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Record No. 4974

In the Supreme Court of Appeals of Virginia at Richmond

WILLIAMSBURG SHOP, INCORPORATED

v.

MAXINE BRYANT WEEKS

FROM THE CIRCUIT COURT OF THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY

RULE 5:12—BRIEFS

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HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4974

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 8th day of January, 1959.

WILLIAMSBURG SHOP, INCORPORATED, Plaintiff in Error,

against

MAXINE BRYANT WEEKS, Defendant in Error.

From the Circuit Court of the City of Williamsburg and County of James City

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Upon the petition of Williamsburg Shop, Incorporated, a writ of error and *supersedeas* is awarded it by one of the Justices of the Supreme Court of Appeals on January 8, 1959, to a judgment rendered by the Circuit Court of the City of Williamsburg and County of James City on the 30th day of July, 1958, in a certain motion for judgment then therein depending wherein Maxine Bryant Weeks was plaintiff and the petitioner and another were defendants; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of seven thousand dollars, with condition as the law directs.

RECORD

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page 20 }

* * * * *

Filed Mch. 26, 1958.

VA. BLANCHARD, Clerk.

BILL OF PARTICULARS.

In response to motion for bill of particulars by defendant, Williamsburg Restoration, Incorporated, plaintiff alleges that the defendants, jointly and severally, were negligent in one or more of the following particulars with reference to the construction of the said stairway and its maintenance:

1. The said stairway being an exit stairway was not to be used for any purpose which would interfere with its value as an exitway, but contrary to Virginia Fire Safety Regulations, Section 1410-4, the platform of said stairway was used to house a display case reducing the already too narrow platform to 30-3/4 inches in width.
2. The treads and landings should have been constructed and maintained in a manner to prevent persons from slipping thereon, but contrary to generally accepted standards of safe stairway construction and maintenance, this stairway is exposed wood and does not have rubber or other anti-slip treads or nosings.
3. The exit width of an interior exit stairway should be not less than 44 inches, but contrary to generally accepted standards of safe stairway construction and maintenance this stairway is only 35-7/8 inches wide.
4. The length and width of the landing on said stairway should not be less than the width of the stairway, but contrary to generally accepted standards of safe stairway construction and maintenance this landing is only 39-5/8 inches wide and when reduced by the display case is only 30-3/4 inches wide.

page 21 } 5. The stairway should have had hand rails on both sides, but contrary to generally accepted standards of safe stairway construction and maintenance this stairway, at the time of the accident, had a railing on only one side.

6. The stairway should have been maintained at all times free of water and other fluid or foreign matter which might make it slippery, but contrary to generally accepted standards of safe stairway maintenance this stairway was allowed, at the time of the accident, to have water or moisture on it thereby making it slippery and footing thereon unsure.

7. There was a failure on the part of the defendants in not exercising ordinary care in the maintenance of said stairway consistent with generally accepted standards of safe stairway maintenance.

MAXINE BRYANT WEEKS
By HARRY P. ANDERSON, JR.
SATTERFIELD, ANDERSON & BLANTON
500 Travelers Building
Richmond, Virginia
Counsel for plaintiff.

* * * * *

page 29 }

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INSTRUCTION NO. 1.

The Court instructs the jury:

That the Williamsburg Shop, Incorporated owed the plaintiff the duty to have and maintain the stairway and platform where the accident happened in a reasonably safe condition considering the circumstances as shown by the evidence. If you believe from the preponderance of the evidence in this case that Williamsburg Shop, Incorporated failed in this duty and that as a proximate result of such failure, if any, the plaintiff was injured while in the exercise of ordinary care for her own safety, you will find your verdict in favor of the plaintiff against the defendant, Williamsburg Shop, Incorporated.

If you also believe from a preponderance of the evidence in this case, should you find your verdict in favor of the plaintiff against Williamsburg Shop, Incorporated, that when defendant, Williamsburg Restoration, Incorporated designed and constructed the stairway and platform it did so with the known purpose of having it used in the operation of a depart-

ment store business to which the public was to be invited, and that said stairway and platform was constructed with a structural defect which defect was the proximate cause of the plaintiff's injuries, and was a defect which said defendant could not reasonably expect the Williamsburg Shop to correct, you will also find your verdict in favor of the plaintiff against the defendant, Williamsburg Restoration, Incorporated.

R. T. A.

* * * * *

page 31 } INSTRUCTION NO. 3.

The Court instructs the jury that in going down the stairway and using the platform in question the plaintiff had the right to assume that the stairway and platform were constructed and maintained in a reasonably safe condition until the contrary should have appeared to a person exercising ordinary care for her own safety.

R. T. A.

page 32 } INSTRUCTION NO. 4.

The Cout instructs the jury: That if you believe from a preponderance of the evidence that there was a defective condition or conditions of the said stairway and platform which caused the plaintiff to fall and be injured which was due in part to the negligence, of the Williamsburg Shop, Incorporated as explained in Instruction No. 1, and in part to the negligence, of Williamsburg Restoration, Incorporated as explained in said Instruction No. 1, then both of the defendants would be jointly liable unless you further believe that the plaintiff was guilty of contributory negligence which efficiently caused the accident.

R. T. A.

page 33 } INSTRUCTION NO. WS-A.

The Court instructs the jury that the mere happening of an accident resulting in injury to the plaintiff is not sufficient to place liability on a defendant. On the contrary, the Court tells the jury that the burden is on the plaintiff to prove by a preponderance of the evidence every essential fact necessary to place liability on a defendant. Preponder-

ance of the evidence as here used does not mean proof by the greater number of witnesses but it is the greater weight of all the evidence before the jury. The jury is the sole judge of the weight of the evidence and the credibility of the witnesses and you have the right to discard or accept the testimony, or any part thereof, of any witness which you regard proper to discard or accept when considered in connection with the whole evidence in the case. In determining the credibility of the witnesses and the weight to be given their testimony, the jury may consider the appearance of the witnesses on the witness stand, their manner of testifying, their apparent candor and frankness, their interest, their bias, if any, their apparent intelligence or lack of intelligence, their opportunity to observe the matters about which they testified, the reasonableness of their testimony, and from all other facts and circumstances appearing in the case, determine which witnesses are worthy of credit and give credit accordingly.

page 34 } Your verdict cannot be based on conjecture, surmise, or sympathy, but must be based solely on the evidence and the law as laid down in the instructions of the Court.

R. T. A.

page 35 } INSTRUCTION NO. WS-B.

The Court instructs the jury that the defendant the Williamsburg Shop was not an insurer of the safety of the plaintiff. On the contrary, the burden of proof is on the plaintiff to prove by a preponderance of the evidence that the defendant, The Williamsburg Shop, was guilty of negligence which was a proximate cause of her fall. Negligence as here used means the failure of The Williamsburg Shop to use ordinary care to maintain its store in a reasonably safe condition. If you believe from the evidence that The Williamsburg Shop was not guilty of such negligence or if you believe from the evidence that it is just as probable that it was not guilty of such negligence as that it was, then the plaintiff has not borne the burden of proof and you must find your verdict for the defendant, The Williamsburg Shop.

By proximate cause is meant that cause which directly contributed to and brought about the injury. Even though the Williamsburg Shop may have negligent, unless there was a direct casual connection between that negligence and the injury, the plaintiff can not recover.

R. T. A.

page 36 } INSTRUCTION NO. WS-C.

The Court instructs the jury that the plaintiff was chargeable with knowledge of any danger in the construction or in the maintenance of The Williamsburg Shop which was open and obvious to a person exercising ordinary care for her own safety under the same or similiar circumstances. The Court further instructs you that even though you believe that any such danger may have existed, yet if you also believe from a preponderance of the evidence that such danger was open and obvious to the plaintiff, so that she knew or should have known of the danger, then she assumed the risk incident thereto and cannot recover on account therefor and you must find your verdict for both defendants.

R. T. A.

page 37 } INSTRUCTION NO. WS-E.

The Court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff's fall was caused in whole or in part by her slipping or by one of her heels turning or catching without fault on the part of the defendant, The Williamsburg Shop, then the plaintiff cannot recover against this defendant and you must find your verdict for The Williamsburg Shop.

R. T. A.

page 38 } INSTRUCTION NO. WS-G.

The Court instructs the jury that the defendant, Williamsburg Shop, is not liable to the plaintiff if the jury believe that the stairs on which the plaintiff fell may have violated the Virginia Fire Safety Standards Act unless it is also proven by a preponderance of the evidence that such a violation was the proximate cause of the plaintiff's injury. The element of proximate cause must be proved by the evidence and will not necessarily be presumed from the fact that a statute has been violated.

R. T. A.

page 39 } INSTRUCTION NO. WS-I.

The Court instructs the jury that the plaintiff is presumed, in the absence of evidence to the contrary, to have exercised

reasonable care for her own safety, and that the burden is upon the defendants to prove the contributory negligence of the plaintiff by a preponderance of the evidence, unless it is disclosed by the plaintiff's own testimony or may be fairly inferred from all of the facts and circumstances of the case; and the jury is further instructed that if you believe from a preponderance of the evidence that the plaintiff was negligent and that such negligence efficiently caused or contributed to the accident, then she is guilty of contributory negligence and cannot recover.

R. T. A.

page 40 } INSTRUCTION NO. WR-1.

The Court instructs the jury that under the facts in this case, the defendant, Williamsburg Restoration, Incorporated, is not liable for the injuries suffered by the plaintiff, Maxine Bryant Weeks, unless her injuries were caused by a structural defect in the stairs and platform and that this defect was in existence and known to or should have been known by the defendant, Williamsburg Restoration, Incorporated, at the time said stairs and platform were constructed, and that this defect was the type of defect, such as a structural defect, that the defendant, Williamsburg Restoration, Incorporated, could not reasonably expect the defendant, Williamsburg Shop, Incorporated, to repair or remedy.

R. T. A.

* * * * *

page 42 } INSTRUCTION WR-3.

The Court instructs the jury that negligence on the part of the Defendant, Williamsburg Restoration, Incorporated, may not be inferred from the mere fact that an injury has occurred, but must be proved by a preponderance of affirmative evidence, either direct or circumstantial. The burden of producing such proof is upon the Plaintiff.

R. T. A.

page 43 } INSTRUCTION WR-7.

The Court instructs the jury that if you believe from the evidence in this case that on or about February 6, 1957, the

Plaintiff, Maxine Bryant Weeks, entered the premises known as the Williamsburg Shop as an invitee of the Defendant, Williamsburg Shop, Incorporated, that the premises is owned by the Defendant, Williamsburg Restoration, Incorporated, and is leased to the Defendant, Williamsburg Shop, Incorporated, for the purpose of operating a clothing store, and that the Plaintiff, Maxine Bryant Weeks, while on the premises and when descending the stairs between the first and second floors of the Williamsburg Shop, fell and injured herself on the said stairs, and if you further believe from the evidence:

1. That at the time of the accident the Plaintiff, Maxine Bryant Weeks, failed to exercise reasonable care in descending the stairs, and which failure to do so contributed to or caused her to fall on the said stairs; or
2. That there were no structural defects in the said stairs and platform at the time same were constructed; or
3. That even if there were structural defects existing in the said stairs and platform at the time same was constructed, but that such structural defects were not the proximate cause of the fall of the Plaintiff, Maxine Bryant Weeks; or

page 44 }

* * * * *

6. That even if the proximate cause of the fall of the Plaintiff, Maxine Bryant Weeks, was a structural defect in the construction of the said stairs and such defect was in existence and known to the Defendant, Williamsburg Restoration, Incorporated, at the time the premises was leased to the Defendant, Williamsburg Shop, Incorporated, but that the defect was a type of defect that the Defendant, Williamsburg Restoration, Incorporated, could reasonably expect the Defendant, Williamsburg Shop, Incorporated, to remedy or guard against injury from such defect; then

You must find for the Defendant, Williamsburg Restoration, Incorporated.

R. T. A.

page 45 } INSTRUCTION NO. WS-D.

The Court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff knew or in the exercise of ordinary care for her own safety should have known of the conditions prevailing in The Williamsburg Shop and accepted those conditions and used the premises as she found them, then she assumed the risk of those conditions. And if you believe further from a preponderance of the evidence that her fall was caused or contributed to by those conditions, then she is chargeable with her fall and the resulting injury and cannot recover and you must find your verdict for both defendants.

Refused.

R. T. A.

page 46 } INSTRUCTION NO. WS-F.

The Court instructs the jury that the plaintiff cannot recover from the defendant, The Williamsburg Shop, on account of the structural condition of its store or any part thereof at the time of its lease thereof from the defendant, Williamsburg Restoration, Incorporated. And if you believe from the evidence that the plaintiff's fall was caused solely by such structural condition, then you must find your verdict for the defendant, The Williamsburg Shop.

Refused.

R. T. A.

* * * * *

page 54 } June 19, 1958.

Harry Anderson, Esquire
Attorney at Law
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Richmond, Virginia

H. Armistead Boyd, Esquire
Bowles, Anderson and Boyd
Mutual Building
Richmond 19, Virginia

C. Vernon Spratley, Jr., Esquire
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Vernon M. Goddy, Jr., Esquire
Attorney at Law
Williamsburg, Virginia

D. B. Taylor, Esquire
Attorney at Law
Williamsburg, Virginia

Re: Weeks *v.* Williamsburg Shop, Inc.

Gentlemen:

Counsel for the defendant, Williamsburg Shop, argued that the verdict should be set aside for four reasons.

First it is contended that the fact that the stairs had been used for many years and the manager stated that he knew of no prior accidents having occurred thereon is conclusive that there is no negligence on the part of the defendant. A quotation from a Missouri Case cited in *State Planters Bank* v. *Cans,* 172 Va. 76, appears to sustain the position but I do not believe that the Court intended to adopt the rule as the law in Virginia since it is contrary to the great weight of authority and it was not the real basis for the decision in that case. See 65 C. J. S. Negligence page 1074.

page 55 } Secondly, the defendant contends that the plaintiff's own testimony shows that she was guilty of contributory negligence. I can not say that this is not a question over which reasonable people would differ and since that issue was fairly submitted to the jury, their finding is conclusive.

The third point is that the plaintiff did not take the stand in rebuttal and deny the testimony of the Manager and other employees that immediately following the accident she stated: "It is not your fault." This seems to be an expression of opinion and would certainly not exonerate the store. Unless they would amount to an estoppel, extra Judicial admissions are not conclusive. 31 C. J. S. Evidence, paragraph 380 and *Worrell* v. *Worrell,* 174 Va. 11; 4 S. E. (2nd) 343.

The last point gives the most concern. The plaintiff's evidence tends to establish the defendant was negligent, in four particulars, namely, failure to have non-skid treads, failure to have a handrail on both sides of the stairway, having a display case on the landing and dampness. It is contended that these acts of negligence were either not proven, or if proved, were not the proximate cause of the accident. An expert witness testified as to the first three items of negligence and stated that the stairway failed to comply with the usual standards in these respects. I agree that his testimony as to the necessity for non-skid treads is not impressive and that the presence of two handrails would not have prevented the plaintiff from slipping but, if such a handrail had been present, she could have grasped it with her right hand and thus have avoided a serious fall.

He also testified that the presence of a showcase reduced the width of the landing and since one instinctively stays away from glass it would cause one descending the stairs to approach them at an angle. The jury, at the defendant's request, had an opportunity to use the stairway and test the truth of this statement. They must have noticed that the display case was a distraction and that it caused one to instinctively look away from the direction in which one is turning. That this is negligence is hardly debatable. The plaintiff testified that one "automatically" looks at the show case (pages 75 & 76) but she did not look at it after she had turned.

The evidence of Mrs. Coddington (page 39-43) coupled with other testimony was sufficient to submit the question of dampness to the jury. The jury could have concluded that the dampness combined with other alleged defects was the cause of the accident.

A fair reading of Mrs. Weeks' testimony discloses that she does not know exactly what caused her to slip. She attempted to attribute her slipping to dampness (page 59) and on motion from the defendant, the jury was instructed to disregard this conclusion of her part. Usually falls occur suddenly and unexpectedly. The fact that she cannot honestly

state the exact cause of her fall should not pre-
page 56 * clude her from recovery. If this were so, one who
was killed or injured so that his memory was impaired could rarely recover. Proximate cause may be proved by circumstantial evidence and it being shown that defective conditions existed at the point where the plaintiff fell, the jury had the right to infer from all the facts and circumstances in the case that the defective conditions were the proximate cause of the accident.

While the point was not argued, it appears from reading the testimony of Judith Weeks that the Courts ruling on her testimony as to dampness is probably incorrect (page 55) but I feel that this is too insignificant to have affected the outcome of the trial.

An order should be prepared overruling the motion to set aside the verdict and entering final judgment for the plaintiff with interest from date of verdict. If the defendant desires to appeal and give *supersedeas* bond, I should think $7,000.00 would be sufficient.

Yours very truly,

R. T. ARMISTEAD.

Filed June 19, 1958.

VA. BLANCHARD, Clerk.

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page 57 }

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FINAL JUDGMENT ORDER.

This day came the parties, the plaintiff and the defendant, The Williamsburg Shop, Incorporated, by their attorneys, the jury having heretofore, on May 9, 1958, returned its verdict in favor of the defendant, Williamsburg Restoration, Incorporated, and the court having heard argument on the motion of the defendant, The Williamsburg Shop, Incorporated, to set aside the verdict of the jury as to it and enter final judgment for same defendant on the ground that said verdict was contrary to the law and the evidence and without evidence to support it, and in the alternative, to set aside said verdict of the jury and grant the said defendant a

new trial for misdirection of the jury and other errors occurring during the course of the trial as shown by the record, and being of the opinion that the same should be overruled, said motion is overruled.

It is therefore ADJUDGED AND ORDERED that the said Maxine Bryan Weeks recover and have judgment against the defendant, The Wiliamsburg Shop, Incorporated, in the sum of Five Thousand Five Hundred Dollars ($5,-
page 58 } 500.00) with interest thereon at 6% per annum from the 9th day of May, 1958, until paid, and her costs by her in this behalf expended, to which action of the court said defendant excepted.

And it being represented to the court that said defendant desires to apply to the Supreme Court of Appeals of *of* Virginia for a writ of error and *supersedeas* to the judgment herein rendered, execution on the same is hereby suspended for a period of four months from this date if the said defendant shall file with said appellate court or one of the justices thereof within the time specified a petition for writ of error and *supersedeas,* and the execution is likewise thereafter suspended until the appellate court or one of the justices thereof has acted thereon, on condition, however, that the said defendant, or someone for it, shall within twenty days from this date enter into a bond in the Clerk's office of this court with surety to be approved by its Clerk in the penalty of Seventy-five Hundred Dollars ($7,500.00) conditioned according to law.

Date: 7/30/58.

Enter:

R. T. A., Judge.

I ask for this:

HARRY P. ANDERSON, JR.
Attorney for Plaintiff.

Seen and objected to:

H. ARMISTEAD BOYD
Attorney for the Defendant,
The Williamsburg Shop, Incorporated.

* * * * *

page 62 }

* * * * *

Filed Sep. 25, 1958.

VA. BLANCHARD, Clerk.

NOTICE OF APPEAL.

To Maxine Bryant Weeks.

You are hereby notified that the defendant, Williamsburg Shop, Incorporated, appeals from the judgment rendered against it in your favor in this matter by the Circuit Court of the City of Williamsburg and County of James City on July 30, 1958.

ASSIGNMENTS OF ERROR.

The defendant, Williamsburg Shop, Incorporated, makes the following assignments of error to said judgment of July 30, 1958:

1. The trial court erred in refusing to grant the defendant, Williamsburg Shop, Incorporated, the opportunity to challenge three jurors peremptorily.

2. The trial court erred in refusing to strike the plaintiff's evidence at the end of the plaintiff's case on the ground that there was no evidence to support a plaintiff's verdict and, in the alternative, that the plaintiff either assumed the risk of the alleged dangers or was guilty of contributory negligence barring her recovery as a matter of law in any event.

page 63 }

3. The trial court erred in refusing to strike the plaintiff's evidence at the end of all the evidence on the ground that there was no evidence to support a plaintiff's verdict and, in the alternative, that the plaintiff either assumed the risk of the alleged dangers or was guilty of contributory negligence barring her recovery as a matter of law in any event.

4. The trial court erred in refusing to set aside the verdict of the jury and to enter judgment for the defendant, Williamsburg Shop, Incorporated, notwithstanding the verdict, on the ground that the same was contrary to the law and the evidence, without evidence to support it, and because, in the alternative, the plaintiff either assumed the risk of the al-

leged dangers or was guilty of contributory negligence that barred her recovery as a matter of law in any event.

5. The trial court erred in granting instructions WR No. 1 and WR No. 7, and in amending other instructions, to permit the jury to find against the defendant, Williamsburg Shop, on the ground that there were defects in the stairway of a type that the defendant, Williamsburg Restoration, Incorporated, could reasonably expect the defendant, Williamsburg Shop, Incorporated, to remedy, contrary to the law and the evidence and without support in the evidence.

6. The trial court erred in refusing to set aside the verdict and grant the defendant, Williamsburg Shop, Incorporated, a new trial for misdirection of the jury and for failure to permit this defendant to challenge three jurors peremptorily.

WILLIAMSBURG SHOP,
INCORPORATED
By AUBREY R. BOWLES, JR.
901 Mutual Building
Richmond 19, Virginia
Counsel.

* * * * *

APPEARANCES:

For the Plaintiff—

Harry P. Anderson, Jr., Esq., of Messrs. Satterfield, Anderson & Blanton, and D. R. Taylor, Esq., of counsel.

For the Defendants—

C. V. Spratley, Jr., Esq., counsel for The Williamsburg Restoration, Inc.

A. Scott Anderson, Esq., and H. Armistead Boyd, Esq., of Messrs. Bowles, Anderson, Boyd, Clarke & Herod, and Vernon M. Geddy, Jr., Esq., of Messrs. Geddy & Geddy, of counsel for The Williamsburg Shop, Inc.

page 2 }

* * * * *

Mr. Boyd: If the Court please, there are two defendants in this case and each defendant, we believe, is entitled to three peremptory challenges. I do not believe that with nine among the three parties involved would leave us enough jurors.

The Court: I never have known from a reading of the

statute whether it means that each defendant is entitled to three or whether it does not.

Mr. Boyd: We believe it does, sir.

The Court: You can read it either way. It says the plaintiff and the defendant shall each have, but it is in the singular.

Mr. Boyd: That is correct, sir.

The Court: There is some difference of opinion among other judges in respect to it. Are the interests
page 3 } conflicting?

Mr. Boyd: They might be.

The Court: My offhand opinion is that the defendants would have to choose among themselves as to the three.

Mr. Boyd: We would like to take that matter up with you because we are serious about it and we do want the opportunity of each defendant having three strikes.

* * * * *

(IN CHAMBERS)

Mr. Boyd: Judge, we hope there will be no conflict between the defendants, but there certainly is that
page 4 } possibility and for that reason we feel like each defendant should have the right to strike three jurors independently of any cause and, as you have just said out in the courtroom, the statute certainly says each may challenge. The wording of it is: "In every case the plaintiff and defendant may each challenge three jurors peremptorily when the juries consist of either five or seven." If the defendants have to have only three between them it might be that one would have one and one would have two, but theoretically it could be that if there were four defendants sued jointly three would each have one and one would have none. I am sure that the statute would never have been written with any such intent as that. Therefore, the only proper intent, it seems to me, is that each defendant should have the privilege of striking three.

Further, sir, unless that is followed then it means that the defendant is at a disadvantage so far as strikes are concerned with respect to the plaintiff's position. The plaintiff has three strikes and neither defendant, if they are limited to three jointly, would have the same privilege that the plaintiff would have. I do not believe that the statute intended that one party should have any privilege over another with respect to peremptory strikes. So we are serious when we ask

that you have enough jurors drawn so that each de-
page 5 } fendant may have an equal right with the plaintiff
as far as peremptory challenges are concerned.

Mr. Harry Anderson: Judge, we take the opposite position. We feel that the defendant, in the practice in Virginia —I don't know of any case that I have ever been involved in, and there haven't been a great number of them, I admit, where the defendants have ever been allowed more than what the statute indicates they should be entitled to, and that is three strikes. In this case, he speaks of putting the defendant at a disadvantage. What the defendants are really after in this case is six strikes to plaintiff's three, and their interests are the same, they have been sued on the same theory.

There is only one possibility, one element, as I see it, that one could be let out and the other stay in, but nevertheless there is no cross-claim between the two defendants. Their interest is to defeat the claim of the plaintiff. I submit to the Court that the practice in Virginia since the three peremptory strikes has come into being has been that the defendants have three and the plaintiffs have three also; and where in a number of cases you would have more than one plaintiff, you might have a number of parties trading as, their interests would conflict as plaintiffs, but nevertheless they get three
strikes.

page 6 } The Court: I have seen it come up once or twice.
I had it come up once in the Federal Court under the third-party practice where you interpleaded another person and at that time Judge Hutcheson made the three of us divide out strikes on the theory that everyone was sort of suing each other. But the general practice has been that while the statute is ambiguous, that each side would only get three strikes. Sometimes you have more than one plaintiff, and it is possible that they could have some conflict of interest on the subrogation claims or something like that. You might argue that the plaintiff was entitled to more.

My ruling will be, especially in this case where it does not look like to me there would be any direct conflict, that you would only be entitled to three strikes.

Mr. Spratley: Your Honor, there could be a conflict of interest because the landlord and the tenant owe different duties to the invitee.

The Court: I understand that, but I think your argument would have more force, let's say, in an automobile accident where an innocent person is injured by the collision of two vehicles and each one is deliberately trying to throw the blame on the other. It would appear to me in that type of case that the argument had more force than it would in this

type of case; but even in those cases it has always
page 7 } been the practice here to limit it to the three and
choose between them. On one occasion when there was an argument about it, I think my ruling was that the defendant first named would strike first and the defendant second named would strike second, and if they couldn't agree I would choose lots between the two. In other words, each one would then choose the last juror and I would draw between the two and with that they made some compromise.

Mr. Boyd: What would you do if there were four defendants?

The Court: If there were four people all having conflicting interests? I guess I would do the same thing, let each one strike one and draw the third of them.

Mr. Boyd: So one would end up without any.

The Court: Without any.

Mr. Boyd: I just suggest this to you, sir. You said it might be more than one plaintiff. I don't believe that in Virginia there can be more than one plaintiff in a suit unless they are an entity in interest. In the Federal Court, for instance, a number of plaintiffs can join in suits as plaintiffs, but that is not true—

The Court: I have seen cases where there are subrogation claims where there seemed to be some apparent conflict, at
least, the parties did not agree on how they were
page 8 } going to conduct the suit. Let's put it that way.
There was the same cause of action and two people trying to collect from it and there was a difference of opinion as to how to proceed, and I think they could very well argue, "Well, we are at odds and therefore we should each have a strike." But the practice is so well established, here at least, limiting each side to three strikes, that I am not going to depart from it although I must concede if I were writing the statute I would certainly make it plainer. It says defendant, singular, and then says "each." What it means when defendants are plural, I don't know.

You had better note his exception to that.

Mr. Boyd: Please.

The Court: What is the other matter?

Mr. Boyd: The other matter, Judge, is that we would like to have the jury and the Court take a view of the premises and we would like to do that before opening statements or before any evidence, because we feel it would give the Court and the jury a much better understanding of the evidence that comes before them.

In that connection, sir, after this accident occurred—first, at the time of the accident, and it did occur on some stairs or

a landing in the stairs, there were no handrails on the wall side of the stairs. Subsequent to this accident, handrails were put up as a precautionary measure, not in con-
page 9 } nection with this accident or because of this accident, but just as an additional thing—

The Court: Mere coincidence.

Mr. Boyd: —the landlord might have wanted done.

Mr. Spratley: Why don't you say maybe that the tenant had them installed?

Mr. Boyd: The tenant might have wanted them also. In order to have the premises exactly as they were at the time of the accident, those additional handrails have been removed and the place that they were put into the walls I do not think is now visible. I want to call that to the Court's attention and to ask the Court to rule at this time that nothing can be said about the fact that those rails were installed after the accident and have now been removed. There is authority for that.

The Court: I was going to say that ordinarily that is the rule, because if you held otherwise you would discourage a person from making repairs. Is there any question about that?

Mr. Harry Anderson: I looked up some law on that. I think that as a matter of direct evidence that is probably true, but I can see how it would be possible to have the matter brought into evidence.

page 10 } The Court: It sometimes comes into evidence when one party asks for a view. That is generally where we get into the hassle and that usually forces it in regardless of any ruling, theoretical ruling, to the contrary.

Mr. Spratley: We have taken a precaution against that now.

The Court: It looks to me like the defendants, having done that, are running the risk of someone falling down the steps today or having a good argument. What possible theory could you comment on it today? If the railing were still there obviously you could comment on it, but under present circumstances what possible reason could the plaintiff reasonably comment on it?

Mr. Harry Anderson: Well, I think it is possible to ask the adverse witnesses if they considered the stairway safe in accordance with accepted or standard engineering practice. Saying yes, I think you might be able to ask why it is that you installed railing on the other side? I think it is possible to come in. I hate to bring it out because that is like telegraphing your punch, but I think it is possible for it to come in that way.

The Court: That punch has been telegraphed so many times I guess we all are aware of it.

Mr. Harry Anderson: The showcase is still there.

Mr. Boyd: That is right, it is exactly like it page 11 } was.

Mr. Harry Anderson: Judge, we had an expert examine these stairs and when he made the examination everything was as it was on the day of the accident except this handrail. Now if the Court is going to rule that out, I will have to get together with him and say, "Now, don't mention anything about this other handrail that was there when you were there," because obviously we have got plans that have been given to us by the other side and they conform with the stairway as he examined it in all particulars with the exception of this handrail.

Mr. Spratley: I don't believe the handrail is on those plans.

Mr. Harry Anderson: No, it is not.

Mr. Boyd: If Your Honor please, that is exactly why we wanted to bring this matter to your attention at this time, to avoid that. We would like you to go, so far, if you will, as to ask Mr. Anderson to caution Mrs. Weeks, for instance, about talking about the rail since then. I think it is true that she has been in the store since the accident and she must have seen the rail and knows of it of her own knowledge, I assume. But regardless of who may know of it, it is just as inadmissible, we believe, sir, and we would like insofar as page 12 } possible to have you rule at this time that this is not admissible and to caution all parties concerned that it should not be stated.

The Court: My ruling is this: The only time that I have ever permitted it to come in before (this is not an uncommon situation) is when one party asks for a view, but this has been alleviated here. I do not see any possible theory for its admissibility. While I realize the plaintiff would like to get it in and I can see considerable logic on his side, but the authorities, as I recall them, are overwhelmingly to the effect that if you permitted it to come in you would discourage a landlord from fixing his premises.

Mr. Harry Anderson: I think that is the general rule. I want to point out to the Court that we have got about six or eight witnesses, some of whom I have seen and some of whom I have not seen, and they have all, I am sure, been in the store since this handrail was put on. I will do the best I can and I will not intentionally bring it in if that is the Court's ruling, but I cannot govern the way a witness is going to testify.

Mr. Scott Anderson: On that basis, if Your Honor please,

I would suggest that the witnesses be brought in and let the Court caution them if he doubts that he cannot caution them sufficiently.

page 13 } Mr. Harry Anderson: I just do not want to have the responsibility. I have six or eight witnesses to testify.

The Court: All right. Why not bring them in and we will make it plain to them right now that it is not in evidence, because once it gets in you can tell the jury to disregard it and that may have some effect and it may not. You have to be a mind reader to know that. I guess the proper thing to do is when you call your witnesses—if you had a list of them here I guess I could have the Sheriff call them—we could bring them back and make it plain to them.

Mr. Harry Anderson: The only ones that I would imagine that might say anything about it would be the ladies who probably go in that store.

Mr. Boyd: Judge, as a matter of mechanics in the way of doing it, you might let the jury retire and have everybody out there and just use the courtroom.

The Court: I guess that would be the easiest thing to do. Is there anything else to take up?

Mr. Harry Anderson: There is one other point I would like to bring out that is a corollary or collateral matter. Mr. Boyd called me previous to the trial and asked if I wanted to share in the expense of the court reporter.

page 14 } (The discussion thereon was reported but not transcribed.)

(The Court and counsel returned to the courtroom and the trial continued.)

(The reporter was sworn.)

(A jury of seven was empaneled and sworn.)

The Court: Would you take the jury out of the hearing of the Court.

(The jury retired from the courtroom.)

The Court: I want to caution the witnesses who are about to testify on this point. I understand there has been some change made in the stairway since the time of the accident. It is the ruling of the Court that the change cannot be shown; in other words, subsequent repairs or alterations cannot be

shown, because otherwise it would discourage a landlord from ever making repairs. So in answering any questions that are propounded, unless the direct question is propounded so that you have to answer it truthfully, I do not want the witness to inject into the matter that there has been some change respecting a handrail on the stairway because that is not proper evidence to be considered by the jury.

Tell the Sheriff to bring the jury back.

(The jury was returned to the courtroom.)

The Court: Do you desire to make an opening statement?

Mr. Harry Anderson: Yes, sir.

page 15 } Mr. Boyd: If the Court pleases, I thought we would have the view.

The Court: I did not rule on that, Mr. Boyd; that was purely an oversight on my part. I generally find this, that we can understand the view better after we have heard some evidence because then we know what to look for, and until you have heard some evidence you go out there and look at something you really don't know exactly what items should be examined. My ruling is that I would permit the view, but I think it would be advisable that we hear at least a part of the evidence, if not all of the evidence, before having a view.

Mr. Boyd: It was our feeling, sir, that they might understand the evidence a little better if they had seen the premises.

The Court: I realize it works both ways, but my feeling is on the whole that it works better after they have heard the evidence and know exactly what the issue is.

Mr. Boyd: Yes, sir.

(Discussion about the calling of doctors is omitted.)

The Court: Was there any motion to exclude witnesses?

Mr. Boyd: Yes, sir, I was just going to make

page 16 } that, if I may. We do make the motion that all witnesses be excluded.

The Court: All right. Call the plaintiff's witnesses.

(The plaintiff and her witnesses were sworn and the witnesses excluded from the courtroom.)

Mr. Spratley: Your Honor, I might point out at this time that we have some photographs and I have not summonsed the photographer, although he will be here at a later time this afternoon, but the only thing he will testify is that he took the photographs.

The Court: Can't you stipulate that?

Mr. Harry Anderson: I do not see any reason why not. I have not seen the photographs.

The Court: At the first recess, would you exchange them and see if you can't save him the trouble of coming. Call the defendants' witnesses.

(The defendants' witnesses were called and sworn.)

Mr. Boyd: If the Court pleases, Mr. Sutton is the manager of the store and is here as the representative of The Williamsburg Shop.

The Court: Each defendant is entitled to have one representative in court.

page 17 } Mr. Spratley: Your Honor, Mr. Cooke is an officer of the defendant Williamsburg Restoration.

The Court: All right.

(The witnesses for the defendants were excluded, save a representative for each.)

The Court: Proceed with your opening statement.

(Mr. Harry Anderson opened to the jury in behalf of the plaintiff.)

(Mr. Geddy opened to the jury in behalf of the defendant The Williamsburg Shop, Incorporated, and Mr. Spratley opened in behalf of The Williamsburg Restoration, Incorporated.)

EVIDENCE ADDUCED IN BEHALF OF THE PLAINTIFF.

Mr. Harry Anderson: Mr. Carl Torrence will be our first witness, Your Honor.

The Court: Would you like an opportunity to talk to him for just a minute?

Mr. Harry Anderson: I thought maybe the Court wanted to inform him of the same matter you informed the other witnesses.

The Court: I see no reason why we should not do that. Suppose we take a five-minute recess, gentlemen.

page 18 } Let me caution you now not to discuss this case with anyone outside of your panel or permit anyone outside of your panel to discuss it with you or in your presence. We will take a five-minute recess.

Carl Torrence.

(Thereupon the Court and counsel and the witness Torrence retired to chambers where the following occurred.)

The Court: Mr. Torrence, I had ruled that the plaintiff cannot show that there had been some change in the stairway after the accident had occurred, and unless you are asked the direct question to that effect, I did not want it injected involuntarily. Of course, if counsel asks you a direct question then you must answer the question.

Mr. Torrence: The only problem I see is to describe the stairs shown on the plans which we do have that were submitted by the Restoration. It shows one rail and when I was there in March or April there are two rails. There is a rail on each side; but when I was there the plans showed only one rail of course.

The Court: I understand. The rail that was added after the accident cannot be brought out in evidence for the obvious reason that it would discourage a landlord from ever making repairs. That is sort of public policy. Commonsense would tell you that it ought to come in, but the law seems to be well settled the other way.

page 19 } Mr. Torrence: I know industry is very reluctant to put guards on machines until a case is settled. I understand that, sir.

The Court: All right, sir.

* * * * *

page 20 }

* * * * *

CARL TORRENCE,
was sworn in behalf of plaintiff and testified as follows:

DIRECT EXAMINATION.

By Mr. Harry Anderson:

Q. Will you state your name, Mr. Torrence, to these gentlemen over here?

A. Carl Torrence, T-o-r-r-e-n-c-e.

Q. What is your occupation, Mr. Torrence?

A. I am a partner of Torrence and Dreelin, consulting engineers in Richmond.

Q. What do you mean by consulting engineers?

Carl Torrence.

A. Well, our firm devotes its attention to structural design of buildings for fifteen different architects in Richmond and we also design industrial buildings for clients. We do some safety work. I am a member of the Virginia Society of Safety Engineers.

Q. Prior to your becoming the senior partner in Torrence and Dreelin, what was your engineering background?

page 21 } A. Well, from 1949 until 1954 I was senior engineer for the Department of Public Safety in Richmond. My job was to check all of the plans for buildings to be built in the city to see that they complied with the Building Code.

Q. This work that you did with Torrence & Dreelin, did that include stair designing and passing upon stairway construction?

A. Yes. We design stairways in buildings that we design.

Q. Does that include stairways for such a building as Williamsburg Shop, buildings of that type?

A. Stores and public buildings, schools and churches, we design the stairs.

Q. Do you do any teaching?

A. My partner and I alternate at terms teaching a coach class for architects for the University of Virginia. We give a coach class in Richmond for young architects who are going to take the State Board Examination and we alternate the teaching each year.

Q. During your career, has any part of it been devoted, would you say exclusively or almost exclusively, to stairway construction and maintenance?

A. From 1937 to 1942 I was engineer with Crookshanks Iron Works in Richmond. Crookshanks build steel stairways

page 22 } that go in schools and churches and public buildings and we designed them and help build them and installed quite a few of them.

Q. Do you recall whether the installation of any of that work occurred in Williamsburg?

A. Yes, I recall once coming here to put one into the basement in Rose's Store. It was a steel stairway to the basement.

Q. Are you licensed in Virginia as an engineer?

A. Yes, I am licensed in Virginia, Maryland, Delaware, Kentucky, and West Virginia.

Q. Mr. Torrence, did you at my request examine a certain stairway from the first to the second floor in The Williamsburg Shop?

Carl Torrence.

* * * * *

A. (Continuing) On March 22, 1958, I inspected the stairway leading to the second floor at The Williamsburg Shop at 414 Duke of Gloucester Street.

page 23 } By Mr. Harry Anderson:

Q. Have you subsequently received through me from the gentlemen on the opposite side, namely, Williamsburg Restoration, the plans and details of that stairway?

A. Yes, I received through you a plan of Williamsburg Shop No. 12, plan is dated April 5, 1948, and apparently revised in June 28, 1948, and July 16, 1948. It is plan No. 123.

Mr. Harry Anderson: If Your Honor please, we offer this in evidence as Plaintiff Exhibit 1.

The Court: All right, sir. So marked.

(The plan sheet was received in evidence as Plaintiff Exhibit 1.)

By Mr. Harry Anderson:

Q. Mr. Torrence, did the stairway that you examined in March conform with the plans there?

A. Yes.

Q. Will you tell us with reference to the standards which it has been your experience as an engineer for safety stairway construction and maintenance: Did this stairway conform to the standard or accepted standard for safe stairway construction and maintenance?

Mr. Boyd: Wait a minute. If the Court pleases, that is a wide open question talking about a lot of things

page 24 } up at the store that according to the opening statement of Mr. Anderson would be immaterial and irrelevant. We would like this witness' testimony with respect to anything he might have to say to be limited to something in connection with the plaintiff's fall. In other words, as I understand from Mr. Anderson—

The Court: I think the defect, if any, should be limited to the landing or immediately following that where the plaintiff is supposed to have fallen. It would be obviously useless to discuss some other defect that did not cause the accident.

A. I understand that. I would have to qualify the question before that you asked me Is this stair like the plan? It is in respects except there is a showcase on the stairway that does

not show on the plan, a glass display case. Now the next question, please?

By Mr. Harry Anderson:

Q. The next question: Does this stairway conform to the accepted standard for safe stairway construction and maintenance which it has been your experience as an engineer?

The Court: I think there should be added to that page 25 } at or near the point where the plaintiff is alleged to have fallen.

By Mr. Harry Anderson:

Q. (Continuing) Commencing with the landing on down to the first floor?

A. I take it you are speaking of the first landing coming down from the top. There are two landings.

Q. That is right. The platform where the showcase is.

A. Yes. Well, all building codes are codes of minimum construction safety. That is the purpose of building codes, and there are a number of them. Generally accepted codes, such as the City of Richmond, Newport News, their codes are modelled after the Southern Conference Building Code or the Building Officials Conference of America Code, and there is one more, the National Building Code. They are the three major codes that most city codes are modelled or copied from those codes.

I would like to cite the City of Richmond code. May I? The City of Richmond code describes, in Section 230, general stair construction—

Mr. Scott Anderson: If Your Honor please, we object to the Richmond Code. I do not think this happened in Richmond and it is not proper to bring in the requirepage 26 } ments for the City of Richmond for this thing in Williamsburg.

The Witness: May I use the National Building Code?

The Court: I would say this, that some accepted standard of practice that prevails with all architects or say prevails generally with architects throughout this area would be permissible, but I do not think we should go into the particular details of the Richmond Code because obviously any regulations that the City of Richmond would make would not have any effect here.

Carl Torrence.

Mr. Harry Anderson: No. I asked the gentleman about the standard which prevails.

The Court: Can't you tell us what the usual standards are that are prevailing?

The Witness: Yes, I can describe it in these codes.

A. Stairways in buildings are generally outlined to be 44 inches wide between the newel post and the post—you know, that is the rail that is mounted in the newel post—

Mr. Harry Anderson: Before we go on, we offer in evidence as Plaintiff Exhibit 2 and 3 these two pic-
page 27 } tures.

The Court: I understand there is no objection?

Mr. Boyd: No, sir.

Mr. Spratley: No, sir.

(The two photographs were received in evidence as Plaintiff Exhibit 2 and Plaintiff Exhibit 3.)

The Court: Perhaps it would be helpful if we showed those to the jury now. I think they will probably get a better idea.

By Mr. Harry Anderson:

Q. You are speaking of a newel post. Would you show that to the jury?

A. Yes, the newel post here is the post here that the rail is attached to.

The Court: Take it up closer to the jury, both photographs, so you can see what you are speaking of.

(The photographs were handed the jury.)

By Mr. Harry Anderson:

Q. You are speaking, sir, of the width of the platform?

A. No, the width of the stair. Now platforms
page 28 } are required to be as wide as a stair, that is as wide in dimension as the stair. In other words, most codes require platforms be 44 inches wide.

Q. What is the significance of having a platform narrower than the stairway in regards to standards of safety?

A. Well, because when you come down the steps you need the same distance to swing around a newel to keep from being

too close to the nose of the tread. That is the purpose of making it as wide as the stair is wide.

Q. What were the dimensions for this platform?

A. The platform was 3 foot 4½ inches wide to the edge of the tread and between the newel and the glass showcase it was 30-3/4 inches wide.

Q. How much space does that give a person swinging around the newel post?

A. 30-3/4 inches, while the stairs themselves between the newel and the wall is 37-3/4 inches. It has been reduced from 37-3/4 to 30-3/4, about 7 inches. The case itself was 8-7/8 inches wide and it extends all of the way across the platform.

Q. Mr. Torrence, what significance with regards to standards of safety is the showcase on the platform?

A. Well, all codes prohibit any obstructions being put on stairways. Stairways are put in to make a safe
page 29 } egress from a building and should not have any obstructions, particularly glass.

Q. Is that consistent with the standards of safety as you practice them as an engineer?

A. No.

Q. That is not?

A. No.

Q. What about the anti-slip nosings or treads?

A. Yes. These are wood treads and there was no rubber mat or no nosing of any kind. There are many manufacturers who manufacture safety nosings for treads and you have seen some of them on—this is one manufacturer who specializes in it, Worcester; here is another one, Martin.

Mr. Scott Anderson: If Your Honor please, we object to him showing those exhibits to the jury. They are not admitted in evidence yet at all.

The Court: Do you desire to admit those in evidence?

Mr. Harry Anderson: Just a moment. I would like to ask this—

By Mr. Harry Anderson:

Q. Is there any anti-slip nosing or tread that is designed or suitable and available for this particular stair-
page 30 } way?

A. Yes.

Q. In February of 1957: What was your answer to that?

Carl Torrence.

A. Yes. I have a picture here of one type, 2-A, on page 7 of the Worcester catalog.

By The Court:

Q. Let me ask you this question. Is it customary or general practice among architects to install such nosing as you have mentioned?

A. Yes, I believe it is customary. Most codes have such a statement as this: "Treads and landings shall be constructed and maintained in a manner to prevent persons from slipping thereon." That is a very customary statement in building codes.

Q. I wasn't asking that, what I was particularly getting at is it generally considered by architects to be unsafe not to have such protected nosing or would just ordinary plain wooden stairs be acceptable?

A. No, I think it is customary to provide a nosing, and I would like to say architects are not trained in safety to the extent engineers are, they don't specialize in safety, they specialize more in aesthetics.

Mr. Harry Anderson: Your Honor, see this gentleman is an engineer, not an architect.

page 31 } The Court: I understand.

Mr. Harry Anderson: We offer this, if Your Honor please.

Mr. Boyd: It has a whole lot of things besides what he is talking about. I think he has explained to the jury what he had in mind. There is a lot of extraneous matter in it.

Mr. Harry Anderson: We can cover only the pertinent matter.

Mr. Spratley: What is the date of that publication?

Mr. Harry Anderson: Do you know the date of that publication?

The Witness: It is probably on the front.

The Court: I do not see any date on it.

By The Court:

Q. Do I understand you to say that this one that you have circled here is a type that is customarily used in public buildings?

A. Available for public use. Rubber mat treads are often used, rubber treads for wooden stairs are available at hardware stores and are often used.

Q. I understand as a matter of common knowledge that

they are available, but the question that I am try-
page 32 } ing to get from you is that an ordinarily accepted
practice in public buildings to have this or some similar type tread?

A. Yes. In cities it is customary to have some type of safety nosing on treads.

Q. Similar to this?

A. Yes, sir.

The Court: I will admit this one page. I do not think we need more. Is it all right to tear this?

The Witness: Yes, sir, it is all right with me.

The Court: I will mark in ink the one that you have circled.

(The catalog page was received in evidence as Plaintiff Exhibit 4.)

By Mr. Harry Anderson:

Q. You spoke of the anti-slip treads and nosings; after having seen this floor what would be in your opinion the effect of any dampness or water on the stairway?

A. Water would obviously make it slicker than when it was dry.

Q. I believe you spoke about the width of the stairway; did
that conform with the standard practice for simi-
page 33 } lar stairway construction and maintenance?

A. The generally accepted width in building codes is 44 inches. This stair is 37-3/4 inches between the newel and the wall.

Q. Is that generally the accepted practice, what you have just stated?

A. The generally accepted practice is to make it 44 inches wide.

Q. And this was how much?

A. 37-3/4 inches. Now some codes permit stairs to be 3 feet wide when the occupancy is limited to a small number of people.

Q. What about a railing on the right going down the stairway? What, in your opinion, is the practice and the acceptable standard with regard to safe stairway construction and maintenance?

A. Codes generally require rails on both sides of stairways.

Q. Is that the acceptable practice?

Carl Torrence.

A. Yes, it is the acceptable practice to have railings on both sides. Rails are permitted to project within the required widths about 3½ inches.

Q. And assuming that there was no rail on the right in this particular stairway, that would in your opinion be—

page 34 } A. It would be more dangerous than had a rail been there.

Q. I have asked you about accepted practice. What about the minimum standards? In these various items that you have gone over did you find that they met the minimum standards for safe stairway construction and maintenance?

A. No. The least width that I know of any code permitting would be 3 feet wide for a stairway and platform and this stair at the platform is only 30-3/4 inches wide between showcase and newel post.

Q. What effect in your opinion did the showcase or the display case showing merchandise have as a distracting element?

A. That is probably one reason nothing is permitted on stairways, no obstructions are permitted on stairways, plus the fact that you need the width to swing around the newel post and get started down a straight direction rather than stepping off at an angle.

Mr. Harry Anderson: I have no further questions.

CROSS EXAMINATION.

By Mr. Spratley:

Q. Mr. Torrence, you are not an architect, are you?

A. No, sir, I am an engineer.

page 35 } Q. What did you say the job of a structural engineer was?

A. We design the structural phases of buildings in cooperation with architects; also we design industrial buildings without the association of architects; warehouses, factories, mills.

Q. Don't you basically deal in footings and foundations and bare walls and floors and ceilings and roofs?

A. No. We do that and we also deal in the safety features of a building. If a stairway was concrete, we would have to be the ones to design it because architects are not trained in concrete design.

Q. Who takes care of interior details in the design of a building?

A. Well, if we are associated with the architect the architect takes care of the space assignments. But having been in

the Safety Department for the City of Richmond I am consulted almost daily about such problems as this.

Q. Mr. Torrence, how would you classify these stairs under building codes?

A. May I refer to our code, please? This would be classified in Richmond under Section 230, new stairs and old buildings, general stairway construction for new buildings or for new stairs in old buildings.

page 36 }

Q. How would that be classified under the Virginia fire safety regulations?

Mr. Boyd: If the Court pleases on behalf of Williamsburg Shop we do not feel that any fire safety regulations are pertinent to this case.

The Court.: Don't they deal primarily with permitting escape?—which of course did not occur in this case. What would be the purpose of that?

Mr. Spratley: Most all of these codes that he has been referring to are minimum fire standard codes which they prescribe the width of stairs, the height of the risers, the width of the treads.

The Court: I think some of the other codes have other things in mind besides that particular point, but it looks like to me a fire code would be concerned primarily with enabling someone to escape from the second floor.

Mr. Spratley: They have minimum safety requirements in regards to the construction of stairs.

page 37 } By Mr. Spratley:

Q. Mr. Torrence hasn't your testimony been based in general on fire safety regulations?

A. No, I refer to the three major building codes that all of the city codes are modelled after: the National Building Code, the Building Officials' Conference of America Code, and the Southern Conference Code. Petersburg is on the National Code, Newport News is on the Southern Conference Code. Codes are minimum standards of safety. For instance, they describe the capacity of steel beams, which has nothing to do with fire; it describes the capacity of wood joists; nails, the capacity, the holding power of nails. All of that is described in these building codes.

By The Court:

Q. Let me ask you this. The fire code on which I have to rule, does that have any bearing on a person ordinarily walk-

ing down the steps or does it pertain primarily to permitting sufficient room for exit in case of fire?

A. I think the answer to that is both.

Q. In other words, this code does pertain to ordinary safety such as walking up and down the steps—the fire code?

A. Yes, it describes the width of the treads and the heights of risers; whether you are in a big hurry or whether you are taking your time, that would have some bearing on page 38 } how safe the stairway would be. The width of it would have some bearing on how safe it would be under ordinary use.

Mr. Boyd: If Your Honor please, I wish you would look at it and see for yourself that it is a fire safety regulation promulgated by the State Corporation Commission Fire Marshal.

Mr. Spratley: I wish you would look at who prepared some of those other publications.

The Court: My ruling is that the fire safety code has nothing to do with this accident and is immaterial.

By Mr. Spratley:

Q. Mr. Torrence, why do they require steps to be 44 inches in width?

A. Well, it depends upon the occupancy of the rooms or floors using the stair. They have to be wider than that in many cases, depending upon the number of people using a floor. But 44 inches is the accepted minimum except in a few cases where they are permitted to be 36 inches. Some codes allow 10 persons above the floor to use a stair and you can cut it to 36 inches. Some codes permit 35 people. page 39 } If the occupancy is less than 35, the stairs can be only 36, but above that the minimum is 44 inches.

Q. What did you say was the actual width of these stairs?

A. My measurement between the newel post and the wall at the tread on which the accident occurred, I measured 3 foot 1-3/4 inches.

Q. What was the width of the stairs at that point after you turned?

A. 3 foot 5, between the next newel post and the wall or between—yes, 3 feet 5 inches.

Q. 3 feet 5 inches?

A. That is right.

Q. How many different types of safety treads are there?

A. Quite a few. There is a rubber and there is aluminum

with the lines in it, noses like they use where you have linoleum treads. There are some in the field as Alundum. I think the catalog type is that type. It is a metal with places to put in non-slip metallic compound.

Q. Do you consider the lack of safety treads a structural defect?

A. No. I testified that I was competent in safety matters as a member of the Virginia Society of Safety Engineers and do quite a bit of safety work.

page 40 } Q. How difficult is it to install safety treads?

A. Well, the rubber mat type are very easy to install. The type the catalog shows of course would have been installed when it was built. It is no problem.

Q. Are there any other reasons for installing safety treads other than to give better traction?

A. To prevent falling.

Q. That is the sole reason that they are installed?

A. That is the only reason that I can think of why you would install them.

Mr. Boyd: If Your Honor please, I cannot see how the width of the stairway or the width of the landing is material to the cause of this lady's fall with relation to the opening statement of her counsel. For that reason, sir, I ask that this evidence be excluded from the consideration of the Court and the jury.

The Court: Mr. Boyd, I had thought about it, too, if the objection had been made, but you did not make that objection. Before I ruled on it, I would certainly give plaintiff's counsel an opportunity—

Mr. Boyd: If you recall, I made the objection at the beginning of his testimony that it should be limited

page 41 } to the facts set out in the statement of the plaintiff's counsel at the beginning.

Mr. Harry Anderson: If Your Honor please—

The Court: We are taking too much time. Let me ask him this.

By The Court:

Q. Mr. Torrence, what bearing does the width of a stairway have on a person being more apt to fall?

A. Well, a real narrow stairway, you cannot swing around a newel at arm's length and be in a position to head directly down the steps, you have to come at it obliquely by coming closer to the newel with elbow bent and you run obliquely to

the stair and you are not stepping straight down but walking down diagonally.

Q. In other words, you think it would be safer for one walking down the steps, he would have less chance of falling, if the stairs were wider than if they were narrower?

A. Yes. That is why they require platforms to be wider and why they require stairs to be wider.

The Court: I overrule your objection.

Mr. Boyd: Exception.

page 42 } By Mr. Boyd:

Q. Mr. Torrence, can you make a turn in 30 inches?

A. Yes, you can make a turn in 30 inches.

Q. And if you have made a turn—

Mr. Harry Anderson: Let him finish, please, Mr. Boyd.

Mr. Boyd: He answered my question.

Mr. Harry Anderson: If Your Honor—

The Court: Let's not waste any time bickering about the thing.

A. (Continuing) A ladder is safe for a man accustomed to using a ladder, but it is not safe for someone not accustomed to using it.

By Mr. Boyd:

Q. If one had used these steps many times and they were open and obvious to them, would you say 30 inches would be a safe space for that person to come down?

A. No, I wouldn't think so, otherwise codes would permit narrower steps. All the safety codes require them to be wider than that.

Q. Now, sir, if the person involved had made the turn and was facing directly the steps, the width of the landing wouldn't have anything to do with it, would it?

A. Well, I don't know because I don't know whether you could turn it—I don't even know that the plaintiff
page 43 } had her hand on the rail. I don't know what condition—in fact, I didn't know until now that it happened right on the platform until I came to court.

Q. I believe you said, sir, that the minimum width for stairs was 36 inches?

A. Yes, that is the minimum I have ever heard of in any code.

Carl Torrence.

Q. I believe you testified that the width between the newel post, which is the narrower part of the stairs, was 37-3/4 inches?

A. Yes, that is the part between the newel post and wall.

Q. And I believe you testified that the width of the stairs below the newel post increased to 41 inches?

A. Yes, between the newel at the second floor—between the newel and the wall it is 41 inches.

Q. If a person has once started down the stairs, does the width of the stairs have anything to do with the safety involved?

A. Considering that no one is passing, I wouldn't see that it was too important as long as it was 36 inches or more wide because 36 inches is permitted when only 10 people or, in some cases, 35 people use the second floor.

Q. Then if the plaintiff in this case had started down the stairs, you would not say that the width of the
page 44 } stairs was an unsafe factor as far as her fall is concerned?

A. No, I haven't said that I don't believe.

Q. What did you just now say?

A. Talking about the stairs?

Q. Yes.

A. I said some codes permit 36 inches of stairs when the second floor is limited to 10 people and in some cases 35 people. It depends on the code.

Q. Do you know whether there is a code in Williamsburg?

A. I don't think you have a building code.

Q. Then in whatever condition the steps are in they are not in violation of any code applicable to this city, are they?

Mr. Harry Anderson: That is a question of law, Your Honor.

The Court: I would think if he is familiar with the thing he could testify.

The Witness: May I answer that?

Mr. Harry Anderson: The judge says you can.

The Court: Yes, he asked the question.

A. The Virginia Legislature enacted ordinances in Chapter 493 of the Acts of Assembly 1948, enacted cer-
page 45 } tain ordinances that are for new buildings and retroactive for old buildings. In my opinion this does comply with these ordinances although—that is, the

ordinances I take it that the Legislature gave the Corporation Commission to make rules.

By Mr. Boyd:

Q. Don't those regulations that you are now talking about apply to fire hazards?

A. They apply to all buildings and were to be complied with within a very short time. In my opinion this stair does not comply with them.

Q. Is the thing—

A. Yes, that is right.

Q. What you are talking about is the Virginia Fire Safety Regulations?

A. Yes, sir. That is not used, I don't believe except in the acts of the Legislature. I don't believe that name was used, it may be. But it again is a safety code.

By Mr. Spratley:

Q. You say the Virginia Safety Regulations are a safety code?

A. Yes, it is a safety, it is a fire safety a building safety code because it copies this data about stairs from these other National Codes, these generally accepted standards. It is the same thing reworded.

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Mr. Boyd: If the Court please, we take the position that his testimony is not relevant to this case since he is talking about fire safety.

The Court: I have ruled on that, Mr. Boyd, but you asked him if it violated any code and he answered in the affirmative. The only reason it was brought up was in answer to your question. But I will instruct the jury that the violation of the fire code has no bearing on the cause of plaintiff's accident.

By Mr. Boyd:

Q. Did you have any trouble getting up the courthouse steps this morning?

Mr. Harry Anderson: If Your Honor please, I object to that.

The Court: I think perhaps if he is going to bring in—I will permit him to ask it.

Mr. Harry Anderson: I submit it isn't relevant.

The Court: Overrule the objection.

Carl Torrence.

A. I noticed some violations there, too. I take
page 47 } it the enforcement officer for the State of Virginia
managed to stay away from Williamsburg.

By Mr. Boyd:

Q. In other words, you tell the jury that the Courthouse steps out here are unsafe steps?

A. Yes. There is only a rail on one side and I was careful to keep my hand on the rail.

Q. Regardless of anything else, if you had your hand on the rail on one side you could not have reached the rail on the other side if there had been one, could you?

A. Not on a wide stairs, no.

Q. So if a person is using the steps with a rail on one side and is using that rail, they have got all of the help that they can get from rails right there; isn't that true, sir?

A. Yes, it is customary to only have one rail on a narrow stairs; a double rail comes in when you have one 44 inches wide and at the same time under codes that are required to have two rails.

Q. Then as a matter of fact, sir, it would be better if these stairs in the Williamsburg Shop which are 37-3/4 to 41 inches not have an additional rail?

A. I wouldn't go along with that at all. I believe if you could grab it with two hands, assuming that you had bundles
in one hand you could grab to the side if you had
page 48 } a free hand.

Mr. Boyd: I have no other questions.

RE-DIRECT EXAMINATION.

By Mr. Harry Anderson:

Q. Mr. Torrence, forgetting codes but with regard to the standard practice for safe stairway construction and maintenance, I ask you did these stairs conform?

A. No, I don't think so.

Q. For the reasons that you have given?

A. Well, for reasons mainly that the platform has an obstruction on it, both it narrows down the platform width to what I would consider unsafe width and it also distracts a person. No one wants to walk up too close to a glass because of fear of breaking it. You naturally by instinct stay a distance away from glass that you won't stay away from plastered walls.

Carl Torrence.

Mr. Boyd: If the Court please, I hate to keep on objecting, but the statement of plaintiff's counsel is that the lady had her back to the glass at the time of her fall.

The Court: We will have to rule on that when we get to it. But my understanding of his statement is that she page 49 } had just turned at the landing at the point. So I will permit him to describe the conditions on the landing. We have already been over that.

A. (Continuing) You asked the question about whether if the platform was wet would it be more dangerous. If it was wet, it shouldn't—

The Court: Haven't we been over all that before?

Mr. Harry Anderson: We have, but I wanted to bring out the point that it was in violation of the standard practice for safe stairway construction rather than these codes. There has been a lot of talk about codes.

The Court: I think he has made that clear.

By Mr. Harry Anderson:

Q. I will ask you one further question in regard to the type of building that Williamsburg Shop is. What in your opinion would be the standard or accepted width of the stairway in accordance with safe stairway construction and maintenance?

A. It depends on the total occupancy of the second floor. If it is reasonable to believe there would be as page 50 } many as 35 or 40 people up there at any one time, then the stair under all standards should have been at least 44 inches wide and the platform should have been the same width.

Mr. Harry Anderson: Thank you. I have no further questions.

RE-CROSS EXAMINATION.

By Mr. Boyd:

Q. If there were 10 people above these stairs on the second floor, would you say that the width that you found was sufficient for 10 people?

A. The platform was not, no. The stair is, but the platform is not.

Q. It is a fact, sir, isn't it, that these stairs out here in the Courthouse do not have any safety tread on them?

A. No, they do not.

Q. And the tread and the nose of those stairs are substantially similar to the trend and nose of the stairs up here at Williamsburg?

A. Yes, sir.

Mr. Boyd: That is all.

page 51 } RE-DIRECT EXAMINATION.

By Mr. Harry Anderson:

Q. How about the width these stairs are out here?

A. I don't know. They are quite wide.

Q. They are a great deal wider than at Williamsburg?

A. Yes, sir. The platform is wider.

* * * * *

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CHARLIE F. STOUT,
was sworn in behalf of the plaintiff and testified as follows:

DIRECT EXAMINATION.

By Mr. Harry Anderson:

Q. Mr. Stout, I do not believe I have seen or talked with you. Will you please state your name to the gentlemen of the jury?

A. Carlie F. Stout.

Q. What connection do you have with the United States Weather Bureau, Mr. Stout?

A. We have the station up there to measure the precipitation and the maximum and minimum temperatures.

Q. Are you responsible for keeping these records? Do you keep records of the precipitation, that is, the rain and the maximum and minimum temperatures?

A. I have been responsible for that since the beginning of 1957, but in February I was not.

Q. You were not?

A. No, sir.

Q. Were those records turned over to you by your predecessor?

Charlie F. Stout.

A. Yes, sir.

Q. And they are part of your office, are they?

page 53 } A. That's right.

Q. Would you refer to those records, Mr. Stout, and tell us whether there was any rain or precipitation in the Williamsburg area commencing with February, 1957.

A. I have here a daily report for February, 1957. This monthly report is a copy off of the daily report.

Q. You can refer to your daily report or your monthly report, it doesn't make any difference.

A. On February 1, 1957, there was .72 of an inch of rainfall.

Q. That was rainfall?

A. Yes, sir.

Q. How about on February 2?

A. February 2, 1957, was .34.

Q. On February 3?

A. .53.

Q. On February 4?

A. February 4 was .09.

Q. How about on February 5?

A. It was .05.

Q. How about February 6?

A. .11.

Q. How about February 7?

A. .32.

Mr. Harry Anderson: I think that covers it,

page 54 } Mr. Stout. Thank you very much.

The Court: Any questions?

Mr. Geddy: Yes, I have a few, Your Honor.

CROSS EXAMINATION.

By Mr. Geddy:

Q. Mr. Stout, you said on February 4 there was .09 inches of rain.

A. I will check and make sure.

The Court: That is what I have.

By Mr. Geddy:

Q. Describe generally to the jury how much rain that represents. Does that represent a hard rain all day long or light drizzle or just what?

A. Well, it could not be a hard rain, what I mean, just a big

dash of rain, I don't think; or it could be just a misty rain, not maybe rain the whole 24-hour period, just a light, misty rain.

Q. Do your records show which of those occurred on that day?

A. On the 6th?

Q. Well, let's go to the 6th. You testified it was .11 inches on that day.

A. Well, on the 6th there was .11 of an inch precipitation measured. Mr. Cecil Haines was the operator that page 55 } taken those measurements on the 6th day of February. He drawed a line here during the hours from 5 p. m. to 12 midnight indicating that there was no rainfall up until 5 o'clock, you see. He had drawed a line indicating that it did rain from 5 p. m. to 12 midnight.

Q. So that the records you had indicate that there was no rainfall on February 6 prior to 5 p. m. and that thereafter you had .11 inches?

A. Now he give a brief description of the weather condition here. He says, "Cloudy and rainy all day, not so cold." But if it rained all day, he didn't mark a line through the hours here indicating that it did rain.

Q. Where sir, is this reading made in respect to the City of Williamsburg? Where is your station?

A. City Filter Plant.

Q. How far is that from the city?

A. Two miles north of Williamsburg.

Q. On the Waller Mill Road?

A. On the Waller Mill Road.

* * * * *

page 56 } RUTH CODDINGTON,

was sworn in behalf of the plaintiff and testified as follows:

DIRECT EXAMINATION.

By Mr. Harry Anderson:

Q. Mrs. Coddington, will you speak loud enough for these gentlemen to hear you? Will you state your name, please?

A. Ruth Coddington.

Q. What is your occupation?

A. Housewife.

Q. Where do you live?

Ruth Coddington.

A. 114 Matoaka Court.

Q. I assume you are acquainted with the plaintiff in this case, Mrs. Weeks?

A. That's right.

Q. How long have you known her?

A. About nine years.

Q. In what capacity? I mean, what has been your association?

A. Just friends.

Q. During this time have you lived near her, been a neighbor?

A. You mean since the accident, since this?

Q. Well, before the accident.

page 57 } A. No, she lived on one side of town and I the other.

Q. But you knew her?

A. Yes.

Q. On the day this accident happened, Mrs. Coddington, will you tell us whether you were in the Williamsburg Shop?

A. Yes, sir.

Q. Will you tell us the reason for your being there?

A. I was meeting her there.

Q. For what purpose?

A. To do a little shopping. She was buying an evening dress for her daughter.

Q. For her daughter Judy?

A. That's right.

Q. Where did you park your car when you went to the shop?

A. To the best of my recollection, I parked on Front Street just two or three—about the corner at the Williamsburg Shop.

Q. About a block to the shop?

A. About half a block.

Q. And yet met Mrs. Weeks and her daughter where?

A. In The Williamsburg Shop.

Q. Do you recall as you were walking along

page 58 } what the condition of the pavement was, sidewalk?

A. It was wet; it was raining some.

Q. Was there any matting in the Williamsburg Shop or just outside of the shop or by the door to dry your feet on?

A. If there was I haven't seen it.

Q. You met her in the shop and where did you go in the shop?

A. Upstairs on the second floor.

Q. The three of you?

A. That's right.

Ruth Coddington.

Q. What did you do there?
A. Looked at evening dresses.
Q. Did she purchase one?
A. She got one, yes.
Q. After the purchase was made, where did you go?
A. Back downstairs.
Q. Do you recall whether you went down before Judy or Mrs. Weeks or just what order did you go down?
A. I went down first.
Q. You went first?
A. Yes.
Q. And Judy followed you?
A. Her youngest daughter, Joey, was right behind me.
Q. Then Judy?
page 59 } A. Then Judy.
Q. Did you see Mrs. Weeks fall?
A. No, I heard it.
Q. You heard it?
A. Yes.
Q. Where were you when you heard it?
A. Several steps from the foot of the stairs. I had taken several steps after I got down.
Q. What did you do when you heard it?
A. I picked up her smallest daughter and went back upstairs where she was.
Q. You went back up. Did you help her up the stairs? Do you know?
A. No.
Q. You went back up to the second floor?
A. That's right.
Q. What assistance did you give her after this?
A. I personally didn't do anything as long as she was in the store, but I did take her children home and then went back to the hospital and picked her up afterwards.
Q. I believe you will have to speak a little bit louder, Mrs. Coddington. You took her children home, I believe?
A. That's right.
page 60 } Q. And then later on you did what?
A. I went back—I went to the hospital to pick her up and take her home.
Q. Will you tell us when you saw Mrs. Weeks after you heard her fall? You turned and saw her—
A. That's right.
Q. Will you tell us what you saw, approximately where was she on the stairway?

Ruth Coddington.

A. Well, she was at the landing. Well, one foot was down one or two steps on the landing.

Q. That is the landing that separates the first and the second floor?

A. That's right.

Q. What did you notice about her face?

A. I noticed it was bleeding. She put her hand up to her face; you could see blood going down her arm.

Q. When you brought her home that night what was her condition?

A. She seemed to be in pain and she was very upset.

Q. Did you have occasion to see her any more after that?

A. I went back out there later that afternoon and I saw her the next day and for several days after that.

Q. Can you describe to us what her condition
page 61 } was as you saw it?

A. Well, it was approximately the same. She probably was feeling a little better, but I could tell she was still in some pain.

Q. Did you notice whether she was having any difficulty with her back?

A. Yes.

Q. What did you notice about that?

A. The way she sat down and the way she stood up, and walked around even. She could hardly—well, she couldn't do it with very much ease.

Q. And you continued to see her for what period of time after that would you say?

A. Oh, I don't know how long it was, for several days every day and then kept in touch with her by phone all of the time, too, for several weeks. I don't know just how long.

Q. Can you tell us, Mrs. Coddington, with reference to the stairs, whether there was any moisture or dampness on them?

A. To the best of my recollection they were damp.

Q. I believe Mrs. Weeks moved out away from Williamsburg for a period of time; is that true?

A. That is right.

Q. Do you recall approximately when that was?
page 62 } A. That was in October.

Q. When she came back where did she live?

A. She lived with me.

Q. When was that that she came back?

A. In March. I don't remember the exact date.

Q. What was her condition when she came back so far as you were able to observe?

Ruth Coddington.

A. Well, she was still having some trouble with her back.

Q. What if anything did you notice about the scar on her cheek, about the manner in which she conducted herself when she was with others?

A. Well, I think ever since then she has been very conscious of that; she would act like she tried to hide it by putting her hand up over it.

Q. Did you see the scar before it was fixed by Dr. Smith?

A. That is right.

Q. Could you in your own terms describe it?

A. Well, it was pretty red looking and kind of rough and seemed to have a knot or something right on the scar for a right good while. I don't know just exactly how long.

Q. Did you notice anything about her face other than the scar?

A. You mean since then?

page 63 } Q. No, at the time?

A. Oh, she had a very black eye, her face was swollen, her face was bruised on that side it looked like.

Q. Is Mrs. Weeks still living with you?

A. No.

Q. How long did she live with you?

A. About a month.

Q. Did she work when she came back?

A. That's right, she did.

Mr. Harry Anderson: I have no further questions.

CROSS EXAMINATION.

By Mr. Geddy:

Q. Mrs. Coddington, you said you preceded Mrs. Weeks down the stairs; correct?

A. That is correct.

Q. And you did not see her when she fell, you saw her afterwards?

A. That's right, I saw her immediately after she fell.

Q. When you heard her, I assume that you turned and immediately looked?

A. That's right.

Q. Where was Mrs. Weeks standing with respect

page 64 } to the railing and the newel post at that time?

A. Well, she was standing at that landing there with one foot anyway down below and one I think was on up, looked like she had one knee on the floor. That is what it looked like to me.

Ruth Coddington.

By The Court:

Q. This was after she had fallen?

A. Yes, sir.

Q. In other words, her body was on the landing and one foot was, you say, one or two steps down?

A. Yes. And looked like maybe the knee was—

Q. On the landing?

A. Yes.

By Mr. Geddy:

Q. Mrs. Coddington, what I am getting at was she in the center of the steps now, the up and down center?

A. No, she was next to the rail.

Q. Was she holding onto the rail?

A. Yes.

Q. She was holding onto the rail at that time?

A. Yes.

Q. You had come down the steps a very short time before she had, had you not?

A. Yes.

Q. Did you see any trash or debris on the steps?

page 65 } A. No, I didn't see anything.

Q. Did you see any defect in the steps, any board or anything of that nature, that might have tripped her?

A. Not then.

Q. You said the steps were damp?

A. Yes.

Q. Were the steps damp at the point that you saw her after the fall?

A. Well, it seemed to me that the steps were damp. Whether right there or not, I didn't notice that particularly.

Q. Was that dampness that appeared to have been tracked in by customers from the outside?

A. I would say I think it was.

Q. Was it heavier at the bottom of the steps?

A. I don't know, no.

Q. Did you have any difficulty, did you slip or fall, when you came down the steps just before?

A. No, I didn't.

Q. You said you visited Mrs. Weeks the day following the accident, several days after that?

A. Yes.

Q. Did Mrs. Weeks go back to work the day after the accident?

A. I don't think so.

Judith Ann Weeks.

Q. Do you remember the time of day that you visited her?
A. No, I do not remember.
page 66 } Q. She worked at odd hours, did she not?
A. Yes. She had different hours different days; she didn't always work the same.
Q. And you do not know whether she had gone back to work at that time?
A. She didn't go back to work that night.
Q. She did not go back to work that night?
A. No, I am sure.
Q. You don't know whether she went to work the following day?
A. I am not sure about that.

Mr. Geddy: That is all.
Mr. Spratley: No questions.

RE-DIRECT EXAMINATION.

By Mr. Harry Anderson:
Q. Did you have anything in your hands or arms as you were coming down the steps?
A. Nothing but my pocketbook, as I can remember.
Q. How about Mrs. Weeks? Do you remember what she had?
A. No.
Q. You do not?
page 67 } A. No, I don't remember whether she or her daughter was carrying the package. I don't know.

* * * * *

page 68 } JUDITH ANN WEEKS,
was sworn in behalf of the plaintiff and testified as follows:

DIRECT EXAMINATION.

By Mr. Harry Anderson:
Q. Judy, will you state your name to these gentlemen over here?
A. Judith Ann Weeks.
Q. What relation are you to this lady here?
A. I am her daughter.
Q. How many children are there in the family?

Judith Ann Weeks.

A. Three.
Q. And you are the oldest?
A. Yes, sir.
Q. On the day this accident occurred, I believe you and your mother went to Williamsburg to shop?
A. That's right.
Q. Do you recall where you parked the car?
A. It was in the parking lot behind The Williamsburg Shop.
Q. Do you recall the condition of the pavement as you went from the lot to the shop?
A. Yes, sir.
Q. Will you tell us?
A. It was rather damp. It had been sprinkling quite hard and there were puddles of water in different places
page 69 } in the parking lot.
Q. You went in the shop. Was there any mat or rug of any kind to dry your feet on?
A. Not that I remember. I didn't see it if there was.
Q. I believe you went up to the second floor?
A. Yes, sir.
Q. And you bought a dress up there?
A. Yes, sir.
Q. And then you came down. With reference to coming down the stairs, Judy, who was next to your mother?
A. I was the closest one to her. She was behind me.
Q. Did you see her fall?
A. No, sir, I didn't.
Q. Did you hear her fall?
A. Yes, sir.
Q. Did you turn around and look at her after she fell or you heard her fall?
A. Yes, sir, I turned as soon as I heard her fall.
Q. Approximately where was she when you saw her?
A. She had just—she was off of the landing as if she had just slid off the landing.
Q. Just slid off of the landing?
A. Yes.
page 70 } Q. Was she next to the newel post? You see this post right here and the railing? Was she next to that or just where was she?
A. She was about right here.

The Court: You had better let the record show what exhibit.

Judith Ann Weeks.

Mr. Harry Anderson: Yes, sir. I am sorry. Referring to Plaintiff Exhibit No. 2, the witness has pointed to an area

By Mr. Harry Anderson:
Q. Where did you say?
A. About right through here, right off the landing.

By The Court:
Q. That would be the railing going downstairs?
A. Yes, sir.

By Mr. Harry Anderson:
Q. Covering the landing and the first two stairs shown in the picture?
A. Yes, sir.
Q. What did you do, Judy?
A. Well, I turned as soon as I heard her fall and I ran to her and I think I was the first one to get to her, in fact, no one else knew that she had actually fallen, everyone thought it was the baby. And when I saw her, I ran to her and called out, "Mama." And when I got to her, she had page 71 } put her hand to her face and it was bleeding quite badly and I helped her get up and then we took her upstairs.
Q. Did you go to the hospital?
A. No, sir.
Q. You were taken home?
A. Yes, sir.
Q. Judy, how old are you?
A. Fifteen.
Q. That would put you fourteen then?
A. Yes.

* * * * *

page 74 } CROSS EXAMINATION.

By Mr. Geddy:
Q. Miss Weeks, you came down the steps directly ahead of your mother; is that correct?
A. Yes, sir.
Q. How far were you from her when you heard the fall? Do you remember?
A. I was approximately at the bottom of the steps.
Q. That is below the second landing, coming down?

Judith Ann Weeks.

A. I was completely off the steps.
Q. Completely off of the steps?
A. Yes.
Q. When you turned you saw your mother coming off of the landing?
A. No, sir. I had seen her when she had fell, after she had fallen.
Q. After she had fallen?
A. Yes, sir.
Q. And she was slightly off of the landing?
A. Yes, sir.
Q. Was she holding to the rail at this time?
A. I believe so.
Q. When you came down the steps, did you see any trash or debris or anything on there?
A. Not that I can recall, no, sir.
page 75 } Q. You didn't have any trouble coming down the steps yourself, did you?
A. No, sir, I went down on the other side.
Q. You went down the other side where there was no rail?
A. Yes.
Q. After you ran up to your mother, who was the first person who got there to assist you with her? Do you remember?
A. I am not real sure, but I think it was Mrs. Sutton.
Q. The saleslady on the second floor?
A. Yes, sir.

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RE-DIRECT EXAMINATION.

By Mr. Harry Anderson:
Q. Judy, you were asked about trash or debris on the stairway; I ask you whether you noticed that the stairway was damp or moist?
A. Well, I couldn't say that I noticed it when I walked in. I couldn't say that I noticed it when I saw it, but it evidently was because it was raining outside.

Mr. Scott Anderson: If Your Honor please, we object to the witness' conclusion. She says she did not see it.

Maxine Bryant Weeks.

The Court: Objection is sustained. Any conclusion as to whether it was evident or not the jury has to draw the conclusion, not the witness.

By Mr. Harry Anderson:
Q. Judy, after your mother fell, did you notice it?

Mr. Scott Anderson: If Your Honor please, she has testified that she did not see it.
The Court: No, he is asking now a different question. She said she did not notice it on the way up and now the question is after her mother fell did she notice it. I will
page 77 } overrule the objection.
Mr. Scott Anderson: Exception.

By Mr. Harry Anderson:
Q. Will you answer the question?
A. No, I didn't notice when I was going down the steps.
Q. When you were going down the steps you didn't?
A. No, sir.
Q. Did you notice it after your mother fell?
A. I think so. She said something about I thought that the steps were damp after I had gotten home.

By The Court:
Q. You say, "I think so?" You are not sure, is that what you mean, whether they were damp or not?
A. I am not positive, I couldn't swear they were wet because I didn't look to see.

Mr. Scott Anderson: That being true, sir, we ask you to instruct the jury to disregard that.
The Court: I think the fact that she is not positive is a matter that the jury should consider in weighing the testimony. I do not think it should be excluded entirely. I overrule the objection.
Mr. Scott Anderson: Note the exception.

* * * * *

page 93 } MAXINE BRYANT WEEKS,
was sworn in her own behalf as plaintiff and testified as follows:

Maxine Bryant Weeks.

DIRECT EXAMINATION.

By Mr. Harry Anderson:

Q. Mrs. Weeks, you are Mrs. Maxine B. Weeks, is that true?

A. Yes, sir.

Q. How old are you, Mrs. Weeks?

A. I am thirty-three years of age.

Q. On the date this accident happened, Mrs. Weeks, I believe you parked the car in the parking lot; is that true?

A. Yes, sir.

Q. Walked over to the shop which is about a block away?

A. Yes, sir.

Q. And what was the condition of the pavement as you walked?

A. It was wet and I remember hitting some puddles and splashing my stockings at the time.

Q. When you got in the store I believe the testimony is that there was no mat or rug to wipe your feet on?

A. No, sir.

Q. And you went upstairs and purchased a dress?

A. Yes, sir.

page 94 } Q. And came downstairs. Will you tell us what occurred as you came down the stairs?

A. Judy and Mrs. Coddington had gone ahead of me with my daughter that is four years old, they had taken her down the stairway.

Q. Mrs. Weeks, you speak to these gentlemen over here, not me.

A. All right. And they were ahead of me and then I came down. As I came down the first flight of stairs and started to turn on the landing my foot slipped and I fell against the railing and I grabbed—I was holding with this hand and I grabbed with this one; and when I fell I hollered.

Q. Excuse me. You say you were holding with "this hand." For the purposes of the record—

A. To support myself.

Q. You are referring to your left hand?

A. Yes, sir, when I came down.

Q. And you grabbed with which hand?

A. When I swung and slipped, this hand grabbed the bannister to keep me from rolling down.

Q. You are referring to your right hand?

A. Yes. And I grabbed with this hand. And then after I fell, I hollered and I suddenly realized that my face was

Maxine Bryant Weeks.

page 95 } bleeding and I reached up and grabbed it and then Judy came running to me and picked me up and I believe Mrs. Sutton came from the upstairs. And she said she heard the noise and thought the baby had fallen. And they helped me up and took me up to the second floor.

Q. Mrs. Weeks, what did you notice about the dampness or anything of that nature on the stairway?

A. Well, I suddenly realized after I had slipped that there must have been water because my foot hit something and I slipped.

Q. And you were taken upstairs, you say?

A. Yes, sir.

Mr. Boyd: If the Court pleases, she said she realized there must have been water because she slipped.

The Court: That, I grant you, is a conclusion and I instruct the jury to disregard the conclusion that she said she slipped because there must have been water.

By Mr. Harry Anderson:

Q. I am asking you, Mrs. Weeks, were you aware or did you observe any moisture or water on the stairway?

A. No. But as we went into the store there was nothing to wipe our feet on and it was damp at the doorway, going in the doorway there.

* * * * *

page 103 } CROSS EXAMINATION.

By Mr. Boyd:

Q. Mrs. Weeks, on the day of the accident, did you have on the shoes that you have on now?

A. These are the shoes that I had on.

Q. Would it be too much to ask you to take one off and hold it up and take a look at it?

A. (Exhibiting.)

Q. Hold it over so the jury can see the shoe.

A. (Exhibiting).

Q. Thank you. I believe you said that when you parked in the parking lot that you saw that there were puddles of water there?

A. That's right.

Q. And you went from that damp place into the store?

A. Yes, sir.

Maxine Bryant Weeks.

Q. You of course knew that if your feet had any dampness on them that you would track some into the store?

A. I suppose so. There was nothing to wipe my feet on when I went into the store.

Q. You realized there was nothing to wipe them on?

A. Yes, sir.

Q. And you went on in the store just as you were?

A. That's right.

page 104 } Q. Did you complain to Mr. Sutton about not having anything to wipe your feet on?

A. No, sir.

Q. I am talking about Mr. Sutton, the store man.

A. No, sir.

Q. Where had you been, please, ma'am, prior to coming to the store to buy this dress for your daughter?

A. I hadn't been any place. I had come from home, which is out on 168 Nelson Park, and driven into the parking lot and gotten out of the car, walked across the parking lot into the shop.

* * * * *

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* * * * *

Q. Before the day of this accident, you had been in this store on many occasions, had you?

A. Yes, sir.

Q. You had been up to the second floor on many occasions?

A. Yes, sir.

Q. And you were familiar with the whole layout as it was on the day this accident occurred, were you not?

A. Yes.

Q. The only other one thing that I want to ask you to do, if you don't mind, please, ma'am, in order to get into the record, if Your Honor please, this shoe, I should like to have some way of measuring it so that the height of the heel can be stated for the purpose of the record and perhaps some other identification of the shoe.

By The Court:

Q. Can you explain what kind of heel it is? Is it a spike heel?

A. No. As a matter of fact, the day I fell I busted the heel

and I have had the heel replaced since then. Mr. Henretta Forcasus ordered me a new pair.

Q. Was the heel broken off the same type that page 105a } is on there now?

A. Well, they are entirely different. This is the shoe that has the old heel and this is the new heel that he ordered. You can tell that there is a differ*ent* in them.

Q. Then actually it is the shoe to the right which is the one that is exactly alike. Could you state what type of heel that is, if you know?

A. I haven't any idea.

Mr. Scott Anderson: If Your Honor please, we would like to get a ruler.

By Mr. Scott Anderson:

Q. Could we have in the evidence the make of it? Will you state what that name is in there?

A. It is a De Angelo.

By The Court:

Q. Do you know what what size it is?

A. It is a seven.

The Court: Let's go ahead. We will see that the size is measured.

Mr. Boyd: I have no other questions.

By Mr. Spratley:

Q. On which side of the stairs were you when you were descending from the second floor?

page 105b } A. On the lefthand side.

Q. That is where the hand rail was?

A. Yes, sir.

Q. And you were along the lefthand side all of the way?

A. As far—as best I can remember, yes.

Mr. Spratley: I have no further questions.

RE-DIRECT EXAMINATION.

By Mr. Harry Anderson:

Q. Mrs. Weeks, about the shoes, are they normal ladies' wearing shoes?

Maxine Bryant Weeks.

A. I think they are. They are not spikes, they are an average heel.
Q. Is there anything unusual about them?
A. No, sir.
Q. They are what you call high heels?
A. Just heels, I suppose.
Mr. Harry Anderson: I have no further questions.

By The Court:
Q. Mrs. Weeks, can you recall exactly where you were when your foot slipped?
A. I slipped off of the landing, I remember my foot slipped off of the landing.
page 105c } Q. And you had hold of a railing with your left hand?
A. Yes; and when I slipped I fell with such force that I grabbed the bannister with my right hand to keep from going down the stairs.
Q. Do you know which foot slipped?
A. Yes, sir, my right foot.
Q. Your right foot?
A. Yes, sir.
Q. Was that the same foot on which the heel was broken or did it break?
A. Yes, I believe so. Yes.
Q. Coming up the steps, had you noticed anything there at that point?
A. No. We were rather excited over the evening dress, it was my daughter's first evening dress, and I didn't think about anything at the time, to check for anything.
Q. Did you have any packages in your hand?
A. No, sir, Judy had taken her evening dress.
Q. And as I understand it as you were walking down the steps you made the turn there at the landing?
A. Yes.
Q. And you had your left hand on the rail?
A. Yes.
page 105d } Q. And when you got to the edge there your right foot slipped?
A. Yes, sir.
Q. And then you fell and reached over with your right hand and grabbed the rail?
A. Yes, sir.
Q. That is substantially how it occurred?
A. Yes, sir.

Maxine Bryant Weeks.

The Court: All right.

Mr. Harry Anderson: Mrs. Weeks, I have one further question.

By Mr. Harry Anderson:

Q. As I understand your testimony, you say that when you were making the turn that is when your foot slipped?

A. Yes, sir.

Q. That is around the newel post?

A. That's right.

Mr. Boyd: If the Court pleases, the Court has inquired of this lady as to how the accident occurred without leading her. When the plaintiff's attorney asked her—

The Court: The question is leading, but it has been asked and answered, but I do not think any substantial harm is done.

Mr. Boyd: We ask that her answer and that
page 105e } answer be excluded from the testimony.

The Court: All right. I will grant that. You will disregard the last question and answer.

Mr. Harry Anderson: If Your Honor please, I think the record will show that that is what she said on direct examination.

The Court: If you want to ask her another question that is not leading I will permit you to do so.

Mr. Harry Anderson: I certainly think it has been covered. There is no point in asking it again. I have no further questions.

Mr. Scott Anderson: May we measure the heel now?

The Court: All right, sir. Are you going to measure it perpendicularly or on a slant?

Mr. Scott Anderson: I was asking the question?

The Court: I think if you will measure the heel, the heels are measured at vertical height.

Mr. Scott Anderson: Will the Court tell me what it is? It looks to me like it is a three-inch heel. Would
page 105f } you say that is approximately a three-inch heel?

Mr. Harry Anderson: Approximately so. Are you measuring from the top or from the instep here, which is the bottom of the foot?

The Court: Let's say this: The average height is three inches. If you measure it from the instep, it is 2½; if you measure it from the back, it is 3¼.

Mr. Scott Anderson: All right, sir. Would you measure the bottom of the heel to see how wide that is?

The Court: All right, sir. That seems to be 9/16ths wide and 9/16ths long.

Mr. Scott Anderson: All right, sir.

By Mr. Harry Anderson:

Q. Mrs. Weeks, I have one other question about the showcase on the platform or the landing. Did you notice that when you were going down the steps?

A. Well, when you come down the stairway you are facing it and you automatically see it and look and of course there could be any number of things to cause you to pause and look at it if you were interested in it.

Q. Did you have occasion to look at it on this particular day?

page 105g } A. Well, yes, I did as I came down the stairway.

The Court: Any further questions?

RE-CROSS EXAMINATION.

By Mr. Boyd:

Q. Mrs. Weeks, do you mean by that last statement that you were looking at the showcase and not looking where you were going?

A. No, when you come down the stairway you automatically look at the showcase and I was looking at the showcase as I came down the stairs and not after I turned. I hadn't looked back.

Q. So from the time you started your turn you were not looking at the showcase?

A. When I turned, no, sir.

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Mr. Harry Anderson: If Your Honor please, we would like to call Mr. Cocke as an adverse witness.

DUNCAN COCKE,

was sworn and as an adverse witness in behalf of the plaintiff, testified as follows:

Duncan Cocke.

page 139 } DIRECT EXAMINATION.

By Mr. Harry Anderson:

Q. Mr. Cocke, would you state your name, please?

A. Duncan Cocke.

Q. What is your affiliation or capacity with the defendant, Williamsburg Restoration, Incorporated?

A. I am an officer of that corporation, vice-president.

Q. I believe that Williamsburg Restoration, Incorporated is the owner of the building in which Williamsburg Shop operates; is that true?

A. That is correct.

Q. And you have a lease or, that is, the Restoration has a lease, with Williamsburg Shop?

A. That is correct.

Q. What is the date of that lease? what is the effective date of it?

A. I will have to refer to it.

Q. Yes, sir, you can refer to it.

A. The effective date of the lease at the time of the accident in question was March 18, 1955.

Q. March 1, is it?

A. March 18.

Q. On March 18, 1955, were the premises, and in particular the stairway in question in the Williamsburg
page 140 } Shop, substantially in the same condition as it appeared on February of 1957?

A. Would you restate that, please?

The Court: Was there any change between the time you leased in 1955 and the time that this accident occurred in 1957?

A. No, sir.

By Mr. Harry Anderson:

Q. No change. Under your lease, is there a profit-sharing or a gross receipts sharing provision?

A. No, it is fixed rental.

Q. It is a fixed rental?

A. Yes, sir.

Q. Who keeps up the building, janitor service?

A. Janitorial service provided by the tenant. The tenant is responsible for interior maintenance, the landlord for certain exterior maintenance.

Duncan Cocke.

Q. You are responsible for exterior maintenance; exactly what is that?

A. Roof, things of that sort.

Q. How about heating, plumbing?

A. Heat is provided by the landlords, and the landlord is responsible for the maintenance of the heating pipes and so forth.

Q. Do you have any employees on duty in or
page 141 } about the building?

A. Well, we have employees on duty in the same general area, yes. We operate the heating plant which is across the street, but we do not maintain employees in that building.

Mr. Harry Anderson: I have no further questions.

Mr. Boyd: No questions.

By The Court:

Q. Let me ask you this. When did the defendant first start to lease the premises?

A. That was 1940, I believe, sir, September, 1940.

Q. Has the stairway been changed any since they first leased the premises?

A. Yes, it has. Would you like for me to review it?

Q. Yes.

A. The premises which Williamsburg Shop, Incorporated, first leased in 1940 consisted of the basement, first floor, and the same second floor which is there now except that the second floor was a detached residential apartment that was entered by a stairway which came off of the parking area and not from the first floor. In 1949, that residential apartment was converted into shop space and the interior stair constructed. That is the change.

page 142 } Q. Who constructed the interior?

A. The work was actually done by Williamsburg Restoration, Incorporated, our mechanics.

Q. Done at the request of the defendant?

A. Done at the request of Williamsburg Shop, Incorporated, and at their expense.

The Court: All right.

CROSS EXAMINATION.

By Mr. Boyd:

Q. The stairs which are there now were put there in order

that the Williamsburg Shop might utilize the second floor as part of the store; isn't that correct?

A. That is correct.

Q. And the stairs were put there by Williamsburg Restoration?

A. Were constructed by Williamsburg Restoration at the request of and expense of the tenant.

Q. And of course the only way they could use the upstairs as now used was that the stairs be used and new stairs put in.

A. That is right.

Q. So it would have been right foolish for them to have rented the upstairs and not been able to use it, so they asked you for the steps.

page 143 } A. Well, see, the upstairs had been used as a residential apartment with an outside entrance prior to that.

Q. Yes, sir. Now the plans and the specifications of the steps were drawn up and proposed by the Restoration; is that correct?

A. Yes, sir. The Restoration prepared the plans and did the work.

Mr. Boyd: That is all.

RE-DIRECT EXAMINATION.

By Mr. Harry Anderson:

Q. The building was rented to Williamsburg Shop for the purpose of a department store business?

A. Department store business and a residential unit.

Q. Both?

A. Both. That is the initial lease.

Q. And the lease was changed by the lease of March 18, 1955?

A. Yes, by that time it was store business only.

Mr. Harry Anderson: All right. That is all.

Mr. Harry Anderson: That is the plaintiff's

page 144 } case, if Your Honor please.

* * * * *

(IN CHAMBERS)

Mr. Boyd: If the Court pleases, the defendant, The Wil-

liamsburg Shop, Incorporated, moves the Court to strike the plaintiff's evidence as to it on two grounds:

The first is that there has been no actionable negligence shown which would support a verdict; and the second is that in any event the plaintiff either assumed the risk of whatever danger there was or was guilty of contributory negligence in the cause of her difficulty.

With respect to the first, sir, the question of proximate cause is most important and we submit that she has shown no act or no failure on the part of The Williamsburg Shop that anyway caused her fall. You will recall that you questioned her rather carefully about the manner in which this accident occurred, and she stated that she came down the first part of the steps to the landing, turned around, started down the next steps when her foot slipped on the floor of the landing at the edge of the steps. She has not explained in anywise what The Williamsburg Shop did that caused that slip. She has no recollection that the steps at that particular place were even wet or damp. She has a recollection that some steps were damp. She does not say that her foot slipped because of any dampness.

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No other witness saw the accident and no other witness has stated to Your Honor what the cause of it may have been. Before she has any right of recovery or any right even of having her case submitted to a jury, there must be more than an equal probability that something was done or was chargeable to the defendant, The Williamsburg Shop, which caused her to fall. I submit, sir, that there is no inference even that her fall was caused by any failure in a duty which was owed to her.

The only possible basis which the plaintiff seems to lay here today is one of dampness on the steps. She herself stated that there was no debris or trash on them. The only way that those steps could have been damp would have been by persons such as herself walking into the store; and we submit that if that caused the dampness that was there then the only alternative to there being no dampness would have been to have closed the store.

On the question of contributory negligence, the plaintiff stated that she had been on the premises many times before, had been up these same steps and down them on many occasions, that on this particular day she got out of her car at the parking lot and I believe stepped in a puddle of water. In any event, she certainly testified that she knew of whatever dampness there was and that she knew that if any water was to be tracked

page 146

into the store that she was tracking it just as any other person would.

With respect to the structure of the steps and whether there was or was not any non-skid material on them, they were certainly open and obvious to her, and if that required any more care in using the steps than would have been the case had the non-skid material been there, she of course knew all about that.

There are one or two cases that I should like to call to Your Honor's attention. The first is one of *Revell* v. *Deegan,* and for some reason I did not put the Virginia Report down there, but I can get it for you. (192 Va. 428). In that case the $10,000 verdict for the plaintiff was set aside and the Trial Court's judgment affirmed in entering up judgment for the defendant. In that case the plaintiff was walking down a common outside stairway which was used by him as one of several tenants. As he came down the steps with his hand on the rail, for some reason the rail gave way and he and his companion fell. There was no explanation of why the railing broke. It was testified to that it appeared
page 147 } to be in good condition, but, in any event, it did break and the man fell and was seriously injured and the jury gave him $10,000.

The court in that case held that there was no evidence of negligence on the landlord as a proximate cause of the break of the rail. We submit that that case was applicable in sizable strength to the situation here.

More to the point from the standpoint of a slipping case, I call Your Honor's attention to *W. T. Grant Co.* v. *Webb,* 166 Va. 299.

The Court: That came from Newport News? Never mind.

Mr. Boyd: I just don't remember, sir. Anyway, the case is so similar to the one here and to the amount of proof that the plaintiff has produced in that case that I should like for Your Honor to read it. I will give you my brief of it.

Mr. Geddy: I will get it.

Mr. Boyd: One thing of interest there is the plaintiff had on what the Court stated to be "spike heels" 2-5/8 inches high, and in the instant case the plaintiff's heel ranged from two and one half to three and one quarter inches, I believe, depending upon whether you measured instep or at the back. In this case judgment for the plaintiff was reversed and the final judgment was entered for the defendant in
page 148 } the Supreme Court.

In that case the plaintiff was standing at a

counter with her mother and turned to answer an inquiry of her mother and as she did so her foot started slipping and she fell and was injured. The plaintiff testified that she did not notice anything unusual about the floor and did not pay *any* attention to it. The plaintiff's mother testified that the floor was slippery but that she did not know why the plaintiff fell. Another witness testified that when the plaintiff reached her home her shoes had a deposit of oil or oily light stuff on them, but the plaintiff had been in other places and there was no evidence of where the oily spot got on the shoe. Under the circumstances, the court held that the evidence failed to show that the defendant had breached any duty which it owed to the plaintiff.

I submit, sir, that if you apply the law of that case with the facts of that case to our case here, that you have a very similar situation in that the plaintiff here was starting down the steps and slipped, and that is all there is to her case, as I see it, sir. Why she slipped, she has never suggested. She had gotten around the—

The Court: She suggested it, but you objected to her suggestion.

Mr. Spratley: She was speculating.

Mr. Boyd: Her statement was, I believe, that page 149 } it must have been wet because she slipped.

The Court: I remember this Webb case did come from Newport News.

Mr. Boyd: I believe, sir, if you will read the case, it is very short, it ought to be good authority for sustaining this motion.

The Court: I think I have heard Captain Berkeley complain of the results so many times that I am well familiar with it.

What about the evidence here of this expert witness Torrence who said that the steps being narrow, and particularly the landing being narrow, and the obstruction on there, that that put someone in a position, according to him, of approaching the steps at an angle where it was somewhat dangerous. In other words, he said you don't take the usual turn around when you come down, that unconsciously you stay away from glass and since it is already narrow that apparently you approach it at some angle rather than walking straight down. There was other evidence that he had that the treads were of the ordinary fitting and that the handrail was a customary thing. What about that evidence?

Mr. Boyd: He did not see her fall, he does not know why she fell. He talked about why somebody might fall. But if

you stick to what she had to say about it, she did
page 150 } not claim that she swung around that rail on any
short-cut and approached the first step down at an oblique angle, nor did she claim that she would have done any better or have had any better luck if there had been another rail. She was holding to one side when she fell, and unless she turned that loose it wasn't anything to do except for her right hand to go over to that same rail. That is what happened. So although this expert, if he be believed, may have set up a situation in which somebody may have done what he suggested, there is no evidence at all that this plaintiff did those things and we get back again to proximate cause.

If there were many defects there, yet if they were not the cause of her fall, then you certainly could not hold the defendant responsible on account of those defects.

The Court: Let's take the handrail. She said when she realized she was falling she attempted to grab it, she had to grab over on the left-hand side. It seems to me if she slipped on her right heel, as she described it, with her right foot, that naturally it would have been far easier and would have given her much more support had she grabbed to her right. I mean, grabbing to the left, if you are slipping on your right
foot, does not avail you very much.

page 151 } Mr. Boyd: She said she was already holding
to the left rail, as you recall, at all times, so that is the thing that she held to even tighter by using the other hand. You will also recall that this expert said that in steps of this width where traffic volume was no greater than it was and where she was not involved in somebody else's coming up or using the steps at the same time that there was no occasion for her, as I understood his testimony, to be concerned about another rail.

The Court: That wasn't exactly the way I believe he put it. I believe he said if the steps were wide—but of course if you are sticking to the left-hand rail you would have no need of a right-hand rail because you couldn't reach it, but he did not consider those steps wide.

Mr. Boyd: That is right; he considered the steps too narrow and if they would have been as wide as he wanted them to be, the possibility of a rail would not have been there. So he was blowing both hot and cold, if you take that theory of it.

Following right along on this same proposition, you immediately get into the question of assumption or risk or contributory negligence. You recall that she said she had

used these steps on many occasions and she knew exactly what was there, but knew that the showcase was page 152 } on the landing, she knew from prior use what the width was. Now on this particular day everything that was there was perfectly open and obvious to her and if she falls on account of something that she sees or should see, then the cases hold that she has no right of recovery in any event. On that proposition, I call Your Honor's attention first to *Flanke* v. *Telephone Company,* 199 Va. 31, in that case the plaintiff was watching something on the television, I believe it was a baseball game or football game.

The Court: You mean and hit the guy wire?

Mr. Boyd: That's right. He ran over and told his wife to hold up lunch and ran back so as not to miss much of the television, and ran right into it. The evidence was that he parked his car at a place where this guy wire would have been visible to him on many occasions, he lived right next door to the neighbor on whose land the guy wire was, and he had just passed under these guy wires going away from his neighbor's house to tell his wife about holding up lunch, and then came right back and stumbled over the same guy wire he had just gone under.

The Court in that case held that the evidence established that the plaintiff had visited the place at which the wire was located a number of times and could have seen it, but had never noticed it, according to his testimony. He was held guilty of contributory negligence as a matter of page 153 } law.

The Court: Of course you can do much better than you can with a department store. Contributory negligence is usually a little more difficult because they always say, "I was looking at the merchandise," or "you were attracted to display cases."

Mr. Harry Anderson: The duty is considerably different in a guy wire.

Mr. Boyd: If Your Honor please, the plaintiff testified that at the time of her fall she had gotten around sufficiently so that she was not looking at this display case and that she was looking where she was going.

Then the other case I call your attention to is *Atlantic Co.* v. *Morrisette*, 198 Va. 332. There the plaintiff was injured when, as an invitee upon the defendant's premises, he was unloading a platform truck of potatoes onto an auto truck. He had been on the premises before and had unloaded similar platform trucks, and on the occasion of his injury had unloaded two and was in the process of unloading the third when

it rolled so as to cause him injury. Final judgment was for the defendant and he complained about that fact.

At page 333 the Court said:

"Since plaintiff was on defendant's premises
page 154 } as its invitee, it owed him the duty to exercise
ordinary care to have its premises reasonably safe for his visit. In the instant case this duty of ordinary care required that defendant give plaintiff notice or warning of latent dangers which were known or should have been known to it and were unknown to plaintiff, but no notice or warning was required if the alleged dangerous condition was open and obvious to a person exercising reasonable care for his own safety. Therefore, in order for plaintiff to sustain his charge of negligence, the unsafe condition relied upon must be one of which the defendant knew or should have known, and one of which plaintiff did not know and which he could not reasonably have discovered."

This plaintiff has put herself in a position of knowing everything that the defendant knew and therefore there was no duty on the part of the defendant to tell the woman anything or to do anything. She knew of the fact that there was no handrail, she had just come up the steps, and she had seen then that there was no handrail, and the thing was exactly as it was when she went down. We submit, sir, that on her evidence she certainly must have assumed the risk
of the conditions that existed there perfectly
page 155 } open and obvious to her.

The Court: The matter is not free from doubt, but I would certainly hesitate to strike the evidence. I will let it go to the jury and if the result should be adverse I will consider it.

What about the landlord?

Mr. Spratley: I would like to make a motion, Your Honor, to strike the evidence as to the landlord.

Mr. Boyd: Note an exception to the overruling of the motion.

Mr. Spratley: The landlord owes a very limited duty to the business invitees of its tenants.

Oliver v. *Cashin,* 192 Va. 540 (543):

"The duties and liabilities of the landlord to the guests and invitees of the tenant, with respect to personal injuries, are ordinarily the same as those which the landlord owes to the tenant.

"On the owner's surrender of control of the premises to his

lessee, in the absence of no warranty of their condition or fraudulent concealment of known defects, or agreement to repair, he is not liable to the lessee or to his invitees for defects known to the lessee, or which he could have discovered by reasonable inspection, and the invitee stands page 156 } in the shoes of the lessee with respect to his right to recover from the lessor."

In this particular case, it says:

"There are exceptions to this rule, particularly where the premises are let for public or semi-public purposes."

They refer to the leading case of *Webel* v. *Yale University,* which is 125 Conn. 515.

Even assuming that this is a public or semi-public building, this particular case states that the accident has to arise from a defect, it has to be a defect that existed at the time of leasing. It has to be known or should have been known by the landlord and it should be the type of defect, such as structural defect, that the landlord cannot reasonably expect the tenant to remedy or correct.

In reviewing the evidence, the lack of a handrail, of a second handrail, which Mr. Torrence said was a defect, did not enter into this. She was coming down, she stated specifically in answer to my question, on the left-hand side with her hand on the handrail. As to the size of that platform, as Mr. Boyd pointed out, she had already cleared that, headed around and started down when she slipped. There is no evidence that she fell because of any type of structural defect. Mr. Torrence says that the generally page 157 } accepted practice is to have safety treads. Well, there is no evidence here that she would not have fallen if there had been safety treads. He was merely speculating.

The Court: They are not structural in any event.

Mr. Spratley: No, it is not structural and he stated on the stand it was not a structural defect.

The Court: And of course placing the showcase up there was not structural.

Mr. Harry Anderson: I think that was structural. I mean that was there when the premises were leased.

The Court: Is the show case a part of the premises?

Mr. Harry Anderson: No question. Wasn't that there? That is what I understood him to say.

Mr. Geddy: No.

The Court: I don't recall anything like that. I thought it was a glass showcase.

Mr. Spratley: It is part of the fixtures installed by the tenant.

Mr. Harry Anderson: I understood Mr. Cocke's testimony to be to the effect that it was the same condition. I included the showcase, at least, I thought I was including the showcase.

page 158 } The Court: I do not recall that being specifically mentioned, but I would hardly think that they would build a showcase. A showcase is more or less something that a merchant would probably put there or move from time to time. The only evidence is that there was a glass showcase on the landing. Unless there is somthing in the evidence that it was affixed to the premises in some manner, I would hardly consider that structural.

Mr. Harry Anderson: I thought the landlord built the showcase.

Mr. Spratley: No, he did not.

The Court: There isn't any evidence of that.

Mr. Geddy: He built the stairs.

The Court: The plans that were drawn by Williamsburg Restoration, which were put in evidence as Plaintiff's Exhibit No. 1, which was the alteration made I think in 1949, do not show the display case and your witness Torrence so testified.

Mr. Harry Anderson: Yes, sir, I know that they didn't, but I understood that they were built by the landlord.

The Court: What have you got here that you can go to the jury on the landlord?

Mr. Harry Anderson: Well, I think we have got, No. 1, the right-hand rail missing. Certainly that is

page 159 } part of the building. And we have the width of the landing being narrower than the width of the stairs, which is certainly structural, as Mr. Torrence said, would not enable a person coming down to go all of the way around and straighten up and go down by a direct route, but obliquely.

The Court: But didn't he say that the reason that the landing was of less width than the stairs was because the show case took up 7-1/8 inches of it?

Mr. Spratley: That is correct, unless I misunderstood him.

Mr. Harry Anderson: And I think that helped—

The Court: Let's make certain that I understand it, because my recollection is that he said 37-1/8 inches wide, the same as the steps but that the showcase projected 7 inches,

or whatever it is, and left approximately 30 inches, and he said that you would instinctively, without knowing it, shy away from glass and that that would sort of cramp your movement as you made the turn.

Mr. Harry Anderson: I have got my notes with the exact measurements.

The Court: Isn't that substantially correct?

Mr. Harry Anderson: Well, I think that he attributed negligence to the showcase, I think Your Honor is exactly right. No. 1, the glass, a person shying away page 160 } from glass; No. 2, it takes up a portion more of the landing. But without the showcase, let's eliminate the showcase, the landing is still not as wide as the stairway. Now I think those are the measurements. I can go out there and get them.

Mr. Spratley: You can assume that this is a defect that in no way contributed to Mrs. Week's accident.

Mr. Harry Anderson: I assumed that it is. I say that it is a structural defect as testified to by an expert.

The Court: Let me get my notes. Here is what I have. He said the usual practice was 44 inches, the minimum was 36, that according to him it was 37-3/4 inches wide, the stairway, that the platform was 30-3/4 inches wide because the showcase took up 7-7/8 inches.

Mr. Geddy: That is what my notes say.

Mr. Spratley: My figures that I wrote down, the width from the newell to the showcase was 30-3/4 inches.

The Court: I wrote down the same figures. I sure that is no coincidence that all of us would have the same.

Mr. Spratley: 37-3/4. It looks to me the best you could possibly say—he says that the approved practice was 44 but that 36 was the minimum. Of course they page 161 } come within that minimum when they put the showcase there.

Mr. Harry Anderson: I asked him with reference to this building and it was my understanding that his testimony was 44 with reference to this building. I think he testified that the minumum of 36 obtained in certain buildings where there was no more than ten on the second floor, and that 44 inches obtained as a minimum in other types.

Mr. Boyd: You do not have any proof that there was more than ten on the second floor in this case.

The Court: Let's get back to what you can argue as a cause of the accident. You might argue from the fact that her feet were wet, and I presume other people's feet were wet, that there was some dampness there. I don't know whether it was wet, but that may have something to do with it. But

isn't about the best you can make out from your expert that he said when the landing is cramped that it puts you in a position of sort of approaching the steps at an angle rather than straight down?

Mr. Harry Anderson: I think that is true.

The Court: And that is basically what he testified to. The other things about width, 36 inches or 42 inches, isn't going to make you slip. That may have some bearing on other factors, but for all causes of a slippage, the width of the stairs, unless they were so extremely narrow

page 162 } that you couldn't get one foot in front of the other—

Mr. Harry Anderson: The more width you have, as I recall his testimony, at least the inference that I got from him, was the more space you would have to straighten out and go down.

The Court: I think that is true. Stairs can be too narrow and be dangerous because they are too narrow, but I am talking about now of the danger between a 37—

Mr. Harry Anderson: How about the handrail on the right side?

The Court: The question is, Is that structural or something that a tenant would put there?

Mr. Harry Anderson: You rent a building with the railings on it. That would be my impression.

Mr. Boyd: The plans as were drawn do not include any handrail.

Mr. Harry Anderson: As I recall his testimony, I think the question was asked him if she was using the left-hand rail the right-hand rail wouldn't have helped her any, and his answer was, "Well, it would have been natural for her to reach out and grab it." I think what happened in this case was that because there was no handrail there certainly her coming over like this with her right-hand ag-

page 163 } gravated the blow that she received on her face. If there had been one over on the right, she probably could have—

Mr. Spratley: She testified she was coming down alongside the handrail and that she had her hand on the handrail all of the time.

The Court: I think they can argue the right-hand rail being missing, because she slipped on her right foot, and obviously it would have been advantageous for her right-hand to hold onto.

Mr. Boyd: Judge, she didn't make any such claim as that, though.

Mr. Geddy: She didn't even say she tried to.

Mr. Boyd: She never suggested that she reached for the rail or it wasn't there. She never blamed the lack of it for being a cause of her fall. We can't suppose all of these things and that is all we are doing right now. She has got to make out her case on some kind of a basis and she has not yet said one thing as to why she fell. She has not put the blame for the fall on anything.

I know you have already made a ruling as to me, but there is one other thing that I wanted to suggest to you before we go along any further, and that is that a New Jersey case is the only one I could find on this point, page 164 } I couldn't find any Virginia cases on it, the *Lindeman* v. *F. W. Woolworth Co.,* 8 A. (2d) 321, decided 1939. There the plaintiff was injured when he fell walking along the sidewalk adjacent to the demised premises. There was some question about the condition of the premises between the sidewalk and the building. I think he stepped in a hole of some kind. Anyway, this was quoting from the Court's opinion at page 322:

"We think that the principle enunciated by the late Chief Justice Gummere in the cases of *Meyer* v. *Harris,* 61 N. J. L. 83, 38 A. 690, and *Ackerman* v. *Ellis,* 81 N. J. L. 1, 79 A. 883, is applicable and should be followed. In those cases it was held that a tenant is not responsible in damages to a third person for maintaining and keeping in repair upon the demised premises a structure erected thereon prior to the tenancy which operates to the nuisance of a third party."

I call it to Your Honor's attention for this reason. If that be the proper law, and I think it is, then all this defendant, that is, The Williamsburg Shop, did, was to use what was there as it was at the beginning of its lease. The showcase on the plaintiff's testimony is not a cause of this accident. If the rail should have been there or page 165 } if any non-skid material should have been on the steps, it would be no responsibility of the tenant if it maintained the structure as it was at the time it was rented, according to this case.

The Court: I do not follow that. It looks like to me if I am renting a building for a store and I think I ought to put a rubber mat down on the steps that I could do that.

Mr. Boyd: You could do it, sir. There are a lot of things that you might do in a precautionary way, but the fact that you don't do them does not mean that you are negligent.

The Court: No, that is for the jury to decide, though.

Mr. Boyd: I think that the court holds that if the tenant

maintains the premises received from the landlord that is all he is obligated to do as to third parties. That is what this New Jersey case held.

Mr. Harry Anderson: There was a case right on that of the Atlantic Rural Exposition in 1953 and the tenant and the landlord were both held liable in that case. In that case there was no expert evidence offered and it concerned the height of a fence. It was a track that was used for stock car racing. It concerned the height of the fence before the grandstand.

page 166 } The Court said—as a matter of fact, the landlord conceded in that he was responsible for an unsafe or dangerous condition.

The Court: Is that the one where the car ran off the track and killed a spectator?

Mr. Harry Anderson: The wheel came off and the wheel hit the fence, jumped it, and hit this man and killed him and injured him.

Mr. Spratley: I think if you look at the facts of that case, that was a joint endeavor between the landlord and tenant.

Mr. Harry Anderson: That is very true, but you also—

Mr. Spratley: He did not have exclusive possession of the premises, getting part of the gate receipts. The landlord had retained the right to handle all of the parking and it had concessions inside of the grandstand.

Mr. Harry Anderson: That is very true. You had a situation there where the landlord was sharing in the gross receipts and so forth, and the Court held that it did owe certain duties and responsibilities to third parties because it was benefiting from the attendance of third parties, but nevertheless in this case it held that "an unsafe or dangerous condition existing in the leased premises"—and I am quoting—

page 167 } "and known to it or which by reasonable inspection must have been known to it, or which by reasonable inspection must have been known to it at the time of leasing, that the landlord is held—"

Mr. Spratley: Wasn't that a day-to-day lease?

Mr. Harry Anderson: No.

Mr. Spratley: I think if you will read the facts they were renting it to them on a day-to-day basis or maybe a week, but on certain days the arrangement changed.

Mr. Harry Anderson: It was a lease that covered a period of months, but within the lease you had certain days in which the landlord had certain rights and privileges that he didn't have on other days, that is true.

The Court: Let's get back to this thing. Isn't the question whether it was structural defects in order to charge the

landlord? Is that the question, or should we be arguing another question?

Mr. Harry Anderson: It all depends on what you mean by structural defect. I think if the premises, including this showcase, including no rail on the right, including no treads on the steps, if that condition prevailed, and also the width of the stairs, which there cannot be any argument about, if that condition prevailed at the time the prem-
page 168 } ises were leased to The Williamsburg Shop, that the landlord knew it was being leased, he stated it was for a department store business, then they are just as liable as the tenant.

Mr. Spratley: But the law does not read that way. You are placing the same duty on the landlord to the tenant's invitees that the tenant has towards his invitees.

Mr. Harry Anderson: I think this, that the business of this dampness in not having any mat and not having anything to take care of dampness brought in that would aggravate the condition on the steps, no anti-slip devices there,I don't think that could be chargeable to the landlord. I have got an instruction which covers that. I don't think that you can say to the landlord, "Look, if you believe that the proximate cause of this accident was the dampness of the steps, you certainly can't hold the landlord." I agree with that. But as to these other things—

The Court: Let's get away from the other things. Doesn't it really boil down, basically, to the handrail? What else can you charge the landlord with except the handrail? The width of the steps, whether 37 inches or 44 inches, I can hardly conceive of that being the proximate cause of the accident. What can you pin on them besides the handrail?

Mr. Harry Anderson: Well, the showcase, for
page 169 } one thing, if it was there when the premises were leased.

The Court: There is no evidence that it was there when the premises were leased.

Mr. Harry Anderson: I may have missed the boat on that, but I thought when I asked the man if the stair was *was* in substantially the same condition, that included the staircase. Is that not so?

Mr. Spratley: I don't know how long the staircase has been there.

Mr. Harry Anderson: Showcase.

Mr. Spratley: I don't know how long the showcase has been there.

Mr. Geddy: Wasn't it put in there?

Mr. Spratley: The tenant put it there.

The Court: It is rather ridiculous that the landlord would go around and put showcases in a particular place. I cannot conceive of somebody renting a building to a tenant, and telling him where he can put his showcase.

Mr. Harry Anderson: I don't think the tenant has got the right to do it unless he has the permission of the landlord.

The Court: If that comes into court I will let the tenant put his showcase anywhere he wants to.

page 170 } Mr. Spratley: As far as the landlord is concerned, the lack of this handrail was not the proximate cause of this accident.

Mr. Harry Anderson: It is certainly one of the contributing causes. If she had grabbed hold of that and had not sustained as severe an injury, she may not have *have* been injured at all, if there was this other handrail. If the steps had been—

Mr. Spratley: You are talking about something after the fall.

Mr. Harry Anderson: No, I am talking about after the fall, if it could have been there and she could have grabbed it.

Mr. Geddy: She didn't grab at it.

Mr. Harry Anderson: There is no point in grabbing something that wasn't there.

The Court: It looks like to me it really resolves itself down to the fact of whether the handrail is structural. All of the things that you are arguing generally come down to some point. I think you can argue that lack of the handrail was a contributing factor in the accident. It wouldn't have prevented her perhaps from slipping, but it may have prevented her from failing. Now the thing that concerns me is whether I would hold that a handrail is structural. It looks

page 171 } like to me the only theory on which you could possibly hold the defendant is the fact that the defendant designed and prepared the plans; and whether preparing the plans and doing it and failing to include the handrail is negligence, that would look like to me to be the question, but to follow the theory that you can stretch a plaintiff's case—

Mr. Harry Anderson: Well, I think that the landlord is certainly entitled to an instruction which covers the point that if the plaintiff's fall and injury was proximately due to a condition—and I say condition, the Court says structural—but due to a condition which existed at the time the premises were leased, then I think they are liable. If it is not due to a condition which existed at the time the premises were

leased, the landlord is not liable, in my opinion. That can be argued to the jury.

Mr. Spratley: There is no evidence that the lack of the handrail was the proximate cause. They are merely speculating and you cannot speculate as to the cause of the accident.

Mr. Harry Anderson: Why did she grab? She grabbed to the only—

Mr. Spratley: She was already holding.

Mr. Harry Anderson: But she testified her right-hand came over this way. Isn't it reasonable to infer that if there had been one over here she would have grabbed page 172 } the nearest rail?

Mr. Spratley: She did grab the nearest rail. She claimed that she was walking with her hand there, and when she stumbled she put her hand there.

The Court: The case against the Restoration is certainly far weaker to me than the case against The Williamsburg Shop. It does look to me that it is perhaps conceivable, since they designed it themselves and failed to include a handrail, that you might say that that was some theory on which you could hold them. I think I will overrule both motions at this time.

Mr. Spratley: I except.

Mr. Boyd: We respectfully except.

* * * * *

MYRTLE SUTTON,

was sworn in behalf of the defendant, The Williamsburg Shop, Incorporated, and testified as follows:

page 173 } DIRECT EXAMINATION.

By Mr. Boyd:

Q. Mrs. Sutton, I am going to have to ask you some questions, but you are supposed to talk so that the gentlemen of the jury over there can hear you. Will you please give your full name and age and residence, please, ma'am?

A. Myrtle Sutton, 29 James City County.

Q. What is your occupation?

A. I am in charge of Ready-to-Wear on the second floor.

Q. What is your husband's name?

A. James L. Sutton.

Myrtle Sutton.

Q. What relationship does he have with The Williamsburg Shop?
A. He is the manager.
Q. I believe your activities are pretty much on the second floor?
A. That is right.
Q. Do you know Mrs. Weeks, the plaintiff in this case?
A. As a customer.
Q. How long had she been a customer of yours?
A. I don't know how many years.
Q. How long had you been working at The
page 174 } Williamsburg Shop?
A. Three years last April.
Q. Had she been a customer since that time?
A. I remember her at that time, yes, sir.
Q. Can you give us any idea as to how often she came to the second floor of your store?
A. No, sir. She came upstairs quite often, but how many times I don't know.
Q. Would she come as often in your opinion as once every week or once every two weeks?
A. It might average out that, I wouldn't say.
Q. Did she have a charge account with you?
A. Yes, sir.
Q. On the 6th of February, 1957, did Mrs. Weeks come to your store?
A. Yes, sir.
Q. Who was with her?
A. Her daughter, Judy, and her youngest daughter, I don't remember her name, and Mrs. Coddington.
Q. Did they come to the second floor of your store?
A. Yes, sir.
Q. What was the purpose of their visit to your store?
A. They were looking for a formal for her
page 175 } daughter Judy.
Q. What do you mean by a formal?
A. Evening dress.
Q. Did they purchase an evening dress on that occasion?
A. Yes.
Q. How long were they on the second floor making this purchase, if you recall?
A. I don't remember.
Q. Was anything purchased other than the dress itself?
A. No, not and carried out that day.

Myrtle Sutton.

Q. What was the reason, if you know, these other people were with Mrs. Weeks?
A. I didn't understand.
Q. What was the reason Mrs. Coddington was there? Did she take any part in this purchase?
A. No.
Q. She was just standing around up on the second floor with them?
A. She came in with Mrs. Weeks.
Q. And she was with her during the time she was on the second floor?
A. Yes, sir.
Q. Do you recall whether there were other
page 175a } customers there at that time?
A. There were customers in and out.
Q. Up to the second floor and down?
A. Yes, sir.
Q. After the purchase, tell us what happened to these four people who had come to your floor: Mrs. Weeks, Mrs. Coddington, her daughter Judy, and her small daughter; what happened to them?
A. You mean, tell the story?
Q. Yes.
A. Well, the daughter and Mrs. Coddington and the little girl, Judy, and her baby sister went downstairs and I was talking to Mrs. Weeks.
Q. Where were you talking to Mrs. Weeks, if you recall?
A. I was standing at the head of the steps.
Q. On the second floor?
A. Yes, sir.
Q. Where was she standing at that time?
A. The second step from the top.
Q. Do you recall how she was talking to you, over her left or over her right shoulder?
A. I don't remember.
Q. Do you remember how she was turned, whether she was next to the rail or next to the wall?
page 176 } A. She was next to the rail.
Q. As she stood there talking?
A. Yes, sir.

By the Court:
Q. Did I understand she was on the landing then or doing down the steps?
A. She was going down the steps.

Myrtle Sutton.

Q. Had not reached the landing?
A. No, sir.

The Court: All right.

By Mr. Boyd:
Q. After the conversation was concluded between you and Mrs. Weeks, what did she do, so far as you know, and what did you do?
A. Well, after we completed our conversation I walked to my right to wait on a customer, and then I heard a noise and I walked back to the stairway and saw Mrs. Weeks.
Q. Where was she then?
A. She was on the second landing, I mean the first landing from upstairs, the second coming from the first floor.
Q. The first one that you get to as you go down?
A. Yes, sir.
page 177 } Q. Can you tell us whether she was holding to anything?
A. She was holding to the rail, yes, sir.
Q. Where was the newel post, if you understand what I mean, the post which terminates the rail which goes down to the landing and then begins from there down to the next landing.
A. I don't quite understand.
Q. Where was she with respect to that newel post? Was she down the steps from it, holding on to it, beside it, or where?

By the Court:
Q. Let's put it this way. About how many steps had she gotten down? Do you know?
A. She was on the landing when I saw her.
Q. You had finished talking to her when she was on the landing?
A. No, when I finished talking to her she was on the second step from the top, and when I heard the noise on the stairway I went back to check and see what it was caused by.
Q. When you last saw her where was she?
A. The second step from the top.
Q. She had just started down the steps?
A. Yes, sir.
page 178 } Q. And had not reached the landing?
A. No, sir.

Myrtle Sutton.

By Mr. Boyd:

Q. You did not see her fall?

A. No, sir.

Q. You don't know how she fell?

A. No, sir.

Q. Or anything about the fall?

A. No, sir.

Q. When you saw her, what did you then do?

A. I went down to help her up the steps and sat her down.

Q. Did you help her up the steps?

A. Yes, sir.

Q. What did you do as you helped her up the steps?

A. She was crumpled to the floor and I helped her up to her feet and then I helped her back up on the second floor and sat her in a chair.

Q. What did you do then?

A. Mrs. Holmes and I applied cold towels to her.

Q. Did you have any conversation with Mrs. Weeks as you helped her up the steps or as she was sitting upstairs in the chair?

page 179 } A. On the way up, Mrs. Weeks asked me, told me, not to worry, that it wasn't our fault, that she would be all right. And then Mrs. Holmes met us at the stairway, at the head of the steps, and she helped us to the chair. Mrs. Holmes got cold towels and Mrs. Weeks was concerned about her coat and I was helping her get it off.

Q. Did your husband come up?

A. Mr. Reil came up right behind me, the assistant manager of the store, and I asked him to get Mr. Sutton.

Q. Then did Mr. Sutton come up?

A. Yes, sir.

Q. What happened to Mrs. Weeks after you had administered the cold cloths?

A. Mr. Sutton asked her who her physician was and she said, "Dr. Dick." He called Dr. Dick's office. He wasn't in. Then he got the Rescue Squad from the Fire Department.

Q. How was she taken away from the store, if you know?

A. The man from the Fire Department helped her down the steps.

Q. Did you notice the steps on this particular day?

page 180 } A. Yes, sir.

Q. Did you notice them at the time of the accident?

A. In going down.
Q. Right afterward, I mean?
A. Yes, sir. I noticed that they were clean.
Q. There was no trash or debris?
A. No, sir.
Q. Were they wet?
A. No, sir.
Q. Did Mrs. Weeks make any claim to you that she had fallen because of water or dampness on the steps?
A. She said nothing to me, no, sir. The only thing she said is, "It wasn't your fault."

Mr. Boyd: I think I have no other questions. Will you answer these gentlemen's questions, please, ma'am?

CROSS EXAMINATION.

By Mr. Harry Anderson:
Q. Mrs. Sutton, The Williamsburg Shop is part of the chain of Southern Department Stores, isn't it?
A. Yes, sir.
Q. That is one of the many stores that Southern Department Stores operates?
page 181 } A. Yes, sir.
Q. I am sitting here, Mrs. Sutton, and I am looking at your shoes. We had some discussion this morning about Mrs. Weeks' shoes. Are those the type of shoes that you normally wear?
A. Yes, sir.
Q. Around the store?
A. Yes, sir.
Q. Going up and down the steps?
A. Right.
Q. They are about three-inch heels, would you say?
A. My husband is more qualified to answer about the shoes.
Q. You stay on the second floor, as I understand it, in this building?
A. Yes, sir.
Q. And sometimes when you have a sale there I suppose you have as many as 35 or 40 people up there, don't you?
A. Yes, sir.
Q. There have been occasions, I guess, when you have had more than that up there, would you say that?

Myrtle Sutton.

A. There may have been, but it isn't that
page 182 } large.
Q. You can't hold a hundred people or so, but—
A. No.
Q. —but it can easily accommodate 35 or 40?
A. Yes, sir.
Q. And this conversation that you had with Mrs. Weeks, you say that was when you went down to help her up?
A. Which conversation is that?
Q. Well, I think she made some reference about it wasn't your fault, or something like that, and while you were helping her up?
A. Yes, sir.
Q. That is when her face was bleeding?
A. Yes, sir.
Q. She had that laceration or cut across her face?
A. Yes, sir.
Q. Blood was coming out and she was holding her face; is that true?
A. Yes, sir.
Q. And you said that she said nothing to you about what caused her to fall?
A. No, sir.
Q. And you didn't ask her?
A. No, sir.
page 183 } Q. The main topic of conversation between you and her was let's get some medical attention and get you fixed up; wasn't that it?
A. Yes, sir.

Mr. Harry Anderson: Thank you.

RE-DIRECT EXAMINATION.

By Mr. Boyd:
Q. Do you know, Mrs. Sutton, what time this accident occurred on this particular day? Do you recall approximately the time?
A. I don't remember the exact time. But it was between 11 and 12.

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page 184 }

* * * * *

MARY HOLMES,
was sworn in behalf of the defendant, The Williamsburg Shop, Incorporated, and testified as follows:

DIRECT EXAMINATION.

By Mr. Boyd:

Q. Mrs. Holmes, will you please, ma'am, state your name, age, and residence?

A. Mary Holmes.

Q. You have to speak so that all of these gen-
page 185 } tlemen and the jury can hear you.

A. Mary Holmes; I live on Jamestown Road; I am 49.

Q. Where are you employed?

A. Williamsburg Shop.

Q. Where were you employed on February 6 of last year?

A. Williamsburg Shop, on the second floor.

Q. Do you know this lady here, Mrs. Weeks?

A. Yes, sir.

Q. Was she a customer of yours on that day?

A. Yes, she was, with her daughter.

Q. Can you tell us whether or not she frequented the second floor of The Williamsburg Shop?

A. I didn't understand the question.

Q. Was she a regular customer of the shop?

A. Yes, she was.

Q. Can you tell us how often she came to the second floor of The Williamsburg Shop?

A. I don't know exactly.

Q. Could you say whether it was maybe once every week or once every two weeks or once a month? I know you can't be accurate, but can you give us your idea as to the general frequency with which she came to the
page 186 } second floor?

A. I would say once every week or two weeks or it wasn't the same length of time in between.

The Court: Would she average as much as once a week? That is what he is trying to find out. Once a month or what?

Mary Holmes.

Mr. Boyd: I believe, sir, she said once every week or perhaps once every two weeks, and that is about as much as she can help us.

A. (continuing) As much as I recall.

By Mr. Boyd:

Q. On this day that we are considering, the 6th of February, 1957, you say she did come to the store on that day?

A. Yes.

Q. And to the second floor?

A. Yes, she did.

Q. Who was with her?

A. I helped her daughter get her formal.

Q. What do you mean you helped her daughter with her formal?

A. I tried the formal on her daughter and wrote the ticket.

Q. This was a charge sale?

A. Yes, sir.

page 187 } Q. Do you have any idea as to how long Mrs. Weeks and her daughter were on the second floor in making this purchase?

A. I would say about an hour.

* * * * *

Q. What was the first that you knew about a fall by Mrs. Weeks?

A. When I was putting some crinoline slips back in stock, I heard it and I run over to the steps.

Q. What did you see then?

page 188 } A. I saw her just crouched down.

Q. Where was Mrs. Sutton?

A. Mrs. Sutton was right behind me. We both heard it and ran together.

Q. Do you recall what Mrs. Sutton did?

A. Yes, she went down the steps and helped her up.

Q. Where did Mrs. Weeks then come from the place of her fall?

A. Up to the second floor in the chair at the hat bar.

Q. What was then done to Mrs. Weeks?

A. I got cold towels while Mrs. Sutton stayed with her.

Q. You got the cold towel what?

Mary Holmes.

A. While Mrs. Sutton stayed with her.

Q. How long was it approximately, if you recall, that Mrs. Weeks was up there in the chair before she left with the fire engine boys to go over to the hospital?

A. Approximately 20 minutes, 25 minutes.

Q. Did you hear any conversation or any statements then made by Mrs. Weeks about the accident?

A. I only heard her say, "Do not worry, it is not your fault."

Q. And that was when she was upstairs sitting

page 189 } on the chair?

A. Yes, sir.

Q. Did you notice the steps as to whether or not they were clean or whether they were dirty?

A. I didn't notice particularly, but they are always kept clean.

Q. So far as you can tell us, was the condition of the stairway the same on that day as it had been on prior days when Mrs. Weeks would visit your store?

Mr. Harry Anderson: Objection, your Honor. She says, "I don't know, I didn't pay any particular attention," I believe, or words to that effect, with reference to a question as to what the condition was.

The Court: I think she can state whether she noticed it, or to put it another way:

By the Court:

Q. Did you notice any differences on that day than other days when you were there?

Mr. Boyd: Will you answer the judge's question?

A. No, I did not.

Mr. Boyd: That is all. Thank you, ma'am. Answer this gentlemen's questions, please.

page 190 } CROSS EXAMINATION.

By Mr. Harry Anderson:

Q. Mrs. Holmes, I just have one question I want to ask you—two questions, really. The floor upstairs on the second floor is linoleum or tile floor, isn't it?

A. I believe it is asphalt tile.

Q. There is no rug or anything?
A. No.
Q. And you don't remember whether anyone else was with Mrs. Weeks that day or not, do you? You mentioned helping her daughter, I believe.
A. That is right.
Q. So so far as you know it was just Mrs. Weeks and her daughter Judy that were there that day; is that true?
A. Yes, sir.

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GALEN REIL,
was sworn in behalf of the defendant The Williamsburg Shop, Incorporated, and testified as follows:

DIRECT EXAMINATION.

By Mr. Boyd:
Q. Will you please state your name, age, and residence?
A. Galen Randolph Reil; I am 23; and I live at 524½ Henry Street.
Q. By whom, sir, are youemployed?
A. The Williamsburg Shop, Incorporated.
Q. What is your job with Williamsburg Shop?
A. I am Mr. Sutton's assistant and manager of the shoe department.
Q. Where is the shoe department in the store?
A. It's the left rear and right rear.
Q. With respect to the bottom of the steps, where is the shoe department?
A. To the right and to the left.
Q. Immediately adjacent?
A. To the right, immediately, yes.
Q. Do you know the plaintiff in this case, Mrs.
page 192 } Weeks?
A. Not very well, except to speak to her when she came in the store.
Q. You know her as a customer of the store?
A. Yes, sir.
Q. How long have you been working in the store?

A. Five years and ten months.

Q. Can you tell us with what frequency Mrs. Weeks was a customer in your store?

A. No, I cannot.

Q. You didn't have anything to do with the ladies' department upstairs?

A. No, sir.

Q. Were you in the store on February 6, 1957?

A. Yes, sir.

Q. When an accident occurred?

A. Yes, I was.

Q. Where were you? What was the first that you knew that there had been an accident?

A. I was sitting in the office looking through some orders when I heard someone slip.

Q. What did you then do?

A. I got up and came out and went upstairs.

Q. What did you see?

A. When I got to the bottom of the stairway she was kneeling and Mrs. Sutton had gotten to her.

page 193 } Q. You saw her up the stairs from the first floor where you were working?

A. Yes, sir.

Q. Can you tell what then happened to Mrs. Weeks?

A. Mrs. Sutton helped her upstairs and sat her in a chair.

Q. Did you go upstairs?

A. Yes, I went right up behind her.

Q. Did you stay up there long enough to hear any conversation by Mrs. Weeks?

A. The only thing I heard her say was that it wasn't our fault, and not to worry about it.

Q. Where was she when she made that statement?

A. She first made it just as I got up there to her, still on the stairway.

Q. Did she make it any other time?

A. She made it again when she sat in the chair upstairs.

Q. What was happening to Mrs. Weeks as she sat in the chair upstairs?

A. As she sat in the chair, she noticed she had blood coming through her fingers and was concerned about her coat that she had on.

Q. Did you do anything about the blood one

page 194 } way or the other?

A. I went back downstairs and got some cheese-

cloth and brought it back up and Mrs. Holmes took it in the rest room and wet it.

Q. What did she do with the cheese cloth after she wet it?

A. Used it on Mrs. Weeks' face.

Q. What did you do then?

A. I called Mr. Sutton when I went down after the cheese cloth and came back up and gave this to her and then I went to the fire house and got the ambulance.

Q. Did you have anything further to do in connection with this accident after that?

A. No, sir, I stayed downstairs while they completed it.

Q. Can you tell us about the condition of the stairs from your own observation on this day and at this time?

A. Well, they were clean.

Q. What do you mean by that?

A. Nothing, I didn't notice any dirt, trash, or anything like that on them.

Q. Can you tell us whether they were wet or not?

A. No, they were not wet.

Q. Do you recall whether it was raining at the
page 195 } time?

A. No, it wasn't raining at the time.

Q. It was not?

A. It was not.

Mr. Boyd: I think I have no other questions. Thank you. Answer this gentleman's questions.

CROSS EXAMINATION.

By Mr. Harry Anderson:

Q. Mr. Reil, you say it was not raining at the time; what time are you talking about?

A. It wasn't raining at the time I came downstairs and went to the firehouse.

Q. And that was about how long after the accident, half hour, twenty minutes?

A. It was, I would say, less than five minutes.

Q. Less than five minutes after the accident. And if Mrs. Weeks had been in the store for an hour at that time you don't know what the condition was, whether it was raining an hour previous to that, do you?

A. Well, it was not wet when I went outside.

By the Court:

Q. What did you say, it was not wet?

A. It was not wet when I went outside.

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JAMES SUTTON,

was sworn in behalf of the defendant The Williamsburg Shop, Incorporated, and testified as follows:

DIRECT EXAMINATION.

By Mr. Boyd:

Q. Will you please, sir, state your name, age, and address?

A. James Sutton; 120 Davis Drive; age 32.

Q. What is your occupation, Mr. Sutton?

A. I am Manager of The Williamsburg Shop.

Q. How long have you been manager of The Williamsburg Shop?

A. Five years.

Q. Do you know Mrs. Weeks, the plaintiff in this case?

A. Yes.

page 197 } Q. Do you recall whether she was a customer in your store on February 6, 1957?

A. Yes.

Q. Can you tell us with what frequency she had visited your store prior to that time?

A. I can't say definitely the time. She may have been in today and tomorrow and at other times she might be two or three weeks or a month, but she was in very frequently.

Q. Can you tell us how long she had been a customer of your store?

A. According to our charge account records which her account was opened on March 30, 1956.

Q. Do you know whether she had been a cash customer prior to that time?

A. I definitely cannot say.

Q. You cannot say for certain; is that right?

A. That is right.

Q. Will you tell us whether or not the stairway and the

rail and the display counter were exactly the same on the day of February 6 as they had been during the prior times that she had been a customer of yours?

A. There had been no changes from March 30 of 1956 until that date.

Q. Where is your ladies' ready-to-wear depart-
page 198 } ment?

A. It is on the second floor.

Q. Who is in charge of that?

A. Mrs. Sutton.

Q. She is your wife?

A. Yes.

Q. What employes do you have there?

A. On the second floor?

Q. Yes.

A. We carry three to four, on Saturdays, five.

Q. Can you tell us whether or not Mrs. Holmes is one of your employees on the second floor?

A. Yes, for ten years.

Q. Was she on the day of February 6?

A. Yes.

Q. Mr. Sutton, I show you some charge slips and ask you whether or not they are charge slips in connection with sales made to Mrs. Weeks from the second floor of your store?

A. Shall I go through each and verify each?

A. That's right, sir.

Mr. Harry Anderson: They are admitted. We admit them.

The Court: You concede that they were made?

Mr. Harry Anderson: Certainly.

page 199 } The Court: Why not just count them and read off the dates?

Mr. Harry Anderson: The only relevancy, if Your Honor please, as I understand it, are the dates to show the dates that she was in there.

The Court: Read off the dates that she was in there.

A. The first one was May 9, 1956; March 30, 1956; June 2, 1956; June 6, 1956; 9-15-56; 11-2-56; 12-12-56; 2-1-57; and 2-6-57.

By Mr. Boyd:

Q. Tell us whether or not the merchandise on all of these

charge slips was from the second floor or if there was merchandise from the second floor on each charge slip?

A. Well, these, according to the departments and coding, are all second floor, and merchandise listed here cannot be purchased on any other floor.

Q. Can you tell us whether or not Mrs. Weeks came into the store and made other purchases other than from the second floor?

A. Oh, yes.

Q. Would they be in addition to these?

A. They would be in addition to these.

Mr. Boyd: We offer those in evidence.

page 200 } The Court: That will be Defendant Exhibit 1. I shall clip them and make them one exhibit.

(The tickets were received in evidence as Defendant Williamsburg Shop Exhibit 1.)

By Mr. Boyd:

Q. Was the condition of the stairs the same on each of these occasions that you have referred to by these tickets?

A. Yes.

Q. On this day, I believe Mrs. Weeks had a fall. What was your first information about it?

A. Well, I was up near the front of the store when it happened. I do remember hearing Judy saying something near the shoe department about "Mama," and I turned around and I was stopped by a customer and asked a question. At that time, Mr. Reil came down the stairs and said my wife wanted to see me upstairs. So I excused myself from the customer and went upstairs, at which time Mrs. Weeks was sitting in a chair by the hat bar. I walked over to her and I noticed she was bleeding from the face. So we did everything possible to stop the blood, get her coat off, and I asked her who her physician was,

page 201 } and she said, "Dr. Dick." But Dr. Dick was not in his office so we called the Fire Department and got the ambulance and requested they take her to Bell Hospital, which was the neighborly thing to do. So they came over—well, on the way over I talked to Mrs. Weeks—

Q. Wait a minute. On the way over to where?

A. While the Fire Department was getting the ambulance to the back of the shop.

Q. Where was Mrs. Weeks at that time?

James Sutton.

A. She was still sitting in the chair.

Q. And you were waiting for the Fire Department?

A. That's right. So I talked to Mrs. Weeks because I was concerned how it happened, where it happened, and conditions and so forth. She said not to worry about it because we couldn't help it, it wasn't our fault. So I asked her, "Where did it happen?"

She said, "On the first or second step." She says, "I tripped on my heel." She insisted that we not take her to the doctor, but it is our policy, as instructed by our store company, that any time an accident should occur to give all the attention, medical attention, or anything that might help this customer.

Q. I believe, sir, that she had a coat on this particular day?

A. She had a coat on. It was a tweed coat, it had blood on the left side, I believe.

page 202 } Q. What did you do about the coat?

A. I took the coat and took it to the West End Valet Shop to have the bloodstains removed immediately before they got set. Charlie Geary at West End Valet Shop stopped his work and steamed it out and cleaned it. Then I went to the hospital with the coat to see Mrs. Weeks and I found her at the hospital.

Q. Then where was Mrs. Weeks when you got to the hospital?

A. She was in the examination room, I guess, or someplace.

Q. What did you do when you got there?

A. I waited in the reception room until she came out.

Q. After she came out what happened?

A. Well, Mrs. Weeks asked me, she says,—I offered to pay Dr. Bell and he said to talk to you first. I said, "Well, we will take care of the bill."

Q. Then that having been decided what did you do thereafter?

A. Mrs. Weeks and Mrs. Coddington came out in my car and proceeded to the parking lot back of the shop. I took Mrs. Weeks's car from there and her personal belongings that were left in the store and delivered her auto-

page 203 } mobile and personal belongings to her house and my wife picked me up there.

Q. Did you notice the condition of the steps on this date?

A. Yes, I did. I took particular notice of the steps and made notes of them.

James Sutton.

Q. Just tell us what the condition of the steps was.
A. The steps was clean, in fact, the boy had, more than an hour or hour and a half, at the most, had swept the steps down.
Q. On this particular day?
A. Yes.
Q. Can you tell us when the steps had last been waxed?
A. I can't say definitely. Maybe we should wax them more often, but it was some time before Christmas and I would say either October or November.
Q. How had the steps and the floors of your store been maintained since that time?
A. Well, we wax the stairway about once every six months.
Q. I say, since that time in October or November, how had the floor and the stairways been maintained up until the time of this accident?
A. The same as before.
page 204 } Q. What did you do each day?
A. They are swept the first thing in the morning. We start sweeping on the second floor and come to the first floor.
Q. Can you tell us whether the shop had been swept on this particular day, completely?
A. Yes.
Q. How long had those steps been in that condition or how long had the steps been in the condition they were in at the time of this fall?
A. What condition are you speaking of?
Q. Structurally as they were set there so you could use them to go up on the second floor?
A. Well, I came there on March 14, 1949, and they were that way at that time.
Q. And you have been there ever since March 1949?
A. March 14, 1949.
Q. Has anyone ever fallen down those steps?
A. No.

Mr. Harry Anderson: Objection, Your Honor. I move that that be stricken. I don't think that is evidence that is admissible.
The Court: To bring in the fact anyone had
page 205 } fallen. You bring it in to show notice. The fact that people had used it for some while, I think that is evidence. I overrule the objection.
Mr. Harry Anderson: Exception noted.

James Sutton.

By Mr. Boyd:

Q. Do you have any idea of how many people use those steps to the second floor on an average day?

A. It is hard to say. At times you might have ten people on the second floor; again, you might have fifteen, say, in the dressing room and on the floor, but on the average I would say four to five people.

Q. At one time, are you speaking of?

A. Yes.

Q. My question to you was, how many people would use those steps to go up and come down in an average day?

A. An average day, possibly 150 on the average. Some days are more rushed than other.

Q. And that average is maintained, I believe, since 1949?

A. More or less, yes.

Q. Did Mrs. Weeks make any claim then to you that her fall was caused by virtue of the way you all maintained the store?

Mr. Harry Anderson: Objection, Your Honor. That is repetition. He has gone over that and he stated page 206 } what her claim was, and now he is getting into negative evidence of what she didn't say. He stated what her claim was, or rather what she said, and I submit he cannot go over the same ground which has already been covered.

By the Court:

Q. Did she say anything other than what you have related about the accident?

A. Are you talking to me?

Q. Yes.

A. What was the question?

Q. Did she say anything other than what you have related about the accident?

A. No.

The Court: All right.

Mr. Boyd: I think that is all. Thank you. Answer this gentleman's questions, please.

CROSS EXAMINATION.

Q. Mr. Sutton, you say, and I am quoting you, "our policy as instructed by our company" was to give first aid when anyone gets hurt in the store.

James Sutton.

A. That is the policy set by the company, that page 207 } we carry out. If at any time an accident should occur in the store, no matter *now* minor, it is that medical attention be given.

Q. How do you receive these instructions? Is it in the form of a letter?

A. It is in our manual.

Q. In your manual?

A. Yes, our store manual.

Q. What store are you talking about? Are you talking about Williamsburg Shop?

Mr. Scott Anderson: If Your Honor please, I object to that.

Mr. Harry Anderson: He brought it up.

The Court: What bearing does that have?

Mr. Scott Anderson: He brought it up about instructions.

The Court: I understand that, but what bearing does that have on the matter?

Mr. Harry Anderson: I would like to know in what manner these instructions are coming and from whom.

The Court: I don't see that it has any bearing on this case. That is the common policy everywhere to render first aid. I think any further examination about that page 208 } is immaterial.

Mr. Harry Anderson: All right, sir. Exception noted.

By Mr. Harry Anderson:

Q. You say the store was swept out the first thing in the morning; when do you open?

A. Nine o'clock.

Q. And I believe this accident occurred between 11 or 12 o'clock?

A. I have it noted as 11:35.

Q. That would be two hours and 35 minutes after you swept down? Isn't it true, Mr. Sutton, or has it been brought to your attention, that a young lady who worked in the office of Dr. Bradingham fell on those steps?

A. No, it has not.

Q. Do you know about the young lady who works in the office, about any accident she had in your store?

A. Well, I guess I can use the name of the person.

Q. Yes.

A. Barbara Dutton?

Q. Yes.
A. I had never heard anything about it, no, sir. If she fell, it is something that I don't know.
Q. If she fell, it wasn't reported to you?
A. No.

page 209 } Mr. Harry Anderson: All right, sir. I have no further questions.

By Mr. Spratley:
Q. Mr. Sutton, does The Williamsburg Shop, Incorporated, share possession of the premises with anyone?
A. No.
Q. You have exclusive possession of the premises?
A. Yes.

Mr. Spratley: I have no further questions.
Mr. Boyd: I think that is all.

By the Court:
Q. Mr. Sutton, who placed the showcase there?
A. That was placed by Acme Fixture Company in Richmond, I believe.
Q. Was that done at your request or the request of The Williamsburg Restoration?
A. I requested the president of the store, and what happened from there on I don't know. The next thing I know it was put in.
Q. How long has that been there?
A. That was put there in 1954, I believe. I believe it was installed in 1954, I am almost positive. I would have to check the record to be sure of it.
page 210 } Q. But it has been there for a year or two before this accident occurred?
A. Oh, yes, definitely, yes, sir.

* * * * *

Mr. Boyd: If the Court please, that is the case for The Williamsburg Shop, with one exception. There is a photographer here and we would like to ask permission of the plaintiff that he take a picture of that shoe so that it might be put in the record.
The Court: All right.

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Mr. Spratley: Your Honor, I have four photographs here that I should like to submit into evidence. Mr. Anderson, you have seen those?

Mr. Harry Anderson: I think I have already seen those, yes. O. K.

The Court: I will mark them R-1 to distinguish from the other defendant, and R-2, R-3, and R-4.

(The four photographs were received in evidence as Defendant Exhibits R-1 to R-4, inclusive, for The Williamsburg Restoration, Incorporated.)

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page 212 } CHARLES E. HACKETT,

was sworn in behalf of the defendant The Williamsburg Restoration, Incorporated and testified as follows:

DIRECT EXAMINATION.

By Mr. Spratley:

Q. Mr. Hackett, will you state your name and address?

A. Charles E. Hackett, Williamsburg, Virginia.

Q. What is your job?

A. I am Director of Building Construction and Maintenance for Colonial Williamsburg.

Q. How long have you held this job?

A. Since June, 1946.

Q. How long have you been in construction?

A. Twenty years in construction.

Q. Are you familiar with the stairs between the first and the second floors of The Williamsburg Shop?

A. I am.

Q. When were these stairs constructed?

A. In the spring of 1949.

Q. Did you have anything to do with the construction of these stairs?

A. They were constructed under my supervision.

Q. Are you familiar with the building code of the City of

Williamsburg?

page 213 } A. None exists, to the best of my knowledge.

Q. They have no code in existence?

A. Not that I know of.

Q. Did Williamsburg Restoration, Incorporated, install that showcase on the landing on the second floor? The landing between the first and second floors?

A. No, it did not.

Mr. Spratley: I have no further questions, Your Honor.

The Court: Now that you have introduced these pictures in evidence, don't you guess they are not of much value unless the jury sees them? Suppose you have Mr. Hackett point out to the jury what they represent? Stand over there in front of the jury, refer to the number on the back, and then explain them.

A. (continuing) This is R-4. This is the second intermediate landing between the first and second floor where the dog-leg or reverse run occurs looking down from the second floor on the landing.

This is a picture of the same thing from a slightly different angle. This is R-3.

This is a picture of the same landing looking

page 214 } up from about, I guess, the ninth riser from the first floor, looking up toward the intermediate landing between the first and second floor. This was R-1.

This is a picture of the stair—it is R-2—from the first floor, looking up toward the first landing and intermediate landing where the stair turns, from the first floor to the second floor.

The Court: Did you have some questions that you wished to ask Mr. Hackett?

Mr. Harry Anderson: I think I have got two questions.

CROSS EXAMINATION.

By Mr. Harry Anderson:

Q. I guess these gentlemen of the jury already know this, but I don't. You mentioned that you are Director of Building and Construction for Colonial Williamsburg; is that the same as Williamsburg Restoration?

A. Same thing.

Q. And you said that the stairway was constructed under your supervision; is that true?
A. That is true.
Q. And you constructed it according to the plans and specifications submitted to you?
A. Right.
Q. Who prepared the plans and specifications?
page 215 } A. The Architectural Department of Williamsburg Restoration.
Q. So in other words you were just doing what you were told to do?
A. Correct.

Mr. Harry Anderson: All right, sir. I have no further questions.

By Mr. Boyd:
Q. Mr. Hackett, are the stairs up there now in the same condition they were at the time you completed construction of them, with the exception of the showcase being there?
A. Yes, materially, yes.

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page 216 } HUBERT L. JONES,
was sworn in behalf of the defendant The Williamsburg Restoration, Incorporated, and testified as follows:

DIRECT EXAMINATION.

By Mr. Spratley:
Q. Mr. Jones, will you state your name and address?
A. Hubert L. Jones; 103 East Cary Street, Richmond.
Q. What is your profession, Mr. Jones?
A. I am an architect.
Q. Are you currently engaged in this profession?
A. Yes, I am in private practice now.
Q. Where do you practice architecture?
A. In Richmond.
Q. Are you by yourself or with a firm?
A. I am, I have two other partners. I am a partner in the firm of Walford & Wright.
Q. Are you a registered architect?
A. Yes, I am registered by examination in Virginia.

Hubert L. Jones.

Q. Did you study architecture?
A. Yes, I studied architecture for three years.
Q. When did you study architecture?
A. I finished my three years in 1940.
page 217 } Q. Since you finished school in 1940 what have you been doing?
A. I was employed by Baskerville & Son, architects, and then served three years in the Army Engineers as an assistant engineer; following that, I was employed by Slaughter, Seville & Blackburn, consulting engineers, as an architectural draftsman; and then I was employed by Samuel N. Mayo, Architect, as an architectural draftsman. Following that, I went with the firm of Walford & Wright as an architectural designer. I was with Walford & Wright until I was taken into partnership in 1954.
Q. In what type of architecture does your firm specialize?
A. It specializes in commercial, institutional, and educational buildings.
Q. Have they designed any educational buildings in Williamsburg?
A. Yes. We have designed the Phi Beta Kappa Hall, three dormitories on the campus of William and Mary, and the addition to the old Phi Beta Kappa Hall.
Q. Were you the partner in charge of these projects in Williamsburg?
A. Yes, I was.
Q. Are you a member of any architectural
page 218 } organizations?
A. Yes, I am a corporate member of the American Institution of Architects.
Q. Mr. Jones, have you examined the interior steps between the first and second floors of The Williamsburg Shop?
A. Yes, I have.
Q. When did you make this examination?
A. Two days ago.
Q. Based on your examination of the stairs and your experience as an architect, what is your expert opinion regarding the construction of these stairs?
A. Well, these stairs are constructed in accordance with good practice. They are, in particular, constructed to meet the requirements of the Virginia Fire Safety Regulations, which are the only governing code for stairways in this particular locality. They also meet the requirements of the National Board of Fire Underwriters, National Building Code, which is accepted all over the country, and they also meet the

requirements of the National Fire Protective Association code, a building exits code.

Q. Mr. Jones, what is the general requirement for handrails on stairs?

page 219 } A. Well, as to the location of the handrails, it is determined by the width of the stairway. In this particular case—well, in any case, the width of the stairway is determined by the number of people occupying the floor that the stairway serves as an exit for. This place that we are talking about does not serve enough people to require a stairway of more than three feet in width. In accordance with the code that I have mentioned a stairway three feet in width does not require a handrail but on one side; it requires a balustrade and handrail on one side and a wall on the other side.

Q. What are the widths of those particular stairs?

A. They are in excess of 36 inches, 3 feet-2½ inches between rail and wall, to be exact.

Q. When are two handrails required?

A. When the stairway is as much as 44 inches wide.

Q. Mr. Jones, what are the general building requirements in regard to safety tread on steps?

A. Well, the Virginia fire safety regulations simply say that stairs shall be constructed so as to—of materials that will retard slipping that can be maintained to retard slipping.

Q. What type of treads did you find on these particular stairs?

page 220 } A. I found an oak wood tread without any varnish finish or wax finish at all.

Q. Would you say that these treads meet the acceptable requirements?

A. Yes, I would.

Mr. Spratley: I have no further questions.

CROSS EXAMINATION.

By Mr. Harry Anderson:

Q. Mr. Jones, you referred to the Virginia fire safety regulations; that also says that no part of an exitway—I am reading from Section 1410-4:

"No part of an Exitway shall be used for any purpose which will interfere with its value as an Exitway."

Hubert L. Jones.

In your opinion, doesn't this showcase, which is on the platform, interfere with its value as an exitway?

Mr. Boyd: If the Court please, this is purely for the quesiton of whether somebody is going to be able to get out of that building when they have a fire. There was no fire, nobody rushing or hurrying.

The Court: Mr. Boyd, I had previously ruled that, but this other defendant brought the fire code in again, so having brought it in again and he having answered it, I page 221 } think it is proper cross examination and I overrule the objection.

Mr. Boyd: We respectfully except.

A. In explaining the Fire Safety, I didn't consider any store fixtures, but the store fixture does diminish the width of the stairway, the required width of the stairway.

By Mr. Harry Anderson:

Q. So it would be in violation of this code that you brought in?

A. Yes, it would.

Q. As a matter of fact, with reference to the treads and the landings, in quoting from the Code again, under the Section 404-1 relating to "Construction and Arrangement of Interior Exit Stairways," said Section (c), it states:

"Treads and landings shall be constructed and maintained in a manner to prevent persons from slipping thereon."

That is a correct statement, is it not?

A. That is right.

Q. Isn't it true that anti-slip treads and nosings will prevent persons or will lessen the chance of persons slipping on the stairway?

page 222 } A. I don't believe they would add any more abrasive surface than you had with the rough wood surface that you have now.

Q. In other words, I want to show you an exhibit. You and I refer to Plaintiff Exhibit No. 4, to the Type 20-A nosing and anti-slip tread, and ask you if that type of anti-slip device, if it was used, it wouldn't be reasonable to say that it would cut down on the probability of a person slipping as against the surface as it now exists, and as it existed on February 6, 1957? Isn't that a fair statement?

A. Well, this is more—this is a carborundum material which is more abrasive than a wood tread, yes. I would also like to mention that my firm would never consider using this type of nosing because it has a metal edge on the outer edge and it is very slippery on that edge, although it is abrasive back on the tread itself.

Q. How about just a plain rubber tread? That would certainly cut down on the probability of slipping as against a hard surface, wouldn't it?

A. Rubber treads are normally put on to cut down on maintenance and to overcome a worn surface on the steps.

Q. But I am asking you about slipping? Isn't it true that a rubber surface would have less probability of
page 223 } slipping than it would a hard wood surface?

A. Not on the hard wood surface as it exists in the building at present.

Q. So you think that any type of tread, anti-slip tread, or nosing would not cut down on the probability of a person slipping as against the condition which exists today and existed in February 1957?

A. Well, a carborundum type of tread would certainly cut down on the probability of slipping on the steps.

Q. Referring to this code that you have mentioned, again, Mr. Jones, and Section 404-4 Width, it reads as follows:

"* * the required exit width of an Interior Exit Stairway shall be not less than 44 inches * *."

Now this was certainly less than 44 inches, wasn't it?

A. Yes, it was less than 44 inches, but the code goes on beyond that.

Q. All right, sir. Let's read it on:

"provided that in multifamily houses and Group E buildings, and in other buildings occupied by a single tenant and limited in occupancy to 40 persons, such width
page 224 } may be 36 inches."

A. That is right.

Q. Doesn't that mean that if you have 40, 50 persons using, or at times using the second floor that this width is to be 44 inches rather than 36 inches?

A. No. Well, the number of people in the code is based on the square footage which is set forth in the front of the code as one person per hundred square feet. Now I think

you will find that the capacity of that second floor, one person per hundred square feet, is less than 20 people.

Q. All right, sir.

A. And in that case—

By The Court:

Q. In other words, you don't measure the number of people that can be packed in there, but rather the number of squares that is in the floor?

A. That is right. It is a Class D building, and a Class D building occupancy is figured at one person per hundred square feet.

By Mr. Harry Anderson:

Q. Let's see if you agree with this. The code says, Section 404-6 in regard to landings that "The length and
page 225 } width of landings shall be not less than the width of stairways in which they occur."

A. Than the required width.

Q. No, it says "than the width of stairways in which they occur."

A. Yes.

Q. That is the correct reading, if you would like to see it, you can.

A. No, that is all right.

Q. Isn't that true?

A. Yes.

Q. And isn't it true that that does not prevail in this case?

A. Yes, it prevails. I am speaking of the stair as constructed from the edge of the stair to the wall now, and the width of the landing.

Q. You are not considering the showcase, then?

A. I am not considering store fixtures, that is right.

Mr. Boyd: If the Court please, we want to maintain our position about this fire business and we still take the position, sir, that it is not material to this case and there is no fire involved and the fire regulations are not governing anything in the matter.

page 226 } The Court: I think I had previously ruled on that, but I have also ruled that it is proper cross examination because this man stated positively on direct examination that it did not violate the fire code. In other words, I was willing to leave it out if you were willing to leave it out, but having put it in, it is in.

Mr. Boyd: The Williamsburg Store did not put it in.

The Court: I cannot help that. It came out in the evidence and no one objected to it. It got in and having gone this far he is entitled to cross examine on it.

Mr. Boyd: Exception.

By Mr. Harry Anderson:

Q. Mr. Jones, isn't the difference between an architect and an engineer the architect is concerned with design and the engineer more with construction and maintenance?

A. Well, now, it depends on what kind of an engineer. They make many types of engineers.

Q. Well, I am talking about the usual civil engineer, structural engineer.

page 227 } A. We employ structural engineers, but our structural engineers simply do what we tell them to do as far as designing a stairway or anything else. They only determine whether the building will stand up or not.

Q. Are you a member of any associations or societies concerned with safe stairway construction and maintenance?

A. No.

Q. You have never had your attention for any period of time specifically directed toward that subject, have you?

A. Yes, I have, for two years at Aberdeen Proving Grounds in Maryland, in addition to my other duties in the army, and I served as the Post Safety Engineer.

Q. And that concerned what? Safety in general, didn't it, on the post?

A. It concerned the safety of all of the buildings on the post, maintaining the buildings in safe condition, and inspection to see that design is proper.

Q. But you have never worked for any organization or company, have you, that concerned itself solely with stairways?

A. Oh, no.

Mr. Harry Anderson: I have no further questions.

page 228 } Mr. Boyd: If the Court please, without waiving our position about these matters and in light of the Court's ruling, I should like to ask a question of this witness.

Hubert L. Jones.

RE-DIRECT EXAMINATION.

By Mr. Boyd:

Q. With respect to Section 1410-4, which Mr. Anderson questioned you about, which reads:

"No part of an Exitway shall be used for any purpose which will interfere with its value as an Exitway,"

it is true, sir, that that regulation or that section does not require any particular width?

A. That is right.

Q. And so if there is a sufficient width available for someone coming down those steps and around that landing as it is, with the showcase there, there would be no violation of this section, would there?

A. That is right.

Mr. Boyd: Thank you, sir.

A. (continuing) Of course, the width of the stairway is set up in the code and provided to accomodate a number of people coming down the steps, it is not set up at a particular width to take care of one person. The reason
page 229 } the width is for a larger capacity is so more people can come down the steps at one time.

By The Court:

Q. The width required would be 36 inches?

A. That is right, the width required would be 36 inches.

Q. If it is less than 36 inches would there be a violation or not?

A. Yes, it would.

By Mr. Boyd:

Q. That would be a violation of what, the fire code?

A. If the width of the stairway were less than 36 inches, it would be a violation of the fire code.

By Mr. Harry Anderson:

Q. Would there be a violation of good practice in your profession? In other words, you wouldn't design a building of this type and have the stairway less than 36 inches, would you?

A. No, I wouldn't.

* * * * *

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* * * * *

(Thereupon after a short recess, the Court, jury, and counsel adjourned to The Williamsburg Shop for a view, and where the following occurred:)

The Court: Gentlemen, you may go ahead and take your view.

* * * * *

page 232 }

* * * * *

Mr. Boyd: The defendant The Williamsburg Shop, Incorporated, offers as its Exhibit 2 a photograph of the shoe worn by the plaintiff at the time of her fall.

The Court: I have so marked it.

(The photograph was received in evidence as defendant The Williamsburg Shop, Incorporated, Exhibit 2.)

Mr. Boyd: If the Court please, before we get into the question of instructions, we would like to renew our motion to strike the plaintiff's evidence as to the defendant Williamsburg Shop for the reason that after all of the evidence has been presented to the Court and the jury, there does not appear to be any act on the part of the defendant or any omission on its part which caused the plaintiff's fall. The burden of proof is on the plaintiff to prove the reason of her fall, and that reason must be a failure of the duty on the part of the defendant. No such failure has been
page 233 } shown by the evidence and on the plaintiff's own statement she slipped and does not attribute that slip or fall to the lack of a rail or to distraction on account of the showcase, or to wetness of the floor, or to any other fact with which the defendant is charged.

In addition, sir, we think that the motion should be granted because in any event whatever may have been the cause of the plaintiff's fall that condition was open and obvious to her, she having frequented the premises many times and not

only had notice from past visits but had opportunity to see what there was at the time of the fall.

For those reasons and for the reasons assigned at the time of the motion to strike the plaintiff's evidence at the end of the plaintiff's evidence, we ask that the plaintiff's evidence be stricken at this time and the jury directed in accordance therewith.

The Court: I am going to overrule that motion. I assume that the defendant The Williamsburg Restoration, Incorporated, makes a similar motion.

Mr. Spratley: Yes, sir. We would renew our motion on the same grounds as stated before, that the only way there can be liability is for structural defect in the premises, that the defect be there at the time of the leasing.

page 234 } There is no evidence that the fall was occasioned by any structural defect. The lady stated that she came down with her hand on the handrail, she completed her turn, and at the time she completed her turn that her foot slipped.

The Court: I feel that the case against Williamsburg Restoration is certainly much weaker than the case against The Williamsburg Shop, Incorporated. I have not made up my mind definitely, but I am going to let it go to the jury. If they bring in a verdict against Williamsburg Restoration, I am certainly going to give most serious consideration to setting it aside. The only theory, as I stated before, was the fact that they designed this stairway and did not put that railing in. That would be the only conceivable theory on which they could be held liable; and it would seem to me that if they really were required after the stairway was there, that that is something that was hardly structural, it was something that a tenant could supply with very little expense.

Mr. Spratley: The evidence is in the record from the architect who was the expert witness that a stairway 36 inches in width was required to have only one handrail.

The Court: Their engineer testified somewhat to the contrary. That conflict of evidence the jury is

page 235 } entitled to pass on. For The Williamsburg Shop, they have other items, especially the showcase there, which not only partially blocked the stairs but looked like, to me, obviously, to some extent, distracting to walk down to it. Your tendency was to turn your face away from the stairway rather than towards it.

I am going to let it go to the jury. I will overrule your motion and note your exception for the reasons that you have above given.

Mr. Spratley: Note my exception.

The Court: I might say that one thing that influences me in that is if you let one defendant out and leave another one in the jury frequently draws a conclusion that one of them is liable, otherwise I would not have so acted.

Mr. Boyd: Note our exception to the Court's ruling.

* * * * *

The Court: Do you have any objections to No. 1? Is there any objection to the first paragraph of
page 236 } No. 1?

Mr. Boyd: Except that we will object to the giving of any instructions.

The Court: I have that. That objection applies to the giving of all instructions on the grounds that there is no evidence to support it. There is no need to repeat it.

* * * * *

page 247 }

Instruction No. 4

Mr. Harry Anderson: I have one other instruction:

"The Court instructs the jury: That if you believe from a preponderance of the evidence that the condition or conditions of the said stairway and platform which caused the plaintiff to fall and be injured was due in part to the negligence, if any, of The Williamsburg Shop, Incor-
page 248 } porated, as explained in Instruction No. 1, and in part to the negligence, if any, of Williamsburg Restoration, Incorporated, as explained in said Instruction No. 1, then you shall find your verdict in favor of the plaintiff against both defendants and assess her damages in accordance with the instruction on damages."

The Court: Isn't that a finding instruction and does not include contributory negligence?

Mr. Geddy: I was going to suggest contributory negligence.

The Court: If we are going to have to find in there, we had better put everything—

Mr. Boyd: Judge, you have that already covered in No. 1.

The Court: It looks to me that it is fairly well covered.

Mr. Harry Anderson: No, this is a concurring negligence instruction and we do not have it covered in No. 1.

Mr. Boyd: If you are entitled to that, we are entitled to

one that says you can find against The Williamsburg Restoration and not against us, Judge.

Mr. Harry Anderson: How?

Mr. Boyd: Because you are saying if this man is negligent and if this man is negligent and they concur, then page 249 } you must find against both. Now then, the reverse of that is that if this man only is negligent, or if this man only is negligent, then you find only—

The Court: The only trouble is that I am not going to reverse it.

Mr. Harry Anderson: I think they can find against Williamsburg Shop without finding against the Restoration, but I don't see how they could find against the Restoration and not the Williamsburg Shop.

Mr. Boyd: I don't know.

The Court: Let me see. We had better do something there and put "then both of said parties will be liable" or something like that, rather than putting in this finding thing. That is where you are getting into trouble. I think if you said "then both of said parties will be jointly liable" or some words to that effect—

Mr. Boyd: Unless you believe that the plaintiff was guilty of contributory negligence.

Mr. Geddy: Your Honor, when he says in part by Williamsburg Restoration and part by Williamsburg Shop, it leaves an inference in the jury's mind that that might be part of it, and her negligence may have contributed to it.

Mr. Harry Anderson: We are covering that.

The Court: I was going to say: "if you con- page 250 } clude then both of said parties would be jointly liable unless you believe that the plaintiff was guilty of some negligence which efficiently caused or contributed to the accident."

Mr. Harry Anderson: I have got it this way: "then both of the defendants are jointly liable unless you further believe that the plaintiff was guilty of contributory negligence which efficiently caused the accident."

The Court: I think it would be better to say "would be jointly liable."

Is there any objection to that?

Mr. Boyd: Judge, we think that the proposition of that instruction was taken care of by plaintiff's Instruction No. 1, which explains to the jury how they can find against both, and tells them that if they find against the Williamsburg Shop and then find that The Williamsburg Restoration was at fault they shall also find against The Williamsburg Restoration.

It looks like to me that is telling them what they can do about finding against both defendants.

The Court: I think it is a further explanation of concurring negligence that he is entitled to. In other words, I feel this way: It can't do the defendants any harm and might possibly do the plaintiff some good.

page 251 } Mr. Spratley: Our objection is that it really covers two different theories of law. Her fall is occasioned by one or the other. She either slipped out of defective maintainance or structural defect. It can't be both.

The Court: Oh, yes, it could be both. She could have slipped on a wet place and could have avoided the fall had there been a handrail. I think that you can argue that there were two conditions.

Mr. Boyd: Judge, how can you bring into this picture the lack of a handrail if she didn't say she wanted one?

The Court: She said that she attempted to grab and actually—I am not too impressed with it, but I am going to submit it to the jury.

Mr. Spratley: She had her hand on the handrail but spun into it. She had plenty of things to grab hold of.

Mr. Boyd: The defendant Williamsburg Shop objects and excepts to the granting of Instruction 4 offered by the plaintiff for the reason that Instruction No. 1 offered by the plaintiff tells the jury under what conditions and in what way they may find against both defendants, and this instruction is a duplication.

page 252 } The defendant objects further for the reason that The Williamsburg Shop should not be held jointly liable with The Williamsburg Restoration for structural defects installed by the Restoration, provided that the structure as installed was maintained in proper condition.

* * * * *

page 266a }

Instruction No. WR-1

The Court: Let the plaintiff state his objections first and the Williamsburg Shop, Incorporated, second.

Mr. Spratley: I would like to make one change and add the words "stairs and platform."

The Court: I will add the words "and platform" in the fifth line.

Mr. Spratley: Also, because it changes the instruction, "stairs and platform were constructed."

The Court: You want to delete the words "premises were leased to the defendant" and add "at the time such stairs and platform were constructed."

Does the plaintiff have any objection to that?

Mr. Harry Anderson: I object. I do not think that the latter part is—well, that is something for the Shop. I object first of all to the term "structural." I think it

page 267 } is a condition which existed at the time the stairway and the platform were built rather than structural, but I understand the Court's ruling on that point. However, I think that "a substantial" structural defect should be included, because if it is a structural defect and it was the proximate cause of her fall, then it doesn't make any difference whether it is substantial or not.

The Court: Let's suppose there was something wrong and we get right back to the handrail: The question there is if a tenant would have been expected to have put a handrail up. Isn't that something that the jury—

Mr. Harry Anderson: But what I am objecting to is the use of the phrase "substantial structural defect." I don't think it makes any difference.

The Court: If you eliminate the word "substantial," does that affect you in any way? Just say such structural defect that the defendant could not be expected to remedy or repair. It is a question of whether the tenant would be expected to repair it.

Mr. Geddy: A substantial defect might be important if you are suing for contribution on the lease, or something.

The Court: But I do not think that really adds anything. Let me hear from you.

page 268 } Mr. Boyd: We object to the instruction because there is no evidence of any defect which there was any duty on the tenant to repair. The instruction would suggest to the jury that there may have been such a defect. I don't recall any evidence about any defect at all, much less anyone which there may have been any burden on the tenant to repair.

The Court: I would grant that. If anybody wants the word "substantial" deleted, I will delete it. I do not see that it makes any difference one way or the other. If it is something that the tenant could not be expected to repair, then it is substantial. That is the way I would look at it.

(Further discussion omitted.)

The Court: I will grant WR-1.

Mr. Boyd: We object to it for the reasons stated and except. Did you delete "substantial?"

The Court: I said I would delete it if somebody wanted it.

Mr. Harry Anderson: I wanted it, yes, because they might get the idea that the handrail is not substantial.

Mr. Spratley: I object to the deletion and except.

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Instruction No. WR-7:

The Court: I might say as to WR-7 that I go along with it fairly well until I get to 4. How could you possibly say that if it was a structural defect it was not in existence when it was leased? How could you possibly say in No. 5 they had no notice of it when they broke it? 6 is more or less a repetition or rehash of 3, isn't it? The things that you have got in here are law, but they couldn't possibly apply in this case. 4 is the law, but how could it apply in this case?

Mr. Spratley: I agree with you there.

The Court: Now 5. How could it be possible that you did not have knowledge of the defect?

Mr. Spratley: If it was a structural defect page 273 } at the time of construction we would not.

The Court: Does the plaintiff have any objection to 7 other than those the Court has noted?

Mr. Harry Anderson: I think there is one change you ought to make in Paragraph 2. It is not at the time the premises was leased but at the time the stairway and the platform were constructed.

The Court: All right. That would be consistent.

Mr. Harry Anderson: At the time the stairs and platform were constructed by The Williamsburg Restoration.

The Court: I am just going to put there "at the time same was constructed." Does the plaintiff have any further objection?

Mr. Harry Anderson: You have deleted 6?

The Court: No, I deleted 4 and 5.

Mr. Harry Anderson: All right.

The Court: I presume the defendant Shop has the same objection about correcting the defects that you have to some

other instruction and I note your exception on those grounds. Do you have any others?

Mr. Boyd: I don't believe that because they might expect us to do something about it is going to relieve them of doing something about it, too.

page 274 } The Court: I understand that, but I think I had previously ruled against you on that and I note your exception on that point.

Mr. Boyd: I think that perhaps there is something we did not call to your attention in the other objection that the mere fact the burden may have been on us to do something about it does not necessarily relieve them of a burden. Take a stair rail, it might have been that both defendants had a duty about—

The Court: In that case I have already told the jury to find against both of them.

Mr. Boyd: I just do not want to let him out, Judge.

The Court: If the jury does not let him out, I think I am, I am not sure.

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page 275 }

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The Court: On looking at Plaintiff's Instruction No. 1, which was retyped, I believe that it was erroneous in that we do not have in here a structural defect which the Shop could not be expected to correct. I had that in others, but on thinking of it more I think that since it is a finding instruction that it should be "constructed with a structural defect which defect was the proximate cause of the plaintiff's injuries, 'and which the defendant could not reasonably expect Williamsburg Shop, Incorporated, to correct.' "

I understand that your position is that you have objected to that all along, and I would note your exception to it for the reason that you heretofore stated on numerous occasions.

Mr. Spratley: You may make it coincide with the other instructions.

The Court: That is what I am really doing. Since it is a finding instruction, I believe it had better be in there.

Mr. Geddy: You are going to add that after "proximate cause of the plaintiff's injuries?"

The Court: Yes, I think that would be as good

page 276 } a place to add it as any: "and was a defect which said defendant could not reasonably expect the

Williamsburg Shop to correct." I believe you made that objection and I think perhaps I brushed over it without giving it the thought that I should.

Mr. Boyd: The defendant Williamsburg Shop objects and excepts to the giving of Instruction No. 1 as to the second paragraph thereof for the plaintiff, for the reason that a defect might very readily be such a defect that both defendant would have a duty with respect to it even though there might be a duty on The Williamsburg Shop to take some action in connection therewith.

* * * * *

page 281 } The Court: Gentlemen, I am sorry to have kept you waiting so long. Yesterday it was agreed that a picture would be taken of the lady's shoe and that picture has been introduced in evidence and marked Defendant's Exhibit 2.

You have heard all of the evidence in the case. At this time it is my duty to instruct you as to the law. I want to make it plain to you that I only pass on matters of law. While I instruct you as to the law, it is your duty and your duty alone to pass on the facts, that is, you determine which witnesses you believe, what part of their testimony you believe, and give credit accordingly. You are not to infer from these instructions that I believe one witness or another, because that matter alone is in your province.

All of these instructions start off that if you believe so-and-so you reach one conclusion, or if you believe so-and-so you reach another conclusion. I do not mean to say from that I believe either one way or another. It is up to you and you alone to decide which witnesses you believe.

(At the conclusion of the reading of Instruction No. 1, the following occurred:)

The Court: Of course, I should have explained to you gentlemen that there are two defendants in this
page 282 } case. If you find a verdict for the plaintiff, you can find a verdict that The Williamsburg Shop alone was responsible or you may find a verdict that The Williamsburg Shop and The Williamsburg Restoration were both jointly responsible.

(The remaining instructions were read.)

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page 296 }

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The Court: Gentlemen of the jury, have you agreed upon a verdict?

The Foreman: Yes, we have.

The Court: "We, the jury, find the defendant
page 297 } Williamsburg Restoration not guilty as charged.

"We the jury find the defendant The Williamsburg Shop guilty as charged, and award the plaintiff the total figure of $5,500.00."

Is that the verdict of all of you?

Several Jurors: Yes, sir.

The Court: Just a minute. Let me write that in a different form.

Gentlemen of the jury, hearken to your verdict as the Court has recorded it:

"We, the jury, on the issue joined find for the plaintiff against The Williamsburg Shop, Incorporated, and fix her damages at $5,500.00.

"We find for the defendant Williamsburg Restoration, Incorporated."

Is that the verdict of all of you?

The Jury: (In unison): Yes, sir.

The Court: Would you sign that as foreman, please?

I want to thank you gentlemen for serving. You have certainly given this matter thorough attention. You will find you are excused until such time as the Sheriff notifies you to return. Thank you again for serving.

page 298 } (The discharged jurors retired from the courtroom.)

The Court: Are there any motions?

Mr. Boyd: Yes, if Your Honor please.

The defendant The Williamsburg Shop moves the Court to set aside the jury's verdict as contrary to the law and the evidence, without evidence to support it, and for misdirection of the jury, and assigns as its reasons with respect thereto those grounds relied upon during the course of the trial and also those assigned at the end of the plaintiff's evidence, and at the end of all of the evidence.

The Court: That would leave out that exhibit. You had better put that in, too.

Mr. Boyd: And upon the grounds of the other errors committed during the course of the trial with respect to the evidence as admitted by the Court.

The Court: I am not much inclined to set it aside. If you wish to argue the matter, I would give you an opportunity to do so.

Mr. Boyd: We would like to have that chance, sir. We would like to talk to our client and see what its disposition is. We believe, though, that we would want to argue the matter with you very seriously.

page 299 } The Court: All right, sir. I have the feeling that there is expert testimony there, if they believed the expert, that they could perhaps have attributed that to her fall.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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