Ohio until the case of *Wagner* v. *State*, 115 Ohio St. 136, 152 N.E. 28 (1926) was decided. The Supreme Court held in that case that the only proper course to follow when cross-examining a witness with reference to collateral offenses, for the purpose of affecting his credibility is to ask him whether he has been convicted of the offense in question. The court said that if the party had been convicted, there was no need to show the indictment, and if he had not been convicted, there was no more reason for presuming him guilty of that crime because of the indictment than for presuming him guilty of the one for which he is now being tried. And for the present trial the presumption of course, is that he is innocent. In the syllabus of the principal case the Wagner case is "approved, followed, and distinguished." But the rule of the Wagner case that you canot inquire about previous indictments is not altered in the instant case.

In the principal case the court held that a witness could be asked if he had voluntarily confessed that he had committed a crime. Of course, this could not be reconciled with a doctrine that the only way to prove a crime is by showing proof of conviction. But such a rule seems to unduly limit the cross-examination. In many states a witness may be asked if he committed a certain crime.

The holding in the principal case, however, may be reconciled with the ruling that an indictment cannot be shown. In proving the indictment, the party is offering the opinion of the grand jury that there was probable cause to believe the witness guilty of the crime. It is hearsay since the grand jury is not present in court to be examined. While the confession also is hearsay since it was made out of the court there is not the same objection to admissibility since the party making the confession is present in court and upon the stand. The confession, if voluntary, is convincing and for probative effect falls little if any short of proof of a conviction. It is submitted that the Supreme Court rightly held that the question was proper. R. W. VANDEMARK.

EVIDENCE OF KNOWLEDGE OF DEFENDANT OF DEFECT NECESSARY TO TAKE CASE TO JURY ON ISSUE OF NEGLIGENCE.

The plaintiff proved that she was a customer in the defendant's store; that a foot-stool or sewing-stool obstructed the aisle; that the defect in the aisle caused her to fall; and that the stool belonged to the counter of which a saleslady had charge, supervision, and control, and was returned to the counter after the plaintiff fell over it. The court held that the plaintiff had not presented a prima facie case to go to the

jury without evidence that the proprietor of the store or his agents had placed the stool in the aisle, and that the doctrine of res ipsa loquitur could not be invoked without evidence that the instrumentality was under the sole and complete control of the defendant. The Supreme Court refused to consider the important question of how long the stool had remained in the aisle because the record was silent on that point. *Sherlock* v. *Strouss Hershberg Co.*, 132 Ohio St. 35, 4 N.E. 912, 7 Ohio Op. 92 (1936).

If the plaintiff has shown a state of facts on which men might reasonably differ, the case should go to the jury. *Leonard, D. B. A. Akron and Buffalo Fast Freight Co.* v. *Kreider*, 128 Ohio St. 267, 190 N.E. 634, 40 Ohio L. Rep. 648, 51 Ohio App. 474 (1934). But where the plaintiff has given no evidence to establish a fact without which the law will not permit a recovery, there is nothing to submit to the jury, and a determination by the court that certain facts constitute an essential element in the cause of action necessarily ends the case. *Gibbs* v. *Village of Girard*, 88 Ohio St. 34, 102 N.E. 299 (1913).

In certain types of cases of alleged negligence, liability is not imposed upon the defendant even though he may have actual knowledge of the circumstance which caused injury to the plaintiff. One such circumstance is where the defendant has waxed and polished the floor resulting in its being slippery, and the plaintiff falls. The courts hold that the duty to exercise ordinary care is not violated by merely oiling and polishing the floor in the usual way, although the floor is rendered slippery thereby. *Bonawitt* v. *Sister of Charity of St. Vincent's Hospital*, 43 Ohio App. 347, 182 N.E. 661, 11 Ohio L. Abs. 303 (1932); *J. C. Penny Co.* v. *Robinson*, 128 Ohio St. 626, 193 N.E. 401 (1935); *F. W. Woolworth Co.* v. *Smallwood*, 26 Ohio L. Rep. 474 (1928). When a customer slipped on the floor which was wet by incoming customers during a rainstorm, evidence that the floor had been in the same condition for thirty minutes was offered. This was another situation where knowledge was held to be immaterial, since the defendant had no duty to keep such water off the floor, and a motion for directed verdict in favor of the defendant should have been sustained. *S. S. Kresge Co.* v. *Fader*, 116 Ohio St. 718, 158 N.E. 174 (1927); *Picman* v. *Higbee Co.* 54 Ohio App. 55, Ohio Bar, Feb. 1 (1937).

A second type of case is one where liability is imposed upon the defendant even though no evidence of notice, actual or constructive, is introduced. In the case where the plaintiff, a customer in the defendant's theater, caught her foot in a defect in the rug and fell downstairs, the case went to the jury on the question of negligence in failing,

before the accident, to use reasonable and ordinary care under all circumstances to discover and remedy such defect. The court held that knowledge of such defect by the proprietor was not a necessary predicate of his negligence or breach of duty to inspect. *Stephens* v. *Akron Palace Theater Corp.*, 53 Ohio App. 434, Ohio Bar, Jan. 4, (1937) 3 Ohio Op. 401 (1936). Another case which was held to present a case for the jury without evidence of notice on the part of the defendant was *Reichlin, Reidy and Scanlan Co.* v. *Brighton*, 8 Ohio L. Abs. 362 (1930). A customer fell over an electric cord, part of the lamps exhibited for sale, and was injured. This case where the defective condition was caused by an instrumentality employed by the owner of the store in the conduct of his business was distinguished from the case where the substance or the device causing the defective condition was not directly connected with the store; and the court said that the rule that some evidence must be given bringing knowledge home to the defendant of the presence of the defective condition before he could be charged with negligence applies only to the latter situations.

The third type of cases is that in which courts hold that evidence of notice of the defect is necessary in order to make a prima facie case of negligence. *Lowe* v. *Hippodrome Inn Co.*, 30 Ohio App. 520, 162 N.E. 749, 6 Ohio L. Abs. 641, 270 Ohio L. Rep. 557 (1928), the court made the unqualified statement that in order to be liable in negligence, one must be guilty of something done, or left undone with knowledge or what is tantamount to knowledge, of the situation. Thus when the plaintiff slipped on a greasy spot on the stairway and fell, a directed verdict for the defendant was sustained by the Court of Appeals, because plaintiff had offered no evidence that the defendant knew of the defect or that sufficient time had elapsed in order to leave a logical inference and deduction in law of knowledge which creates liability. Evidence that the substance which caused the plaintiff to fall had been on the floor for twenty-four hours was sufficient to go to the jury, but there was a strong dissent in *F. W. Woolworth Co.* v. *Kinney*, 7 Ohio L. Abs. 572, affiirmed in 121 Ohio St. 462, 169 N.E. 562 (1929). While the plaintiff was walking along the street during the evening, she stepped into a two inch drop in the sidewalk; she fell and sustained injuries thereby. A directed verdict for the defendant was granted in the trial court, but the supreme court revised the judgment on the ground that evidence that the sidewalk had been in that defective condition for approximately two years, and that three or four accidents, not so serious, had occurred at that particular place was sufficient to go to the jury on the question of constructive notice.

The principal case does not fall within cases designated type one, *supra,* since the stool in the aisle is not a defect to be anticipated and guarded against by a customer as would water on the floor on a rainy day or the slippery conditions of waxed floors. The cases in type two and three, *supra,* are very similar as far as fact situations are concerned, and the case under consideration could conceivably be placed into either classification. Since it is extremely difficult, in many instances, for the plaintiff to obtain evidence as to how long a defect has existed or as to the defendant's actual knowledge of its existence, some courts might take a liberal view as to the requirement of such specific evidence. If the plaintiff is to be required to offer positive evidence to show that the defendant placed the stool in the aisle or that it had been there an unreasonable length of time, it is impossible for her to make out a case, because she cannot show such a state of facts. DORIS MESSER

PRIVILEGE — LAWYER AND CLIENT — INSURER AND INSURED — DISCOVERY.

In March 1932, one Meyer Plost was injured by an automobile driven by Joseph Scharff. Two years later he died and an action for wrongful death was instituted by his widow. The action was against the Avondale Motor Car Company. The plaintiff's petition alleged that the driver of the fatal car, Scharff, was an employee and agent of the company at the time of the accident. The Defendant denied the agency and also any responsibility for the injuries or death suffered by Meyer Plost.

Later the plaintiff caused subpoenas *duces tecum* to be issued upon George L. Ten Eyck, the vice-president and general manager of the Avondale Motor Car Company, demanding the production of a casualty report made by the said company or by any of its officers or employees, or by Joseph Scharff to any insurance or indemnity Company, or to any agent or attorney of any insurance or indemnity company concerning the casualty.

A similar subpoena *duces tecum* was served on Gordon Bennett, secretary of the A. R. Witham Insurance Agency demanding the same report. It appeared that insurance was written by the Lumbermen's Mutual Casualty Company, through the above agency, insuring the Avondale Motor Car Company against liability for damages caused by negligent acts of its salesmen.

George Ten Eyck and Gordon Bennett refused to produce the casualty report and testified that it was no longer in their possession but