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Notice of Appeal and Grounds of Appeal.

New Jersey Supreme Court.

PASSAIC COUNTY.

S. KOSSON & SONS, Plaintiff,	}	Notice of Appeal and Grounds of Appeal.	10
vs.			
UNION BUILDING & CONSTRUCTION CO., PASSAIC CONSOLIDATED WATER CO., PUBLIC SERVICE ELECTRIC & GAS CO., Defendants.	}		20

To: CORBIN & HARTY,  
Attorneys for Union Building & Construction  
Co.  
HENRY H. FRYLING,  
Attorney for Public Service Electric & Gas Co.  
AARON L. SIMON,  
Attorney for Passaic Consolidated Water Co.

Sirs: 30

Please take notice that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the last resort of all causes in New Jersey from the whole of the judgment entered in this case upon the following ground, to wit:

Because the court erred in entering a judgment of non-suit in favor of the defendants and against the plaintiff.

HELLER & BOSS, 40  
Attorneys for Plaintiff.

**Complaint.**

Filed July 17, 1929.

NEW JERSEY SUPREME COURT.

PASSAIC COUNTY.

10	<p style="text-align: center;">S. KOSSON &amp; SONS, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">UNION BUILDING &amp; CONSTRUCTION Co., PASSAIC CONSOLIDATED WATER Co. and PUBLIC SERVICE ELECTRIC &amp; GAS Co., Defendants.</p>	} Complaint.
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20 Plaintiff, a corporation of New Jersey, having its principal place of business in the City of Passaic, County of Passaic and State of New Jersey, says:

1. On or about the 25th day of April and the 28th day of April, 1929, the plaintiff was the owner of a certain business and building located at 149 Second Street, Passaic, New Jersey.

30 2. On said dates and for a long time prior thereto the said plaintiff was engaged in the glass business and used the cellar and store of the said premises for the purpose of storing its merchandise.

40 3. On or about the said dates and prior and subsequent thereto, the said defendant Union Building & Construction Co., Passaic Consolidated Co. and Public Service Electric & Gas Co. were engaged in certain excavations and repair work upon the roadway and sidewalk in front of the premises

*Complaint.*

and adjacent to the premises owned by the said plaintiff.

4. Said plaintiff further charges that the said defendant Public Service Electric and Gas Co. negligently and carelessly performed its excavations work and so carelessly and negligently dug trenches along the front of premises owned by the said plaintiff that as a result thereof a large amount of water caused by rain was allowed to seep into the premises owned by the plaintiff thereby caused great damage to the stock of glass and to the building. 10

5. Said plaintiff further charges that the said defendant Union Building & Construction Co. was negligent in the manner in which they performed their excavations and construction work in that they placed large piles of sand and other materials in front of the building owned by the plaintiff, as a result of which the proper flowing of the water in the gutters was impeded and as a result the water was forced to run into the cellar and premises owned by the plaintiff. 20

6. Said plaintiff further charges that the Passaic Consolidated Water Co. so carelessly and negligently performed its construction work along the premises in front owned by the plaintiff that as a result thereof the water caused by rain-storms was diverted into the cellar of the plaintiff. 30

7. Said plaintiff further shows that the said defendants Union Building & Construction Co., Passaic Consolidated Water Co., and Public Service Electric & Gas Co. were negligent and careless in the manner of construction along the roadway and sidewalk in divers other respects as a result 40

*Complaint.*

of which the proper flow of the water caused by rain was diverted into the cellar of the premises owned by the plaintiff, as a result thereof great damage was done to the store and merchandise of the plaintiff.

8. Said plaintiff further charges that notices of  
10 this condition was served upon the defendants Union Building & Construction Co., Passaic Consolidated Water Co., Public Service Electric & Gas Co., and that the said defendants have failed to remedy the condition as a result of which said plaintiff was greatly damaged.

9. Said plaintiff further charges that on and before the dates hereinbefore mentioned, the said defendants Union Building & Construction Co.,  
20 Passaic Consolidated Water Co., Public Service Electric & Gas Co. have permitted a nuisance to remain in front of the premises owned by the plaintiff in that the trenches were improperly piled along the leaders, stopping the proper flow of the water and in divers other respects so carelessly and negligently constructed and maintained the said highway and sidewalk, that as a result thereof great damage was sustained by the plaintiff.

30 Wherefore judgment will be demanded against all the defendants in the sum of Five thousand (\$5,000.00) dollars and costs of suit.

HELLER & BOSS,  
Attorneys for Plaintiff.

**Answer of Defendant, Union Building & Construction Company.**

NEW JERSEY SUPREME COURT.

PASSAIC COUNTY.

<p style="text-align: center;">S. KOSSON &amp; SONS, Plaintiff, vs. UNION BUILDING &amp; CONSTRUCTION Co., PASSAIC CONSOLIDATED WATER Co. and PUBLIC SERVICE ELECTRIC &amp; GAS Co., Defendants.</p>	}	<p>10</p> <p>Action at Law. Answer.</p>
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The defendant, Union Building & Construction Co., a corporation of New Jersey, having its principal office in the City of Passaic, County of Passaic and State of New Jersey, answering, says that: 20

1. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 1 and 2 of the complaint and leaves plaintiff to its proof.

2. As to paragraph 3 of the complaint, this defendant admits that on or about April 26, 1929 and April 28, 1929, it was engaged in certain work up on the roadway and sidewalk in front of the premises known as 149 Second Street, Passaic, New Jersey, but neither admits nor denies all other allegations contained in said paragraph and leaves plaintiff to its proof. 30

3. This defendant neither admits nor denies the allegations contained in paragraph 4 of the com- 40

*Answer of Defendant Union Building & Construction Co.*

plaint, and leaves plaintiff to its proof.

4. This defendant denies paragraph 5 of the complaint.

5. This defendant neither admits nor denies the allegations contained in paragraph 6 of the complaint, and leaves plaintiff to its proof.

6. As to paragraph 7 of the complaint, this defendant denies the allegations contained therein in so far as they apply to this defendant.

7. As to paragraph 8 of the complaint, this defendant admits that it received a notice from the plaintiff with reference to the performance of said work, but denies said paragraph 8 in so far as it states that this defendant was in any way responsible for said alleged condition and said alleged damage to said plaintiff.

8. As to paragraph 9 of the complaint, this defendant denies the allegations contained therein in so far as they apply to this defendant.

FIRST SEPARATE DEFENSE.

This defendant avers that the alleged damage to the said plaintiff set forth in paragraphs 4, 5, 6, 7, 8 and 9 of the complaint, was the result of the negligence and carelessness of the said plaintiff, which contributed thereto.

SECOND SEPARATE DEFENSE.

This defendant violated no duty which it owed to the plaintiff.

THIRD SEPARATE DEFENSE.

The damages sustained, if any, by the plaintiff,

*Answer of Defendant Union Building & Construction Co.*

were due to no fault, cause or negligence on the part of this defendant, but were due to causes entirely beyond this defendant's control.

FOURTH SEPARATE DEFENSE.

This defendant avers that it reserves the right to strike out the complaint at or before the trial of this suit, on the ground that the allegations set forth in said complaint do not constitute a cause of action, to wit, that the damages sustained by the plaintiff, if any, were not due to any negligence of this defendant, that this defendant's acts in engaging in said work violated no duty that it owed the plaintiff, and that such acts were not wrongful or unlawful and were not the proximate cause of the damage or loss, if any, sustained by the plaintiff.

CORBIN & HARTY,  
Attorneys of defendant, Union  
Building & Construction Co.

**Answer of Defendant, Passaic Consolidated  
Water Company.**

NEW JERSEY SUPREME COURT.

PASSAIC COUNTY.

	<hr/> S. KOSSON & SONS, Plaintiff,	}	
10	vs.		
	UNION BUILDING & CONSTRUCTION Co., PASSAIC CONSOLIDATED WATER Co. and PUBLIC SERVICE ELECTRIC & GAS Co., Defendants.	}	Action at Law. Answer.

20 Defendant, Passaic Consolidated Water Company, a corporation, having its principal office in the State of New Jersey, in answer to the complaint of the Plaintiff, says that:

1. Defendant has no knowledge or information from which to form a belief as to paragraph 1, and puts the plaintiff to his proof.
2. Defendant has no knowledge or information from which to form a belief as to paragraph 2, and puts the plaintiff to his proof.
- 30 3. Defendant has no knowledge or information from which to form a belief as to paragraph 3, and puts the plaintiff to his proof.
- 40 4. Defendant has no knowledge or information from which to form a belief as to paragraph 4, except that portion which reads "that as a result thereof a large amount of water caused by rain was allowed to seep into the premises owned by the plaintiff thereby causing great damage to the stock of glass and to the building" which portion they deny.

*Answer of Defendant, Passaic Consolidated Water  
Company.*

5. Defendant has no knowledge or information from which to form a belief as to paragraph 5, except that portion which reads "as a result of which the proper flowing of water in the gutters was impeded and as a result the water was forced to run into the cellar and premises owned by the plaintiff, which portion they deny. 10

6. Paragraph 6 is denied.

7. Paragraph 7 is denied.

8. Paragraph 8 is denied.

9. Paragraph 9 is denied.

FIRST SEPARATE DEFENSE.

The alleged damages said to have been sustained by the plaintiff was due solely to the negligence of some other person or corporation over whom this defendant has no control. 20

SECOND SEPARATE DEFENSE.

This defendant charges that the plaintiff was guilty of contributory negligence in that he improperly and carelessly placed his merchandise in a hazardous and risky place and position, well knowing the results thereof; sustained his damage as a result thereof. 30

THIRD SEPARATE DEFENSE.

Defendant alleges that the damages sustained by the plaintiff were due solely to his own negligence and carelessness and he cannot therefore recover.

AARON L. SIMON, 40  
Attorney of Defendant.

**Answer of Defendant, Public Service Electric  
and Gas Co.**

NEW JERSEY SUPREME COURT.

PASSAIC COUNTY.

10	<p style="text-align: center;">S. KOSSON &amp; SONS, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">UNION BUILDING &amp; CONSTRUCTION CO., PASSAIC CONSOLIDATED WATER CO. and PUBLIC SERVICE ELECTRIC &amp; GAS Co., Defendants.</p>	}	<p>Action at Law.</p> <p>Answer of Public Service Electric and Gas Co.</p>
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20       The defendant, Public Service Electric and Gas Co., a corporation of New Jersey, having its principal office at the City of Newark, County of Essex and State of New Jersey, in answer to the plaintiff's complaint insofar as it refers to this defendant, says that:

30       1. It has no knowledge or information thereof sufficient to form a belief as to the allegations contained in paragraphs one and two, and it therefore denies the same.

      2. It denies the allegations contained in paragraphs three and four.

      3. It denies the allegations contained in paragraphs seven, eight and nine insofar as they refer to this defendant.

Attorney of Defendant,  
Public Service Electric & Gas Co.

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**Reply.**

## NEW JERSEY SUPREME COURT.

## PASSAIC COUNTY.

<p style="text-align: center;">S. KOSSON &amp; SONS, Plaintiff, vs. UNION BUILDING &amp; CONSTRUCTION CO., PASSAIC CONSOLIDATED WATER CO. and PUBLIC SERVICE ELECTRIC &amp; GAS CO., Defendants.</p>	}	<p style="text-align: center;">Action at Law. Reply.</p>	10
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Plaintiff replying to the answer filed by the defendant Union Building & Construction Co., in the above matter, says: 20

**FIRST SEPARATE DEFENSE.**

Plaintiff denies the allegations contained therein.

**SECOND SEPARATE DEFENSE.**

Plaintiff denies the allegations contained therein.

**THIRD SEPARATE DEFENSE.**

Plaintiff denies the allegations contained therein. 30

**FOURTH SEPARATE DEFENSE.**

Plaintiff denies the allegations contained therein.

HELLER & BOSS,  
Attorneys for Plaintiff.

**Reply.**

NEW JERSEY SUPREME COURT.

PASSAIC COUNTY.

10	S. KOSSON & SONS, Plaintiff,	}	Action at Law. Reply.
	vs.		
	UNION BUILDING & CONSTRUCTION Co., PASSAIC CONSOLIDATED WATER Co. and PUBLIC SERVICE ELECTRIC & GAS Co., Defendants.		

20 Plaintiff replying to the answer filed by the defendant, Passaic Consolidated Water Co. in the above matter says:

AS TO FIRST, SECOND AND THIRD SEPARATE DEFENSES.

Plaintiff denies each and every allegation contained therein.

30 HELLER & BOSS,  
Attorneys for Plaintiff.

40

**Postea.**

## NEW JERSEY SUPREME COURT.

PASSAIC COUNTY.

<p style="text-align: center;">S. KOSSON &amp; SONS, Plaintiff, vs. UNION BUILDING &amp; CONSTRUCTION CO., PASSAIC CONSOLIDATED WATER CO. and PUBLIC SERVICE ELECTRIC &amp; GAS Co., Defendants.</p>	}	<p style="text-align: center;">Action at Law. Postea.</p>	10
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This action was tried before Newton H. Porter, Judge of the Passaic County Circuit Court with a jury on December 12, 13, and 16, 1929. 20

The plaintiff having submitted its evidence and rested its case, and the court being of the opinion that the plaintiff did not prove negligence against the defendants; it is ordered upon motion of the defendants' counsel that the plaintiff be non-suit-ed.

Dated Dec. 16, 1929.

NEWTON H. PORTER, 30  
Judge.

**Testimony.**

NEW JERSEY SUPREME COURT.

PASSAIC CIRCUIT.

10	<p style="text-align: center;">S. KOSSON &amp; SONS, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">UNION BUILDING &amp; CONSTRUCTION CO., PASSAIC CONSOLIDATED WATER CO. and PUBLIC SERVICE ELECTRIC &amp; GAS CO., Defendants.</p>	}	At Law.
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Paterson, N. J., December 12, 1929.

20

Before: HON. NEWTON H. PORTER, Judge, and  
a Jury.

## APPEARANCES:

For the Plaintiff: HELLER &amp; BOSS, ESQS.

For the Defendant Union Building and Construction Company: CORBIN and HARTY, ESQS., by ADDISON P. ROSENKRANS, ESQ.

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For the Defendant Public Service Electric and Gas Company: HENRY H. FRYLING, ESQ., by HAROLD E. DORGEVAL, ESQ.

For the Defendant Passaic Consolidated Water Company: AARON L. SIMON, ESQ.

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(A jury was called and sworn, and counsel for the respective parties opened to the jury.)

40

*Daniel J. Hoar—Direct.*

DANIEL J. HOAR, sworn.

*Direct-examination by Mr. Heller:*

Q. Mr. Hoar, where do you reside? A. 72 Pennington Avenue, Passaic.

Q. Are you employed? A. Public Service.

Q. Were you on the job on Second Street in April of last year? A. Yes. 10

Q. In what capacity? A. Foreman.

Q. Foreman of the job? A. Yes.

Q. Do you remember the night of April 25th of this year? A. Very well.

Q. Do you recall who was doing work on the day of April 25th, what companies there were working there? A. It was the Union Building and Construction Company and the Public Service, as far as I know. I don't know, the Water Company was doing some odd jobs, I don't know whether they were there on that day or not. 20

Q. When you say the Water Company, do you mean the Passaic Consolidated Water Company? A. Yes.

Q. Now just what kind of work was the Union Building and Construction Company doing? A. They were widening the street about two foot on each side, taking two foot off each sidewalk. 30

Q. Are you familiar with the location of the Kosson Building? A. Oh, yes.

Q. Now, will you just tell us the conditions of the sidewalk and the curb and gutter on April 25th, when you left the job? A. Well, we made two holes of inspection there, and we found our pipe was O. K. and therefore we filled the openings in but the walk was broken up and the old curb was left standing, the support to the bricks from the repair held it up on one side and a cer- 40

*Daniel J. Hoar—Direct.*

tain portion of dirt on the other side. There was two foot built on the inside of the old curb, and it was dug probably two feet or more. I am not positive about it because I did not measure it, but I would say it was about two feet.

10 Q. Now with respect to the concrete curb, was that broken up at the time? A. No; that was not a concrete curb then, it was a bluestone curb.

Q. Was that broken up at the time? A. No, we did not break that up. That was used back for the new curb.

Q. What do you mean? A. That was moved two feet back.

Q. It was not right next to the new sidewalk, was it?

20 Mr. Rosenkrans: I object to that as leading.

A. They were only in the act of breaking the street and to widen it at the time. There was no new sidewalk there then.

Q. Of course, I knew that.

Mr. Rosenkrans: I objected, and the witness completed his answer.

30 A. There was no new sidewalk then.

Mr. Rosenkrans: It was leading.

The Court: I will let the answer stand. Do not lead. You are not cross-examining you know.

Mr. Heller: I just want to get the true conditions that exist.

The Court: You cannot put the words in his mouth.

*Daniel J. Hoar—Direct.*

Q. Was the open part of the sidewalk ripped away? A. Yes.

Q. Now, with respect to the sidewalk that was ripped away, was that near the building or nearest the road? A. Nearest to the road.

Q. Speaking now, specifically on that part, was there dirt there or was there—well, what was there? A. Well, there was dirt and there was stones and there was sand along the gutters in different places. 10

Q. Now, the bluestone that usually comes right up to the sidewalk, the bluestone curb, was that where it used to be or was it moved? A. It was where it used to be but the dirt was dug from inside for about two feet to make room for the new curb.

Q. See if I understand. First, there was bluestone, then there was this two feet that was ripped away? A. Yes. 20

Q. After the continuation of the sidewalk? A. Yes.

Q. Was there anything to protect the new sidewalk along the curb line? A. Oh, they had horses or wooden barricading along there to protect people passing.

Q. Well, I don't mean that. Now, was there any bluestone placed along the new part of the sidewalk or any concrete or anything like that? A. No; that was only in the act of being dug out at the time. 30

Q. Now, on that night were you there? A. Yes.

Q. Did you see the water going into the cellar?

Mr. Rosenkrans: I object.

A. No, I didn't see it going in. I seen it rushing in the cellar when I looked inside. 40

*Daniel J. Hoar—Direct.*

The Court: It is pretty leading.

Q. What did you see? A. I seen water coming in at the foundation line with the floor—the cellar apparently under the sewer—sewer connections.

10 Q. Just see if you can tell us where that water came from again? A. Well, to the best of my knowledge it came convenient to where the sewer connection went through the cellar wall, and it came close to the level of the cellar floor on that side, but then I could not say exactly even with the cellar floor, because there was probably six or eight inches of dirt washed into the cellar at the time I was there, from the heavy rain.

20 Q. The six or seven inches of sand, where did it come from? A. It came from, of course, from the sidewalk.

Q. Came from the sidewalk where who was working? A. Well, the Union people were there, but we made two openings there and we had them filled in previous to that. Of course, we had openings down the street that were not filled in, but we had no trouble down there. We had those red lamps.

30 Q. You said something about six or eight inches of sand having been washed out. Just exactly where was that sand? Was that in the roadway or between the new curb and the old curb, or where was it? A. It was between the old curb and the property line—the foundation of the building.

Q. That covers the Union Building and Construction Company?

Mr. Rosenkrans: I object.

The Court: No. Objection sustained.

40

Mr. Heller: How could I ask that?

*Daniel J. Hoar—Direct.*

The Court: Whose work was it?

Q. Whose work was it? A. It was the Union Building and Construction Company's work. I thought I made you understand that once before.

The Court: Oh, no, you did not.

The Witness: All right, sir. 10

The Court: Sometimes we have to be told six times.

The Witness: I understand that.

Q. Now, did you see where the Passaic Consolidated Water Company were doing work? A. Not on that day.

Q. On the day or the day before this first flood, April 25th. A. I have not seen them working in that vicinity at all. 20

Q. Where did you see them working?

Mr. Simon: I object to that.

The Court: Objection sustained. Might have been in Newark.

Q. Well, along Market Street.

Mr. Simon: He said, "I didn't see them in that vicinity." I think you are bound by that. 30

Q. Was there anybody else doing work besides the persons that you have named to wit, the Union Building and Construction Company and the Public Service? A. Not that I remember of. If I had known, I would be here and cross-questioned on in this form. I might pick up more information at the time I was working there, but I didn't think nothing of what went on or I didn't think 40

*Daniel J. Hoar—Direct.*

nothing about the wash-out, because I have seen hundreds of them.

The Court: Nobody is finding any fault with you.

10 Q. You just said something about wash-out. Where did this happen, the wash-out? A. It was in that end of the sidewalk.

Q. End of the sidewalk? A. It was at the sidewalk further on—well, I would say fifteen or twenty feet past this store building.

Q. Was there anyone doing work where the wash-out occurred? A. No, sir, but it was a ditch that was opened there.

25 Q. Do you know who dug the ditch? A. It seems to me it was never patched with dirt again or otherwise all the dirt when I saw it was washed away from there.

Q. Who dug that ditch. A. Well, now, there was a water box there but I did not see no water men working there.

Q. Do you know who dug that ditch? A. I do not, sir.

Q. Will you tell us how wide and how high the ditch was? A. How wide?

30 Q. If you know. A. Well, now, I did not measure it. I would say it was probably six or eight feet wide.

Q. About how high, or how deep? A. It would be from four to six feet.

Q. Now, were you there on April 28th also? A. Yes, I worked right there on the job for a whole month?

40 Q. On the night of April 28th, did you see anything unusual along the premises owned by Kosson, the plaintiff? A. Not that I remember of.

*Daniel J. Hoar—Direct.*

Q. Do you remember whether it was raining that night? A. Was it the 25th or the 28th?

The Court: The 25th? Was there another bad spell a couple of days later?

The Witness: There was, yes.

The Court: That is what he was after.

The Witness: But not one hundred per cent. 10

The Court: Well, ninety per cent., sixty-two per cent., or how much?

The Witness: I will tell you, the one on the 25th, it was the heaviest rain I ever remember.

Q. How about the 28th? A. Oh, it was not near as heavy as the 25th. 20

The Court: Did it do any damage that you know of?

The Witness: Not that I seen.

Q. Were you called to the Kosson store on that night? A. I was called one of those—

Q. The 28th? A. Yes, I was called out on the job one night. I think it was on the 25th.

The Court: Were you called out two nights? 30

The Witness: No, sir, only one.

The Court: The big night?

The Witness: The night of the heavy rain, yes.

Q. You were called out only once on the 25th? A. That is all.

Q. That is the first time. Did you on that night go into the cellar of the Kosson Building? A. 40

*Daniel J. Hoar—Direct.*

Well, I went part of the way. I went down the stairway and I seen—

Q. What was the condition of the cellar? A. Well, it was in pretty bad condition; I could see water on the floor, but to what depth I could not say.

10 Q. Did you see any merchandise? A. Of course, it was not much of the floor to be seen, because the floor is pretty well occupied from cases of glass.

Q. I was just going to ask you, was there much glass in the cellar or just a little? A. Oh, there was big cases of glasses all packed with straw or hay or something of that kind. Some of those cases would take two or three men, of course, to move.

20 Q. Do you know how many inches of water there was in the cellar when you saw it? A. As I told you before, there was so much sand there washed in, I really couldn't see the floor and I couldn't tell what steps there was there.

Q. In other words, you say there was sand washed into the cellar with the water? A. Yes.

*Cross-examination by Mr. Rosenkrans:*

30 Q. What hour did you arrive at the cellar of the plaintiff company? A. On the night of the rain?

Q. On the night of the great rain? A. It was around ten or a quarter past ten.

40 Q. I think you guessed at the point at which the water entered the cellar. It was at the floor of the cellar—at the bottom of the cellar or near the bottom of the cellar? A. Yes, the bottom of the cellar is where I saw it.

*Daniel J. Hoar—Cross.*

Q. It was only by looking into the cellar— A. That is all.

Q. —that you could see. A. No; I went down the stairway near the floor but I didn't go down into the water.

Q. You could get no line on where the water was entering the cellar, could you? A. No. 10

The Court: From the outside? You could not see from the outside?

The Witness: No, sir.

The Court: What you are telling us is what you observed from the cellar stairs?

The Witness: That is all.

The Court: Is that the point?

Mr. Rosenkrans: Yes.

Q. You have been foreman for the Public Service for how long? A. For thirty-four years. 20

Q. Your duties as foreman take you to places where excavations are being made in public streets? A. I am one of several, of six or seven foremen in the City of Passaic.

Q. Yes, I know, but your duties as foreman are the same as the duties of other foremen doing the same kind of work? A. Yes, sir.

Q. You have a gang of men under you who dig down to where your conduits are to replace them, if necessary, and inspect them? A. Well, we do not work on conduits; I am working on the gas main. You have reference to the electric department, I guess. We do not use conduits; we use gas main, cast iron pipe. 30

Q. All right. That is your line, gas. A. Yes.

Q. On this job, you were looking for gas pipes? A. Yes. 40

*Daniel J. Hoar—Cross.*

Q. How many days have you been engaged in looking for gas pipes of the Public Service?

Mr. Dorgeval: When do you mean?

Mr. Rosenkrans: In this week.

A. I was there about a month all told on that street.

10 Q. Yes. Do you know the names there of the side streets? A. Well, the majority of them I do.

Q. All right. From what side street to what side street did you work there during the period you say worked in April? A. On what side of the street?

Q. No; from what side street to what side street?

A. I think, if I am not mistaken, it was between Mercer and Hudson.

20 Q. Do you know the number of the Kosson property on Second Street? A. I didn't take particular notice to the number, but I know where that building is situated, know that for years.

Q. Was it 149? A. I believe that is the number of it, 149.

Q. Now is Second Street flat or does it slope slightly? Has it a grade? A. I cannot get you, sir. I had a mastoid operation and I cannot hear only in one ear just now.

30 Q. Does Second Street lie flat or has it a grade? A. Well, it grades north and south at points.

Q. Do you know at what end the high numbers run and what end the low numbers on Second Street run? A. Well, I think the numbers increase as you went north.

Q. Yes. A. I would not be positive.

Q. But the grade was the other way, wasn't it?

40 A. Yes.

*Daniel J. Hoar—Cross.*

Q. The grade ran from the high numbers to the low numbers. A. If I am not mistaken, the grade runs to Mercer Street from Monroe, or that way. It is pretty flat, that street; around pretty near level. The grade is very slight, in other words, but from Passaic Street to Mercer, the grade is fair grade.

Q. Assuming the property of Kosson is at 149 Second Street, would you say that 153 Second Street was higher or lower? Tell us the grade at 149? A. Well, I would not be prepared to say that. 10

Q. Well, isn't it a fact that the grade runs from the higher numbers to the lower numbers? A. I think it does when you start at Monroe. If the high number is at Monroe, it runs a certain distance to the lower numbers. 20

Q. All right. A. Well, it runs from Passaic Street to the highest numbers.

Q. Now you said that the Public Service had done some excavating there, had dug some trenches which were left uncovered. A. Where?

Q. On that street. A. Oh, yes; that was pretty near a block away, we were.

Q. All right; so you say. Were those trenches in front of the properties bearing a higher number than 149? A. You see, when we made an opening for an extension— 30

Q. Answer the question, Mr. Hoar, if you understand it. A. Explain it again, please.

The Court: Were they up towards Monroe Street, in that direction?

Mr. Rosenkrans: I am not talking about those streets.

Mr. Dorgeval: May I suggest we use the 40

*Daniel J. Hoar—Cross.*

compass, if it is north and south. Does not that street run north and south?

Mr. Rosenkrans: Yes.

The Court: Where were those openings, north or south?

10 The Witness: We had some of them north of there on the east side of the street.

The Court: What side of the street is that—I mean, is this building?

The Witness: That was on the west side.

The Court: West?

The Witness: Yes.

The Court: Well, I think Mr. Rosenkrans is asking you about the excavation on the same side of the street.

20 The Witness: No. We had some a block farther than that.

The Court: North?

The Witness: North, but then we were—

*By Mr. Rosenkrans:*

Q. That is further up? A. Then we were out—

Q. So your excavations, Mr. Hoar, up the street were made when the street had a higher grade than in front of 149? A. There is very little difference.

30 Q. But difference there was was in favor of that portion of the street where your excavation was made? A. Yes.

The Court: It was higher there, wasn't it?

The Witness: I don't think it was. No, I would not say it was, or I wouldn't say it was. I am not here to tell any stories.

*Daniel J. Hoar—Cross.*

Q. You don't know? A. I want to tell the truth and nothing but the truth.

Q. But there is no question in your mind but what the general grade of the street is from the high numbers from the north to the low numbers on the south? A. You cannot make me say so, because I am not going to say anything I am not positive of. 10

Q. You have already said so, haven't you?

Mr. Dorgeval: He has not said it without qualification. He said over and over again he could not be sure.

The Court: Oh, no! he said that the grade was from where the high numbers were to where the low numbers were.

The Witness: To my estimation, but the road is very near to grade. 20

The Court: That is what you said.

The Witness: Yes.

The Court: In some places it is level?

The Witness: Yes, sir.

The Court: Now he is asking you where this excavation was a block away to the north, whether the ground was a little higher there than it was at this Kosson place. What do you say to that? 30

The Witness: It might be, but I wouldn't be positive.

The Court: You cannot be sure?

The Witness: No, sir.

The Court: All right.

Q. Now, whenever a public improvement is made in the street, in which the gas company has laid its pipes, you are often there, aren't you? A. 40

*Daniel J. Hoar—Cross.*

Well, I get my share of the work. I am not there especially, no more than any other.

Q. You have observed the manner in which prudent contractors open up streets and make excavations, haven't you? A. Yes, sir.

Q. You have done that for many years? A. Yes, sir.

Q. Now, will you say whether or not there is anything negligent in the manner in which the Union Building and Construction Company did any of its work, in the vicinity of 149 Second Street?

Mr. Heller: I object to that.

Q. In April, 1929?

The Court: I think he might give his opinion.

Mr. Heller: I ask an exception.

The Court: You may have an exception.

Mr. Dorgeval: If your Honor please—

The Court: Give you an exception too.

Mr. Dorgeval: If he is an expert, then I think he should be asked his opinion of the cause of the leaking into the cellar.

The Court: You may ask him that when your turn comes.

Mr. Dorgeval: Thank you.

A. Well, to my opinion, there was a mistake made. While I am very good friends with the Union Building and Construction Company, the foreman and I worked on that job in harmony together—when my men came in the way, I shifted them to the other side of the street, and they helped me out remarkably in getting through with my work and I always kept out of their way as much as possible,

*Daniel J. Hoar—Cross.*

because I knew they were on contract work keep in their way on the job.

Q. Tell us about the mistake? A. Where the mistake, to my estimation, was made, where those leaders came down on the buildings, there was no gutter formed for to carry water into the original curb, outside of the old curb. That trench, about that wide, was cut inside of the old curb, and that formed a reservoir that the water found its way into some loose places in the brick work of the foundations, and wherever it found a hole in the foundation, of course, that found its way in the cellar. 10

Q. Now, Mr. Hoar, you say that on the 25th day of April, the Union Building and Construction Company made an excavation immediately west of the standing curb two feet in width and two feet in depth? A. Yes. 20

Q. Was there anything negligent in the way in which the construction was made, in which the excavation was made? A. As far as the excavation was made, of course, I had nothing to say about that.

Mr. Heller: I object to that on the same ground.

The Court: Same ruling. 30

Anything wrong with the excavation?

The Witness: I don't know, sir. I had nothing to do with it.

The Court: You saw it?

*By Mr. Rosenkrans:*

Q. You saw it done? A. I said what was wrong with it once. I said—

The Court: No; listen to the question. 40

*Daniel J. Hoar—Cross.*

The question is was there anything wrong with this trench, this 2x2 trench by the curbstone.

The Witness: When I went there the night of the rain—

The Court: No, before that.

10 The Witness: No, nothing wrong.

*By Mr. Rosenkrans:*

Q. Was it dug in the usual manner? A. No, sir.

Q. Was it dug in the usual manner at all? A. In my estimation it was.

The Court: There was no other way to dig it, was there?

20 The Witness: Well, I guess there was other ways of doing it. There is many ways of doing that kind of excavation.

*By Mr. Rosenkrans:*

Q. Other ways of digging it? A. Sir?

Q. Other ways of preparing that excavation? A. They are men that are well qualified on the work. They dug it the way I would do it, if I was doing contracting—dig it the fastest way to make 30 money on it, of course.

Q. The work where you say this excavation lay, was on the sidewalk? A. Yes.

Q. What covered the sidewalk before any excavation was made, if anything? A. What covers the sidewalk?

Q. Yes. A. Concrete, to my estimation was the surface cover on the sidewalk.

Q. All along there? A. Well, the majority of 40 both sidewalks, east and west side of the street, was concrete.

*Daniel J. Hoar—Cross.*

Q. Was anything else there beside concrete? A. Some places there was bluestone flagging, but not many places.

Q. Stone flagging; all right. When the Union Building and Construction Company commenced its work there, it first broke up the flagging or concrete sidewalk with a machine, didn't it? A. Yes. 10

Q. Did it do that properly? A. Oh, certainly.

Q. In accordance with the approved method of doing that kind of work? A. I guess they did.

Q. Well, you know, don't you? A. Oh, I know.

Q. What ought to be done? A. Yes, certainly.

Q. It was done as it ought to be done? A. Certainly. It was done as far as workmanship.

Q. Then the next step in the pavement work, was to dig out the soil that lay beneath the concrete or flagstone that had been broken up? A. Yes. 20

Q. To a depth, you say, of two feet? A. To a width of two feet.

Q. Was that properly done by the Union Building and Construction Company? A. I guess it was.

Q. Well, do you know? A. Well, I wasn't suppose to know. They had foreman there along their own work. 30

Q. You saw it done, you say? A. Yes, I saw it done.

Q. So far as you observed, it was done properly? A. Done the same as I should do it myself, as I told you before, to make money fast.

Q. And according to the approved methods? A. Yes.

Q. Now, will you tell us what, according to your recollection, what was the extent of length in any 40

*Daniel J. Hoar—Cross.*

excavation made by the Union Building and Construction Company, that lay upon this street in the neighborhood of 149 Second Street? A. I couldn't tell you that. I don't know what length it was. As I said before, I never anticipated any trouble from the affair; if I did, I might have made measurements.

10

Q. You were there— A. I was there, certainly, but I had plenty of work to attend to of my own, without watching theirs.

Q. —on the morning of the 26th of April, Mr. Hoar— A. Yes.

Q. And you talked there with Mr. Richard? A. I did, sir, every day.

20

Q. Was that the head of the Union Building and Construction Company? A. Well, sometimes I saw the head, that is a Mr. Richard Drucker; I guess I met him once.

Q. You talked to both Mr. Druckers there? A. Yes.

Q. On the 26th of April? A. Well, I am not particular whether I talked to them on that day or not, but I spoke to some of them.

Q. On the day following the storm? A. Yes.

30

Q. Did not Mr. Richard Drucker call you on the telephone about eleven o'clock in the night of the big storm?

E

Mr. Dorgeval: Now, if your Honor please—

A. Not that I know of.

Q. Did anybody call you by telephone? A. Not by telephone. A man came after me with a truck.

40

Q. A Public Service man? A. Public Service truck. He said there was a call made to the Public Service office, not to my house.

*Daniel J. Hoar—Cross.*

Q. Don't you remember that on the morning following that storm, early that morning, you met Mr. Drucker upon the job? A. Yes, sir.

Q. And you talked about the excavations made and left open by your company? A. No.

Mr. Dorgeval: That is objected to.

The Court: I will allow it. This is cross-examination. 10

Mr. Dorgeval: I object to it on the ground, that this witness, of course, has no authority to make any admissions, so far as this defendant is concerned.

Mr. Rosenkrans: Well, I am not undertaking to bind his company. I am attacking his credibility.

The Court: Very well. Anything he may say unauthorized, of course, would not be binding upon his employer. 20

Mr. Dorgeval: I also object to it as outside the scope of the direct examination.

The Court: No. I think it is within the scope. You may take an exception.

(Answer repeated by reporter.)

Q. Didn't you say to him that a mistake had been made on your part, on the part of your company, in leaving the excavations, the cross excavations you had opened on the day before unfilled? 30

Mr. Dorgeval: I object for the same reason.

A. No, I don't remember.

The Court: Same ruling.

Q. And that your company was in for it good and plenty? 40

*Daniel J. Hoar—Cross.*

Mr. Dorgeval: I object.

The Court: I will allow it for the same reason.

Mr. Dorgeval: Exception. Defendant.

10 A. I don't know nothing at all about it; the first I heard of it.

The Court: You did not say that to Mr. Drucker?

The Witness: No, sir, never.

The Court: All right.

Q. Are you under subpoena? A. Not that I know.

20 Q. On the night of the storm, the curb in front of the plaintiff's property stood there in the position in which it had stood for years; that is right, isn't it? A. I believe so.

Q. You do believe so? It had not been removed back? A. You mean the building?

Q. No, the curb. A. No; I don't remember all of it. Of course, I remember when the street was paved with brick before, but I do not—

30 Q. I don't think you heard my question. A. The curb might have been re-set but I do not think it was moved back any.

The Court: It was in the same position that it had been for some time, at any rate, wasn't it?

The Witness: I think so.

Q. It had not been set back to the new position?

A. No, sir.

Q. Two feet beyond where it originally stood? A. No, sir.

40

*Daniel J. Hoar—Cross.*

The Court: Had any part of it?

The Witness: Oh, yes, some parts of it.

The Court: I mean right in front of these premises?

The Witness: No, sir; not that I seen.

Q. Or in that immediate vicinity? A. No, not around there, no, sir. 10

Q. Then you have no recollection whatever as to the length of the excavation which you say the Union Building and Construction Company had made in front of the plaintiff's building? A. No; I wouldn't say it was fifty feet or a hundred feet.

Q. Ten feet? A. Well, it was more than ten, I am sure.

Q. How much more than ten? A. Well, might be twenty and it might not. I am not positive on that point, but I know it was more than ten. 20

Q. How wide is the plaintiff's property? A. I think it was wider than the property—the front—

Q. How wide is the plaintiff's property? A. I couldn't tell you that either.

Q. Well, about? A. It might be fifty feet, probably in front, and it might be twenty-five, I would judge, but I did not measure it. As I said before if I knew I would be on a case of this kind I might have made closer observation, but I didn't. 30

Q. And you cannot tell us with any degree of certainty, how long you think this trench was?

Mr. Dorgeval: That is objected to.

A. I can't tell you and tell you truthfully.

The Court: I will allow it.

A. I do not want to tell an untruth in the matter.

Q. All right. Now, you say there was a wash- 40

*Daniel J. Hoar—Cross.*

out in this neighborhood, don't you? A. Yes.

Q. And on the same side of the street as plaintiff's property stood? A. Yes, sir.

Q. Was not that wash-out at 153 Second Street?

A. I couldn't tell you the number; it was convenient to where this glass store is situated.

10 Q. About two doors or two stores north of the glass store? A. I thought it was one door, maybe two. But there was a big wash-out there.

Q. You say that there is a water-table there?

A. No; what they call a water-curb box; in other words, a box that they have a valve so that they can shut the water off on the building or turn it on the building when they require.

Q. Where did that box sit with reference to the curb? A. Eh?

20 Q. The old curb line? A. The box, I think, was set in for the new curb; that was two feet inside.

Q. Had it lately been removed? A. Yes.

Q. Where had it been removed from? A. Oh, it must be directly in front of it. I wouldn't say that.

Q. Directly in front of what? A. From where it stood before, at the old curb.

30 Q. Where was it before? A. Well, I am telling you, if I was moving it or doing that kind of work, my pipe would come in there.

Q. No; I want you to tell us the position that the water-box was in before it was removed? A. Why, how could I tell? How could I tell you anything about it? I did not see that water-box before that morning. How do I know anything about what position it was in, whether it was six inches high above the surface or four inches below.

40 Q. Where was it when you saw it? A. That is a very funny question, lawyer.

*Daniel J. Hoar—Cross.*

Q. Where was it when you saw it? A. I told you it was as near as I recollect about on the inside of where the new curb was going to be placed.

Q. That is nearer the house line? A. Nearer the house line, nearer to the house.

Q. That would be beneath the unbroken sidewalk? A. No; they broke the sidewalks themselves, as we would move a box. 10

Q. Mr. Hoar, here is the old curb line, here is the old curb. A. Yes.

Q. And the house line. A. Yes.

Q. And the curb line would be back here, wouldn't it? A. Yes.

Q. Where was this box? A. Well, it would be on this side of your hand, inside the new curb.

Q. Inside of my right hand? A. Yes, to the best of my knowledge. It was already placed to give room to the new curb to be set outside of it. 20

Q. Was there anything about it that led you to infer that it had been newly placed in the position in which you saw it? A. No, nothing, only from the wash-out, that I could see that the ditch must have been freshly opened and filled in, as the water takes more effect on loose dirt than it does on dirt that is resting there for a number of years and not interfered with. 30

Q. Had your gang done any digging around this box? A. No, sir.

Q. Or near it? A. No, no.

Q. Made no excavation there? A. No, sir.

Q. Had you that work yet to be done? A. No, sir.

Q. Well, this box set in front of some property, didn't it? A. Yes, sometimes.

Q. And the gas lines run into that property? A. Sometimes. 40

*Daniel J. Hoar—Cross.*

Q. Wait, Mr. Hoar. It was your duty to dig down and examine the gas lines, that went into each property along that street? A. Yes.

10 Q. Whether they were in use, in present use or not? A. Well, it was our business to examine every one, but we had cards on some of those that had been installed only a few years, and all we done with those was to examine them in the cellar. We did not dig up the street; we did not examine it because we had our records there for to show that they were new lines.

Q. You say there were lines in respect to which you made no examination, except those made in the cellars? A. But we made no examination of renewals.

20 Q. In the cellars only? A. From the street to the cellars.

Q. Oh, certainly. How deep underneath the surface of that street did your equipment lay? A. Well, we run at an average of say two feet eight to three feet and in some places we are only about two feet six.

30 Q. And somewhere as deep as three feet? A. Depends on the obstructions we meet. We lay a line sometimes and the sewer above it is too high and brought us a little higher.

Q. Your principal pipe, where does that lay? A. That is the one I have reference to.

Q. With reference to the westerly curb line? A. It lay about six feet east of the west curb line.

Q. Out into the street? A. Yes.

Q. About three feet beneath the surface? A. As I said, it shallows to two feet six in some places.

40 Q. Now suppose you were to examine your pipes in front of 153 Second Street, how would you go at it?

*Daniel J. Hoar—Cross.*

Mr. Dorgeval: I object.

The Court: That is close enough.

Mr. Dorgeval: There is no testimony that the pipes had been examined before the storm occurred. The question is not proper at this time.

The Court: I think so.

10

Q. How did you go at it now? A. I don't remember.

Mr. Dorgeval: May I have an objection noted and an exception?

The Court: You may. You don't know?

The Witness: No.

The Court: Why?

The witness: I don't remember whether we had the service at 53 overhauled previous to that, or whether we had to overhaul it at all. I had a cadet engineer that was breaking in and learning the business with me, that was making out all them records, and I did not make or hold them myself.

20

Q. This will serve my purpose. You did examine your pipes in front of 149 Second Street, in front of the plaintiff's property? A. Yes.

Q. Now tell us how you went about it? A. We made an opening in the street and we made one in the trench that the Union Building and Construction people had dug, because we had only to dig a couple of shovels of dirt until we found our pipe, at most, the depth of our service going into the cellar, and of course, we dug nothing; we seen the pipe was in good condition. Examined it in the cellar also. We filled those holes in a little be-

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*Daniel J. Hoar—Cross.*

cause we had no renewals to make from those openings.

Q. You dug first in the street six feet from the curb? A. Yes.

Q. How big an opening did you make there? A. I would say about three by two.

10 Q. Three by two? A. Yes.

Q. At the curb, that is the old curb, the standing curb? A. Yes.

Q. How deep an opening did you make there? A. Well, we did not have to go very deep there. A good lively rooster could go there and examine where our pipe was in about five minutes.

Q. How deep did you go? A. Well, I would say probably from four to six inches, that is all, and it was all sand there, you could scrape it out  
20 with your hand.

Q. Now you say that the Union Building and Construction Company, Mr. Hoar, had not removed the curb in front of 149 Second Street, didn't you? A. I did, yes, sir.

Q. That the only excavation that it made in that vicinity, was two feet in width west of the curb? A. Yes, sir.

Q. That is right, isn't it? A. Yes.

30 Q. No mistake about that? A. No mistake.

Mr. Dorgeval: I should think the counsel would give the depth of the excavation.

Mr. Rosenkrans: He has told us. He said two feet.

Mr. Dorgeval: All right.

Q. When you examined your pipes at the curb, which side of the curb did you examine? A. Well,  
40 of course—

*Daniel J. Hoar—Cross.*

Q. The street side or the— A. I examined it where I had no digging to do practically. The Union had to do it for me; I just examined their trench.

Q. Don't talk so much, but listen.

Mr. Dorgeval: I object. That was a proper answer. 10

The Court: No; because I cannot tell where that was. I do not think the jury can. I cannot at any rate.

Where was it? On which side of the curb, the house side or the street side?

The Witness: Well, it was on the west side of the curb, the house side.

The Court: The house side?

The Witness: Yes, in the trench that was already dug. They saved us a lot of work. Where we found that trench, all we had to do was scrape a little dirt around and locate our pipe. 20

The Court: If you had your rooster, he could have done it?

The Witness: Yes, a good lively one.

Q. Sometimes you had to replace your pipe? A. Yes. 30

Q. How did you replace your pipes? A. Well, we renewed them from the main to the building, to the cellar.

The Court: You would make more of an excavation there?

The Witness: Well, we would make a trench here of our own right through unless the Union Building Company had the sidewalk broke up through, and we would feel 40

*Daniel J. Hoar—Cross.*

very glad they had it broke, it would save us a lot of work.

The Court: If they did not, you would have to make a hole?

The Witness: Yes, sir.

*By Mr. Rosenkrans:*

10 Q. Of course, the entire width of the sidewalk, they never broke up, did they? A. No, not that I have seen. No, they broke about half way on the sidewalk.

Q. They only broke about two feet? A. Yes, they broke more than that; they broke four feet or more.

20 Q. Four feet? A. Yes. There were two flags originally on the width of the sidewalk. If that sidewalk, these two flags would be six feet each, they broke two feet off that flag. They start that flag and they had to take that flag out and put a new flag in in order to make a presentable job of it.

Q. Where they left off digging, whatever point that was you had to continue the excavation in order to reach the house? A. Yes, in many cases.

Mr. Dorgeval: That is objected to.

30 The Court: In many cases?

Mr. Dorgeval: Yes.

Q. On the average, how many feet did you have to dig in towards the house from the point where the Union Building and Construction Company left off?

Mr. Dorgeval: I object.

The Court: I will allow it.

40 Mr. Dorgeval: Without any proof that there was any pipe renewed in this vicinity.

*Daniel J. Hoar—Cross.*

The Court: We are coming to it.

Mr. Dorgeval: I think he should lay the foundation first.

The Court: I think it is proper.

Mr. Dorgeval: I pray an exception.

The Court: You may have it.

How far?

The Witness: Well, I'll say four feet. 10

The Court: Four feet?

The Witness: Yes.

Q. To what depth beneath the surface? A. About two feet six, two feet to two feet six.

Q. Did you tear up the sidewalk? A. Yes, sir.

Q. Did you burrow beneath the sidewalk? A. Well, I tunneled four feet nearer the building because we let a portion of the sidewalk, the public could pass on. 20

Q. All right. Didn't you cut the sidewalk? A. Yes.

Q. When you made your trench? A. Yes.

Mr. Dorgeval: If your Honor please, I pray an exception to all this line of testimony.

The Court: If it appears that they did not do anything like that there, then we will cross it out. 30

Q. Now, you cannot say from recollection, in front of what house you renewed the pipe, and in front of what houses you merely inspected it? A. Well, we renewed them in so many and we inspected them so many, I would have to have a regular book in my head for to keep a memory of that kind.

*Daniel J. Hoar—Cross.*

The Court: You cannot remember?

The Witness: No, I cannot.

Q. But you did make inspections in front of some houses? A. Yes.

Q. And did renew your equipment entirely in front of others? A. Yes, sir.

10 Q. That is all.

Mr. Simon: No questions, your Honor.

The Court: Now, Mr. Dorgeval, you will be some little time?

Mr. Dorgeval: I suppose so.

The Court: This will be a good time to recess until tomorrow morning.

Recess till December 13, 1929 at ten A. M.

25

Paterson, N. J., December 13, 1929.

(Trial of the Cause Resumed).

DANIEL J. HOAR, resumed.

*Cross-examination by Mr. Dorgeval:*

Q. Mr. Hoar, you were what on that job? What was your position on that job? A. Foreman.

30 Q. How long would you say you have been doing that kind of work? A. Thirty-six years.

Q. And how long have you been a foreman? A. About twenty-eight.

Q. Now, then, you were asked if you had said anything the day after this rainstorm, anything to the effect that it was your mistake or something had gone wrong, that there was going to be a lot of trouble for the Public Service? Did you say anything like that? A. Never.

40

*Daniel J. Hoar—Cross.*

- Q. Anything resembling that? A. Never.
- Q. In any way at all? A. No, sir.
- Q. Now, let's see. You say you opened in front of 149? A. Yes, sir.
- Q. You opened in the street? A. Yes.
- Q. At the main? A. Yes.
- Q. How far from the curb out in the street is that? A. About six feet from the old curb. 10
- Q. From the old curb? A. Yes.
- Q. And the old curb was still in its regular position? A. Yes.
- Q. And then you opened inside of the old curb? A. Yes.
- Q. In that ditch? A. In that trench.
- Q. That trench? A. Yes.
- Q. It was two feet wide? A. Yes.
- Q. How deep did you have to get— A. I would say from— 20
- Q. (Continuing) —in the trench? A. From four to five inches.
- Q. Did you have to do any other digging in front of 149 than that? A. No, sir.
- Q. Were those holes covered up? A. Yes.
- Q. Were they covered up in a workmanlike fashion? A. Oh, yes.
- Q. You had that work completed in front of 149 on the day of the rainstorm, a day before, or two days before? A. No, it was the day before. 30
- Q. The day before? A. Yes.
- Q. What time did your men quit work then? A. Well, we generally quit about four-thirty.
- Q. I see. And when you quit work the day before those holes were properly filled in? A. Yes.
- Q. In a workmanlike manner? A. Yes.
- Q. In your opinion? A. We tamped it all good and solid. 40

*Daniel J. Hoar—Cross.*

Q. Speak out louder. A. We generally used a steel tamper in all our work to get it back that there will be no depression later on.

Q. Now, you went to this house at about ten, did you say, or ten-fifteen? A. I wouldn't be positive as to the minutes.

10 Q. You would not? A. But it was a few minutes after ten.

Q. All right. Before that in addition to the trench were there any other things in the street? A. Oh, yes.

Q. What else was there in the street? A. There was broken concrete from the sidewalk, there was dirt, there was sand, and there was stone.

20 Q. Now, where was the sand? I mean, how is it? Was it all spread out, was it in a pile, or how was it? A. It was in the same as it was dumped from the trucks.

Q. From whose trucks? A. The Union Building, they were the only ones using sand.

Q. They were the only people using sand? A. Yes.

Q. Did you see any of this sand dumped there? A. Oh, yes, and stone and dirt, all places along the street.

30 Q. Sand and so on dumped? A. Several places, yes.

Q. Then, you say, there was what, broken concrete and so on? A. There was concrete that they had taken from the place and some of that was in the gutter, also.

Q. How was it, all spread out or what? A. It was thrown outside in the old gutter.

Q. In the gutter? A. Yes.

40 Q. And the sand you speak of, was that out in the middle of the street or sidewalk or where? A.

*Daniel J. Hoar—Cross.*

No, they dumped it near the old curb in order to leave a passageway.

Q. Was the gutter blocked? A. Oh, yes.

Q. Was this sand in the gutter? A. Oh, yes; yes, sir, that gutter was blocked.

Q. Now, all right. Was there any such pile of sand close to number 149? A. There was piles of dirt. I couldn't be positive about the sand. There was dirt there. 10

Q. All right. Where was it with reference to 149? A. I would say it was convenient to 51 or 53.

Q. In other words, there was some sand or dirt or whatever it was, piled north of 149? A. Yes.

Q. Now, was there anything south of 149? A. Well, I wouldn't be positive about that. There might have been. 20

Q. Was there any pile of sand alongside 147 on the south boundary of 149? A. I know there was some stuff up that way, but in front of it or not I wouldn't be prepared to say.

Q. All right. You went there, at any rate, that night? A. Yes.

Q. When you arrived there what did you find? What object—withdraw that.

Had anybody been there before you? A. Well, there was others before I was. 30

Q. Had any workmen been there before you arrived? A. Not belonging to our company.

Q. But to any company, any workmen? A. Yes.

Q. From what company? A. Union Building.

Q. What, if anything, had they done right around? A. Well, really, where they had the trench broke on the sidewalk it prevented the water from its proper course to the old gutter, they put planks and some tar paper to carry the water. 40

*Daniel J. Hoar—Cross.*

towards the leaders out to the old gutter; that was all that I seen they done.

Q. In other words, they had made a temporary gutter from the leaders— A. Yes.

Q. —bridging over the— A. Old curb.

Q. Over the two-foot trench? A. Yes, sir.

10 Q. Well, assume that this is the trench here (indicating). A. Yes?

Q. I mean, the curb. A. Yes.

Q. Now, they had run gutters, had they, over the trench? A. Yes.

Q. So that the water would run over the curb? A. Out in the street, yes.

Q. Yes? A. Yes. Previous to that it was running into that trench and finding its way into the cellars.

20 Q. Now, how was it raining at that time? A. It was pouring. I couldn't exactly describe, but my estimation, it was the heaviest rain I ever saw that was falling at that time.

Q. Was there much water in the street, on the sidewalk, and so on? A. There was so much there I couldn't see the old curb.

Q. The curb was submerged? A. They were submerged in water.

30 Q. And was there water in this two-foot trench? A. Yes.

Q. Was it filled or not? A. Overflowing.

Q. Overflowing? A. Yes.

Q. Was the water up on the sidewalk? A. Yes.

Q. Yes, up on the sidewalk? A. It would reach a little on the sidewalk.

Q. Was there water towards the sidewalk? A. Yes, sir, a little ways on the sidewalk, yes.

40 Q. Now, what happened to the piles of dirt and sand that they had—which you say were there?

*Daniel J. Hoar—Cross.*

What did the rain do with them, if anything? A. There was a great deal of the sand washed away. At one place I know there wasn't more than a little hill of sand left there out of a truckload that was left there the night before.

Q. Did Mr. Drucker, that gentleman sitting there at the table, tell you anything about what happened to that sand? A. Well, we spoke about it and he said yes, it was quite a loss, they lost quite some sand that night. 10

Q. He told you they had lost quite a bit of sand? A. Yes.

Q. Was the sand around the street? Could you see it or not? A. Well, in some places where the sand was the night before you couldn't see hardly any there the next day.

Q. Now, did you inspect the opening that you had made? A. Yes. 20

Q. That is, the men working under you had made at 149? A. Yes, sir.

Q. On that work? A. Yes.

Q. The opening in the street you inspected? A. Yes.

Q. How was it? Was it all right or not? A. It was all right.

Q. Could you see the opening in the ditch? A. I could see that it was overflowing, the whole trench was dug two feet wide and two feet deep was overflowing with water, covering the curb, and I couldn't see it through, of course, the water was quite muddy. 30

Q. Now, the day following that or the second day after it did you see that trench again? Did you? A. Yes.

Q. After it had drawn off? A. Yes. 40

*Daniel J. Hoar—Cross.*

Q. What was the condition then? A. Everything was messed up and there was a lot of shrubbery and paper and empty boxes and one thing and another that the rain had washed in there.

Q. Were the pipes that you had worked on in that ditch uncovered? A. No, sir.

10 Q. Were the openings that you had made reopened? A. It was O. K., as far as I saw it.

Q. And the opening in the street, was that still all right? What about the openings that you had made in the houses just to the north side; were they all right or not? A. Well, the majority of them was all right, some of them might settle a couple of inches, but that was all.

Q. Might settle a couple of inches? A. Yes.

20 Q. Anything more than that to any of them? A. That is all. That is all.

Q. Now, you said you went down the cellar? A. Yes.

Q. What did you do—withdraw that. Did you see where the water was coming in down the cellar? A. I saw it boiling at the foundation line of the cellar floor, as far as I could see from where I stood on the bottom of the stairway.

30 Q. Was it coming in next to anything in particular? A. There was a stream coming down by the elevator.

Q. Down by the elevator? A. Yes, sir.

Q. Where is the elevator located? A. It is situated on the sidewalk.

Q. In the sidewalk? A. Yes.

Q. Which is in front of the building? A. In front of the building.

Q. To the very extreme front of the cellar? A. Yes.

40

*Daniel J. Hoar—Cross.*

Q. And there was water coming down the elevator shaft? A. Water coming down by the sides of it.

Q. Where was that water coming from that was coming down the elevator shaft? A. It was what was raining on the sidewalk.

Q. That was coming down from the sidewalk? 10  
A. Yes.

Q. At the bottom of the cellar, you say, what was that coming in next to, if anything? A. To the best of my belief it was coming in through a sewer connection, because our gas pipe was about five feet higher than the cellar wall.

Q. Than what? A. Than any of the other connections, than the sewer connection in particular. I would say four feet higher than this—that came in pretty shallow at that point. 20

Q. By the way, was there water coming in next to your connections? A. No, sir, we examined all ours in the cellar foundation thoroughly.

*By the Court:*

Q. Was that—did you examine it? A. Yes, that wall was—I could see the dirty, muddy stream where it came in.

Q. From the stairs you could see that no water came in there? A. Oh, yes, that is quite visible. 30

*By Mr. Dorgeval:*

Q. And there was no water coming in there? A. No.

Q. By the way, what about your service pipes, that is, the pipes that run from the main into the house? Do they run straight in from the main or go up hill or down? A. We carried them to the main line, they go up hill. 40

*Daniel J. Hoar—Cross.*

Q. How much higher about is pipe at the house than it is at the main? A. I would say from six to eight inches.

Q. Up hill from the main? A. Yes, sir.

(Interruption).

10 Q. Did you see water coming in any other place in the cellar than you have mentioned? A. Not to my memory.

Q. You mentioned a washout? A. Yes.

Q. Where was that located with reference to this property, north or south of it? A. It was north.

Q. How far north? A. Next door to my—

Q. Can you give us any idea in feet about how far it was from this building? A. It might be fifteen to twenty feet; it might be less.

20 Q. What about the dimensions of this washout—withdraw that. First, where was the washout? Out in the street or in the ditch? A. No, it was in the sidewalk.

Q. Under the sidewalk? A. Yes.

Q. How deep was it under the sidewalk? How deep down did it go? A. I would say it was five or six feet deep.

Q. Five or six feet deep? A. To my estimation.

30 Q. How far did it go, assuming that this is the sidewalk coming out like this and this is the building line? How far did it go in under the sidewalk? A. I couldn't see the distance. To my conception it must have reached pretty near the foundation.

40 Q. Pretty nearly into the foundation? A. Yes, sir; I couldn't see the end of it. I stooped and looked underneath it to get a view at it—not that I intended to be a witness at the time or anything like that—otherwise I would take measurements.

*Daniel J. Hoar—Cross.*

I stooped down to look in, but I couldn't see the end of it.

*By the Court:*

Q. What do you mean by a washout is a hole?  
A. Yes.

Q. Where the dirt was washed out? A. A big  
cave-in, yes. 10

Q. Was the washout towards the building from  
the gutter? A. Yes.

Q. Where did the earth go? A. Well, I presume  
that most of it was washed in the cellars.

Q. Could you see where it went? A. Why, in  
the glass store there was quite some inches of dirt  
in the cellar.

The Court: All right.

20

*By Mr. Dorgeval:*

Q. In what cellar did you see dirt? A. 149.

Q. 149? A. Yes.

Q. How much dirt was in there? A. Well, now,  
I didn't measure the dirt.

Q. Was it a lot or just a little or what? A.  
There might be five or six inches.

Q. This washout, then, went under the sidewalk  
almost to the building line? A. Yes. 30

Q. How wide was it? A. Well, I believe it would  
be about—

Q. Just about. A. About five or six feet, or  
probably more.

Q. Now, could you see any—withdraw that. Did  
you look—you looked into the excavation? A.  
Yes.

Q. Did you see any pipes—any gas-electric pipes,  
that is, any pipes of the Public Service Electric 40

*Daniel J. Hoar—Cross.*

and Gas Company in that washout? A. Nothing, no.

Q. Had your men done any work in that area where the washout occurred? A. Nothing at all.

Q. Did you see any pipes or anything like that at any time? A. I saw a water box.

10 Q. Water box of what? What company did that belong to? A. It is only the one company I know of.

Q. Was it a water box of a water company or some other company? A. No, it was a water box, because "water" is printed on the cover of the box.

*By the Court:*

Q. What do you mean by a water box, the shut-off box at the curb? A. Yes, sir, the shut-off box.

20 The Court: I assumed he did.

*By Mr. Dorgeval:*

Q. Now, can you say whether that box had been moved, in your opinion, for the new curb? A. That had been moved from its old position about three feet—matter of judgment.

Q. That is, in your judgment? A. Yes.

30 Q. Have you had occasion to see many of those water boxes in your thirty-four years of experience? A. Oh, yes, yes.

Q. And you have seen many water pipes and you have been around water pipes in that time? A. I worked in the water business myself for a while.

Q. This had been moved, in your opinion, for a particular purpose? A. In order to have it set inside of the new curb.

40 Q. Now, what caused this dirt to wash out around the water box? What, in your opinion, caused that? A. Well, my opinion was water get-

*Daniel J. Hoar—Cross.*

ting into that two-foot trench in the sidewalk and not having its proper course to the gutter had done it.

Q. Well, why did that, in your opinion, cause this big washout that went in almost to the building line under the sidewalk? A. That ditch hadn't been opened, to my estimation, very long previous to that, and it went from the old gutter all the way underneath the sidewalk, and it wasn't properly tamped. 10

Q. What wasn't tamped? A. The dirt wasn't tamped over the trench, and water always finds its way into the softest place in the earth, and it worked over and the opening in the cellar wall was large enough to admit dirt to be carried through to the cellar from this cave-in.

Q. The opening in what wall? A. In the cellar wall, of— 20

Q. Of 149? A. 149.

Q. It was large enough to allow what dirt to come in from where? A. From the cave.

Q. You mean to come in from underground? A. Yes.

Q. Do you mean that dirt from this washout, this cave-in, was washed underground into the cellar, in your opinion? A. Yes, sir, I don't see where else it could go, unless one of those cellars. 30

Q. And you think that some of the dirt from this washout went into the cellar? A. Yes.

Q. Of 149? A. Yes.

Q. And do you think water went in with that, too? A. Oh, yes, it had to carry it with it. The dirt would never go in by itself without the water carrying it.

Q. In your opinion, the cause of the washout was 40

*Daniel J. Hoar—Cross.*

that the dirt in there had not been tamped properly? A. I would think so, yes.

Q. That is just your opinion based upon your experience? A. Yes.

Q. What do you mean by tamping, so we all understand? A. We used a pounder, a twenty-six pound weight which has a round lump of iron on it with a notch up there for a handle.

Q. You pack the dirt? A. We use it as a pounder, we call them pounders.

Q. By tamping you mean packing? A. Yes, but—

Q. Did you see, when you looked in that opening, any other pipes in there except the water box, any other pipes of any company? A. No, sir, but my men told me after—

20 Q. No, no. A. No?

Q. Did you see anything else there except the— A. No, no.

Q. —water box? A. The water box.

Q. Now, by the way, when this occurred on the 25th where were your men working on that day? A. Well, we were working—

Q. On Second Street. Where were you working on Second Street? A. I can't recall the numbers.

30 Q. Not the numbers. Were you still working in front of 149? A. No, sir.

Q. Or to the north or south of it? A. No, we had that filled in, any place that we didn't have to renew pipe, put in new pipe and take the old pipe.

Q. All I mean is, Mr. Hoar, had you finished working at 149? A. Oh, yes.

Q. Where were you working on the morning of the 25th, on the morning of the 25th? A. We were  
40 working on both sides of the street.

*Daniel J. Hoar—Cross.*

Q. Where? To the north or south or both? A. To the north, and I think we were doing some work on the south side, too.

Q. Now, how far to the south were you working then, on the 25th? A. Oh, I would say 150 feet.

Q. Were you working on the west side or east side of the street then? A. I was working on both sides. 10

Q. All right. And then you were doing some work also to the north? A. Yes.

Q. On the 25th? A. Yes.

Q. How far would that be to the north from 149? A. I would say it would be about 100.

Q. About a hundred away. Was that on the east or the west side of the street? A. That is on the east side.

Q. That is the opposite side from this store? A. Yes. 20

Q. You said yesterday that you left on the east side of the street to the north a couple of openings? A. Yes.

Q. On the 25th? A. Yes.

Q. That is when the rain occurred? A. Yes.

Q. Which side of the street were they on? The east or west side? A. On the east side.

Q. What were they in front of? A. One of them was in front of a vacant lot; it was putting a connection in there. The other was in front of a bakery on the corner. 30

Q. I see. Now, when you went there after the rain had started was any of the dirt from those openings on the east side of the street coming over to the west side? A. No, sir, it couldn't. It couldn't come.

Q. What was happening? Which way was the 40

*Daniel J. Hoar—Cross.*

water going? Was it running from the west side of the street towards the east side or was it running from the east side or how was it? A. It was running from the west to the east side.

Q. Why was that? A. On account of the obstruction in the gutters.

10 Q. What obstructions in the gutters? A. Dirt and sand and stone.

Q. Who had put those obstructions there? A. The Union Building was the only people using that stuff there.

Mr. Dorgeval: That is all.

Mr. Simon: No questions.

*By the Court:*

20 Q. So if that is so, none of the sand and dirt that may have been out beyond the curbstone got into the cellar at all, did it? A. I wouldn't say it did, sir.

Q. It couldn't have, if what you say is true, that it all went over to the other side of the road? A. Washed principally to the other side.

*By Mr. Dorgeval:*

30 Q. Where did the dirt that was in the cellar come from?

The Court: He has already told us that.

Mr. Dorgeval: Oh, I see.

*Further Cross-examination by Mr. Rosenkrans:*

40 Q. Where this washout was, the washout was north of 149, you said yesterday, it may have been two or three lots? A. I said it was in either 51 or 53.

*Daniel J. Hoar—Cross.*

Q. You think about 153? A. I wouldn't be sure whether 151 or 153.

Q. Which is your best judgment? A. I would say it was fifteen to twenty feet from 149.

Q. Was it 153 or 149? A. Well, if it was 153 it would have been much farther.

Mr. Dorgeval: I think that has been answered. 10

The Court: Let him answer it again.

Q. We want your very best judgment. What do you say it was in front of, 151 or 153? A. To my opinion, it was 151.

Q. Now, there was no trench laid by the Union Building and Construction Company in front of 151 or 153, was there? That is what you said yesterday. A. No, there must have been a trench there; otherwise I would not have seen the cave-in. 20

Q. Now what there must have been. Didn't you say yesterday that you couldn't tell the length of the trench in that vicinity? A. Yes, sir.

Q. Made by the Union Building and Construction Company? A. I couldn't give any estimate on that length.

Q. Now you say, too, that it lay directly in front of 149? A. That might have been ten feet in length and might have been twenty. 30

Mr. Dorgeval: That is objected to. He didn't say that.

A. Or it might be a hundred. I told you it might have been a hundred. I didn't measure it.

Q. Did you— A. But the trench must have been open on the sidewalk or I couldn't see that cave-in at 51.

Q. Well, all right. There is a hole in front of 40

*Daniel J. Hoar—Cross.*

151 or 153? A. I think it was 51; I am not positive, though.

Q. And you infer from the fact that you saw the hole there that the Union Building and Construction Company had an excavation there? A. Yes, sir.

10 Q. That is about it, isn't it; it is an inference?  
A. Yes.

Q. It is an inference that you draw from the fact that you saw a hole there? A. Yes.

Q. Isn't that right? A. I could see the—

Q. You say you have no definite recollection where the trench laid that you say was made by the Union Building and Construction Company began and where it ended? A. No, I told you I didn't know whether it was twenty feet or a hundred feet.  
20

Q. What did you say yesterday? A. I told you I didn't know whether it was twenty feet or a hundred feet long.

Q. Can you tell us where it began and where it ended? A. And I say the same today.

Q. Can you tell us this morning, Mr. Hoar, where the trench began and where it ended?

*By the Court:*

30 Q. Where did it begin and where did it stop?  
A. I couldn't tell you that, Judge.

*By Mr. Rosenkrans:*

Q. How long was it? A. I will give you the same answer I did yesterday. It might have been twenty; it might have been a hundred feet.

Q. You gave me several answers yesterday. A. I didn't measure it.

40

Mr. Dorgeval: I object to that.

*Daniel J. Hoar—Cross.*

Q. What is the answer?

Mr. Dorgeval: Counsel hasn't the right—

The Court: The witness has no right to argue with him, and if the witness argues with him I think he has the right to argue back. The witness says, "I will give you the same answer I gave you yesterday," and counsel says, "You gave me several answers yesterday." I think he did. I think it is all right. 10

Mr. Dorgeval: I may have an exception noted as a misquotation of the testimony.

The Court: You may.

Q. Didn't you finally say yesterday that you thought the trench in front of 149 was from ten to twenty feet in length? A. I told you I had no recollection or I didn't take any measurements. 20

Q. Do you have any recollection this morning about the length of it? A. I told you it might be twenty feet or 100 feet or it might be ten feet, but I know there was an opening in front of these stores.

Q. Your recollection is very vague? A. (No answer).

Q. Your recollection about the length of this trench and about its position is very vague and uncertain, isn't it? A. (No answer). 30

Q. Isn't it? A. Well, as I told you, I made no measurements.

Q. Now, let's see, Mr. Hoar. Did you see—not that you inferred—but did you see in front of 151 or 153 wherever this washout was— A. Yes.

Q. Do you say that you saw a trench there made by the Union Building and Construction Com- 40

*Daniel J. Hoar—Cross.*

pany? A. Yes, sir, I say so, or otherwise I would not see the washout.

Q. All right. You never saw the trench there, as I understand you, you saw a washout and so you inferred there must have been a trench to start the washout? A. Yes.

10 Q. Is that right? A. Yes, that is it, exactly.

Q. Now, if the water company, as you say you infer, removed its equipment from a point by the old curb to a point where the new curb was to set, they made some excavation there, didn't they? A. Yes.

Q. And that excavation could have started this washout, couldn't it? A. No, they had repaired theirs.

Mr. Simon: Just a minute.

20 A. Their work was done long before that.

Q. But you say it wasn't properly tamped down, in your opinion? A. Well, I would say that, yes.

Q. Eh? A. I would say that, yes.

*By the Court:*

Q. You don't know how long before this 25th of April that trench had been filled in and improperly tamped down, do you? A. No, sir, I don't.

30 *By Mr. Rosenkrans:*

Q. You said yesterday very recently, you thought didn't you? A. It might be a month, it might be two months, for all I know.

Q. It might be two days? A. (No answer).

*By the Court:*

40 Q. Might it? A. Well, I couldn't answer that. I think I was speaking to the foreman of the water company and he told me—

*Daniel J. Hoar—Cross.*

Q. Don't tell us what he told you. A. They were through there for quite some—

*By Mr. Rosenkrans:*

Q. We are asking you what you saw. A. I didn't see them working there so I can't say whether it was a day or ten or twenty.

Q. The gas pipe of the Public Service in the cellar of 149 Second Street, where was that located with reference to this elevator that you have spoken of? A. Oh, it is away from the elevator. I couldn't say how many feet, but it is—

Q. Well, about. A. It might be three feet and might be six.

Q. And you say you saw no discoloration of the wall? A. No, sir.

Q. Beneath your pipe? A. No, sir. 20

Q. Now, where was—where did the water company's pipes enter that cellar? A. They came in the sewer connection.

Q. That is where you saw water pouring in? A. Yes.

Q. Gushing into the cellar? A. Yes.

Q. Is that correct? A. Yes.

Q. All right. Now, where is the stairway that went down into the cellar? Is it in front of the store, in the rear, or where? A. It is in front. You go in the front door and the stairway was, to my memory, to the right, you know, a wide stairway, and you went down that stairway. 30

Q. All right. And the foot of the stairway lay how far from the front foundation of the building? A. I couldn't tell you.

Q. Well, about. A. There was only a small space of floor that you could see anything on, and 40

*Daniel J. Hoar—Cross.*

there was so many cases of glass in the cellar that the floor was all occupied.

Q. You could see the front wall of the cellar?

A. Yes, just a portion of it.

Q. Why can't you tell us about the distance?

A. I could see probably twenty feet to the front wall.

10 Q. Was that the distance between the foot of the stairs and the front wall, twenty feet? A. No, one side of the cellar the glass was coming up towards the front; you couldn't see that distance unless you went in the cases of glass.

*By the Court:*

Q. No, the question is, How far was the stairway where you were to the front wall? How many  
20 feet? A. Oh, I would say probably fifteen to twenty feet.

*By Mr. Rosenkrans:*

Q. How many? A. Fifteen to twenty feet, that is, to my judgment.

Mr. Rosenkrans: All right.

The Court: Anything further?

30 *Further cross-examination by Mr. Simon:*

Q. Mr. Hoar, you wouldn't say that this work done by the Consolidated Water Company was done on June 28 of last year, would you, ten months before this occurrence? Would you? A. I couldn't say how long ago that was done.

Q. No, and you didn't visit the particular place until April of that year; that is right, isn't it? A. Right.

40 Q. So you know nothing at all about that par-

*Daniel J. Hoar—Cross.*

particular place till April of that year? A. No, not anything.

Mr. Simon: That is all.

*By Mr. Dorgeval:*

Q. Was the water company doing any work in that street, that is, in that vicinity, at that time? 10

Mr. Simon: Just a minute.

The Court: He has already answered that. He has already told us about the moving of the water box.

Mr. Dorgeval: I didn't mean that.

Q. I meant this: Was the water company—don't answer the question—my question is, Was the water company working in the street? I don't mean at this point, but were they doing work in this street? Were they doing any work along with the Public Service Electric and Gas Company? 20

Mr. Simon: Pardon me. I submit he has answered that.

The Court: I will let him answer it again.

Q. What is the answer, Mr. Hoar? A. Was the water company doing any work? Yes, they were doing some work on Second Street, but at what particular point I couldn't say, because I come in contact with some of their men— 30

Q. Have you any idea of the length of that trench, that two-foot trench, with reference to the property front of Mr. Kosson's property? A. I couldn't give any estimate on the length.

Q. All right. Just what happened? You said there had been piles of dirt and stuff in the gutter? Just what happened to the water as the re- 40

*Daniel J. Hoar—Cross.*

sult of these piles of dirt? Just what did happen to the water? A. It directed the water.

Q. Where did the water go as the result of that? A. Huh?

10 Q. Just where did the water go as the result of being piled in the gutter? Just where did the water go? Did it go in the street, did some of it go on the sidewalk, or where? A. Some went into the trench where odd pieces of old curb fell down, because the water was so forcible at that point some of the old curb fell down and it washed in towards the cellar, and it washed across the street, also.

Q. Some of that washed in towards the cellar? A. Yes.

20 Q. And some of it washed across the street? A. Yes, both ways.

Q. Did some sweep against the piles? A. Yes, against the piles of dirt and stuff.

*By Mr. Rosenkrans:*

Q. How many piles of dirt and sand did you see there in this vicinity? A. I couldn't give you an estimate on that, but there were several of them.

30 Q. One? A. I told you I couldn't give you an estimate.

Q. About how many? A. I couldn't tell you. There might have been twenty or thirty.

Q. There might have been one? A. There might be only six or seven, but there was more than one—more than five.

40 Q. All right. Now, over what area of the ground did they cover, did they extend? A. You can take one of those large trucks which they use for hauling this material, and when it is dumped it covers quite a space of ground. I would say

*Daniel J. Hoar—Cross.*

it covers probably from the curb out in the street seven feet.

Q. Yes. And it is something like a pyramid in shape, it is higher in the center? A. Yes.

Q. It is very shallow at the circumference? A. It runs flat towards the edge.

Q. And you say that the center point of that sand heap would be about three and a half feet from the gutter? A. Well, it might have been about that, three feet. 10

Q. You can't tell us how many heaps of sand you saw in that neighborhood? A. No, sir. I know there was six or seven, probably, but not exactly.

Q. All right. Now, what distance did they cover? A. I wouldn't say it was all sand.

Q. North and south. A. Why, between the piles that was there, of dirt, stone, and sand. I was alluding to sand alone. 20

Q. All right. How many hundred feet were these piles of dirt or sand? A. They were along the gutter of the roadway.

Q. How many feet? A. Sir?

Q. How far did they extend?

*By the Court:*

Q. From the first to the last one. A. Oh, there would be a distance probably of two or three feet between them. 30

*By Mr. Rosenkrans:*

Q. All right. A. They generally dump sand and stone convenient, in order that they have them convenient for their mixer to use if they desire.

Mr. Rosenkrans: He is not answering a question. 40

*Daniel J. Hoar—Cross.*

The Court: Not at all.

Mr. Dorgeval: He said they were close together.

10 The Court: No, he says they usually put them convenient, and that, of course, is not responsive. We don't care what they usually do at all. Everything that he said wasn't responsive.

Mr. Dorgeval: He said they were very close together.

Q. Now, how many feet or yards were there between the first heap and the last heap? A. Well, if there was a load in the second block down, how could I give you an estimate on that?

20 Q. I am asking you. I don't know whether you know anything about it at all. A. I couldn't answer that question. I want to be honest and fair and you can't make me crooked, or any other man.

The Court: Nobody is trying to make you crooked, Mr. Hoar. You are talking too much. That is enough.

The Witness: All right.

30 The Court: Nobody is trying to be unfair with you; nobody is trying to make you crooked. They are asking you questions. Now, if you will respond to them that is all we ask. Next question.

Mr. Rosenkrans: That is all.

*By Mr. Simon:*

40 Q. Mr. Hoar, you testified yesterday, did you not, that there were no men there of the Consolidated Water Company around that vicinity, did you not? A. Around 149?

*Daniel J. Hoar—Redirect.*

Q. Yes. A. None that I saw, no, sir.

Q. All right. That is true, isn't it? A. But they were working on Second Street.

Q. Oh, yes, Second Street runs from one end of the City of Passaic to the other end, doesn't it? But there were around this vicinity no men of the Passaic Consolidated Water Company? A. None that I saw. 10

Mr. Simon: Yes.

*Redirect-examination by Mr. Heller:*

Q. Mr. Hoar, the physical conditions that you have described and the trenches and the excavations and the piles, were they or were they not the same on the night of April 28, three days later? A. I don't think I was working around that vicinity on that day, on the 28th I was further up the street. 20

Q. So that you don't know the conditions on the 28th? A. I do not, sir.

Q. Do you know whether the trenches were the same and the washout was the same? A. No, I do not.

Mr. Heller: All right.

*Recross-examination by Mr. Dorgeval:* 30

Q. Did you hear of any complaint at all on the 28th? A. No.

Q. Did you hear that there was any trouble on the 28th? A. No. On some of those dates, but I wouldn't be prepared to say it was on the 28th. Mr. Drucker called my attention—

Q. You have been talking about the 25th? A. Yes. 40

*Daniel J. Hoar—Recross.*

Q. Now, was there any other complaint that you heard of excepting the one on the 25th? A. No, that is all.

Q. That is what I am getting at. A. No.

Q. Just one complaint that you know of; is that right? A. That is all. That is right.

10 Q. And those piles of dirt you have mentioned were close together, were they? A. Well, sometimes the sand and stone got mixed in together, because the edge of one load coming up by the other, a portion of it is mixed.

Q. And the piles of dirt? A. The piles of dirt, that was thrown out from the trench.

Q. All right. And those piles that you mentioned, of sand and so on, you said they were six or seven feet out in the street? A. Yes.

20 Q. How high would they be at the highest point? A. I would say it covered six or seven feet from the curb.

Q. How high would they be at the highest point? A. They might average probably three or four feet.

*By Mr. Heller:*

Q. Now, Mr. Hoar, are you connected with the construction department of the Public Service? A. I am in the distribution department.

30 Q. You are not in the construction department, are you? A. No.

Q. So that if a letter was addressed to the Public Service, attention of the construction department—

Mr. Dorgeval: That is objected to.

Q. (Continuing)—you would not get it, would you? I will withdraw it.

40 The Court: The question is withdrawn.  
Mr. Heller: That is all.

*Richard Drucker—Direct.*

RICHARD DRUCKER, sworn:

*Direct-examination by Mr. Heller:*

Q. Mr. Drucker, where do you live? A. 425 Terhune Avenue, Passaic.

Q. And are you connected with the Union Building & Construction Company, one of the defendants in this case? A. Yes. 10

Q. In what capacity? A. Superintendent.

Q. Were you superintendent on the job on Sec-

Q. Were you superintendent on the job on Second Street? A. I was.

Q. In April of last year? A. I was.

Q. Do you recall the night or the day of April 25, 1929? A. I do.

Q. Now, do you recall who was doing the work along the curb or along the roadway in front of the premises of 149 Second Street? A. The Union Building & Construction Company and the Public Service Gas & Electric Company. 20

Q. Now, as to the Public Service Gas & Electric Company, what did they do? A. The Public Service had opened the trenches.

The Court: He did not ask you that.

Mr. Heller: I asked him what they did.

The Court: What the Union Building and Construction Company did? 30

Mr. Heller: No, the Public Service Gas & Electric Company.

The Court: Excuse me.

The Witness: They were renewing the service pipe from the main line to the buildings.

*Richard Drucker—Direct.*

*By Mr. Heller:*

Q. What physical work did they actually do with the ground? A. They excavated the ground to a depth of approximately two feet. That is as near as I could judge.

10 Q. Now, where did they do this excavation work with respect to the old curb, take it first?

Mr. Dorgeval: May I ask that this witness be asked to state what he only saw himself.

The Court: Of course.

Mr. Dorgeval: Thank you.

*By the Court:*

Q. You were there? A. Yes, sir.

20 Q. Tell us only what you know, and not what your men told you. A. Yes, sir.

*By Mr. Heller:*

Q. With respect to the curb as it existed, where did the Public Service do the excavation work that you speak about? A. Well, they did the excavation work from the main and where the old curb originally stood past where the new curb was to be placed and to the rear of that into the sidewalk towards the building for about four feet.

30 Q. Now, I think you came down to the scene of this place on the night of April 25th? A. I did.

Q. And did you notice the water going into the cellar? A. I did.

Q. Where did the water come from? A. That night was a very heavy rain.

Q. Yes. A. And I was called on the phone.

40 Q. Just tell us where the water came from? A. The water was coming from all directions around through there, all over.

*Richard Drucker—Direct.*

Q. Well, was it from any particular excavation, or from any particular place, or from all places?

A. It was coming from the high part of the road and flowing down toward the lower part. The slope of that street is from the higher numbers from 153 down towards the lower numbers, which goes past Mr. Kosson's store.

Q. Now, with respect to the excavations that were made by the Public Service was there any water in those excavations?

10

Mr. Dorgeval: There is no testimony by this witness that those excavations are in this vicinity.

The Court: He was asked if there are excavations and he said yes, and I suppose that is in this vicinity. Is that what you understood?

20

The Witness: Yes, sir.

*By the Court:*

Q. There were excavations there of the Public Service? A. Yes, sir.

Q. Where were they exactly?

Mr. Dorgeval: That is it. Ask him where they were.

30

*By the Court:*

Q. Precisely where were they? A. They were at 141 Second Street; they were at 143 Second Street; they were at 145 Second Street; they were at 147 Second Street; and they were at 149, 151, and 153 Second Street.

Q. Open excavations? A. Open excavations.

40

*Richard Drucker—Direct.*

*By Mr. Heller:*

Q. Unguarded? A. Unguarded.

*By the Court:*

10 Q. What do you mean by unguarded? A. Well, may I ask the attorney what he means by unguarded?

Q. You said unguarded and I am asking you, and if you do not know what he means, don't answer.

A. The only thing is that there was earth thrown up on each side of the trench.

Q. You do not mean there were no lanterns? A. That is what I thought he meant.

*By Mr. Heller:*

20 Q. Mr. Drucker, on the night of April 25th, I think you said you were called by Kosson? A. Yes, sir.

Q. And did you see the Public Service men there that night, too? A. Yes, sir.

Q. Did you see anyone from the water company there that night, too? A. No, sir.

Q. Do you know what time you got there? A. Yes, sir, I got there at about a quarter to nine.

Q. In the evening? A. In the evening.

30 Q. Did you notice any piles along the gutter or the new curb or the old curb? A. I did.

Q. Who made those piles? A. Dirt had been thrown out of the excavations that the Public Service had made.

40 Q. Now, with respect to the flowage of the water as it rained, did the piles have anything to do with the flowage of the water? A. It did; the water could not pass by. It went into their trenches and flowed out around on both sides where the dirt had been piled up on the sides and it went into the

*Richard Drucker—Direct.*

trenches and then flowed to the south side of the trenches.

Q. And then where did the water go after that?

A. It went down the street, down towards the lower part of the street.

Q. Did any of it go in the cellar? A. It may be some of it got into the cellars.

Q. How many piles did you say the Public Service made of the sand material? A. Of sand and material? 10

Q. Yes. A. They had no sand there and material because they did not use any.

Q. They made some piles, you said? A. From their trenches.

Q. Well, how many piles did they make along the front of Kosson's premises? A. They had one in front of Kosson's premises which was 149, earth 20 which had been thrown above the excavation.

Q. Now, did you notice the washouts north of the Kosson building? A. I did.

Q. Did you know who made that washout?

The Court: Who made the washout?

Mr. Heller: I will withdraw that.

The Court: Yes.

*By Mr. Heller:*

Q. Who dug the trench? A. Why, that trench 30—there was as I have stated, there was a trench excavated by the Public Service at No. 153 which was left open that night and the water got into the trench of the Public Service, and then it got into the trench of the water company which had been doing the work in there possibly 10 or 12 months previously and settled down and made a big area of water into that big ditch.

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*Richard Drucker—Direct.*

Q. And how far was that from the Kosson building? A. The Kosson building is at 149. There are 25 foot lots there and the Kosson building is at 149 where this excavation was, and where the big settlement was is at 153.

10 Q. Now, did you notice the water box of the water company there? A. I did.

Q. Do you know whether or not the water box, the position of that box was changed at any time in April of 1929? A. It had been set back to the proper place.

Q. Now, do you know when they were there? A. No.

Q. Can you approximate the time? A. I do not know anything about it.

20 Q. You do not know whether it was a week or six months before, do you? A. It might have been six months.

Mr. Heller: That is all.

The Court: Cross-examine.

Mr. Heller: There is just one question that I forgot to ask the witness.

The Court: Proceed.

Mr. Heller: May I have the letters sent to the water company?

30 Mr. Rosenkrans: You may.

The Court: Proceed with the examination of the witness.

Mr. Rosenkrans: I object to the introduction of these letters in evidence because they were self-serving.

The Court: Objection sustained.

Mr. Heller: It is evidentiary to show that we gave them notice on April 26th and there

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*Richard Drucker—Cross.*

was another flood on April 28th; that is the notice.

The Court: You may ask him whether you notified him before the second flood and that may be evidentiary, not the contents of the letter.

*By Mr. Heller:*

10

Q. Did you receive notice of the flood of April 25th before April 28th? A. I did not to my knowledge; I did not receive it.

Q. Well, you were there on the night of April 25th? A. Yes.

Q. Then you did know about the flood on the 25th? A. I did.

Mr. Heller: That is all.

The Court: Cross-examine.

20

*Cross-examination by Mr. Rosenkrans:*

Q. Mr. Drucker, when did the Public Service open the trench in front of 153 Second Street? A. Those trenches were all opened the day previous to the storm.

Q. That is, the storm occurred upon the 25th of April? A. The storm was on the 25th and they opened the trenches the same day, and the storm came that night.

30

Q. The same day? A. The same day.

Q. And how many trenches did they open on April 25th, the day of the storm? A. The same places I have mentioned, 153, 151, 149, 147, 145, 143, and 141, all the way down the line.

Q. Now, were these trenches all of the same depths? A. They were.

40

*Richard Drucker—Cross.*

Q. Of the same length? A. As near as my knowledge is, they were.

Q. Now, describe them as to where they began and where they ended? A. They ran from the main which is about six or eight feet from the curb, they ran back into the building and some of them they excavated and they tunnel under the sidewalks so that they will not block the traffic into the buildings.

10 Q. The principal main you say lay at a point some six feet east of the westerly curb? A. Yes, sir.

Q. And at what depth beneath the surface of the road? A. Approximately 30 inches.

Q. Was there an open cut made by the Public Service from that main up to the curb? A. Beyond the curb.

20 Q. That is, which way, toward the house? A. Toward the buildings.

Q. And how wide? A. Possibly two feet.

Q. How wide? A. About two feet.

Q. And how deep? A. Thirty inches.

Q. And then it ended at some point on the sidewalk? A. Yes, sir.

Q. Well, how did the Public Service then get from that point where they ended to the walls of the building? A. They tunneled under the sidewalk in some places and some places they would dig up all the way.

30 Q. Now, can you tell us at what points they had made tunnels? A. I could not tell you that.

Q. Had your company been working in the vicinity on the 25th? A. Yes, sir.

Q. And what was the nature of the work that your company did on that day? A. We were setting the curb back.

40

*Richard Drucker—Cross.*

Q. And where did you set the curb back? A. We started—

Q. Suppose you refer to numbers. A. We started that morning and we worked up as far as we had the curb reset up as far as No. 135, from the center line of No. 135; that was as far as our curb had been reset.

Q. And 135 was of course south of 149? A. Yes, sir. 10

Q. Now, did you do any work on that day in front of 149? A. The only work that we had done on that street in front of 141 at that time was we had a compressor working there which broke up the sidewalk for two feet in back of the curb on that block.

Q. And had the material which was broken up, the material which had composed the sidewalk, had that been removed? A. It had not. 20

Q. Had you dug any trench in front of No. 149? A. No, sir.

Q. Or in front of 153? A. No, sir.

Q. Or 151? A. No, sir.

Q. Now, you say that you got notice, a telephone call from Kosson's? A. Yes, sir.

Q. On the evening of the 25th? A. Yes, sir.

Q. What was the state of the weather at the time? A. Raining very hard. 30

Q. Well, was it any unusual rainfall? A. It was an unusual rainfall.

Q. And what did you do after receiving the message? A. I went right down to the street and I picked up a man and went right down to the street.

Q. And where did you go to? A. Mr. Kosson was the man that had called on the phone and I said I do not know what I can do, but I will go down and see, and I saw him, Mr. Kosson, and 40

*Richard Drucker—Cross.*

said, "Mr. Kosson, your trench is all filled with water."

Mr. Dorgeval: I object to that.

*By Mr. Rosenkrans:*

10 Q. What did you say to him? A. I said, "Mr. Kosson, this is none of our funeral," just like that. I said, "That is the Public Service; their trenches are all filled with water."

Mr. Dorgeval: I do not see how that is proper as to us; if that is not a self-serving declaration, I do not know what that is.

20 The Court: I will let it stand. It is not binding on you but it is evidentiary of what this witness says to one of the parties to the suit. It is not binding on you. It is this man's opinion and it might not be worth anything to the jury, but he can state what he said.

Mr. Dorgeval: May I move to strike it out?

The Court: Motion denied.

Mr. Dorgeval: Exception.

The Court: Go ahead.

30 *By Mr. Rosenkrans:*

Q. Then what did you do? A. I called up the Public Service.

Q. What did you say to them? A. I told them, "Your trenches are filled with water, and Mr. Kosson is having some trouble down here and you had better come down and look after your own work."

Q. Then did you do anything? A. Sir?

40 Q. Did you do anything further? A. I filled in the trench with my man, in front of No. 149.

*Richard Drucker—Cross.*

Q. Whose trench? A. The trench of the Public Service.

Q. And why did you do that? A. To help Mr. Kosson, a good fellow, and to help prevent anything going down the cellar.

Q. Now, did you see Mr. Hoar that night? A. I did not see him that night.

Q. Did you see him on the following morning? A. I saw him at seven o'clock the next morning.

Q. Where? A. Right on Second Street, in that particular block.

Q. And did you say anything to him? A. Yes, sir.

Q. What did you say to him?

Mr. Dorgeval: I object to that.

The Court: Objection sustained.

Mr. Rosenkrans: I laid the foundation for that, if you please.

The Court: In what way?

Mr. Rosenkrans: I asked Mr. Hoar whether Mr. Drucker did not talk to him about this flow and whether Hoar did not say that.

The Court: If you have laid the foundation, why, that is all right. If it is for that purpose to discredit Mr. Hoar.

Mr. Dorgeval: Of course counsel has not laid the foundation for what Mr. Drucker said and that is what this question is.

The Court: Mr. Hoar said he did not say anything.

Mr. Dorgeval: The foundation has been laid I understand for what Mr. Hoar said, but not for what Mr. Hoar said at that time.

The Court: Which Mr. Hoar denies, isn't that correct?

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*Richard Drucker—Cross.*

Mr. Rosenkrans: Yes.

The Court: I think it is all right. You may answer.

10 Mr. Dorgeval: I pray an exception to what Mr. Drucker said on the ground that Mr. Drucker said to Mr. Hoar is no evidence in this case. It is a self-serving declaration at the most and not binding.

20 The Court: There is no question about that, but to discredit Mr. Hoar's testimony, and that is the only purpose for which it is used, if Mr. Hoar is not testifying according to the truth, and it is proper to show it. It might be due to his faulty recollection but it is to undermine the testimony of Mr. Hoar, and Mr. Hoar says he had no conversation, he was not told this and he was not told that and this witness says he was.

Mr. Dorgeval: I understand now that what is being allowed is what Mr. Drucker said to Mr. Hoar. That is to be allowed in as evidence in this case?

The Court: Yes.

Mr. Dorgeval: I pray an exception for the reasons mentioned.

30 The Court: Because Mr. Hoar denies it and it is to discredit Mr. Hoar and only for that purpose.

Mr. Dorgeval: I pray an exception for the reasons mentioned.

The Court: You may have it.

Q. All right, answer the question. A. I do not remember the question.

40 Q. What was said by you and Mr. Hoar the next morning? A. I said, "I called you, the Public Ser-

*Richard Drucker—Cross.*

vice on the telephone last night, but I did not see you. I left here at eleven o'clock," and Mr. Hoar said, "I came on the job right after 11," and he said, "What could I do?" He said, "My trenches were all full of water." He said, "There was water all around, and what could I do?"

*By the Court:*

10

Q. Is that all? A. Yes, sir, that is all.

*By Mr. Rosenkrans:*

Q. Now, Mr. Drucker, when you said that the Public Service had made trenches in front of 153, 151, 149, 147, 143 and 141— A. Yes, sir.

Q. Are you testifying from your recollection, or did you do something at the time? A. I made a record of it and on the following morning—I took a note that night of the numbers where the trenches were opened that night, and the following morning I made a little diagram of what trenches were open the following morning. 20

Q. And have you got that diagram? A. I have.

Q. And will you produce it, if counsel will allow him to produce it? A. Certainly.

The Court: Is there any objection?

Mr. Dorgeval: Of course there is.

30

The Court: Objection sustained.

Mr. Rosenkrans: Exception.

The Court: Proceed.

*By Mr. Rosenkrans:*

Q. Now, you say that you are the superintendent? A. Yes, sir.

Q. Of your company? A. Yes, sir.

Q. Under whose supervision was the work being done? A. Under mine. 40

*Richard Drucker—Cross.*

Q. That they were doing in Second Street on the 25th of April? A. Under mine.

Q. Do you know what sand heap, if any, you had in that neighborhood? A. I do.

Q. On the 25th of April? A. Yes, sir.

10 Q. Describe it and tell us the location? A. We had had a pile of five yards, five cubic yards, and five cubic yards of stone had been dumped partly at 149 and partly at 147.

Q. And that is a truckload, I suppose, of each? A. A truckload of each.

Q. Five cubic yards of each? A. Yes, sir.

Q. And where did those piles lie with reference to that gutter or curb? A. About three and a half feet from the gutter line.

20 Q. Now, was there a load of material or of excavating dirt or rock deposited by your company in the neighborhood of 149 Second Street? A. No, sir.

Q. On April 25th? A. No, sir.

Q. And how long had this sand or this heap of stone, rather, whatever it was, been lying in front of 149 and 151 Second Street? A. That afternoon, the 25th.

30 Q. And for what purpose was it brought there? A. To be used to mix concrete which was placed underneath the curb and for the rear of the curb that we worked, to re-set the curb.

Q. The old curb, I understand, you had not touched? A. Had not touched it.

Q. And the old curb was to be taken out and set back two feet? A. Yes, sir.

Q. West of this former line? A. Yes, sir.

*By the Court:*

40 Q. That was all you were doing, wasn't it? A. Yes, sir.

*Richard Drucker—Cross.*

Q. Re-setting the curb? A. Yes, sir.

Q. Repaving the street? A. Another contractor was doing the repaving of the street.

Q. By way of excessive caution, let me ask you one specific question. A. Yes, sir.

Q. On the night of April 25, 1929, was there any trench or excavation made by your company in front of 149 Second Street or in that vicinity, two feet wide and two feet deep, and anywhere from ten to one hundred feet in length? A. Our trench that we had there, we had set the curb up to 135, and then we had an open trench from 135 to the center line of 135 and to the center line of No. 141, which was two feet deep. 10

Q. Now, north of 141. A. We had not touched the curb and had done no work, only break up the sidewalk in back of the curb in preparation to set the curb back. 20

Q. Now, will you tell us from what number to what number you had broken up the sidewalk on April 25th? A. The entire side of that street was broken up, from Mercer Street to Putnam Street.

Q. I am talking about the work that you did on the 25th of April, the breaking up. A. Yes, sir.

Q. From what number to what number on the west side of Second Street had you broken up the sidewalk two feet in depth on that day? A. That was all broken up. 30

Q. That day? A. At that time, yes, that was all broken up, and the man with the compressor was working in a different place on the following day, but that day, the 25th, the sidewalk had been broken all the way along.

*By the Court:*

Q. When you break up the sidewalk, what do you 40

*Richard Drucker—Cross.*

do; did you throw out the broken pieces? A. That was left, your Honor, until the man came along to excavate the curb.

Q. On the 25th from 141 all along there, when you had not opened the curb? A. Yes.

10 Q. The broken concrete sidewalk lay there? A. Yes, that lay there.

Q. And that made no trench? A. No, sir.

Q. Made no depression? A. No, sir.

Q. Just made a lot of broken pieces of concrete? A. Possibly six or eight inches there.

Q. Concrete, was it? A. Some was bluestone and some was concrete.

Q. Did you take up the slabs? A. No, they were useless after they were broken up.

20 Q. So that in front of 149 there was this broken sidewalk as far as you were concerned? A. Yes, sir.

30 Q. When you came to places where there were tunnels underneath the sidewalk, where the water company was making connections or where the Public Service was making or renewing their pipes, if they were, what would you do with the broken pieces at those points? A. There were several places where we encountered, where the sidewalk, before even the Public Service or Gas Company or Water Company, or anybody, got to that place, we had worked under the sidewalk and had been there possibly for a number of years.

Q. Is that where the water ran? A. It might have gotten in. There was a lot of places where the sidewalk was intact and the ground had gotten underneath and settled underneath the concrete sidewalk, and we do not know where the water went when it got under there.

40 Q. What would you do with the broken pieces of

*Richard Drucker—Cross.*

stone when you came to those depressions, let them drop in the hole? A. They let them drop.

Q. Suppose you came to a trench that had been opened, not one of those depressions, but a trench that had been opened and tunneled under the sidewalk, if there were any such condition, what would you do with the broken pieces then? Do you recall anything of that kind? A. No, only at 153 when the man that worked with the compressor, he had on his jack hammer, as we call them, a drill about that long, and with his drill went down through this sidewalk and there was a big shallow hole under the sidewalk. You could throw possibly six or seven wheelbarrow loads of earth into it to fill it up. 10

Q. Is that one of those depressions that you speak of? A. Yes, that was a natural depression even before the Public Service or Water Company or anybody else got on the job? 20

The Court: All right.

*By Mr. Rosenkrans:*

Q. You made no excavation in front of 153? A. Sir?

Q. You made no excavation in front of No. 153? A. No, sir. 30

*By the Court:*

Q. That depression you speak of was not made by you? A. No, was not made by anybody, was a natural settlement.

*By Mr. Rosenkrans:*

Q. You say the Public Service did have a trench in front of 153? A. Yes, sir, they had an open trench there that night. 40

*Richard Drucker—Cross.**By the Court:*

Q. That was out further in the street; that was not under the sidewalk? A. Yes, sir.

Q. Was it under the sidewalk? A. In the street, it run from about six feet out from the street under the curb and back under the sidewalk.

10 Q. But at a place some place else from this natural depression? A. It just happened to be coming to that place.

Q. Nearby? A. Right nearby.

The Court: That is all.

Mr. Rosenkrans: That is all.

The Court: Do you wish to examine, Doctor.

Mr. Simon: No questions.

20 The Court: Have you any cross-examination, Mr. Dorgeval?

Mr. Dorgeval: Yes, sir.

The Court: Very well. Proceed.

*Cross-examination by Mr. Dorgeval:*

Q. What is your connection with the Union Building & Construction Company? A. I am superintendent and secretary of the company.

30 Q. You are a member of the company? A. Yes, sir.

Q. You are interested in the outcome of this suit, of course? A. Sir?

Q. You are interested in the outcome of this suit? A. Yes, sir.

Q. Yourself, are you not? A. Yes, sir.

Q. You are personally interested in the outcome of this suit? A. Yes, sir.

40 Q. You just said that the deep depression in

*Richard Drucker—Cross.*

front of 153 was nobody's fault, isn't that right?

A. At 153?

Q. Is a deep depression under the sidewalk which your man found was nobody's fault; is that correct? A. Yes; when I saw it I could not at the time—we ran our hammer right through it and the drill went right down through it.

10

Q. You just said a few minutes ago that it was nobody's fault, and you just told the Court that the Public Service was pretty close to it? Do you mean to say that the Public Service was mixed up in this depression? A. The Public Service trench was about three or four feet beyond where this depression was.

Q. The Public Service? A. Yes, sir.

Q. The trench had nothing to do with this, did it? A. Nothing to do with it, not at that time.

20

Q. No? A. No, when I saw it, no.

Q. Assuming that this is the trench that you speak of— A. Yes, that settlement that was there.

Q. Now, did your men encounter any other such depression in that vicinity? A. No.

Q. None other? A. Not to my knowledge.

Q. Now, the Public Service trenches that you speak of, that you say were in front of all these places, they were dug in a workmanlike manner, were they not? A. Yes, sir.

30

Q. You would approve of the way they were dug? A. Yes, sir.

Q. There was nothing about them that should have caused trouble under normal circumstances, was there? A. No.

Q. By the way, do you know Mr. Kosson quite well? A. I do not know him, not until I come on that street.

40

*Richard Drucker—Cross.*

Q. You said he was a good fellow? A. I never had spoken to him.

Q. You just said on the stand that he was a good fellow? A. I filled in like a good fellow.

Q. You were the good fellow? A. I was the good fellow and just tried to accommodate him, that was all.

10 Q. Now, then I understand after being accommodating you went home and made a map, isn't that right? A. No, I made a sketch where the trenches were open, right on the job, before I left that night.

Q. Before you left that night? A. Yes, right there at the time.

Q. And before you left that night you mean you prepared this map? A. Yes, sir, put down the  
20 numbers of where the trenches were open.

Q. Showing all the things that the Public Service had done in your opinion to cause this? A. Yes, sir.

Q. Flowage? A. Yes, sir.

Q. What? A. Yes, sir.

Q. You did that right away on the job? A. On the job.

Q. Where, in Mr. Kosson's store, or out in the  
30 rain? A. In the doorway.

Q. In a doorway? A. In a doorway.

Q. Right in a doorway, you got out a pad and pencil and made this map? A. Where there was an insert in the road.

Q. Yes. A. Yes.

Q. And right there in the doorway or in that insert, whatever you call it, you made a map right down there? A. Yes, sir, and I put the numbers  
40 down.

*Richard Drucker—Cross.*

- Q. And did you sit down to a table to do it? A. No.
- Q. Anybody there with you? A. No.
- Q. All by yourself? A. Yes.
- Q. Now, this conversation you say you had with Mr. Hoar, all that was said that is supposed to be damaging is that his trenches were full of water? A. Yes. 10
- Q. That is all he said? A. As near as I know.
- Q. Well, that is all you know? A. Yes.
- Q. He did not say anything about some mistake having been made? A. No.
- Q. He did not say any great flaw had been made? A. No.
- Q. He did not say there was going to be trouble for the Public Service, did he? A. No.
- Q. Just said the trenches were full of water? A. Yes, sir. 20
- Q. Now, you say the repaving of the street had not been started, had it? A. No, sir.
- Q. So the principal worker in that street at that time was your company? A. Yes, sir.
- Q. That is right? A. Yes, sir.
- Q. You were doing the biggest job then, were you not? A. The paving contractor was doing the biggest job. 30
- Q. Now, at that time they were not working in the street? A. No.
- Q. So then at that time you were doing the biggest contracting job? A. Yes.
- Q. You were doing a little excavating in the street at that time, were you not? A. Yes, sir.
- Q. The Public Service was checking up on its gas connections, wasn't it? A. Yes.
- Q. And the Water Company was checking up on 40

*Richard Drucker—Cross.*

its water connections? A. I never saw the Water Company do any of it.

Q. The Water Company were not doing any checking at all? A. No.

Q. They were going to put a permanent street in? A. Yes, sir.

10 Q. You did not see them around? A. Yes, sir.

Q. You were doing the major excavating work on that street at that time? A. Yes.

Q. All along there you were setting the curb there back two feet, were you not? A. In some parts of that street.

Q. Well, in this vicinity you were setting the curb back two feet? A. Set it up to No. 135, that is as far as we had set it.

20 Q. I am talking about the work you were doing, the work you were doing was widening that street two feet on each side? A. Yes, sir.

Q. And now of course you have been in this business how long? A. About thirty years.

Q. And you work systematically and efficiently, don't you? A. I try to.

Q. And you work ahead, by that I mean, first you have your men there who break the concrete?  
30 A. Yes, sir.

Q. And then after that come the men who dig?  
A. Yes, sir.

Q. And then after that of course for this new curb that you were going to put in, you were going to put in a concrete foundation, were you not?

Mr. Rosenkrans: The old curb was to be replaced.

*Richard Drucker—Cross.*

*By Mr. Dorgeval:*

Q. All right, for the resetting of the old curb, you were going to put in a concrete foundation, were you not? A. Yes, sir.

Q. And of course after the diggers would come the concrete mixers? A. Yes, all mixed by hand.

Q. And then would come the people who were going to put in the concrete? A. Yes, sir. 10

Q. Or are they the same people who mixed up by hand? A. Yes, sir, the same people.

Q. And of course it takes a little time to set, doesn't it? A. About an hour.

Q. What? A. About an hour.

Q. You can use it within the hour? A. We mix it dry so that we can set the curb on it.

Q. You put the curb on in an hour after it is in? A. Yes, sir. 20

Q. And then come the men who put the curb in? A. Yes, sir.

Q. Then of course you fill in after that? A. Yes, sir.

Q. How fast do you work along; how many feet of curbing do you set in the course of a day? A. About three hundred or three hundred and fifty feet.

Q. About three hundred and fifty feet? A. Yes, 30  
lineal feet.

Q. What? A. Lineal feet.

Q. Three hundred and fifty lineal feet in the course of a day? A. Yes, sir.

Q. And of course that is what you actually set, do you mean after the excavating has been done; you mean after all the preparatory work has been done, you actually lay 350 feet? A. Yes, sir.

*Richard Drucker—Cross.*

Q. So of course you do the preparatory work well in advance, don't you? A. We do.

Q. Fairly well in advance? A. Fairly well, yes.

Q. You were working of course there—is that the north here, where you were? A. Yes.

10 Q. In other words, you were working towards this property? A. Yes, sir.

Q. And you had reached you say on the day this thing occurred, you had reached the curb to No. 135? A. Yes, sir.

Q. And those are 25-foot lots there, 135 to 149, would be 12 lots? A. (No answer.)

Q. 135 to 149? A. 25 feet to a lot?

Q. What? A. 25 feet to a lot?

Q. Yes, from 135 to No. 149 would be seven lots, wouldn't it? A. Yes.

20 Q. Seven times twenty-five? A. Yes.

Q. 175 feet, is that right? A. Right.

Q. In other words, on the day that this happened you had reset up to within 175 feet of Mr. Kosson's property? A. Yes.

Q. Hadn't you? A. Yes, sir.

Q. And you set how many feet a day, three hundred and what? A. Three hundred and fifty.

30 Q. Three hundred and fifty feet a day? A. Yes, sir.

Q. And of course when you finished work on the 24th, you were interested in continuing the work on the 25th at the same rate of speed, were you not? A. Yes.

Q. Of course? A. Sure.

Q. The quicker you finished the job, the more money you make out of it, isn't that so? A. Sometimes.

40 Q. And so, do you mean to tell us that when

*Richard Drucker—Cross.*

you quit work on the 24th, what time did you quit? A. Four-thirty.

Q. You quit work on the 24th, and you had not done any digging at all?

Mr. Rosenkrans: He has been talking about the 25th, not the 24th.

Mr. Dorgeval: I withdraw that. 10

The Court: Proceed.

*By Mr. Dorgeval:*

Q. On the 25th it started raining early in the morning, fairly early? A. It rained nearly all day.

Q. About ten o'clock? A. I do not know.

Q. Did you work to any extent on the 25th? A. All day.

Q. All day on the 25th? A. Yes, sir. 20

Q. Up to when? A. Four-thirty.

Q. How about the rain during that time? A. It did not rain hard enough to stop us.

Q. Did I understand you to say in answer to Mr. Rosenkrans's question that you had excavated only to 141? A. Yes, sir.

Q. That would be—sixty-three feet? A. Yes, sir.

Q. Sixty-three feet? A. Yes, sir.

Q. You had excavated only sixty-three feet ahead of the point where you had finished resetting the curb? A. When we finished that night, yes, sir. 30

Q. You only had excavated sixty-three feet ahead of where you had finished resetting the curb? A. Yes, sir.

Q. And the excavating part is by far the slowest part of your work? A. No, sir.

Q. It is not? A. No.

Q. And digging out of the trench two feet on 40

*Richard Drucker—Cross.*

each side? A. It does not take us long.

Q. Isn't that one of the slowest parts of your work? A. No, sir.

Q. When you take all the details of this kind of a job? A. Yes.

10 Q. Isn't the digging of the trench the slowest part? A. No, sir.

Q. What is? A. Why, there is not much difference.

Q. There is not much difference? A. No, there is not much.

Q. It takes some time, doesn't it, to dig three hundred and fifty feet of trench, two feet wide and two feet deep? A. Well, it was not dug all at one time.

20 Q. Well, that is what you lay a day? A. Yes, sir.

Q. And that is what you opened every day, isn't it? A. Yes.

Q. And you want to have 350 feet open, of course? A. Yes, sir.

Q. Don't you? A. Yes, sir.

Q. So that you can lay that much? A. Yes, sir.

30 Q. How long does it take to dig 350 feet of trench after the sidewalk is cracked, to dig 350 feet of trench, two feet wide and two feet deep; how long does it take? A. About nine hours.

Q. About nine hours? A. Yes, sir.

Q. That is a day's work, isn't it? A. Yes.

Q. What? A. Yes.

Q. And so you dug ahead; you keep your digging a day ahead of your other work, don't you? A. No, sir.

40 Q. What do you do, reset the curb up to the point you finished and excavated and then have

*Richard Drucker—Cross.*

your mixers and curb resetters and so on all sit around while the trench is dug for nine hours? Do you do that? You do not do that, do you, Mister?  
 A. No, we have men setting curb and we have men digging all at the same time.

Q. But you keep your digging ahead of your work, you want to keep ahead of resetting? A. 10  
 Some of it.

Q. Ahead of your other work? A. Some of it.

Q. You want to keep enough dug so that your other men or concrete mixers can work at half speed beyond them? A. They do.

Q. What? A. They do.

Q. And to do that you have got to have a trench open, of course? A. A certain number of feet.

Q. Well, it takes nine hours to open up enough for you to reset, what did you reset in the ordinary day's work? A. That is correct. Please repeat 20  
 that question.

Q. Isn't that it? A. I do not understand you.

Q. I said it takes nine hours to open enough of the trench to reset as much curb as you do reset in an ordinary day's work? A. Yes.

Q. Now, you say that you had those two piles of material on this street? A. Sir?

Q. You say that you had those two piles, two 30  
 piles and one pile of sand and one pile of stones?

A. At that time we had five yards of sand and five yards of stone.

Q. Five cubic yards? A. Yes, sir.

Q. All in one pile, five cubic yards in one pile, is that right? A. There was five cubic yards of sand and about four feet from that, along the line of the street, was about five yards of stone.

Q. And that is all, just these two piles? A. Yes, 40  
 sir.

*Richard Drucker—Cross.*

Q. That is all there was for how great a distance? A. On that block, sir.

Q. Between Hudson and Mercer? A. Yes, sir.

Q. That is all there was, just these two piles? A. Yes, sir.

10 Q. You did not have any down there where you were just resetting the curb? A. No, sir.

Q. 135 is on this block, isn't it? A. That is all we had on this block.

Q. What? A. That is all we had on this block.

Q. You had reset the curb to 135, that is on that block; wasn't there any other material down there? A. Not down there, no.

Q. None at all? A. No, we had it all sent away.

Q. And you had a trench opened to 141, you say? A. Yes, sir.

20 Q. And of course you were going to reset the curb in the morning there? A. Yes.

Q. And there was no material there? A. No.

Q. The only material was between 147 and 149? A. Yes, sir.

Q. Just these two piles? A. Yes, sir.

Q. And they were neatly arranged? A. Yes, sir.

30 Q. How big a pile were they, how broad were they and how high? A. They covered about an area of six or seven feet on the bottom and went up like a pyramid.

Q. Two feet in diameter? A. Yes, sir.

Q. And how high? A. About three or four feet.

Q. About three or four feet? A. Yes, sir.

Q. And these were, I believe you said, out in the street away from the curb? A. About three and a half feet from the curb.

40 Q. Is that right? A. Yes, sir.

*Richard Drucker—Cross.*

Q. Out in the roadway? A. Yes.

Q. But out in the roadway? A. Yes.

Q. You had carefully avoided any of these piles of sand or stone getting into the gutter, you had carefully avoided that? A. They were simply dumped there about three and a half feet from the curb.

Q. Did you supervise the dumping? A. Did I? 10

Q. Did you supervise the dumping, yes? A. No, I did not.

Q. What made you particularly notice that they were three and a half feet out? A. That is all my instructions over there.

Q. Is that what you think happened because of your instructions? A. It was.

Q. Is that what you told the men to do, or what you actually saw them do? A. What was done. 20

Q. Then you saw this? A. Yes.

Q. And you saw these piles carefully arranged three and a half feet from the curb? A. Yes, sir.

Q. What? A. Yes.

Q. And none of them had gotten over there to block the gutter at all? A. No, sir.

Q. No chance of that? A. No.

Q. Well, I understand now that the Public Service just had a series of trenches from 141 to 153, inclusive; you say the Public Service had trenches dug from their main eight feet out in the street or whatever you say it was, six or eight feet up to what, to the buildings? A. Those numbers that I have mentioned. 30

Q. 141, 143, 145, 147, 149, 151, 153, that is correct, isn't it? A. Yes, sir.

Q. Now, the Public Service had those trenches open? Were they open from the main up to the buildings? A. They were open from the main to 40

*Richard Drucker—Cross.*

about three feet or four feet beyond the sidewalk.

Q. And there were those series of trenches? A. Yes, sir.

Q. At all those places? A. Yes, sir.

Q. All of them wide open? A. Absolutely.

Q. Absolutely wide open? A. Yes, sir.

10 Q. And you in this area from 141 to 153 had nothing open, absolutely nothing? A. Sixty-three feet from 135 to 141.

Q. You had open only to 141? A. Yes, sir.

Q. That is what you said, isn't it? A. Yes, sir.

Q. So that when I say you had nothing open from 141 to 153 I am correct, am I not? A. Yes, sir, quite.

Q. You had nothing whatever open from 141 to 153? A. Only broken beyond the sidewalk.

20 Q. I said open. A. Open, right.

Q. You had nothing whatever open? A. No.

Q. The Public Service had this series of trenches? A. Yes, sir.

Q. However, when the rain occurred, you were called first, were you not? A. Yes, sir.

Q. And you went down there with a gang of men, didn't you? A. I went.

Q. With some men? A. Yes.

30 Q. What? A. Yes.

Q. And when you got down there with some men you kindly filled in this one trench? A. Yes, sir.

Q. What time did you get down there?

The Court: Let him finish.

The Witness: Sir?

The Court: He said you kindly filled in one trench, and you started to say something, and that is correct, is it?

*Richard Drucker—Cross.*

The Witness: I filled that trench in there.

The Court: All right.

*By Mr. Dorgeval:*

Q. What time did you get there, a quarter of nine? A. Yes, sir.

Q. And you left at eleven? A. Yes, sir.

Q. Did you do anything else besides fill in the trench? A. I filled in a trench at 141. 10

Q. Oh, you did not mention that before, did you? A. No, I mention it now. I was not asked before.

Q. You were asked what you did before, and don't you remember being asked what work you did there? A. No, I do not remember.

Q. You do not remember that? A. No.

Q. Now, however, you say you filled in a trench at 141? A. No. 20

Q. Did you do anything else? A. No, not to my knowledge.

Q. How many men did you have with you? A. Two.

Q. You were there two hours and a quarter with these two men? A. Yes, sir, about that.

Q. And in that time you filled in two trenches and these trenches were about two or two and a half feet deep? A. Yes. 30

Q. You say they were two and a half feet deep, and how long? A. About ten feet.

Q. About ten feet long, each of them? A. I cannot exactly remember.

Q. And so twenty feet of trench, two and a half feet deep, was filled in in two hours and a quarter, is that right? A. That is right.

Q. How many men did you use when you excavated for your curbstone, when you say it took 40

*Richard Drucker—Cross.*

you nine hours to excavate 350 feet, how many men did you use? A. We stood in the doorway—

Q. I am asking you a question; how much excavating of 350 feet, how many men do you need for this work? A. About twelve men.

Q. How many? A. About twelve men.

10 Q. Twelve men? A. Yes, sir.

Q. It takes twelve men nine hours to do that? A. Yes, sir.

Q. And two men it took only two and one-quarter hours to fill in these two trenches?

Mr. Rosenkrans: He did not say that continuously.

*By Mr. Dorgeval:*

20 Q. How long did it take you, just a few minutes? A. That is all.

Q. How long did it take? A. About five minutes.

Q. How much each? A. About ten minutes each.

Q. Twenty minutes, is that fair? A. Yes, sir.

Q. That covers all the work that you did? A. Yes, sir.

30 Q. What did you hang around there for for two hours and a quarter? A. Because it was raining so hard we got out of the rain.

Q. So you have been doing this work how many years? A. About thirty years.

Q. And you have been doing outside work? A. Yes, sir.

Q. You are pretty used to the weather, aren't you? A. Yes, sir.

40 Q. And this night when you received a telephone call, it was raining hard when you got the call? A. Yes, sir.

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Q. And you went out of course dressed for the rain, didn't you? A. Yes, sir.

Q. You know how to take care of yourself in the rain? A. Yes, sir.

Q. You are an old soldier at this kind of work? A. Yes, sir.

Q. And after twenty minutes' work, then you stood there for an hour and fifty-five minutes, did you, on account of the rain, is that right? A. I did not stand in the rain. 10

Q. You stood inside an hour and fifty-five minutes? A. I did what most anybody would do.

Q. This hour and fifty-five minutes you stood after twenty minutes' work, just waiting for the rain to slacken, is that what you did? A. Just waited for it to stop.

Q. Waiting for it to stop? A. I thought it would stop; nobody knows when it will stop. 20

Q. You did not want to go out into that rain for an hour and fifty-five minutes, and you stood there. A. There was no reason.

Q. No reason? A. No.

Q. You did not want to go home? A. Did not have to.

Q. You were busy with the map, I suppose?

Mr. Rosenkrans: He has not said that he made a map. 30

Mr. Dorgeval: He said he made a map that night.

The Court: You continually say he made a map, when he did not say that.

Mr. Dorgeval: I will consent to have that stricken out.

The Court: My recollection of the testimony is that I refused to let it be introduced 40

*Richard Drucker—Cross.*

because he did not make it on the job. He never once made a map; he said he marked the numbers down that night and the next morning he made a diagram and there is no need of looking it up.

Mr. Dorgeval: I understood him to say that he made a map.

10

The Court: Am I right in that?

The Witness: You are right, Judge.

The Court: It is of no consequence. Do not let us waste any time on that. That is of no importance, but I just want to straighten it out.

Mr. Dorgeval: Thank you.

The Court: Very well. Proceed.

*By Mr. Dorgeval:*

20

Q. Now, during the time you were there you did not put any temporary gutters there to carry the water from the leaders over the trench that you had made there in the gutter? A. I did not.

Q. You did not do anything like that? A. I did not.

Q. You have done that before, have you not, in an emergency like that, you have built that sort of construction?

30

Mr. Rosenkrans: I object.

Mr. Dorgeval: I withdraw the question.

The Court: All right.

*By Mr. Dorgeval:*

Q. And that is an approved manner in the case of a circumstance where you have been called down, in front of the houses between 135 and 141 where you did have a trench, where you admit that

40

*Richard Drucker—Cross.*

you had a trench, and the water was running off the leaders in great excess, to get the water over the ditch that you had, you would build a little runway, wouldn't you?

Mr. Rosenkrans: I object on the ground that this is not cross-examination.

Mr. Dorgeval: I am asking him if that is not an approved way. 10

Mr. Rosenkrans: It is not cross-examination in the first place.

The Court: I will allow it.

Mr. Rosenkrans: And in the second place I think it is immaterial.

The Court: I will allow it.

Mr. Dorgeval: Exception. We contend that that is just what happened. 20

The Court: I understand that according to his testimony he was under no duty, and whatever he did, he did as a matter of courtesy.

Mr. Rosenkrans: That is one of the bases of the objection.

The Court: If you think it is important, he may answer.

Mr. Rosenkrans: Exception. 30

*By Mr. Dorgeval:*

Q. That is an approved method of keeping the water over a ditch, isn't it? A. I never studied it, never did it.

Q. Never in your experience, never had occasion to try to carry the water from the leader over the ditch you had made in the gutter? A. I never had occasion to do it.

Q. Never? A. No, sir, never. 40

*Richard Drucker—Cross.*

Mr. Dorgeval: That is all.

The Court: Is there any further cross-examination?

Mr. Rosenkrans: I have a few more questions to ask.

The Court: Very well, proceed.

10 *By Mr. Rosenkrans:*

Q. That is all you did? A. Yes, sir.

Mr. Rosenkrans: That is all.

The Court: Anything further?

Mr. Rosenkrans: I suppose it is conceded by all counsel that the work that the Union Building & Construction Company were doing on Second Street was being done in pursuance to a contract between the City of Pas-

20 saic and that company?

Mr. Heller: I suppose so.

Mr. Rosenkrans: And the contract was made under lawful authority?

Mr. Dorgeval: I don't know anything about that.

Mr. Heller: I concede that you are working there.

30 Mr. Dorgeval: I will concede that too.

Mr. Rosenkrans: Then I will ask him about that.

The Court: Very well.

*By Mr. Rosenkrans:*

Q. The work that you were doing there, or the company was doing on Second Street, was being done under a contract? A. Yes, sir.

Q. And between whom was the contract?

40

*Richard Drucker—Cross.*

Mr. Heller: That is objected to as immaterial.

The Court: It should have been brought out before.

Mr. Heller: May I have an exception to your Honor's ruling?

The Court: You may. 10

The Witness: Between the City of Passaic and the Union Building & Construction Company.

The Court: I will allow it to stand.

Mr. Heller: Exception.

Mr. Dorgeval: I do not see how it is material.

The Court: Only this, that if he did anything wrong it is the City's responsibility, and therefore they have got the wrong man in here. 20

Mr. Dorgeval: I do not think it is material.

The Court: He can prove it by the contract. He is just proving the contract.

Mr. Dorgeval: I object to the contract with the third party.

The Court: Objection sustained as not being cross-examination. 30

Mr. Rosenkrans: I take an exception.

The Court: The question is whether he is responsible or not. One of his defenses is, according to the pleadings, that if there is any responsibility, it is not his, but the City's. I mean, if there was any negligence on his part it is not their responsibility but the City's, because he did it as the City directed and instructed. 40

*Richard Drucker—Cross.*

Mr. Dorgeval: The agent is always equally responsible, assuming that he is working with the principal.

10

The Court: That may be so but that does not necessarily follow. I would not be responsible if I worked for you under duress and was obliged to run over somebody would I?

Mr. Dorgeval: I am talking not about duress. There is no suggestion here of that.

The Court: I am talking about following your instructions, not doing a negligent act.

20

Mr. Dorgeval: I will cite to your Honor the case of one of the Public Service bus drivers, and your Honor well knows that any Public Service bus driver who has an accident may be sued equally with the Company.

The Court: That is all right, but if I dig a trench and work for you and say, "Mr. Dorgeval, this is not the way to dig this trench," and you say, "Go ahead and do as I told you or I will get another man to dig it," would I be responsible if the trench was dug negligently?

Mr. Dorgeval: Certainly.

30

The Court: All right; we will cross that bridge when we come to it.

Mr. Rosenkrans: Counsel forgets that if the City of Passaic had itself done this work, we would not have been answerable for any negligence.

Mr. Heller: I want to call your Honor's attention to the fact that that is not set up as any defense in the pleadings.

40

The Court: What?

*Richard Drucker—Cross.*

Mr. Heller: The fact that the work was done under a contract with the City and that that the City might be responsible.

The Court: I will allow an amendment to cover it. You cannot now object.

Mr. Rosenkrans: I wish to amend.

Mr. Heller: I want to call attention to that. 10

The Court: I understand that is one of the defenses.

Mr. Heller: That is all Mr. Drucker.

The Court: Next witness.

Mr. Rosenkrans: Just one more question.

The Court: Proceed.

*By Mr. Rosenkrans:*

Q. How many men do you employ on this job? 20

A. How many?

Q. How many men were employed? A. We had possibly twenty-five or thirty men working there, doing odd jobs and things.

Mr. Rosenkrans: That is all.

The Court: Call your next witness.

Mr. Heller: I will call Mr. Aaron Boss.

30

AARON BOSS, sworn.

*Direct-examination by Mr. Heller:*

Q. Where do you live, Mr. Boss? A. I live at 340 Bennington Avenue.

Q. Where? A. Passaic.

Q. Passaic? A. Yes, sir.

Q. What is your business? A. I am a builder. 40

*Aaron Boss—Direct.*

*By the Court:*

Q. Speak so we can hear you, speak up louder.

A. I am a builder.

Q. Speak louder than that.

*By Mr. Heller:*

10 Q. You are a builder? A. Yes.

Q. Are you familiar with the building owned by Kosson on Second Street, Passaic? A. Yes, sir.

Q. Who built that building? A. I built it.

Q. When? A. About three or four years ago.

Q. Now, when the building was completed, in what condition were the walls around—surrounding the cellar? A. It was in perfect condition.

20 Q. Was it possible for water to get through the walls? A. No, sir.

Q. What were the walls made of? A. Concrete.

Mr. Heller: That is all.

*By the Court:*

Q. Did you ever see a concrete wall that water did go through? A. Concrete wall, if water gets through?

30 Q. Answer my question. A. Yes.

Q. Did you ever see a concrete wall that water went through? A. No, sir, never did.

The Court: Cross examine.

Mr. Simon: No questions.

Mr. Dorgeval: No questions.

Mr. Rosenkrans: No questions.

The Court: Next witness.

Mr. Heller: I will call Mr. Irwin J. Kosson as the next witness.

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*Irwin J. Kosson—Direct.*

IRWIN J. KOSSON, sworn.

*Direct-examination by Mr. Heller:*

Q. Mr. Kosson, where do you reside? A. At 365 Main Avenue, Passaic.

Q. Are you a member of the firm of S. Kosson & Sons, the plaintiff in this case? A. I am.

Q. And what position do you occupy with that firm? A. Secretary-treasurer.

Q. Is your company the owner of the building at 149 Second Street? A. It is.

Q. What kind of business is conducted there, at this place of business? A. Wholesale glass business.

Q. And in the course of your business, do you store any merchandise in the cellar? A. We do.

Q. On the night of April 25, 1929, were you in the place of business of your company? A. I was.

Q. And did anything unusual happen that night? A. Yes.

Q. About what time? A. I would say about eight-thirty to nine o'clock we heard a rush of water in the cellar.

Q. And what did you do after you discovered that? A. I immediately called up the companies that were working on that street at that time, namely, the Union Building & Construction Company and the Public Service Company.

Q. And in response to your telephone call, did anybody come down there? A. Yes, some people from the Union Building & Construction Company showed up immediately.

Q. And did they do anything? A. Yes, they started to shift piles of dirt that were in front of the place.

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*Irwin J. Kosson—Direct.*

Q. And after they got through shipping the dirt and doing whatever they did, did they remedy the situation? A. The water of course kept coming in there and it was already coming through.

Q. Besides telephoning, did you do anything else the next day? A. Yes, I typed off a letter notifying them.

The Court: Did anybody else come besides the Union Building & Construction Company?

Mr. Heller: I will ask this question first

The Court: I have asked the question.

Mr. Heller: All right, I beg your Honor's pardon.

20 *By the Court:*

Q. Did anyone else come besides the representatives of the Union Building & Construction Company? A. Not while I was there.

Q. What time did you leave? A. I left about ten o'clock.

The Court: All right, you may proceed.

*By Mr. Heller:*

30 Q. Now, the following morning, did you do anything? A. Yes, I wrote a letter to both companies, and notified them.

*By the Court:*

Q. Never mind that; you wrote a letter? A. Yes.

*By Mr. Heller:*

Q. You wrote a letter to both companies? A. Yes, sir.

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*Irwin J. Kosson—Direct.*

*By the Court:*

Q. You told them about the flood? A. Yes, sir.

*By Mr. Heller:*

Q. Now, after that was there any more trouble in the cellar? A. A few days later we had the same occurrence.

10

Q. And that was on what date? A. It was a few days later and I would say about—the first was the 25th—that was about the 28th I would say.

Q. Now, on that night, did you do anything when you discovered the flood? A. Yes, I called up the parties again.

Q. And who did you call up? A. I called up the Union Building people.

Q. Yes. A. And the Public Service again.

20

Q. And the following morning did you do anything again? A. I sent off letters again the same way.

Q. You sent letters to what companies? A. To the Union Building and the Public Service.

Q. On the night of the 28th was it a very severe storm or a small storm, or what kind of rain storm was it? A. It was a heavy rain but not quite as heavy as the 25th.

30

Q. The 25th was a heavier one? A. Yes, sir.

Q. Now, did you make a list of the damaged items in that cellar? A. I did.

*By the Court:*

Q. How much water came in your cellar on the 25th? A. Well, I should say about eight inches.

Q. Did it come out between then and the 28th of April? A. Well, it was in there, some of it

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*Irwin J. Kosson—Direct.*

had started to dry up, but there was no way of getting it out.

Q. There was no drip in the cellar? A. No.

Q. No sewer traps? A. No.

Q. And on the 28th how much more came in?

A. It came back to the original level.

10 Q. How much was that, would you say? A. Eight inches.

Q. What else came in the cellar? A. Some dirt that shifted in with it.

Q. Sand? A. I think it was sand.

The Court: Proceed, counselor.

*By Mr. Heller:*

Q. Did you make a list of the damages? A. I did.

25 Q. And did anyone in behalf of any of the three companies in this suit come down to inspect the loss? A. Yes.

Mr. Dorgeval: I object to that.

Mr. Rosenkrans: We object.

The Objection sustained.

Mr. Rosenkrans: I move to strike it out.

The Court: Strike it out.

30 *By Mr. Heller:*

Q. And did you submit a bill of the damages to any of the defendants in this case?

Mr. Dorgeval: I object.

The Court: Objection sustained.

Mr. Heller: Exception.

The Court: Proceed.

*Irwin J. Kosson—Direct.*

*By Mr. Heller:*

Q. Did you make a list of the damages? A. I did.

Q. And can you tell us without looking at any memorandum what the damages were? A. Well, approximately, I cannot, but I can get the exact figures from the memorandum that I made. 10

Mr. Heller: Is there any objection to him having the use of the memorandum?

Mr. Rosenkrans: I object.

The Court: Objection sustained.

Mr. Heller: Exception.

The Court: Proceed.

Q. Tell us from your memory then what was the damage? 20

Mr. Rosenkrans: I object to that, because I would like to ask him a few questions.

The Court: You may ask him.

Mr. Heller: Do you wish to qualify him?

Mr. Rosenkrans: Yes, sir.

Mr. Heller: All right.

*By Mr. Rosenkrans:*

Q. What is your business? A. I am connected with the glass business. 30

Q. What other business have you? A. I am also a public accountant.

Q. You have an office in the office of Heller & Boss? A. I have just desk space there.

Q. Desk space there? A. Yes, sir.

Q. Is that your chief business? A. No, my leading business is glass business. I devote very little time to accounting. 40

*Irwin J. Kosson—Direct.*

Q. Do you know when the glass that was stored in the cellar of 149 Second Street arrived there? A. Yes, sir, I do.

Q. When? A. At various times.

10 Q. How long before? A. Well, there are different shipments coming in, and I cannot say exactly to the date when so many boxes of glass came in, but our records can disclose that.

Q. Your cellar was full of glass? A. It was.

Q. In boxes or containers? A. That is right.

Q. And some of those boxes and containers had never been opened? A. That is right, but they were opened subsequently, but they had not been opened before the flood.

20 Q. And some of those boxes had been there for a long time? A. Yes, some of them had been there.

Q. A long time? How long a time would you say? A. Possibly a year or two years.

Q. And had been shipped in on the order of S. Kosson & Company? A. That is right, yes, sir.

Q. And remained unexamined by them? A. That is right.

30 Mr. Rosenkrans: How can this witness testify when he is not able to state the condition of the glass before the 25th of April as to what the items of damage were?

The Court: I do not know.

Mr. Rosenkrans: I object to it.

The Court: I will allow him to proceed with the examination first.

*By Mr. Heller:*

40 Q. Mr. Kosson, who takes care of the buying and selling of the glass for your firm? A. I do.

*Irwin J. Kosson—Direct.*

Q. And how long have you been doing that? A. For the past twelve or fourteen years.

Q. And do you supervise the entries into your books on the shipments of glass that you receive? A. I do.

Q. And are you familiar with the condition of the glass as it comes in? A. I am. 10

Q. And did you know the condition of the glass before the flood? A. I did.

Mr. Rosenkrans: He said not, he said it was unexamined.

*By Mr. Heller:*

Q. Were they watersoaked, or anything like that? A. No, all glass is graded on the box.

Mr. Heller: I submit that he is qualified, 20  
sir.

*By the Court:*

Q. What do you mean, graded on the box? A. They are all bought by grade, and the factory manufacturing it certifies to the grade and quality of the glass.

Q. You assume it is correct? A. It is always found correct, very seldom otherwise. 30

Q. But sometimes you do find otherwise? A. In very rare instances, about one box in ten thousand.

*By Mr. Rosenkrans:*

Q. At any rate, neither you or any other member of the company has ever opened these boxes? A. Oh, yes, we open them up.

Q. Didn't you say— A. Not all of them, no.

Q. Didn't you say that a large number of boxes or containers of glass never had been examined 40

*Irwin J. Kosson—Direct.*

by you or any member of your firm? A. Closed boxes.

Q. Didn't you say that? A. I did not mean that. I said that none of the closed boxes had been opened. There are others that are opened.

Q. And there are many closed boxes in that cellar? A. That is right.

Q. And the great bulk, the greater number of boxes, a great majority of the boxes in that cellar were unopened? A. Yes, sir.

Q. In the very shape that you received them in? A. Yes, sir.

Q. And some had been received weeks before? A. Yes, sir.

Q. Some had been received months before? A. Yes, sir.

Q. And some two or three years before? A. No, not two or three years—two years before.

The Court: I will allow it.

Mr. Rosenkrans: I take an exception. That is all.

*Cross-examination by Mr. Dorgeval:*

Q. The glass damaged was at the bottom of the pile? A. Yes, sir.

Q. And these piles were all the way to the ceiling? A. Not to the ceiling, about four or five feet high.

Q. About five feet? A. Yes, sir.

Q. And the damaged boxes were at the bottom? A. Laying flat and some standing on end at the bottom.

Q. The ones laying flat at the bottom of those piles you never saw? A. Some of those laying flat—

*Irwin J. Kosson—Direct.*

Q. Please answer my question. A. Yes.

Q. You had never seen them before lying flat?"

A. I had seen them before.

Q. And did you open the boxes? A. Some of them have been opened, but they were at the bottom of the pile.

Q. All of the glass in the pile that was damaged was at the bottom? A. That is right, but some of the boxes were entirely covered by water because the boxes are only four or five inches thick. 10

Q. You looked at them after the flood? A. Yes, I looked at them.

Mr. Dorgeval: I object to all this testimony.

The Court: I will allow it.

Mr. Dorgeval: May I have an exception? 20

The Court: You may have an exception.

Mr. Heller: I have some further questions to ask the witness.

The Court: You may proceed.

*By Mr. Heller:*

Q. How was the glass packed? A. It was packed with straw.

Q. And by the way, how long do you say you are in the glass business? A. About twelve to fourteen years. 30

Q. And how long is your firm in the glass business? A. About twenty-five years.

Q. And do you know the effect that water has on glass damaged by straw? A. Yes, I do.

Q. What effect does it have? A. It leaves stains on the glass because some of the glass sticks together and in taking it apart it breaks. Some will leave the stains that cannot be removed. 40

*Irwin J. Kosson—Cross.*

Q. Now, you say you made an estimate of the loss? A. I did.

Q. Just tell us what that estimate is? A. About two hundred or a few more boxes, that is, those that were laying flat were all damaged, so that they were not usable at all.

10 Q. How many? A. Two hundred boxes, or a little over that.

Q. Do you know the exact number? A. I think it was 211, from my recollection.

Q. What was the entire cost of those 211 boxes? A. About \$700, I should say.

*By the Court:*

Q. The boxes are all together? A. All together.

20 *By Mr. Heller:*

Q. Besides those 200 boxes were there any other boxes damaged? A. Yes, there were.

Q. How many more? A. About 1500.

*By the Court:*

Q. Boxes? A. That is right.

*By Mr. Heller:*

30 Q. As far as the 200 boxes were concerned, were they damaged altogether? A. They were a complete loss.

Q. As far as the 1500 boxes were concerned, how much of that was destroyed? A. Well, they were all destroyed partly so that they had to be cut down to smaller sizes.

*By Mr. Heller:*

40 Q. And were you able to salvage some part of that glass? A. Yes, we were.

*Irwin J. Kosson—Cross.*

Q. And what was the loss on the 1500 boxes? A. About \$1.50 per box, \$2250.

Q. That would make \$2250? A. Yes, sir.

Q. And \$700 for the 211 boxes? A. Yes, sir.

Q. I show you a crate and ask you if that crate is similar to the one that you have in your cellar?

A. It is.

Q. And is the glass in that the kind that was in the cellar? A. I will look at it.

10

Mr. Dorgeval: There were several kinds in the cellar.

The Witness: It is all one kind.

The Court: He said it is all one kind, window glass, I think.

*By Mr. Heller:*

Q. Now, is this some of the glass showing the effect of the water? A. That is right.

20

Q. Is that taken from your cellar after the flood? A. It was.

Q. And I call your specific attention to the physical effect of the glass, what would you call it?

A. It is all stuck together.

Q. Anything else? A. It is all stained. If you take it apart you find it has stains on it.

Q. Can that glass be used? A. No, it cannot.

30

Q. Is there any way that by taking that sticky part away so we can use that glass? A. None has been found yet to take away the stains.

Mr. Heller: I will offer the glass in evidence and the glass it contains.

The Court: I understood that the testimony would be that it was the straw that made the stains.

The Witness: There was paper between.

40

*Irwin J. Kosson—Cross.*

The Court: In some cases there is no straw there?

Mr. Heller: Yes, there is paper between.

*By the Court:*

10 Q. Then as I understand it, they are packed with paper between and straw on each side? A. Straw all around.

Q. And straw between the panes of glass. A. Well, the straw of course gets in sometime, but it is all around.

Q. If the straw is only to protect the glass from shaking around in between the wood and the glass how can the straw affect the glass in between? A. Some straw gets in between. This happens to be a box in which the glass is stuck together  
20 when there was no straw in between.

Q. That is exactly what I mean; there is no damage to this glass because of the straw, is there? A. No, not the straw itself, except the outside ones.

Q. Where is the outside? A. This is where the straw would have touched it, on this side.

Q. You mean that this ground stain is straw? A. Yes, sir.

30 The Court: All right, proceed.

Mr. Heller: I offer it in evidence.

The Court: It will be received.

Mr. Dorgeval: I take an exception.

The Court: You may have an exception.

(Glass referred to received and marked P-1 of 12/13/29).

*By Mr. Heller:*

40 Q. Now, Mr. Kosson, on the day of the 25th of April were you in and about your place of business on Second Street? A. I was.

*Irwin J. Kosson—Cross.*

Q. Did you notice any of the companies in this dispute working there? A. I did.

Q. Who did you see working there? A. Some men for the Public Service and some for the Union Building & Construction Company.

*By the Court:*

Q. What other storage have you for your glass? 10

A. We have a plate glass storage at another address.

Q. Have you a store there on the ground floor?

A. What?

Q. A store? A. At this address on Second Street?

Q. Yes. A. A store and storage for window glass.

Q. And do you have a lot of glass in the store upstairs? A. We have lots of glass. 20

Q. There is quite a little there? A. Yes, sir.

Q. The main storage is in the cellar? A. Yes, sir.

Q. And the cellar is a very bad place to store glass? A. It is not for our business, it is very good for our business. It is a dry cellar, absolutely; ordinarily it is, but it was not that night.

Q. A damp cellar would be bad? A. It would. 30

Q. Because if a damp cellar were used to store glass in, the glass would stick together, wouldn't it, because of the dampness that would get into the paper between the panes and because of the stains that would come from wet hay? A. I do not know, your Honor, that dampness would cause that.

Q. Wouldn't it? A. I do not know as it would.

Q. Didn't you have any such experience? A. No, we have not had such an experience because when 40

*Irwin J. Kosson—Cross.*

it has been soaking wet we cannot use it.

Q. How long after this flood did you begin to salvage this glass? A. About a week or so after.

Q. Still wet? A. Yes.

Q. Couldn't they have been pulled apart when they were still wet? A. They could not be.

10 Q. Why? A. It would have been in the same condition; it was stuck together already.

Q. It is stuck because it is now dry, but when it was still wet, you could have pulled it apart? A. Hardly.

Q. Did you try? A. We tried on one of the boxes where we had to use it right away and send it out to a customer, and we could not do it.

*By Mr. Heller:*

20 Q. How long has your company been in business at the same address, 149 Second Street? A. At that address about fourteen years.

Q. And the new building that you have is only built how many years ago? A. About three or four years.

Q. During the fourteen years that you are in the place with your business do you always store glass in the cellar? A. Yes, we did.

30 Q. Did you ever have any trouble like this before? A. Never.

Q. Now, I think in answer to a prior question you said that men of the Union Building and Public Service were working there? A. That is right.

Q. Now, can you tell us what the physical condition of the premises in front of the curb along your store was on the night of April 25th? A. It was all broken up, at least—ditches dug, piles of dirt, and different building materials lying in front  
40 of the place.

*Irwin J. Kosson—Cross.*

Q. Now, as far as the piles of dirt are concerned, do you know how many piles there were along your frontage? A. Well, I could not tell you exactly but I should judge about five piles.

*By the Court:*

Q. Dirt or sand? A. Different materials, dirt and some stones; I just did not take particular notice of what kind of material it was. 10

Q. Are you distinguishing between building material there and that that is thrown out of the hole? A. No, I am not; it may have been dirt thrown out from the hole.

*By Mr. Heller:*

Q. How many feet frontage have you on Second Street? A. Twenty-five. 20

Q. And do you know who made those piles or put the piles of material there that you spoke about? A. I know that whatever was delivered was delivered by the Union Building trucks; and the excavations I think were made by both companies.

Q. Now, as far as the piles are concerned, what effect, if any, did that have on the flowage of the water? A. It stopped the flow of the waters in the gutters.

Q. And what happened to the water? A. It overflowed and seeped in through and naturally we had a lot of water in our cellar. 30

Q. Now, on the night of April 28th, three days later, what was the physical condition of the gutter and the premises in front of your store? A. very similar to what it was before.

Q. You say on that night you notified the companies, too? A. I did.

Q. Did anybody come there that night, if you re- 40

*Irwin J. Kosson—Cross.*

member? A. I do not think that the Union people got down at all but the Public Service man was there.

*By the Court:*

10 Q. Who? A. They had some men there and I think the gentleman who had the stand first was there, and that was the time I saw him.

*By Mr. Heller:*

Q. Are you sure about that? A. I did not take particular notice of him, but he is not dressed now as it seems to me he was then, but he may have been the man.

20 Q. Did you ever notify anybody else besides the Public Service and the Union Building about this loss?

Mr. Simon: I object.

The Court: What difference does it make?

Mr. Simon: I withdraw the objection.

The Court: Proceed.

Mr. Heller: That is all.

The Court: Cross-examine.

*Cross-examination by Mr. Rosenkrans:*

30 Q. It rained extremely hard this April night, didn't it? A. Well, I would not say it was the heaviest rain I ever seen.

The Court: He did not ask you that; was it an extremely hard rain?

The Witness: It was a hard rain.

*By Mr. Rosenkrans:*

40 Q. And if not the very heaviest, it was one of the heaviest rains you have ever seen? A. I do

*Irwin J. Kosson—Cross.*

not think it was one of the heaviest; it was a very heavy rainfall.

Q. And rained for many hours, didn't it? A. Yes.

Q. Heavily? A. Yes.

Q. And did you look into the street while the rain was coming down? A. I was out in the rain and I came in about an hour or so previous to that time when the water started rushing in. 10

Q. At that time, nine o'clock in the evening, did you observe what quantity of water was in Second Street? A. How is that?

Q. Along about nine o'clock in the evening did you see what quantity of water was flowing down Second Street?

Mr. Simon: May I at this time make a motion inasmuch as counsel have not included us in the testimony so far? 20

The Court: We will let him proceed first.

*By Mr. Rosenkrans:*

Q. About nine o'clock of this evening did you look out in the street and see what volume of water was coursing down Second Street? A. I did not notice the volume, but I knew it was raining very hard. I saw that. 30

Q. Wasn't the water coming down in such floods that it was deeper than the curb of Second Street? A. I could not notice that, because there was no curb, practically, there; it was all ditches.

Q. You say that the old curb had been removed in front of your premises? A. I could not say that definitely, as I did not take notice.

Q. When you looked out no curb was in sight? A. I did not notice any, but it might have been there. 40

*Irwin J. Kosson—Cross.*

Q. There was a river in sight in front of your premises? A. There was water, a lot of water.

Q. And the water covered the sidewalk? A. Yes.

Q. And covered the road? A. I would not say it covered the road, but I could see the roadway where the water was coursing down.

10 *By the Court:*

Q. How about the sidewalk? A. The sidewalk had a little water.

Q. Right up to the building? A. Yes, sir.

*By Mr. Rosenkrans:*

Q. Where did the water go to that concealed the curb? A. Partly on the sidewalk. The sidewalk runs to the building line, but there was no water up to the building.

20 Q. The sidewalk was covered, wasn't it? A. Yes, I imagine so.

Q. On the same grade as the curb towards the building? A. Oh, no, the sidewalk slopes towards the curb.

Q. Much? A. I suppose enough to let the water run down.

Q. It is a very slight slope? A. Yes, a slight slope.

30 Q. Did you ever see more water on Second Street than on the night of the 25th of April? A. I think I have.

Q. When? A. Various times.

Q. When? A. I do not know how long before.

Q. Can you name any time? A. I cannot name exactly.

Q. Any cases when you saw more water? A. I cannot name the exact dates but I know I have seen more water.

40

*Irwin J. Kosson—Cross.*

Q. What became of these two hundred cases of glass that you say were destroyed to the extent of \$700? A. Some of the boxes are still there and some have been thrown out.

Q. And when were they thrown out? A. Some time after that occurrence.

Q. How long? A. I would say about three or four weeks afterwards. 10

Q. How many were thrown out? A. I cannot say the exact number.

Q. How many are there now? A. There may be of the 211, I judge there may be about 60 boxes still there.

Q. And what did you do with those that you threw out; where were they thrown out? A. They were dumped.

Q. Where? A. I do not know. 20

Q. And why have you retained some 60 boxes? A. Well, they were still under piles which we have not moved, and they will be thrown out when we get to them.

Q. You are pressed for room in that cellar? A. No, we are pretty well loaded there.

Q. On the 25th of April you were loaded to the ceiling? A. We always have boxes, about three or four feet high. 30

Q. And these boxes cover almost the entire floor of your cellar? A. I would not say the entire floor, the biggest part of it.

Q. What are you keeping these 60 boxes for? A. They are still at the bottom of piles which have not been moved.

Q. Then you have never examined them, have you? A. They have been examined.

Q. When? A. About a week or so afterwards. 40

*Irwin J. Kosson—Cross.*

Q. How did you examine them? A. We keep moving the glass; the glass is sold and new glass comes in and we keep shifting it.

Q. But these 60 boxes are still at the bottom of the original pile? A. They were left there.

Q. Yes? A. They were left there.

10 Q. At the bottom of the piles as they stood on the night of April 25th? A. Yes.

Q. How did you ever examine them? A. The boxes have been taken off at various times.

Q. You say they are at the bottom of the original piles? A. No, not the original piles, but I would say that they are all original piles. We ship out about 150 or 200 boxes a day and we may get in say five or six hundred at a time.

Q. How long is that store? A. Ninety feet.

20 Q. And how wide? A. Twenty-five feet.

Q. And did the water cover the entire surface of the cellar? A. It did.

Q. Where are the sixty boxes that you say you kept? A. In the cellar.

Q. What part of the cellar? A. I think most of those are towards the rear of the cellar.

Q. What is on top of them? A. Other boxes of a similar nature.

30 Q. When were those other boxes put on top of them? A. I cannot say. Maybe one pile is an original pile and it may be new boxes; but I cannot tell that.

Q. Had they been opened, those sixty boxes? A. Not all of them I would not say had been opened.

Q. So you do not know anything about their condition? A. We can tell by checking them.

40 Q. Then you do not know anything about the condition of those sixty boxes that have been opened? A. We do.

*Irwin J. Kosson—Cross.*

Q. Only by inference? A. No, more than inference, by trying them.

Q. You say some of them have never been opened? A. We shook them and we can tell.

Q. Who shook them? A. I did, some of them, and others did.

Q. How many did you shake of those sixty? A. Possibly half of them. 10

Q. When did you shake them? A. When we were going through and making up our list for damages.

Q. At that time there were boxes on top of that pile up several feet high, weren't there? A. Above some of them.

Q. Some of them have never been disturbed? A. No, they were all disturbed, they were all moved when we were ascertaining our loss. 20

Q. Did you know at the time that they were worthless? A. Yes.

Q. While they were uncovered, didn't you get a truck there and throw them out? A. They were just left there.

Q. Why? A. No special reason.

Q. They are an encumbrance to you? A. I saved some to have the samples.

Q. They are an encumbrance to you, but you did not need sixty samples, did you? A. Well, they were at the bottom of the pile so they would not be used again. 30

Q. So you say you uncovered them all? A. We had to put back, to keep shifting the piles.

Q. That is why you kept them? A. Yes.

Q. Sixty of them? A. I would not say sixty, but there may be forty. I say judging from that proportion that there might be sixty boxes there. 40

*Irwin J. Kosson—Cross.*

Q. What is the matter with this glass? A. The water, the stain.

Q. Where? A. There is one right here.

Q. What stain on it? A. There is a stain there.

Q. Show this forewoman here that there is a stain on that glass. A. All these lines cannot be removed by a washing. They are the result of the water and wet paper and straw; they came in contact with the glass, and that glass has been stained.

10

Q. Rainbow color, is that because the glass has not been made right? A. It is not.

Q. That makes a prism? A. No, the prisms are entirely different propositions.

Q. All right, after a dusty summer, a shower comes up and comes against the window pane and it is spattered, isn't it, and that washes off? A. Yes, that is not paper or straw against it.

20

Q. Have you got any glass here that you have endeavored to wash or clean? A. This has been partly washed.

Q. If they were thoroughly washed and polished up would the stains remain? A. The stains that you see there—

30

Q. Answer the question, would they remain? A. Everything that does not rub out now will be a stain.

Q. Now, I show you the other part of this one. A. Yes, sir.

Q. Would you say that the top of this glass is stained? A. Yes, sir.

Q. The glass itself is stained? A. All of this glass is stained in the whole pile.

Q. Where is that stained? A. You cannot see a stain unless you have a glass to look through.

40

Q. How do you know it? A. I know this same

*Irwin J. Kosson—Cross.*

glass that is part of that there is stained and they have a stain so I assume these were also stained.

Q. You think that this is the glass that is stained, you think that this glass is stained glass itself, and the stains you see are not the stained paper beneath the glass? A. No, the paper is originally cleaned off.

Q. Now, wasn't the problem in your company, Mr. Kosson, after the water got into your cellar, wasn't it the problem of your company to remove the paper from between the sheets of glass, and wasn't that the thing that should have been done? A. No.

Q. And if it had been done seasonably what harm would have resulted to your glass, if any harm did result to it? A. The stains would have remained.

Q. Do you know what caused the stains? A. Yes, I do.

Q. What caused it? A. The water soaking the paper or straw when glass is tightly packed together and moisture getting in there.

Q. Have you studied chemistry? A. I have not, except in my high school education.

Q. Do you know what factors in the water or in the paper or in the two combined causes glass to be stained? A. I do not, but we have one who will know.

Q. Of course you do not claim that this glass is stained in the sense that colors appear upon it? A. Some of the glass will show colors of the rainbow.

Q. Have you any samples there that show colors of the rainbow? A. I can look through it and see.

Q. Look through it and see, please? A. Yes.

*Irwin J. Kosson—Cross.*

*By the Court:*

Q. Did you try to clean up any of this glass?

A. Yes, we did.

Q. Did you succeed? A. No, we were not successful.

10 Q. You have sixty cases still there and you are short of room? A. I said I do not know the exact number.

Q. Suppose you said about sixty? A. Yes, sir.

Q. Aren't you saving that so that some day you might clean it up? A. No, because it takes more labor.

Q. No reason at all for saving it? A. No.

Q. Go ahead. A. Here is one with straw on it.

*By Mr. Rosenkrans:*

20 Q. We are looking for one with a rainbow on it. A. You can see some colors in this.

Q. What colors do you see in that glass? A. Purple.

Q. Point out the purple. A. About there.

Q. Not about there; put your hand on the very spot. A. Right there (indicating).

30 Q. Show the Court and jury the purple in there. A. Right there, right here in this line here. Suppose you hold it yourself and look for it.

Q. Purple is one of the seven colors in the rainbow? A. Yes, sir.

Q. How many other colors do you find there? A. Some of them and a mixture, some are blue.

Q. You see all that in that glass? A. Yes.

Q. Three colors, blue, purple and red? A. A mixture of colors, the rainbow is not one color.

40 Q. There are seven distinct colors in the rainbow? A. I do not recall.

*Irwin J. Kosson—Cross.*

The Court: Next question.

Mr. Rosenkrans: I guess that is all.

The Court: Is there any further cross-examination?

Mr. Simon: No questions.

*Cross-examination by Mr. Dorgeval:*

10

Q. The balance of this glass you say you do not know what happened to that at all? A. What is that?

Q. You have sixty boxes? What happened to the others? A. We dumped them out. I do not say there are sixty; there may be forty.

Q. There were 211 damaged? A. 211 damaged.

Q. So if there were sixty still left, then there were 150 left? A. I do not say that is the exact number. 20

Q. About 151 were dumped? A. There may be others dumped. We have not looked into that, and we have not included that in our damage.

Q. Didn't you sell that for something? A. No, threw it out.

Q. Where did you throw it out? A. I do not know.

Q. How was it thrown out? A. We loaded it on a truck and sent a man out with it. 30

Q. To where? A. I do not know where he dumped it.

Q. You do not know where he took it? A. The same place—to some place where he could dump it. We often have to dump broken glass and so on.

Q. I suppose you had to pay for having it dumped? A. This is our own man who operates the truck.

Q. Now, of course you brought the best samples? 40

*Irwin J. Kosson—Cross.*

A. They are not the best samples. They are all about alike. This is a state similar to what the glass is in.

Q. You brought the samples that would serve your purpose best? A. No, I just picked them out at random from two boxes.

10 Q. This stuff you happened to open and you brought them along? A. That is right.

Q. And all the samples that you have shown are all the samples that you have? A. No, I brought samples of clear glass as what it looks like when it is not water stained.

Q. Outside of that were all the samples damaged in any other way? A. I brought it as a specimen of what the glass looked like.

20 Q. And all the samples you have brought were damaged by the paper getting wet, were they not? A. Moisture getting the floor and glass and paper wet.

Q. Have you brought any samples of the straw here? A. This is some of the straw.

Q. It is the only sample you brought? A. Yes, sir.

Q. Where is the damage caused by the straw? A. When the straw sticks to the glass—

30 The Court: He has already testified that the brown stains are from the straw.

The Witness: It may be a straw stain.

*By the Court:*

Q. You told me it was a straw stain. A. I assume it is a straw stain.

Q. That is brown, and you said that was straw? A. I think it is.

40 Q. You are not sure? A. I would not say positively.

*Irwin J. Kosson—Cross.*

*By Mr. Dorgeval:*

Q. Mr. Kosson, you cannot be sure whether that stain is on the glass or on the paper underneath?

A. It is on the glass.

Q. You can tell from looking at it? A. If you will take it in your hand—

Q. Can you tell by looking at that whether that stain is on the paper or on the glass? A. It is on the glass. 10

Q. This sample and the one you have—what is the matter with that glass? A. Which one?

Q. The straw one? A. It is stained.

Q. Will you show us the stain? A. I will show you that. If you will look at it the same angle as I do you will see it.

Q. You have not attempted to clean this up? A. No, in fact none of the glass. 20

Q. Will you show the forelady, please, what stain there is in that glass? A. It is the same stain, and if you put that through water and get that all washed, it will still show stains.

Q. Have you a sample of anything like that? A. What?

Q. A sample of anything which has been cleaned up? A. No.

Q. You have nothing to show it? A. No, but I could do it very easily to this very piece. 30

Q. You did not bring any of that? A. No.

*By the Court:*

Q. How much is that box worth? A. They run from an average of about \$3 or \$4.

Q. \$3 or \$4? A. Yes, sir.

Q. What size would that be, about? A. That should twelve by twenty, it should be about \$3. 40

*Irwin J. Kosson—Cross.*

Q. That is not twelve by twenty? A. That is twelve by eighteen.

Q. You testified that damage to the glass is caused by the straw getting wet? A. The straw or paper.

10 Q. The straw or paper? A. Getting wet in the glass that is packed tightly together.

Q. What is the chemical reaction caused by the straw getting wet? A. I am not familiar with chemistry so I cannot say that.

Q. What causes the stain? A. I do not know; that is something I do not know.

Q. The paper used in this packing is clean paper, of course? A. I assume it is.

20 Q. And what makes the glass get stained when that paper gets wet? A. It is a fact that the glass is packed tightly together and the material used in packing gets wet and always shows a stain. That is a well known fact in the glass business.

Q. How much experience have you had in seeing glass that has been wet? A. Twelve to fourteen years.

Q. And what experience have you had in seeing glass in this condition? You have been testifying as an expert? A. Yes.

30 Q. I want you to say what you base your expert testimony on. A. Yes.

Q. What experience have you had in seeing glass like this? A. I have seen buildings set with glass where glass had stains and that was caused by the glass being used that had been allowed to remain outdoors and get soaking wet, and then used in the building.

40 Q. And you saw these panes of glass in the building? A. You will see—

*Irwin J. Kosson—Cross.*

Q. Please. A. Not the panes that we have here, other panes similar to them.

Q. In the building? A. In the buildings.

Q. They were put in the building? A. Yes.

Q. What other experience have you had? A. Architects—

Q. Testify to what you have been saying. A. Architects specify certain kinds cannot remain outside before being set. 10

Q. Your experience. A. My experience is that if glass is set in the building and the architect comes along and inspects it and sees stains, he makes us take it out.

Mr. Dorgeval: I move to strike that out.

The Court: Strike that out. Did you ever have any floods in your cellar before? 20

The Witness: Never.

The Court: Did you ever have any glass get wet in your stock?

The Witness: We have.

Q. This is the first time in your twelve or fourteen years' experience that any glass got wet while it was in your possession? A. Yes.

*By Mr. Dorgeval:*

Q. This is the first time you have ever seen the effect of glass getting wet when it was in the cellar? A. Well, if glass is left standing outside in the box and it gets all soaking wet, you take the glass out and it is in the condition you have seen there. I have seen that happen in other cases. 30

Q. You sometimes did leave that out in the rain?

A. We do not. We are very careful about that.

*Irwin J. Kosson—Cross.*

*By the Court:*

Q. These prices that you have charged in your estimate are the prices, the actual cost? A. That is right.

Q. They are not the retail prices? A. No, not retail.

10 Q. You say that out in front of your building there were piles, there were several piles of material? A. Yes, that is right.

*By Mr. Dorgeval:*

Q. You mentioned also that there were some piles of sand, and of stone, that is right, isn't it? A. Yes, that is.

20 Q. That was material to be used in the construction work, wasn't it? A. I do not know what it was to be used for, but I know it was there.

Q. And that was brought by the Union Building & Construction Company? A. Not them alone. I say that whatever material was left there was brought by the Union Building trucks.

Q. And how many piles were in front of your premises? A. I say just from ordinary appraisal, I would say about five piles.

30 Q. Five piles in front of your premises? A. Yes, sir.

Q. How many of those were sand and how many were stone? A. I could not say—some dirt, some sand, some small stones, larger stones, but I could not say how much.

*By the Court:*

40 Q. What would you say as to whether there was an open trench along the curblin in front of your premises?

*Irwin J. Kosson—Cross.*

Mr. Dorgeval: I was going to ask him that.

Q. Was there or was there not? A. There were open trenches.

Q. For the removing of the curb was there an open trench for that purpose or was the sidewalk just broken and the broken pieces lying there preparatory to being prepared for the removal of the curb? A. Well, there were pieces chopped out. 10

Q. Of the sidewalk? A. Of the sidewalk, and there was a trench made, where the sidewalk had been it was removed; it was still open at that time, and the curb had not been put back.

Q. You are sure about that? A. A new curb had not been put back.

Q. You are sure there was a place ready for it? A. I do not know. I know the new curb had not been put in place. 20

Q. Had there been an opening made for it? A. Yes, there was dug out; there was a trench there.

Q. What could it have been there if it was not for the curb? A. They may have just dug that to get a foundation there for it.

Q. A foundation for the curb? A. Yes.

Q. You see what we are driving at is diverting from the testimony. Some say that the trench was there for the purpose of putting in the foundation and for the curb and the new curb, or one or the other, and another line of testimony is that the sidewalk had just been broken, and the broken pieces allowed to remain, and no excavation between the place for the new curb and the old curb, or the present location of the curb. You see, there is a difference. You say that your observation 30

*Irwin J. Kosson—Cross.*

was that there had been an opening made? A. That was my observation.

Q. And that the sidewalk had been broken and excavated? A. That is right.

10 Q. For the purpose of something you do not know what? A. There were pieces of stone lying there yet, but there was an excavation there. Some of the stones were lying there and it was broken up in pieces.

Q. Along where? A. All around; all over that section.

Q. That had been removed and so it was thrown in piles, some of it?

*By Mr. Dorgeval:*

20 Q. As a matter of fact, there was this trench right next to the curb? A. Yes, sir.

Q. And that was about two feet wide and two feet deep? A. I should say about that.

*By the Court:*

Q. In front of your place? A. Yes, sir.

*By Mr. Dorgeval:*

Q. In front of your place? A. In front of my place.

30 Q. And did it cover the whole front of your place? A. I think it did.

Q. And then on the building side, towards your building, some of the concrete between the trench or your building was also broken, wasn't it; that is to say, some of the concrete sidewalk in back of the trench between the trench and your house was also broken? A. That was broken to allow the ditch; otherwise there would be a ditch.

40 Q. And it was broken in back of the ditch for a

*Irwin J. Kosson—Cross.*

few feet? A. The whole broken part was about two feet.

Q. But there is no question about the ditch being there, two feet wide and two feet deep? A. I think there was a ditch there, but I am sure of that.

Q. You are sure of that? A. Yes, sir.

Q. And did you look at the ditch? A. I noticed, in passing it I noticed it. 10

Q. Did you see water in the ditch that night? A. Yes, it was all filled with water.

Q. And the curb was submerged? A. Yes, the curb was submerged.

Q. Now, you said the thing that blocked the water in the gutter were the piles of stones in the gutter of course? A. Yes, that of course helped to block the water. 20

Q. That is all that blocked it? A. It did not allow a free flow.

Q. All the water that was blocked in the gutter was blocked by these things that were piled there? A. Yes.

Q. By the way these materials piled there, were they piled in the gutter or in the street? A. Alongside the old gutter or a little over; they were in the regular piles. 30

Q. But the sand and the dirt and the stones that you saw dumped there, was it dumped away from the street? A. No, it was just near the curb.

Q. In the curb? A. Covering the curb.

Q. Covering the curb? A. Yes, sir.

Q. And of course you do not remember any particular digging that the Public Service had been doing there, do you? A. Yes, I do.

Q. Do you remember any particular digging that they have been doing? A. Yes. 40

*Irwin J. Kosson—Cross.*

- Q. Where? A. They were digging right to our buildings, right along they were digging small ditches, I assume to connect up the gas mains.
- Q. Did you see any digging in front of your premises? A. Yes, I did.
- Q. What day was that? A. All along during that time, the same day and the next day.
- 10 Q. What day was that? A. Before the time.
- Q. How many days before the storm did you see the digging by the Public Service? A. A few days.
- Q. How many, three or four days? A. They had been working along there, right along.
- Q. And the Public Service dug in front of your place three or four days before? A. They dug the same day also.
- 20 Q. They dug three or four days before? A. And also the same day, all along, and I could not distinguish, but I know that there were Public Service men there.
- Q. Three or four days before? A. Yes, and the same day.
- Q. When they worked three or four days before, they finished up that work, didn't they? A. I do not know.
- 30 Q. Where is your office with reference to this building? A. In front of the building on the main floor.
- Q. And you were busy, you have two businesses? A. No, just one business that I transact there.
- Q. You are busy in your own business? A. Naturally I attended to my business.
- Q. Let us see, you are an accountant, are you not? A. I am down there and I do not attend to that.
- 40

*Irwin J. Kosson—Cross.*

Q. Are you not a certified public accountant?

A. No, I am not.

Q. You are a public accountant? A. Yes, sir.

Q. And you are in this business? A. Yes, sir.

Q. And you are also a law student? A. Perhaps.

Q. You are not ashamed of it, are you? A. No, I am a student of law; a former student. 10

Q. Are you not a student now? A. No, not now.

Q. Well, you were not out there noticing particularly what was being done, were you, what the contractors were doing? A. No, I could see from the window.

Q. What did the Public Service do three or four days before? A. Digging various trenches.

*By the Court:* 20

Q. In front of your place? A. Yes, sir.

*By Mr. Dorgeval:*

Q. Three or four days before? A. During that time, I cannot say.

Q. What do you mean by various trenches in front of your place three or four days before? A. They were digging those trenches all along the street. 30

Q. I want to know what they dug in front of your place? A. They dug one of the trenches in front of our place.

Q. Three or four days before? A. During the course of those days.

Q. What did they dig then? A. Dug those trenches.

Q. What trenches, two or three, or one? A. I would say two trenches. 40

*Irwin J. Kosson—Cross.*

Q. Where were the trenches, where did they run from? A. Just in front of and passed the old curb.

Q. From where did they go, from the curb to the building? A. From the curb to the building, a little ways past the curb, in fact to the building.

10 Q. And that was three or four days before? A. And continued along.

Q. And then what did they do; did they work in front of your place for three or four days? A. Well, their men were there.

Q. Doing something in front of your place? A. In front of our place; they were moving back and forth, but I did not notice particularly to see how many men were working around exactly and what  
20 they were doing, but I could see them from my window going about their work.

Q. What I am getting at is this, that you did not notice particularly what they did? A. Yes, I did see them dig a trench.

Q. And they dug one trench, I understand, three or four days before? What did they do? A. They were digging trenches and filling them in, I suppose.

Q. They were filling them in as they went along?  
30 A. I do not know. They were digging and then shifting back dirt. They made piles of dirt excavations.

Q. You said they were digging trenches and filling them in as they went along? A. Speaking generally I do not know if they did or not.

Q. They dug a trench in front of your place?  
A. Yes, sir.

Q. Three or four days before, and they filled it  
40 in? A. I think the one had been filled in.

*Irwin J. Kosson—Cross.*

Q. That was filled in? A. I think it was.

Q. And then when did they come again and dig another trench? A. The same day when we had trouble with the water they dug some more right in the same location.

Q. Came back to the same place on the day of the flood? A. I think they were working there right along; I don't think they may have stopped, but they may have gone there for a couple of hours. I suppose that they do their work. 10

Q. Just what was the condition, Mr. Kosson, three or four days before they dug the trench and filled it in? A. I do not know if they filled it in at all three or four days before. I did not observe them closely as to what they were doing.

Q. It was not exactly a big trench? A. It was a long trench. 20

Q. How long? A. From the building line to a little past the curb, I would say.

Q. That would be twelve or fifteen feet? A. About that.

Q. And that is not much of a trench, is it—and then did they spend three or four days working in there? A. I would not say they worked all the time.

Q. They filled that in, you said that? A. Not three or four days before, they had not filled it in. 30

Q. You said that they did fill it in before the flood? A. Yes, sir.

Q. And they opened it again? A. It was open at the time of the flood.

Q. And did you take particular notice of that? A. Yes.

Q. When did you notice that? A. That same night it was pointed out to me. 40

*Irwin J. Kosson—Cross.*

Q. It was pointed out to you? A. Yes, sir.

Q. By whom? A. By Mr. Drucker.

Q. Mr. Drucker? A. Yes.

Q. Mr. Drucker showed you, took you out and showed you the trench? A. I was out there and he pointed it out. He showed me just where the water was coming in.

10 Q. He showed you a trench and said that trench was dug by the Public Service? A. Yes, that is right.

Q. And that is all you know about it? A. I knew that the Public Service had been working there.

Q. You knew that the Public Service had been working all along the street? A. Yes, sir.

20 Q. They had been working along your place three or four days before? A. Yes.

Q. And all along the street? A. Yes, sir.

Q. And you were not paying particular attention to just what ditches they were digging? A. Not particular attention.

Q. You had something else to do, didn't you? A. Yes, sir.

30 Q. And when he took you out and showed you this ditch you had not particularly noticed any ditch before he showed it to you? A. I saw the ditch and he pointed to it as being the cause of it.

Q. You had not noticed who dug this particular ditch? A. I knew that the Public Service had worked on that particular ditch.

Q. Did you see them digging there? A. During the course of the time.

40 Q. During the course of the three or four days? A. Yes, sir.

*Irwin J. Kosson—Cross.*

Q. And that is all you know about it? A. Yes, sir.

Q. Mr. Drucker kindly took you over and showed you the Public Service ditch? A. He said that is the cause of it.

Mr. Dorgeval: That is all.

Mr. Simon: I am going to ask your Honor's indulgence in view of the fact that the only other evidence does not connect us here at all. 10

Mr. Heller: I would like to have some re-direct-examination.

The Court: All right.

Mr. Simon: In view of the fact that counsel has no further evidence, I would like to make a motion. 20

The Court: He said he did have some further evidence.

Mr. Heller: Yes, sir.

The Court: I will hear your motion Monday morning. We will take a recess to Monday morning, December 16, 1929.

(Adjourned to Monday, December 16, 1929, at ten o'clock A. M.)

30

Monday, December 16, 1929.

Ten o'clock A. M.

TRIAL CONTINUED.

The Court: One of our remaining jurors is unable to be here this morning. What is your pleasure, gentlemen? She has some sickness in the family and cannot be here. 40

*Irwin J. Kosson—Redirect.*

Are all you gentlemen content to go on with ten jurors?

Mr. Simon: Yes, sir.

Mr. Dorgeval: Yes, sir.

Mr. Rosenkrans: That is agreeable to me.

10

Mr. Heller: Yes, sir.

The Court: May it be so indicated on the minutes, that the case will proceed with ten jurors. Proceed, Counselor.

Mr. Heller: I will recall Mr. Kosson.

IRWIN J. KOSSON, recalled.

*Redirect-examination by Mr. Heller:*

20

Q. Did you bring into court more samples of the glass? A. I did.

Q. I give you one for the time being, and will you please step down to the jury box and show the jurors what is wrong with that glass? A. You will see streaks all through this glass. You can try to wipe it or clean it. All these streaks will not come out of the glass; it will always have that dull appearance and if you will pass it around and

30

hold it up to the light you will see it.  
Q. Did you attempt to clean that glass before you took it into court? A. I did.

Q. Did you have somebody wash it and clean it? A. I did.

Q. And is that the result after the washing and cleaning of it? A. Yes, sir, that is the result.

Q. And what caused those stains on the glass? A. Water.

40

Q. What? A. Water.

*Irwin J. Kosson—Redirect.*

Q. Now, in the trade is that glass worth anything? A. It is not.

Q. What do they do with glass like that when they get it in the trade? A. They throw it out.

The Court: Do you offer that glass in evidence?

Mr. Heller: Yes, I offer it in evidence. 10

The Court: It will be received and marked.

(Glass referred to received and marked P-2 of 12-16-29.)

*By the Court:*

Q. That I understand is part of this damaged glass? A. That is right.

*By Mr. Heller:*

20

Q. Now, I show you another sample of glass and will you step down and show the jury what is wrong with that glass? A. Yes, sir.

Mr. Heller: I offer that in evidence.

The Court: Is there any objection?

(No objection.)

The Court: It will be received and marked.

(Glass referred to received and marked P-3 of 12-16-29.) 30

Mr. Heller: P-3 includes eight pieces, and P-2 includes twelve pieces of glass.

The Court: All right, proceed.

*By Mr. Heller:*

Q. Now, will you explain the trouble with the glass referring now to Exhibit P-3? A. You see that dull spot up here, that will not come out. 40

*Irwin J. Kosson—Recross.*

There are other dull spots less prominent that will not come out.

Q. Now, referring to the glass that you have just showed to the jury, can you cut down that glass and save part of it? A. Some parts can be cut down, but it takes too much labor to go to work and select and recut and reassemble the glass into various size boxes.

Q. Is it cheaper to salvage it or throw it away? A. It is cheaper to throw it away.

Mr. Heller: That is all.

The Court: Cross examine.

*Recross-examination by Mr. Rosenkrans:*

Q. Did you see the glass washed that you offered in evidence this morning? A. I did.

Q. How was it washed? A. Washed with water and chamois.

Q. Did you use any Bon Ami? A. Bon Ami would scratch the glass.

Q. Did you use any? A. No, we did not.

Q. You used water tepid or cold? A. Used ammonia mixture, that is the regular glass product cleaning solution.

Q. I thought you said you used water. A. Water mixed with a small part of ammonia.

Q. And what proportions did you use? A. We have a regular mixture, coming regular mixed.

Q. With chamois? A. Yes.

Q. How long did you do that? A. Well, about an hour or so.

Q. An hour? A. Yes.

Q. Did you watch him? A. What is that?

Q. Did you watch him? A. I washed part of them.

*Irwin J. Kosson—Recross.*

*By the Court:*

Q. Did you watch him? A. Yes, I watched right throughout the process.

*By Mr. Rosenkrans:*

Q. How many did you wash in an hour? A. Those various ones that we have here about sixteen pieces altogether. 10

Q. When did you wash them? A. This morning.

Q. What time? A. What is that?

Q. What time? A. Between eight and nine.

Q. Now, Mr. Kosson, assuming that you are right about this glass, that these smears will not come out, you say that these panes of glass are utterly valueless? A. They are. 20

Q. Aren't they good enough to use in horse stables? A. We do not have any call for that.

Q. Or car barns, or certain kinds of factories? A. All the work we do is done according to the plans and specifications and architects that require all first class work and glass.

Q. Now, you don't know, then, whether there is any market for them? A. Not that I know of, so that I can get in touch with it.

Q. And you experimented with them no more than to use this solution consisting of water and ammonia? A. That is right. 30

Q. A very small quantity of ammonia? A. Well, it is the regular glass-washing solution.

Q. Do you know what proportion? A. No, I am not familiar with the chemical contents.

The Court: Is that all?

Mr. Rosenkrans: Yes, sir.

*Irwin J. Kosson—Recross.*

The Court: Is there any further cross-examination?

Mr. Simon: Yes, I have a few questions.

The Court: Proceed.

*Cross-examination by Mr. Simon:*

10 Q. Mr. Kosson, up to April of 1929, this year, you did not suffer any loss or any damage as a result of any water getting into your cellar? A. No, we did not.

Q. You understand the question quite thoroughly? A. Yes, sir, I do.

Q. Up to April 25, 1929, the time you say the work was done by the Union Building & Construction Company and by the Public Service, you suffered no damage at all in your cellar? A. No.

20 Q. Sure about that? A. Yes, sir.

Q. You do not want to change that? A. Yes, sir.

Q. You know that the work was done by the Water Company was completed in June, 1928, ten months before that? A. I do not know that.

Q. And from that time down to the present time you suffered no loss and no damage in your cellar, and it had rained in the interim, had it not?

30 A. Yes, sir.

Mr. Simon: That is all.

The Court: Anything else?

Mr. Dorgeval: Yes, sir, I have a few more questions.

The Court: Very well; proceed.

*By Mr. Dorgeval:*

Q. How promptly did you try to save the glass  
40 in the cellar? A. What is that?

*Irwin J. Kosson—Recross.*

Q. How promptly did you try to save it? A. As soon as we could get it out, about a week after.

Q. About a week after? A. Yes, sir.

Q. You did not do anything until a week after?  
A. We could not; all our men were busy.

Q. As a matter of fact you have several grades of glass, A, B and C? A. All the glass there is of one grade. 10

Q. Isn't it a fact that some of the glass that you say was damaged, even in its damaged condition could be used for cellar lights? A. Not in our business.

Q. But that sort of glass is used as cellar lights by some glass people? A. It may be, but not to my knowledge.

Q. Garage glass? A. Could not be used.

Q. Could not be used for any of those things? 20  
A. No, not in our business.

Q. You are positive that none of this glass could be used for anything? A. No, not for business.

Mr. Dorgeval: That is all.

The Court: That is all; next witness.

Mr. Heller: I will call Mr. Churchin.

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MAX CHURCHIN, sworn. 30

*Direct-examination by Mr. Heller:*

Q. Mr. Churchin, where do you live? A. In New York.

The Court: Speak a little louder.

The Witness: In New York, in the Bronx.

*Max Churchin—Direct.**By Mr. Heller:*

Q. And what is your business? A. I am representing the Royal Glass Works.

Q. The Royal Glass Works? A. Yes, sir.

Q. And where is your business? A. They were in Brooklyn, but now they are in Long Island.

10 Q. How long have you been connected with the Royal Glass Works? A. Since 1915.

Q. And during all that time have you been buying and selling glass? A. Only selling.

Q. Selling glass? A. Only selling.

Q. And during your experience as a glass salesman have you ever had any experience or opportunities to inspect glass which was damaged by water? A. Yes, sir.

20 Q. Now, in what way is glass damaged by water?

Mr. Rosenkrans: I object.

The Court: Objection sustained; just because he sells glass does not make of him a qualified expert.

*By Mr. Heller:*

30 Q. Have you inspected any number of glass which was reached by water? A. By complaint, yes, from our customers.

Q. And can you give us a rough idea in your fifteen years of how many times you have had complaints? A. Oh, several times.

Q. About how many times?

Mr. Rosenkrans: Several, he said.

*By Mr. Heller:*

40 Q. About how many times? A. Maybe twenty-five times, maybe thirty times.

*Max Churchin—Direct.*

Q. In your place of business, in the firm that you work for? A. Yes, sir.

Q. Did you ever come across glass that was damaged by water? A. Yes.

Q. And from your experience do you know what the effect of water is on glass? A. I am not a chemist but the only thing that I know that on account of the water or the straw the glass becomes stained. 10

Mr. Rosenkrans: I object.

The Court: I will let that stand.

Mr. Rosenkrans: I take an exception.

The Court: You may have one.

*By Mr. Heller:*

Q. Now, do you do business with S. Kosson & Sons? A. Yes, sir. 20

Q. And do you remember calling at their place of business in April of this year? A. Yes, sir.

Q. And how often did you call at their place of business? A. Every week, every Monday.

Q. Do you recall the time there was a flood in the cellar? A. Yes, sir.

Q. Did you make an inspection of the glass at that time? A. Just showed me before I came in there was a lot of water and I told him he is going to have damages. 30

*By the Court:*

Q. He asked you whether you examined the glass. A. Yes, sir.

Q. That is the answer. A. Yes, sir.

The Court: Next question.

*Max Churchin—Direct.*

*By Mr. Heller:*

Q. And just tell us what you found the condition of some of the glass to be in? A. I found some glass stained, the glass is stained, all the glass is stained, and I found that you could use something.

10 Q. What else did you find? A. That is all that I found there.

Q. I show you Exhibit P-1; did you see anything like that in the cellar? A. Yes, sir.

Q. What do you call that? A. That is stained.

Q. Isn't it stuck together? A. Yes, stuck together. It is very hard to separate them.

Q. Well, did you make an appraisal of the loss? A. I told them.

20 Q. What did you estimate the loss to be? A. I figured about three and a half or four thousand dollars, three and a half to four thousand dollars.

Q. And how did you arrive at that figure? A. I figured about 225 to 250 boxes lying flat on the floor, all in water; then I figured he has got about 1500 boxes standing up with one edge in the water.

Q. As far as the boxes edged in water, are they a total loss? A. No, they are not a total loss. You can get something out of it.

30 Q. What did you have to do with those boxes? A. You have to open up and clean out light by light, wipe out the water, and then get it off the piece what is stained, and the rest you can use it in larger sizes.

Q. And what is the amount of labor required to open a box, get it down and repack it? A. It would cost more than what the glass is worth.

40 Q. How much do you estimate it to be? A. I figure a workman can make the highest three boxes

*Max Churchin—Direct.*

a day. Between the papers it is very hard to separate the glass from there. When he takes it out and take it up again it will take him a long time and you cannot make this in a day in fact.

Q. I show you Exhibit P-2, and I ask you if you ever saw glass in that condition? A. Oh, yes.

Q. And what is that caused by? A. That is caused by the water and straw. 10

Q. Now, when you found glass in this condition in your experience what do you do with it? A. We only throw it out.

Q. Can you still use it in your business? A. No.

Q. You always threw it out? A. Absolutely.

Q. And with respect to P-1, what did you do with the glass like that? A. The same thing, we only have to throw it out. 20

Q. And with respect to Exhibit P-3, what do you do with glass like that? A. You cannot use that glass; the same thing.

Q. Referring to Exhibit P-3, can any part of that glass be used? A. For what purpose?

The Court: He is asking you.

*By Mr. Heller:*

Q. For the purposes of use. A. No, I do not think so; not for windows. 30

Q. If an attempt were made at salvage you would have to do what? A. Just only throw him out.

Q. To do what? A. You cannot use it for any purpose at all.

Q. If you try to save part of the glass you would have to cut it away? A. Absolutely.

Q. And with respect to the cost of cutting away — A. Yes. 40

*Max Churchin—Cross.*

Q. —would that be cheaper than throwing it out? A. It would be cheaper to throw it out than to cut the glass.

Mr. Heller: That is all.

The Court: Cross examine.

10 *Cross-examination by Mr. Rosenkrans:*

Q. You say that it would be hard to separate the glass? A. Yes, sir.

Q. From Exhibit P-1? A. Yes, sir.

Q. Well, water is what glued that glass together? A. The air.

Q. What? A. The air with the water is pressing the glass together.

20 Q. And water will undo what water did? A. What?

Q. Water will undo what water has done? A. What do you mean?

Q. Suppose you put P-1 in a tub of water and let it soak, what would happen? A. What do you mean?

Q. Wouldn't the paper release the grip on this glass? A. No.

30 Q. Have you ever tried that experiment? A. Certainly, I have tried it.

Q. When? A. For the time what I am with my concern.

Q. When? A. I cannot tell you.

Q. I thought you were a salesman. A. At the same time I was before on the inside where I worked.

Q. Tell us in what year you tried that experiment. A. In what year I tried the experiment?

40 Q. Yes. A. I tell you I think I tried this in

*Max Churchin—Cross.*

1917 or 1916 in the time we have a fire in our place.

Q. And at the time you had a fire in the place—

A. Yes, sir, the water was on the glass and we had a hard job to separate the glass.

Q. —did you separate it? A. No, we threw it out.

Q. Did you know then as much as you know now about glass? A. Absolutely. 10

Q. Yes? A. Absolutely.

Q. And you testify now that glass when it is soaked with water and is smeared as these exhibits are, is worthless for all purposes? A. Yes.

Q. Now, why do you try to separate glass when it is once glued together. A. We never received glass packed in paper in 1916 or 1917—in 1919 and 1918. The American glass is not packed in paper. That is only imported glass packed in paper. 20

Mr. Rosenkrans: I do not hear you.

The Court: Please repeat the answer.

(Answer repeated by stenographer.)

The Court: Proceed.

*By Mr. Rosenkrans:*

Q. You say in 1916 and 1917? A. Yes. 30

Q. You undertook to separate glass that was in the condition that Exhibit P-1 is? A. Not with paper, without paper.

Q. Not with paper? A. Absolutely; if you take two glasses and put water between and then straw, it is very hard to separate.

Q. Then you have never tried to take glass packed together as Exhibit P-1 is? A. No, sir.

Q. And tried to separate them by immersing 40

*Max Churchin—Cross.*

the glass in water and letting it stand? A. No, sir.

Q. You have never tried that? A. No, sir.

Q. Have you? A. No, sir.

Mr. Rosenkrans: That is all.

Mr. Simon: No questions.

10 *By Mr. Dorgeval:*

Q. When did you make this examination for Mr. Kosson? A. I think in the beginning of May he showed me the paper and he told me in April, but I cannot step in the cellar because there is too much water there.

Q. You made an examination in May? A. The beginning of May, yes, sir.

20 Q. And what did your examination consist of? A. It consisted, I saw the glass is stained.

Q. What did you look at? How many boxes of glass? A. I just looked at about ten or twelve boxes; that is what I looked over.

Q. That is all you looked over? A. Yes, sir, that is all.

Q. And that is all you looked at? A. Absolutely.

30 Q. Ten or twelve boxes were opened? A. I opened then ten or twelve boxes from a couple of piles and I just found it out and I told them.

Q. You looked in ten or twelve boxes only? A. Absolutely.

Q. And that is all you did, isn't it? A. Yes, that is all.

Q. And how many boxes did you figure were damaged? A. I figured the boxes what is lying in the water.

40 Q. Yes. A. I figured around about 2000 boxes.

*Max Churchin—Cross.*

Q. So you figured and what you have just testified to is based upon the belief that there were 2000 boxes or more damaged, isn't that right? A. Yes.

Q. And you looked at ten or twelve of them? A. Yes, sir, certainly; I cannot look over all the boxes.

Mr. Dorgeval: That is all. 10

Mr. Heller: That is all.

The Court: Call your next witness.

Mr. Heller: That is all, if your Honor pleases. I expect the manufacturer of this glass who I understand is also a chemist, who comes from Charleston, West Virginia, and might I ask whether I can rest now and call him later?

The Court: Is there any objection? I have not any objection if counsel have not.

Mr. Heller: He is coming from West Virginia. 20

The Court: Do you object?

Mr. Rosenkrans: I object.

The Court: Objection sustained.

Mr. Heller: Of course, I just wanted to say that the man comes from West Virginia.

Mr. Rosenkrans: You should have had him here Friday.

The Court: I will hear the defense.

Mr. Heller: Will your Honor allow me an exception? 30

The Court: Yes.

Mr. Rosenkrans: I move for a non-suit on behalf of the defendant Union Building & Construction Company, on the ground that there is no legal evidence of negligence in this case. The work that this defendant did and the work that the other defendants did as far as the work was concerned 40

*Motion for Non-Suit.*

was not a nuisance in itself, nor was it inherently dangerous. The testimony is that the work that this defendant did was done according to the approved methods and there is no evidence of any negligence on the part of this defendant. The evidence is conflicting as to the state of the surface of the sidewalk in front of these premises on the night of April 25th and I do not care what other statements will be made more favorable to the plaintiff, than have been made already. Suppose that we take that view of the case, and that is that we had dug a trench two feet wide and two feet deep in front of these premises. What is negligent about that? Suppose we had done very much more than that? Suppose our contract had called for the complete relaying of the sidewalk on Second Street and we had excavated and removed the old surface and then had dug down to a depth of two feet, and six feet in width, from the curb to the store line, for one hundred feet, and this storm came and damage resulted, what would there be actionable about that? There is no evidence that none other but an approved method was used to make the excavation, and leaving it uncovered for a reasonable time or an unreasonable time, for that matter, would not make any difference, and there is no evidence of that sort in this case whatever. I do not see either how there is any carelessness shown anywheres or any suggestion in this case either on the part of this defendant or any other.

Mr. Simon: If your Honor pleases, of course I am only concerned about the Passaic Consolidated Water Company. Of course it behooves the complainant to prove that there is negligence on the

*Motion for Non-Suit.*

part of our defendant, and I do not see how your Honor can recall any act of negligence done by our defendant. If Kosson, the plaintiff, says what is true, our work was done ten months before that, and if your Honor calls that negligence I will stop right there.

The Court: But Mr. Hoar says something else. 10

Mr. Simon: Ten months before we moved it. Suppose we moved it, was it negligence to move it? Who said it was moved improperly? I assume that we moved it and moved it properly, and assuming that, who will say they did it in a negligent way? I will assume that it was done that way and who will say that it is the proximate cause of the damage done? Certainly it was not Kosson, because he says to the time of April, 1929, there was no damage and our work was done. If that is true, 20  
from the time our work was done until the time that these other men were in there and did their work, we cannot be held liable for that. We cannot be responsible for the acts of others. Now, that comes down to the proximate cause, and there are any number of cases on that. If your Honor wants to hear me on that I would be glad to submit an argument. I would like to hear what counsel says as to where we are negligent and if we 30  
were negligent, was it proximate?

Mr. Dorgeval: I am in complete agreement with what Mr. Rosenkrans said. I do not see any proof of negligence on the part of this defendant in this case. There is nothing to show what caused this water to go in the cellar. The testimony is that there was work being done, and looking at it most favorable to the plaintiff, there was nothing to show that it was done negligently, but on the other 40

*Motion for Non-Suit.*

hand we have direct proof that the Union Building & Construction Company and the Public Service Company work, Mr. Drucker said that the work was done in a workmanlike way and was corroborated by two witnesses. There is direct proof that the work was being done correctly, and the  
10 only inference I see that can be drawn from the testimony as it stands is that the flood was due to a condition beyond our control.

The Court: Mr. Heller, do you wish to say anything in response to that?

Mr. Heller: The evidence against the Union Building is that Mr. Hoar says that they made a mistake in their excavation. That alone, without taking anything else in the case, I think, is enough to hold them, and hold them for the jury to decide  
20 whether there was any negligence. As far as the Public Service is concerned, Mr. Drucker said that they had erred and that they did not fill in their trenches and that they did not properly pile the sand or rather they did pile the sand and caused all this water to flow over the sidewalk and form this reservoir so that the water got into the cellar. So I think there is a question for the jury to determine. If your Honor wants to hear me on  
30 cases which I have, I have a few of them here. As far as the Water Company is concerned, of course there is legal proof here and the only proof they are concerned in is the moving of that water box. Kosson does not know when they did work there. We do not know whether it is ten months or six months.

The Court: He said he does know.

Mr. Heller: He said he does not.

The Court: He said that it was ten months before.  
40

*Motion for Non-Suit.*

Mr. Heller: Not Kosson, sir.

The Court: I think Dr. Simon said that.

Mr. Heller: He said he did not know. We really do not know when they did the work there. We do know that they moved the water box. If your Honor wants to hear me on the law I have some cases where there was a building contractor constructing a sewer for the City and there was adjacent property and the Court held there—they went a little further than in this case. 10

Mr. Rosenkrans: That is a blasting case, and they held there that they did not hold a blasting case.

Mr. Heller: In another case, Genaro, they did not even introduce that as a defense.

The Court: That is the Orange Club case.

Mr. Heller: That was the case up in the Orange Mountains. 20

The Court: I know that case, and I knew the contractor.

Mr. Heller: Now, on the evidence in this case I submit that there is a jury question and I do not want to take up too much time.

The Court: I will give you all the time you need because I am not in accord with you.

Mr. Heller: Then may I have a few minutes more? 30

The Court: Yes, sir.

Mr. Simon: He knows of no negligent act except that we moved the box, and of course there is no proof of negligence, and at this time I ask for a non-suit against the Passaic Company.

The Court: It is quite patent to me what caused this under the testimony.

Mr. Heller: As far as the Union Building Com- 40

*Motion for Non-Suit.*

pany is concerned, Mr. Hoar testified unqualifiedly that the Union Building Company made a mistake when they dug these trenches. Now, I am at a loss to understand how we can get around that statement. Here is a man who is a foreman for the Public Service Company.

10 Mr. Rosenkrans: Wherein did he say there was any mistake?

Mr. Heller: He said there was a mistake in the excavations; there was no gutter formed to carry the water, but if your Honor pleases, that is for the jury now to say on that statement alone.

The Court: I listened to Mr. Hoar very carefully and I have got down here that he was the foreman of the Public Service.

20 Mr. Heller: May I have the stenographer refer to that testimony?

The Court: No, because I do not think that covers it.

Mr. Heller: Where he says there was a mistake made, there was no gutter formed to gather the water, and that when people usually do excavating, that is the proper thing for them to do.

Mr. Rosenkrans: He did not say that.

30 Mr. Heller: I say that the testimony will bear me out that he positively stated that in that way. He also said that the piling of this sand along where the water should run was done in a negligent way so that a reservoir was formed and because of that reservoir the water seeped down into the cellar. Now, Mr. Hoar positively said that, and under his testimony I feel that the case is one for the jury. Now, citing this case of Wigmore against Epolito, that is a case in 131 Atlantic 873.

40 May I read part of this decision?

*Motion for Non-Suit.*

The Court: Yes, sir.

Mr. Heller: Well, this might be a blasting case, yet let me read part of the decision as announced?

The Court: Have you got any cases that are not blasting cases? Have you any cases where damage was done by a torrential rain?

Mr. Heller: Yes, I have one just like it, if your Honor please. 10

The Court: Or where they left an open trench and because of the torrential rain there was damage sustained?

Mr. Heller: Yes.

The Court: Go ahead.

Mr. Heller: 29 Sackett 504.

The Court: A New Jersey case?

Mr. Heller: There is no New Jersey case. This is the only one as far as the water is concerned, but the rules of law as laid down in the other cases—they do not touch the blasting question, but they touch the questions of law resembling those here. May I be permitted to read them? 20

The Court: You may.

Mr. Heller: Where a land owner in excavating his land negligently leaves the excavation exposed so that the rain runs into it and causes the land of the adjoining proprietor to give way, he is liable for such injuries although the rain may have been an unusual and an excessive one, if it would not have run into the excavation for his negligently leaving it exposed. 30

The Court: According to that he should fill it up at night and open it again in the morning.

Mr. Heller: Well, that decision is so, and on the authority it is followed by fifteen or eighteen states. 40

*Motion for Non-Suit.*

The Court: New Jersey has not followed it yet.

Mr. Heller: New Jersey, I think, follows it according to the language of the Court in another case, if I may be permitted to read from a New Jersey case, Wigmore against Epolito, where the defendant had a contract with the City of Orange for the construction of a sewer along a certain street and the contractor blasted, and because of these blastings in the roadway the adjoining buildings were damaged. There were no other allegations of negligence as I read this opinion, and this is what the Court says: "The case was considered by the jury upon the theory outlined by the trial court that while the defendant had a legal right to blast in the execution of his contract he should exercise that right with due regard for the rights of others all over adjoining the highway—" Now, here where there is an excavation being done there is no reason why there should be any water damage and according to the testimony the fact that there is a water damage is enough to have the jury decide whether or not there was negligence.

Mr. Rosenkrans: Here is the heart of this case.

The Court: I think that is clearly distinguishable from this case.

Mr. Rosenkrans: There is the testimony in the case that a proper regard for the safety of the adjoining property would induce the defendants to adopt the standard practices of land building before blasting and as a result of which there was this damage, but that is not the case here.

The Court: It is a question of fact clearly there.

Mr. Heller: But there is evidence here too. Mr. Hoar said that they made a mistake in their work, if your Honor pleases.

The Court: They left the trench open?

Mr. Heller: Not only in leaving the trench open

*Motion for Non-Suit.*

but in failing to form a gutter to carry the water.

The Court: When it was not raining?

Mr. Heller: It was raining and they had notice of that, and if your Honor pleases, in the more recent cases that your Honor said he was familiar with the same thing applies.

The Court: That was the blasting case, where the rocks came up on the road and hit the people passing by. 10

Mr. Heller: May I cite the case of *Ansbro vs. Walters*, 126 Atl. 426?

The Court: You may.

Mr. Heller: In this case a sidewalk was constructed and there was some obstruction left standing there in the sidewalk and in that case—I have this case for another proposition on the question of negligence—I think that question was left to the jury. 20

The Court: I think that is on another proposition.

Mr. Heller: They were in the performance of their work when there was the obstruction left there and the engineer had to use that for the purposes of doing this work.

The Court: And it was not protected?

Mr. Heller: I have not got it here, because I had it for another proposition of law. 30

The Court: Go ahead.

Mr. Heller: There is another case which I also had cited for another proposition of law, *Johnson vs. Jersey City*, and in that case the City of Jersey City was building a new City Hall and they sublet part of the work to a contractor, and one of the men in the course of his employ was injured by the falling wall, and in that case there was a question 40

*Motion for Non-Suit.*

of negligence for the jury. Of course I have tried to find a case like the one at bar in the State of New Jersey, and as already explained to you the only case I found was in this case in Cyc. followed by a number of States. That case is exactly parallel to our case.

10 The Court: And the reason you did not find any is because the others have been thrown out.

Mr. Heller: The reason that we cannot find any is that there was no damage because of negligence, and in this case we have negligence by the persons performing a work. If a contractor does his work in a proper way he protects this negligence against rain and other things like that, but in this case they were negligent in their work and I strenuously urge that this is a jury question and should be  
20 submitted to the jury.

The Court: I find no question of fact for the jury at all. I find no negligence in the testimony which was the proximate cause of this damage. The damage was undoubtedly caused by a torrential rain and not by the negligence of any of the three defendants. The motions are all granted and the defendants are discharged.

Mr. Heller: Isn't that for the jury to decide?

30 The Court: No.

Mr. Heller: May I have an exception?

The Court: You may.

28 MAY.T.1930

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## New Jersey Court of Errors and Appeals

S. KOSSON & SONS, Plaintiff, vs. UNION BUILDING & CONSTRUCTION CO., PASSAIC CONSOLIDATED WATER CO. and PUBLIC SERVICE ELECTRIC & GAS CO., Defendants.	}	Action at Law.
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### BRIEF OF PLAINTIFF.

#### Statement of Facts.

This is an appeal from the judgment of non-suit entered after the closing and resting of the plaintiff's direct case. The facts in this case briefly are these:

On the twenty-fifth and twenty-eighth days of April, 1929, and prior thereto, the plaintiff was the owner of a certain building known as No. 149 Second Street, Passaic, New Jersey. The plaintiff, for a long time prior to the dates mentioned, was engaged in the wholesale glass business and used the cellar of said building for the storage of glass.

On the dates mentioned, the defendants, Union Building and Construction Co. and Public Service Electric and Gas Co. were engaged in performing certain excavation work in front of the premises owned by the plaintiff. The Union Building & Construction Co. were engaged in the work of shortening the sidewalk and in the performance of

New Jersey State Library

their work, dug trenches along the curb and also caused piles of dirt and sand and materials to be placed along the curb in front of the premises of the plaintiff. The Public Service Electric and Gas Co. were engaged in the work of connecting their mains and in the performance of said work, dug trenches from the street to the curb and underneath the sidewalk. Sometime before the dates mentioned, the defendant Passaic Consolidated Water Co. removed their water box which was stationed about twenty-five feet north of the Kosson property and in the performance of said work, dug a trench at that place. On the dates mentioned there were rain storms, and a large amount of water and quite some sand was forced into the cellar of the plaintiff thereby causing great damage to the glass which was stored there.

Suit was brought against the three defendants named above and in the plaintiff's case, the plaintiff called the foreman of the defendant, Public Service Electric & Gas Co. as its witness as likewise the superintendent of the defendant, Union Building & Construction Co.

The aspect at the trial was that the Public Service Electric & Gas Co. charged that the Union Building & Construction Co. was negligent in leaving its trenches exposed and in improperly piling their materials in places where the natural course of the water was diverted. The Public Service Electric & Gas Co. also blamed the Passaic Consolidated Water Co. for the reason that that company did not properly stamp down its trench where the water box was located. The defendant, Union Building & Construction Co. blamed the Public Service Electric & Gas Co. contending that said company was negligent in improperly leaving its trenches open.

The undisputed testimony is that the defendants

Public Service Electric & Gas Co. and Union Building & Construction Co. were working during the day of April 25 as one making their excavation; and that it had been raining the entire day. The heavy rain fell during the evening.

The entire trend of the testimony was one in which each defendant charged the other with negligence. I shall as briefly as possible summarize the important parts of the testimony in an effort to show that this was a fact.

At the close of the case, motions for non-suit were made by the various defendants and the court granted the same upon the ground that there was no negligence on the part of any of the defendants. From this rather surprising conclusion in view of the testimony, this appeal is brought.

### POINT I.

**We contend that the court erred in entering a judgment of non-suit in favor of the defendants and against the plaintiff.**

We desire first to urge that in the situation such as in the case at bar, it is fundamentally the rule that the plaintiff's evidence must be and should be taken as admitted for the purpose of a motion of a non-suit. In support of this contention, we cite the case of *Kerner vs. Zerr*, 135 Atl. 866 (103 N. J. L. 424), decided by the Court of Errors and Appeals, speaking through Mr. Justice Black, "A motion for a non-suit admits the truth of the plaintiff's evidence, and of every inference of fact that can be legitimately drawn therefrom, but denies its sufficiency in law. The trial judge is to say whether any facts have been established by evi-

dence from which negligence may be reasonably inferred. It is for the jury to say whether from those facts negligence ought to be inferred."

Also Reichman vs. Public Service, 142  
Atl. 439. (67 N. J. M. S. 636)

The plaintiff in proving its case called as its witness the chief witness of the two defendants, to wit, Public Service Electric & Gas Co. and Union Building & Construction Co., so that during the course of the testimony there were certain contradictions as to who was liable. Counsel might argue that because Mr. Drukker, for example, testified that the Union Building & Construction Co. were not at fault despite the fact that Mr. Hoar, the foreman of the Public Service Electric & Gas Co. testified that the Union Building & Construction Co. were negligent, that the court was justified in finding no negligence on the part of the Union Building & Construction Co. It is equally fundamentally the rule that where there is conflicting testimony as to negligence it becomes a question for the jury.

Citing Sutton vs. Bell, 79 N. J. L. 507, 77 Atl. 42: "Where the existence of negligence depends on the conclusion to be reached from a variety of circumstances, considered in relation to and their action upon each other, the jury, and not the Court, is normally the tribunal to draw such conclusion.

We therefore come to the question as to whether or not the testimony produced on part of the plaintiff and the inference to be derived therefrom most favorable to the plaintiff was sufficient to raise a jury question.

The court, in a colloquial with counsel on the argument for the motion of non-suit, misconceived

the facts in the case as well as erring in concluding that there was no negligence.

State of Case, page 170, ll. 37 to 41; Case, p. 171, ll. 1 to 9:

The Court: It is a question of fact clearly there.

Mr. Heller: But there is evidence here too. Mr. Hoar said that they made a mistake in their work, if your Honor pleases.

The Court: They left the trench open?

Mr. Heller: Not only in leaving the trench open but in failing to form a gutter to carry the water.

The Court: When it was not raining?

Mr. Heller: It was raining and they had notice of that, and if your Honor pleases, in the more recent cases that your Honor said he was familiar with the same thing applies.

Apparently the court was under the impression that the rain commenced at night, but the undisputed testimony is that it rained all day.

State of Case, p. 95, the testimony of Richard Drukker, ll. 13 to 18:

Q. On the 25th it started raining early in the morning, fairly early? A. It rained nearly all day.

Q. About ten o'clock? A. I do not know.

Q. Did you work to any extent on the 25th? A. All day.

It will be observed therefore that the defendants were aware of the rain and the court in ruling on the motion assumed that there was no rain during the day, but that the storm fell at night and was apparently laboring under the theory that the rain

having been sudden caused by an act of God created the injury in question.

The court in granting the motion also stated, (Case, p. 172, ll. 21 to 32) :

The Court: I find no question of fact for the jury at all. I find no negligence in the testimony which was the proximate cause of this damage. The damage was undoubtedly caused by a torrential rain and not by the negligence of any of the three defendants. The motions are all granted and the defendants are discharged.

Mr. Heller: Isn't that for the jury to decide?

The Court: No.

Mr. Heller: May I have an exception?

The Court: You may.

We respectfully refer to the actual testimony, and submit that upon a casual reading thereof, the trial court erred in failing to submit the question of the cause of the damage to the jury. In view of the abundance of testimony indicating negligence, we are compelled to quote at length.

#### **As to the defendant Union Building and Construction Co.**

We refer first to the witness Daniel J. Hoar. This witness was the foreman on the job for the Public Service Electric & Gas Co., and was placed upon the stand for the purpose of proving negligence against the other defendants. Case, p. 28, ll. 10 to 40 and p. 29, ll. 1 to 16:

Q. Now, will you say whether or not there

is anything negligent in the manner in which the Union Building & Construction Company did any of its work, in the vicinity of 149 Second Street?

Mr. Heller: I object to that.

Q. In April, 1929?

The Court: I think he might give his opinion.

Mr. Heller: I ask an exception.

The Court: You may have an exception.

Mr. Dorgeval: If your Honor please—

The Court: Give you an exception too.

Mr. Dorgeval: If he is an expert, then I think he should be asked his opinion of the cause of the leaking into the cellar.

The Court: You may ask him that when your turn comes.

Mr. Dorgeval: Thank you.

A. *Well, to my opinion, there was a mistake made. While I am very good friends with the Union Building and Construction Company, the foreman and I worked on that job in harmony together—when my men came in the way, I shifted them to the other side of the street, and they helped me out remarkably in getting through with my work and I always kept out of their way as much as possible, because I knew they were on contract work keep in their way on the job.*

Q. *Tell us about the mistake?* A. *Where the mistake, to my estimation, was made, where those leaders came down on the buildings, there was no gutter formed for to carry water into the original curb, outside of the old curb. That trench, about that wide, was cut inside of the old curb, and that formed a reservoir that the water found its way in-*

*to some loose places in the brick work of the foundations, and wherever it found a hold in the foundation, of course, that found its way in the cellar.*

This testimony was adduced on cross-examination by counsel for the Union Building & Construction Co.

Case, p. 30, ll. 11 to 21:

By Mr. Rosenkrans:

Q. Was it dug in the usual manner? A. No, sir.

Q. Was it dug in the usual manner at all?

A. In my estimation it was.

The Court: There was no other way to dig it, was there?

The Witness: Well, I guess there was other ways of doing it. There is many ways of doing that kind of excavation.

The witness in the course of the testimony stated that he was called to the scene of the flood on the night of the twenty-fifth day of April, and describes what was done to prevent the flood. Case, p. 47, ll. 24 to 35; case, p. 48, ll. 1 to 19:

Q. And the sand you speak of, was that out in the middle of the street or sidewalk or where? A. No, they dumped it near the old curb in order to leave a passageway.

Q. Was the gutter blocked? A. Oh, yes.

Q. Was this sand in the gutter? A. Oh, yes; yes, sir, that gutter was blocked.

Q. Now, all right. Was there any such pile of sand close to number 149? A. There was piles of dirt. I couldn't be positive about the sand. There was dirt there.

Q. All right. Where was it with reference to 149? A. I would say it was convenient to 51 or 53.

Q. In other words, there was some sand or dirt or whatever it was, piled north of 149? A. Yes.

Q. Now, was there anything south of 149? A. Well, I wouldn't be positive about that. There might have been.

Q. Was there any pile of sand alongside 147 on the south boundary of 149? A. I know there was some stuff up that way, but in front of it or not I wouldn't be prepared to say.

Q. All right. You went there, at any rate, that night? A. Yes.

Q. When you arrived there what did you find? What object—withdraw that.

Q. Had anybody been there before you? A. Well, there was others before I was.

Q. Had any workmen been there before you arrived? A. Not belonging to our company.

Q. But to any company, any workmen? A. Yes.

Q. In other words, they had made a temporary gutter from the leaders— A. Yes.

Q. —bridging over the— A. Old curb.

Q. Over the two-foot trench? A. Yes, sir.

Q. Well, assume that this is the trench here (indicating). A. Yes?

Q. So that the water would run over the curb? A. Out in the street, yes.

Q. Yes? A. Yes. Previous to that it was running into that trench and finding its way into the cellars.

Again at page 58, ll. 3 to 14:

A. It was running from the west to the east side.

Q. Why was that? A. On account of the obstruction in the gutters.

Q. What obstructions in the gutters? A. Dirt and sand and stone.

Q. Who had put those obstructions there? A. The Union Building was the only people using that stuff there.

Case, p. 65, ll. 37 to 40; case, p. 66, ll. 1 to 18:

Q. *All right, just what happened? You said there had been piles of dirt and stuff in the gutter. Just what happened to the water as the result of these piles of dirt? Just what did happen to the water?* A. *It directed the water.*

Q. Where did the water go as the result of that? A. Huh?

Q. *Just where did the water go as the result of being piled in the gutter? Just where did the water go? Did it go in the street, did some of it go on the sidewalk, or where?* A. *Some went into the trench where off pieces of old curb fell down, because the water was so forcible at that point some of the old curb fell down and it washed in towards the cellar, and it washed across the street, also.*

Q. *Some of that washed in towards the cellar?* A. *Yes.*

These excerpts from the testimony clearly indicates three things, *first*, that the defendant Union Building & Construction Co. dug trenches which were left exposed; *second*, that they piled materi-

als along the gutter where the water should flow, and as a result of that reservoirs were formed; and because of these two operations, the water and sand seeped into the cellar of the plaintiff; *third*, that the defendant Union Building & Construction Co. were negligent in failing to provide a passage for the water; so that as to the defendant Union Building & Construction Co., it is our contention that this testimony alone is sufficient to raise a jury question. But we have more than that. We have the testimony of Mr. Drukker, the foreman of the Union Building & Construction Co., who testified that he knew it was raining during the day and that he had worked in the vicinity during the day (Case, p. 95, ll. 13 to 17).

Also referring to the testimony of Mr. Drukker (Case, p. 104, ll. 20 to 26) :

By Mr. Dorgeval:

Q. Now, during the time you were there you did not put any temporary gutters there to carry the water from the leaders over the trench that you had made there in the gutter? A. I did not.

Q. You did not do anything like that? A. I did not.

Taking therefore the excerpts of the testimony as herein outlined together with the rule applicable upon a motion of non-suit, we must necessarily arrive at the conclusion that the Union Building & Construction Co. were negligent in the performance of their work. This not only because of the facts as presented but also of the inference which may be derived therefrom most favorable to the plaintiff.

### As to the Public Service Electric & Gas Co.

The witness Richard Drukker was a witness for the plaintiff in an effort to prove the negligence of the defendant Public Service Electric & Gas Co. This witness was the superintendent of the defendant Union Building & Construction Co. and blamed the Public Service Electric & Gas Co. for the damages in question.

Before commenting upon this witness's testimony, it should be borne in mind that the witness Hoar blamed the Union Building & Construction Co., claiming that they left open trenches; that they did not provide the proper gutters for the flowage of the water and piled their materials in a negligent way stopping the flowage of the water. The witness Drukker seems to put the responsibility on the Public Service Electric & Gas Co. upon the ground that they piled their materials improperly, stopping the flowage of the water and that they left their trenches exposed. Case, p. 74, ll. 32 to 41; case, p. 75, ll. 1 to 10:

*Q. Who made those piles? A. Dirt had been thrown out of the excavations that the Public Service had made.*

*Q. Now, with respect to the flowage of the water as it rained, did the piles have anything to do with the flowage of the water? A. It did; the water could not pass by. It went into their trenches and flowed out around on both sides where the dirt had been piled up on the sides and it went into the trenches and then flowed to the south side of the trenches.*

*Q. And then where did the water go after that? A. It went down the street, down towards the lower part of the street.*

Q. Did any of it go in the cellar? A. It may be some of it got into the cellars.

The witness in referring to a conversation had with the plaintiff the day following the flood, says: (Case, p. 80, ll. 8 to 11)

Q. What did you say to him? A. I said, "Mr. Kosson, this is none of our funeral," just like that. I said, "That is the Public Service; their trenches are all filled with water."

Referring to a conversation with the foreman of the Public Service (Case, p. 80, ll. 33 to 40; case, p. 81, ll. 1 to 6):

Q. What did you say to them? A. I told them, "Your trenches are filled with water, and Mr. Kosson is having some trouble down here and you had better come down here and you had better come down and look after your own work."

Q. Then did you do anything? A. Sir?

Q. Did you do anything further? A. I filled in the trench with my man, in front of No. 149.

Q. Whose trench? A. The trench of the Public Service.

Q. And why did you do that? A. To help Mr. Kosson, a good fellow, and to help prevent anything going down the cellar.

Case, p. 82, ll. 38 to 40, Case, p. 83, ll. 1 to 10:

Q. What was said by you and Mr. Hoar the next morning? A. I said, "I called you, the Public Service on the telephone last night, but I did not see you. I left here at

eleven o'clock", and Mr. Hoar said, "I came on the job right after 11," and he said, "What could I do?" He said, "My trenches were all full of water." He said, "There was water all around, and what could I do?"

Also Case, p. 99, ll. 28 to 40; case, p. 100, ll. 1 to 9:

Q. And none of them had gotten over there to block the gutter at all? A. No, sir.

Q. No chance of that? A. No.

Q. Well, I understand now that the Public Service just had a series of trenches from 141 to 153, inclusive; you say the Public Service had trenches dug from their main eight feet out in the street or whatever you say it was, six or eight feet up to what, to the buildings? A. Those numbers that I have mentioned.

Q. 141, 143, 145, 147, 149, 151, 153, that is correct, isn't it? A. Yes, sir.

Q. Now, the Public Service had those trenches open? Were they open from the main up to the buildings? A. They were open from the main to about three feet or four feet beyond the sidewalk.

Q. And there were those series of trenches? A. Yes, sir.

Q. At all those places? A. Yes, sir.

Q. All of them wide open? A. Absolutely.

Q. Absolutely wide open? A. Yes, sir.

This witness testified that the trenches of the Public Service Electric & Gas Co. were open and exposed but it is undisputed that he called at the scene of the Kosson building on the night of the occurrence and filled in one of the trenches thereby

stopping the rush of the water into the cellar (Case, p. 100, ll. 25 to 40).

Of course there is some testimony by Mr. Drukker and Mr. Hoar that the trenches were not dug in the regular way, consequently the defendants were not negligent. However, the testimony is very strong to the effect that although the digging was done in the proper way, the precautionary measures which usually follow the digging were not used by either one of the defendants.

### **As to the Passaic Consolidated Water Co.**

There is testimony by both Mr. Hoar and Mr. Drukker that twenty-five feet north of the Kosson property there was a large open trench about six or eight feet wide and that the rain caused a wash-out of this trench. There is also sufficient testimony that the trench was dug for the purpose of moving the water box from the old point to a new point and that the trench was not properly stamped down and because of this condition, a washout was caused, the water seeped into the cellar of the plaintiff (Case, p. 20, ll. 8 to 35).

Q. You just said something about wash-out. Where did this happen, the wash-out?

A. It was in that end of the sidewalk.

Q. End of the sidewalk? A. It was at the sidewalk further on—well, I would say fifteen or twenty feet past this store building.

Q. Was there anyone doing work where the wash-out occurred? A. No, sir, but it was a ditch that was opened there.

Q. Do you know who dug the ditch? A. It seems to me it was never patched with dirt again or otherwise all the dirt when I saw it was washed away from there.

Q. Who dug that ditch? A. Well, now, there was a water-box there but I did not see no water men working there.

Q. Do you know who dug that ditch? A. I do not, sir.

Q. Will you tell us how wide and how high the ditch was? A. How wide?

Q. If you know. A. Well, now, I did not measure it. I would say it was probably six or eight feet wide.

Q. About how high, or how deep? A. It would be from four to six feet.

Case, p. 35, ll. 39 to 40; case, p. 36, ll. 1 to 28:

Q. All right. Now, you say there was a wash-out in this neighborhood, don't you? A. Yes.

Q. And on the same side of the street as plaintiff's property stood? A. Yes, sir.

Q. Was not that wash-out at 153 Second Street? A. I couldn't tell you the number; it was convenient to where this glass store is situated.

Q. About two doors or two stores north of the glass store? A. I though it was one door, maybe two. But there was a big wash-out there.

Q. You say that there is a water-table there? A. No; what they call a water-curb box; in other words, a box that they have a valve so that they can shut the water off on the building or turn it on the building when they require.

Q. Where did that box sit with reference to the curb? A. Eh?

Q. The old curb line? A. The box, I

think, was set in for the new curb; that was two feet inside.

Q. Had it lately been removed? A. Yes.

Q. Where had it been removed from? A. Oh, it must be directly in front of it. I wouldn't say that.

Q. Directly in front of what? A. From where it stood before, at the old curb.

Case, p. 37, ll. 22 to 30:

Q. Was there anything about it that led you to infer that it had been newly placed in the position in which you saw it? A. No, nothing, only from the wash-out, that I could see that the ditch must have been freshly opened and filled in, as the water takes more effect on loose dirt than it does on dirt that is resting there for a number of years and not interfered with.

Case, p. 53, ll. 11 to 18:

Q. Was the washout towards the building from the gutter? A. Yes.

Q. Where did the earth go? A. Well, I presume that most of it was washed in the cellars.

Q. Could you see where it went? A. Why, in the glass store there was quite some inches of dirt in the cellar.

Case, p. 55, ll. 4 to 35:

Q. Well, why did that, in your opinion, cause this big wash-out that went in almost to the building line under the sidewalk? A. That ditch hadn't been opened, to my estimation, very long previous to that, and it

went from the old gutter all the way underneath the sidewalk, and it wasn't properly tamped.

Q. What wasn't tamped? A. The dirt wasn't tamped over the trench, and water always finds its way into the softest place in the earth, and it worked over and the opening in the cellar wall was large enough to admit dirt to be carried through to the cellar from this cave-in.

Q. The opening in what wall? A. In the cellar wall, of—

Q. Of 149? A. 149.

Q. It was large enough to allow what dirt to come in from where? A. From the cave.

Q. You mean to come in from underground? A. Yes.

Q. Do you mean that dirt from this wash-out, this cave-in was washed underground into the cellar, in your opinion? A. Yes, sir, I don't see where else it could go, unless one of those cellars.

Q. And you think that some of the dirt from this wash-out went into the cellar? A. Yes.

Case, p. 55, l. 40; case, p. 56, ll. 1 to 11:

Q. *In your opinion, the cause of the wash-out was that the dirt in there had not been tamped properly?* A. *I would think so, yes.*

Q. That is just your opinion based upon your experience? A. Yes.

Q. What do you mean by tamping, so we all understand? A. We used a pounder, a twenty-six pound weight which has a round lump of iron on it with a notch up there for a handle.

Case, p. 62, ll. 11 to 25:

Q. Now, if the water company, as you say you infer, removed its equipment from a point by the old curb to a point where the new curb was to set, they made some excavation there, didn't they? A. Yes.

Q. And that excavation could have started this washout, couldn't it? A. No, they had repaired theirs.

Mr. Simon: Just a minute.

A. Their work was done long before that.

Q. *But you say it wasn't properly tamped down, in your opinion?* A. *Well, I would say that, yes.*

Q. Eh? A. I would say that, yes.

Case, p. 65, ll. 27 to 33:

Q. What is the answer, Mr. Hoar? A. Was the water company doing any work?  
A. Yes, they were doing some work on Second Street, but at what particular point I couldn't say, because I come in contact with some of their men—

Also referring to the testimony of Mr. Drukker,  
Case, p. 75, ll. 31 to 40:

Q. Who dug the trench? A. Why, that trench—there was as I have stated, there was a trench excavated by the Public Service at No. 153 which was left open that night and the water got into the trench of the Public Service, and then it got into the trench of the water company which had been doing the work in there possibly 10 or 12 months previously and settled down and made a big area of water into that big ditch.

We presently come to the question of whether under the rules of law the facts raise a question which ought to be submitted to the jury.

Although we do not find a case exactly parallel with the case at bar in the State of New Jersey, yet we have a very similar situation in 29 Cyc. 504, wherein it is stated, "Where a landowner in excavating his land negligently leaves the excavation exposed so that rain runs into it and causes the land of an adjoining proprietor to give way, to the injury of the buildings thereon, he is liable for such injuries, although the rain may have been an unusual and excessive one, if it would not have run into the excavation except for his negligently leaving it exposed. *Ulrick vs. Dakota L. & T. Co.*, 3 S. D. 44, 51 N. W. 1023, 2 S. D. 285, 49 N. W. 1054."

However, we find support for the theory that the question of whether or not the defendants have used the approved methods in the excavations and the precautionary measures connected with it in the decision of our State.

The defendant in the *Whitla* case moved for a non-suit upon one of the grounds that no negligence had been shown. The former Justice Minturn commenting on this phase of the case: "The case was considered by the jury upon the theory outlined by the trial court that, while the defendant had a legal right to blast in the execution of his contract, he should exercise that right with due regard for the rights of others lawfully adjoining the highway, and that, if he was negligent in the proper exercise of that duty by failing to utilize the recognized and available methods of blasting to the plaintiff's detriment and damage, the defendant was legally liable for the loss thus occasioned \* \* \* Whether what defendant did and

the method of its execution, under such circumstances, constituted a reasonable exercise of due care, manifestly presented a jury question."

Referring again to the note in 29 Cyc. 504: "Where a fire destroyed defendant's house, leaving one of the walls standing in a dangerous condition, and defendant, knowing the fact, neglected to secure or support the wall or take it down, and some days after the fire it was blown down by a high wind and damaged plaintiff's house, it was held that defendant could not shield himself under the plea of vis major, and was liable for the damages caused. Nordheimer vs. Alexander, 10 Can. Sup. Ct. 248."

The learned trial court in non-suiting the plaintiff stated that he found no negligence which was the proximate cause of the damage. This we submit was not for the court to decide in view of the testimony. Case, Smith vs. Public Service Corporation, 78 N. J. L. 478, 75 Atl. 937: "Whether the defendant's act or omission, alleged to be negligence, naturally and proximately caused by the plaintiff's injuries, is, as a rule, a question for the jury. But if there is no evidence connecting the defendant's alleged negligence with the plaintiff's injuries, or if it is obvious that the defendant's act or omission was not the natural and proximate cause thereof, the question is for the court."

In the same decision under the syllabus by the court: "The term 'natural' imports that they are such as might reasonably have been foreseen, such as occur in an ordinary state of things. The term 'proximate' indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss."

Case of Cox vs. Pennsylvania R. R., 76 N. J. L. 786, 71 Atl. 250: "When it cannot be said as matter

of law that an intermediate object or agency in the chain of causation was the immediate or proximate cause of the injury complained of, it becomes a question for the jury under the circumstances to determine whether defendant's act, if wrongful, was the proximate cause of the injury."

Citing the case of *De Mott vs. Knowlton*, 100 N. J. L. 296, 126 Atl. 327: "Where an act is negligent, it is not necessary to render it the proximate cause that the person committing it could or might have foreseen the particular consequence or the precise form of the injury, or the particular manner in which it occurred, if by the exercise of reasonable care it might have been foreseen or anticipated that injury might result."

### Conclusion.

We have attempted to show by the testimony in this case that there was sufficient evidence of negligence on all the defendants. It will be observed that the plaintiff attempted to prove the negligence of the defendants by calling two of the defendants' witnesses. In this state of affairs there were some contradictions on the defendants' case, since each defendant charged the other with negligence. One of the defendants also testified that the excavations were done in an approved manner. We do not quarrel with this statement, but there was abundance of testimony that the excavations were improperly done and that the precautionary measures were not properly taken.

We have attempted to show that upon the motion of non-suit all the facts favorable to the plaintiff and inference from facts are conceded for the

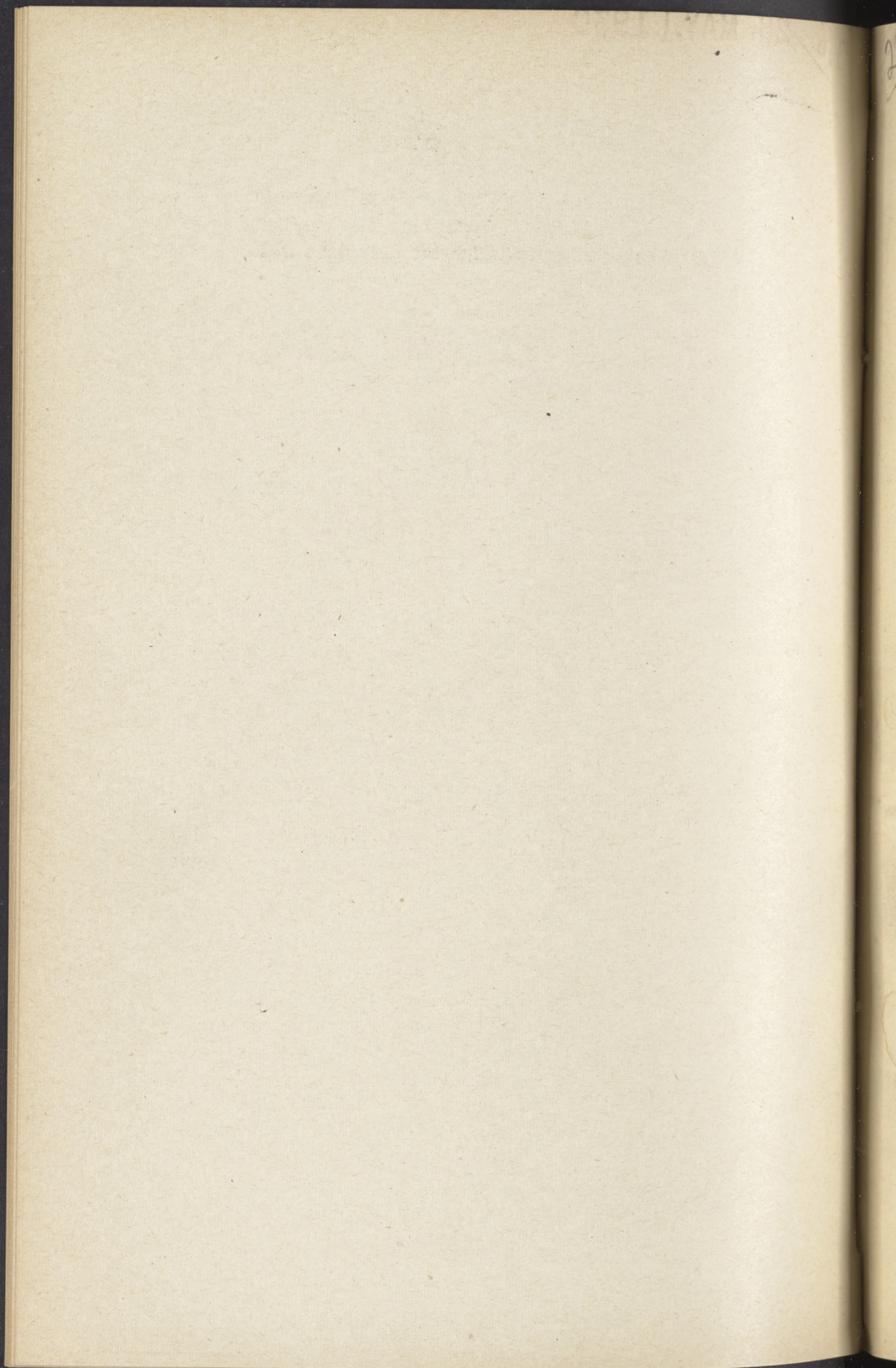
purposes of this motion. We have cited the case which is reported in Cyc. which is actually parallel with the case at bar in which the defendant was held responsible.

**For the foregoing reasons we respectfully urge that the judgment of non-suit be reversed with costs.**

Respectfully submitted,

HELLER & BOSS,  
Attorneys of Plaintiff.

AARON HELLER,  
Of Counsel.



## New Jersey Court of Errors and Appeals

S. Kosson & Sons,

Plaintiff,

vs.

Union Building & Construction  
Co., Passaic Consolidated  
Water Co. and Public Serv-  
ice Electric & Gas Co.,  
Defendants.

Action at Law  
On Plaintiff's  
Appeal from  
Judgment of  
Non-suit.

### BRIEF FOR DEFENDANT, UNION BUILDING & CONSTRUCTION CO.

#### STATEMENT OF CASE

This case was tried on December 12, 13, and 16, 1929, at the Passaic Circuit, before Judge Newton H. Porter with a jury. When the plaintiff rested, motions for non-suit were made on behalf of each of the three defendants (Case, pages 163, last 6 lines; 164, lines 37-40, and 165, first 9 lines; and page 165, last 10 lines, and they were granted, the trial court saying:

"I find no question of fact for the jury at all. I find no negligence in the testimony which was the proximate cause of this damage. The damage was undoubtedly caused by a torrential rain and not by the negligence of any of the three defendants." (Case, page 172, lines 21-26.)

Plaintiff excepted to the ruling (Case, page 172), and appeals from the judgment of non-suit (Case, page 1).

On April 25, 1929, plaintiff owned and occupied premises in Passaic, N. J., known as 149 Second Street. It was engaged there in the sale of glass, quantities of which it had stored in the cellar of the premises.

The driveway of Second Street was then being widened, and the widening of it was being effected by reducing the width of the sidewalks on either side of it. This involved the setting back of the curb line two feet both on the west and east side of the highway; and this work the defendant, Union Construction & Building Co., was performing in pursuance of a contract between it and the City of Passaic.

The defendant, Public Service Electric & Gas Co., were excavating in the street; its gas main ran under Second Street in a line parallel with the westerly curb line and about six feet to the east of that curb; and it was examining the feed pipes running from the main to the properties fronting on Second Street and, where needed, it was replacing them.

The defendant, Passaic Consolidated Water Co., then was, or had been, engaged in shifting its shut-off boxes from the old to the new curb lines and in the excavation incident to that work.

Plaintiff's premises stood on the west side of Second Street. In front of its premises and of neighboring properties trenches lay open at the close of the working day on April 25th. It had rained slightly that day, but so little that the work of the workmen was not stopped. But after night-fall rain fell in floods; "the heaviest rain I ever saw," declared the foreman of defendant, Public Service Electric & Gas Co. (Case, page 21, lines

14-16, and page 48, lines 21-24) ; there is no contradiction of the claim that the volume of precipitation was extraordinary ; and water got into the cellar of the plaintiff's premises damaging, as it alleged, a part of its stock of glass. It brought this suit to recover for that damage.

We think there was no legal evidence of any negligence on the part of defendant, Union Building & Construction Co., which was the proximate cause of plaintiff's damage, and say, therefore, that

**THE NONSUIT IN FAVOR OF DEFENDANT,  
UNION BUILDING & CONSTRUCTION CO.,  
WAS RIGHTLY GRANTED.**

As to whether this defendant had dug a trench in front of the plaintiff's premises or in proximity thereto, or whether the excavations thereabouts had been made by defendant, Public Service Electric & Gas Co., the evidence is contradictory. For the purposes of this argument, we understand that this defendant must be presumed to have made them, and that it is quite useless to point out the testimony tending to prove that "the Public Service had opened the trenches" (Case, page 71, lines 24-26), and was "renewing the service pipe from the main line to the buildings" (Case, page 71, last 3 lines), and had "excavated the ground to a depth of approximately two feet" (Case, page 72, lines 1-8), and "did the excavation work from the main and where the old curb originally stood past where the new curb was to be placed and to the rear of that into the sidewalk towards the building about four feet" (Case, page 72, lines 22-30).

and that when asked to locate "precisely" the excavations made by the Public Service Electric & Gas Co., a witness testified that "they were at 141 Second Street," and were "open excavations" they were at 145 Second Street, they were at 147 Second Street; and they were at 149, 151 and 153 Second Street", and were "open excavations" (Case, page 73, lines 23 to bottom); and that dirt thrown out of such excavations of the Public Service into the gutter prevented the water from passing by (Case, page 74, lines 30-41), and that one such pile lay in front of the plaintiff's premises at 149 Second Street (Case, page 75, lines 18-21), and that water got into the Public Service trench at 153 Second Street (North of No. 149 and on higher ground) and then into a trench of the Water Company and "made a big area of water into that big ditch" (Case, page 75, lines 23 to bottom), and that these trenches of the Public Service were all dug on April 25th (Case, page 77, lines 23 to bottom), and that the Union Building & Construction Co. had dug no ditch and made no excavation in front of 149 or Nos. 151 and 153, and had done nothing north of No. 135 except to break up the sidewalk with a compressor back of the old curb for a width of two feet (Case, page 79, lines 3-25). We understand, we say, that this evidence is of no present value, because there is evidence to the contrary.

The evidence to the contrary came from Daniel J. Hoar, a foreman of the defendant, Public Service Electric & Gas Co. (Case, page 15, lines 1-13.) When asked who was doing work on April 25, he answered that the Union Building & Construction Co. was widening the street by taking

two feet off each sidewalk, and that the Passaic Consolidated Water Co. was also doing some odd jobs, although he does not know whether it was working there on that very day (Case, page 15, lines 14-30). He says that his company made two holes of inspection there on that day and found its pipe "O.K.", and refilled the openings it had made, and that the walk was broken up, but the old curb left standing in its old line (Case, page 15, last 8 lines). The curb was a bluestone, not a concrete curb, and was to be used in the new line; it was simply to be moved back two feet (Case, page 16, lines 9-17). A strip of sidewalk lying next to the old curb line had been ripped away, leaving the sidewalk near the buildings unimpaired, and a wooden barricade had been set up between the unimpaired and the broken surface of the sidewalk (Case, page 17).

On the night of April 25th, this witness, when he looked inside the plaintiff's cellar, saw water rushing in (Case, page 17, last 5 lines), at the foundation line of the cellar floor where the sewer connection went through the cellar wall, and he observed sand swept in with the water (Case, page 18). There was a washout in the sidewalk "fifteen or twenty feet past this store building"; a ditch was opened there which he infers had not been properly closed; he does not say by whom it was made, but saw a water box in it, and says the ditch was six or eight feet wide and from four to six feet deep.—a washout (Case, page 20).

He says that the further north one goes on Second Street, the higher the street numbers run, but the grade runs just the other way, that is, from north to south (Case, page 24, last 10 lines).

When asked whether there was anything negligent in the manner in which the defendant, Union Building & Construction Co., had performed work in the vicinity of 149 Second Street, he says: "Well, to my opinion, there was a mistake made" (Case, page 28)

"Q. Tell us about the mistake? A. Where the mistake to my estimation, was made, where those leaders came down on the buildings, there was no gutter formed for to carry water into the original curb, outside of the old curb. That trench, about that wide, was cut inside of the old curb, and that formed a reservoir that the water found its way into some loose places in the brick work of the foundations, and wherever is found a hole in the foundation, of course, that found its way in the cellar (Case, page 29, lines 1-16).

What is the significance and value of this testimony? The witness does not say that it is customary for a contractor to furnish a gutter to carry rain water from the leader on a building out into the driveway, when making an excavation in the sidewalk in front of the building, or that an approved or common method of performing such work involved the furnishing of a gutter for that purpose. He does not describe the position of the leader, nor say whether it discharged collected rain water upon the surface of the sidewalk or conducted it beneath the surface out into the street. He does not say that there was any interference with the leader by the Union Building & Construction Co.

And it certainly does not appear, either from his testimony or from anything else in the record, that the Union Building & Construction Co. had any legal right to obstruct the unimpaired portion of the sidewalk, along which pedestrians passed, by an artificial "gutter".

The witness does not say that in the whole course of his experience he ever saw such a thing done; and Richard Drukker, the superintendent of the defendant Union Building & Construction Co., testified that he had never done it in his own experience (Case, page 105, last 10 lines).

There is no evidence whatever that the defendant was under any duty to do it.

On the other hand, the witness, Hoar, says that there is nothing wrong with the trench, two by two feet, by the curb stone, which he says was made by this defendant, that it was dug in the usual manner and in the way in which he would have done it (Case, page 29, lines 22 to bottom and page 30, lines 1-30).

When examined upon the successive steps taken by the Union Building & Construction Co. in the performance of its work, he commends it all, says it was all done "according to the approved methods", and quite properly (Case, page 31).

In resisting the motion for nonsuit, plaintiff's counsel contended that there was negligence merely in leaving "the excavation exposed" (Case, page 169, lines 27 to bottom). But that is not charged in the complaint (Case, pages 2-4), and was not put in issue by the evidence. The trench

in the present case had just been dug; the curb still stood in its old position; it had not yet been moved back and reset (Case, page 34, lines 28 to bottom, and page 35, lines 1-10). There is no proof that contractors of ordinary prudence in the exercise of reasonable care refill at the close of each day, and leave nothing open overnight, and no evidence from which it may be inferred that good practice requires it. Wherever we see a road being surfaced or resurfaced with any sort of pavement, or a sidewalk improved, we witness the very opposite practice. It seems to us not worth while to labor the point.

The witness, Hoar, further testified that out in the street were broken concrete from the sidewalk and dirt, sand and stone, and that these things lay as if dumped from trucks; "it was thrown outside in the gutter" (Case, page 46), and dumped "near the old curb in order to leave a passage way" (Case, page 46). He says the gutter was blocked (Case, page 47, lines 5-7), but he cannot locate at what points; but thinks the piles of dirt lay "convenient to 51 and 53" (meaning Nos. 151 or 153); they lay north of 149; but he does not know whether there were any to the south (Case, page 47).

He says that on the evening of April 25, he arrived at the premises of the plaintiff after ten o'clock (Case, page 46, lines 6-9); and that the rain was "pouring, I couldn't exactly describe, but my estimation, it was the heaviest rain I ever saw that was falling at that time" (Case, page 48, lines 17-23). He testified that there was so much water in the street that the curbs were submerged (Case,

page 48, lines 25-28); and that the water was up on the sidewalk. When his attention was called by plaintiff's counsel to the question of what happened to the piles of dirt and sand, he replied that a great deal of the sand was washed away, and only a little hill remained out of a truck load, and could hardly be seen at all the next day (Case, page 49). The volume of rain fall was shown by the shrubbery and paper and empty boxes that had been washed into the excavations (Case, page 50, lines 1-5).

Hoar says that, when he arrived on the evening of April 25th, the water "was running from the west to the east side" (Case, page 58, lines 1-5). This means that it was running, not towards the plaintiff's property, but away from it. He says that the current was deflected from the west to the east "on account of the obstructions in the gutters"—"dirt and sand and stone" (Case, page 58).

"Land owners have a right to deposit in the street building materials required for the improvement of the abutting property; the right is to be reasonably exercised in view of the rights of the public, and is subject to regulation in the public interest." Friedman vs. Snare & Triest Co., 71 N. J. L., 605.

Such materials may be kept there for a reasonable time. Mann vs. Max, 93 N. J. L., 192.

This must be the rule also in favor of a contractor who is improving a public street under a contract with the municipality.

Moreover the testimony just quoted is to the effect that no damage resulted to the plaintiff from any obstruction in the gutter; the water, the witness says, ran in a direction opposite to that of the plaintiff's premises.

Elsewhere he said that the piles "directed the water"; and then adds what is clearly conjecture on his part: he is testifying to what he inferred, and not to what he saw:

"Some went into the trench where odd pieces of old curb fell down, because the water was so forcible at that point some of the old curb fell down and it washed in toward the cellar and it washed across the street also" (Case, page 66, lines 7-16).

He does not say that the piles were improperly placed; they covered "probably from the curb out in the street seven feet"; and were shaped something like a pyramid, high in the center and running "flat toward the edge" (Case, page 67); and adds that it is the practice to "dump sand and stone convenient in order to have them convenient for their mixer to use if they desire" (Case, page 67).

Irwin J. Kosson, who is connected with the plaintiff as Secretary-Treasurer (Case, page 111), testified that the storm of the evening of April 25th "was a very heavy rainfall and that it rained heavily for many hours" (Case, page 126, last two lines and page 127, lines 1-5); he looked out into the street, **and noticed no curb in sight** (Case, page 127, last two lines); **and the sidewalk was covered with water "right up to the building"** (Case, page 28, lines 1-13); and this was so, notwithstanding that the sidewalk sloped away from

the building line to the curb (Case, page 128, lines 20-30).

This was nine o'clock in the evening (Case, page 127), an hour before the arrival of Hoar.

Is it not clear from the evidence that Second Street ran like a river by the act of God, and that the trial court was right when he said:

"The damage was undoubtedly caused by a torrential rain and not by the negligence of any of the three defendants" (Case, page 172, lines 24-27).

A contributing cause or a condition which helped to bring about the inflow of surface water into plaintiff's cellar was undoubtedly the cave-in north of the plaintiff's premises, which is described by the witness Hoar, and which he thinks was caused by the failure of the Water Company to tamp the soil effectively which it had stirred in removing a curb box some time before (Case, pages 36 and 55).

If the City of Passaic had undertaken this public improvement directly instead of contracting the work to the defendant, Union Building & Construction Co., no suit could have been maintained by the plaintiff against it.

"As a general rule a municipality is not liable for damages to abutting property by water percolating through the soil of the highway, though the way has been filled with loose materials through which water easily percolates, or though the soil has been loosened up in making improvements." (13 R. C. L., page 113, Highways, Sec. 100.)

In *Whitla vs. Ippolito*, 102 N. J. L. 354, there was affirmative evidence that the defendant failed to utilize modern and approved methods of blasting, and that this failure occasioned the injury complained of.

There is no legal evidence in the present case that the Union Building & Construction Co. was negligent in leaving a trench unfilled over night, or that it was negligent in placing sand, stone or soil in conical forms in the driveway and (if there was any fault in this) that such fault was the proximate cause of plaintiff's damage, in view of the evidence—the accordant evidence—that the whole street swam with surface water, submerging the curbs and covering the sidewalks to the building line, or that it was negligent in failing to provide an artificial gutter from the leader connected in some manner (not described or defined) with the building of the plaintiff to the curb line.

The record contains, we think, no legal evidence from which a valid inference could have been deduced that the Union Building & Construction Co. was in any wise negligent or that it did anything or omitted anything, the doing or nonperformance of which was the proximate cause of any injury to the plaintiff.

Respectfully submitted,

CORBIN & HARTY,

Attorneys of Union Building &  
Construction Co.

ADDISON P. ROSENKRANS,  
Of Counsel.

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## New Jersey Court of Errors and Appeals

S. KOSSON & SONS, Plaintiff,  vs.  UNION BUILDING & CONSTRUCTION Co., PASSAIC CONSOLIDATED WATER Co. and PUBLIC SERVICE ELECTRIC & GAS Co., Defendants.	}	Action at Law.
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### BRIEF OF THE DEFENDANT PASSAIC CONSOLIDATED WATER CO.

To the statement of facts as set forth by the plaintiff, this defendant has no desire to attempt to add or detract, but only to make clear to this Honorable Body the exact circumstances surrounding the entire transaction involved, and this purpose can only be attained by bringing forth all the testimony involving the defendant, the Passaic Consolidated Water Company.

The plaintiff contends that the Passaic Consolidated Water Company was negligent in replacing its water box, as a result of which a large amount of water caused by rain was allowed to seep into the premises at 149 Second Street, Passaic, N. J. and cause damage to stock of glass and building. But to this we say that no evidence of negligence was brought out throughout the trial of the case at bar.

In *Kelson vs. Public Service R. Co.*, 110 Atl. 919, the court held: "The 'proximate cause' is that

cause which naturally and probably led to and which might have been expected to produce the result; *it is the efficient cause; the one that necessarily sets the other causes in operation.*" Counsel for plaintiff totally failed to bring forth any evidence which would tend to show that this defendant's negligence contributed in any way as to proximately cause the damages complained of in this action. Also, in this case the court went further to say, "*whether the cause of the accident is too remote to allow compensation by way of damages is a question of law to be decided by the court.*"

The testimony throughout the trial fails to place the water box in any definite place but the inference is left that it was located in front of the premises at 153 Second Street. Both Mr. Drucker, an officer of the Union Building & Construction Company, and Mr. Hoar, a representative of the Public Service Electric & Gas Company, the two other defendants in this action, were the only witnesses the plaintiff produced to testify as to the direct causes of the resulting damages to his property and they did not testify to any specific acts of negligence of which the Consolidated Water Company was guilty, and they even go further; Mr. Hoar, by declaring that the Union Building & Construction Company was negligent in maintaining the gutters, and leaders as well as the trenches (pgs. 29, 30, 47, 65, 66). Mr. Drucker testified to the fact that the excavations were due to natural causes and also that his company had performed work there at different times before the Water Company had replaced their water box. Further, the excavations complained of, located in front of the premises at 153 Second Street were so far removed that it was practically impossible

for the plaintiff to suffer thereby, his property being located at 149 Second Street. Mr. Drucker also states that on the day of this rainstorm his men had open trenches in front of the premises located at 149 Second Street. Therefore, would it not be more practicable to infer that the water would seep into the plaintiff's cellar due to this excavation rather than to the one located at 153 Second Street, a distance of approximately twenty to fifty feet away, the frontage of each parcel of land being twenty-five feet as testified to by this witness.

The plaintiff's principal witnesses testified, insofar as the Passaic Consolidated Water Company, as follows:

(Pg. 20, ll. 22-27)

Q. Who dug that ditch? A. Well, now, there was a water box there but *I did not see no water men working there.*

Q. Do you know who dug that ditch? A. *I do not, sir.*

(Pg. 23, ll. 8-10)

Q. You could get no line on where the water was entering the cellar, could you? A. *No.*

(Pg. 28, ll. 11-16; Pg. 29, ll. 1-16)

Q. Now, will you say whether or not there is anything negligent in the manner in which the Union Building & Construction Company did any of its work, in the vicinity of 149 Second Street?

Q. Tell us about the mistake? A. Where the mistake, to my estimation, was made,

where those leaders came down *on the buildings*, there was no gutter formed for to carry water into the original curb, outside of the old curb. That trench, about that wide, was cut *inside of the old curb*, and that formed a reservoir that the water found its way into some loose places in the brick work of the foundations, and wherever it found a hole in the foundation, of course, that found its way in the cellar.

(Pg. 36, ll. 32-40)

Q. No, I want you to tell us the position that the water box was in before it was removed? A. *Why, how could I tell? How could I tell you anything about it? I did not see the water box before that morning (April 25th) (parenthesis our own).* How do I know anything about what position it was in, whether it was six inches high above the surface or four inches below.

Q. Where was it when you saw it? A. That is a very funny question, lawyer.

(Pg. 52, ll. 13-19)

Q. You mentioned a washout? A. Yes.

Q. Where was that located with reference to this property, north or south of it? A. It was north.

Q. Can you give us any idea in feet about how far it was from this building? A. It might be fifteen to twenty feet; it might be less.

(Pg. 62, ll. 11-21)

Q. Now, if the Water Company, *as you*

*say you infer*, removed its equipment from a point by the old curb to a point where the new curb was to set, they made some excavation there, didn't they? A. Yes.

Q. And that excavation could have started this washout, couldn't it? A. *No, they had repaired theirs.*

Mr. Simon: Just a minute.

A. *Their work was done long before that.*  
The testimony of Mr. Drucker was as follows:

(Pg. 76, ll. 9-21)

Q. Now, did you notice the water box of the water company there? A. I did.

Q. Do you know whether or not the water box, the position of that box was changed at any time in April of 1929? A. It had been *set back to the proper place.*

Q. Now, do you know when they were there? A. No.

Q. Can you approximate the time? A. *I do not know anything about it.*

Q. You do not know whether it was a week or six months before, do you? A. *It might have been six months.*

(Pg. 86, ll. 19-33)

Q. So that in front of 149 there was this broken sidewalk as far as you were concerned? A. Yes, sir.

Q. When you came to places where there were tunnels underneath the sidewalk, where the water company was making connections or where the Public Service was making or renewing their pipes, if they were, what would you do with the broken pieces at those

points? A. There were several places where we encountered, where the sidewalk, before even the Public Service or Gas Company or Water Company, or anybody, got to that place, *we had worked under the sidewalk and had been there possibly for a number of years.*

(Pg. 76, ll. 1-8)

Q. And how far was that from the Kosson building? A. The Kosson building is at 149 where the excavation was, and where the big settlement was is at 153.

(Pg. 37, ll. 3-40)

Q. Suppose you came to a trench that had been opened, not one of those depressions, but a trench that had been opened and tunneled under the sidewalk, if there were any such condition, what would you do with the broken pieces then? Do you recall anything of that kind? A. No, only at 153 when the man that worked with the compressor, he had on his jack hammer, as we call them, a drill about that long, and with his drill went down through this sidewalk and there was a big shallow hole under the sidewalk. You could throw possibly six or seven wheelbarrow loads of earth into it to fill it up.

Q. Is that one of those depressions you speak of? A. Yes, that was a *natural depression* even before the Public Service or Water Company or anybody else got on the job.

Q. You made no excavation in front of 153? A. Sir.

Q. You made no excavation in front of No. 153? A. No, sir.

By Mr. Rosenkrans:

Q. You say the *Public Service did have a trench in front of 153?* A. Yes, sir, they had an open trench there that night.

Mr. Kosson, the plaintiff, was asked one question by counsel for the Water Company which in conjunction with all the aforestated testimony seems to absolve them entirely from any blame whatsoever, insofar as his damages are concerned; the question follows:

(Pg. 154, ll. 16-21)

Q. *Up to April 25, 1929, the time you say the work was done by the Union Building & Construction Company and by the Public Service, you suffered no damage at all in your cellar?* A. *No.*

Q. Sure about that? A. *Yes, sir.*

Counsel for plaintiff cites the case of *Kerner vs. Zerr* (135 Atl. 866), decided by the Court of Errors and Appeals, with which we are in hearty accord, "A motion for non-suit admits the truth of the plaintiff's evidence, and of every inference of fact that can be legitimately drawn therefrom, *but denies its sufficiency in law. The trial judge is to say whether any facts have been established by evidence from which negligence may be reasonably inferred. It is for the jury to say whether from these facts negligence ought to be inferred.*"

It is our contention that from the evidence adduced at the trial no reasonable inference of fact could be drawn therefrom which would warrant its being sufficient in law to permit it to become

a jury question, for the plaintiff's wholly failed to carry their burden in establishing a prima facie case against this defendant, the Passaic Consolidated Water Company.

**Conclusion.**

We respectfully submit, that in view of the foregoing salient points urged by the defendant, the Passaic Consolidated Water Company, that no prejudicial error was committed by the learned trial judge, and that this appeal should consequently be discharged.

Respectfully submitted,

AARON L. SIMON,  
Attorney for Defendant, Passaic  
Consolidated Water Company.

AARON L. SIMON,  
Of Counsel.

## New Jersey Court of Errors and Appeals

S. KOSSON & SONS,

*Plaintiff,*

*vs.*

UNION BUILDING AND CONSTRUCTION Co., PASSAIC CONSOLIDATED WATER Co., PUBLIC SERVICE ELECTRIC & GAS Co.,  
*Defendants.*

*Action  
at Law.*

*On Appeal  
from Passaic  
County  
Circuit  
Court.*

### BRIEF OF DEFENDANT, PUBLIC SERVICE ELECTRIC & GAS CO.

The statement of the case as set out in the plaintiff's brief under the title of "STATEMENT OF FACTS" is sufficient for present purposes except that it contains certain inaccuracies which we wish to take this opportunity to correct.

First, it recites that this defendant was excavating in front of plaintiff's premises on April 28th, 1929, the day of the second alleged inundation of plaintiff's cellar. In point of fact there was no evidence introduced, or attempted to be introduced, indicating that this defendant was doing any work in front of, or in the vicinity of, plaintiff's premises on said date. In short, there is no evidence whatever as to this. We will, therefore, dismiss this phase at this time without further comment.

Second, it states that "The defendant, Union Building & Construction Co. blamed the Public Service Electric & Gas Co. contending that said company was negligent in improperly leaving its trenches open." There is not a scintilla of evidence charging this defendant, either directly or

inferentially, with negligence for "improperly leaving its trenches open."

Third, it says "The entire trend of the testimony was one in which each defendant charged the other with negligence." There is not one whit of evidence to substantiate this declaration so far as this defendant is concerned, *i. e.*, neither of the co-defendants charge it with negligence. No one from the Passaic Consolidated Water Company was called to testify by the plaintiff, and, therefore, no evidence whatever was introduced by anyone from that company, while the only witness from the Union Building and Construction Company, called by the plaintiff, testified specifically that the work done by this defendant was performed in a workmanlike manner.

Fourth, it declares "The undisputed testimony is that the defendants Public Service Electric and Gas Co. and Union Building and Construction Co. were working during the day of April 25th as one making their excavation; \* \* \*." The inference apparently sought by this language is that it is "undisputed" that the defendants Public Service Electric and Gas Company and Union Building and Construction Company were excavating "as one" *in front of plaintiff's premises*. In fact the witness Hoar, this defendant's foreman on this job who was called as a witness by the plaintiff, denied specifically and categorically that this defendant did any excavating, or any work, in front of plaintiff's premises on April 25th, 1929, or that there were any excavations attributable to this defendant in front of said premises on said date. Further, the evidence is that these defendants were working entirely independently of one another. Naturally their work in the same street brought them

into contact with one another from time to time and, when it did, they tried to accommodate themselves to one another. There is, however, no warrant whatever in the evidence for the statement that they were working "as one" which might be taken to imply that they were engaged in a joint or common enterprise. Such was not the fact. It will be seen, therefore, that this point is strenuously *disputed*.

We have in the foregoing purposely limited ourselves only to correcting inaccurate statements, and have accepted the plaintiff's statement of the case in other respects, thereby omitting the narration of the very considerable volume of evidence in favor of this defendant, for the reason that, of course, in this discussion the truth of the plaintiff's evidence, and of every inference of fact that may be reasonably drawn therefrom, is admitted.

With one of plaintiff's statements there can be no quarrel, *i. e.*, that there was a very heavy rainfall during the evening of April 25th, 1929. There is absolute unanimity among the witnesses as to this; in fact all agree that it was extremely heavy and the evidence justifies the trial judge in referring to it as "torrential."

At the conclusion of the plaintiff's case the court granted this defendant's motion for a nonsuit on the ground that there was no evidence of negligence that was the proximate cause of the damage (p. 172, ll. 20-30). The plaintiff appeals therefrom (p. 1).

The trial judge did not err in granting this defendant's motion for a non-suit.

The plaintiff, in contending that the court erred in granting this defendant's motion to non-suit, relies upon certain excerpts from the testimony, which it quotes verbatim, in that portion of its brief that is devoted to this defendant, *i. e.*, pages 12 to 15 inclusive. We will take up each of said excerpts in order, the reference thereto, however, being to where they may be found in the State of Case. We here wish to respectfully call attention to the fact that all of them are from the testimony of *one* witness, *i. e.*, Mr. Drucker, superintendent on this job for the defendant, Union Building and Construction Company (p. 71, ll. 1-15), secretary of and a member of said company and, according to his own admission, personally interested in the outcome of this suit (p. 88, ll. 25-39).

The first of said excerpts is as follows (p. 74, l. 32 to p. 75, l. 10):

“Q Who made those piles? A Dirt had been thrown out of the excavations that the Public Service had made.

“Q Now, with respect to the flowage of the water as it rained, did the piles have anything to do with the flowage of the water? A It did; the water could not pass by. It went into their trenches and flowed out around on both sides where the dirt had been piled up on the sides and it went into the trenches and then flowed to the south side of the trenches.

“Q And then where did the water go after that? A It went down the street, down towards the lower part of the street.

“Q Did any of it go in the cellar? A It may be some of it got into the cellars.”

Certainly the last two questions and answers are conclusive and entirely dispositive of this phase. Instead of permitting, they actually nega-

tive, any inference of negligence. Where did the water go? "It went down the street, down towards the lower part of the street." It must be remembered in this connection that this witness testified that the street graded down hill from the high numbers to the low numbers, *i. e.*, from north to south (p. 73, ll. 1-10), and the admitted fact that plaintiff's premises were located on the west side of said street. There can be no question, therefore, that the clear purport of this testimony is that the water flowed in a southerly direction along the street which, admittedly, ran north and south. Asked point blank "Did any of it go in the cellar?" the witness answered "It *may* be some of it got into the *cellars*." It will be noted that his answer at best implies only that it is *possible* that some of the water got into the "cellars" along the street; that in this connection he is not even speaking of this particular cellar but of cellars along this street in general. Certainly, there is nothing here from which an inference of negligence on the part of this defendant can be legitimately drawn.

The next portion of this witness' testimony relied upon is as follows (p. 80, ll. 8-12):

"By Mr. Rosenkrans:

"Q What did you say to him? A I said, 'Mr. Kosson, this is none of our funeral,' just like that. I said, 'That is the Public Service; their trenches are all filled with water.'"

*It will be noted that by this question Mr. Drucker, Superintendent, Secretary and a member of the defendant, Union Building and Construction Company, was asked, by the attorney for said company, and permitted to testify to what he, Drucker, had said to Mr. Kosson, Secretary and Treasurer of the plaintiff company (p. 111, ll. 1-15), about this defendant when not even*

*a representative of this company was present.* Upon what possible theory such evidence was admitted, or allowed to stand, after admitted, in the face of this defendant's motion to strike out, it is impossible for us to conceive. We quote the colloquy that occurred between the court and the attorney for this defendant in this connection (p. 80, ll. 13-30):

"Mr. Dorgeval: I do not see how that is proper as to us; if that is not a self-serving declaration, I do not know what that is.

"The Court: I will let it stand. It is *not binding on you* but it is evidentiary of what this witness says to one of the parties to the suit. *It is not binding on you.* It is this man's opinion and it might not be worth anything to the jury, but he can state what he said.

"Mr. Dorgeval: May I move to strike it out?

"The Court: Motion denied.

"Mr. Dorgeval: Exception.

"The Court: Go ahead."

It will be noted that although the trial judge denied the motion to strike out, he *expressly limited* the effect of this evidence, twice stating specifically that it was "*not binding*" on this defendant. This, then, is the law of the case so far as this testimony is concerned. Nevertheless, it is worthy of note that, despite this, counsel for the plaintiff in his brief, although he quoted the question and answer verbatim, carefully refrained from either quoting or referring to this colloquy which qualified and limited said testimony and is at least as important as the testimony itself.

Regardless of the fact that this evidence was patently inadmissible and should have been, as we respectfully submit, struck out on this defendant's motion, and regardless of the further

fact that its effect was expressly so qualified and limited by the court as to be in no way binding on this defendant, we submit that accepted at its face value it fails utterly of the purpose to which plaintiff attempts to put it, *i. e.*, to prove or permit an inference of negligence on the part of this defendant. The very most that can be said for it in this connection is that it is a statement that the trenches of this defendant were filled with water. Assuming that this was true, it cannot, by any stretch of the imagination, be said that this is proof of negligence, or evidence from which negligence may be inferred, on the part of this defendant; it is a mere statement; certainly there is nothing phenomenal or unusual about such an occurrence in the midst of a very heavy downpour of rain.

The plaintiff next quotes another portion of Mr. Drucker's testimony in this connection in which Mr. Drucker, after stating that he called up the Public Service (p. 80, ll. 30-32), was questioned and answered as follows (p. 80, l. 33, to p. 81, l. 8):

"Q What did you say to them? A I told them, 'Your trenches are filled with water, and Mr. Kosson is having some trouble down here and you had better come down and look after your own work.'

"Q Then did you do anything? A Sir?

"Q Did you do anything further? A I filled in the trench with my man, in front of No. 149.

"Q Whose trench? A The trench of the Public Service.

"Q And why did you do that? A To help Mr. Kosson, a good fellow, and to help prevent anything going down the cellar."

That no inference of negligence could possibly be drawn from the foregoing is so obvious as to render argument superfluous. It amounts to

nothing more than a statement by the witness as to his actions, *i. e.*, that he notified this defendant and then elected to fill in one of its trenches.

The next excerpt from the testimony of this witness set out in plaintiff's brief is as follows (p. 82, l. 38 to p. 83, l. 10):

“Q What was said by you and Mr. Hoar the next morning? A I said, ‘I called you, the Public Service on the telephone last night, but I did not see you. I left here at eleven o’clock,’ and Mr. Hoar said, ‘I came on the job right after 11,’ and he said, ‘What could I do?’ He said, ‘My trenches were all full of water.’ He said, ‘There was water all around, and what could I do?’”

Here again counsel for the plaintiff carefully avoids completely and properly informing this court of the circumstances and purposes for which this evidence was admitted. Reference to the testimony, however, discloses that when this question was first asked the attorney for this defendant objected and, after a rather lengthy colloquy between the court and counsel, it was permitted *only* for the purpose of discrediting Mr. Hoar (p. 81, l. 15 to p. 82, l. 35) the court saying specifically in this connection (p. 82, ll. 29 to 31); “Because Mr. Hoar denies it and it is to discredit Mr. Hoar and only for that purpose.”

The effect of the testimony here referred to is, therefore, by the court's ruling *expressly limited to one purpose, i. e., to discredit the witness Hoar*, and is not in any sense evidence against or binding upon this defendant. Were this not so, however, the most favorable inference that could be drawn from it is that this defendant's representative allegedly said that his trenches were filled with water. At best this is merely a statement of a condition. We repeat

that there was nothing unusual in open trenches, assuming that there were such, being filled with water after several hours of a very heavy down-pour. Certainly no inference of negligence on the part of this defendant can be drawn from such a circumstance. As a matter of fact it is merely corroborative of the other evidence in the case indicating the generally flooded condition of the street.

Next, the following is quoted from Mr. Drucker's testimony (p. 99, l. 26 to p. 100, l. 9):

"Q And none of them had gotten over there to block the gutter at all? A No, sir.

"Q No chance of that? A No.

"Q Well, I understand now that the Public Service just had a series of trenches from 141 to 153, inclusive; you say the Public Service had trenches dug from their main eight feet out in the street or whatever you say it was, six or eight feet up to what, to the buildings? A Those numbers that I have mentioned.

"Q 141, 143, 145, 147, 149, 151, 153, that is correct, isn't it? A Yes, sir.

"Q Now, the Public Service had those trenches open? Were they open from the main up to the buildings? A They were open from the main to about three feet or four feet beyond the sidewalk.

"Q And there were those series of trenches? A Yes, sir.

"Q At all those places? A Yes, sir.

"Q All of them wide open? A Absolutely.

"Q Absolutely wide open? A Yes, sir."

Without going into further repetitious argument and detail we respectfully submit that here again are mere statements of conditions, not in themselves negligent or evidential of negligence, and from which no inference of negligence can be drawn.

Counsel for the plaintiff in his brief, at the bottom of page 14 and top of page 15, refers to another portion of this witness' testimony, *i. e.*, State of Case, page 100, lines 25 to 40, which without quoting it, he glibly summarizes in the following language:

“This witness testified that the trenches of the Public Service Electric and Gas Co. were open and exposed but it is undisputed that he called at the scene of the Kosson building on the night of the occurrence and filled in one of the trenches thereby stopping the rush of the water into the cellar (Case, p. 100, ll. 25 to 40).”

Examination of the testimony referred to discloses that there is absolutely no warrant whatever in it, not an iota of evidence in fact, to justify counsel for the plaintiff in concluding the extract from his brief quoted above with the statement that Drucker “filled in one of the trenches thereby stopping the rush of water into the cellar.” The testimony referred to is so conclusive of the point we are here making that we take the liberty of setting it out at length (p. 100, ll. 25-40):

“Q However, when the rain occurred, you were called first, were you not? A Yes, sir.

“Q And you went down there with a gang of men, didn't you? A I went.

“Q With some men? A Yes.

“Q What? A Yes.

“Q And when you got down there with some men you kindly filled in this one trench? A Yes, sir.

“Q What time did you get down there?

The Court: Let him finish.

The Witness: Sir?

The Court: He said you kindly filled in one trench, and you started to say something, and that is correct, is it?”

There is not a suggestion, here or anywhere else, that this alleged act, or any other, stopped the flow of water into plaintiff's cellar. If there is any doubt as to whether counsel for the plaintiff is attempting to mislead this court as to the facts in this case, in so far as this defendant is concerned at least, it would seem to be entirely dispelled by this final and unbridled liberty with the text of the testimony.

The foregoing disposes of *all* of the evidence relied upon by the plaintiff as against this defendant. We submit that none of it, nor the sum total of all of it, is sufficient to make out a *prima facie* case as to this defendant. We may add that the balance of the testimony may be scanned in vain for any such evidence.

As a matter of fact, examination of the other testimony conclusively demonstrates the reverse to be true, *i. e.*, affirmatively proves that this defendant exercised due care. The very, and the one and only, witness from whose testimony all of the above excerpts were taken, *i. e.*, Mr. Drucker, specifically so testified as follows (p. 89, ll. 28-36):

“Q Now, the Public Service trenches that you speak of, that you say were in front of all these places, they were dug in a workman-like manner, were they not? A Yes, sir.

“Q You would approve of the way they were dug? A Yes, sir.

“Q There was nothing about them that should have caused trouble under normal circumstances, was there? A No.”

This opinion of Mr. Drucker's is based upon an experience of thirty years in this kind of work (p. 102, ll. 32-33). The testimony of Mr. Hoar, this defendant's foreman on this work, is to the same effect. While he testified that this defendant had completed all work in front of plaintiff's

premises on the day before the first rainfall, and that all openings had been filled in which, because it was contradicted, we will not discuss further, he also testified that said work was done in a workmanlike manner (p. 45, l. 6 to p. 46, l. 6); that he inspected said work the day following the flood and found everything "O. K." (p. 49, l. 20, to p. 50, l. 20). There was no other evidence upon this subject.

In this connection it seems pertinent to call attention to the last sentence of that portion of plaintiff's brief that is devoted to this defendant, which reads as follows (plaintiff's brief top of p. 15):

"However, the testimony is very strong to the effect that although the digging was done in the proper way, the precautionary measures which usually follow the digging were not used by either one of the defendants."

There is not a scintilla of evidence to bear out this statement in so far as this defendant is concerned. On the contrary all of the direct evidence on this subject is, as above pointed out, that the work of this defendant was done in an approved and workmanlike manner. As a matter of fact no attempt was even made by the plaintiff to prove either a standard or a deviation therefrom as to this defendant. Just what counsel for the plaintiff meant by the last above quoted statement it is impossible to even conjecture as there was no evidence as to what, if any, "precautionary measures \* \* \* usually follow the digging" in so far as this defendant was concerned. In fact there was no evidence whatever on this subject as to this defendant.

There was, to be sure, some evidence as to this as to both the Union Building & Construction Company and the Passaic Consolidated

Water Company. We are not, of course, concerned with that and only mention it for the purpose of pointing out that counsel for the plaintiff has apparently overlooked the fact that there was absolutely no evidence whatever on this subject relating to this defendant.

We feel that discussion of the evidence relating to the other defendants is outside of the proper scope of this brief and will not, therefore, indulge in it. We do wish, however, to call special attention to one very important point as to which all witnesses are in complete agreement, *i. e.*, that the rainfall was an extraordinarily heavy one.

Mr. Hoar, who had been doing this kind of work for thirty-six years (p. 44, ll. 28-33), testified that the rainfall on the night of April 25th, 1929 was the "heaviest" he could remember or had ever seen (p. 21, ll. 14-16; p. 48, ll. 20-23); that there was so much water in the street that the curb was submerged and there was water on the sidewalk (p. 48, ll. 24-33).

Mr. Drucker, who had been engaged in this kind of work for thirty years (p. 102, ll. 32-33), described it as a "very heavy rain" and said the "water was coming from all directions around through there, all over" (p. 72, ll. 35-40); again, that it was "Raining very hard" and "It was an unusual rainfall" (p. 79, ll. 29-32). He further testified, when interrogated by the court, that as his men worked along, breaking the sidewalk, they encountered from time to time places beneath said sidewalk where the earth had sunk or settled, perhaps for a number of years, and, he added "*we do not know where the water went when it got under there.*" That in front of No. 153, *i. e.*, two doors north of plaintiff's premises, his men came upon a big, shallow hole under

the sidewalk which would have required six or seven wheelbarrow loads of earth to fill, that this was a "natural depression" or "settlement" with which neither the Public Service nor the Water Company, nor anyone, had anything to do (p. 86, l. 22, to p. 87, l. 36).

Even Mr. Kosson agreed with this. When first asked about it he fenced and said, "Well, I would not say it was the heaviest rain I ever seen." Immediately thereafter, however, he said, "It was a hard rain"; "it was a very heavy rainfall"; and admitted that it rained heavily for many hours (p. 126, l. 30 to p. 127, l. 8). Again, that "it was raining very hard. I saw that" (p. 127, ll. 28-30) and the curb was submerged (p. 143, ll. 15-16).

The above is all undisputed. Our point in setting it out is to call attention to the fact that under all of the evidence, at least so far as this defendant is concerned, the view taken by the trial judge, *i. e.*, that the damage was caused by a "torrential rain" was correct.

In the absence of any proof of negligence on the part of this defendant, and we submit there was none, we have only the physical conditions described by the testimony. Even if we take these alone, and omit entirely for the moment the question of whether there was negligence, the plaintiff is in no better position as to establishing a causal connection between the work allegedly done by this defendant and the entrance of water into the plaintiff's cellar.

For the purpose of this discussion we must, of course, take the physical conditions most favorable to the plaintiff's thesis. Assuming, without repeating, them to be as testified to with reference to the excavations which this defendant is

charged with having made, the evidence last quoted above leaves no doubt that there was an *unusually heavy* rainfall; that there were natural depressions beneath the sidewalk where the earth had settled or sunk; that it was impossible to determine where the water went after it got into them.

It may be argued, perhaps, that no water would have entered the plaintiff's cellar had the sidewalk surface not been broken in any way. May it not be argued with equal force, however, that no water would have entered the plaintiff's cellar, even though the sidewalk was broken, if the rainfall had been an ordinary, and not an extraordinary one? Again, the sidewalk having been broken, however, does not the undisputed evidence referred to above in regard to the natural depressions and settlements beneath the sidewalk, from whence it was impossible to tell where the water would run, make it at least as probable that the water coursed into plaintiff's cellar via them as via any excavation that this defendant is charged with having made?

So we see that, irrespective of the question of negligence, the evidence does not make a *prima facie* case even for the propositions that the breaking of the sidewalk or the alleged excavation, or both, proximately caused the water to enter plaintiff's cellar, and this is regardless of how said work was done. As pointed out above, however, there is no proof whatever that said work was done negligently, but on the contrary the only evidence upon this subject is that it was done in an approved and workmanlike manner.

For purposes of argument, however, let us arbitrarily draw an inference of negligence from

the evidence adduced relating to this defendant. By no stretch of the imagination could said inference conceivably be such as to weigh more heavily than the inference that this defendant was entirely free from negligence. In other words the evidence as a whole would, at the very least, be equally consistent with the non-existence as with the existence of negligence. In this situation the plaintiff would be in no better position than he is now in having failed to prove any negligence whatever against this defendant, as we maintain, for the law is well settled that in this situation, too, it should be non-suited.

To this effect is the case of *Hummer v. Lehigh Valley R. Co.*, 75 N. J. Law 703, in which our Court of Errors and Appeals, *in deciding that a non-suit should have been granted*, said (italics ours):

“Where the evidence is equally consistent with either view, with the existence or non-existence of negligence, *it is not competent to the judge to leave the matter to the jury.* The party who affirms negligence had altogether failed to establish it. That is a rule which ought never to be lost sight of.”

Another excellent case in point is that of *Stumpf v. D., L. & W. R. R. Co.*, 76 N. J. Law 153, in which the facts are stated in the opinion as follows:

“The plaintiff, George Stumpf, recovered a judgment in the Second District Court of Newark for personal injuries sustained by him by being struck on the head by a piece of coal while sailing a boat on the Passaic river, near the bridge of the defendant, the Delaware, Lackawanna and Western Railroad Company. It was alleged in the state of demand that the missile which struck the plaintiff was wilfully thrown upon him by the defendant’s employes, or that it was

permitted to fall upon him through their negligence.

“The proof, as disclosed by the agreed state of the case, was that the coal came from above while the plaintiff and his companions were about to pass beneath defendant’s bridge, and that it was either thrown or fell from the bridge, or from a coal car which was a part of a train of the defendant. Upon this proof the defendant moved for a non-suit, on the ground that ‘no negligence was proven nor any cause of action established by the plaintiff’s evidence,’ which motion was denied. The defendant offered no evidence, and a judgment was rendered for the plaintiff.”

The Supreme Court said (*italics ours*):

“We think the denial of the motion for a non-suit was erroneous.

“It will be observed that the only proof in the case is that the plaintiff was struck on the head by a piece of coal. Where it came from is not definitely shown. The testimony is that it came either from the bridge or from a car on the bridge. Whether it was thrown by some person with willful intent, as charged in the demand, or fell from the bridge or from a car through some negligence, as alternatively alleged, is left to speculation.

“As the defendant is not liable to respond in damages to the plaintiff for any willful injury inflicted by strangers, or by its employes acting outside of the scope of their duty, the only theory upon which the plaintiff was entitled to recover was that the piece of coal fell from the bridge or from a car through defendant’s negligence. No proof having been made of any defect, unusual condition, or of any situation involving negligence in the defendant’s bridge or car, the question narrows to this: Does proof that the plaintiff was struck upon the head by a piece of coal while traveling beneath the defendant’s bridge raise any pre-

sumption that the precipitation of the piece of coal resulted from any negligence of the defendant?

“It may be stated as a general principle that the burden rests on the plaintiff to prove that the defendant was negligent, and that such negligence was the proximate cause of the injury. In other words, negligence is not presumed, but must be proved. *The difficulty of proving the negligence charged does not affect the principle.* 6 Thomp. Negl., §7695.”

The court further said at page 158 (italics ours):

“We think the true rule is that where it appears that the injuries were occasioned by one of two causes, for one of which the defendant is responsible, but not for the other, the plaintiff must fail if the evidence does not show that the injury was the result of the former cause. *If under the testimony it is just as probable that it was caused by the one as the other, he cannot recover.*”

“In the case at bar no state of facts showing negligence, or from which it may be legitimately inferred, is established. The alternative is double, *i. e.*, the piece of coal came either from the bridge or from a car; it was either thrown or fell. As has been pointed out, if thrown, the defendant is not liable unless it was thrown by its servant in the course of duty.”

May we not paraphrase the language of the court and say that no proof having been made of any defect, unusual condition, or of any situation involving negligence in the work of this defendant, the question narrows to this: Does proof that water entered the plaintiff's cellar during an unusually heavy rainfall at a time when this defendant lawfully had open excavations in the street in front of, and adjacent to, plaintiff's premises, raise any presumption of a

causal connection between said excavations and the water in the plaintiff's cellar?

The case *sub judice* is stronger than the above cases, however, as in it there is no proof whatever that is consistent with negligence on the part of this defendant. We have simply cited them, may we say, in an excess of caution.

Counsel for the plaintiff in his brief has cited three cases on proximate cause, to wit, *Smith v. Public Service Corporation*, 78 N. J. Law 478; *Cox v. Penn. R. R.*, 76 N. J. Law 786; *DeMott v. Knowlton*, 100 N. J. Law 296 (plaintiff's brief, pp. 21 and 22). They are simply authority for the proposition that whether defendant's negligence was a proximate cause of plaintiff's injury is, as a rule, a question for the jury. It will be noted, however, that in this statement of the law negligence on the part of the defendant is assumed and the only question is whether the court shall say, as a matter of law, that said negligence was not the proximate cause of the injury. That is quite different from the case at bar where there is no evidence whatever of negligence.

As a matter of fact, however, the first of said cases, *i. e.*, *Smith v. Public Service Corporation*, *supra*, is one of the exceptions to said rule, and we are very glad to join with counsel for the plaintiff in citing it to this court. In it this court held that the negligence relied upon was not the proximate cause of the injury. We are in such hearty accord with that portion of the syllabus of the case quoted in plaintiff's brief that we take the liberty of setting it out, in part again:

“Whether the defendant's act or omission alleged to be negligence naturally and proximately caused the plaintiff's injuries, is, as a rule, a question for the jury. But if there

is no evidence connecting the defendant's alleged negligence with the plaintiff's injuries, or if it is obvious that the defendant's act or omission was not the natural and proximate cause thereof, the question is for the court."

In the instant case there was not only no evidence of negligence on the part of the defendant, but absolutely no evidence connecting this defendant in any way with the plaintiff's alleged damage.

To sum up, the evidence, in so far as this defendant is concerned, when viewed most favorably to the plaintiff merely describes the physical conditions that existed in front of, and in the vicinity of, plaintiff's premises. There is no proof whatever of anything that this defendant did, or omitted to do, that indicates negligence, or from which an inference of negligence can reasonably or legitimately be drawn. There is nothing to indicate any causal connection whatever, proximate or otherwise, between anything that this defendant did, or omitted to do, and the damage sustained by the plaintiff. There was no proof of the standard or most approved way in which this sort of work is done, or of any deviation therefrom on the part of this defendant. On the contrary, the only evidence on this subject was unqualifiedly to the effect that the work of this defendant was done in an approved and workmanlike manner. In short, the plaintiff has utterly failed to maintain the burden which the law casts upon it of proving negligence which, in a case of this kind, is not presumed but must be proved and, to quote from *Stumpf v. D., L. & W. R. R. Co., supra*, at page 154, "The difficulty of proving the negligence charged does not affect the principle." For the trial judge to have let this case go to the jury,

under the evidence as to this defendant, would have been to permit them to merely guess or speculate as to something as to which there was no proof.

We respectfully submit, therefore, that the trial judge did not err in granting this defendant's motion for a non-suit.

Respectfully submitted,

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