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Notice of Appeal.

PASSAIC COUNTY CIRCUIT COURT.

<p>JAMES CALLAN, Administrator <i>ad prosequendum</i> of James Callan, deceased, Plaintiff-Respondent,</p> <p style="text-align: center;">vs.</p> <p>CITY OF PASSAIC, Defendant-Appellant.</p>	}	Action- at-Law.	10
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To:

Dr. William B. Gourley, Attorney of Plaintiff.		20
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Sir:

Take Notice that the defendant, The City of Passaic, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause.

JOSEPH J. WEINBERGER, Counsel for the City of Passaic.		30
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Dated, October 25th, 1927.

Summons.

10 (L. S.) THE STATE OF NEW JERSEY To CITY OF
 PASSAIC: You Are Summoned to
 answer the annexed complaint of
 James Callan, administrator *ad*
prosequendum of James Callan, de-
 ceased, in an action at law in the
 Passaic Circuit Court. And Take
 Notice that unless you file your answer to said
 complaint with the Clerk of the said Passaic
 Circuit Court at Paterson within twenty days
 after service upon you of this writ and the an-
 nexed complaint the plaintiff may proceed in
 the suit and judgment may be entered against
 you.

20 WITNESS, Clifford L. Newman, Judge of the
 said Court at Paterson, this 19th day of
 February, Nineteen Hundred and Twenty-six.
 JOHN McCUTCHEON,
 Clerk.

WILLIAM B. GOURLEY,
 Attorney.

30

40

Judgment Record.

IN THE
 PASSAIC COUNTY CIRCUIT COURT.

JAMES CALLAN, Administrator
ad prosequendum of James
 Callan, deceased, 10
 vs.
 CITY OF PASSAIC. 30

COMPLAINT.

City of Passaic, the defendant in this cause 20
 was summoned to answer unto James Callan,
 Administrator *ad prosequendum* of James Cal-
 lan, deceased, the Plaintiff therein, in an action
 at law upon the following complaint:

Plaintiff, James Callan, administrator *ad*
prosequendum of this suit for the benefit of the
 next of kin of James Callan, deceased, of the
 City and County of Passaic and State of New
 Jersey, says: 30

1. Defendant, City of Passaic, is a municipal
 corporation of the State of New Jersey.

2. Defendant wrongfully and illegally con-
 structed before the grievances hereinafter men-
 tioned and has hitherto wrongfully and illegally
 maintained a catch basin for the reception of
 storm water at the curb line on the northerly
 side of Gregory Avenue, one of the public 40
 streets of the City of Passaic, with an aperture

Judgment Record

fourteen (14) inches high and twenty (20) inches wide for the entrance of surface water without any bar or guard across the said aperture to protect children from entering said catch basin. Said basin was constructed ten feet
10 deep, the bottom of which was five feet below the outlet to the sewer.

3. On July 29th, 1925, plaintiff's intestate, James Callan, who was seven (7) years of age while playing with other boys in the vicinity of said catch basin entered said catch basin through said aperture in an attempt to hide from his play fellows and fell into the water lodged therein, which water was a depth of five feet and was immediately drowned.
20

4. Said decedent left him surviving his father, James Callan, his mother, Teresa Callan, and the following brother and sisters, Frederick Callan, Bernadette Callan, and Lorraine Callan, who are his only next of kin and who have suffered pecuniary loss by reason of his death.

5. On August 26, 1925, administration *ad prosequendum* was granted by the Surrogate of Passaic County to the plaintiff to enable him to prosecute this claim against the defendant for the benefit of the next of kin of said James Callan and was accepted by him.
30

6. This action is commenced within two years after the death of said James Callan.

Plaintiff demands as damages, \$10,000.

40

WILLIAM B. GOURLEY,
Attorney of Plaintiff.

Judgment Record

MEMORANDUM.

NEWMAN, J.:

This is a motion to strike out the complaint in this case on the ground that it does not set forth a cause of action. The complaint provides that the "Defendant wrongfully and illegally constructed * * * and has hitherto wrongfully and illegally maintained a catch basin, etc.," by reason of which the plaintiff's intestate was killed.
10

The law in this state seems to be settled and has found its latest expression in *Garrison vs. Fort Lee*, 106 Atl. 381, to the effect that a municipality is exempt from an action for damages resulting merely from neglect in the performance of its duty, and the Court there said that, if that, and that only appeared, the case would call for the application of that rule, but the Court then adds:
20

"No doubt the jury might have so found the facts if they had seen fit, but it was also open to the jury to find from the evidence that the plaintiff's injury was the result of active wrongdoing in the construction and use of the sewer, and the rule is that the exemption of a municipal corporation from actions by individuals suffering special damage from its neglect to perform or its negligence in performing public duties, whereby a public wrong is done, for which an indictment will lie, does not extend to actions where the injury is the result of active wrongdoing chargeable to the corporation."
30
40

Judgment Record

The complaint attempts to charge no negligence, and, indeed, the pleader, conscious of this rule, has avoided any reference to any negligence on the part of the defendant. It may be that at the trial the evidence will show that the proximate cause of the injury was negligence on the part of the defendant instead of the wrongdoing by way of construction and maintenance alleged in the complaint, in which event it would doubtless become a court question, but for the present purposes the attention of the Court must be confined to the allegation in the complaint, and inasmuch as it charges an act of wrongdoing, for which a municipality is liable, the motion is denied with costs.

ANSWER.

The defendant, in answer to the complaint filed by the plaintiff in the above-entitled matter, says:

1. It denies each and every allegation therein contained.

FIRST SEPARATE DEFENSE.

1. The complaint does not state a cause of action against the defendant, the City of Passaic.

2. The defendant, by reason of its being a municipality, is exempt from liability for neglect to perform or in negligently performing its duties.

Judgment Record

3. There was no act of wrongdoing on the part of the defendant, the City of Passaic.

4. The damages complained of by the plaintiff, were the result of the negligence of the plaintiff's decedent.

FREDERICK S. RANZENHOFER,
Attorney of Defendant.

10

It is hereby stipulated and agreed that Joseph J. Weinberger, be and he is hereby substituted as counsel for the defendant, City of Passaic, in the above-entitled cause.

FREDERICK S. RANZENHOFER.
JOSEPH J. WEINBERGER.

Dated, May 26th, 1927.

20

RULE FOR JUDGMENT.

This action was tried before Judge Clifford L. Newman, with a jury, in the presence of the counsel of the respective parties, at the Passaic County Circuit Court, on October 3rd and 4th, A. D., 1927.

The cause having been heard and submitted to the jury, they returned their verdict as follows: One Thousand Dollars (\$1,000.00), in favor of the plaintiff.

Whereupon, it is adjudged that the plaintiff, James Callan, administrator *ad prosequendum* of James Callan, deceased, recover of the defendant, City of Passaic, the sum of One Thousand Dollars (\$1,000.00), and his costs, which are taxed at the sum of Seventy-five Dollars and Twenty cents (\$75.20), making in the whole the

30

40

Judgment Record

sum of One Thousand and Seventy-five Dollars and Twenty Cents (\$1,075.20).

Judgment entered and signed October 19th, A. D., 1927, at 11:55 A. M., Action No. 10307, Docket J., page 500.

10

JOHN McCUTCHEON,
Clerk.

State of New Jersey,
County of Passaic, ss:

I, John McCutcheon, Clerk of said County and Clerk of the County Courts thereof, Do Hereby Certify, that the foregoing is a transcript of the Judgment Record, *in re*: James Callan, Administrator *ad prosequendum* of James Callan, deceased, Plaintiff, vs. City of Passaic, Defendant, as the same is taken from and compared with the original entry thereof in Book "A-2" of Circuit Court Judgments, for said County and now remaining of record in my Office.

30

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Courts and County, at Paterson, this Twenty-eighth day of November, A. D., Nineteen Hundred and Twenty-seven.

JOHN McCUTCHEON,
Clerk.

By P. F. CUNNINGHAM,
Special Deputy Clerk.

40

Case.

PASSAIC CIRCUIT.

JAMES CALLAN, Administrator
ad prosequendum of James
Callan, deceased,
Plaintiff,
vs.
CITY OF PASSAIC,
Defendant.

At Law.

10

Paterson, N. J., October 3, 1927.

Before: Hon. Clifford L. Newman, Judge, and
a jury.

20

Appearances:

For the plaintiff: William B. Gourley, Esq.,
and Albert Comstock, Esq.

For the defendant: Joseph Weinberger, Esq.

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

Mr. Comstock: I offer in evidence the letters
of administration issued by the Surrogate of the
County of Passaic upon the Estate of James
Callan on August 26, 1925.

30

Mr. Weinberger: What is it, general admin-
istration?

Mr. Comstock: No administration *ad prose-
quendum*.

Paper marked Exhibit P1.

Mr. Comstock: I have some photographs of
this sewer. Do you wish to look at them?

40

Mr. Weinberger: When were they taken?

Plaintiff's Witness, Albert Denhart, Direct

Mr. Comstock: Taken within a week. September 23, this year.

Mr. Weinberger: I certainly object to photographs taken in 1927. This happened in 1925.

Mr. Gourley: There has been no change. Call
10 the photographer.

ALBERT DENHART sworn.

Direct-examination by Mr. Comstock:

Q. Mr. Denhart, what is your business? A. Commercial photographer.

Q. Where? A. 107 Paulison Avenue, Passaic, New Jersey.

20 Q. Were you requested to take photographs of the sewer in Passaic? A. I was.

Q. What sewer? A. Why, the corner of Gregory Avenue and River Drive.

Q. Northwest corner, I believe? A. Northwest corner.

Q. I show you what purports to be a photograph of a catch basin or sewer, and ask you if you took that? A. I did.

30 Q. When? A. September 28, 1927.

Q. You finished it in the usual manner? A. I did.

Mr. Comstock: I offer it in evidence.

Mr. Weinberger: I object.

The Court: I suppose you will have to show by some testimony that there has not been any change. That should be proved before it is admissible.

40 Mr. Comstock: I will ask to have it marked for identification.

Plaintiff's Witness, Albert Denhart, Direct

Photograph marked P2 for identification.

Q. I show you another photograph and ask you what that shows. A. Shows the same sewer.

Q. When was that taken? A. Taken September 23, a few days previous. 10

Mr. Comstock: I ask that that be marked for identification.

Photograph marked P3 for identification.

Q. I show you another photograph and ask you what that shows. A. Picture of the same sewer taken on the same day, the 23rd. 20

Photograph marked P4 for identification.

Q. I show you P2 for identification and ask you where the camera was placed when that was taken? A. It was placed about 25 feet away from the sewer.

Q. And on P3 for identification, where was it placed? A. The same distance.

Q. But a different angle from the first? A. 30 Different angle. One was taken more to the left and the other more to the right.

Q. On P4 for identification where was the camera placed? A. That was a close up about 15 feet from the opening.

No cross-examination.

Plaintiff's Witness, Patrick Sheridan, Direct

PATRICK SHERIDAN sworn:

Direct-examination by Mr. Comstock:

Q. Mr. Sheridan, where do you live? A. Passaic.

10 Q. Live there in 1925? A. Yes, sir.

Q. Do you recall taking a boy out of a sewer in Passaic in that year? A. Yes, sir.

Q. What sewer? A. At the corner of River Road and Gregory Avenue.

Q. Do you remember the date? A. I do not, sir.

Q. Do you know the name of the boy? A. Callahan.

20 Q. Just tell us what you did there, Mr. Sheridan. A. Why, I was coming down Gregory Avenue about a quarter of eight; I come down past there every night; and I seen a bunch of boys up on a hill throwing stones at one another, and this little boy was on the sidewalk below the hill, and there is a building right alongside of there, and he run around the side of the building and started to throw the stones
30 over the top of the building, and I thought to myself—

Mr. Weinberger: I object.

The Court: No, not what you thought.

Q. Just what you saw. A. Well, he was throwing stones and I passed by and I went into the lunch room there at the corner of Gregory Avenue and River Road, and I asked the lunch
40 room keeper—

Mr. Weinberger: I object.

The Court: Never mind; just what you saw.

Plaintiff's Witness, Patrick Sheridan, Direct

Q. What did you see in reference to the boy and the sewer? You said something to the proprietor of the lunch room? A. I went in after a cup of coffee.

Q. Yes. After you had the coffee you came out? A. No, sir. 10

Q. Tell us what happened? A. And a little girl came into the lunch room and she said—

Mr. Weinberger: I object.

The Court: Not what she said.

Q. A little girl came into the lunch room and she said something to you? A. She said, "My brother"—

Mr. Weinberger: I object. 20

Q. Never mind what she said. But she said something? A. Yes, sir.

Q. And because of what she said what did you do? A. I went outside and I got a rake at the side of the building; I went to the sewer, and the lid was laying halfway off the sewer, and there was a crowd of people around, and I pushed the lid off the rest of the way, and I noticed bubbles coming up out of the sewer, and I took my coat off and I took my shirt off, and people said, "Don't go in there." 30

The Court: Do not tell what was said, just what you saw.

Mr. Gourley: What you did and saw.

A. I reached down into the sewer with this rake. I feel the boy and I just get him up a little bit and the fellows that was laying on my legs left me go. 40

Plaintiff's Witness, Patrick Sheridan, Direct

Q. Why were they laying on your legs? A. To hold me.

Q. Were you reaching down? A. Yes.

Q. How long was the rake, do you know? A. About five feet six.

10 Q. Did you have to reach down any distance to touch the body? A. Yes, sir.

Q. How far do you think? A. Well, as far as my body would bend and the length of my arm and the length of the rake.

Q. Then you felt the body? A. Yes, sir.

20 Q. All right; go right on and tell us what you did. A. When I felt the body I told them I had it, and they left me go. They pulled me up out of there. When they left go I left the body go and the rake go, and I reached and got the rake again, and they pulled me back up, and another fellow took the rake out of my hand and he reaches down and in a second the boy's body was up.

30 Q. Then what did you do? A. They laid the boy at the side of the garage. There is a garage there. Previous to that I had called the patrol wagon at the lunch room.

Q. Did the patrol wagon arrive? A. No, sir.

Q. Well, what did happen? A. There was a man came along in a car, and we picked the boy up and rushed him into the automobile and brought him to St. Mary's Hospital in Passaic.

Q. Did the boy appear to be dead or alive at that time? A. Dead.

Q. Did you go to the hospital? A. Yes, sir.

40 Q. Did you come back afterwards to this sewer? A. Yes, sir.

Plaintiff's Witness, Patrick Sheridan, Direct

Q. Well, how long afterwards was it you came back? A. One hour.

Q. Who did you see there at that time? A. Officer Farrell.

Q. What was he doing? A. Taking measurements. 10

Q. Measurements of what? A. The sewer.

Q. The depth of it? A. The depth.

Q. The opening also? A. Yes.

Q. Can you tell us how wide the opening is? A. Well, at that time I remember he said—

Mr. Weinberger: I object.

A. —twelve feet six—

Mr. Weinberger: I object to what he said. 20

A. —twelve feet six—

The Court: No, not what he said.

Q. You saw him measure it? A. Twelve by twenty-four.

Q. Did he measure the depth of it? A. Twelve by six from the top of the sewer there. 30

Q. Twelve what? A. Twelve by six. Twelve feet six.

Q. That is the depth? A. Yes, sir.

Q. Did he make a memorandum of those figures? A. Yes, sir.

Q. And he took that with him, I suppose? The officer took the memorandum with him? A. Yes, sir.

Q. Can you tell us how much of that depth was water and how much was above the surface of the water? A. A rake and a half from the 40

Plaintiff's Witness, Patrick Sheridan, Direct

bottom to the top of the iron manhole cover, nine feet.

Q. Nine feet from the top of the surface of the water to the manhole? A. From the bottom to the level of the water.

10 Q. Nine feet of water? A. Yes.

Q. I show you exhibit for identification P3 and ask you if that is the sewer in question. A. That is the side opening, sir.

Q. That is the side opening of the same sewer? A. Yes; there is two openings.

Q. Was it in the same condition then as it appears in this photograph? A. Yes.

20 Mr. Comstock: I offer this in evidence. Photograph marked Exhibit P3.

Q. Now, I show you another photograph that purports to be the same sewer, marked P2 for identification. A. That is the opening he was drowned in.

Q. That is the sewer in question? A. Yes, sir.

30 Q. Was it the same then as appears in that photograph? A. Yes, sir.

Mr. Comstock: I offer that in evidence. Photograph marked Exhibit P2.

Q. I show you P4 for identification and ask you if that is the same sewer.

Mr. Weinberger: I object to that photograph, because the photograph shows it is a distortion of the photograph.

40 The Court: Let us see what the witness says.

Plaintiff's Witness, Patrick Sheridan, Cross

A. Yes, that is the same sewer.

Q. Was it the same then as appears in that photograph? A. Yes, sir.

Mr. Comstock: I offer that.

Mr. Weinberger: I object to this photograph being offered in evidence on the ground that this witness did not say he examined the side of the sewer or knew anything about it. 10

The Court: You may examine him if you want to.

Mr. Weinberger: I do not object to the first two photographs, but I do object to the third. 20

CROSS-EXAMINATION by Mr. Weinberger:

Q. Did you measure the height of this crevice underneath the sidewalk? A. I did not.

Q. Did you go down there through that way or did you go in through the top where the manhole is on the sidewalk? A. Through the manhole at the top.

Q. You could not get in through the side, could you? A. Certainly. 30

Q. You could? A. Certainly.

Q. How tall are you? A. Five feet seven and three-quarters inches.

Q. How high do you say this opening was on the side? A. Twelve by twenty-four.

Q. What do you mean? Twelve feet? A. Twelve inches by twenty-four inches.

Q. You could get through a place twelve inches by twenty-four; is that what I understand? A. Yes. 40

Plaintiff's Witness, Patrick Sheridan, Re-direct

Q. And that is how high it was, twelve inches by twenty-four; is that right? A. Twelve inches this way and twenty-four this way.

Q. Twenty-four inches in width, one foot high, and less than two feet wide, and you could
10 creep through? A. I could, sir.

Q. You weigh how much? A. 138 pounds.

Q. You are five feet six inches tall? A. Five feet seven and three-quarters.

Mr. Weinberger: Now I object to it on the ground that this photograph evidently shows a condition which does not appear existed.

The Court: He says it was the same as
20 that photograph. Let us see the one in question.

Mr. Weinberger: This is the one.

Mr. Gourley: Nobody suggests it is not accurate except counsel. The photographer says he took it fifteen feet away.

The Court: It is admissible so far. Whether it is true or not is for you to argue on cross-examination.

Mr. Weinberger: May I have my objection noted?
30

The Court: You may.

Photograph marked Exhibit P4.

RE-DIRECT EXAMINATION by Mr. Comstock:

Q. You did not see this child crawl in through
40 the top of the manhole, did you? When you got there the child was already in? Am

Plaintiff's Witness, Charles A. Farrell, Direct

I right or wrong? A. The child was already in the sewer.

Q. Yes. The first thing you knew about this was when a girl came in and told you something, as the result of which you ran out to the place where the child was already in the sewer;
10 is that correct? A. Yes.

Q. You don't know who moved, of the crowd around this place where the child was in the sewer, this top manhole, do you? A. I do, sir.

Q. What? A. I do.

Q. Who did? A. Craft.

Q. Who? A. Craft, the landscape artist.

Q. This was after the child was already in that he started to move it; is that right? A.
20 Yes, sir.

Q. You live in Passaic? A. Yes, sir.

Q. How long? A. Thirty-three years.

Q. You have had occasion to go by there very often, this particular sewer? A. Every night for fifteen years.

Q. And the water has this method of getting into the river through this storm sewer; is that correct? A. I don't know, sir.
30

Q. You never noticed that? A. No, sir.

Q. That is all.

CHARLES A. FARRELL, sworn.

Direct-examination by Mr. Comstock:

Q. Mr. Farrell, you are a police officer of the
40 City of Passaic? A. I am.

Q. Have been how long? A. Nineteen years.

Plaintiff's Witness, Charles A. Farrell, Direct

Q. Are you familiar with this sewer at the corner of Gregory Avenue and Main Avenue, spoken of here? A. I am, yes.

Q. Were you there the day the boy got drowned? A. Yes, July 29.

10 Q. What time did you get there? A. I think somewhere around eight o'clock.

Q. Have you any notes? A. No; I haven't any notes with me, but I have—

Q. What did you find when you got there? A. We received a call at headquarters that there was a little boy fell in the manhole at the corner of Gregory Avenue—

20 Mr. Weinberger: I object and move to strike it out.

A. We got a call for the ambulance at the corner of Gregory Avenue and River Drive, and I arrived there; the crowd there had taken the child to the hospital.

Q. What did you do then? A. I went on to the hospital.

Q. See the boy there? A. Yes, he was there.

30 Q. Did you come back then to the sewer? A. I started back to the scene of the accident and met the child's father a couple of doors from the hospital, and brought him back with me and went to the house. Then I went on down to the accident after.

40 Q. What did you do when you went back to the scene of the accident? A. Why, we tried to determine how deep the water was and how deep the hole was.

Q. How did you try to determine that? A. Well, with a rake, rake handle.

Plaintiff's Witness, Charles A. Farrell, Direct

Q. Could you touch bottom? A. Yes.

Q. How deep was it? A. My figures—my report shows nine feet deep and five feet of water. That would be nine feet deep from the manhole top to the sediment in the bottom of the pit. How much was in there I don't know. 10

Q. How much water? A. Five feet of water, about. Approximately five feet of water.

Q. Did you notice where the outlet of the basin was located? A. Yes. The outlet?

Q. Yes. A. No, I did not, not the outlet.

Q. How near the surface of the water was the outlet pipe, did you notice? A. I do not recall seeing the outlet pipe or taking notice to it. 20

Q. Now, did you measure the opening? A. It seems to me I did; it is around—but I couldn't testify positively on it, so of course—

Q. Have you got any memorandum of the fact? A. No, I have not.

Q. Don't you recall whether or not you made measurements of that opening? A. I remember measuring it. I had no rule to measure by, so for that reason I could not measure it, you see. 30

Q. Did you use anything else except the rule? A. Why, it seems to me I measured off with my feet. I think it was about two feet wide by about a foot high. That is an approximate measurement. That is as near as I could get without a ruler.

Q. I show you Exhibit P3 and ask you if that is the sewer in question? A. Yes. 40

Q. Which opening does that show? A. That

Plaintiff's Witness, Charles A. Farrell, Cross

shows the opening on the Gregory Avenue side, that is, looking toward the north that will show.

Q. Did you measure that opening? A. No, I did not.

10 Q. You only measured the opening that the boy— A. On the side. That would appear in here.

Q. Does that show the opening you measured? A. That is the one.

Q. Does this also show it? A. Yes, that is the one.

The Court: That and this on the record does not mean anything.

20 Q. Exhibit P2 shows the opening on the side? A. Yes.

Q. And Exhibit P4 shows likewise the same opening? A. Yes, sir.

CROSS-EXAMINATION by Mr. Weinberger:

30 Q. You don't know how this child crawled into this sewer, do you, whether through the top or through the side? A. I don't know.

Q. You know nothing at all about how the child got in there that was drowned? A. Only from what I heard around there.

Q. You have been a police officer in the City of Passaic for a number of years? A. Yes.

Q. As such you have had occasion to pass this very place in question numerous times? A. Oh, yes.

40 Q. You always found the same sewer there, Mr. Farrell? A. I never took particular notice

Plaintiff's Witness, Peter Yaros, Direct

of the sewer, except it is a sewer that has been there.

Q. It is a tremendous grade downhill from Gregory Avenue going towards the City Hall?

A. Oh, from the City Hall down towards this point.

By the Court:

Q. How long has that sewer been there, to your knowledge? A. I am sure I could not testify intelligently on that. I have heard it said—

Q. No. As far as you know, how long has it been there? A. Well, it has been there several years. They repaired that road there about five or six years ago, and I know it was there at that time. Now, how much longer I cannot say. I couldn't testify.

PETER YAROS, called.

By the Court:

Q. How old are you? A. Eleven.

Q. Do you go to Sunday school? A. No; I go to Wallington School Number 1.

Q. Ever been to church or Sunday school of any kind? A. No.

Q. Do you know what it is to tell a lie? A. Yes.

Q. Do you know what happens to boys if they tell a lie? A. Yes.

Q. What happens to them? A. They go to jail.

Plaintiff's Witness, Peter Yaros, Direct

Q. Well, you don't want to go to jail? A. No.

The Court: All right, swear him.
(Witness sworn.)

10 *Direct-examination by Mr. Comstock:*

Q. Peter, where do you live? A. Wallington, 99 Dowlington Avenue, Wallington.

Q. Did you know James Callan? A. Yes.

Q. How long had you known him? A. I knew him when he moved up by 19 High Street.

Q. Did you play with him? A. Yes, sir.

Q. Did he have any brothers or sisters? A. Yes.

20 Q. How many brothers did he have? A. He had one that time.

Q. Any sisters? A. Had one sister.

Q. One sister that you knew? A. Yes, sir.

Q. Did you go to school with him? A. No. He went to a different school. I don't know where he went to. I went to No. 4 and No. 3. I lived at 49 Gregory Avenue at that time.

30 Q. Do you remember the day he fell in the sewer?

Mr. Weinberger: I object to that as leading and putting words in the witness's mouth.

The Court: He was in.

Mr. Weinberger: He says he fell in.

Q. Do you remember that day? A. Yes. I don't know the date of the day.

40 Q. Remember when it happened? A. Yes.

Q. Had you been playing with him that day? A. Yes.

Plaintiff's Witness, Peter Yaros, Direct

Q. Who else was playing? A. Me and James and Freddie and Michael.

Q. Freddie who? A. Freddie Callan. Michael is my brother.

Q. What happened to James? A. James came from the house, he want to go by Freddie to play with him, so Freddie told him to go home, not to play with him, so when Freddie was chasing him, Freddie got behind a building over there, by the machinery building, something like that, near the botom of Gregory Avenue, so he want to hide away, so he went down to the sewer to hide away from Freddie, and he went in there. He went in feet first; he crawled in, and when he was going in he bumped his head. 10

Q. He got in the gutter first? A. He got into the wide opening over there. 20

Q. How did he go in, feet or head first? A. Feet first.

Q. How far away were you? A. I was about twelve feet.

Q. I believe you said that he got down in the gutter to hide away from his brother? A. Yes, down into the sewer. 30

Q. When that happened what did you do? A. I ran and called Freddie.

Q. That is his brother? A. Yes.

Q. Then what did you do? A. Then he ran over there and my brother and Freddie didn't believe he was in, and my brother seen bubbles, so he says, "He is in"; so Freddie ran right to the restaurant and got a guy over there, and he got a rake. 40

Q. How did they get him out? A. He got

Plaintiff's Witness, Peter Yaros, Direct

him out by the rake. First he had him, but he let loose or something, because he didn't hold on good or something, and then they felt the body and then they grabbed him under his arms.

By the Court:

10 Q. Mr. Sheridan, the man who was on the stand, was the man that pulled him out? A. Yes, he pulled him out.

By Mr. Comstock:

Q. Now, when he got in this gutter to hide away from his brother, could you see his head above the curbstone? A. No; that was way under.

20 Q. The gutter is quite deep there, isn't it? A. Yes, it was over my head there.

Q. When he slipped down there could you see him? A. No, sir, I didn't see him.

By the Court:

Q. What were you playing, hide and seek? A. No; we wasn't playing hide and seek.

30 Q. Were you playing to hide away? A. Freddie told him to go home. He didn't want to go home.

Q. He was hiding from Freddie? A. Yes, sir.

By Mr. Comstock:

Q. I show you a photograph, Exhibit P4. Do you recognize that as the place? A. Yes, that is the place.

40 Q. Where was he hiding? A. He went through this way (indicating).

Plaintiff's Witness, Peter Yaros, Cross

Q. He went through there, but where was he hiding? A. He was hiding in there (indicating).

Q. In here? A. No; in the sewer here.

Q. He fell in the sewer, you say? A. No; he didn't fell in. He crawled in. 10

Q. Could you see him over the top of the gutter here when he got here, not in the gutter? A. No; he got in—he ran quick and he got in feet first.

Q. His feet went in the hole first? A. Yes.

Q. Could you see him then? A. Yes, I seen him then when he was in the square hole, then he went right in when I was about twelve feet away. 20

Q. Head hit anywhere? A. Yes, this top here, right here. See, this top here. He went like this.

Q. The back of his head? A. No; right here.

Q. Back of his head hit the top? A. Yes.

Q. Then he disappeared? A. Yes.

CROSS-EXAMINATION by Mr. Weinberger:

Q. Let us see. Do you know how old Jimmy was? A. He was seven years old. 30

Q. How do you know? A. Because that is what his mother said, he was seven years old.

Q. When did his mother tell you that? A. That is when it was in the papers. They told it in the papers, and I read it in the papers, he was seven years old.

Q. Now, you say that Jimmy crawled in feet first? A. Yes, feet first. 40

Plaintiff's Witness, Peter Yaros, Cross

Q. Which way was his face turned, away from the sewer? Say, referring to Exhibit P2, which way was his face—toward the City Hall?
A. This way. Yes, up towards the City Hall.

10 Q. So he put his feet in first; laid down on his stomach; is that it? A. Just like this.

Q. He laid down on his stomach and put his face down on the street, toward the street, and put his feet into the hole, backwards, and then he started to crawl backwards; is that it? A. Yes.

Q. Then his head hit all of a sudden against the—

20 Mr. Gourley: I object. You take the stand yourself and tell your story.

Mr. Comstock: Let him tell how it happened.

The Court: Proceed.

(Question repeated by the stenographer.)

Q. —against the top of the—

30 Mr. Comstock: I object. Ask him where he struck.

The Court: It is cross-examination.

Q. See if I am right, Sonny. You say that he started to crawl with his stomach laying on the street, is that correct? A. Yes.

Q. What? A. Yes.

Q. And you say that he put his feet in first, into the sewer; is that correct? A. Yes.

40 Q. And then, you say, his head hit against something when he was crawling into the sewer. What did it hit against? A. Hit the top, you

Plaintiff's Witness, Peter Yaros, Cross

know, like this is the sewer, he hit against here.

Q. Now, I show you a picture marked exhibit—just step down here so the jury can see it, please—Exhibit P2, and ask you to point out to the jury what he hit his head against. A. 10
Right at the top here.

Q. Will you just mark a cross there where he hit his head against? A. (Witness complies.)

Q. All right. Now, you have indicated on this photograph, Exhibit P2, where he struck his head when he was climbing and crawling into the sewer, is that right? A. Yes.

Q. You are telling the truth, aren't you? A. 20
Yes.

Q. How many years did you live around that place? A. I lived about eight years.

Q. You go around that place very often, do you? A. Yes.

Q. How old are you now? A. Eleven.

Q. The water goes down into that sewer from the street, does it? A. Yes, sir.

Q. Lots of water comes down there? A. 30
Yes, it is swift.

Mr. Comstock: I object.

A. Because it was swift they made it so the water won't run out in the street.

Q. Oh, they made it so the water would not run into the street? A. Bigger. The hole was bigger there, so the water runs in the sewer.

Q. Otherwise the water would go on? A. On 40
the street.

Mr. Comstock: I object to the cross-examination of a child eleven years old in that manner.

Plaintiff's Witness, Fred Callan, Direct

Q. You say that this sewer hole was for the water to go down in the sewer? A. Yes, sir.

Q. And during the eight years that you lived around this place, this sewer was always the same way? A. Yes, sir.

10 Q. The water always went down nicely, did it? A. Yes.

Q. Did the water go slow or fast? A. Fast.

Mr. Comstock: I object.

The Court: I do not think it makes any difference.

20 Mr. Weinberger: The only reason I am showing it is to show the necessity for a sewer of that kind where there was so much water.

The Court: I do not think you can show necessity by a boy eleven years old.

Q. That is all, Sonny.

FRED CALLAN sworn.

30 *Direct-examination by Mr. Comstock:*

Q. Fred, you are the brother of James Callan? A. Yes.

Q. Were you with him the day he got drowned in this sewer? A. Yes, sir.

Q. What were you doing? A. I was in the City Hall Park at the time.

40 Q. What were you doing there, you and your brother, if anything? A. I wanted him to go home and he started to run, so I hid behind a building where they make machinery and I

Plaintiff's Witness, Fred Callan, Direct

waited for him to come back and he didn't; he was by the sign—there is signs there—so he stood there, so I thought I would get him to go, so I went back up on the hill in the park, and a little while after Peter came running to me and told me—

10

Mr. Weinberger: I object.

The Court: Do not tell what he said.

Q. Peter told you something? A. Yes.

Q. Peter is the last boy that was on the stand? A. Yes.

Q. After he told you this thing, what did you do? A. Well, I went and looked in the hole to see if there was any sign of my brother coming up, so I ran around the corner to a little restaurant and got a man by the name of Mr. Sheridan.

20

Q. The man who was on the stand here today? A. Yes, sir.

Q. And he came out? A. Yes, sir.

Q. What did he do? A. Got a rake and took the lid off the manhole.

Q. Did he take the lid off? A. Yes.

30

Q. Yes? A. So then some men held his feet while he had the rake and the whole length of his arm down, and he got my brother on it, and he slipped, my brother fell off the rake again, so they tried again and then they got him up and they took him to the side.

Q. They took him to the hospital? A. Yes.

Q. Yes? A. A car came and they brought him to the hospital.

40

Plaintiff's Witness, Fred Callan, Cross

Q. Did your brother go to school? A. Yes, sir.

Q. What class was he in? A. First grade.

By the Court:

10 Q. How old was he when he was killed? A. Seven.

By Mr. Comstock:

Q. How long had he been going to school? A. This was his first year.

CROSS-EXAMINATION by Mr. Weinberger:

20 Q. What was this birthday? A. It was a week before he got drowned.

Q. So he was only seven years of age? A. About a week.

Q. What was his birthday? A. It was in July.

Q. July what? A. I don't know the date.

By the Court:

30 Q. What day did your brother die? A. It was about nine days after his birthday, but I don't know the date.

By Mr. Weinberger:

Q. You did not see your brother crawl into this place, you were up in City Hall Park? A. No, sir.

40 Q. That was several blocks away? A. I wasn't by City Hall Park, but I was in Armory Park.

Plaintiff's Witness, William Boyle, Direct

Q. That is several blocks away? A. It is only one block.

Q. You did not see it? A. No, I did not witness it.

Q. You lived on Gregory Avenue for a long time? A. I live on High Street. 10

Q. How far is that from Gregory? A. About a block and a half. It is just up from Gregory.

Q. You have lived there how many years before this happened to your little brother? A. About two years.

Adjourned to October 4, 1927, 10 A. M.

20

Paterson, N. J., October 4, 1927, 10 A. M.

WILLIAM BOYLE sworn.

Direct-examination by Mr. Comstock:

Q. Mr. Boyle, did you examine this sewer? A. I did.

Q. When? A. Last night and one night 30 about ten days ago.

Q. Did you make any measurements of the openings? A. I did.

Q. Will you give us those measurements? A. I will.

Mr. Weinberger: Just a minute, now. I object on the ground that I cannot see the materiality of the measurements of the sewer some two years after an al- 40 leged accident.

Plaintiff's Witness, William Boyle, Direct

Mr. Comstock: It is to show whether the measurements agree with the measurements testified to by Mr. Sheridan yesterday.

The Court: That is all right.

10 Mr. Weinberger: If that is the purpose, to show they agree—

Mr. Comstock: How nearly they agree.

Mr. Weinberger: I think it is incumbent on them to show it is in the same state.

The Court: If it is the same distance, it will show.

20 Mr. Weinberger: Your Honor note an exception?

Q. Will you give us the measurements? A. The aperture in question, that is, the side aperture, the outside was twelve by twenty-three, inside was twelve by twenty-one inches.

Q. What is the size of the cover? Have you that? A. You mean the manhole?

Q. No, the granite? A. The granite block itself?

30 Q. The cover. A. That is forty-four inches by sixty.

Q. Did you examine the inside of the catch basin? A. I did.

Q. How? A. I removed the manhole and got down in the sewer.

Q. How deep is it now?

40 Mr. Weinberger: I object to that, if your Honor please. What difference does it make?

Plaintiff's Witness, William Boyle, Direct

Q. How deep is the sewer?

The Court: You mean the water or the structure?

Mr. Comstock: There is no water in it now, as a matter of fact.

The Court: I will permit the question. 10

Mr. Weinberger: I ask an exception.

Q. Now, how deep is the sewer? A. The bottom of the sewer now is twenty-one inches.

Q. The catch basin? A. Twenty-one inches below the bottom of the aperture in question.

Q. What is the bottom composed of? A. Hard—

The Court: Now, Mr. Comstock, are you going to show it was the same as at the time of the accident? 20

Mr. Comstock: I am going to show that since this accident it has been filled up, the catch basin itself has been filled up, and instead of being nine or ten feet deep in depth, the depth is just as he testified.

Mr. Weinberger: He is talking about the inside of the sewer and the depth of the water. 30

Mr. Gourley: He is speaking about the bottom of the catch basin.

The Court: It is not proper to show it has been changed since the accident occurred, is it?

Mr. Gourley: There are two points to the question, sir, one is the opening and the depth of it, and the City themselves have tried to correct that thing. 40

Plaintiff's Witness, William Boyle, Direct

Mr. Weinberger: If your Honor please, the hole is the same hole, to let the water go down there. What the City did was, they do not permit water to be inside in the place; they filled that up.

10 Mr. Gourley: You admit you did that. That is all we want.

The Court: It does not seem to me it is proper to show what changes were made in this case.

Mr. Comstock: At the time of the accident there was five feet of water beyond the catch basin at the time of the accident. Now, it is dry and it is filled up.

20 The Court: What difference does it make?

Mr. Gourley: That shows the City realized their wrongdoing.

The Court: The Courts say that is not competent.

Mr. Weinberger: I ask that all the testimony be stricken out.

The Court: There is no testimony in.

30 Mr. Weinberger: I objected to his changing the depth and your Honor permitted him to testify.

The Court: I have not ruled on the question of depth.

Q. You say you stood in the sewer? A. I did.

Q. Did you see where the overflow pipe is?

40 A. Yes, sir.

Q. Where is that located? A. It is opposite the aperture in question.

Plaintiff's Witness, William Boyle, Cross

Mr. Weinberger: I object to all this line of testimony; what he did, now, as being not evidential and immaterial and irrelevant.

The Court: I cannot deal except with this last testimony. 10

Mr. Weinberger: I object to the witness testifying to what he did last night.

The Court: Your objection is too late.

Q. Is there any water in the sewer?

Mr. Weinberger: I object. I do not think it makes any difference.

The Court: I do not think it makes any difference at this time. 20

Mr. Comstock: To show the difference between the condition then and as it has been changed since.

The Court: That is the same question you asked a while ago.

CROSS-EXAMINATION by Mr. Weinberger:

30 Q. You are a nephew of Doctor Gourley, aren't you? A. Yes.

Q. Studying law in his office? A. I am.

Q. You go down to examine sewers, do you? A. I have done all kinds of things.

Plaintiff's Witness, Harold J. Harder, Direct

HAROLD J. HARDER, sworn.

Direct-examination by Mr. Comstock:

Q. Mr. Harder, what is your profession? A. Civil engineer.

10 Q. Have been how long? A. About thirty years.

Q. You were a city engineer for Paterson for a good many years? A. Nearly twenty-five years.

Q. During the course of your official duties did you have anything to do with sewers and their construction? A. Yes, sir.

20 Q. A great deal, I suppose? A. Yes, with many sewers.

Q. Did you go to Passaic to examine this sewer in question? A. I did.

Q. Did you make the measurements of it? A. Yes, sir.

Q. Can you give us the measurements?

Mr. Weinberger: I object to it, unless the witness fixes a time.

30 Q. When was it, Mr. Harder? A. About half-past nine this morning.

Q. Now, will you give us the measurements?

Mr. Weinberger: I object to the witness testifying to the measurements of the sewer now.

The Court: Only to show they were the same as they were when Mr. Boyle testified.

40 Mr. Weinberger: I ask an exception.

Plaintiff's Witness, Harold J. Harder, Direct

A. I measured an opening on the side of an old receiving basin on Gregory Avenue—

Mr. Weinberger: I object to the witness characterizing as an "old receiving basin," it being hearsay.

The Court: I do not think that is proper. Basins do not get old like a piece of board. Proceed. 10

A. May I put it this way, then? A granite top receiving basin on Gregory Avenue near the River Drive. The front opening measures thirty-six inches by seven inches, and there is an additional opening on the side measuring twenty-three inches by eleven inches. 20

Q. What type of catch basin is that known as? A. It is a granite top receiving basin.

Q. Is it in general use? A. It was some years ago. None have been constructed in Paterson since 1900.

Q. 1900?

Mr. Weinberger: I object to the last answer and ask that it be stricken out, "None have been constructed in Paterson." 30

The Court: I will permit it to stand.

Mr. Weinberger: I ask an exception.

Q. Is it the usual method of making openings in this sewer? A. Are you speaking of the front or the side opening?

Q. Well, both? A. The front opening is usual. I have no knowledge of any side openings being made in basins of that type. 40

Plaintiff's Witness, Arthur Clegg, Direct

Q. Is there any in Paterson? A. No, there are none.

Q. In Passaic, that you know of? A. I cannot answer that, in Passaic.

No cross-examination.

10

ARTHUR CLEGG, sworn.

Direct-examination by Mr. Comstock:

Q. Mr. Clegg, where do you live? A. Paterson.

Q. Do you remember this accident that has been spoken of here? A. Yes, sir.

Q. Were you there at the time? A. At the time, yes, after the boy had been removed from the catch.

Q. You saw him? A. Yes.

Q. What did you do? A. Why, after they laid the body alongside of the building I suggested—

The Court: No, not what you said, just what you did.

The Witness: The body was laid alongside of the building. It was then put into my car, taken to the hospital, taken out of the car, delivered to the hospital, laid on the table and pronounced dead.

Mr. Comstock: That is all.

40

No cross-examination.

Plaintiff's Witness, James Callan, Direct

JAMES CALLAN, sworn.

Direct-examination by Mr. Comstock:

Q. Mr. Callan, are you the father of James, who was spoken of here today? A. Yes, sir.

Q. How old was he? A. Seven years and eight days. 10

Q. What was the date of his birthday? A. July the 21st, 1918.

Q. Do you recall the date of his death? A. Yes, sir.

Q. What day was that? A. July the 29th, 1925.

Q. It was just eight days after his birthday? A. Yes, sir. 20

Q. Did you see the accident, Mr. Callan? A. No, sir.

Q. What was the first you heard of it? A. My two girls came running up from the place. They had been down there and seen the man having his coat off go down in the sewer, and they came running, and I was working in the basement and I heard the girls say, "Come, come." 30

Mr. Weinberger: I object.

The Court: Just what you saw.

Q. Just what you saw and what you did. A. Well, I was called down to this—

Q. Keep your voice up. A. When the girls told me that—

The Court: Proceed.

Q. After they told you whatever they told you, what did you do? A. I ran towards Main 40

Plaintiff's Witness, James Callan, Direct

10 Avenue and I seen a car passing there with a horn continuously blowing, but I did not see anybody that I recognized in the car, and I continued on to where the crowd was at the corner of the street; Gregory Avenue and River Drive, and they told me that the child was taken to the hospital.

Q. What did you do then? A. I went back and I got—I didn't know which hospital he was taken to, and I got a lady to telephone and found out it was St. Mary's, and I ran from there to St. Mary's, and as I was about a hundred feet from St. Mary's Hospital the patrol wagon was pulling out of the yard and they would not let me go in. They took me back home.

By the Court:

Q. How old was your boy at the time of his death? A. Seven years and eight days.

Q. Just past seven? A. Yes.

By Mr. Comstock:

30 Q. How old are you, Mr. Callan? A. I am forty-three.

Q. Have you any other children? A. Yes, sir.

Q. How many?

The Court: At the time of the boy's death, how many children did you have?

The Witness: Three.

40 Q. Who are they? A. Freddie is the oldest.

Q. How old? A. Sixteen. Bernedette, a girl is fifteen and Lorraine is fourteen.

Plaintiff's Witness, James Callan, Direct

Q. Are they going to school? A. Yes, sir.

Q. What school does the eldest go to? A. Well, the eldest is a boy, Freddie; he goes to St. Nicholas, Parochial School.

By the Court:

10 Q. These ages of the children, are they the present ages? A. The present ages, yes.

By Mr. Comstock:

Q. Was James going to school at the time of his death? A. Yes, sir.

Q. What school was he attending? A. St. Nicholas' Parochial School.

20 Q. What grade was he in? A. He was in first grade, the first year, but he finished.

Q. When did he start going to school? A. He started going to school on September 11, 1924.

Q. Are your parents living? A. My father is dead; my mother is living.

Q. How old is she? A. Seventy-four.

30 Q. Do you know how old your wife is? A. My wife is forty-two.

Q. Are her parents living? A. Her father.

Q. How old is he? A. About seventy.

Q. How old was your mother when she died? A. My mother is not dead.

Q. How old was your father when he died? A. Seventy-two.

40 Q. What was the character of the boy James? Was he bright or intelligent or not? A. He was very smart, very bright. He got little gold stars and silver stars in school and he thought an awful lot about it.

Plaintiff's Witness, James Callan, Cross

Q. Did you take a picture of this sewer? A. Yes, I took a picture.

Q. I show you a picture and ask you if that is the picture that you took? A. Yes, sir.

Q. When was that taken? A. I took that the
10 Sunday after James was buried, the Sunday following the Wednesday he was drowned. I took the picture of that sewer.

Mr. Comstock: I offer this in evidence. Photograph marked Exhibit P5.

Q. You spoke of the boy getting gold stars in school? A. Yes.

Q. What does that indicate? A. Well, that
20 indicates he was smart in his class.

Q. Are these the marks (showing the witness a paper)? A. Yes, sir.

Q. Where did you get this? A. Well, he give it to my wife, and he told her to keep that for him.

Mr. Weinberger: I object to this.

The Court: Do not tell what he said.

Mr. Comstock: I offer this in evidence.

Mr. Weinberger: I object.

The Court: It does not seem to be ad-
30 missible.

CROSS-EXAMINATION by Mr. Weinberger:

Q. This happened in broad daylight? Am I right? A. Yes.

Q. What time of day? A. Eight o'clock in
40 the evening.

Q. I say, this happened in broad daylight? A. Well, it is broad daylight in July at eight o'clock.

Q. Daylight saving time? A. Yes.

Plaintiff's Witness, Theresa Callan, Direct

MRS. THERESA CALLAN, sworn.

Direct-examination by Mr. Comstock:

Q. Mrs. Callan, you are the mother of James, the boy who was drowned? A. Yes.

Q. On what day did he die? A. He died on
10 the 29th of July, 1925.

Q. What was the first you heard of the accident? A. I was in the kitchen and my daughter came in and told me James found a coat—

Mr. Weinberger: I object.

The Court: Do not tell what you were told. There is no dispute about his being dead, I suppose.

Q. You did not see the accident? A. I did not, no, sir.

Q. Did you go down and examine the sewer afterward? A. No, not afterwards. I went very late at night, maybe one o'clock or half past twelve, around that time.

Q. How old was James? A. Seven years and eight days.

Q. How long had he been going to school?
A. I guess a year. 30

Q. About a year? A. About a year.

Q. Did he do anything around the house to assist you? A. Yes; he used to go messages for me.

Q. Was he a bright boy or not? A. Yes, very smart boy.

Q. Well, what would he do that would indicate brightness? A. Well, if I gave him a bill,
40 five dollars or two dollars or sent him to the

Plaintiff's Witness, Theresa Callan, Direct

store, he would always bring my change right, and he would always put it in a paper for me and say, "Ain't I a good boy, Mamma?" That is all. Very good.

10 Q. Are your parents living? A. Only my father.

Q. How old is he? A. He is about seventy, I guess.

Q. Your mother is dead? A. Yes, sir.

Q. How old was she when she died? A. About sixty-five.

Q. Yes? A. I can't say for sure. I imagine so.

No cross-examination.

20 Mr. Comstock: I wish to put on the record, if your Honor please, the fact that it is admitted that this sewer was built and maintained by the City of Passaic. That is so, isn't it, Mr. Weinberger?

Mr. Weinberger: Yes, sir, lawfully built by the City of Passaic.

30 Mr. Comstock: I didn't say lawfully. I said built.

Mr. Weinberger: I won't stipulate unless counsel says it was lawfully built.

Mr. Comstock: Show it was lawfully built.

Mr. Gourley: Just say it is a Passaic sewer.

Mr. Weinberger: I said it was a Passaic sewer.

40 PLAINTIFF RESTS.

Defendant's Witness, Raymond G. Parke, Direct

Motion to Nonsuit.

Mr. Weinberger: I move for a nonsuit, if your Honor please, on the ground that the uncontradicted evidence in this case is that the decedent was guilty of contributory negligence; and, secondly, that the City of Passaic cannot be held responsible, there being no proof that the sewer was improperly or illegally constructed or maintained, or that the City committed any overt act which resulted in the death of the decedent. 10

The Court: I think it is a jury question, and I will deny the motion, and you may take your exception. 20

Mr. Weinberger: Your Honor note an exception?

The Court: Yes.

Defendant's Testimony.

RAYMOND G. PARKE, sworn. 30

Direct-examination by Mr. Weinberger:

Q. Mr. Parke, what is your business? A. I am assistant city engineer of the City of Passaic.

Q. How long have you been assistant city engineer of the City of Passaic? A. Why, about three years. 40

Q. Have you prepared a map showing the construction of and the measurements of this sewer? A. Yes, sir.

Defendant's Witness, Raymond G. Parke, Direct

Mr. Weinberger: I would like to offer this map in evidence.

Map marked Exhibit D1.

10 Q. Referring to Exhibit D1, will you explain this map in detail? What is the scale of the map, first? A. This map is scaled ten feet to one inch.

Q. This is River Drive here, running north and south; this is Gregory Avenue, running east and west; at the angle point on the north curb of Gregory Avenue, just west of River Drive, is a catch basin drawn in larger scale on this side. Where would the catch basin be over here? A. Right there.

20 The Court: Is that the catch basin you are talking about?

Mr. Weinberger: Yes, sir.

Q. You have indicated on the map by a little square box where the catch basin is? A. Yes.

Q. You have written the words "catch basin"? A. C. B. there.

30 Q. How wide is that catch basin? Point out on here. A. This catch basin is drawn to a larger scale here, and it is oriented the same as it is there. That distance across there is three feet seven inches.

Q. Three feet seven from what angle? A. From that corner to that corner across there, and five feet wide.

40 Q. The width of that is five feet. So, it is five feet this way? A. Yes, sir.

Q. Where is the gutter with reference to

Defendant's Witness, Raymond G. Parke, Direct

that? A. The gutter is right along this line here, the curb line.

Q. How high is the gutter at that point? A. This basin, the opening?

Q. Yes. A. That is eleven inches high by one foot ten inches wide. 10

Q. Now, what covers this catch basin; what is on top of it? A. A granite head.

Q. Is that a removable or metallic substance? A. No; it has a cover. It has an opening about two feet in diameter with an iron cover.

Q. So that the entire sidewalk, if there was a continuation of the sidewalk, was granite head? A. Yes, covered over with an iron cover. 20

Q. Covered with an iron cover in the center? A. Yes.

Q. That is about two feet wide? A. Yes.

By the Court:

Q. Let me understand these dimensions. Three feet seven by five feet refers to what dimension? A. That is the granite head.

Q. Eleven inches by one foot? A. That is 30 the west opening.

Q. Which is the dimension as shown by these pictures?

Mr. Weinberger: I am going to ask him.

By Mr. Weinberger:

Q. Now, Mr. Parke, referring to Exhibit P3, how wide is that opening into the sewer? A. 40 That is the south opening. That is three feet wide by seven inches high.

Defendant's Witness, Raymond G. Parke, Direct

Q. Seven inches in height. How wide and how high is the opening on the west side? A. That is the west opening, and that is eleven inches high by one foot ten inches wide.

10 Q. So that it is eleven inches in height by one foot ten inches in width? A. That is it.

Q. This large rock you call the granite head covering the hole; is that right? A. Yes, sir.

Q. This is a metallic cover? A. Yes.

Q. Do you know whether there is a grade on that street there or not? A. Yes, there is a four per cent grade runs on Gregory Avenue.

20 Q. Is that a very steep grade? A. It is quite steep.

Q. What is the purpose of this sewer? A. That is to catch the water that comes down from Main Avenue and along the railroad, that rushes down Gregory Avenue and tends to cross this street, but this sewer catches it on that side.

30 Q. Do you know how long that has been in existence in Passaic? A. It has been there as long as I remember, and I went with the City seven years.

Q. Maintained the same way today? A. Yes.

Q. Has always been maintained the same way? A. Yes.

Q. That is a very busy street, is it? A. Why, yes.

40 Q. That is a perfectly graded street? A. Yes.

Defendant's Witness, Raymond G. Parke, Cross

CROSS-EXAMINATION by Mr. Comstock:

Q. Where in the City of Passaic is there another sewer constructed like that? A. Well, there is one similar to that on Lafayette Avenue on the southwest corner. 10

Q. With two openings in it? A. Beg pardon.

Q. With two openings in it? A. There is a side opening the same as that.

Q. And a front opening also? A. There is a front opening. It is the same kind of a head, but it has a side opening. It is a little larger than that, the side opening.

20 Q. How many did you say there are in Passaic? One other like this? A. Well, I haven't looked all around, but I know about one other right near there. Must have been built around the same time.

Q. Do you know whether there is any in the City of Paterson? A. I couldn't say.

30 Mr. Weinberger: I object to that as not proper and as irrelevant and immaterial.

The Court: He has already answered it.

Q. What are the dimensions of the openings in the other sewer which you speak of? A. On Lafayette Avenue?

Q. Yes. A. That is eighteen inches high and it is thirty-three inches wide.

40 Q. Are there two openings in it? A. Well, there is a side opening the same as that, and a granite head is covered over with flagstone.

Defendant's Witness, Raymond G. Parke, Cross

Q. With only one opening? A. There is one opening on the side.

Q. Is there any other opening? A. There must be an opening for River Drive.

10 Q. Is there? A. Yes, there is, I am pretty sure. I have never made a drawing of it, but just from memory I would say there is two openings.

Q. In order to create the opening in the sewer in question, how much was the road cut below the grade? A. The cover?

20 Q. Yes. How much was it cut down below the grade of the street? A. Well, I would say—I will go up and examine that for a second and see if I can. I would say it was cut down about six inches.

Q. What is the height of the curb along Gregory Avenue—not at the sewer? A. Why, I would say about eight inches.

Q. What is the curb at the mouth of the sewer? A. Well, that is eleven inches plus ten inches, that is twenty-one inches.

30 Q. And a normal curb is how much? A. Well, where there is no basin?

Q. Yes. A. About eight inches. Of course, it differs on different streets. They run eight inches, ten inches, nine inches.

Q. Do you know what it is here? A. No. I am assuming it is about eight inches.

Q. Well, then, the grade was lowered to accommodate this big opening?

40 Mr. Weinberger: I object to that as calling for a conclusion.

Q. How many inches?

Defendant's Witness, Raymond G. Parke, Cross

The Court: Do not lead him.

Mr. Gourley: He spoke about the grade of the street and the flowing of water into that.

A. The grading of the street?

10 Q. How much was it lowered at the mouth of this opening? A. Well, when a catch basin is built the cover is built about six inches lower than the grade.

Q. Six? A. About six.

20 Q. How deep is the sewer? A. The sewer is eight feet deep. That is four feet from the top to the run of the pipe, the outlet pipe, and four feet from the run of the outlet pipe to the bottom of the basin.

Q. When were these drawings made? A. Why, February 26, the date right on there, 1926, I think it is, over on the left-hand corner.

Q. Have you examined the sewer recently? A. No. I passed there, but I never examined it.

Q. Don't know how deep it is now?

30 Mr. Weinberger: I object. What difference does it make?

A. No.

The Court: I will permit it.

Mr. Weinberger: Exception.

A. No.

Q. That is all.

By the Court:

40 Q. Let me see the picture. I want to get this in my head if I can. The picture which

Defendant's Witness, James B. Greeley, Direct

is shown in Exhibit P4, that is what opening?
A. That is the west opening. That is eleven inches by one foot ten inches.

Q. And the opening which is shown in Exhibit P2, that is both openings? A. No—yes,
10 that is taken a little further away. It shows the west opening and the south opening.

Q. Which is the west opening, the one in front of the picture? A. Yes, that is the west opening. That is the south opening there.

Q. That is the south opening on Exhibit P3?
A. Yes.

Q. All right.

20

JAMES B. GREELEY, sworn.

Direct-examination by Mr. Weinberger:

Q. Mr. Greeley, what is your official occupation today? A. Inspector of buildings.

Q. You were formerly what in the City of Passaic? A. Street superintendent.

30 Q. How long had you been street superintendent? A. About four and a half years, I guess.

Q. Before that what did you do? A. Inspector of sewers.

Q. In the City of Passaic? A. Yes. I have been in the official employ of the City of Passaic about around fifteen or sixteen years.

Q. Was it or was it not part of your official duty to examine and take care of various sewers
40 in the City of Passaic? A. Up until 1922 I had charge of the sewers.

Q. From when? A. From 1911.

Defendant's Witness, James B. Greeley, Direct

Q. Do you know this sewer at the corner of Gregory Avenue and River Drive? A. Yes, sir.

Q. Where this young boy crawled in it and was drowned? A. Yes, sir.

Q. What have you to say with reference to
10 the manner of its construction?

Mr. Gourley: I object.

The Court: What do you mean by manner?

Q. How was that constructed? Just describe how it was constructed.

Mr. Gourley: I object. This man is not the engineer, and he is not a mason.
20 He is the superintendent of streets.

The Court: What do you mean, the dimensions or what?

Mr. Weinberger: How it was constructed, what materials.

The Court: If he knows he may tell.

Q. Just describe how it was constructed. First of all, are you a brick mason? A. Yes,
30 sir.

Q. Are you president of the Brick Masons' Union? A. Yes.

Q. How long have you been a brick mason? A. 1895.

Q. Go ahead, Mr. Greeley, tell us how it was composed? A. The sewer was constructed under a contract job.

Q. How many years ago? A. Why, to my
40 knowledge—of course, I am not referring to notes—1911.

Defendant's Witness, James B. Greeley, Direct

Q. Has been there since 1911? A. Yes.

Q. How many years before 1911 you don't know? A. I couldn't tell you.

Q. So that it is there for the last sixteen years; is that correct? A. Yes, sir.

10 Q. Was it kept in good shape?

Mr. Gourley: I object to that.

The Court: Sustain the objection.

Q. How was it kept? Just tell us?

Mr. Gourley: I object to how it was kept. That is not a question.

20 The Court: I don't know what it means. If you are trying to describe it, whether it was good, of course it is proper.

Mr. Weinberger: I am asking him how it was kept.

The Court: What do you mean?

Mr. Weinberger: Well, what was done to cleanse it out and what was done to protect this flow of water there.

30 The Court: You may tell us that.

Q. Tell us what you did? A. The only thing I done was maintain and clean out the sewer. When the catch basin was full I had the men clean it out.

Q. For a period of how many years did you do that? Have charge of that?

Mr. Gourley: I object to that as irrelevant and immaterial.

40 The Court: The plaintiff, as I understand, does not complain of the way it has been conducted.

Defendant's Witness, James B. Greeley, Direct

Q. Was this sewer constructed properly?

Mr. Gourley: I object.

The Court: Sustain the objection.

Mr. Weinberger: I ask an exception.

Q. Tell us how it was constructed? A. The 10 sewer was constructed with an opening in the gutter. I could not exactly—

Mr. Gourley: Is there any dispute about it?

The Court: Not that I know of.

Q. Just tell us how—

The Court: What do you mean by its 20 construction—how they undertook to build it, or are you denying the pictures which they say are correct, or what?

Mr. Weinberger: No, sir. They have charged in their complaint that we maintained this and that it was improperly constructed. I am showing from a practical man that it was properly constructed to relieve the situation of water.

The Court: But you are getting two 30 questions there. Now, you are getting into an expression of opinion. Is that what you want?

Mr. Weinberger: Not yet. I am asking how it was constructed, of what materials.

The Court: I will permit you to show what it was made of, the dimensions.

Mr. Gourley: What we contend is that 40 this was constructed as shown in this

Defendant's Witness, James B. Greeley, Direct

case, and that it was maintained in that manner.

The Court: He can show how it was constructed.

10 Mr. Weinberger: I am going to show it was properly constructed.

The Court: I don't know whether you will or not. That is what the jury is going to say. I do not think anybody can express an opinion.

20 Q. Mr. Greeley, will you tell us how that catch basin is constructed and of what materials? A. The catch basin was constructed of brick construction. It was a brick manhole or an opening on the side of the curb. I wouldn't say exactly whether, to be exact, it was twenty or twenty-one or twenty-two inches, and I wouldn't say in depth whether it was ten to twelve inches high, not exact.

Q. You don't know the accurate dimensions? A. I don't know accurate.

30 Q. Was the material of which it was constructed good material? A. Certainly. It was brick plastered with cement as the standard catch basin at that time was built.

Q. And as supervisor of sewers did you have occasion to make regular inspections of that particular sewer?

Mr. Gourley: There is no question about that in this case, and it should not be diverted into another channel.

40 Mr. Weinberger: I maintain that I have a perfect right to go into this and show from the time of its erection down to the

Defendant's Witness, James B. Greeley, Direct

present day it was maintained and kept in a proper manner and a legal manner.

The Court: The witness is not going to say it is the legal way to do it. That would be for the jury to say.

10 Q. Mr. Greeley, will you describe how many openings there were there? A. Why, there was an opening on the side going down the gutter, coming down towards the north side, and then there was an opening in the front.

20 Q. For what purpose were these openings made? A. Why, I suppose there was such a rush of water comes down there from Main Avenue and part of Gregory Avenue and from the railroad track, a big volume of water, I guess it was the engineer's idea that such a big opening was constructed.

Mr. Gourley: I object and ask that it be stricken out.

The Court: He is guessing what the engineers did.

30 Q. Have you ever seen quantities of water flowing there? A. Yes, sir.

Q. How often was that sewer during your term of office filled up from overflow of water? A. How often?

Q. Yes, and rubbish and things going through? A. I couldn't tell you exactly.

Q. How often did you empty it, cleanse it? A. Why, that was according to what storms we had.

40 Q. Well, approximately how often did you examine it? A. Why, about a couple of times a year.

*Defendant's Witness, James B. Greeley,
Re-direct*

Q. Now, during your entire years from 1911 to 1922 was that sewer kept and maintained by the City of Passaic in the condition in which it is at the present time?

10 Mr. Gourley: I object.

A. Up until 1922?

Q. Yes? A. I think there was some changes during the time when the road was reconstructed after my time, being out of the Sewer Department.

Q. Up to the time you left were there any changes? A. No.

20 *CROSS-EXAMINATION by Mr. Gourley:*

Q. That was before the accident? A. Yes, 1922.

Q. You had nothing to do from the time of the accident until the present time with the sewers? A. With the sewers, no, sir.

30 Q. You have spoken about the same type of head catch basins. The other catch basins you speak of have two openings, one on the side and one on the front? A. No, sir.

Q. Only in the front? A. Only in the front. There is a few in the city, probably here and there, where there are side openings.

RE-DIRECT EXAMINATION by Mr. Weinberger:

40 Q. How many are there in the city where there are side openings? A. I couldn't tell you that. Roughly, two or three; I do not think there is many of them.

Defendant's Witness, Herbert Bush, Direct

RE-CROSS EXAMINATION by Mr. Gourley:

Q. How many catch basins are in the City of Passaic? A. I guess up to the time I was there, in the neighborhood of three or four hundred. I couldn't exactly tell you. 10

HERBERT BUSH sworn.

Direct-examination by Mr. Weinberger:

Q. Mr. Bush, you are employed by the City of Passaic? A. I am.

Q. Have been for how many years? A. Four 20 and a half or five years.

Q. What are your duties? A. My duties are looking after the sewers, ashes and garbage.

Q. For the City of Passaic? A. Yes, sir.

Q. Do you know this sewer at the corner of River Drive and Gregory Avenue, Passaic? A. I do.

Q. You were in charge of sewers during these number of years since Mr. Greeley left off? 30 A. I was.

Q. With reference to the sewer at the corner of Gregory Avenue and River Drive, were there any changes made to that sewer since you have been in office? A. Been what?

Q. Any changes with reference to the openings for water to go into that sewer? A. Not to my knowledge.

Q. Well, you inspect the sewers how often? 40 A. Oh, maybe every month.

Defendant's Witness, Herbert Bush, Direct

Q. Do you go down and examine them there?
A. No.

Q. Your men clean around there? A. Yes,
the men go down.

10 Q. Well, now, Mr. Bush, during the five years
you have been sewer inspector—I show you Ex-
hibit P3 and ask you whether the openings are
shown on this photograph are the same for the
last five years? A. About the same thing.

Q. Is the headstone the same? A. Yes, the
headstone—everything is just about the same
for the last twenty years.

Q. Everything is just the same for the last
twenty years? A. Yes.

20 Q. Do you have charge of seeing that it is
properly taken care of? A. I do.

Q. Do you take proper charge of it? A. I
do.

Mr. Gourley: "Proper charge." I ask
that that be stricken out.

Q. Do you take charge of this thing? A. I
do.

30 Q. Send men there to inspect it how often?
A. Men go there maybe every month.

Q. Do you go there and see what they do? A.
I do.

Q. Is the sewer maintained and kept under
your supervision?

Mr. Gourley: I object.

A. Yes.

40 Mr. Gourley: I object. That is not in-
volved in this controversy.

Defendant's Witness, Herbert Bush, Direct

The Court: What are you trying to
show?

Mr. Weinberger: I am trying to show
that this sewer has been kept in the same
condition for twenty-five years by official
representatives of the City of Passaic. 10

The Court: You agree with the plain-
tiff. They claim so, too.

Mr. Weinberger: All right. There
have been no changes. That is all.

Q. Are there any other sewers constructed
in the same way throughout the city? A. We
have one that is a little bigger than this one,
that is a receiving place for the water, that is 20
on Lakewood Avenue, but it is a culvert, it is
not a sewer. It goes across the street.

Q. The whole street? A. Yes. It is a cul-
vert.

Q. Is there a tremendous grade for the flow
of water on Gregory Avenue? A. Yes.

The Court: What do you mean by tre-
mendous grade?

Q. Is there a grade there, and how steep is
that grade there, Mr. Bush, about? A. Oh, I
could not say. 30

Q. Where does it run to? A. It runs all the
way from Main Avenue—from Park Place, and
all the way over to Gregory Avenue, comes all
down Paulison Avenue, all comes down there;
High Street, all runs down to that one side of
that gutter.

Q. Is it necessary to have an opening on the
side? A. Yes, sir, and a little bit more if we 40

Defendant's Witness, Herbert Bush, Cross

could get it there. Once in a while it goes over the street and now.

Q. Such a tremendous flow of water? A. Yes.

CROSS-EXAMINATION by Mr. Gourley:

10

Q. Who filled up the sewer? A. Sir?

Q. With ashes. Who filled it up?

Mr. Weinberger: That is objected to on the ground it is not proper cross-examination.

Mr. Gourley: He said it was exactly the same all these years.

20

Mr. Weinberger: I am talking about the entrance to the sewer, not what is inside, down by the bottom.

Mr. Gourley: It is the condition, sir. He is trying to show it is exactly the same.

The Court: I have ruled on that question.

Q. You filled it up, didn't you?

30

Mr. Weinberger: I object.

Q. Didn't you fill it up? Didn't you fill it up?

Mr. Weinberger: I object.

Q. Didn't you fill it up?

40

Mr. Weinberger: I object to the question on the ground it is not proper cross-examination, and your Honor ruled on it.

Defendant's Witness, James E. Earl, Direct

The Court: I have admitted the question two or three times.

Mr. Weinberger: I ask an exception.

Mr. Gourley: We will withdraw the question. You withdraw the witness and I will withdraw the question.

10

JAMES E. EARL, sworn.

Direct-examination by Mr. Weinberger:

Q. Mr. Earl, you are the city engineer of the City of Passaic? A. Yes, sir.

Q. Have been employed by the City for how many years? A. About twelve years. 20

Q. Before you were city engineer what did you do? A. I was assistant city engineer.

Q. As such did you have charge of laying out and the installation of sewers in various parts of the city? A. I do.

Q. Are they all under your supervision in conjunction with the director of streets and public improvements? A. They are. 30

Q. By the way, how many sewers have been erected under your supervision since you have been city engineer, approximately? A. Well, sewers, or do you mean manholes and catch basins?

Q. Yes, sewers and catch basins? A. Oh, probably twenty miles of sewers and say fifty basins.

Q. Have you had occasion to look over this particular sewer in question at the corner of Gregory Avenue and River Drive? A. I have. 40

Defendant's Witness, James E. Earl, Direct

Q. How often during your twelve years as the city engineer have you had occasion to look over the various sewers of the city and the construction of the same? A. Well, from day to day.

10 Q. What have you to say with reference to the construction of this sewer?

Mr. Gourley: In what respect?

Q. What have you to say as to whether or not this sewer and catch basin at the corner of River Drive and Gregory Avenue was constructed properly with reference to receiving the flow of water in that neighborhood? A. Well, I would say it was constructed to meet the conditions as they exist.

Q. What conditions do you refer to, Mr. Earl? A. Well, there is a steep grade there and there is a large volume of water coming down.

Q. Is it necessary to have an opening on the side to receive the flow of water? A. It is in this particular case.

Q. Is the opening in conformity with the requirements? 30

Mr. Gourley: I object.

The Court: What requirements?

Q. To meet the situation from the flow of water?

The Court: I do not see how he can say that.

40 Q. Does that substantially take care of the flow of water, that opening? A. A heavy rain there, it takes all the water that comes down Gregory Avenue.

Defendant's Witness, James E. Earl, Cross

Q. What becomes of the water that it doesn't take? A. It flows on over and goes in some basins located on River Drive.

Q. Are there other sewers constructed throughout the city with two openings similarly constructed? A. There are two or three in different localities. 10

Q. Do you know how many years this particular sewer has been in existence and kept in the condition it is now? A. I can remember back about fifteen years.

CROSS-EXAMINATION by Mr. Gourley:

Q. What was the height of the curb in Gregory Avenue north of the sewer? A. At this particular point I did not make any measurements. 20

Q. Well, a gentleman as skillful as you surely could tell us about it? A. Why, our curbs vary in the city. We have curbs that vary from six to ten inches.

Q. Well, now, you know Gregory Avenue after being city engineer for so many years, surely? A. Yes, sir. 30

Q. Very nice avenue? A. Yes.

Q. What is the curb there? Somebody said it was eight inches; is that about right? A. I would say it was about eight inches.

Q. About eight inches; and the opening into this sewer and into this catch basin right at the entrance is how deep below the curb? A. Why, it is eleven-inch opening plus the top of the basin head, whatever that is; I have not measured it. 40

Defendant's Witness, James E. Earl, Cross

Q. Well, twenty-one inches, what do you say to that?

The Court: I think the engineer gave the width eleven inches by one foot ten inches.

10

A. That is inside.

Q. I mean the curb, the depth of the curb of the entrance into the hole? A. Would be about twenty inches or twenty-one inches.

Q. I notice on this photograph eight brick with a stone on top of that. That is about twenty or twenty-one inches, isn't it? A. Yes.

20 Q. Now, what is the opening in front of the catch basin, the usual front?

Mr. Weinberger: I object to counsel supplying the usual.

Q. Well, whatever it is, tell me. What is the measure of the other opening? A. I would have to look at the plan. I did not measure it out.

30 Q. Weren't you there this morning? A. I was there this morning, but I did not measure that opening on the base of the basin.

Q. There were other people there this morning; they say that is thirty-six by seven. Is that right, about—the usual opening? A. If it is on the plan I would say it is correct.

Q. Eh? A. If it is on the plan, I will say it is correct.

Q. Can you tell us here? A. Yes, sir.

40 Q. All right? A. (Witness examines plan.)

Mr. Weinberger: Which opening are you asking about?

Defendant's Witness, James E. Earl, Cross

Q. The opening other than the one where the boy went in? A. The south opening, seven by thirty-six inches.

Q. Now, I want you to tell this jury why an opening like that was put in the west side.

Mr. Weinberger: I object to counsel asking this witness to give his conclusions why an opening was put there.

10

The Court: If he knows he can tell; if he doesn't know he can say so.

Mr. Gourley: He is the city engineer of Passaic. If he does not know, where shall we go for information?

The Court: Proceed.

20

A. It was put in there to take the water.

Q. Well, would not the same opening that you have on the south side do for the west side? A. No, sir.

Q. Why not? A. Volume of water is too great, and there is an angle at that point, and water would shoot right by.

Q. Let me call your attention to the fact that you say it is thirty-six by seven? A. Yes.

30

Q. That is 252 square inches? A. Yes.

Q. The other one is twenty-three by eleven, which is 253 square inches? A. Yes, sir.

Q. Why would not that same opening have done? A. Because the volume of water it too great.

Q. You have the same square inches of opening; what difference does it make about the volume of water? A. You cannot get as much water through a small opening as you can through a larger opening.

40

Defendant's Witness, James E. Earl, Cross

Q. But this is the same size as the regular opening on the front? A. Well, it is built on an angle.

Q. Why was not that opening made, do you know, the same as the other side? A. I could not say why it was.

Q. Well, that is all.

By Mr. Weinberger:

Q. You do say that it was put there for the purpose of taking care of the flow of water; is that correct? A. I do.

By Mr. Gourley:

Q. But you did not put it there? A. No, sir.

Q. You spoke of some other outlets, some other catch basins. Can you give me where those other sewer openings are? A. There is one on Lafayette Avenue and River Drive.

Q. That is a culvert? A. An entrance to a sewer, in the side of the gutter, the same as this.

Q. What are the dimensions of that? A. That is eighteen by thirty-six.

Q. How was it covered over? A. It is covered over with a flagstone.

Q. Oh, covered over with flagging? What is the other one? A. There is one on Main Avenue and Aycrigg Avenue.

Q. How is this covered? A. I believe with a concrete slab, as I recollect.

Q. What about the other one? A. That is the two that I recall now. I believe there is three or four, but I don't just recall it.

Q. That is all?

BOTH SIDES REST.

Motion For Direction of Verdict.

Mr. Weinberger: If your Honor please, I move for a direction of verdict in favor of the defendant on the ground, first, the city cannot be held liable for any acts of omission; and, second, on the ground that the undisputed testimony in the case as the case now stands is that this boy was guilty of contributory negligence.

The Court: I think they are both jury questions.

Mr. Weinberger: Your Honor will allow an exception to each one?

The Court: Yes.

(Counsel for the respective parties summed up to the jury.)

During his summation Mr. Gourley made the following statement: "This is a public nuisance on which an indictment could lie."

Mr. Weinberger: I object. Mr. Gourley says that this is a public nuisance, and I maintain there is no evidence to support that.

The Court: The Court will interpret that.

Mr. Weinberger: I ask that that remark be stricken out.

The Court: The argument is proper.

Mr. Weinberger: May I have an exception to the remark that it is proper?

The Court: You may have it.

Court's Charge to the Jury.

NEWMAN, J.:

10 Members of the jury: This is an action brought by James Callan, administrator *ad prosequendum* of James Callan, deceased, against the City of Passaic. Mr. Callan is the administrator, bringing this suit in behalf of the next of kin and for their benefit.

20 There has been a motion in this case for a nonsuit, as you have heard, which, of course, must not influence you in the least as to what your verdict shall be, based upon the charge of the Court. You are the sole judges of the facts, and the law you must accept from the Court. If the Court is mistaken in his interpretation of the law that party who feels himself or itself aggrieved can have that error corrected by the Court above.

Neither must you take into consideration who the parties are to the case, whether they are rich or poor, but decide the case solely upon the evidence and the law, regardless of the result or against whom or for whom.

30 The case being against the City of Passaic, if any of you are residents of the City of Passaic the fact that you are a taxpayer of that city should not, and I doubt if it will, make any difference to you one way or the other. Your duty is to decide the case according to the evidence and the law which the Court shall give you for your guidance.

40 The plaintiff, on behalf of the next of kin, claims that he has suffered damages by the active wrong-doing of the defendant in that it has erected and caused to be maintained in its

Charge

public streets a catch basin which was what he has termed a death trap.

10 For the negligence of its officers the municipality is not liable to one who as a member of the public has thereby suffered special damages from such negligence, but that remedy is by indictment. But in this case the plaintiff does not rely on the negligence, but claims damages by reason of the active wrong-doing by the defendant as aforesaid, and thus is relying on such misconduct of the defendant. The law casts upon him the burden of proving the necessary elements of his case by a fair preponderance of the evidence.

20 You will notice that I have touched upon the question of negligence and wrong-doing. You must keep in mind in this case the distinction between negligence and wrong-doing, active wrong-doing, because the municipality, under our law, is not liable for the negligence of its officers. But the plaintiff in this case does not rely upon negligence, but relies upon what I have termed active wrong-doing. In other words, if the Board of Freeholders or those in charge of some municipality should permit a road or street or whatever they were in charge of to become out of repair through their negligence, there would be no action against the municipality; but if they went out in the street and through their active wrong-doing dug a hole in the street, whereby a person was injured, they would be liable. So you see by that illustration the difference between active wrong-doing and negligence.

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Charge

10 Negligence is the failure to do something which they should have done, or doing something which they should have done, in a negligent manner. For the plaintiff to recover in this case he must prove by a fair preponderance of the evidence the death of the boy and that the active wrong-doing by the defendant was the proximate cause of such death.

20 Fair preponderance of the evidence does not mean that he should have produced more witnesses than the defendant. Preponderance of the evidence means the greater weight of the evidence; that is, that you are satisfied by the greater weight of the evidence that certain facts essential to his recovery exist.

30 The negligence of the defendant, through its officers or agents, is not sufficient, but to recover he must show more than negligence, that is, failure to exercise reasonable care, and show that the presence of this catch basin was due to the active wrong-doing of the defendant or its agents. He must show that the defendant designedly built and constructed this catch basin—its building and maintenance does not seem to be disputed—and that its design and maintenance were such that its presence and existence constituted a public nuisance and was the proximate cause of the boy's death.

A public nuisance is something that affects the rights enjoyed by citizens; that is, the rights to which every citizen is entitled.

40 Proximate cause means the cause which necessarily sets the other causes in operation. It does not mean that the defendant must have acted maliciously or have had in its mind any

Charge

disastrous consequences of its act. These are not essential.

There does not seem to be much dispute as to the facts. The dispute is as to the inferences to be drawn from the evidence. That is solely your function. Wherever there are any disputed questions of fact, of course you are the sole judges of the facts and you are the sole judges of the inferences to be drawn from the facts as they have been presented. 10

It is alleged that this boy, about seven years and eight days old, while playing with his play-fellows, got into the catch basin and was drowned. The defendant denies that it has maintained any nuisance, and says that the boy came to his death through his own conduct and as the result of his own contributory negligence. 20

Now, contributory negligence means negligence which contributes to his own injuries, and you will test the question of contributory negligence under the rules as I shall give them to you. Contributory negligence is a defense, and the burden of proving that by a fair preponderance of the evidence rests upon the defendant. This boy appears to have been about seven years and eight days of age, as I recall the evidence. Now, of course, you must test this boy, not necessarily by the rules which you would apply to an adult. Because of his age he was obliged, under the law, to exercise such judgment as should have been exercised by a boy of similar age, judgment and experience. That is the test which you will apply to the conduct of this boy. 30 40

The sewer appears to have been there for a number of years, and the defendant urges that

Charge

its presence as it exists is a necessity because of the presence of such an amount of surface water, because of its location and grade.

10 The defendant further says that its presence there is in accordance with good engineering practice. Of course, all those facts are for you to determine, as well as the inferences to be drawn from the facts as they have been outlined by the evidence.

20 Of course, for the plaintiff to recover, as I have indicated to you, this catch basin must have constituted what I have denominated as a public nuisance. Now, the facts are not very seriously disputed, that the sewer was there, and that it has been maintained for a number of years seems to be conceded. The plaintiff alleges it was a nuisance and has been maintained as a nuisance ever since its installation, while the defendant says that it was not a nuisance and therefore says that it is not liable. Whether the City is liable or not is for you to say under the rules of law which I have given you for your guidance. Now, if the plaintiff re-
30 covers, of course he is entitled to damages. As has been said to you by counsel for the plaintiff, no amount of money could compensate a parent for the loss of a child; and therefore the law does not permit you to award anything by way of compensation for bereavement. It is simply a question of money loss. The measure of damages in a death case is the reasonable expectation of pecuniary advantages of which
40 these next of kin have been deprived by the death of this boy. So you will see it resolves itself simply into money damages, the reasonable

Charge

expectation in the future of which they have been deprived by his death.

Now, he left him surviving his father, age forty-seven, his mother, age forty-two, and three brothers and sisters whose present ages are sixteen, fifteen and fourteen. 10

Now, you can readily perceive that nobody could determine the damages with any degree of mathematical accuracy, and therefore the law leaves that largely to your judgment, because nobody can tell what the future held in store for this boy at this age. He had not yet arrived at an age of earning capacity. Nobody knows what would happen to him after this age if death had not removed him at that time. 20 Would he have become a very adept workman or something of some character whereby he would have earned lots of money? Or would he have become a cripple due to defect or sickness so that he was unable to earn any money?

Of course, up until he did earn money the father would have been obliged to support and maintain the child, and to have paid whatever it would have cost should the boy have become a student in some school. 30 Would he have gone to work when he became of age to perform such services and have earned money? Of course, up to the time he was twenty-one years of age the father would have been entitled to the moneys which he earned at that time. The father is one of the next of kin as well. Would he have married before he became of age or about that time and thus removed himself from turning
40 over money to the balance of the family, or would he have remained single and contributed

Charge

to the support of his father and mother and brothers and sisters? In other words, as I outlined to you in the beginning, the measure of damages relates solely to money. What money loss or anticipation of money incoming to them have they been deprived of? What reasonable anticipation had they of receiving moneys in the future? Then, of course, whatever they recover now, it would be in one lump sum in lieu of those moneys. In other words, you ascertain in your mind what moneys he would have earned and turned over to the next of kin, over and above any moneys which they would have been obliged to expend in maintaining him, and reduce that to one lump sum, how much it is worth today, keeping in mind, of course, that the next of kin would be having the earnings or increment upon that lump sum which you find until such time as they would have had the money if the boy had lived, and therefore you must take into consideration the earnings or increment in the meantime on any such sum as you award. That is the measure of damages which this father would recover in this suit for the benefit of the father, mother and next of kin, the three children.

Of course, if your verdict is for the defendant, then your verdict is no cause of action. So your verdict must be either no cause of action, in favor of the defendant, or for a lump sum of damages in favor of the plaintiff. You may retire.

The jury retired to consider of their verdict.

*Charge**Defendant's Exceptions.*

Mr. Weinberger: I respectfully except to that part of your Honor's charge with reference to the illustrations your Honor gave with reference to the difference between negligence and an active wrong-doing.

I also respectfully except to your Honor's charge wherein your Honor said that the plaintiff claims that that is a public nuisance, and on that theory the case went to the jury. The complaint does not so state, and the case presented a different issue than as your Honor charged.

I respectfully except to that part of your Honor's charge wherein your Honor stated that the jury might infer from the evidence as to whether or not the City had maintained a nuisance, there being no evidence to support such an inference.

I respectfully except to that part of your Honor's charge wherein your Honor defined the law with reference to the liability of a child over seven years of age to be held responsible for contributory negligence, the facts in this case being so evident and so apparent on its face that this boy was guilty of contributory negligence that it became a question of law for the Court and not for the jury.

I respectfully except to that part of your Honor's charge where your Honor used the words in defining the age and standing and reasonable probability of this child to be taken as the test; that law not being applicable in this case because of the fact there was direct evi-

Grounds of Appeal

dence showing this boy was guilty of contributory negligence and the sole cause of this particular accident.

I respectfully except to that part of your Honor's charge wherein your Honor said the facts are not seriously disputed, and the exact language used in connection therewith.

The Court: All right.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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JAMES CALLAN, administrator ad prosequendum of James Callan, deceased,

Plaintiff-Respondent,

vs.

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CITY OF PASSAIC, Defendant-Appellant.

Action-at-Law On Appeal. Grounds of Appeal.

The defendant-appellant, City of Passaic, herewith files the following grounds of appeal in the above-entitled cause:

1. The Trial Court erred in refusing to grant a non-suit at the close of the plaintiff's case.

2. The Trial Court erred in refusing to direct a verdict in favor of the defendant, City of Passaic, at the close of the entire case.

Grounds of Appeal

3. The Trial Court erred when it charged as follows: "He must show that the defendant designedly built and constructed this catch basin—its building and maintenance does not seem to be disputed—and that its design and maintenance were such that its presence and existence constituted a public nuisance and was the proximate cause of the boy's death."

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4. The Trial Court erred when it charged as follows: "There does not seem to be much dispute as to the facts. The dispute is as to the inferences to be drawn from the evidence."

The Court erred when it charged as follows: "Now, of course, you must test this boy, not necessarily by the rules which you would apply to an adult. Because of his age he was obliged, under the law, to exercise such judgment as should have been exercised by a boy of similar age, judgment and experience. That is the test which you will apply to the conduct of this boy."

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6. The Court erred when it submitted the case to the jury on the theory that this sewer was a public nuisance, whereas the complaint was founded on an entirely different basis.

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7. Because there was no legal testimony upon which to base a verdict.

JOSEPH J. WEINBERGER, Attorney of Defendant-Appellant, the City of Passaic.

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Exhibit P1.

State of New Jersey,
Passaic County Surrogate's Court.

10 I, Frederic Beggs, Surrogate of the County
of Passaic, do certify that on the twenty-sixth
day of August in the year of our Lord one thou-
sand nine hundred and twenty-five, Administra-
tion *ad prosequendum* was granted by me to
James Callan of the County of Passaic, for the
purpose of enabling him to prosecute the alleged
claim of the heirs at law and next of kin of the
said James Callan, deceased, against the City
of Passaic, which is alleged caused the death of
the said James Callan by its wrongful act,
neglect or default.

20 WITNESS, my hand and seal of office
the twenty-sixth day of August in
L. S. the year of our Lord one thousand
nine hundred and twenty-five.

FREDERIC BEGGS,
Surrogate.
By GEORGE L. KING,
Deputy.

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Exhibit P1

State of New Jersey,
Passaic County, ss:

I, Frederic Beggs, Surrogate of the County of
Passaic aforesaid, do certify the foregoing to be
a true copy of the letters of administration *ad* 10
prosequendum granted upon the estate of James
Callan, late of the County of Passaic, deceased
an intestate, as taken from and compared with
the record in my office and custody.

WITNESS my hand and seal of office, at
Paterson, this twenty-sixth day of
L. S. August in the year of our Lord one
thousand nine hundred and twenty-
five. 20

FREDERIC BEGGS,
Surrogate.
By GEORGE L. KING,
Deputy.

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New Jersey Court of Errors and Appeals

JAMES CALLAN, Administrator
Ad Prosequendum of James
Callan, Deceased,

Plaintiff-Appellee,

vs.

CITY OF PASSAIC,
Defendant-Appellant.

On Appeal
from Passaic
County
Circuit Court.

BRIEF FOR DEFENDANT-APPELLANT.

Statement of Facts.

This suit was instituted by James Callan, Administrator *Ad Prosequendum* of James Callan, deceased, against the City of Passaic, to recover damages for the death of James Callan, aged seven (7) years and eight (8) days, who the plaintiff alleges was drowned in a catch basin constructed at the intersection of Gregory Avenue and River Drive in the City of Passaic. The complaint charged the defendant with alleged wrongdoing as follows:

“Defendant wrongfully and illegally constructed before the grievances hereinafter mentioned, and has hitherto wrongfully and illegally maintained a catch basin for the reception of storm water at the curb line of the Northerly side of Gregory Avenue, one of the public streets of the City of Passaic, with an aperture fourteen (14) inches high and twenty (20) inches wide, for the entrance of surface water *without any bar or guard across the said aperture* to protect children from entering said catch basin. Said basin was constructed ten (10) feet deep, the bottom of which was five (5) feet below the outlet to the sewer.”

The evidence produced by the City of Passaic showed that the catch basin has been in existence in its same condition for at least twenty years. It was constructed of brick plastered with cement as the standard catch basin at the time of its construction, was built. There is a granite head covering the basin with an iron cover in the center of the head. The opening through which the boy crept into is eleven (11) inches high and twenty-two (22) inches wide. There is a decided grade along the streets, and this basin was constructed in this mode in order to receive the great volume of water at this point, and because it was necessary. The plaintiff offered in evidence three (3) photographs marked Exhibits P-2, P-3 and P-4, the first two are actual photographs of this catch basin. Exhibit P-4, which was a close-up is a distortion of the actual appearance of the basin.

The cause came on for trial before Newman, J., and a jury at the Passaic County Circuit on October 3rd and 4th, 1927, and resulted in a verdict in the sum of one thousand (\$1,000.00) dollars against the defendant, the City of Passaic. The case is here now on appeal and the appellant urges the exceptions reserved, and reversal of the judgment at Circuit for the following reasons:

POINT I.

The Court erred in refusing to grant a motion for a non-suit at the close of the Plaintiff's case, because the evidence did not disclose a case of liability against a municipality engaged in the performance of a public duty.

On page 47, after the plaintiff rested, the defendant moved for a non-suit on the ground that the City of Passaic was not liable, there being no proof

that the sewer was improperly constructed or maintained, or that the City committed any overt act, which resulted in the death of the decedent. The exception to refusal to the non-suit on this point can be found on page 47, line 11.

In *Waters v. Newark* (56 N. J. Law 361; affirmed, 57 Id. 456), Garrison, J., says at page 363:

"The courts of this state have said in conclusive form that the neglect of a municipal corporation to perform or its negligence in the performance of a public duty imposed on it by law, is a public wrong to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect."

1. *Strader v. Sussex*, 3 Harr. 108.
2. *Cooley v. Essex*, 3 Dutcher 415.
3. *Livermore v. Camden*, 5 Id. 245.
4. *Callahan v. Morris*, 1 Vroom 161.
5. *Livermore v. Camden*, 2 Id. 507.
6. *Pray v. Jersey City*, 3 Id. 394.
7. *Union v. Durkis*, 9 Id. 21.
8. *Marvin Safe Co. v. Ward*, 17 Id. 19.
9. *Condict v. Jersey City*, Id. 157.
10. *Little v. Dusenbury*, Id. 614, 636.
11. *Wild v. Paterson*, 18 Id. 406, 411.
12. *Varrath v. Hoboken*, 20 Id. 285."

With this proposition, the settled law of the state, the plaintiff attempted to charge the City of Passaic with active wrongdoing in the construction of the catch basin. This position was assumed by the present respondents upon realization that with this legal limitation, the theory of active wrongdoing was the only thread with which they could possibly attach liability upon the part of the city. A careful reading of the evidence, however, fails to disclose any such proof. *Nowhere throughout*

the entire presentation by the plaintiff of his case is there any evidence at all of wrongdoing.

The case of Lydecker v. Freeholders of Passaic (91 Law 622) Justice Bergen, speaking for the Court of Errors and Appeals, says at page 629:

"In the present case, all that the complaint avers is that the county negligently omitted to remove the oil from the highway; failed to close it from use by the public; failed to warn persons not to use it, and failed to make it safe after the spreading of the oil rendered its use dangerous. All of which are acts of omission and not of active wrongdoing."

Paragraph 2 of the plaintiff's complaint attempts to set forth the acts of wrongdoing upon the part of the city. It complains of the construction of a catch basin "*without any bar or guard across the said aperture to protect children from entering said catch basin.*" These words taken in their ordinary meaning can only signify a failure to do an act, and for such omission the City cannot be held responsible. It does not seem possible that the plaintiff can ever seriously contend, and we fail to see how such omission could in anywise be regarded as wrongdoing, especially in view of the decision reached in Lydecker v. Freeholders of Passaic, *supra*.

The catch basin in question here was constructed at least twenty (20) years ago. We quote from the testimony of Herbert Bush (Case p. 62, ll. 9-19):

"Q. Well, now, Mr. Bush, during the five years you have been sewer inspector—I show you Exhibit P-3, and ask you whether the openings are shown on this photograph are the same for the last five years? A. About the same.

"Q. Is the headstone the same? A. Yes, the headstone—everything is just about the same for the last twenty years."

The testimony of the plaintiff's own witness, Harold J. Harder, a civil engineer, discloses that this very same type of catch basin was in general use some years ago, (Case p. 39, ll. 20-25).

"Q. What type of catch basin is that known as? A. It is a granite top receiving basin.

"Q. *Is it in general use?* A. *It was some years ago.* None have been constructed in Paterson since 1900."

What then was the position of the plaintiffs when they rested their case? Mr. Harder was their only witness called to prove active wrongdoing in the construction of the sewer. We invite the attention of the Court to his testimony which is to be found on pages 38, 39 and 40 of the State of the Case. *There is absolutely nothing in his entire testimony to affirmatively show any active wrongdoing on the part of the City of Passaic, or from which any such inference can even be drawn.*

At about the time of the construction of the catch basin it was shown by the plaintiff's own witness that basins such as the one involved in this case were in general use. There could legally be no active wrongdoing in the construction of a basin in general use, especially when such construction pertained to the public health, safety and comfort, and in such matters the municipality acts in its public or governmental capacity in discharging public duties.

We submit that a careful perusal of the evidence at the close of the plaintiff's case conclusively failed to show any active wrongdoing upon the part of the City of Passaic. Such allegation in the complaint was merely a pleader's conclusion which the proof failed to sustain. Under these circumstances, the learned trial Judge should have taken the case

from the jury, since there was nothing left for the jury to consider in this regard.

POINT II.

The Court erred in refusing to grant a non-suit at the close of the Plaintiff's case and also erred in refusing to direct a verdict for the Defendant at the close of the entire case on the ground that the Plaintiff's decedent, James Callan, was guilty of contributory negligence.

It is an elementary principle of law, that even though, where the defendant may be negligent, yet if the plaintiff had contributed to his injury in such a way that if he had not been negligent, he would have received no injury from the negligence of the defendant, he cannot recover, notwithstanding the defendant's negligence.

At the close of the plaintiff's case, counsel for the defendant moved for a non-suit, which motion was denied by the Trial Court and an exception duly taken to the ruling of the Court.

Conceding, but not admitting that the defendant was negligent, the uncontradicted proof in this case shows that the plaintiff's decedent was guilty of contributory negligence. *The testimony of Peter Yaros, called by the plaintiff as his main witness is of utmost importance.* He was the only eye witness to the boy's drowning.

We desire to go into an examination of his testimony somewhat extensively, in order to show that the Court erred in refusing to grant the motion of the defendant, the City of Passaic, for a non-suit at the close of the plaintiff's case. *On direct-examination by the plaintiff's counsel, Peter Yaros testified as follows, (Case p. 25, ll. 1-30) :*

"Q. Who else was playing? A. Me and James and Freddie and Michael.

"Q. Freddie who? A. Freddie Callan. Michael is my brother.

"Q. What happened to James? A. James came from the house, *he want to go by Freddie to play with him, so when Freddie was chasing him, Freddie got behind a building over there, by the machinery building, something like that, near the bottom of Gregory Avenue, so he want to hide away, so he went down to the sewer to hide away from Freddie, and he went in there. He went in feet first, he crawled in and when he was going in he bumped his head.*

"Q. He got into the gutter first? A. He got into the wide opening over there.

"Q. How did he go in, feet or head first? A. Feet first.

"Q. How far away were you? A. I was about twelve (12) feet.

"Q. I believe you said that he got down in the gutter to hide away from his brother? A. Yes, down into the sewer."

Again, when questioned by the Court, this very same testimony was brought out (p. 26, ll. 30-33) :

"Q. Were you playing to hide away? A. Freddie told him to go home. He didn't want to go home.

"Q. He was hiding from Freddie? A. Yes, sir."

Once more, on direct-examination, the plaintiff's counsel attempted in vain to eradicate the previous damaging testimony given by this boy, (Case p. 27, ll. 9-14) :

"Q. *He fell in the sewer you say?* A. No, *he didn't fell in. He crawled in.*

"Q. Could you see him over the top of the gutter here when he got here in the gutter? A. No, he got in—he ran quick and he got in feet first."

And more specifically on cross-examination (Case p. 27, l. 40 through p. 28 and p. 29, ll. 1 and 2):

"Q. Now, you say that Jimmie crawled in feet first? A. Yes, feet first.

"Q. So he put his feet in first; laid down on his stomach; is that it? A. Just like this.

"Q. *He laid down on his stomach and put his face down on the street, toward the street and put his feet into the hole, backwards, and then he started to crawl backwards, is that it?* A. Yes."

Then after a colloquy between counsel, the examination continued:

"Q. See if I am right, Sonny? You say that he started to crawl with his stomach laying on the street, is that correct? A. Yes.

"Q. What? A. Yes.

"Q. And you say that he put his feet in first, into the sewer; is that correct? A. Yes.

"Q. And then you say, his head hit against something when he was crawling into the sewer. What did it hit against? A. Hit the top, you know, like this is the sewer, he hit against here."

This was the uncontradicted testimony of the single eye witness to the mishap. *The uncontroverted evidence of the single eye witness called by the plaintiff was that the boy deliberately crawled into the basin in order to hide away from his brother.* It is difficult to conceive how a conclusion other than that the proximate cause of the boy's injuries was his own negligence can possibly be reached, the evidence of the plaintiff himself showing that the decedent was the heedless instrument of his own injuries, and that his death resulted solely from his own negligence.

James Callan, the father of the boy, testified that the alleged accident happened in broad daylight,

(Case p. 44, ll. 37-43). His testimony also disclosed that the decedent was smart in his class (p. 44, ll. 17-20). This statement of the boy's smartness was corroborated by his mother (Case p. 45, ll. 37 through to Page 46, ll. 1-8).

"Q. Was he a bright boy or not? A. Yes, very smart boy."

In *Harmer v. Reed Apartments*, 68 N. J. Law, 332, Garretson, J., speaking for this Court, says at page 334:

"It is a familiar rule that one who receives injuries from the disregard of an obvious danger or a danger which could be discovered by the reasonable exercise of his faculties, is regarded as being injured through his own negligence."

Quoting the syllabus in the case of *Verdon vs. Crescent Automobile Company* (1910) 80 Law 199, in which the opinion of the Supreme Court was written by Mr. Justice Bergen:

"A boy, seven (7) years of age, of ordinary intelligence, sufficiently so to be allowed by the trial court to be sworn and testify regarding occurrences resulting in his being struck and injured by an automobile on a public highway, is not altogether exempted from the exercise of care and prudence in approaching a known danger, and if it appears that he is 'sui juris', and that he has been the heedless instrument of his own injury, he cannot recover."

Again in *North Hudson v. Flanagan*, 57 Law 696, the present Chief Justice, speaking for the Court of Errors and Appeals, held:

"A boy of his age, (nine years) even if mentally not up to the standard of other boys of the same age, is not in law altogether exempted from the exercise of care and pru-

dence in approaching a known danger, and, when the evidence shows that he has been the heedless instrument of his own injury, he cannot recover. If it were necessary for us to decide this point in order to dispose of this case, we should be inclined to hold that the plaintiff was guilty of contributory negligence in acting as he did."

This case is cited by Justice Dixon in the case of *Brady v. Consolidated Traction Company* (63 Law 25).

Also, *David v. West Jersey & Sea Shore R. R.* 84 N. J. Law 685 (Ct. of Er. & Ap.)

Fitzhenry v. Consolidated Traction, 35 Vroom 674.

Anderson v. Central R. R., 39 Vroom 270.

It would seem from these decisions that the true test of whether the question of negligence of a person of immature age is one for the determination of the court or for the jury, is dependent upon whether the child by a reasonable exercise of his faculties could have avoided a danger which was perfectly obvious.

In *Lawyers Reports Annotated* 1917 F, the following passage appears on page 11:

"It should be observed in this connection that a child, although ~~non~~^{non} sui juris', may be precluded from recovery for an injury on the ground that its act was not such as the defendant might reasonably anticipate from one of its years; in other words, the question of negligence on the part of the defendant may be affected by what an ordinary child, although 'non sui juris', might reasonably be expected to do."

In the note 271 to L. R. A. 1917 F on page 97, this case is cited:

"Where a workman in repairing the street removes the lid of a hydrant and left pro-

truding about two feet above the surface of the ground a T-shaped water-key, and on a call that the workman was coming, a five year old boy who was playing nearby started to run and ran against it, injuring his eye, it was held in *Plantza v. Glasgow* (1910) 47 Scot. L. R. 688, that, assuming that the defendant was negligent, there could be no recovery because of the boy's contributory negligence, in view of the facts that he was aware of the key and that the danger was obvious."

The evidence of contributory negligence adduced by the plaintiff himself, and inferences therefrom were never controverted. Summarized, the proof clearly indicated that a very smart boy in an attempt to hide away from his brother deliberately settled upon his stomach and crawled feet first, in broad day-light, into an opening which was perfectly obvious to anyone who would have reasonably exercised his faculties. The conclusion could only be reached that the decedent by his conduct had subjected himself to risk of injury which was perfectly obvious, and which he could not encounter without negligence.

In 48 L. R. A. (N. S.) 633, the following proposition of law is stated in the note:

"When the dangerous condition of a street is open and apparent, *the court may say as a matter of law*, that the plaintiff was not exercising the ordinary and reasonable care necessary to entitle him to recover damages."

The uncontradicted testimony at the close of the plaintiff's case clearly showed that the boy's negligence had proximately contributed to his own injuries. The fact of contributory negligence remained uncontroverted and no conflicting inference could be drawn.

The plaintiff's decedent, therefore, being guilty of contributory negligence, should have been non-

suiting at the close of his case, and the testimony of the defendants in no way exonerating the plaintiff's contributory negligence, should have induced the Court to lawfully direct a verdict for the defendant. The uncontradicted evidence in the case clearly showed that the death of this boy, age seven (7) years and eight (8) days, *was due solely to his own negligence*, and that the evidence of his negligence was never controverted, and as such, the question became one of law, and the Court committed harmful error in refusing to direct a verdict for the defendant, the City of Passaic, although specifically requested so to do.

POINT III.

The Court erred when it charged the jury as follows:

"Of course, for the plaintiff to recover, as I have indicated to you, this catch basin must have constituted what I have denominated as a public nuisance. Now, the facts are not very seriously disputed, that the sewer was there, and that it had been maintained for a number of years seems to be conceded. The plaintiff alleges it was a nuisance and has been maintained as a nuisance ever since its installation, while the defendant says that it was not a nuisance and therefore says it is not liable."

Under this point, appellant will argue the third, fourth, fifth and sixth grounds of appeal.

These remarks by the Trial Court in charging the jury were highly prejudicial. In the first place, the complaint nowhere sets forth any charge of a nuisance being created and maintained by the City of Passaic. The complaint was founded on an en-

tirely different basis. In the second place, there is not a single allegation throughout the entire record that this sewer was a public nuisance. On the contrary, a careful reading of the testimony will show that the construction of this sewer can in no way be regarded as a nuisance. It was the public duty of the City of Passaic to provide drainage with respect to the particular necessity of the neighborhood and a failure to provide a basin such as the one involved in the instant case would probably have resulted in the creation of a public nuisance, for a municipalities duty to keep its streets in safe condition requires them to be drained.

James E. Earl, the City Engineer of the City of Passaic, testified as follows:

"Q. What have you to say as to whether or not this sewer and catch basin at the corner of River Drive and Gregory Avenue was constructed properly with reference to receiving the flow of water in that neighborhood? A. Well, I would say it was constructed to meet the conditions as they exist.

"Q. What conditions do you refer to, Mr. Earl? A. *Well, there is a steep grade there and there is a large volume of water coming down.*

"Q. Is it necessary to have an opening on the side to receive the flow of water? A. It is in this particular case." (Case p. 66, ll. 15-30)

On cross-examination:

"Q. Now, I want you to tell this jury why an opening like that was put in the west side? A. It was put in there to take the water.

"Q. *Well, would not the same opening that you have on the south side do for the west side?* A. *No, sir.*

"Q. Why not? A. *The volume of water is too great, and there is an angle at that point, and water would shoot right by.*"

Under the topic, Sewers and Drains, 9 Ruling Case Law, page 53 and cases cited thereunder, it is there stated that a municipalities duty to keep its streets in safe condition requires them to be drained. It appears, therefore, that it was incumbent upon the part of the City as a governmental duty when it set out to construct this basin to do so in its present form.

But here, independent of this testimony, the allegation of nuisance was never raised by the plaintiff. The charge questioned herein could have no effect upon the minds of the jurors other than that if this basin was a nuisance, recovery must be had. Under the authority of *Jersey City v. Kiernan*, 50 N. J. Law 246, this we submit is not the law.

POINT IV.

The Court erred when it refused to grant a motion for a directed verdict inasmuch as the proof at the close of the entire case showed that the municipality was not liable.

The Court's refusal to grant a motion for a non-suit made it incumbent upon the part of the defendant to interpose a defense. An examination of the record shows a failure upon the part of the plaintiff to prove any act of wrongdoing, and this error was never corrected by the plaintiff. When all the evidence in the case was in, the proof showed at the most, the neglect of a municipal corporation to perform or its negligence in the performance of a public duty imposed on it by law, which constituted a public wrong to be remedied by indictment, and which cannot constitute the basis of a civil action by an individual who has suffered by reason of such neglect.

In *Loberg v. Amherst*, 87 Wis. 634, 41 Am. St. Rep. 69, 58 N. W. 1048, it was held that:

"Ditches or gutters on the sides of highways designed for drainage and convenient for that purpose, with walks in the nature of bridges across them for the use of pedestrians, leaving unimpeded the traveled portion of the road, cannot be considered as defects or obstructions in the highway, for which a municipality is liable."

And in *Bruch v. Philadelphia*, 181 Pa. 588; 37 Atl. 818, a municipality is held not to be liable for personal injuries caused by a fall into an uncovered gutter at a street crossing, where it appears that the gutter was reasonably safe, and that the open gutter is a common method of construction at crossings in cities and boroughs.

Heiss v. Lancaster, 203 Pa. 260, 52 Atl. 201 was a case in which the plaintiff received injuries by stepping on the crossing of a street as it sloped to the gutter, the gutter not being bridged over from the crossing to the sidewalk. The upper court said that the trial judge would have been justified in giving a binding direction for the defendant. The Court there stated:

"Nor is a City bound to cover its crossings at all places if it does not see fit to do so; this, like other city improvements, it may do or not as the municipal authorities see proper; and the absence of a cover at a crossing is not of itself negligence in the corporation."

In *Wright v. City of Lancaster*, 52 Atl. 245; 203 Pa. 276, a city was held to be not negligent in maintaining an open gutter, eight (8) inches wide and six (6) inches deep, between the sidewalk and street crossing. The contention of the plaintiff was that the gutter was in itself dangerous. The Supreme Court of Pennsylvania

held that such forms of street drainage were necessary and, "it would be unreasonable to allow a jury to say that it was so dangerous that its maintenance was negligence."

In the case before this Court, we find that after all the evidence is in, that the City of Passaic constructed a sewer which was in general use at the time of its construction. Further, that a bright young boy, in open daylight, deliberately settled upon his stomach and crawled into this sewer and was drowned. This is the uncontroverted testimony at the close of the entire case.

We submit that under these circumstances, the Court should have directed a verdict in favor of the defendant, the City of Passaic, it appearing conclusively from the testimony that there was no direct affirmative evidence of any wrongdoing, but on the contrary, evidence of the reasonable and lawful construction of a sewer by a municipality in order to properly perform a public duty. Under these circumstances it was unreasonable and unlawful for the Trial Court to allow the case to go to the Jury.

Conclusion.

It is respectfully submitted that reversible error was committed by the Trial Court on all the grounds argued.

It is, therefore, respectfully submitted that the judgment against the City of Passaic be reversed and a judgment in favor of defendant, the City of Passaic, entered in this Court.

JOSEPH J. WEINBERGER,
Attorney and of Counsel for the
Appellants, the City of Passaic.

72 FEB.T.1928

New Jersey Court of Errors and Appeals

James Callan, Administrator ad Prosequendum of James Cal- lan, deceased,	} Plaintiff,	} On Appeal from Passaic Circuit
vs.		
City of Passaic,	} Defendant.	

BRIEF FOR PLAINTIFF-APPELLEE

STATEMENT

This suit was instituted against the City of Passaic to recover damages for the death of a boy, aged 7 years and 8 days, who was drowned in a catch basin while hiding from his comrades. The complaint alleged active wrongdoing in the municipality in the construction of the basin.

The material allegations in the complaint are as follows:

2. Defendant wrongfully and illegally constructed before the grievances hereinafter mentioned and has hitherto wrongfully and illegally maintained a catch basin for the reception of storm water at the curb line on the northerly side of Gregory Avenue, one of the public streets of the City of Passaic, with an aperture fourteen (14) inches high and twenty (20) inches wide, for the entrance of surface water without any bar or guard across the said aperture to protect children

from entering said catch basin. Said basin was constructed ten feet deep, the bottom of which was five feet below the outlet to the sewer.

3. On July 29, 1925, plaintiff's intestate, James Callan who was seven (7) years of age while playing with other boys in the vicinity of said catch basin entered said catch basin through said aperture in an attempt to hide from his play fellows and fell into the water lodged therein, which water was a depth of five feet and was immediately drowned. P. 3 and 4.

The testimony concerning the death is as follows:

CHARLES A. FARRELL, a policeman testified, p. 21, that the catch basin was

"nine feet deep from the manhole top to the sediment in the bottom of the pit. How much was in there I don't know. There were five feet of water in it and the basin was twelve feet six inches deep." P. 15.

Another witness said there was nine feet of water in the basin at the time. P. 16.

PETER YAROS, a boy of eleven said that James Callan, deceased,

"went down to the sewer to hide away from Freddie and he went in there. He went in feet first; he crawled in, and when he was going in he bumped his head."

"Q. He got in the gutter first? A. He got into the wide opening over there.

Q. How did he go in, feet or head first?
A. Feet first.

Q. How far away were you? A. I was about twelve feet.

Q. I believe you said he got down in the gutter to hide away from his brother? A. Yes, down in the sewer." P. 25.

"Q. He went through there, but where was he hiding? A. He was hiding in there (indicating).

Q. In here? A. No in the sewer here." P. 27.

His brother, FRED CALLAN, said:

"I wanted him to go home and he started to run, so I hid behind a building where they make machinery and I waited for him to come back and he didn't; he was by the sign—there is signs there—so he stood there—so I thought I would get him to go, so I went back up the hill in the park, and a little while after Peter came running to me and told me." P. 33.

"He was taken out dead." P. 14.

There was no dispute about the facts. The entire case turned on the deductions to be drawn from them. It was admitted that the catch basin had been constructed by the City of Passaic and had been in use for many years. Counsel for the defendant below placed his defense on two grounds:

1. That there was no active wrong-doing by the City.

2. That the deceased boy was guilty of contributory negligence.

THE LAW

While the law on this subject is familiar it may be serviceable to set it out here.

The principle involved is stated in this language:
 THE EXEMPTION OF A MUNICIPAL CORPORATION FROM ACTIONS BY INDIVIDUALS SUFFERING SPECIAL DAMAGE FROM ITS NEGLIGENCE TO PERFORM OR ITS NEGLIGENCE IN PERFORMING PUBLIC DUTIES WHEREBY PUBLIC WRONG FOR WHICH AN INDICTMENT WILL LIE IS DONE, DOES NOT EXTEND TO ACTIONS WHERE THE INJURY IS THE RESULT OF ACTIVE WRONG-DOING CHARGEABLE TO THE MUNICIPAL CORPORATION.

The earliest case in New Jersey touching the liability of municipal corporations to respond in damages for private injuries is the case of *Freeholders of Sussex v. Strader*, 18 N. J. L. (3 Harr) 108 (1840)

"It was held that where a corporate body, whether of a municipal or of a private character, owes a specific duty to an individual, an action will lie for a breach or neglect of that duty, whenever such breach or neglect has occasioned an injury to that individual; but if such corporation owe a duty to the public and neglect to perform it, although every individual composing that public is injured some more some less, yet they can have no private remedy at the common law. The precise question presented in this case was whether the county was responsible in damages to a person, whose horse was injured while

driving over a bridge, the abutments of which were defective. The question therefore, directly was whether the municipality was responsible for neglect of duty. It was said that:

'There has been no charge, so far as I am aware of any wilfull or fraudulent official neglect upon their part.'" P. 120.

This general principle was followed in *Pray v. Jersey City*, 32 N. J. L. (3 Vr.) 394, (1868). This was also an action to recover damages for injury to the plaintiff's horse because the public authorities neglected to have the street filled in to the proper grade after the construction of a sewer, so that the coping of stone around one of the entrances into the sewer was left projecting and formed the obstacle which occasioned the accident. This case, as well as the cases there cited, that is to say, *Cooley v. Freeholders of Essex*, 27 N. J. L. (3 Dutch) 415; *Livermore v. Freeholders of Camden*, 29 N. J. L. (5 Dutch) 245; aff. 31 N. J. L. (2 Vr.) 508; *Callahan v. Township of Morris*, 30 N. J. L. (1 Vr.) 161, decided that an action in behalf of an individual who has sustained a particular damage will not lie for the mere neglect of agents of the public.

That the doctrine has limitations is shown in *Jersey City v. Kiernan*, 50 N. J. L. 246 (1888). In this case it appeared that a sewer broke through negligent construction, causing sewerage to flow over some vacant lots to the land of the plaintiff.

Chief Justice Beasley speaking for the Supreme Court said, after quoting Freeholders of *Sussex v. Strader and Livermore, v. Freeholders of Camden, supra.*

The conclusion to which this court has finally come is this:

"That the defendant is not responsible for the consequences of a break in the sewer in question *per se*, even though it be the result of the carelessness of its own agents, for the public is not responsible for such misfeasances of its officers; but when such break has occurred occasioning a *private nuisance exclusively* and the public authorities have been notified, of the accident, we think that then they owe a duty to the individual to put the sewer in a proper condition, and that for the non-performance of such duty then an action will lie."

In *Waters v. Newark*, 56 N. J. L. (27 Vr.) 361, (1894) an increased amount of sewage, for which a sewer did not have sufficient capacity after a heavy rain, flowed out of the manhole, ran across the sidewalk in front of plaintiff's property and into her house. A Street Commissioner was notified and also the common council, of the condition and requested to put the sewer in proper condition. This was not done, and the sewage continued to overflow upon the plaintiff's property. Upon this state of facts the Supreme Court held on a case certified that it was evident that the condition to which the plaintiff refers her special injury was one to which the public at large

was to a greater or less extent subjected, and that upon proof of these same facts an indictment would be sustained.

"The Circuit Court should be advised that, in the case before it, a public nuisance was occasioned by flooding the highway, for which an indictment would lie and that so long as this is the situation it is the only remedy and that a notice by the land owner injured does not make the malfeasance actionable in a civil suit."

These are all negligence cases.

In *Hart v. Freeholders of Union*, 57 N. J. L. (28 Vr.) 90 (1894) on demurrer to the declaration it was held that allegation that the board wrongfully and illegally made a deep excavation in a public highway under the control of the board, into which the plaintiff, while lawfully passing along the highway, fell and was injured, discloses a cause of action. The language of the syllabus is:

"The exemption of a municipal corporation from actions by individuals suffering special damage from its neglect to perform or its negligence in performing public duties, whereby a public wrong is done, for which an indictment will lie, does not extend to actions where the injury is the result of active wrongdoing chargeable to the corporation."

This language was quoted with approval in this

court in *Olesiewiez v. Camden*, 100 N. J. L. 339. The Court there said:

"This Court in *Kehse v. Rutherford*, 74 N. J. L., 659, and in *Doran v. Asbury Park*, 91 N. J. L. 651, affirmed this rule, as enunciated in express terms.

While this was a new statement of principle, the principle itself had been previously applied. *Durant v. Palmer*, 29 N. J. L. (5 Dutch) 544 (1862).

Where a municipality so graded its streets as to draw off water from a swamp the water from two or more natural water courses and to conduct such water into a public street as a channel for its discharge was held to be actionable.

Town of Union ads. Durkes, 38 N. J. L. (9 Vr.) 21 (1875).

This proposition was supported also in the case of *Miller v. Morristown*, 47 N. J. Eq. (2 Dick) 62; aff. on appeal in 48 N. J. Eq. (3 Dick) 645; it was there said by Vice Chancellor Van Fleet that no responsibility attaches for damages done by the diversion of surface water where the diversion is merely incidental to and occasioned by the making and altering of the street grades. But where a municipality puts into execution a scheme of improvement by which surface water collected there and a large area is prevented from following the grades of the street and is carried by artificial means from where it otherwise would be discharged and made to flow on to the land of one person in ease of the lands of others, there an actionable wrong is committed.

In *Harrington v. Woodbridge*, 70 N. J. L. (41 Vr.) 28 (1903) the questions decided were on demurrer to the declaration. The township of Woodbridge constructed a public sewer, consisting of a twelve inch drain pipe in one of the public streets with which the house of plaintiff was connected. For want of proper fall or sufficient capacity the sewer ever since the connection was made caused the cellar of the plaintiff's house to be filled with water and sewage. The committee put a wooden plug in a connecting pipe inside of the cellar wall to prevent the further inflow from the sewer which was ineffective. The defendant was often notified, but the nuisance was not corrected. The Court said that it was not alleged that without connections the sewage could in anyway reach the premises of the plaintiff and that the pipe must be deemed the structure of the plaintiff.

In *Kehoe v. Rutherford*, 74 N. J. L. (45 Vr.) 659 (1906) the Borough of Rutherford erected a stone culvert which received surface water flowing down Park Avenue and discharged it opposite the property of plaintiff, from whence it flowed with great force upon his lands. This diverted the former flow. Justice Trenchard, speaking for the Court of Errors, said:

"It is a rule of law of very considerable importance and which is certainly settled in this state, that an action will not lie in behalf of an individual who has sustained special damage from the neglect of a public corporation to perform a public duty. (Citing cases.)

But it is also a rule of law of equal importance that the exemption of a municipal corporation from actions by individuals suffering special damage from its neglect to perform or its negligence in performing public duties whereby a public wrong is done for which an indictment will lie, does not extend to actions where the injury is the result of active wrongdoing chargeable to the corporation.

It is also the settled law of this state that a municipality has no right, by artificial drains, to divert surface water from the course it would otherwise take and cast it, in a body large enough to do substantial injury on land where, but for such artificial drains it would not go. (Citing cases.)

Reviewing the evidence with these principles in mind, we perceive that it established that the artificial culvert constructed and *maintained* by the defendant diverted the surface water, etc."

Here the very word *maintained* is essential in a certain sense to show that the stone culvert was not only originally constructed by the Borough but for ten years it was allowed to remain in the same condition. In the present case, the facts are the same. The catch basin in question was erected years ago and this language was necessary to show that it remained in the same condition to the time of the accident.

In *Garrison v. Fort Lee*, 92 L. 566 (1918) I had not to consider this phase of the case which was present in the mind of the draftsman who drew the Kehoe complaint. The damages in the Garri-

son case arose immediately upon the construction and use of the sewer. There is no space of time of any considerable length between the construction of the sewer and the damages. The syllabi in the Garrison case are as follows:

"1. The exemption of a municipal corporation from actions by individuals suffering special damage from its neglect to perform or its negligence in performing public duties, whereby a public wrong is done for which an indictment will lie, does not extend to actions where the injury is the result of active wrongdoing chargeable to the corporation.

2. An action will lie against a municipal corporation that designedly built and constructed its sanitary sewer with outlets into its storm water drain, etc."

The complaint in the case in hand is that the municipal corporation of Passaic had designedly built and constructed this catch basin. This is active wrongdoing and of course becomes a jury question. It is to be noted that the Court of Errors in the Garrison case said:

"But it is also open to the jury to find from the evidence that the plaintiff's injury was the result of active wrongdoing in the construction and *use* of the sewer."

In the Garrison case there were two sewers constructed in the public streets, a storm water sewer and a sanitary sewer. At the manholes a person could look down into the storm water sewer and also into the sanitary sewer which was very much higher. Part of the sanitary sewer visible from the

manhole was open at the top so that an inspector could notice that the sewage was flowing properly. The fault of the construction was that when the sanitary sewer was obstructed in any way the polluted matter flowed over into the storm water sewer below. This storm water sewer connected with a brook which fed the plaintiff's pond, two miles below. In consequence of this pollution, he lost ice crops for two years. The Supreme Court and Court of Errors held that this construction was active wrong-doing.

In *Dohrmann v. Freeholders of Union*, 84 N. J. L. (55 Vr.) 689, (1913) the defendant constructed a viaduct so that it collected surface water from a wide territory which otherwise would flow elsewhere and carried through a system of pipes and drains and discharged it in a large volume directly into the plaintiff's building. This was held to be an active wrongdoing for which the county was responsible.

In *Simmons v. Paterson*, 60 N. J. Eq. (15 Dick.) 385 (1899) the Court of Errors held that the City of Paterson, although it had legislative authority to construct a system of sewers was responsible for discharging their contents in the Passaic River.

In *Bailey v. Osborne*, 80 N. J. L. (51 Vr.) 333 (1910) the Borough was held liable where a ditch had been dug and refuse thrown upon the plaintiff's land.

In the Garrison case Fort Lee had lawful authority to construct a system of sanitary and

storm water sewers. It was the method adopted that made it active wrong-doing. Passaic had lawful authority to construct a catch basin. It was the method adopted that made it active wrong-doing.

It is held in *Doran v. Asbury Park*, 91 N. J. L., 651, that:

"The fact that a municipality had performed a lawful and necessary work in a manner not injurious to the public does not relieve it from liability to persons injured for active wrong-doing."

Thus the law in its growth furnishes the injured citizen redress. It is now settled that when a municipal corporation embarks upon a private enterprise it is answerable for the action of its servants causing injury to an individual. *Olesiewicz v. Camden*, 100 N. J. L., 336. Justice Kalisch supported the judgment in *Doran v. Asbury Park* on the reasoning of *Kehce v. Rutherford*, *supra*. Justice Swayze in *Cochran v. Public Service Electric Co.*, 97 N. J. L. 480 (1922) speaking of a traffic safety isle in a city street said:

"The safety isle constituted such an obstruction that if it was not properly lighted it might become a nuisance and although this nuisance would be due to the negligence of the City in failing to light the obstruction it had created, the city would not escape liability under the rule of *Freeholders of Sussex v. Strader*, 18 N. J. L. 108, but would be liable for positive misfeasance.

Counsel in his brief for the appellant does not discuss, indeed does not even refer to the cases of active wrong-doing, e.g. *Hart v. Freeholders, Town of Union ads Durkes, Kehoe v. Rutherford, Dohrmann v. Freeholders of Union, Garrison v. Fort Lee*, or *Doran v. Asbury Park*. There is no attempt to distinguish these cases from the case in hand.

ACTIVE WRONGDOING

One witness stated that the particular opening in question in the catch basin was required to take care of the water. This was shown by a simple calculation to be untrue.

The witness, JAMES E. EARL, the City Engineer, was cross examined on this point as follows:

“Q. Well, would not the same opening that you have on the south side do for the west side? A. No, sir.

Q. Why not? A. Volume of water is too great, and there is an angle at that point, and water would shoot right by.

Q. Let me call your attention to the fact that you say it is thirty-six by seven. A. Yes.

Q. That is 252 square inches? A. Yes.

Q. The other is twenty-three by eleven (the opening in question), which is 253 square inches? A. Yes.

Q. Why would not the same opening have done? A. Because the volume of water is too great.

Q. You have the same square inches of opening; what difference does it make about the volume of water? A. You cannot get as much water through a small opening as you can through a larger one.

Q. But this is the same size as the regular opening on the front? A. Well, it is built on an angle.

Q. Why was not that opening made, do you know, the same as the other side? A. I could not say why it was.” P. 69.

The catch basin as stated had the usual opening which is stated to be 36x7. It was constructed in a populous neighborhood where boys assemble for play. Had this opening of the south side been placed on the west side this boy would still be alive. No catch basin of this kind, that is to say with such openings, exists, or ever existed, in the whole City of Paterson, the present City Engineer, Harry J. Harder, testified. He had never seen another like it. It was claimed there were one or two others like it in Passaic, by witnesses for the defense, but an examination will show that they were speaking of culverts rather than such basins. Suppose the City of Passaic had made this opening 23x23 instead of 23x11. Is there any doubt that such an opening in the street would be a nuisance, just as if the city had dug a hole in the pavement? Who passes on this question whether 23x23 is wrong and 23x11 is right? The matter under our law is submitted to the jury for their consideration. The Judge so submitted it in this case. If the aperture had been made only seven inches high it would manifestly

have taken all the water. The southerly opening was 36 inches wide. This opening is only 23 inches wide. If a bar had been placed across the opening it would not have affected the flow, but it would have saved this child's life. Why not have put a grate level with the pavement through which the water would drop into the basin below? Again, there were 5 feet of water in the catch basin. It was clearly unnecessary and most unsanitary, to have this basin so deep. The pavement was of asphalt and there could be no sand or earth washed in. It is significant that the City of Passaic immediately filled up the basin to the outlet pipe after the death of the boy. The witness Sheridan, p. 17, 18, who is 5 feet 7 $\frac{3}{4}$ inches high and 138 pounds in weight, said he could go through this opening. A glance at the first photograph, Ex. P-2, will show, that it was a most attractive hiding place to the mind of a young boy. It was an open invitation to the spirit of boyhood. The second photograph will show the opening on a large plate. It will be seen that the opening on the south side is cut from the granite head while little of the granite head is cut at the aperture in question but that the whole ground is sloped to make this most unusual opening. It will be noticed there are four rows of brick on the left side of the photograph which with the mortar between the layers added make an unusual situation. There are again four rows of brick above the lower four so that from the curb head or the level of the sidewalk to the bottom of the opening there are eight rows of brick with seven courses of mortar. Thus this death-trap was constructed and so constructed within as to hold five feet of water below the outlet pipe.

Counsel suggested that the photograph showing the opening is distorted. It is not distorted; it was taken, the photographer said, 15 feet away. On the last photograph the usual opening of this peculiar catch basin is seen.

CONTRIBUTORY NEGLIGENCE

It is thought that much time need not be taken in discussing this question of contributory negligence. The matter was submitted by the Court to the jury in the following language:

"Now contributory negligence means negligence which contributes to his own injuries, and you will test the question of contributory negligence under the rules as I shall give them to you. Contributory negligence is a defense, and the burden of proving that by a fair preponderance of the evidence rests upon the defendant. This boy appears to have been about seven years and eight days of age, as I recall the evidence. Now, of course, you must test this boy, not necessarily by the rules which you would apply to an adult. Because of his age he was obliged under the law, to exercise such judgment as should have been exercised by a boy of similar age, judgment and experience. This is the test which you will apply to the conduct of this boy."

The language of Judge Newman as to "similar age, judgment and experience" is taken from *David v. W. J. & S. R. Co.*, 84 N. J. L. 685.

This is a plain statement of the law. The question was left by the Court to the jury based upon this rule. It was not a question of law to be disposed of by the Court.

The cases quoted by counsel for the appellant in reference to the question of contributory negligence are not in point. *North Hudson v. Flanagan*, 57 N. J. L. 696, *Verdon v. Crescent Automobile Company*, 80 N. J. L. 199, *Brady v. Consolidated Traction Co.*, 63 N. J. L. 25, *Anderson v. Central R. R. Co.*, 68 N. J. L. 269, *Fitzhenry v. Consolidated Traction Co.*, 64 N. J. L. 674, are all cases where the danger was perfectly obvious. They are cases of automobile accidents, and steam railway crossings. The language of Justice Bergen in the Verdon case set out in the appellant's brief related to the failure of the court below to submit the question of contributory negligence to the jury. Justice Bergen said in that very case:

"In the case under consideration, it was at least a jury question whether the plaintiff was *sui juris* or not and the court was not justified to assume as a matter of law that he was of such immature age that he could not be charged with contributory negligence even if he acted in the most careless way possible."

In the present case the Circuit Judge left the question to the jury. In the Flanagan case the present Chief Justice in the Court of Errors held that there was no negligence shown on the part of the defendant.

The danger in the present case was certainly

not obvious to this boy of seven. How could he at such an age reasonably apprehend that the catch basin had five feet of water below and that this attractive hiding place would be the cause of his death. Justice Trenchard in *David v. W. J. & S. R. R. Co.*, 84 N. J. L. 685, said:

"Thoughtlessness, impulsiveness and indifference to all but patent and imminent dangers are natural traits of childhood and must be taken into account when we come to classify the conduct of the child."

Counsel took certain exceptions that are not pressed. His grounds of appeal embrace only the question of active wrong-doing and contributory negligence. An exception was taken to what Judge Newman said about a public nuisance. This was more in favor of the defendant than otherwise. The whole questions were submitted to the jury for their consideration.

It is respectfully submitted that the judgment below should be affirmed.

WILLIAM B. GOURLEY,
Counsel for Plaintiff-Appellee.

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