, and is argumentative. Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon the plaintiff offered her Instruction K, as follows:

PLAINTIFF'S INSTRUCTION K (GRANTED):

"The Court instructs the jury that if they believe from the evidence that at the time when the defendant's store was open for the transaction of business, including the sale of goods, which goods were then on display therein for sale, that the floor which had been oiled or treated with some other slick substance, and that due to the lack of ordinary care and prudence in such treatment of the said floor, it was not reasonably safe, and that the plaintiff entered such store for the purpose of making a purchase, and while in the exercise of ordinary care, as the proximate result of such unsafe condition of the floor, slipped and fell and was injured, they will find for the plaintiff."

page 163 }

Which said Instruction K was granted by the Court, to which action of the Court the defendant objects and excepts on the ground that Instruction K is covered by other instructions granted for the plaintiff. Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon the plaintiff offered her Instruction L, as follows:

PLAINTIFF'S INSTRUCTION L (GRANTED):

"The Court instructs the jury that if they believe from the evidence that at a time when the defendant's store was open for business and its goods on display for sale, that the floor, or any portion of it where a customer might be reasonably expected to walk or stand, was in such condition as not to be reasonably safe for such purposes, which the defendant by the exercise of ordinary care and prudence could have prevented, and that the plaintiff at such time went into the defendant's store with the intention of making a purchase from it, and with such intention of viewing the goods on display for sale, and in the exercise of ordinary care, as the proximate result of such unsafe condition of the floor, slipped and fell and was injured, they will find for the plaintiff."

mate result of such unsafe condition of the floor fell and was injured, they will find for the plaintiff."

page 164 } Which said Instruction L was granted by the Court, to which action of the Court the defendant objects and excepts on the ground that Instruction L is the same as Instruction K. Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon the plaintiff offered her Instruction N, as follows:

PLAINTIFF'S INSTRUCTION N (GRANTED):

"The Court instructs the jury that if they believe from the evidence that the plaintiff found the defendant's store open for business and goods on display for sale and that she entered therein to view such goods for the purpose of making a purchase, and while viewing goods on display she had a right to assume that the floor of the store, though apparently recently treated with some kind of substance, had been so treated with ordinary care and prudence, and that the floor was thereby reasonably safe for her to move about upon, in the exercise of ordinary care, and if they further believe from the evidence that while she was so using the said floor, she slipped and fell and was injured as the proximate result of the slickness of same, either due to the kind of substances so used, or the amount of the substance with which the floor was treated being left thereon through lack of the exercise of ordinary care in such treatment of the floor, they  
page 165 } will find for the plaintiff."

Which said Instruction N was granted by the Court, to which action of the Court the defendant objects and excepts on the ground that the plaintiff had no right to assume; she had a positive duty to exercise ordinary care to look out for herself. In this instruction, also, the Court tells the jury, or assumes in this instruction, that the floor had been recently treated, which is not the evidence. It leaves out all questions of whether the Grant Company people exercised ordinary care to make the floor safe, and puts it entirely on the basis that if she exercised ordinary care and the floor was slick, then she was entitled to recover; in other words, it makes it to that extent a *res ipsa loquitur* instruction. Defendant further objects and excepts to the granting of any

instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon the plaintiff offered her Instruction O, as follows:

PLAINTIFF'S INSTRUCTION O (GRANTED):

"The Court instructs the jury that if they believe from the evidence that the plaintiff entered the defendant's store to make a purchase therein, at a time when it was open for business, with goods on display for sale, and while viewing such goods in the exercise of ordinary care, she slipped, fell and was injured, as a proximate result of the unsafe condition of the floor which the defendant by the exercise of ordinary care could have known, or reasonably anticipated, they will find for the plaintiff."

Which said Instruction O was granted by the Court, to which action of the Court the defendant objects and excepts on the ground that it is already covered by other instructions granted for the plaintiff; this instruction would allow plaintiff to recover even though the jury believes from the evidence that defendant had not made the floor unsafe. There is nothing but speculation as to whether it was or was not put there by defendant. The evidence in this case is such that, under the view defendant takes, it is very doubtful, very uncertain as to what caused this lady to slip. Plaintiff has raised the inference by saying that there was a black spot on the bottom of her shoe after the accident, an oily black spot. Plaintiff has not shown in this case any length of time that any particular substance other than what was put there by the defendant has been on the floor. Therefore when the instruction says "could have known" it is bringing in the element of constructive or actual knowledge which is not in issue and has no place in the case at bar because in this case, if there be any negligence at all it is the negligence of the defendant himself by its own servants and hence the question of constructive or actual knowledge does not come in, and this instruction will simply confuse the jury by saying "knowing or could have known". On the other hand, if this instruction is for the purpose of showing that there was continual negligence after having put it on in that negligent condition that this young boy when he swept up at night should have taken it off, then there is no allegation of that phase of the case in the notice of motion and no proof about it, and hence it is not proper in this case.

Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon plaintiff offered her Instruction P, as follows:

PLAINTIFF'S INSTRUCTION P (REFUSED):

"The Court instructs the jury that if they believe from all of the evidence in the case that the plaintiff slipped and fell upon the floor of the defendant's store while she was therein as a customer and in the exercise of ordinary care as such, in moving upon the floor, and that such fall was due to an unsafe condition of the floor, as the result of a slick condition due to the treatment of it by the defendant, and which was the proximate cause of her falling, that the presumption is that such unsafe condition was due to the defendant's negligence, and unless it rebuts such presumption by satisfactory evidence, that it is sufficient upon which to find a verdict for the plaintiff."

page 168 } Which said Instruction P. was refused by the Court, to which action of the Court plaintiff objects and excepts on the ground that Instruction P is a *res ipsa loquitur* proposition; it recites plaintiff's ordinary care as an invitee in the store and her right to presume that it was safe, and if the floor was in an unsafe condition and she fell by reason of that, the presumption is that the defendant was guilty of negligence, unless the defendant rebuts it by satisfactory evidence.

Thereupon the Plaintiff offered her Instruction Q, as follows:

PLAINTIFF'S INSTRUCTION Q (GRANTED):

"The Court instructs the jury that if they believe from the evidence that the plaintiff went into the store at the time that it was open for business and goods were on display for sale, and was walking or moving on the floor at the time of her injury, in such manner and with such care as would have been exercised by a person of ordinary prudence under like circumstances, that she was not guilty of any negligence in so doing."

Which said Instruction Q was granted by the Court, to which action of the Court the defendant objects and excepts

on the ground that the instruction should not be confined to walking or moving; she may have been walking or moving with the greatest care in the world, but page 169 } the main duty here was for her to exercise her faculties of sight and her previous knowledge. She testified she had been in there three or four times between October 21 and November 2, prior to this accident; she testified that she saw that floor also and looked at it the day of the accident; she said at first she did not and then she said she did and said she looked at it generally and it looked all right to her. Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon Plaintiff offered her Instruction R, as follows:

PLAINTIFF'S INSTRUCTION R (GRANTED):

"The Court instructs the jury that the ordinary care required of the defendant to keep its store premises in a reasonably safe condition, so that customers entering may do so with safety, means that it must exercise ordinary care to keep its premises in a reasonably safe condition commensurate with the character of its business and the kind of customers whom it knew would be reasonably expected to patronize it, and the kind of shoes it knew were worn by many of such customers, and if the jury believe from the evidence that the defendant's customers are to a large extent women and that it is the custom prevailing in this community for women to wear frail shoes fitted with high heels, the de- page 170 } fendant is charged with that knowledge, and it was the duty of the defendant to exercise reasonable care to keep the floors of its store reasonably safe for women wearing high heeled shoes to walk and move about thereon in the exercise of ordinary care."

Which said Instruction R was granted by the Court, to which action of the Court the defendant objects and excepts on the ground that where the instruction says it is the duty of the defendant "to keep its store premises in a reasonably safe condition so that customers entering may do so with safety", it is an incorrect statement of the law. The law is that the premises may be reasonably safe but to say that defendant has to keep them there so that people can come in there with safety is to say that the defendant is an insurer, and defendant submits that there is no duty on the part of



defendant to have his store reasonably safe for women wearing high heeled shoes of the character that were introduced in the evidence in this case. Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon the plaintiff offered her Instruction S, as follows:

PLAINTIFF'S INSTRUCTION S (GRANTED):

"The Court instructs the jury that a view of the page 171 } premises is not intended to supply evidence, but only to explain and clarify it."

Which said Instruction S was granted by the Court, to which action of the Court the defendant objects and excepts on the ground that the instruction is not applicable to this case. The purpose of having the jury to look at the premises is to reconstruct, if they believe defendant's evidence, the condition of the floor at the time this accident occurred. And if the Court is to instruct them that they cannot use that, there is no sense in sending them to view the premises. The instruction in this form would simply confuse the jury as to what weight they can give to what they have seen. Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon the plaintiff offered her Instruction T, as follows:

PLAINTIFF'S INSTRUCTION T (GRANTED):

"The Court instructs the jury that if they believe from the law and the evidence in this case that the plaintiff is entitled to recover damages, then in estimating the damages sustained by her, they should take into account the physical injury sustained by the plaintiff, the physical capacity and condition of the plaintiff before the injury com- page 172 } plained of, as compared with her physical capacity and condition since, and her present and probable future physical capacity and condition in consequence of the same injury, the probable duration of her injury and the probable physical condition resulting therefrom, as compared to her normal capacity and condition prior thereto, as shown by the evidence, and from the evidence,

whether the said injury is permanent and to what extent the said injury, during its duration and the probable physical condition therefrom will probably affect the plaintiff in doing the things and engaging in the pursuits and employments for which, without the said injury, she otherwise would have been physically better qualified, and also the physical and mental suffering to which she has been and is subjected, and probably will be subjected for the duration of the injury and the probable physical results therefrom, the medical and other expenses she has incurred and will probably incur in the future in an effort to effect a cure, and any other expense she has reasonably incurred and in the future will probably be compelled to incur by reason of her reduced physical capacity therefrom, if any, and upon consideration of all of the above award such damages as in the opinion of the jury the evidence in the case justifies as fair and just compensation for the injury and all damages the plaintiff has sustained therefrom."

Which said Instruction T was granted by the Court, to which action of the Court the defendant objects page 173 } and excepts on the grounds: First, there is no evidence of any expense that she will incur in the future in an effort to be cured; plaintiff has not shown any doctor's bills to be incurred whatsoever; there is no evidence on that. There is not a scintilla of evidence in here that any further treatment is necessary except the testimony of Dr. Vann who stated that he would like to have seen her at the Kiwanis Clinic, to which there is no expense attached. Defendant does not contend that plaintiff is not going to incur some future expenses in treating this injury, but it does contend that plaintiff has failed to prove any fact upon which the jury can base a verdict. The usual and customary way to prove expenses of that nature would have been to ask the doctor what treatment she would require in the future and he would have said so much time and probably cost so much. It is common knowledge that these ankles get in such condition that the doctor can do nothing further about it. The jury has no evidence that they can base any future expenses on, but they would have to guess. There is not a scintilla of evidence in regard to any future expense at all. Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

Thereupon the plaintiff offered her Instruction U, as follows:

page 174 } PLAINTIFF'S INSTRUCTION U  
(GRANTED):

“The Court instructs the jury that they are the sole judges of the credibility of the witnesses and the evidence and weight of the evidence is not necessarily determined by the number of witnesses produced, but the Court instructs you that it is for the jury to determine the weight to be given to the testimony of different witnesses. And in this case you may consider their demeanor on the witness stand, their apparent intelligence, and means of information, their interest, bias or motive, if any, apparent in their relation to the defendant and the plaintiff, and their manner of testifying, and give such credit to the several witnesses as under all the circumstances they are entitled to, and even though their statements, or any of them, may not be contradicted, the jury may altogether disregard them as not true or as unreliable if they believe them to be *incoherently* incredible.”

Which said Instruction U was granted by the Court, to which action of the Court the defendant objects and excepts on the ground that the last portion of the instruction reading “and even though their statements or any of them may not be contradicted, the jury may altogether disregard them as not true or as unreliable if they believe them to be inherently incredible”, is an incorrect statement of the law. There is no witness here who has made any statement to which this part of this instruction could be applicable; there is no inherently incredible testimony of any witness in  
page 175 } the case; there is no evidence in this case to which that part of the instruction could be applied. Defendant further objects and excepts to the granting of any instructions for the plaintiff on the grounds set forth in defendant's motion to strike out plaintiff's evidence.

page 176 } DEFENDANT'S INSTRUCTIONS.

The defendant thereupon offered its Instruction No. 1, as follows:

DEFENDANT'S INSTRUCTION NO. 1 (REFUSED AS  
OFFERED):

“The court instructs the jury that the defendant was not an insurer of the safety of the plaintiff, but that the basis of this action is negligence. You are not to presume negligence from the mere fact that an accident occurred, or that

the plaintiff was injured as a result thereof. On the contrary there is a presumption that the defendant was not negligent, until the plaintiff has proven the contrary by a preponderance of all the evidence.

"The burden rests upon the plaintiff to prove, not only that the defendant was negligent, but that its negligence was a proximate cause of the accident. This burden rests upon the plaintiff throughout the entire trial and at each and every stage thereof, and unless you believe from the evidence that the plaintiff has sustained this burden, you must find for the defendant.

"If you should believe, after hearing all the evidence, that it is just as probable that the defendant was not negligent as that it was, then the plaintiff has failed to sustain the burden of proof in such case, and you must find for the defendant. You are further instructed that by negligence in this case is meant the failure to exercise reasonable care to keep its floors in a reasonably safe condition for use in the ordinary modes by persons exercising ordinary care on their part, under the circumstances, to avoid accidents, and unless you believe that the defendant failed to exercise such care, then you shall find for the defendant."

Which said Instruction No. 1 was refused by the court in the form as offered, to which action of the court the defendant objects and excepts on the ground that the instruction as offered correctly states the law applicable to this case.

Thereupon the court amended said Defendant's Instruction No. 1 to read as follows:

**DEFENDANT'S INSTRUCTION NO. 1 (GRANTED AS AMENDED BY THE COURT):**

"The Court instructs the jury that the defendant was not an insurer of the safety of the plaintiff, but that the basis of this action is negligence. You are not to presume negligence from the mere fact that an accident occurred, or that the plaintiff was injured as a result thereof. On the contrary there is a presumption that the defendant was not negligent, until the plaintiff has proven the contrary by a preponderance of all the evidence. The burden rests upon the plaintiff to prove, not only that the defendant was negligent, but that its negligence was a proximate cause of the accident. This burden rests upon the plaintiff throughout the entire trial and at each and every stage

thereof, and unless you believe from the evidence that the plaintiff has sustained this burden, you must find for the defendant. If you should believe, after hearing all the evidence, that it is just as probable that the defendant was not negligent as that it was, then the plaintiff has failed to sustain the burden of proof in such case and you must find for the defendant. You are further instructed that by negligence in this case is meant the failure to exercise reasonable care *commensurate with the circumstances* to keep its floors in a reasonably safe condition for use in the ordinary modes by persons exercising ordinary care on their part, under the circumstances *as they reasonably appeared to them*, to avoid accidents, and unless you believe that the defendant failed to exercise such care, then you shall find for the defendant."

Which said Defendant's Instruction No. 1 as amended, was granted by the court, to which action of the court in amending said Instruction No. 1 by inserting the words "commensurate with the circumstances" and by inserting the words "as they reasonably appeared to them", the defendant objects and excepts, on the ground that the instruction as originally offered is a correct statement of the law applicable to this case. And to which action of the court plaintiff objects and excepts, also for failure to strike out the first page 179 } sentence and for failure to strike out the second sentence and for failure to strike out the words "on the contrary", being the first three words in the third sentence, and for not adding to the last sentence of the first paragraph the words "or it otherwise appears from the evidence". Plaintiff also objects and excepts to the instruction as granted because of the insertion after the word "circumstances" in the last sentence, the words "as they reasonably appeared to them". Plaintiff contends that the whole instruction ought to be rejected.

Thereupon the defendant offered its Instruction No. 2 as follows:

**DEFENDANT'S INSTRUCTION NO. 2 (REFUSED AS OFFERED):**

"The court instructs *the that* the law does not undertake to hold some one liable for every accident; and in order for the defendant to be held liable in this case it must be shown that the defendant was guilty of negligence proximately causing the injuries complained of. If it appears from the evidence that the defendant was guilty of no negligence and

that the plaintiff was guilty of no negligence, then the law considers an accident occurring under these circumstances an unavoidable accident and under such circumstances the defendant could not be held liable for injuries resulting therefrom."

page 180 } Which said Defendant's Instruction No. 2 was refused by the court in the form as offered, to which action of the court the defendant objects and excepts on the ground that the instruction as offered correctly states the law applicable to this case.

Thereupon the court amended said Defendant's Instruction No. 2 to read as follows:

**DEFENDANT'S INSTRUCTION NO. 2 (AS AMENDED BY THE COURT AND GRANTED):**

"The court instructs the jury that the law does not undertake to hold some one liable for every accident; and in order for the defendant to be held liable in this case it must be shown that the defendant was guilty of negligence proximately causing the injuries complained of. If it appears from the evidence that the defendant was guilty of no negligence and that the plaintiff was guilty of no negligence, then under these circumstances it would be an unavoidable accident and the defendant could not be held liable for injuries resulting therefrom."

Which said Defendant's Instruction No. 2 as amended by the Court, was granted by the court, and to which action of the court in so amending said Instruction No. 2, the defendant objects and excepts on the ground that the Instruction as originally offered correctly states the law applicable to this case. Plaintiff objects and excepts to the action of the court in granting Defendant's Instruction No. 2  
page 181 } as amended, and in not striking out the words "the law does not undertake to hold some one liable for every accident; and"; said portion of the instruction being argumentative.

Thereupon the Defendant offered its Instruction No. 3 as follows:

**DEFENDANT'S INSTRUCTION NO. 3 (REFUSED):**

"The court instructs the jury that if you believe from the evidence that the plaintiff, by the exercise of ordinary

care and diligence could have seen and avoided the defects, if any, complained of in her declaration, and failed to do so, she was guilty of contributory negligence and you shall find for the defendant."

Which said Defendant's Instruction No. 3 was refused by the court.

Thereupon the Defendant offered its Instruction No. 4, as follows:

**DEFENDANT'S INSTRUCTION NO. 4 (GRANTED):**

"The court instructs the jury that the defendant is not an insurer of the safety of their premises and the mere fact that the plaintiff slipped and fell while a customer in W. T. Grant's store does not entitle her to a verdict in this case. W. T. Grant is only charged with the duty of keeping the premises in a reasonably safe condition for the use of those who, while exercising reasonable care for their  
page 182 } own safety, have a right to use the premises, and unless you believe, by a preponderance of the evidence, that the floors at the place of accident of *accident* were not in a reasonably safe condition for a person exercising reasonable care for her own safety, then you shall find for the defendant."

Which said Defendant's Instruction No. 4 was granted by the court, to which action of the court the plaintiff objects and excepts on the ground that the court should have struck out the words "the defendant is not an insurer of the safety of their premises and", as being argumentative, for which reason the whole instruction ought to have been rejected.

Thereupon the defendant offered its Instruction No. 5, as follows:

**DEFENDANT'S INSTRUCTION NO. 5 (REFUSED AS OFFERED):**

"The court instructs the jury that even if you may believe from the evidence that the defendant was negligent, nevertheless there can be no recovery in this case unless you further believe, by a preponderance of the evidence, that the injury to the plaintiff was the natural and probable consequence of the defendant's negligent act, and ought to have

been foreseen by it, or by the exercise of ordinary care could have been anticipated and prevented."

page 183 } Which said Defendant's Instruction No. 5 was refused by the court as offered, to which action of the court the defendant objects and excepts for the reason that the instruction as offered correctly states the law applicable to this case.

Thereupon the court amended said Defendant's Instruction No. 5 by striking out the words, "ought to have been foreseen by it", making the instruction read as follows:

**DEFENDANT'S INSTRUCTION NO. 5 (AS AMENDED BY THE COURT AND GRANTED):**

"The court instructs the jury that even if you may believe from the evidence that the defendant was negligent, nevertheless there can be no recovery in this case unless you further believe, by a preponderance of the evidence, that the injury to the plaintiff was the natural and probable consequence of the defendant's negligent act, or by the exercise of ordinary care could have been anticipated and prevented."

Which said instruction was granted by the court as amended, to which action of the court the defendant objects and excepts to striking out "ought to have been foreseen by it", on the ground that the instruction as originally offered correctly states the law applicable to this case.

page 184 } Thereupon the defendant offered its Instruction No. 7, as follows:

**DEFENDANT'S INSTRUCTION NO. 7 (GRANTED):**

"The court instructs the jury that before the plaintiff is entitled to recover in this case she must show, by a preponderance of the evidence, not only that there was oil on the floor at the place of the injury, but that such oil, considering the amount and character thereof, kept the floor from being in a reasonably safe condition for the use of persons exercising ordinary care, and further show that the servants or agents of the defendant knew, or by the exercise of ordinary care should have known, of such condition and that the oil caused the accident."



Which said Defendant's Instruction No. 7 was granted by the court.

Thereupon the defendant offered its Instruction No. 8 as follows:

**DEFENDANT'S INSTRUCTION NO. 8 (REFUSED):**

"The court instructs the jury that if you believe from the evidence that the plaintiff knew, or should have known of the alleged oil if any on the floor of the defendant's store, and failed to use care commensurate with the known unsafe condition, they should find for the defendant."

Which said Defendant's Instruction No. 8 was refused by the court.

Thereupon the defendant offered its Instruction page 185 } No. 9, as follows:

**DEFENDANT'S INSTRUCTION NO. 9 (GRANTED):**

"The court instructs the jury that if you believe from the evidence that the substance or oil, if any, was visible to a person walking in the store, while using reasonable care, then the plaintiff was guilty of contributory negligence in stepping therein, and you shall find for the defendant."

Which said Defendant's Instruction No. 9 was granted by the court.

Thereupon the defendant offered its Instruction No. 10, as follows:

**DEFENDANT'S INSTRUCTION NO. 10 (GRANTED):**

"The court instructs the jury that you must consider this case upon the evidence and the law laid down in the instructions of the court. You must not allow any sympathy you may feel to influence your verdict. A verdict cannot be based, in whole or in part, upon conjecture or surmise or sympathy, but must be based solely upon the evidence in the case and the instructions of the court."

Which said Defendant's Instruction No. 10 was granted by the court.

Thereupon the defendant offered its Instruction No. 11, as follows:

DEFENDANT'S INSTRUCTION NO. 11 (REFUSED):

"The court instructs the jury that if you shall believe from the evidence that the plaintiff did not exercise that degree of care that an ordinarily prudent person would have used under the circumstances, and particularly did not use her eyes and faculties as she should have been walking in the store of W. T. Grant Company at the point of falling, then the plaintiff was guilty of contributory negligence and you shall find for the defendant."

Which said Defendant's Instruction No. 11 was *granted* by the court, to which action of the court the defendant objects and excepts on the ground that it was the duty of the plaintiff to exercise ordinary care to use her faculties in order to avoid an accident. If she failed to do so, she was guilty of contributory negligence.

Thereupon the defendant offered its Instruction No. 11-A as follows:

DEFENDANT'S INSTRUCTION NO. 11-A (REFUSED):

"The court instructs the jury that if you believe from the evidence that the accident was caused or contributed to by the character of heels on the plaintiff's shoes, you shall find for the defendant."

Which said Defendant's Instruction No. 11-A was refused by the court, to which action of the court defendant objects and excepts on the ground that the jury have a right to consider the fact that she was wearing high heeled shoes in determining whether or not she was guilty of contributory negligence.

Thereupon the defendant offered its Instruction No. 11-B, as follows:

DEFENDANT'S INSTRUCTION NO. 11-B (GRANTED):

"The court instructs the jury that the fact that Mrs. Webb was wearing a high heeled shoe is not conclusive that she was guilty of contributory negligence in so doing. Neverthe-

less you may consider this fact in determining whether or not Mrs. Webb was guilty of contributory negligence under all the circumstances."

Which said Defendant's Instruction No. 11-B was granted by the court, to which action of the court plaintiff objects and excepts, on the ground that the language of the instruction is misleading as it assumes that the wearing of high heels is negligence to some extent; it is misleading because it may be construed that way, may be taken that way. Plaintiff does not contend that is really the sense of it; but it may be taken that way. It emphasizes especially the fact that she had on high heels when there is no evidence that this is the cause of her slipping and it emphasizes that one bit of evidence, except one bit of surrounding circumstances which plaintiff thinks is a mistake.

page 188 } Thereupon the defendant offered its Instruction No. 12, as follows:

**DEFENDANT'S INSTRUCTION NO. 12 (REFUSED AS OFFERED):**

"The court instructs the jury that even though you believe from the evidence that Mrs. Webb slipped on oil or some slippery substance on the floor, nevertheless, you shall find for the defendant unless you believe from the evidence that the oil or slippery substance, if any, was placed on the floor by an employee of W. T. Grant Company. If you are unable to determine from the evidence whether the oil or slippery substance, if any, was placed on the floor or not by Grant's employees, you shall find for the defendant."

Which said Defendant's Instruction No. 12 was refused by the court in the form as offered, but was amended by the court to read as follows:

**DEFENDANT'S INSTRUCTION NO. 12 (AS AMENDED AND GRANTED):**

"The court instructs the jury that even though you believe from the evidence that Mrs. Webb slipped on oil or some slippery substance on the floor, nevertheless, you shall find for the defendant unless you believe from the evidence that the oil or slippery substance, if any, was placed on the floor

*or permitted to remain there if discovered*, by an employee of W. T. Grant Company. If you are unable to determine from the evidence whether the oil or slippery substance, if any, was placed on the floor or not by Grant's employees, *or permitted to remain if discovered*, you shall page 189 } find for the defendant."

Which said Instruction No. 12 was granted by the court as amended, to which action of the court in refusing to grant Defendant's Instruction No. 12 and amending said instruction by the inserting of the words "or permitted to remain there if discovered, defendant objects and excepts since there is no allegation in the declaration of any negligence in permitting any foreign substance to remain on the floor and there is no evidence to sustain the insertion of such words. Plaintiff objects and excepts to the action of the court in granting Defendant's Instruction No. 12 on the ground that there is no evidence tending to show that there was ever any oil placed on the floor by anybody but employees of the defendant.

Thereupon the defendant offered its Instruction No. 13, as follows:

#### DEFENDANT'S INSTRUCTION NO. 13 (GRANTED):

"The court instructs the jury that if you believe from the evidence that the sole proximate cause of the accident was the character of the shoe that Mrs. Webb was wearing, then you shall find for the defendant."

Which said Defendant's Instruction No. 13 was granted by the court, to which action of the court plaintiff objects and excepts for the reason that there is no evidence tending to show that the wearing of the shoe had any-  
page 190 } thing to do with plaintiff's falling and because it segregates a thing that there is no evidence to support.

page 191 } At 11:20 A. M. the jury returned to the jury box, the Court read the granted instructions for plaintiff and defendant, and the case was argued by counsel.

At 3:44 P. M. the jury retired to their room to consider of their verdict.

At 4:35 P. M. the jury returned the following verdict:

"We, the jury, find damages for the plaintiff in the sum of \$1,400. W. E. Colonna, Foreman."

The Court: The form of that will be changed to read: "We, the jury, on the issues joined, find for the plaintiff and assess her damages at \$1,400." The Foreman can sign that.

Note: The verdict as reformed by the Court was then signed by the Foreman and the jury was adjourned.

Mr. Williams: May it please the Court, the defendant desires to make a motion to set aside the verdict as contrary to the law and the evidence and for errors in granting and refusing certain instructions, and in the admission of certain testimony.

The Court: The Court overrules the motion.

Mr. Williams: The defendant notes an exception for the reasons stated.

page 192 { JUDGE'S CERTIFICATE.

I, T. J. Barham, Judge of the Corporation Court of the City of Newport News, Virginia, who presided over the foregoing trial of Edna R. Webb, plaintiff, *against* W. T. Grant Company, a foreign corporation, defendant, do certify that the foregoing, together with the exhibits therein referred to, is a true and correct copy and report of the evidence and all of the evidence, the testimony, all the instructions granted and refused by the Court, and other incidents of the said trial of the said case, with the motions, objections and exceptions of the respective parties as therein set forth.

As to the original exhibits introduced in evidence, as shown by the foregoing report, to-wit:

Plaintiff's Exhibit No. 1, shoes worn by plaintiff at time of injury;

Plaintiff's Exhibit No. 2, X-ray plates of November 22nd, 1933, and October 12, 1934,

which have been initialed by me for the purpose of identification, it is agreed by the plaintiff and the defendant that they shall be transmitted to the Supreme Court of Appeals as part of the record in this case, in lieu of certifying to said Court copies of said exhibits.

And I do further certify that the attorney for the plaintiff had reasonable notice, in writing, given by the defendant, of the time and place where the foregoing report of the testimony, exhibits, instructions, motions, exceptions page 193 } and other incidents of the trial would be tendered and presented to the undersigned for signature and authentication.

Given under my hand this 11th day of December, 1934, within sixty days after the entry of the final judgment in said cause.

T. J. BARHAM,  
Judge of the Corporation Court of the City  
of Newport News, Virginia.

page 194 } CLERK'S CERTIFICATE.

I, F. B. Barham, Clerk of the Corporation Court of the City of Newport News, Virginia, do certify that the foregoing report of the testimony, exhibits, instructions, motions, exceptions and other incidents of the trial in the case of Edna R. Webb, plaintiff, *against* W. T. Grant Company, a foreign corporation, defendant, together with the original exhibits therein referred to, all of which have been duly authenticated by the Judge of the said Court, were lodged and filed with me as Clerk of the said Court on the 12 day of December, 1934.

F. B. BARHAM,  
Clerk of the Corporation Court of the City  
of Newport News, Va.

page 195 } State of Virginia,  
City of Newport News, to-wit:

I, F. B. Barham, Clerk of the Corporation Court for the City of Newport News, in the State of Virginia, hereby certify that the foregoing is a true and correct transcript of so much of the record and proceedings as are required by law to be copied in a certain Notice of Motion for Judgment of money between Edna R. Webb, plaintiff, and W. T. Grant Company, a foreign corporation, defendant. (No particular parts of said record being required by either party

in writing to be copied.) I further certify that notice of the application for this transcript of record has been given as the law directs and that said notice has been filed in the papers of said cause in the Clerk's Office of said Corporation Court.

Given under my hand this 12 day of December, 1934.

F. B. BARHAM, Clerk.

Fee of Clerk of Corporation Court \$8.00.

A Copy—Teste:

M. B. WATTS, C. C.

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