

New Jersey Court of Errors and Appeals

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| JOHN SOMMER FAUCET Co., <i>Plaintiff-Respondent,</i> | } | <i>Action at Law.</i> |
| <i>vs.</i> | | |
| COMMERCIAL CASUALTY INSURANCE Co., <i>Defendant-Appellant.</i> | } | <i>On Appeal from Supreme Court.</i> |

Brief for Defendant-Appellant.

This action was brought upon a policy of liability insurance issued by the defendant. The case was tried at the Essex Circuit before Judge Cutler and a jury, and a verdict returned for the plaintiff for the full amount (\$2,765.71), upon which judgment was entered. The appeal is from that judgment.

The policy of insurance which was the subject of the action is known as a Manufacturer's Public Liability policy (p. 133, etc.) The policy does not insure the manufacturer for claims from its own employees, but applies only to persons not employed by the insured (p. 133, l. 20, and p. 85, l. 20), and not only that, but in order for the company to be indemnified for any accident to a person not employed by it, the accident must have happened "by reason of the business described and conducted at the locations named in said warranties" (p. 133, l. 21).

The policy was issued upon certain warranties as to the nature of the plaintiff company's business (p. 140, and p. 141). These warranties were made a part of the contract (p. 138, l. 37). The

warranties described the character of the business of the plaintiff as follows (p. 140, l. 15):

“4. Classified description of the business: All operations incidental to the following business, including repairs and alterations usual and necessary to the care and maintenance of the premises or plant? Manufacturers of Piano Backs and Piano Cases and Wooden Faucets.”

In addition to this classified description of the business, the policy provided for protection to the company for any special operations in which it might engage upon the payment of an additional premium. Plaintiff company warranted that it intended to conduct no special operations (p. 140, l. 32, etc.), and hence paid only the very small premium of \$3.90 (p. 142, l. 4). The warranties with reference to the special operations, which are material to this action, are as follows (p. 140, l. 35): “Erection, construction, demolition or unusual alteration or repair of premises or plant—None.”

The effect of these warranties upon the liability of the parties is set forth in the policy as follows (p. 141, l. 3):

“5. The foregoing statement correctly describes the business to be insured, including all usual or special operations incident thereto, and the locations at which said business is conducted. None of the special operations described will be covered unless the estimated average number of persons engaged in such special operations, their estimated compensation, and the premium rate, are specifically stated herein.”

The treasurer of the defendant company, Mr. Shale, defined the distinction between the ordinary classified description of the business and the

special operations as affecting the insurance rate as follows (p. 86, l. 14):

“The distinction is this. The general classification is used for the purpose of a rate upon which the policy is issued. If there are any special operations in addition to the business described there is an additional premium charged and under these special operations there would be a special rate for each one of these operations specified and if the holder of a policy was engaged in any of the businesses enumerated as a special they would be charged an additional premium in addition to the one relative to their general business.”

The immediate cause of the bringing of this action was an accident which happened to one DeVincenzo upon the premises of the plaintiff company on December 21st, 1912, during the time the policy was in force. DeVincenzo was employed by an Italian contractor, LaConti, who had been engaged to do some excavating upon the plaintiff company's premises, preparatory to some construction work. DeVincenzo brought suit against the plaintiff company, against which he recovered a verdict for \$2,500, which was on appeal affirmed by this Court. That appeal was argued at the March term, 1915, and decided at the June term, 1915, 94 Atl. Rep. 573.

The defendant insurance company declined to make good the loss to the plaintiff company upon the ground that the injury to DeVincenzo had not been suffered “by reason of the business” described in the policy, and hence that the loss was not covered by the policy. (See Ex. D. 2, p. 143).

The issue raised by this action is, was DeVincenzo injured while engaged upon “repairs and alterations usual and necessary to the care and

maintenance of the premises or plant" (p. 140, l. 18) of the plaintiff; or was he injured while engaged in some "erection, construction, demolition or unusual alteration or repair of the premises or plant" (p. 140, l. 35). The latter were admittedly not within the provisions of the policy.

At the conclusion of the plaintiff's case the defendant moved for the direction of a non-suit (pp. 82-84), and at the conclusion of the entire case (pp. 112-114 and p. 118, l. 32) for a direction of a verdict, upon the ground that the undisputed facts showed that the work which was done was of such a character as not to have come within the description of the business of the plaintiff company as described in the policy, and that there had therefore been a breach of warranty which required the trial court to control the case. At the conclusion of the entire case the plaintiff also moved for direction of a verdict in its favor, also upon the ground that the facts were not in dispute (p. 113, l. 23) and that the law was with it upon a proper construction of the policy. Judge Cutler, however, held that the case was for the jury, and proper objections were taken to his ruling. The effect of the ruling of the trial judge was to leave it to the jury to construe the contract, for the fundamental facts as to the character of the work in the course of which DeVincenzo was hurt, were in no manner in dispute.

I.

THE QUESTIONS INVOLVED PRESENTED MATTERS OF LAW UPON WHICH THE TRIAL JUDGE SHOULD HAVE CONTROLLED THE JURY BY GRANTING THE DEFENDANT'S MOTIONS FOR NON-SUIT AND DIRECTION OF A VERDICT.

The same questions are raised by the refusal of the trial court to charge the defendant's first request (p. 130, l. 3), and the defendant's 11th, 12th and 13th requests (p. 132, ll. 1-22), to which exception was taken (p. 127, l. 10).

In order to properly understand the case a description of the situation is necessary.

At the time of the accident the plaintiff company owned and operated a large factory building on the north side of Central avenue, Newark. Central avenue runs east and west. The factory faced south. The factory property occupied practically the whole block between Duryea street on the east, and Morris avenue on the west. In the rear of the big factory building, or on the north side of it, and a little west of the center of the rear of the building, was an open shed, or covered platform. This structure consisted of a flat roof over a wooden platform. It was open front and back, the front being toward the north and the back toward the south. The east and west sides were closed by walls of adjoining buildings.

If one stood at the rear of the large factory building and faced north, as the situation was at the time of the accident, there would have been on his right hand the brick wall of a boiler or engine room, and on his left the wall of another building, known as the store house. The roof of the open shed rested on the right on the wall of the engine or boiler room, and on the left on the

wall of the store house. The wooden platform thus covered by the roof was used to drive teams and wagons upon for the purpose, among other things, of delivering coal to a coal bin in the boiler room (p. 25, l. 17 to p. 26, l. 25).

The roof of this open shed did not physically adjoin the main factory building on the north side of that building. Between the edge of the wooden platform and the north wall of the factory building was an open areaway some four or five feet wide, by which access could be obtained to the boiler room (p. 52, ll. 1-8). Originally there had been a stone wall along this areaway running up to the ground above at the point where the edge of the wooden platform terminated, but at the time in question this wall had been washed away (p. 52, ll. 10-14). Beginning therefore at the north wall of the big factory building and going north there came first the areaway, four or five feet wide, running between the north wall of the big factory building and the old wall along the end of the wooden platform to the boiler room (p. 53, ll. 1-12); then came the wooden platform which was open on the south and north ends, and closed on the east and west ends by the walls of the boiler room and store house respectively, and covered over by a roof.

The photograph (p. 2) shows the present platform and the wall of the boiler room. The photograph (p. 4) shows the same thing, with the rear, or north wall of the main factory building. It also shows a railing guarding the areaway below.

The photograph (p. 3) shows the rear, or north, wall of the main factory building (and the areaway guardrail) and also the fence along the Morris avenue side. At the time of the accident the store house stood between this fence and the westerly side of the old platform.

Underneath the wooden platform was nothing but waste space. The natural slope of the land at that point is from north to south. The north side of the platform rested on the ground at its natural level. Underneath the platform the ground sloped downward considerably, so that the angle was about 45 degrees, and the bottom of the slope reached the level of the areaway floor at a point underneath the platform which was about at its southern or rear end, and where the original stone wall had been. This space under the platform was not, and in the nature of things, could not be used.

The object of the improvement in the course of which DeVincenzo was hurt was to make the platform on which the wagons had to drive safe.

The plaintiff's theory was that the whole object of the work which was done was merely to make this platform safe to drive upon, and hence that it was a repair or alteration usual and necessary to the care and maintenance of their premises and plant, and so within the provisions of the policy. In the course of the work which they said was thus designed to make the platform safe, the roof of this old shed fell down, causing the injury to DeVincenzo.

The plaintiff's theory of the case necessarily had to be that the work done, in the course of which DeVincenzo was admittedly injured (see answer p. 10, l. 38), was merely to restore the platform and make it safe. Anything more than that would have taken the operations outside of the scope of "repairs and alterations usual and necessary to the care and maintenance of the premises or plant" (p. 140, l. 17).

The plaintiff endeavored to limit its testimony to fit this theory, but the facts and the theory failed to agree. The evidence showed conclusively

that the work done was an unusual alteration and repair, and that a new construction entirely resulted.

John Sommer, the vice president and treasurer of the company, described the use of the old platform to drive upon (p. 18, l. 16), and their fear that it might fall down and kill the horses and men (p. 21, l. 20), and pointed out the necessity of making it safe.

Michael Sommer, manager of the plant (p. 34, l. 35), also testified to the unsafe condition of the old floor (p. 45, l. 25), and the plaintiff's engineering expert, Mr. Winston, gave all his testimony on the theory that the thing which the plaintiff company undertook to do was to make the platform safe for driving wagons and trucks upon (p. 67, l. 37).

As already pointed out, prior to the making of the improvement and for many years before, this wooden platform had rested with its north end on the level of the ground, and its south end held up by the old wall which formed one side of the areaway. The ground underneath sloped at an angle of about 45 degrees, the highest point of the ground being at the north edge of the wooden platform and sloping down at the angle of 45 degrees to the level of the floor of the areaway. This earth as described by John Sommer was (p. 20, l. 16) "shifting earth, and was on an angle of about 45 degrees and ran back about 40 feet in back of that platform." (See also p. 29, l. 36; p. 33, ll. 10-15; p. 40, ll. 32-33). No use whatever was made of the space underneath the platform. John Sommer made this very plain. He said (p. 33, l. 9):

"Q Before you made this change you didn't make any use of the space underneath this shed? It was all filled up with dirt? A

At an angle of about 45, as I explained we didn't make any use of it.

Q We understand the 45. You didn't make any use of the space under there? A No, sir."

And again (p. 40, l. 25):

"Q Did you have any coal back there?

A No, sir.

Q Did you have any barrels there in the old days? A Well, might have been some line pipe.

Q Not might have been. A I don't think there was any barrels there.

Q Nothing in there but dirt? A That is all, sloping up.

Q 45 degrees? A Yes, sir."

The situation presented, therefore, was that the plaintiff was called upon to remove a platform upon which it used to drive its wagons and trucks, which platform had overhead a roof to protect it from the rain, and underneath dirt and rubbish, sloping from the north to the south at an angle of about 45 degrees, and the space underneath the platform used for nothing at all.

The plaintiff's expert witness and engineer, Mr. Winston, after some struggle on cross examination, finally described what was necessary to be done in order to make the platform safe. This was to erect columns or posts to hold up the floor beams (p. 72, ll. 15-25) and then to keep back the ground from shifting in under the platform by building a retaining wall. This retaining wall could have been constructed either by rebuilding the old wall along the areaway and filling in the open space underneath the platform with earth (p. 72, l. 36 and p. 72, ll. 20-30); or by building the retaining wall along the north side of the

platform and excavating the ground underneath (p. 73, ll. 30-40).

There had never been any retaining wall along the north side and according to Mr. Winston it was a matter of choice whether the retaining wall should be placed at the north side and the ground underneath the platform excavated, or the retaining wall rebuilt where it had originally been on the south end of the platform next to the areaway, and the remaining space filled in. He does not give any satisfactory reason why, if the retaining wall had been built on the north, it was necessary to excavate all the space underneath the platform after sufficient had been excavated to sink the piers to hold up the floor beams, and very evidently a rough character of excavation was all that would have been necessary in any event. He admitted that under no circumstances was it necessary to concrete the floor of the excavation (p. 74, l. 16 and p. 78, ll. 1-14).

What did the plaintiff in fact do, as compared with what it was necessary to do to make the platform safe?

The plaintiff in fact constructed a large concreted vault or storage cellar under the platform, in the place where there had been formerly shifting dirt and rubbish, and provided itself with an entirely new addition to its plant for a coal bin and storage purposes.

Under the guise of making the platform safe to drive upon the plaintiff hired LaConti, and his gang of laborers, and excavated a place under where the old platform had been about 24 feet one way, 27 feet another way, and 10 feet deep, from the ground level (p. 60, l. 17; p. 143, l. 35). Following the excavation of this large space by the Italian contractor, masons were employed, who built a brick retaining wall on the north side of

the new vault and then iron posts were put in to hold up the platform, which posts rested on concrete piers (p. 115, ll. 10-30; p. 21, l. 19). After this had been done the floor of this cellar was concreted. John Sommer said that this concrete floor was not put in until seven months after the accident had happened (p. 78, l. 24), but in this he was evidently mistaken. He was occupied with the management of the business both at Newark and at the Washington factory of the company (p. 22, l. 20), and left the management of the details to others, under the supervision of his brother Michael, who carried out his instructions (p. 22, l. 27).

Henry Zomrock had been employed by the plaintiff to do the carpenter work, and he testified that he had built the platform and that the concrete floor was put in as soon as the platform was done. His testimony was (p. 115, l. 31):

“Q After the iron posts had been put up what was done next? A I put two girders over.

Q What was done to the floor of the excavation? A As soon as the platform was done concrete came there.

Q When was the concrete floor put in? A When the platform was done.

Q Then the concrete floor was put in?

A Yes.

Q Who built the platform? A I.”

When Mr. Weir, the chief inspector of the defendant company, looked over the ground in May, 1913 (p. 99, l. 27), the construction was complete with the concrete floor and all (p. 100, l. 17), and the place in use (p. 104, l. 40). The accident to DeVincenzo happened on December 21st, 1912. The vault was in full operation in May, 1913, five months afterwards. Mr. Sommer

was evidently mistaken in his idea as to when the concrete floor was put in. It was evidently part and parcel of the whole improvement. The whole work required some six weeks to complete (p. 57, l. 29).

Not only was the large vault, 27x24x10 feet, completely excavated and the retaining wall on the north built, and the concrete floor laid, but manholes were placed in the platform along the north side or the side farthest away from the factory building, through which coal could be dumped into the floor below. Remember that before this the wagons had had to drive entirely across the platform to the edge of the areaway and dump their coal and very evidently this coal had to be taken into the engine room coal bin. Now, however, manholes for the purpose of dumping coal were made along the north side of the platform. A door led from the vault into the engine room (p. 123, l. 9).

Mr. Weir, when there in May, 1913, noted three manholes nearest the north edge of the platform (p. 108, ll. 9-25).

Michael Sommer, when called in rebuttal, evidently for the purpose of showing that the manholes were not originally a part of the improvement, nevertheless testified that the manholes were placed there "at the same time the work was completed" (p. 111, l. 19); and Mr. Zomrock said that he himself had built the holes and that their purpose was "so that you could chute in coal" (p. 116, l. 24, and p. 118, ll. 15-30). After this vault was built it was used for the storage of coal, barrels and other things. The photograph (p. 5) in evidence shows it (p. 55, l. 26 to p. 56, l. 3). The property is now rented to a tenant who uses it for storing coal and other things (p. 36, l. 29). It was also used by the plaintiff

for coal prior to its having leased the property, and Michael Sommer so admitted on cross examination (p. 56, l. 27):

“Q And there was some coal? A I think there was some coal.

Q Do you remember taking me around there, before we started this suit, in the excavated place and showed me how you took the coal out of the excavated place and wheeled it into the boiler room? A Yes.

There was some quibble in the testimony as to the amount of dirt which had been excavated. The plaintiff company paid the Italian for excavating 491½ cubic yards (p. 102, ll. 32-37), although the engineer, Mr. Winston, said that the space underneath the platform would not figure out that much (p. 71, l. 20). This discrepancy, however, has nothing to do with the case. It is not a question of how much dirt had been excavated, but whether the entire construction, of which the making of the excavation was a part, constituted a repair or alteration usual and necessary to the care and maintenance of the premises and plant of the plaintiff; or whether it came within the scope of the special operations which were outside of the policy, such as the erection, construction, demolition or unusual alteration or repair of the premises or plant.

The trial judge left the case to the jury, but what was there for the jury to pass upon? The facts with reference to the character of the construction were in no manner disputed. They could not well be.

The trial judge left it to the jury to say (p. 122, l. 25): “First, what work was actually done, and secondly, was the work included or excluded under the terms of the policy.” Elaborating this he said (p. 122, l. 38): “You are to say from

all the evidence what was the condition under the old platform. Was there a cellar there, was there a fill there, or what was the condition before the work was begun?" This, however, was not a jury question. There was no doubt of what the condition had been under the old platform. It was, according to the plaintiff's witnesses, not disputed by the defendant, a place where the dirt and rubbish sloped at an angle of 45 degrees, and was used for nothing.

The trial judge further left it to the jury to say "whether or not the cellar was there before to be repaired" (p. 123, l. 24). But again there was no dispute as to that, for there was no pretense by the plaintiff's witnesses that there ever had been a cellar there to be repaired, but simply that the platform had been built over the natural slope and that the space beneath had been filled with dirt and rubbish.

Not only did the trial judge leave these undisputed questions of fact to the jury, but he also left to their decision questions purely of law, which ought to have been decided by the court. For example this (p. 123, l. 21): "Was the work done incidental to plaintiff's business, for that is one of the terms of the policy. Was it a necessary or usual repair?" Or this (p. 123, l. 25): "Was it a necessary and usual alteration? was it necessary to care for and maintain the plaintiff's plant?"

It is conceivable in a case of this character that if the facts had been in dispute the trial judge might properly have left it for the jury to say what had in fact been done. One set of facts might conceivably have resulted as a matter of law in an unusual alteration or repair, or have come within the definition of an erection, construction or demolition. Another set of facts

might not have come within those categories. The interpretation of the policy, the facts being settled, was for the court and not for the jury. In this case the trial judge left it to the jury to settle the facts, although they were in no manner in dispute, and further left it to the jury to say what the policy meant, as applied to these facts. What the trial judge should have done was to have himself interpreted the policy and applied the law to the undisputed facts in this case.

Lippincott vs. Royal Arcanum, 35 Vr. 309.

In his charge to the jury the trial judge defined the words used in the policy. He told them that the word "alteration" means a change (p. 124, l. 24); that the word "usual" means such as is in common use, and that "unusual" would be the opposite (p. 124, l. 26); that the word "construction" and the word "erection" mean "the making of anything, the making of something new" (p. 125, l. 2).

When the situation before the improvement and after is compared, there is no room for dispute as to whether the repair or alteration was usual or unusual, or whether there had or had not been a construction or erection. A usual repair necessary to the upkeep of the plaintiff's plant would have been to do such work as would have been necessary to make the platform safe to drive upon. Instead of that the plaintiff constructed a large storage cellar or vault, concreted it, put man-holes in it, through which to chute coal, and used it for the storage of coal and other commodities, and so completely changed the situation, from a mere platform to drive upon, under which was waste space devoted to dirt and rubbish, to a platform above to drive upon, under which was a large and usable storage vault and coal bin, that there was in the language of the trial judge

“the opposite” of a usual repair, and there was “the making of something new.”

In *Peoples Ice Co. vs. Employer's Liability Assurance Corp. of London*, 36 N. E. 754 (Mass. 1894) the plaintiff was a corporation engaged in the ice business, and as such was building a large new ice house at Wigwam Pond in Dedham, where it already had some smaller ice houses. During the process of construction the new ice house fell, causing injury to several of the plaintiff's employes to whom the plaintiff afterwards paid compensation. The question was whether or not these injuries were covered by the policy. The application applied for a “policy to be based upon the following statement of facts which are to be considered as warranties.” Among other things stated were: “The employer's works are situated as (state all) as above, and where cutting ice.” Upon this application, a policy was issued in consideration of a premium which was therein stated to be “based upon the estimated yearly pay roll of the employer, amounting to \$5,000.” The policy stated “that the sums paid to the employer should be for personal injury, within the meaning of this policy, caused to an employe in his service while engaged in the employer's work in any of the occupations, or at any of the places, mentioned in the schedule.” The Court, by Allen, *J.*, said at page 755:

“Taking the policy and the application together, the risk assumed was for injuries received in connection with the carrying on of the business. No doubt, the words used should be construed with reasonable liberality; but they are not broad enough to cover the work of erecting a new and large building which is to be used for storing ice. The erection of new ice houses or stables for the

enlargement or better accommodation of the business is not an operation connected with the business, within the meaning of the policy and application, when construed together. There is a difference between ordinary day by day repairs, which are incident to the carrying on of the business, and the erection of large, new buildings, which, when completed are to be used in the business. Such buildings might be built wholly by independent contractors. Whether they are so or not, the agreement between these parties does not refer to or include an operation of that character. Looking at all of the provisions above recited, we are unable to put so broad a construction upon the risk assumed as would be necessary in order to sustain the plaintiff's case."

In *Hoven vs. Employer's Liability Assurance Corporation*, 67 N. W. 46 (Wis. 1896), it was held that a policy indemnifying an employer from liability for claims for personal injuries to its employe "while engaged in operations connected with the business of iron and steel work," covered injuries received by an employe by reason of the construction of a building by the employer for the use of his business. This case is easily distinguished from the one at bar. Among the facts in the case it appeared at the time the plaintiff was injured, he was engaged in the manufacturing department, that the employer was building an addition to its works with a crew other than the one the plaintiff was connected with, and that while such crew was raising one of the girders it fell, striking against the shears at which plaintiff was at work, and, rebounding, struck and injured him. The Court in holding that the policy covered the accident, took occasion to dis-

tinguish the case then under consideration from that of *Peoples Ice Co. vs. Employer's Liability Assurance Corporation, supra*, and pointed out that the warranties and representations involved, were not present in the case under consideration.

In *Home Mixture Guano Co. vs. Ocean Accident and Guarantee Corporation, etc.*, 176 Fed. 600, it appeared that a large part of the plaintiff's factory had been destroyed by fire and the company therefore was engaged in re-building the same, and in connection therewith was building an acid chamber which had to be lined with lead. In the course of this work one of the plaintiff's employes while engaged in unrolling the lead, fell from the scaffold and received injuries, for which he recovered damages from the plaintiff. It was held that his work was not "ordinary repairs" but "construction, demolition, or extraordinary repairs" within the exception of the employer's liability policy excepting injuries to persons occurring in the construction, demolition, or in making extraordinary repairs to structures, buildings or plants. Newman, *J.*, said at page 603:

"Was this work such, that injury occurring, the indemnity company would be liable to the plaintiff, in view of the exceptions contained in the policy, which have been quoted above, and the provisions of paragraph 13 of the schedule?"

The argument here is that although the building containing the acid chamber was destroyed by fire, and the same had been rebuilt, and was being relined, inasmuch as relining would be an ordinary repair, and it was done by regular employes of the guano company, it does not come within the exception stated in the policy.

Persons engaged in connection with 'construction' 'demolition or extraordinary repairs' are not covered. Persons engaged in 'ordinary repairs' when made on the premises mentioned in the schedule, by employes whose compensation is regularly included in the company's pay roll are covered. It is contended here, and the contention is unquestionably sound, that this policy should be construed most strongly against the indemnity company, and the exceptions in the policy construed as against the company, but construing the policy in this way, can it be said to cover the person injured in the work in which Womack was engaged, at the time he was injured, although he was on the regular pay roll of the company? For some reason best known to the indemnity company, it saw fit to make an exception in its policy as to employes engaged in 'construction, demolition, or extraordinary repairs,' and the guaranty company assented to this in the schedule.

While it is true that the indemnity company would probably have been liable had Womack been simply engaged as an employe of the company, and on its pay roll, in assisting in relining the acid chamber, that being all, yet, in view of the fact that the building in which the acid chamber was contained was completely destroyed, and was being rebuilt, is there any such liability?

It is perfectly clear from the petition, and from the letters of the plaintiff company attached to the petition, that a large part of its manufacturing plant was destroyed, and that it was engaged in rebuilding the same. That portion of the plant, undoubtedly, in which the acid chamber was placed, was being re-

built. Therefore the contention is that what Womack was doing at the time of his injuries was not repair work at all, but was extraordinary construction work. If the building and the acid chamber were destroyed, and the whole were being rebuilt, it could hardly be called repairing the acid chamber.

It is urged for the plaintiff that a case is made which should go to a jury to determine whether or not this was ordinary repair work. If there was any doubt about the proper construction of this contract, or if any question of fact were involved, this would be true. But there is no difficulty from the terms of this policy and from the facts stated in the declaration and exhibits as to what was being done, and in applying the same to the facts stated. If it was construction work or extraordinary repairs in which J. L. Womack was assisting, his injuries are not covered by the policy. If ordinary repairs it is covered by the policy. To say that where a large part of a manufacturing plant is burned, and is being rebuilt, and an entirely new acid chamber put in, is ordinary repair work, is not possible, giving the most extreme construction to this policy against the indemnity company and in favor of the guano company.

In the case of *Wheeler vs. Fidelity & Casualty Company*, 129 Ga. 240, 58 S. E. 710, Judge Cobb, speaking for the Supreme Court of Georgia, says this:

‘While we recognize the rule that a policy of insurance must be construed most strongly against the insurer, still the words of the policy must be given the meaning which they ordinarily bear; and, where it is manifest

that it was the intention of the insurer that liability should attach only in given circumstances, the law will uphold the contract according to its true intent and import. We do not think there is any ambiguity whatever in the clause of the policy providing for indemnity resulting from death or disability of the beneficiary. Nor do we think that there is any stipulation in the policy which can be properly held to vary or alter the plain and evident meaning of the terms in this clause.

The writing being unambiguous, parol evidence as to what was said by the parties at the time it was executed will not be admitted to vary or alter the terms of the writing. The petition set forth no cause of action, and was properly dismissed on demurrer.'

Other authorities might be quoted to the same effect, but it is unnecessary."

II

THE TRIAL JUDGE ERRED IN HIS CHARGE TO THE JURY AND IN REFUSING TO CHARGE AS REQUESTED.

If the case was to go to the jury at all, it should have gone to them under such instructions from the court as limited the consideration of the case to the normal functions of a jury. But as the case went to the jury the trial judge left them to interpret the policy as a matter of law. The only function of the jury in the case could have been to apply the law as given by the court to the existing set of facts—assuming the case presented a situation where the jury were required to first settle the facts.

By its fourth request the defendant requested the judge to charge as follows (p. 130, l. 24):

“(4). Repairs usual and necessary to the care and maintenance of the plaintiff’s plant or premises consisted in making the platform safe to use and drive upon, and anything more than that was an unusual repair.”

By the 6th, 7th, 8th, and 9th requests the defendant requested the trial judge to charge the jury as follows (p. 130, l. 25, etc.):

“(6) If the jury find that the work done, in the course of which the laborer DeVincenzo was injured, in addition to repairing the platform itself so as to make it safe to use and drive upon, included the construction of a coal bin or storage cellar underneath the platform, then the work came within the definition of special operations as defined in the said policy, and the verdict must be for the defendant.

(7) If the jury find that the excavation which was made under the platform and the construction of the north retaining wall, and the laying of the concrete bottom were not necessary to the repairing of the platform so as to make it safe to use and drive upon, then the work done was not within the class of repairs usual and necessary to the care and maintenance of the plaintiff’s plant or premises, and not within the business described and conducted at the location named in the warranties, and the verdict should be for the defendant.

(8) If the jury find that the plaintiff intended to and did construct a coal bin or storage cellar underneath the platform, in addition to repairing the surface of the platform, so as to make it safe to use and drive

upon, then the said work was not within the business described and conducted at the location named in the warranties, and the verdict must be for the defendant.

(9) The presence of the trap doors or covered holes in the surface of the platform is inconsistent with the plaintiff's theory of the case that the repairs to the platform were only such as were necessary to make the platform safe to use and drive upon, and hence repairs usual and necessary to the care and maintenance of the plaintiff's plant or premises."

These requests were refused and proper objections taken (p. 127, l. 10).

Instead of charging these requests the trial judge made use of the language of the sixth and seventh requests, but so changed the wording as to completely change the meaning. The result was that he left it to the jury to determine both the fact and the law. He said (p. 125, l. 39):

"If the jury find that the work done in the course of which the laborer was injured, in addition to repairing the platform, which was to make it safe to use to drive upon, included the construction of new work underneath the platform and comes under the head of construction which is new and excluded from the terms of the policy, then, of course, the verdict, as I have said before, should be for the defendant. If the jury find that the excavation was made under the platform and the construction of the north retaining wall and the laying of a concrete bottom were not necessary to the repairing of the platform, so as to make it safe to use and drive upon, then you will say whether

or not that work was unusual work, and it makes no difference whether the work was complete at the time this man was injured or not."

The sixth request required the jury to find for the defendant, if the work of repairing the platform included the construction of a coal bin or storage cellar. This construed the contract as a matter of law in accordance with its terms. Instead of so charging the trial judge left it to the jury to say if the construction of the new work on the platform (p. 126, l. 5) "comes under the head of construction which is new and excluded from the terms of the policy." By so charging he left it to the jury to construe the contract as a matter of law.

The 7th request required the jury to find for the defendant if they found that the excavation under the platform and the construction of the north retaining wall and the laying of the concrete bottom, were not necessary to the repairing of the platform so as to make it safe. Instead of charging this, the judge charged the jury (p. 126, l. 10) that if they found that the excavation under the platform and the construction of the north retaining wall and the laying of the concrete bottom, were not necessary to make the platform safe (p. 126, l. 16), "then you will say whether or not that work was unusual work." Here again the trial judge left it to the jury to interpret the policy.

Nothing is better settled than that the construction and effect of a written instrument is a matter of law to be determined by the court and not by the jury.

See *Grueber Engineering Co. v. Waldron*, 42 Vr. 594, p. 599.

Smith & Wallace Co. v. Lunger, 35 Vr. 539, p. 541.

Both of those cases were in this Court.

See also *Hudson v. Trenton Locomotive & Machine Co.*, 1 C. E. Gr. 475.

The trial judge refused to charge in any form the 4th and 9th requests.

If the case was to be submitted to the jury at all, then these various requests ought to have been charged. Under no circumstances should the jury have been permitted to construe the contract.

III

THE TRIAL JUDGE ERRED IN PERMITTING THE PLAINTIFF'S WITNESS WINSTON TO INTERPRET THE POLICY.

Mr. Winston was called as an expert builder and engineer. He was asked a hypothetical question (p. 63, l. 30), which in itself was bad because it did not contain all the elements of fact which had been proved in the case, particularly the fact of the concrete floor in the vault, and then was allowed to give his opinion to the effect that the work done was an ordinary repair (p. 65, l. 14).

This evidence was not only improper, but of no value, and hence immaterial. It would have been equally easy for the defendant to have called an engineer to say in answer to the same hypothetical question that the work mentioned therein was not an ordinary repair, but an unusual one. The question presented, however, was a question of law to be applied by the court to the facts. If the facts were the subject of dispute, it would have been the function of the jury to have settled the facts, and then for the court to

have given binding instructions to the jury as to the law applying to one set of facts or the other. But here there was no dispute as to the fundamental facts. The plaintiff changed the old platform with the useless air space underneath, into a storage vault as described in the evidence, and that presented a situation where the court, and not a witness, was required to say whether the work done constituted a usual or an unusual alteration or repair.

IV

THE TRIAL JUDGE IMPROPERLY EXCLUDED MATERIAL EVIDENCE OFFERED BY THE DEFENDANT.

The policy contained certain warranties which were made a part of it, and by its terms provided that the special operations mentioned in the policy would not be covered by the policy "unless the estimated average number of persons engaged in such special operations, their estimated compensation and the premium rate are specifically stated herein", (p. 141, l. 10). Mr. Shale, the treasurer of the defendant company (p. 84, l. 28), was asked this question (p. 86, l. 36): "If special operations had been specified in this policy under the heading, what effect, if any, would that have had upon (under) the rate of insurance?"

This question was overruled and exception taken (p. 87, l. 3).

The trial court practically left the case to the jury to determine certain questions of fact which he thought ought to be determined, and then to say what the policy meant. If the jury were to have the privilege of passing on questions of that character, they should have been permitted to take into consideration the general scheme of

the insurance from the stand-point of the defendant, with reference to the matter of the insurance rate. The policy very evidently was designed to protect the plaintiff in the ordinary maintenance and upkeep of its plant, but it was not designed to protect the plaintiff in anything beyond that.

In the plaintiff's plant, in common with every manufacturing plant, there is a certain amount of upkeep, sometimes called maintenance, which goes on constantly, or almost constantly. Work of this character proceeds from month to month, and from year to year, in essentially the same manner, and practically the same extent. It is, in insurance parlance, "a constant, current condition, quite as constant as the general operations conducted in the plant." Because these conditions are constantly attendant upon the operative procedure in the plant, they become properly a part of the hazard of such operative procedure. But when changes are made which are not of this constant, current character, but are of a character which may be periodical or sporadic, and which may be in the nature of permanent improvements or changes, required by the demands of the business, then a new risk must necessarily be reflected in the rate of insurance.

It was to bring this situation clearly before the mind of the jury that the question which was overruled was asked, and inasmuch as the jury were permitted to interpret the policy, the evidence which this answer would have elicited, would have been material for their consideration and important to the defendant.

We respectfully submit that the record sent up contains error and that there should be a reversal of the judgment.

Respectfully submitted,

McCARTER & ENGLISH,
Attorneys of Defendant-Appellant.

CONOVER ENGLISH,
Of Counsel.

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Notice of Appeal.

Notice of Appeal.

(Filed May 16, 1916).

New Jersey Supreme Court.

10

JOHN SOMMER FAUCET COMPANY,
Plaintiff,

vs.

COMMERCIAL CASUALTY INSURANCE
COMPANY,
Defendant.

*Action at
Law.*

*Notice of
Appeal.*

20

Sirs:

TAKE NOTICE that the defendant appeals from the whole of the judgment entered in this cause on the sixth day of May, 1916, to the Court of Errors and Appeals in the last resort in all causes.

McCARTER & ENGLISH,
Attorneys of Defendant-Appellant.

TO MESSRS. LUM, TAMBLYN & COLYER,
Attorneys of Plaintiff-Appellee.

30

Dated, May 15th, 1916.

40

*Grounds of Appeal.***Grounds of Appeal.**

(Filed June 9, 1916).

New Jersey Court of Errors and Appeals

10

 JOHN SOMMER FAUCET COMPANY,
Plaintiff-Respondent,
vs.
 COMMERCIAL CASUALTY INSURANCE
 COMPANY,
Defendant-Appellant.

*Action at
Law.**On Appeal
from**Supreme
Court.**Grounds of
Appeal.*

20

Sirs:

TAKE NOTICE that the following are the grounds of the defendant's appeal from the whole of the judgment entered in this cause on May 6th, 1916:

1. The trial court refused to direct a judgment of non-suit at the request of the defendant.

2. The trial court refused to direct a verdict for the defendant at its request.

30

3. The trial court improperly admitted evidence over the defendant's objection, as follows:

a. He permitted the plaintiff's witness Charles A. Winston to answer certain hypothetical questions interpreting the policy of insurance in suit.

b. He permitted the plaintiff's witness Charles A. Winston to answer the following question:

"Assuming that a platform used for wagons and vehicles to drive on was in a ruinous condition and assuming one end of the platform rested on

40

dirt which had shifted and drifted in under there,

Grounds of Appeal.

the other end supported by posts and that it was necessary for the safe operation to repair this platform to put in new timber and that in doing it the old platform was taken up and the dirt underneath which was sloping at an angle of approximately forty-five degrees was cleaned out and a wall was placed for the platform to rest upon. Under those circumstances would you consider that work as in the building trade and in your general experience, as you have given us, would you consider such work, repairs and alterations usual and necessary to the care and maintenance of the premises, of the plant? Assume also in the question that the dirt under the platform was excavated and the retaining wall was put up on the north end of the platform to support it and prevent the dirt from drifting in and that new props were put under.”

c. He permitted the plaintiff's witness Charles A. Winston to answer the following question:

“Would it be a repair and alteration, usual and necessary, so considered in the building trade or as an erection and construction or unusual alteration?”

d. He permitted the plaintiff's witness Charles A. Winston to answer the following question:

“Would it be termed in the building trade under those conditions repair and alteration which was usual and necessary would it be termed an erection and construction, that is erection and construction or repair and alteration?”

e. He permitted the plaintiff's witness Charles A. Winston to answer the following question:

“What you meant in your testimony is—can it be said or not be said that any one way was necessary?”

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Grounds of Appeal.

4. The trial judge refused to permit the defendant's witnesses to answer certain material questions as follows:

a. The defendant's witness J. Horace Shale the following question:

10 "I see in connection with this policy a series of warranties. What is the scheme in reference to making those warranties?"

b. The defendant's witness J. Horace Shale the following question:

"When this kind of a policy is made what is the object of asking the insured to state the character of his business?"

c. The defendant's witness, J. Horace Shale, the following question:

20 "If special operations had been specified in this policy under the heading what effect, if any, would that have had under the rate of insurance?"

d. The defendant's witness, William A. Weir, the following question:

"Didn't that occur to you?"

5. The trial judge refused to admit evidence material to the defendant, and in particular as follows:

a. Exhibit D. 4 for identification.

30 b. Exhibit D. 5 for identification.

6. The trial court permitted the plaintiff's witness, Michael Sommer, to testify in rebuttal as follows:

"Why were they put there?"

7. The trial court refused to charge the jury as requested by the defendant.

8. The trial court refused to charge the jury as requested by the defendant as follows:

40 "(4) Repairs usual and necessary to the care and maintenance of the plaintiff's plant or premises

Grounds of Appeal.

consisted in making the platform safe to use and drive upon, and anything more than that was an unusual repair."

"(8) If the jury find that the plaintiff intended to and did construct a coal bin or storage cellar underneath the platform, in addition to repairing the surface of the platform, so as to make it safe to use and drive upon, then the said work was not within the business described and conducted at the location named in the warranties, and the verdict must be for the defendant." 10

"(9) The presence of the trap doors or covered holes in the surface of the platform is inconsistent with the plaintiff's theory of the case that the repairs to the platform were only such as were necessary to make the platform safe to use and drive upon, and, hence, repairs usual and necessary to the care and maintenance of the plaintiff's plant or premises." 20

"(10) If the jury find that the work done to make the platform safe to use and drive upon was more extensive than was necessary or usual to that end, then the said repairs were not within the business described and conducted at the location named in the warranties, and the verdict must be for the defendant."

"(11) The repairs to the said platform as described in the evidence were not repairs usual and necessary to the care and maintenance of the premises or plant of the plaintiff, but were unusual repairs of the premises and plant, and constitute a breach of the warranties contained in the policy." 30

"(12) The work done in connection with the repair of the platform as described in the evidence was of such a character as to constitute an unusual alteration of the premises or plant of the plaintiff, and so constitute a breach of the warranties of the policy." 40

Grounds of Appeal.

“(13) The work done in connection with the repair of the platform as described in the evidence was of such a character as to constitute an erection or construction on the premises or plant of the plaintiff, and so constitute a breach of the warranties of the policy.”

10 9. The trial court refused to charge the defendant's requests as follows:

“(1) There should be a verdict for the defendant.”

20 “(6) If the jury find that the work done, in the course of which the laborer DeVincenzo was injured, in addition to repairing the platform itself so as to make it safe to use and drive upon, included the construction of a coal bin or storage cellar underneath the platform, then the work came within the definition of special operations as defined in the said policy, and the verdict must be for the defendant.”

30 “(7) If the jury find that the excavation which was made under the platform and the construction of the north retaining wall, and the laying of the concrete bottom were not necessary to the repairing of the platform so as to make it safe to use and drive upon, then the work done was not within the class of repairs usual and necessary to the care and maintenance of the plaintiff's plant or premises, and was not within the business described and conducted at the location named in the warranties, and the verdict should be for the defendant.”

McCARTER & ENGLISH,
Attorneys of Defendant-Appellant.

Amended Complaint.

Amended Complaint.

(Filed August 12, 1915).

New Jersey Supreme Court

ESSEX COUNTY.

10

JOHN SOMMER FAUCET COMPANY,
Plaintiff,

vs.

COMMERCIAL CASUALTY INSURANCE
COMPANY,
Defendant.

*Action at
Law.*

*Amended
Complaint.*

20

John Sommer Faucet Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and having its principal office in the City of Newark in the county of Essex and State of New Jersey, says that:

1. The plaintiff at all times herein alleged maintained, conducted and carried on in the City of Newark aforesaid a certain factory for the purpose of manufacturing piano backs, piano cases and wooden faucets.

30

2. On July 25, 1912, the defendant was and still is a corporation duly incorporated under and by virtue of the laws of the State of New Jersey with power and authority, amongst other things, to insure and indemnify against loss for claims for damages on account of bodily injuries.

3. For and in consideration of the sum of \$3.90 the defendant on the 25th day of July, 1912, exe-

40

Amended Complaint.

10 cuted to the plaintiff a policy of insurance agreeing thereby to indemnify the plaintiff against loss and expense to the extent of \$5,000, resulting from claims upon the plaintiff for damages on account of bodily injuries suffered by any person or persons not employed by the plaintiff, said policy covering a period of twelve months, beginning on August 2, 1912.

4. On December 21, 1912, one Nicola DeVincenzo who was not employed by the plaintiff suffered severe bodily injuries while upon the premises owned by the plaintiff and described in said policy of insurance.

20 5. The said injuries were sustained by the said DeVincenzo by reason of a shed or open wooden structure located upon the plaintiff's premises collapsing and falling while the earth beneath said shed was being excavated in order to make repairs usual and necessary to the care and maintenance of the plaintiff's plant or premises.

6. Immediately after the occurrence of the accident the plaintiff gave notice thereof to the defendant, as provided for in said policy, and otherwise performed all the conditions of said policy on its part.

30 7. The said DeVincenzo after actual trial of the issue, as provided for by the said policy, recovered a verdict against the plaintiff in the Essex County Circuit Court on October 9, 1914, for the sum of \$2,500 damages and \$75.16 costs, which said judgment was affirmed by the New Jersey Court of Errors and Appeals on the 14th day of June, 1915. The plaintiff was forced to and did on the 16th day of July, 1915, pay to the said Nicola DeVincenzo the sum of \$2,765.71,
40 which included the amount of damages recovered,

Amended Complaint.

the costs in the Circuit Court and the Court of Errors and Appeals, and the interest upon said judgment from the time of its recovery.

8. The defendant has not indemnified the plaintiff for said loss and expense.

Plaintiff demands \$2,765.71 with interest thereon and costs. 10

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

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30

40

Answer.

Answer.

(Filed August 14, 1915).

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

JOHN SOMMER FAUCET COMPANY,
Plaintiff,

vs.

COMMERCIAL CASUALTY INSURANCE
COMPANY,
Defendant.

*Action at
Law.*

*Answer to
Amended
Complaint.*

20

The answer of the defendant, Commercial Casualty Insurance Company, says that:

FIRST DEFENSE:

1. It admits the first paragraph of the complaint.

2. It admits the second paragraph of the complaint.

30

3. It admits that it issued a policy of insurance agreeing to indemnify the plaintiff as in said policy provided, and requires that the original policy be produced as to the terms, conditions and provisions thereof.

4. It admits the fourth paragraph of the complaint.

40

5. It admits that the injuries to the said De-Vincenzo were sustained by reason of a shed or open structure located upon the plaintiff's premises collapsing and falling while the earth beneath said shed was being excavated, and denies that said excavation of said earth or work in connection therewith was in order to make repairs

Answer.

usual and necessary to the care and maintenance of the plaintiff's plant or premises, and says that said work in connection with the excavation of earth resulting in the falling of said shed was an unusual alteration or repair to the plaintiff's premises or plant, and was not necessary to the care and maintenance of the plaintiff's plant or premises. 10

6. It denies the sixth paragraph of the complaint.

7. It admits the seventh paragraph of the complaint.

8. It admits the eighth paragraph of the complaint.

SECOND DEFENSE: The policy of insurance executed to the plaintiff by the defendant provided that in consideration of the premium therein named, and of the statements in the warranties in said policy contained, the defendant insured the plaintiff "against loss and expense resulting from claims upon the assured for damages on account of bodily injuries, including death accidentally suffered by any person or persons not employed by the insured, by reason of the business described and conducted at the locations named in the said warranties;" and that the warranties among other things warranted that the business of the plaintiff was conducted at No. 355 Central Avenue, Newark, Essex County, New Jersey, that the business conducted at the said location was that of "manufacturers of piano backs, and piano cases, and wooden faucets," and the defendant says that the injury sustained by the said DeVincenzo by reason of the collapse and fall of the said shed was not an injury sustained by reason of the business described and conducted at the lo- 20 30 40

Answer.

cation named in the said warranties, by reason whereof the said defendant is not required to indemnify the said plaintiff for the said loss and expense complained of.

10 THIRD DEFENSE: The defendant repeats the second defense through the words "manufacturers of piano back and piano cases, and wooden faucets;" and this defendant says that the injury sustained by the said DeVincenzo by reason of the collapse and fall of said shed was sustained while said DeVincenzo was working for an independent contractor, one LaConte, who had a contract with the said plaintiff for the work of excavating beneath said shed, and that said work of excavating as carried on by said LaConte by virtue of his contract with the said plaintiff was no
20 part of the business described and conducted at the location named in the said warranties, by reason whereof the said defendant is not required to indemnify the said plaintiff for the said loss and expense complained of.

30 FOURTH DEFENSE: The defendant repeats the second defense through the words "manufacturers of piano backs and piano cases, and wooden faucets;" and this defendant further says that the said plaintiff in connection with said policy of insurance warranted as follows: "Special Operations. * * * Erection, construction, demolition or unusual alteration or repair of premises or plant: None;" and this defendant says that the injuries sustained by the said DeVincenzo by reason of the collapse and fall of the said shed were sustained in connection with the erection and construction of a building as a part of the premises or plant of the plaintiff, by reason whereof
40 the said defendant is not required to indemnify

Answer.

the said plaintiff for the said loss and expense complained of.

FIFTH DEFENSE: The defendant repeats the second defense through the words "manufacturers of piano backs and piano cases, and wooden faucets;" and this defendant further says that the said plaintiff in connection with said policy of insurance warranted as follows: "Special Operations. * * * Erection, construction, demolition or unusual alteration or repair of premises or plant: None;" and this defendant says that the injuries sustained by the said DeVincenzo by reason of the collapse and fall of the said shed were sustained by reason of the demolition of a part of the premises or plant of the said plaintiff, by reason whereof the said defendant is not required to indemnify the said plaintiff for the said loss and expense complained of. 10 20

SIXTH DEFENSE: The defendant repeats the second defense through the words "manufacturers of piano backs and piano cases, and wooden faucets;" and this defendant further says that the said plaintiff in connection with said policy of insurance warranted as follows: "Special Operations. * * * Erection, construction, demolition or unusual alteration or repair of premises or plant: None;" and this defendant says that the injuries sustained by the said DeVincenzo by reason of the collapse and fall of the said shed were sustained by reason of an unusual alteration or repair of the premises or plant of the said plaintiff, by reason whereof the said defendant is not required to indemnify the said plaintiff for the said loss and expense complained of. 30

McCARTER & ENGLISH,
Attorneys for Defendant.

Reply.

Reply.

(Filed August 24, 1915).

NEW JERSEY SUPREME COURT.
ESSEX COUNTY.

| | | | |
|----|---|---|---|
| 10 | JOHN SOMMER FAUCET COMPANY, <div style="text-align: center;"><i>Plaintiff,</i></div> | } | <i>Action at Law.</i> |
| | <i>vs.</i> | | |
| | COMMERCIAL CASUALTY INSURANCE COMPANY, <div style="text-align: center;"><i>Defendant.</i></div> | } | <i>Reply to Defendant's Answer.</i> |

The plaintiff by way of a reply to the defendant's answer says:

20 REPLY TO SECOND DEFENSE

In reply to the second defense it admits that the policy provided as set up in said defense, but denies all other allegations therein contained.

 REPLY TO THIRD DEFENSE.

In reply to the third defense the plaintiff denies the allegations contained therein, except as admitted in its complaint and in its reply to second defense.

30 REPLY TO FOURTH DEFENSE.

In reply to the fourth defense the plaintiff admits that the policy contained the wording as set forth in this defense, but denies that the injuries sustained by the said DeVincenzo were sustained in connection with the erection and construction of a building as a part of the premises or plant of the plaintiff.

 REPLY TO FIFTH DEFENSE.

40 In reply to the fifth defense the plaintiff admits the wording of the policy as set up in this de-

Judgment.

fense, but denies that the injuries sustained by the said DeVincenzo were caused by reason of the demolition of a part of the premises or plant of the plaintiff.

REPLY TO SIXTH DEFENSE.

In reply to the sixth defense the plaintiff admits the wording of the policy as contained in this defense, but denies that the injuries sustained by the said DeVincenzo were sustained by reason of an unusual alteration or repair of the premises or plant of the plaintiff. 10

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Judgment.

Entered May 6, 1916. 20

NEW JERSEY SUPREME COURT.

JOHN SOMMER FAUCET COMPANY, }

v. }

COMMERCIAL CASUALTY INSURANCE
COMPANY. }

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Two Thousand Eight Hundred and Ninety-Five Dollars and Fifty-Four Cents, and its costs, which are taxed at the sum of Forty-Six Dollars and Thirteen Cents, making in the whole the sum of Two Thousand Nine Hundred and Forty-One Dollars and Sixty-Seven Cents. 30

| | |
|---------------|------------|
| Damages | \$2,895.54 |
| Costs | 46.13 |
| | <hr/> |
| | \$2,941.67 |

Judgment entered May 6, 1916.

WM. S. GUMMERE, 40
C. J.

John Sommer, direct.

NEW JERSEY SUPREME COURT.

JOHN SOMMER FAUCET COMPANY,

vs.

10 COMMERCIAL CASUALTY INSURANCE
COMPANY, of Newark, New
Jersey, a corporation,

Transcript of shorthand notes of testimony, and so forth, taken in the above stated cause, upon the trial thereof, at the Court House, Newark, New Jersey, on Thursday, April 27, 1916.

20 Before Hon. Willard W. Cutler, Judge, and a
Jury.

Lum, Tamblyn & Colyer, by Ralph Lum, for plaintiff.

McCarter & English, by Conover English, for defendant.

Jury impanelled and sworn.

Mr. Lum opened for plaintiff.

Mr. English opened for defendant.

30 *Mr. Lum.* The policy is admitted in evidence.

Marked P. 1.

JOHN SOMMER sworn in behalf of plaintiff.

Direct examination by Mr. Lum.

Q Mr. Sommer, at the time this policy, P. 1, was issued, were you an officer of the John Sommer Faucet Company? A Yes, sir.

40 Q What officer? A I was vice-president and treasurer.

John Sommer, direct.

Q Were you familiar with the plant, the concern? A Oh, yes.

Q Where was it located? A The plant?

Q Yes. A In Newark.

Q Yes. A 355 Central avenue.

Q Of what did the plant consist in a general way, land, buildings? A Lands over on Central avenue. 10

Q About what size? A 40 by 160 running parallel with Central avenue.

Q What other buildings? A There were sheds in the rear. All along the rear there were sheds.

Q Do you recall the injury to one Nicola De-Vincenzo in December, 1912? A Yes, sir.

Q At about that time was any work being done at your place? A Yes, sir. 20

Q Was there a shed there at that time? A Yes, sir.

Q Describe as accurately as you can to this jury, remembering that they are not as familiar with the situation as you are, the position of this shed. A It was right rear of this main building parallel with the building running out, I suppose, about 40 feet, I would judge. I think we have the exact dimension of that shed.

Q For what was the shed used? A The shed was used merely to keep rain off of that part of the ground, covering there. 30

Q Where was the shed with reference to the boiler-room? A Alongside of the boiler-room out about as far as the boiler-room running from the boiler-room over to the end of the building.

Q What supported the roof of the shed? A Uprights, that is, there were no uprights from the floor. They were some frail uprights right under this floor. 40

John Sommer, direct.

Q Was the shed attached to the buildings? A Yes, sir; all around.

Q Was there any platform there? A There was a platform that I just speak of. It was really a floor you might call it.

10 Q Under part of the shed? A Yes, sir; right under the shed even with the ground.

Q Tell us, if you will, what that floor or platform was used for? A It was used to drive around. In other words, we had to cover it. The place was in very bad condition and it had to be covered. The trucks would drive over on this to deposit coal into this coal vault on this side.

20 Q Was anything being done at the platform this time in December, 1912? A Yes, sir; we got instructions to make some changes from the Department of Labor.

Mr. English. I object to that. I don't think the instructions of the Department of Labor are material.

Q Was the instruction in writing? A They did the instructions at different times, but I think this was verbal. They came up there.

Q It was verbal then? A To my knowledge it is verbal.

30 *The Court.* I will allow you to proceed with it.

Mr. English. Your Honor will note my exception.

Exception noted as ground of appeal.

Q In these instructions you have spoken of from the Department of Labor what did you do with reference to the platform? A They gave us instructions—

40 *Mr. English.* No.

John Sommer, direct.

By the Court.

Q No, what did you do? A We cleaned up all the soil that was in under that. It sifted down from the heavy rain, it had washed all down one part of our wall down and was in very bad condition and I agreed with the Labor Bureau—

Mr. English. No.

10

A I removed all the earth that came under there.

Q Was there an open space between the platform and the main building? A Yes, sir; I should judge 5 feet was away, or 7 feet, might have been more, might have been 8.

Q What was the condition of this platform beginning at the time you spoke of? A The condition was a rough planking over this.

20

Q What was its condition, was it good, sound, new or what? A No, old.

Q What condition was it in? A Bad condition.

Q Was it to the bad condition that your attention was directed? A Yes, sir.

Q What was your intent with reference to the demolition of the shed at the time, did you intend to take down the shed? A No; didn't intend to take no shed down.

30

Q Tell us how the shed happened to come down. A The shed happened to come down, there were men cleaning away this earth, which was necessary in order to make the changes that we wanted to make and while we were doing this there was a upright there to hold this flooring. While the men were working at this upright they dug away from under this upright and of course, the shed fell on them, fell on one of the men and injured him.

40

John Sommer, direct.

Q That is how the shed came to come down?

A That is how the shed come down. We didn't take it down.

10 Q The excavation of this dirt that you have spoken of. Will you explain to us why that was done? A That was necessary so as to get a footing for any uprights that we want to put there. If we replaced on the old I should think an accident might have occurred there and that flooring might have come down, might have got into just as bad a situation as it was before.

20 Q Was this earth under this platform that you speak of excavating, was it solid or shifting earth? A Shifting earth and was on an angle of about 45 degrees and ran back about 40 feet in back of that platform. It was necessary to take that earth away.

Q How long had that condition existed? A The old condition?

Q Yes. A I don't know, it couldn't have taken very long, the condition it was in. We went right at it.

Q No, the condition of the earth shifting under there. A Had been that way for some time till it was brought to the attention—

30 *By the Court.*

Q What do you mean by some time? A Well, I suppose it was that way for a year or more or over two years until it was brought to the attention of the Department of Labor and I thought they—

Mr. English. Never mind what you thought.

John Sommer, direct.

By Mr. Lum.

Q I want you to be a little more specific in telling the jury the condition of the surface of this planking prior to the making of this change or doing any of this work. Was it safe to use? What was its condition? A It wasn't safe.

Q Why not? A Why, because they were old planking on there and it was brought to my attention to make those improvements. I thought it was a good idea to make them. I looked it over and gave instructions what to do and I ordered nothing but the best of timber to be put in and we had some uprights and instead of putting back the old uprights that were there we had some iron columns in the yard lying there and I thought they were the very best thing we could possibly use to strengthen it up. We were afraid of this flooring. It was liable to come down and might kill the horses and the men that were driving them.

Q Was that condition apparent to you as you looked at it? A Oh, yes, I seen it after I investigated. I seen it was needed, making the improvements.

Q Now, the matter of this excavation of the dirt, who started it? A We started it with our men.

Q Did you continue it with your men? A No, sir; not altogether, we found it was a little too much work for our men. They wasn't used to the pick and shovel. They started out and some of them made a remark—

Mr. English. No.

Q But it was finished by whom? A By another party, I forget the name.

Q LaConti. A I think that is the name.

John Sommer, cross.

Q His men? A His men.

Q You paid them so much a yard? A We paid them so much for the work. I don't know how it was figured out, whether it was figured out by the yard or day or how they settled.

Q Your brother took care of that end? A
10 Yes, that part of it.

Cross examination by Mr. English.

Q Mr. Sommer, you didn't give any particular attention to this progress of this work yourself, did you? A I gave about the same attention as I do to my business. I am there.

Q How much is that? A I am just trying to explain how much that is. I can't be there every day because I have another business up in
20 Washington.

Q You have another factory up in Washington? A Yes, sir; I had a factory there but it burned down a month ago.

Q This time, the time of this affair, you had a factory up there? A Yes, sir.

Q You left your brother, Michael, here in charge in Newark? A He didn't have full charge. He went according to the instructions I gave him.

Q He was on the ground every day? A Oh,
30 yes; he was there and those days. I wasn't in the factory every other day.

Q He was in closer touch with things than you were? A I should judge a man being there every day might be a little closer.

Q How long had your company occupied this building before this accident? A We had been there, you refer to the main building?

Q The main brick building I am talking about.
40 A We have been there some twenty years or more.

John Sommer, cross.

Q You said there was a row of sheds in the back of the main building? A Yes, sir.

Q Were there other sheds besides this one which fell down? A Oh, yes; other sheds there leading around on Morris avenue and on Duryee street.

Q This factory building fronts on Central avenue? A Yes, sir. 10

Q Central avenue runs east and west? A Yes, sir.

Q You have a big building there, 160 feet front on the avenue? A Yes, sir.

Q Does that occupy the whole block? A No, sir; not the whole block, front on Central avenue.

Q On the west your building is on the corner of Morris avenue? A It runs from Morris avenue to— 20

Q Wait a minute, the building is on the corner of Morris avenue and Central avenue? A That is one end.

Q Morris avenue runs north and south? A Yes, sir.

Q Crosses Central avenue? A Yes, sir.

Q Beginning at the Morris avenue corner the building runs from the corner 160 feet? A Yes, sir. 30

Q When you get to the end of the building is that the next street? A That would be the next street. It is a block, it is the next street.

Q What is the street on the east? A That is Duryee street or Dickerson street—no, Duryee street. Duryee street is the next street to Morris avenue. Dickerson street is to the rear.

Q So your building occupies the space between Central avenue and Duryee street and Morris avenue? A Yes, sir. 40

John Sommer, cross.

Q Now, in the back of this building, this big brick building, you said there were some sheds?

A Yes, sir.

Q Beginning down at Duryee street end, the east end? A Yes, sir.

10 Q What was the shed nearest Duryee street used for? A There was a shed there, sort of a covering for express wagon that when they drove under they would not be out in the weather.

Q And the shed which afterwards fell down—
A On the other end, on the Morris avenue end.

Q This shed near Duryee street had a brick wall? A Had nothing to do with the floor because there was an engine-room in between.

20 Q Just located back of the building but in the middle of the building was this engine-room? A Engine-room.

Q All that had brick walls? A Certainly, brick engine-room.

Q And the brick wall which was toward Morris avenue was the east side of this shed which afterwards fell down? A It is the west side, isn't it?

30 Q The west side. A No, the east side. No, the east side is that way and the west side is that way and it was on that side. The shed that came down was on the side of Morris avenue between the engine-room and the line of the street or a shed coming across there. There was a high fence there and part of a shed.

Q Your building as it stands on Central avenue stands on the north side of the street? A Yes, north side of Central avenue.

Q Then your building faces south, the front of the building faces south? A Yes, sir.

40 Q When you go toward the building you would then face toward the north? A Yes, sir; I would call it north.

John Sommer, cross.

Q Let's face north, let's go to the back of the building and face north? A Yes, sir.

Q You look right under that shed? A Yes, sir.

Q On the right hand would be the brick wall of this engine-room? A No, it would be to the left when you come out of the door. You are talking that you go out. The brick wall as you come out this door and it would be on your right. 10

Q I don't care how you go out. A There is different ways of going out.

Q Let us assume we have got out. Now, we will stand in this open shed and we will look towards the north? A Yes.

Q And you look towards the north and stand in this shed what is there on your right hand or what was there? A There was a boiler-room on the right if you are facing the north. 20

Q That is the way the boiler-room was? A Yes, sir; and the wall.

Q That is what you call the engine-room? A Yes, sir.

Q That had a brick wall? A Brick wall.

Q That is one side of this open shed and located towards the north. Then the brick wall of this boiler-room would be on the left? A Yes, sir. 30

Q It was in that boiler-room where the coal bin was? A In the boiler-room. There is a coal bin there alongside of a boiler-room, place to keep coal, meant for that purpose.

Q And when your wagons used to drive in on this platform they drove in there to deliver coal to this coal bin in that boiler-room? A Yes, sir.

Q Keeping in mind that we are still standing in that shed looking north on the left hand there is an old stone wall? A No, sir; that is, it was 40

John Sommer, cross.

a building that was in line with Morris avenue, that way, and it was opposite that I should judge about 15 feet we would say and this roof that you ask about, one end was fastened on the brick wall.

Q That is the boiler-room? A The boiler-room. The other end was fastened on this here building.

10 Q So, as you stood in this open shed and looked towards the north on the right hand side was the brick wall of the boiler-room which held up one edge of the roof? A Yes, sir.

Q And on the left was the brick wall which held up the other end of the room? A Yes, sir.

By the Court.

20 Q What is the building called? A It was only a covering that I spoke of for the teams to drive under.

Q What do you call the shed next to Morris avenue? A That was a building that was used to go from the main building out. What we call the storehouse, or another shed.

By Mr. English.

Q What did you call it? A Called it store house.

30 Q Then, we will call this building on the left next to Morris avenue the storehouse? A Yes, sir.

Q So the shed that you talked about was held up on the right side by the boiler-room and on the left by the wall of the shed? A Yes, sir.

Q And upon concrete front and back? A With the exception that there was also a pillar on one end of it.

40 Q To hold the roof up there were girders running up from these brick walls? A No, there

John Sommer, cross.

wasn't a girder. I think we have timbers, beams fastened up there.

Q And then there was a big central beam that ran north and south? A Yes, sir; from one end to the other.

Q And then there was a big middle piece to hold up that beam? A There wasn't any in the middle. There was one under this floor, but not on top. 10

Q There was something up there to hold the roof up? A No, sir; it wasn't necessary. It was on the end of the roof and part of this extended over from that end over to this end.

Q You were present at the trial of Mr. DeVincenzo, the Italian laborer? A Yes, sir.

Q You remember you had a carpenter in your employ named Zomrock? A Yes, sir.

Q He is the man that helped shore by this shed, you remember that? A Yes, sir. 20

Q Do you remember he made a sketch of that shed which we used at the trial? A I don't remember about the sketch. Have you the sketch?

Q You were there personally. Don't you remember he produced this sketch which he made, marked in the red posts? A I don't remember just what he did make. Is this supposed to be—where is the shed?

Q Here is the shed, as I understand it, and these red are posts, so he said. A Those are posts at the bottom and this roof was fastened to here and fastened along here and fastened in the back. 30

Q You say here. Do you mean to one of these brick walls? A Yes, sir.

Q And the brick wall on the other side? A No, sir.

Q The shed wall? A Shed wall.

Q What was the shed wall made of? A One is brick and the other one is wood. 40

John Sommer, cross.

Q The shed wall was the wooden wall? A Yes, sir.

Q The brick wall on one side and wooden wall on the other side? A Yes, sir.

10 Q And then posts in back? A And then posts in back to hold that shed up, but there wasn't anything in the middle, that is, as much as I recollect. It had to be quite free for the teams to go on there.

Paper marked D-1 for identification.

Q Do you know the size of it? A I don't remember how many. About—

Q About 74 feet one way and about 30 the other way? A I should judge something like that. It couldn't have been as long as that.

20 Q At the back of the shed, that is to say, on the south side did the shed or did the floor of the shed run right up against the main factory building, or was there a passageway? A No, sir; there wasn't a passageway. There was an opening there. It wasn't a passage.

Q Were there posts back there, you say, to hold that up? A Yes, sir, there was a post back there.

Q And there were posts this way? A No, not to hold the floor. I don't remember any others there.

30 Q You don't remember about posts on the roof? A No, sir, I don't know how many posts. It had to be quite a clearing for the teams to drive in under there and turn around.

Q When you took over that property twenty years before was that shed upon there at that time?

A No, sir; took it over, you mean when I built it?

Q When you built it, did you build the shed at that time? A Between that time and right after. You know I don't know—

40 Q Shortly after you built the building you built the shed, too? A Yes, sir.

John Sommer, cross.

Q And that shed had been there? A Ever since.

Q Had the same planking down that it had from the beginning? A No, sir, you are talking about the floor?

Q Yes, what time are you talking about? A You was asking from the beginning. 10

Q It hasn't got the same planking now? A No, sir.

Q But at the time of the excavation you did have? A Had the old planking.

Q Had the original old planking? A Yes, sir.

Q Now, did you make the arrangement with the Italian contractor to remove the dirt? A I didn't do that personally. I left that to my brother.

Q Your brother, Michael? A Yes, sir.

Q He was paid so much a cubic yard? A I don't really know any more. He likely could give you the debt on that. It was so much for the job, whether they figured it out by the yard or whether they figured the one job I don't remember. 20

Q You know how many cubic yards they took out? A No, I don't know how many. There must have been quite some dirt to come out so we could get a foundation for a post.

Q Did you hear at the time, have you got any recollection of it? A The quantity? 30

Q Yes. A No, sir, I don't recollect.

Q In the neighborhood of 500 cubic yards? A I can't say.

Q 491½ to be exact. A I can't tell you.

Q But you know it was solid, that dirt? A At an angle of about 45, ran right down from the same distance the platform is, it ran down at an angle of 40.

Q Did you see them when they were working? A I seen them doing some work. 40

John Sommer, cross.

Q They had a driveway on the top to drive out?

A Yes, sir, when I seen them.

Q Pretty solid dirt there that had to be excavated? A I don't remember that it was very solid. It was dirt that shifted down continually.

10 Q You won't be positive that there wasn't any center post there to hold this up, will you? A Just where the post. I won't be positive. May have been a post there.

Q To hold the roof up? A There may have been one there.

Q Don't you remember that the claim of the Italian was that that post had not been properly shored and gave way and that is what made the shed fall?

20 *Mr. Lum.* I object to that.

A No, sir, there was a propping under to hold the floor up.

The Court. What is your objection.

Mr. Lum. It does not seem to me that any claim made by the Italian has anything to do with it.

Mr. English. Just to refresh his recollection.

30 *Mr. Lum.* Then I do not object.

Q Were you out there during any period of the construction of the work and saw a post resting down there on a dirt pier? A Yes, sir.

Q You remember that? A Yes, sir.

Q That post held up the roof? A Yes, sir. If you call it a roof, I call it a floor.

40 Q I am talking about the overhead covering to keep the rain off? A I told you before I didn't think there was a post there. You thought there was.

John Sommer, cross.

Q You don't mean to say they did the excavating with the floor on top, you don't mean that? A No, they took that away.

Q They took the floor up first? A They had to take what there was there, they had to take away to get the earth away.

Q Then they began to take—. A Carry it away. 10

Q This accident happened then about the conclusion of the work, the very last day? A I guess so. I ain't sure just when that man was hurt.

Q So at the time the man was hurt there wasn't any floor to fall in. It had been removed? A Yes, sir, that is right. It had been removed.

Q So what fell in wasn't the overhead construction? A The roof fell in. 20

Q Don't you remember from your inspection of that work that there was a big post to hold up this roof? A It wasn't necessary.

Q I don't care whether it wasn't necessary, there was a roof there? A I won't say, but I know there was one held up the floor.

Q The floor was gone at this time. I am talking about the time when the work was almost finished, when the man was hurt. A They may have had a post up there to make sure the roof would not come down in the middle. 30

Q And that post took the place of the other post that had been there in the old days? A Well, I would not say about that.

By the Court.

Q Was the roof flat or did it pitch? A It was mostly, I should judge, it wasn't much of a pitch. It might be called a flat roof. There was a slight pitch to it, just enough to carry off the water. 40

John Sommer, cross.

Q Where did that pitch? A Pitched from the building north, very slight pitch.

Q That would be away from Central avenue? A I would judge that is the way it was. Now, I ain't sure of that. No, come to think of it, I think the pitch ran the other way. Come to think of it now
10 it did run the other way. It was highest in front where you drive in and there was a slight pitch, possibly 25 or 30 feet, or whatever that was, very slight. I would call it more of a flat roof.

By Mr. English.

Q Water had to run off somewhere? A Yes.

Q It ran off on the Central avenue end? A Yes, sir, there was a leader there connected and it ran down there. There was a leader came down
20 from the main building.

Q Before you started to make this change you used to drive your wagons in there, didn't you?
A Yes, sir.

Q How much of the planking was left at that time? A About as much as there is there today.

Q That don't help us any. I want to know—
A How many feet, do you mean?

Q No, I want to know whether all of the original planking was there or whether some of it had
30 been taken up? A None taken up. It was all down only it was in bad condition.

Q Did you arrange for the taking out of this policy or did somebody do that for you? A I was under the impression it was your agent.

Q I mean who, on behalf of your company, negotiated the arrangement? A I usually arrange those matters.

Q And you arranged the policy with the agent?
A I ain't sure whether it is the agent or whether
40 it is a direct representative of the company.

John Sommer, cross.

Q I don't care who it is. A There was somebody that came.

Q Who were the men on behalf of your company who attended to it? A Yes, sir.

Q And made up this policy? A Yes, sir.

Q Before you made this change you didn't make any use of the space underneath this shed? It was all filled up with dirt? A At an angle of about 45., as I explained we didn't make any use of it. 10

Q We understand the 45. You didn't make any use of the space under there? A No, sir.

Q After the change was made the space was used, wasn't it? A I don't know as it was right after. There was an open space there.

Q Shortly after? A It is being made use of at present. 20

Q You put in iron girders overhead? A To hold up that floor.

Q You put them in? A Yes, sir.

Q And you put in iron uprights? A Didn't put a girder across, put a timber across the same as it was before.

Q Iron upright? A Iron upright instead of wood uprights because we happened to have it.

Q Did you build a new wall? A Yes, sir, had to build a new wall. 30

Q Where was the new wall built? A It was built back about the end of the floor.

Q That is to say on the north? A On the north.

Q You put a new wall along the north line to where the old had been? A Yes, sir; a retaining wall. In other words, to keep the earth from going down again.

Q Then you built, did you, built a wall on the engine, boiler side—I mean, the engine-room side? 40

John Sommer, cross.

A No, sir; it wasn't necessary there. The foundation went right down there.

Q What did you do on the Morris avenue side?
A Didn't do anything. Carried away the stone that was there and the earth.

Q Put a new wall in there? A No, sir.

10 Q How did you hold it up on that side, how did you hold up the ground on that side? A Held it up the same as we did before. There was an upright under there.

Q How do you keep the ground from coming in?

A There is one wall. It doesn't take two walls to hold up the ground.

Q The wall and the old shed, you mean? A It is the end of the northern part of the shed.

20 Q You mean the shed which was next to the Morris avenue shed? A That wall was always there. If you said Morris avenue I could explain that.

Q That is what I want to know, how did you keep the dirt out? A On what side?

Q On the Morris avenue side. A That wall was there, that was there.

Q So you made use of the old wall or the existing wall on the boiler-room side and on the shed side? A Yes, sir.

30 Q And you put in a brand new wall crossing the front on the north? A Yes, sir.

Q Then you had an open space so you could use that passageway on the south? A We didn't figure on any passageway being there.

Q It was there, as a matter of fact? A It was there.

Q You put in uprights, iron uprights, to hold up the roof? A Not the roof, the floor.

40 Q Floor above, and that made a great big room in there, 34 by 30? A I don't know about the size.

John Sommer, cross.

Of course, after the dirt was taken out it left more room, but we had to take the dirt away there to put the uprights there and we didn't throw the dirt back again.

Q You used to put coal in there and other things? A No, sir; we didn't put a thing in there.

Q Not right away, afterwards? A No, sir. 10

Q Never? A I can't say ever. I rented the place after. I don't know what it was used for. Instead of ashes being there there was open space.

Q You had in mind in making that structure to use that for storage place for coal? A No, sir; no more than I had of flying.

Q You know this gentleman sitting by me, Mr. Shale? A I have met him before.

Q Treasurer of the defendant company? A Yes, sir. 20

Q He talked to you after this accident happened, looked the ground over? A I suppose he did.

Q After this new constitution had been made? A I don't know. I suppose he saw the plant.

Q You remember he was up there? A I know he was. I ain't sure that he was there, but if Mr. Shale says so he was. There was a great many people up there. 30

Q You talked to him about it? A He may have talked to me about it.

Q Don't you remember you told him in making this new construction you had in mind to use it for a coal bin? A No, I did not. I never told him that.

Q Quite sure about that? A I am positive about that.

John Sommer, cross.

By Mr. Lum.

Q I show you various photographs, which I ask you to identify. A Look like they have been just taken lately.

Q Do you recognize that? A Yes, sir.

Q Is it a fair representation of the location? A
10 Yes, sir, exact, only it hasn't the roof on there.
Marked P-2 for identification.

Q I show you another photograph. Is that a fair representation of the situation shown here? A Yes, sir.

Marked P-3 for identification.

Q I show you another photograph. Is that a fair representation of the conditions shown there? A Yes, sir.

20 Marked P-4 for identification.

Q I show you another photograph. Is that a fair representation of the condition shown there? A No, sir. That looks like it did before.

Marked P-5 for identification.

Q I show you another photograph. Is that a fair representation of the condition?

Marked P-6 for identification.

A The present tenant is using it for coal.

By Mr. English.

30 Q When were these photographs taken? A I suppose a few days ago.

Q You spoke about a present tenant. When did you rent the factory out? A It must be going on six or nine months, about six months.

Q That was during the summer of 1915, summer or fall. Last fall of last year? A Possibly my brother may be able to enlighten me about it. I don't want to say a certain month as I may be
40 wrong.

John Sommer, cross.

Q Have you been on the ground and been in that cellar since you rented the place? A Oh, yes.

Q When were you there last? A I can't say how long ago I was in the factory. I go there every once in awhile.

Q You haven't any cause to be in the factory now, have you? A I do go in there.

Q Have you had occasion to go in the cellar? A I have been down there. There is an engine down there.

10

Q Is the engine in this excavated place? A Yes, sir.

Q When were you down there last looking at the engine? A I can't say, I don't remember.

Q A year ago? A Oh, no, it is less than that. It is only recent I suppose that I was down there. It ain't a year ago. It must be a few months, possibly.

20

Q That is as near as you can come to it? A Yes.

By the Court.

Q How large a space is there as it now stands between the bottom and the roof of this platform you put in there? A The open space I should judge would be 8 or 9 feet on one end. It was just what it is today only the other end, the northern end the earth slopes up to it and it was bound in under there and pressed in under there and to be able to put those braces there we had to take that earth away.

30

By Mr. Lum.

Q Will you tell us in what respects the condition of the plant has changed from the time of the accident, only the condition which is shown in these pictures. A The condition now is about the same as

40

John Sommer, cross.

it was excepting that that roof, we didn't put the roof back there. It is really less there now than there was before.

Q Excepting putting back of the roof is there any difference shown on this picture, P-2? A It don't show there.

10 Q So far as that picture is concerned? A Yes, sir.

Q And the new platform instead of the old one? A That is right..

Q P-3? A That is the same.

Q Excepting what? A There isn't any difference excepting it has a new floor instead of the old one.

20 Q How about the roof? A The roof has not been replaced.

Q How about P-4? A That is from another view. That is the same thing. It has a new floor there instead of the old one. The roof has been omitted or has not been put back.

Q Now, taking P-5. What is the change to that as between the condition as it is now and as it was formerly?

Mr. English. You mean before the new structure was built.

30 Q Indicate the change as shown on that picture as to the condition as it was before the accident happened, as it was before the repair work was undertaken, as to whether or not it was used? What was its condition, what change does it show in that condition? A The condition is that there is coal there instead of earth.

40 Q Earth and rubbish? A Earth and rubbish and stuff that laid in there that had to be cleaned out.

John Sommer, cross.

Q Take P-6. A That looks more like what the thing looked like before. That is a fair picture of what that looks like.

By Mr. English.

Q What is this a picture of, P-6? A That is a sort of driveway. This was formerly a driveway. We didn't do anything with that. That is just about the same as it was. 10

Q This has nothing to do with it? A That has nothing to do with it except it is a covering for that floor, that is new over that part.

Q Where was this driveway, on the north or south side of the road? A It is on the west side.

Q Along by the Morris avenue side? A Yes, sir.

Q That wasn't affected by this one way or the other? A No, sir, there is a retaining wall that you asked me what we did about that. That is the same wall that was there. 20

Q That is the wall shed storehouse? A Storehouse, leads from here to here.

Q This is the bottom, underneath the storehouse, isn't it? A Part of it wasn't. As I have said, it was sort of a gangway. You call it storehouse. I call it passageway and that passageway was in the same condition. 30

Q This is what is underneath the passageway? A Yes, sir.

Q Has nothing to do with this place where the Italian was hurt? A Further than the top has.

Q Separating this pathway from where the Italian was hurt is this big wall? A Yes, sir, opposite that big wall.

Mr. English. That has nothing to do with this case and ought not to be produced. 40

Jacob Eickenbush, direct.

Q This picture here, Exhibit P. 5, that shows the excavation used as a storeroom for coal? A I don't know what they use it for. There is some coal there.

Q If there is coal there presumably they use it for coal? A Unless they are keeping it now, storing it.

10

Q There are some barrels here. Apparently they stored barrels there? A I don't know. They got fire barrels they have along there.

Q You don't know? A I don't know what that is for.

Q This beam here is the beam which holds up the present floor, isn't it? A That is the one that took the place of the one that was there before. The uprights took the place of the old one.

20

Q Iron girders? A Yes, I call them iron posts.

Q This situation which is shown in Exhibit P. 5 is quite different from the situation before the excavation was made? A Not quite different.

Q Did you have any coal back there? A No, sir.

Q Did you have any barrels there in the old days? A Well, might have been some line pipe.

30

Q Not might have been. A I don't think there was any barrels there.

Q Nothing in there but dirt? A That is all, sloping up.

Q 45 degrees? A Yes, sir.

JACOB EICKENBUSH, sworn in behalf of plaintiff.

Direct examination by Mr. Lum.

Q You are employed by Koenig & Company of this city? A Yes, sir.

40

Jacob Eickenbush, cross.

Q Have you had any experience in practical photography? A Yes, sir.

Q How many years? A Eight years.

Q Did you take any photographs on Central avenue of the old plant of the John Sommer Faucet Company? A Yes, sir.

Q You took it personally? A Yes, sir.

Q I show you Exhibit P. 2. Is that a fair representation of the conditions? A Yes, sir.

Q When did you take the photograph? A April 7th.

Q This year? A Yes, sir.

Q Where did you stand in taking that photograph? A I was on the Morris avenue side, next to the fence.

Q Will you refer to these photographs, Exhibits P. 3, P. 4, P. 5 and P. 6, and tell us whether they were all taken the same day? A Yes, sir.

Q Are they all fair representations of the condition shown there? A Yes, sir.

Q Where did you stand in taking Exhibit P. 3? A Why, this is on the north side looking towards the west, then south.

Q How about P. 4? A This is on the north side looking towards the south and east.

Q And P. 5? A That is looking towards the north.

Q And Exhibit P. 6? A That is looking toward the north and a little towards the east.

Mr. Lum. We offer those photographs in evidence.

Cross examination by Mr. English.

Q Exhibit P. 2. You were looking towards the east? A Yes, sir.

Q That shows the wall of the boiler room? A Yes, sir.

John Sommer, further cross.

Q Exhibit P. 3. You were facing towards the west and southwest? A Yes, sir.

Q And that shows the rear side of the big factory building and the fence along Morris avenue?

A Yes, sir.

10 Q Exhibit P. 4, you were facing east and that shows the boiler-room in the rear of the factory building? A Yes, sir.

Q Exhibit P. 5 is the interior underneath the platform? A Yes, sir.

Q And shows coal? A Yes, sir.

Q Barrels? A Yes, sir.

Q What else? General storeroom there? A I don't know what it is.

20 Q This one, P. 6, that shows the same sub-cellar as shown in P. 5, does it? A Well, it is not the same.

Q Separated by a wall? A Yes, sir.

Q And the wall on the left of the picture is right along the line on Morris avenue? A Yes.

Mr. English. I have no objection to Exhibits P. 2, 3, 4 and 5, but I do, very earnestly, object to P. 6.

30 *The Court.* I do not think it is competent. Exhibits P. 2, P. 3, P. 4 and P. 5 for identification are admitted in evidence by striking out the words "for identification."

JOHN SOMMER, recalled.

Further cross examination by Mr. English.

40 Q Mr. Sommer, I show you a letter, which is addressed to the plaintiff company at 355 Central avenue, dated July 2, 1913, purporting to be signed J. Horace Shale, manager of the claim department. Do you remember getting that letter? A That is supposed to be a copy.

John Sommer, further cross.

Q Supposed to be the original produced by your counsel of a letter sent to you by the Commercial Casualty Insurance Company? A I suppose we received that letter.

Q Did you make any reply to it that you know of? A No, I don't remember unless I see the copy. 10

Q Following that letter you and your counsel got into communication with the Commercial Casualty Insurance Company with reference to the question of liability under this policy by this accident? A I suppose so.

Q When you got through with it you entered into a contract between the two of you. Just look at that and see if that is not the contract? A You mean whether we employed attorneys? 20

Mr. Lum. I object to the reference of that. Whatever was entered into was certainly without prejudice.

The Court. I see no objection to them asking him whether he signed an agreement.

Q Was this signed on behalf of your company?

The Court. Ask him whose signature is there.

Q Whose signature is that? A That is my signature, same over there. 30

Q John Sommer, Jr. Are you John Sommer, Jr.? A Yes, sir.

Q This is John Sommer Faucet Company by John Sommer, Jr., V. P. and Treasurer? A Yes, sir, I was vice president and treasurer. That is what I was at the time.

Mr. English. I ask to have letter of July 2d, 1913, marked for identification.

Marked D. 2 for identification. 40

Michael Sommer, direct.

Mr. English. I ask to have contract which has been identified by the witness marked for identification.

Marked D. 3 for identification.

By Mr. Lum.

10 Q Who defended you against this suit of DeVincenzo? A Commercial Casualty Insurance Company.

By Mr. English.

Q They defended as the result of the contract made in this contract, D. 3? A I suppose they did.

20 Q The Commercial Casualty Insurance Company furnished the lawyers at their expense? A I suppose they did.

Q You didn't pay for the lawyers in the DeVincenzo suit? A I don't know that I did.

MICHAEL SOMMER, sworn on behalf of the plaintiff.

Direct examination by Mr. Lum.

30 Q Mr. Sommer, do you recall the time of this accident to DeVincenzo at your plant? A Yes, sir.

Q Were you an officer of the company at that time? A No.

Q What was your position? A Just assistant manager or manager.

Q Were you familiar with the plant then? A I was.

Q Your duties took you there every day? A Yes, sir.

40 Q Were you familiar with the shed that has been referred to? A Yes, sir.

Michael Sommer, direct.

Q There were certain work being done there at the time the Italian was injured? A Certain work?

Q Yes, things being done at your place. A Oh, yes.

Q What did your plans call for with reference to changing the shed, if anything? A No changing of the shed. 10

Q What was your intent with reference to taking down the shed? A We had no intention of taking down the shed.

Q How did the shed happen to come down? A Through the fault of the excavating there.

Q It fell down? A It fell down, yes.

Q Did your plans call for it to be removed? A No, sir. 20

Q What changes were being made there with reference to the platform under the shed? A Conditions very bad there and for that reason we made the changes there.

Q What were the bad conditions? A The floor was in bad shape. The floor was partly rotted away and so forth, the ground was sliding there.

Q Was it in safe condition at the time? A We thought not.

Q Did you receive any instruction in reference to the matter from the Labor Department? A They were around there and instructed us to make the changes. 30

Q In making these changes was it necessary to do any excavating? A Yes, there was.

Q Was that excavation done? A Yes, sir; I hired the contractor.

Q Do you recall whether you people started to do it at the outset? A We did start to do it, but we thought it possibly cheaper to have it excavated by the contractor at so much a yard. 40

Michael Sommer, cross.

Q Why did you have these alterations, changes made? A Because we thought it was necessary.

Q Necessary, why? A Because conditions were very bad there also, from instructions we had to make the improvements.

Cross examination by Mr. English.

10 Q You are the manager or at that time were the manager of this factory plant? A Yes.

Q You were there every day? A Yes, mostly every day.

Q You were very much more familiar with the things around the factory than your brother was, weren't you? A Well, possibly. I don't know whether I was or not. I was there every day.

Q You were there every day? A Yes.

20 Q He was there some days? A He was there some days.

Q You were the man that they looked to as manager of the construction, what to change? A Yes, sir.

Q You made the arrangement with this man, LaConti? A Yes, sir.

Q It was to excavate this dirt at so much per cubic yard? A Yes, sir.

30 Q \$1.25 per cubic yard? A I think that was the price.

Q Do you remember they turned out how many cubic yards? A I don't recall.

Q Do you remember it was 491½? A Something in that neighborhood.

Q That concurs with your recollection? A Yes, I should judge it was around that.

Q And you paid his bill on that basis, \$1.25 a yard? A Yes.

40 Q He had a gang of laborers to do this work? A Yes.

Michael Sommer, cross.

Q Some six or eight or ten men? A I can't recall how many men he had. Possibly six men.

Q He had teams and wagons taking it out? A Yes.

Q I wish you would give us from your personal knowledge the description of this shed. It has been described as having been a passageway on one side of the boiler-room and on the other side an open space? A Yes, sir. 10

Q I am talking about over your head. What was over your head? A Boards.

Q Board roof? A Yes.

Q What was there to hold up this board roof? A There was a girder underneath fastened to the building on the boiler-room side and the other was resting on the other roof of the storehouse.

Q And then there was something in between? A Nothing but girders. 20

Q And running out from the boiler-room wall was a girder which went from the wall up towards the middle and there it was met by a beam running north and south.

Mr. Lum. I object to this as not within the scope of the direct examination.

Mr. English. I make him my own witness for the purpose of inquiring about the structure of the roof. 30

Q Isn't it a fact that resting on the boiler-room wall and running towards Morris avenue there was a girder which there met a central girder running north and south? A There was a girder there, yes.

Q And it joined up a girder running north and south somewheres toward the center of the building, of the roof.

The Court. He is your witness. 40

Michael Sommer, cross.

Q You say there was a girder running from the boiler wall up and towards Morris avenue. What did that girder join fast to when it got up there?

A It was on the other shed, onto the shed, onto the boiler-room.

10 Q It joined to what part of the shed? A To the end of the shed.

Q Were there any other girders to hold this roof up beside the one running from the boiler-room and the one which it united with? A There might have been a girder there. I can't recall.

Q You were present at the trial in the DeVincenzo case? A Yes, sir.

20 Q And testified as a witness. Do you remember that the carpenter, Mr. Zomrock, was there. He was the man that your company had employed to do the shoring? A Yes.

Q Do you remember that he produced a sketch made by him showing the construction of the roof?

A I think I do remember the sketch.

Q See if that is not the sketch which he produced at that time? A He put some posts there to protect that shed.

Q That is not the question. Just tell me if that is not the sketch he produced at that trial? A I presume it is.

30 Q He marked it in little black squares, the location of the old or original posts, then he marked in red squares the location of the new posts which he put in during the excavation. Isn't that true? A I don't know what his idea was. I presume that is it.

Q You remember that, don't you? A Well, I can't recall as to these. The man had posts or the old posts, I don't recall that.

40 Q Where is Mr. Zomrock now, do you know?
A Why, he is at Morris avenue, lives there. He is not working for us.

Michael Sommer, cross.

Q Whereabouts on Morris avenue does he live?

A 220, I believe.

Q Does he do anything now? A I think not, not that I know of. He may be working.

Q You remember this is a sketch that was produced, offered in evidence at that time? A Yes.

Q This is D. 1 for indentification. The dimensions of this shed were 34 by 30? A Somewheres around there. 10

Q What was there to hold the roof up excepting the two walls on either side? A I believe there is one post there, not under, right next to the building.

Q Where was that post located? A That is to say, next to the storeroom there was a big post.

Q That is on the Morris avenue side? A On the Morris avenue side as I recall it.

Q Do you remember just where that post was located with reference to the wall? A No, I can't say. 20

Q What did that post rest on? A That is another question I can't answer. I don't know whether it rested on the wall there, the old retaining wall or whether it rested on the ground.

Mr. English. I will resume the cross examination.

Q How long, to your knowledge, had the planks been there which were afterwards taken up? A The old planks? 30

Q Yes. A Oh, possibly five or ten years.

Q Any longer? A I don't know exactly how long, but I should say five years, at least.

Q You spoke in your direct examination of plans for the construction of this work? A Plans.

Q Yes. Mr. Lum asked you if the plans called for the removal of the shed. You said, "No." What plans did you refer to? A No, I had no plans. 40

Michael Sommer, cross.

Q I took it to mean plans in the sense of architecture, engineer's plans. A No.

Q Who was directing the scheme of the improvement, you? A What improvement?

10 *Mr. Lum.* I object. There is no evidence there was any improvement. The evidence shows it wasn't an improvement, but a mere necessary alteration.

A I was directing the work of excavation.

Q Who directed the subsequent work of construction?

Mr. Lum. I object to that. There is no evidence there was any construction. The evidence was this was a mere necessary alteration.

20 *The Court.* The objection is made to the word "construction." You might ask him who directed the putting in of this new platform.

Q You say you superintended the work of the excavation? A I didn't superintend it, no, but I gave out the contract.

Q You bought the job? A You might call it that.

Q You made the arrangements with the Italian contractor? A Yes.

30 Q You looked the ground over from time to time to see if he was doing it right? A I looked over the ground occasionally.

Q More than occasionally, didn't you? A More than occasionally?

Q Yes? A Once in awhile, possibly once a day.

Q You kept in touch with the situation every day? A Yes.

40 Q Who was it that attended to the work after the construction was done, the work of putting in

Michael Sommer, cross.

uprights and beams across the top platform? A Zomrock did this work.

Q Who was this man that looked after the carpenter, you? A Yes, I gave the carpenter instructions.

Q So, in other words, you were the man that had the general oversight of this work, that is right, isn't it? A Well, I looked at the work, if it was properly done. 10

Q The contractor did the excavating for you? A Yes, sir.

Q Zomrock did the carpenter work? A Yes, sir.

Q Who built the brick wall in front? A I don't remember who the party was.

Q You got some mason to do that or did Zomrock attend to that? A Some mason did that, yes. 20

Q Now, that wall, as I understand it, was along the north edge of where the shed begins? A Yes, along the north edge.

Q Between the boiler room on the one side and the storehouse on the other? A Yes.

Q There hadn't been any wall there before? A There was a wall there, yes, where the alleyway was.

Q I mean on the north edge of this thing? A There was no wall there but there was a wall there right where the alleyway. 30

Q Where is that alleyway that you are talking about? A It is right next to the building, within about 7 feet of the building.

Q Let us start at the south and go north. On the south at the beginning point would be the back? A Of the factory?

Q Of the back of the factory building? A Yes. 40

Michael Sommer, cross.

Q Between the foundation or edge of the wall of the back of the factory building where the excavations used to be there is a passageway or area-way? A That is the idea.

Q That is about 5 feet, I think 4 feet wide? A 4 or 5.

10 Q You say there was a wall which went up to the ground above? A That wall was washed away.

Q But originally there had been a wall there? A Originally, yes.

Q Then, there had been a wall on the right side where the boiler-room was, the foundation of the boiler-room? A Yes.

20 Q There had been a wall on the left side where the foundation of the storage room was? A Like that wall was there.

Q North, on the north side of this old place where the platform was was there any wall there? A No wall.

Q When you did this work there you put a wall along that north edge? A We simply shoved that wall back.

30 Q You say there hadn't been any wall there before. Now, I ask you when you did this new work did you put a wall along that north side? A We did put that wall along there.

Q You say you shoved that wall back from the areaway here and put it along the north edge up to here? A We thought it would be a better plan.

Q I don't care what your thought was. Is that all the explanation of it? A My explanation is we set the wall back a little further.

40 Q That means you put it to the edge, to where the old shed had been and connected up the end of the boiler room on the right with the storage room on the left? A Yes.

Michael Sommer, cross.

Q And that made a great big cellar excavated place 30 by 34 under there with a wall on the north side and you face it on the south and a wall on the right side where the boiler room was and a wall on the left side where the storehouse was and a space back here where the areaway was. That is the way it was arranged by those three walls on three sides and the open space of the areaway? A Yes. 10.

The Court. Where was that areaway?

Witness. Right back of the factory.

By Mr. English.

Q Now, I show you Exhibit P. 4, a photograph. This over here is the north wall of the factory building, isn't it? If you stood with your back to the wall and faced out towards the shed you would face north? A Face north. 20.

Q In the old days the shed, you would have been looking under the shed? A Yes, sir.

Q This wall here in the left of the picture is the wall of the engine room? A Yes.

Q And in the old days there was a wall here where the platform leads off where there is a storage house? A A storage house, yes.

Q There was a wall there and a storage room? A Yes, there was a storage room there, a shed there. 30

Q At the time of this shed, the time of the accident, the shed rested on the boiler room over here, you could see the outline over here? A Yes.

Q And then it rested on a wall over here, which isn't shown in this picture? A Yes.

Q When you had your back to the picture you had the wall on your right and storage room on the left? A Yes. 40

Michael Sommer, cross.

Q I show you picture, P. 3, which shows the big building in the back? A Yes.

Q And shows the fence in the right of the picture, Morris avenue? A Yes.

Q So that the old storage room, which used to be there, is now gone? A Yes.

10 Q When was that taken away? A I can't tell you.

Q Was it taken away at the time this work was done? A No, it wasn't.

Q How soon after? A Long time after, I think.

Q Long time don't mean much to us? A Well, a month.

Q Longer than that, six weeks? A I don't know.

20 Q What demolished that storage room?

Mr. Lum. I object to that. It was long after the time of the accident. That is irrelevant to this issue.

The Court. He is trying to fix the time that it was torn down. I think that it is competent to show the time.

Q Who did this work? A Of what?

Q Of tearing down this old storage building?

A I think our own man.

30 Q Zomrock? A No.

Q Who? A The man that worked in the factory.

Q You undertake to say you can't tell when that was done? A No, I don't recollect.

Q Would your records show when you did that? A Possibly they would.

Q What records would show that? A I don't know.

40 Q Was it done to accommodate the new tenant? A Possibly the new tenant did it, I can't tell you.

Michael Sommer, cross.

Q You don't know one way or the other? A No, I don't recall.

Q At any rate, the fact now is, whereas when this wall was up there it held up this roof. That wall is gone and the storage house is gone? A Yes, sir.

Q When were you last down in the excavation? 10
A Underneath the platform?

Q Yes, the present platform? A Possibly within a month.

Q It is used as a storage place for coal and other things, isn't it?

Mr. Lum. I object to what it is used for now.

A I don't know what it is used for.

Mr. English. Let me finish the question. 20

Q Used as a storage room and for things as shown by the plan, Exhibit P. 5.

Mr. Lum. The picture speaks for itself.

A I don't know what it is used for. They have a lot of barrels.

Q When you were there a month ago did you see any coal there? A Yes, there was some coal there, as that picture shows.

Q You would reasonably conclude that it was used for coal? A There is no coal bin there. 30

Q Because they got rid of the coal bin doesn't prevent them from using it? A No, sir.

Q As a matter of fact, your company used it for coal? A No, I would not swear about that. We had a coal bin. The bin was alongside the boiler room.

Q And there is a wall between this place and the boiler room, isn't there? A There is a wall there, apparently. 40

Michael Sommer, cross.

Q And this wall as shown on the left of this picture, P. 5, is the wall which divides this place between the boiler room? A Yes.

Q And then there is a passageway or area-way? A Passageway.

10 Q I think you used the word, "areaway." The passageway is down on the level of the floor of this excavated place which is shown here by this picture, P. 4, isn't it? Yes.

Q Down where those leaders come down when you come out of this excavated place, as shown in this Exhibit P. 5, and walking towards the factory building you can turn to your left and go along that passageway and come into the boiler room? A Yes.

20 Q In the days when the Sommer Company occupied this building, isn't it a fact you had coal in this present excavated place and had a wheelbarrow and wheeled it through the door into the boiler room? A It might have been done, but it wasn't built for coal.

Q It was used that way? A I think it was used for storing rubbish.

Q And there was some coal? A I think there was some coal.

30 Q Do you remember taking me around there, before we started this suit, in the excavated place and showed me how you took the coal out of the excavated place and wheeled it into the boiler room? A Yes.

By the Court.

40 Q How much room was there between the shed and the main building as you looked north, how much space between the two? A The size of the shed?

Michael Sommer, cross.

Q No, how much space was there between the main building and the shed; in other words, how near did the shed come— A About, possibly 6 or 7 feet.

Q That is the areaway you spoke of? A Yes, that is the areaway.

Q The space between the shed and the building? A And the building. 10

Q That wasn't covered? A That wasn't covered.

By Mr. English.

Q That is not covered now? A No.

Q Do you remember how long it took to do this job of excavating? A How long?

Q Yes. A I don't recall but I think it was several weeks, possibly two weeks. 20

Q How long was it after that that it took to build the overhead construction for the roof and put in the girders and uprights? A How long afterwards?

Q Yes? A I don't recall just how soon.

Q That was some weeks? A Possibly it was.

Q So this whole job occupied a couple of months? A I don't think so.

Q Well, six weeks? A Possibly.

Q How many men did you have working on the job of building the new wall and putting in the overhead beams and uprights and all that? A How many men did we have? 30

Q Yes, after the Italian got there? A What do you mean by that?

Q The Italian had a gang of six or eight men? A Yes.

Q How many men did you have after that to do this other work there that was necessary to finish this up? A We just had our carpenter. 40

Michael Sommer, cross.

Q One man do it all alone? A I think possibly another man in our factory helped him.

Q What about the brick wall? A No, that was a mason job.

Q How many masons were working on that, do you remember? A No, one or two.

10 Q Brick or stone? A Old brick, some of the old brick was there.

Q The floor, after you got the excavation made the floor was concreted, wasn't it? A The new floor?

Q Yes? A Yes, the new floor was concreted.

Q The old floor hadn't been concreted, had it?

A The old floor was boards.

Q No, you are not talking about the same thing?

A No, the old floor wasn't concrete.

20 Q The boards were put on the level with the ground? A Yes.

Q The floor, I am talking about was 10 feet below that? A Whatever the distance is.

Q That was about 10 feet? A I don't know how many feet.

Q About that, roughly 10 feet? A Not quite.

Q Now, at the bottom of that space you put in a new concrete floor? A There is a concrete floor there now.

30 Q In the old days there was no concrete floor?

A No.

Q Wasn't any floor there at all, as I understand, simply the dirt? A The dirt, and the boards, the old boards which were rotted away.

RECESS.

Michael Sommer, cross.

MICHAEL SOMMER resumes the stand.

Cross examination (continued) by Mr. English.

Q Mr. Sommer, are you familiar with the situation when this building was built? Your brother said he built it some twenty years ago? A No.

Q You were not connected with the business then? A Yes, I was in the business then. 10

Q When this building was built, with reference to this location of this shed, that areaway along the big building that was put in originally? A That was originally.

Q As I understand it the land slopes from the north towards the south down towards where this areaway was? A No, the land didn't slope there. It was caused there by storms. Washed under the building. 20

Q Assuming a wall was put in along this areaway, which was at the south end of this shed, and from that you ran planks out toward the north to make a level place, what would be the slope? Your brother John spoke of the slope about 45 degrees? A That was due to the times.

Q Was there an excavation there? A No, that is the areaway was there.

Q The areaway was there and the retaining wall was put there? A The retaining wall was there. 30

Q And this platform was put there and the dirt went in under that? A That is the idea.

Q Are you familiar with the fact that a letter was written to your company under date of July 9, 1913? A No, sir.

Q You didn't handle the correspondence? A I didn't handle the correspondence. 40

Michael Sommer, cross.

Q Have you got in mind the dimensions of the present completed excavated cellar there? A No, I haven't got it in mind.

Q We have the figures. See if they concur with your recollection. You know Mr. Shale, who sits by me? A I have met Mr. Shale.

10 Q He was up at the factory following this accident to De Vincenzo, was he not? A I don't remember Mr. Shale being there. He might have seen my brother.

Q Do you or do you not? A I do not.

Q You don't remember having any conversation with him? Do you remember now that the completed excavation is 24 feet one way, 27 feet another way and 10 feet deep from the ground level? A About that.

20 Q That is approximately right? A Yes.

By Mr. Lum.

Q This dirt that you spoke of as having drifted under the platform was loose dirt? A Yes.

Q Will you tell us why this wall has been referred to at the end of the platform was put there?

A Because it was necessary to keep dirt from going in there.

30 Q Why was the dirt excavated from under there? A Why, because it was shifting and we thought it the best policy to make that repair there.

Q If you hadn't put the wall there what would have happened? A Simply the same case, would be done again, the same condition would occur.

Q In doing this work was it your intention to make a coal storage under there? A No.

40 Q Would this excavation have ever been made if it wasn't made for the ruinous condition of this platform?

Charles A. Winston, direct.

Mr. English. I object to that.

Mr. Lum. Strike it out.

Q Tell us again what was the purpose of this excavation, why it was made? A For the reason of the bad condition of the dirt there.

Q And the condition of the platform have anything to do with it? A Why, the condition of the platform was in bad shape for that reason. 10

Q You spoke of something about an old wall there near the areaway having crumbled? A Yes.

Q Will you tell us whether or not any of the brick or materials in that old wall were used in the new wall? A Most of it was used for the new wall that was put there.

Q With reference to the time of the accident when this man was injured when was this wall that has been referred to put there, before or after? A After. 20

Q How many weeks about? A I should judge six weeks, month or six weeks.

Q Would it have been possible to have repaired this platform without making this excavation? A The best plan would have been to remove the dirt and the wall.

Mr. English. Not would have been.

The Court. It is not an answer to the question. 30

By Mr. English.

Q What wall did you refer to a moment ago as having crumbled? A Why, the areaway wall.

CHARLES A. WINSTON sworn in behalf of plaintiff.

Direct examination by Mr. Lum.

Q Mr. Winston, what is your business? A Civil engineer. 40

Charles A. Winston, direct.

Q Have you had any experience in the building business? A Yes, sir.

Q How much experience? A Twenty-five years.

10 Q By whom have you been employed? A Employed by the Hedden people for about eighteen years, W. H. Fissell, Henry J. Miller Company, Baltimore, and also in business for myself.

Q You have been in business for yourself also? A Yes, sir.

Q Have you had anything to do with the erection of substantial buildings in this city? A I have.

20 Q What ones? A I started the erection of this building we are in, laid the foundation, I had charge of the construction of the Worthington Pump Works, Harrison, Ordway building, in Market street, Peshine avenue school.

Q What did you have to do with reference, for instance, to the Ordway? A I was in complete charge of the erection.

Q You say you are a civil engineer also? A Yes, sir.

Q Have you examined the plant of the John Sommer Faucet Company on Central avenue, this city? A I have.

30 Q When did you examine it? A About a week or ten days ago.

Q Was the platform and excavation and wall and the situation there pointed out to you? A It was.

Q Did you examine it thoroughly? A I did.

Q You have been in court all morning? A I have.

40 Q Have you heard the testimony of Mr. John Sommer and Mr. Michael Sommer as to the condition of the platform? A I have.

Charles A. Winston, direct.

Q Have you heard the testimony as to the changes that were made and what was done? A Yes, sir.

Q In your opinion, will you tell us, based on your knowledge of the examination of the testimony that you have heard as to the work done there, whether or not the work was repaired, and repairs and alterations such as are usual and necessary to the care and maintenance of the premises? 10

Mr. English. I object to that. In the first place it is not a proper form of a hypothetical question; second place, this witness has no qualification to say what was done was a part of the business of this company within the terms of this policy because he has not been personally acquainted with the business of the company and in the third place, this is either a question for the jury or a question of law for the Court to decide. 20

The Court. I think the form of the question is objectionable. If you want to stand on the technical form of a hypothetical question.

Mr. English. Your Honor might as well rule on the more fundamental question.

The Court. The first part is true.

Q Assuming that a platform used for wagons and vehicles to drive on was in a ruinous condition and assuming one end of the platform rested on dirt which had shifted and drifted in under there, the other end supported by posts and that it was necessary for the safe operation to repair this platform to put in new timber and that in doing it the old platform was taken up and the dirt underneath which was sloping at an angle of approximately forty-five degrees was cleaned out and a wall was placed for the platform to rest upon. 30 40

Charles A. Winston, direct.

Under those circumstances would you consider that work as in the building trade and in your general experience, as you have given us, would you consider such work, repairs and alterations usual and necessary to the care and maintenance of the premises, of the plant?

10 *Mr. English.* I object to that. In the first place, it does not take in all the necessary elements, even assuming that as a hypothetical question. It makes no mention of the changed condition under the ground of the iron uprights and the whole floor excavated under there as well as the brick wall. It makes no reference to the fact that it was used by the Sommer Company before they leased the property for a coal bin and that it is now used for

20 coal and for storage purposes. That would simply go to the form of the question. In addition to that there is not enough in the case or in the question or in the mind of this witness which would enable him to say whether under this policy that which has been attempted to be described was a necessary repair or necessary to the care and maintenance of the premises of this plant or repairs and alterations, usual and necessary.

30 *The Court.* I will allow the question provided Mr. Lum changes it by adding the conditions of the space underneath the floor at the time the accident happened and the condition of the space underneath the floor after the accident.

Q Assume also in the question that the dirt under the platform was excavated and the retaining wall was put up on the north end of the platform to support it and prevent the dirt from drifting in and that new props were put under.

40

Charles A. Winston, direct.

Mr. English. I object to that question on the ground, first, it is not a hypothetical question; and, secondly, this witness is not qualified to answer the question and, third, that the question calls for an answer which, under the facts is either a question of law or a question of fact for the jury.

The Court. I will allow the question and allow you an exception. 10

Exception noted as ground of appeal.

A In my judgment I would call it an ordinary repair, simply taking the necessary precautions in order that the same thing might not occur again from storms, and so forth.

Q You have, you say, personally examined the premises? A Yes, sir.

Q And seen the way in which the work was done? A Yes, sir. 20

Q Seen the results? A Yes.

Q You have seen the wall that was there? A Yes, sir.

Q Is it just as it was described according to the testimony? A It seems to be exactly.

Q What is the foundation of this wall, what does it support?

Mr. English. Which wall?

Q The new wall? A It is a retaining wall more than anything else which does support one end of the platform which originally rested on the ground. 30

Q Is this a usual and approved method? A It is.

Q Would it, in the ordinary course of building trade, such work as has been described and as you saw there, be considered and termed a repair or alteration, or would it be termed "erection and construction?" 40

Charles A. Winston, direct.

Mr. English. I object to that. In the first place, there isn't any foundation to answer that question, and in the second place that it infringes on the function of the Court and jury.

10 *The Court.* If the question is put in the proper form I will allow it.

Q Taking the same question as given to you in the former question, you have that in your mind? A Yes, sir.

Q Would it be a repair and alteration, usual and necessary, so considered in the building trade or as an erection and construction or unusual alteration?

20 *Mr. English.* I object on the same ground.
The Court. I will permit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A I would consider it a necessary repair. The old platform had fallen down, was about to fall down and it was necessary to repair it, and that was one of the ordinary methods of repairing it.

30 Q Would it be termed in the building trade under those conditions repair and alteration which was usual and necessary; would it be termed an erection and construction; that is, erection and construction or repair and alteration?

Mr. English. Same objection.

The Court. Same ruling.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40 A Repair and alteration I would consider it.

Charles A. Winston, cross.

Q Is that the way it would be usually considered in the building trade? A I would consider it so. There was nothing there I would consider in the construction. It was simply rebuilding.

Cross examination by Mr. English.

Q You have been called in this case by the plaintiff as an expert? A Yes, sir. 10

Q And at his request examined the locus for the purpose of testifying? A Yes, sir.

Q Of course, you expect to be paid for your services the same as any other job? A I do.

Q You hadn't any knowledge of this location before you went there a few days ago? A No, sir.

Q What you know about it you have learned from either the testimony in this case or people on the ground? A The examination of present conditions. 20

Q You understand that the previous situation was the sliding of the land was down towards the big factory building and that this platform was level, the north end of it being at the level of the ground, at that point the platform running level and the land slid under it? A That is my understanding.

Q And the termination of the whole thing was that this areaway, which was between the edge of the platform and the main building? A Yes, sir. 30

Q Is that your understanding, that this repair was to make a safe platform? A Yes, sir.

Q That the thing which the Sommer Company undertook to do was to make a platform safe for driving of wagons and trucks over it? A Yes, sir.

Q Do you think that in the making of that platform it was necessary to excavate the hole or 40

Charles A. Winston, cross.

underneath to a depth of 10 feet? A As the matter has been explained to me there was a considerable portion under the platform excavated where the ground had run down.

Q Answer my question. A I can only answer your question—

10 Q I want you to have in mind that the object of this repair was to make a safe platform whether you think it was necessary to make a safe platform to take out $491\frac{1}{2}$ cubic yards of dirt and make a place excavated under there 27 feet one way and 24 feet another way and 10 feet deep, whether you think that was necessary to make a safe platform? A It is not my understanding that the entire space was excavated.

20 *Mr. Lum.* I object to the question on the ground that it is a misstatement of the facts. The evidence is very clear. The dirt slopes on an angle of forty-five degrees. You have assumed that that entire space was excavated.

Q In your judgment was it necessary to make that platform on the level of the ground sound and to repair it was it necessary to excavate from underneath that platform $491\frac{1}{2}$ cubic yards of dirt so as to make a place underneath 24 feet
30 one way, 27 feet the other way and 10 feet down from the level of the ground? A It was necessary in order to make a platform to rebuild a wall.

Q Won't you please answer my question? A I will be glad to if you will let me.

Mr. English. I ask to have the question repeated.

40 *Mr. Lum.* I object and ask the Court to allow the witness to continue his answer.

Charles A. Winston, cross.

Q Got the question in your mind? A It was necessary in order to prepare the platform to rebuild the wall.

Mr. English. I move that be stricken out.

The Court. I will let him answer in his own way.

A And it is necessary to rebuild the wall or refill the space under the wall or excavate. It was simply a question of policy in the mind of the owner whether he should fill in so much dirt or take out so much dirt. 10

Q Which wall do you think ought to be rebuilt? A I think the one that was rebuilt.

Q Which one are you speaking of? A The only one that was built.

Q East, north, south or west? A North. 20

Q You are wrong because the evidence is there wasn't any wall there previously, so you will have to reframe your answer.

Mr. Lum. I object to this form of argument with the witness. The witness has testified correctly.

Q Please put out of your mind any thought that there was any wall originally on the north and of this shed because the testimony is to the contrary. 30

Mr. English. I object on the ground that the witness has said there was a wall.

Q Because the testimony is to the contrary and then please tell me whether in order to repair that platform so as to make it safe to drive over it was necessary to take out from under the platform 491½ cubic yards of dirt and make a space 21 feet one way, 27 feet the other way and 10 feet deep? A It was necessary to rebuild the wall. 40

Charles A. Winston, cross.

Mr. English. I ask your Honor to rule on that.

The Court. You are not asked that. The question now is whether the wall on the north end was rebuilt?

10 A There was no wall on the north as I understand the case. Of course, I didn't see it prior to this present January. There was a rear wall which had fallen down which was approximately on the south side of the shed.

Q The trouble is you said the north wall? A I said rebuild it under this present condition on the north. That is the idea I intended to convey.

20 Q You think if a wall is built, that a wall exists at one point and a new wall is built afterwards 27 feet away from it that is rebuilding a wall? A That is rebuilding a wall. It does not necessarily have to be rebuilt in the condition it was if the conditions do not warrant it.

Q You think an interval of 27 feet between the new wall and the old wall constitutes a rebuilding of an old wall? A No; not under those conditions.

Q You just leave out of your mind that thought that there was any rebuilding of any building on the north line of this shed? A Yes.

30 Q That being so, was it necessary, in your judgment, in order to make that platform safe to excavate 491½ cubic yards of dirt and leave a space 27 feet one way, 24 feet another way and 10 feet deep? A Necessary to excavate a certain amount of earth. I am not prepared to say whether that was the amount excavated or not.

40 Q Was it necessary to excavate the dirt which was underneath the platform, a space 27 feet one way and 24 feet the other way and down to a depth of 10 feet? A Will you allow me to make

Charles A. Winston, cross.

a rapid calculation and see if that amounts to 4911½?

Q (Question repeated.)

Mr. Lum. I think the witness is entitled to have the word "necessary" explained, as to whether it means indispensable or whether it means suitable or proper under the circumstances. 10

The Court. You place this witness on the stand as an expert witness and subject to cross examination on a hypothetical question as to what he considered this work was and I think the other side has a perfect right to go into this to test his ability and to go into the whole question. I shall allow the question.

Q Do you understand the question? A If the entire excavation of the size you say, according to the dimensions you have just given me there would have only been 240 yards. 20

Q I am not quibbling with you about the quantity of dirt. What I want to know is whether, in order to make this platform safe, was it necessary to remove the dirt from under it? A No; not absolutely necessary.

Q Then, you will have to change your answer, or at least modify your answer as to that extent, the answer which you gave Mr. Lum? A I don't think so. My answer was as I considered it good policy, and in making the platform safe as economical a way as possible. 30

Q You say now it would not be necessary to do all that excavating to make that platform safe? A You must take into consideration that building methods would have to be employed that would make it just as expensive as that excavation. 40

Charles A. Winston, cross.

Q I want to know whether, in your judgment, to make that platform safe it was necessary to do all that excavating? A I told you, no.

Q I would like to ask you this: In your judgment, was it necessary to make that platform safe to put a concrete floor on the bottom of the excavation? A No, sir.

Q That had nothing to do with it? A Had nothing to do with the platform.

Q Was it necessary to make that platform safe to build a wall on the north side of the excavation, which was made? A It was necessary to build a wall from there under it. I would consider, or say, any other approved method of columns or posts would be practically as expensive.

20 Q Would not the platform have been made just as safe by sinking brick piers and putting in the proper stringer pieces and the platform on that? A It certainly would if the ground was solid enough underneath, if some provision had been made to hold the earth back. The whole trouble with this platform was that the wall gave way.

30 Q If you had this platform up on piers it wouldn't have made any difference what went on underneath? A Not if you could get onto the platform from the earth on the sides.

Q I presume you could if you were on the level or banked up? A If some retaining wall had been built there to hold the earth from continually sliding.

40 Q Suppose the retaining wall which was originally built was there by the areaway, would that have taken care of it? A Practically safe, if the open space had been filled in with earth.

Charles A. Winston, cross.

Q Then it would not have been necessary if they had retained the old area wall and filled it in? A No, sir.

Q And it would not have been necessary, under those circumstances, to concrete any floor there?

A There would not have been any floor there.

Q So that in order to do the repair which was to be made, namely, to make the platform safe, it wasn't necessary to excavate it, to put in a concrete floor? A No, sir. 10

Q And it wasn't necessary to put in a retaining wall under the north side? A You could place the retaining wall on the north side or anywhere you choose, but it was necessary to build it somewhere. The extent of building it on the north side wasn't any greater than any other place. 20

Q There was an old wall on the outside? A Demolished; it was down. 20

Q Not altogether? A In such condition it had to be rebuilt.

Q But there was a foundation there to support the new wall, to rebuild the wall on? A Probably.

Q And it wasn't necessary to excavate to any extent to rebuild that wall? A Not to rebuild that wall. 30

Q Did the building of this wall on the north end of the shed require all this excavation? A Yes, sir; whereas if it had been built on the south side it would have required the filling.

Q Do you think that filling would have been as expensive as excavation and laying a concrete floor? A I say the wall had to be built anyway. That depends where the earth came from for the fill. Sometimes you have to go a long ways for a fill. 40

Charles A. Winston, cross.

Q You know it does cost money to excavate?

A And also to fill.

Q More than it does to excavate? A Ordinarily, yes.

Q And in addition to the cause of the excavation, you had to build this front new wall on the north, didn't you? A It was evidently done. It is there.

Q You had to put in the concrete floor. That cost some money? A Yes.

Q So that the work which was done wasn't necessary to be done in order to make that platform safe? A Not as far as the concrete floor was concerned.

Q Not as far as the excavation was concerned? A That is a matter of opinion.

Q I am asking you your opinion. A I, not having seen the original plan, I don't know how much filling was required. It was simply a question which was cheaper, which was more economical, which was more possible.

Q It appeared that there was excavated out of there 491½ cubic yards of dirt and that a front new wall was built on the north side and a concrete wall was built in on a space 24 by 27. Will you say, from your wide experience as an engineer and builder, that that was cheaper than the filling in of a space which must have remained under that platform before the excavation was made and the rebuilding of the old rear wall? A You are going into the matter of expense of excavation and you have to account that it is twice as much dirt as you could get in.

Q Here are the facts. A Facts are simply a matter of figures and the dimensions of an area give you the cubic contents and everybody knows how many cubic feet in a cubic yard and you can

Charles A. Winston, cross.

get only 240 cubic yards and you are going on the assumption that you get 491 cubic yards. You are running the expense away up.

Q Let us assume, as a matter of fact, that the Sommer Company did pay one dollar and twenty-five cents a yard for the excavation, 491½ cubic yards. Add to that fact the cost of building this new front wall and the cost of laying the concrete floor, 24 by 27, and compare that cost with the cost of building up the old retaining wall and the filling in what space was left. 10

Mr. Lum. I object to that, whether or not it was the cheapest way to do it would make no difference. The question is whether it was a construction or repair.

The Court. I do not think the cost makes any difference. The question is, "Is it a construction or repair?" 20

Q Does the question of cost influence your mind in determining between a construction and erection on one hand and an alteration or repair on the other? A No, sir.

Q Other things being equal for the sake of supposition that the cost is the same, one way or the other, would you say it would be necessary to make that platform safe to go to all that trouble and extra work of excavating 491½ cubic yards and making this room 24 by 27 and laying a concrete floor as opposed to filling up the old wall and putting in the dirt? A No, sir; it would not be absolutely necessary. 30

Q Then, we will agree finally that the excavation which I have described to the extent of 24 feet by 27 feet and the laying of a concrete floor was not necessarily any part of the making of that platform safe? A I will agree as far as 40

Charles A. Winston, cross.

the concrete floor is concerned and a portion of the excavation because there must certainly must have been some excavation done there.

Q Then, we will agree that the concrete floor which they put in wasn't necessary to the making of that platform safe? A No, sir.

10 Q Can we agree further that the excavating of whatever amount of dirt it was so as to make the place under the cellar a square cellar, 10 feet up and down and 24 feet one way and 27 feet the other way, was that extent of excavating necessary to make that platform safe? A Not to that extent.

Q Can we agree on this, that in the making of that platform safe it wasn't necessary as opposed to another form of construction to build a retaining wall on the north side of the building or shed?
20 A You limit the answer to that absolutely on the north side?

Q I want to know whether it was necessary to build a retaining wall on the north side as opposed to the south side where the areaway was? A It could have been built anywhere they decided.

Q It could have been built just as well on the south side where the areaway was? A Yes.

30 Q Then the only excavation necessary there was the excavation that was necessary to build up that wall? A It would have been necessary to have built along the north side at least, but any engineer or architect would have recommended that it be built so deep, of sufficient depth to get down below frost.

Q About 2 or 3 feet? A Something like that.

Q So that could have taken care of the construction so far as the platform was concerned?

40 A Yes, sir.

Charles A. Winston, cross.

Q After that had been done it was merely a matter of judgment whether the earth underneath was excavated out or not? A Yes.

Q So that the excavation of the rectangular place, 24 by 27 and 10 feet down was not necessary? A I don't know that that was necessary.

By Mr. Lum.

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Q The matter of uprights. Were such things as that needed to support this platform of this dimension? A Not if it were not excavated.

Q Then if you didn't have uprights under there you would have to fill it all very compactly and very tightly? A Yes.

Q There are, I believe, different ways of doing such a piece of work as this. A There are.

20

Q What you meant in your testimony is—can it be said or not be said that any one way was necessary?

Mr. English. I object to that. The question is what was done as comes within this policy?

The Court. I think the question is proper. Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

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A I don't know whether it could be said any particular way is necessary. Usually under such conditions it is a matter of policy as to which is the best way to do it.

Q You don't know when the cement floor was put down under there? A I do not.

Q And did the cement floor have anything to do with the method of construction of the wall or excavation? A Absolutely none.

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John Sommer, further direct.

By Mr. English.

Q The only object of putting a cement floor in there was to get some benefit out of the room underneath? A It would seem to be so.

10 Q In other words, it would be more valuable space under there if it had a nice, dry concrete bottom? A Yes.

Q All the bottom which refers to the use of the place? A Yes.

Q And not to the platform overhead? A No.

JOHN SOMMER, recalled on behalf of the plaintiff.

Further direct examination by Mr. Lum.

20 Q You have made reference to the concrete floor under this platform. When was it built, with reference to the time of the accident? A I would judge seven months after.

Q After what? A After the completion of the work that was done there.

30 Q Why was the cement floor put in there? A It was necessary to put it in there on account of the water seeping through there and the foundation or space would not have held, and we would have had the same trouble that we had before. It was absolutely necessary to keep the water out of there.

Q Did the absence of the shed that had been there formerly have anything to do with the water coming through? A Well, the retaining wall; if we hadn't put the retaining wall where it is—

Mr. English. That is not the question.

Q What were you going to say with reference to the purpose of putting the wall in?

40 *Mr. English.* I object because he, obviously, is not answering the question.

John Sommer, cross.

The Court. The question is objectionable.

Q What difference would it have made whether or not this retaining wall was where it was? A Made a great deal of difference. If we put the wall back to where it was the land would slope in and we would not have had any place to put the north end of the platform to rest on. We would have been in as bad a shape as it was before. It wasn't necessary on the south end to replace the wall for the reason that the pillars were there to hold up that platform. 10

Q Is that why you put the wall there? A Yes, sir; if we hadn't put it there the water would have washed in the ground and we would have had the same trouble.

Cross examination by Mr. English.

Q You say the concrete floor was put in after the accident. The whole business was done after the accident. A I referred to a certain time. You wanted to know whether it was at the same time. 20

Q As I understand it, the first thing you had to do was to take up the old platform? A Yes, sir.

Q Then you had to excavate? A Yes, sir.

Q Then you had to put your retaining wall? A Yes, sir; to keep out the water. 30

Q Then you had to put in your concrete floor and your uprights and then you had to build your platform overhead? A No; we put the platform first and the pillars in there. Then we found that water was seeping through there and we had to get the water out, otherwise it would undermine those uprights.

Q So you concreted all around? A Yes, sir; it didn't cost any more than possibly what it would right around the posts. 40

John Sommer, cross.

Q What did those uprights rest on in the beginning? A Foundation.

Q What kind of foundation? A Well, they had to make the usual foundations that they do in putting up uprights.

Q Brick, stone, or something like that? A No;
10 I suppose they are a mixture of cement.

Q Concrete? A Mixture of concrete.

Q You dug a big place— A I didn't dig anything.

Q I am talking about what you caused to be done or have caused a good, big foundation, square foundation— A I don't know how big.

Q You wanted to do this right? A Yes; we done it as we thought right.

Q You thought it was done right? A Yes; I
20 thought it was the proper size.

Q Supposing you put a foundation of brick and stone of the proper size and then you rested your iron upon that? A Yes.

Q Do you think that a little water running under there had any effect on that brick or stone foundation with the iron upright? A I did, because if it took away a wall of a full length it would effect one small beam.

Q When did it affect the wall? A That hap-
30 pened a number of years ago.

Q So that you knew just about as much about the effect of the water on the wall before you began the excavation as you did afterwards? A You could see it.

Q You don't mean to say putting in this concrete floor was done after the rest of the work was done? A Yes, sir.

Q You knew just as much about the effect of the water on the wall before you excavated as you did
40 afterwards? A I knew as much about what?

John Sommer, cross.

Q You say that after you got this excavation made, your experience that the old wall and the water running against it was such as to make you fear it would wash down these brick or stone piers?

A Yes.

Q Whatever you knew about the effect of the water washing against that old wall you knew before the shed fell down? A I knew it, but it wasn't necessary until I saw it. 10

Q You knew then just as well as you knew afterwards when you put a brick pier in there the water would wash against it the same as it did against the old wall? A Yes, sir.

Q Then you didn't have anything new with this proposition than you did before? A I didn't at the time. I did later.

By Mr. Lum. 20

Q Had the actual experience? A Yes, sir.

By Mr. English.

Q How long do you say it was after the brick piers and the uprights and the overhead platform had all been completed, how long was it before that after the concrete floor was put in? A I don't know. It was a long time. It was a empty place in there. In the first place, what made that empty, the shed wasn't there any more and the water came through those beams. We had a roof and it was necessary to put something down there on account of the roof not being dry. 30

Q You mean the roof leaked? A No, we had a roof over that platform.

Q Did the platform leak? A Yes, sir, the platform leaked because it isn't made of tongued and grooved boards.

Q Does it leak yet? A Yes, sir, there is water comes through there now. 40

Motion for Non-suit.

By the Court.

Q Did you attempt to make anything? A No, sir, we haven't replaced the roof.

Q I mean to say, have you ever tried to make this platform watertight so the water would not go through? A No, sir.

10 Q How do you get in this room? A We got in the same way we did before. There is a way to get in the areaway. There is an opening to get into the areaway. This wall,—that is really the engine-room, runs along on the west side of this dirt that was taken away. They put a door there so they could come out in this areaway and go under this platform.

Q Then you go to this room to the engine-room?
 20 A Yes, sir, to the engine-room and coal pit. We didn't have it as a coal pit at first because we didn't know what it would develop after the earth was taken out.

PLAINTIFF RESTS.

30 *Mr. English.* I make a motion for a non-suit. The question, I suppose, is one of interpretation of this policy and whether the work which was done was within the scope and the definition of the business or was not. The definition of the business which is given in this policy was that it included all operation incidental to the business of manufacturing anything, repairs and alterations, usual and necessary to the care and maintenance of the premises and the plant, that any repair or alteration usual and necessary to the care and maintenance of the plant, that was part of this company's business. On the other hand, the
 40 following was not a part of the business and

Motion for Non-suit.

was not included in the policy of its terms. The erection, construction, demolition or unusual alteration or repair of the premises. Now, you have a state of facts before you in this case from which it seems to me the Court can say and ought to say whether the one clause of the policy or the other fits the situation, and it seems to me that what has been described here as having been done comes under the heading of "building, erection or a construction or an unusual alteration or repair of the premises or plant." I think we all have the situation in mind of the use of this platform which made a level sloping place for this bank of earth. It never was used. There was an areaway there and no attention paid to it. Now, the whole object of the repair according to Mr. Sommer, according to the engineer, was to make that platform safe. That is the thing they said they wanted to repair. Had they contended themselves with putting it in undoubtedly it would have been a repair or alteration necessary and usual to the maintenance of the plant. They didn't do that. Instead of that they constructed an elaborate floor underneath, they excavated 491 cubic yards for which they paid over \$600. They removed the wall 27 feet north and they went to the expense of putting in a concrete floor and practically making it a storage for coal and barrels and which the present tenant uses and which they used before. That being the situation how can they claim that what they did was a usual repair necessary to the maintenance of the plant. The thing that was necessary was to make a safe platform. What they did was to make a concrete vault, concrete cellar 27 by 24 feet and 10

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J. Horace Shale, direct.

10 feet deep. The engineer admits it was not necessary to do that. It wasn't necessary to put the north wall, it wasn't necessary to put in the concrete floor. If they had not done that they would not have had the cellar or anything of that kind. Now, I say when they did that they put in a brand new construction, they come under the heading in this policy of the words "erection" or the word "construction."

The Court. I will refuse the motion to nonsuit.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

20 J. HORACE SHALE, sworn in behalf of defendant.

Direct examination by Mr. English.

Q You live here in the City of Newark? A I do.

Q Have you any connection with the Commercial Casualty Insurance Company? A Yes.

Q What is your connection? A At the present time I am treasurer.

30 Q What office did you have with the company on August 2, 1916? A At that time I was manager of the claim department.

Q You, of course, are familiar with this policy, which is the subject of this suit, one of your company's policies? A Yes, it is.

Q How long have you been associated with insurance companies in the insurance business? A About ten years.

40 Q Of course, you have a pretty good understanding of insurance ideas or affairs? A I am supposed to have.

J. Horace Shale, direct.

Q This is what kind of a policy? A That is termed a manufacturer's liability policy.

Q Just in general language, what is that?

Mr. Lum. I object. The policy speaks for itself. The thing is very clear.

The Court. Yes, the policy speaks for itself.

Q What is the scheme of insurance which is contemplated under that policy? 10

The Court. I will allow that question.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A The policy of insurance of this nature was issued by an insurance company for the purpose of indemnifying the holder against loss by reason of any injury accidental to the same by any person not in the employ of the party to whom the policy is issued. 20

Q I see in connection with this policy a series of warranties. What is the scheme in reference to making those warranties?

Mr. Lum. I object to that.

The Court. No, I think the warranties can speak for themselves.

Defendant's counsel prays an exception to this ruling of the Court. 30

Exception noted as ground of appeal.

Q When this kind of a policy is made what is the object of asking the insured to state the character of his business?

Mr. Lum. I object. What they intend or what their object is we certainly cannot try.

The Court. I do not think it is competent. I overrule the question. 40

J. Horace Shale, direct.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10 Q The policy in issue, Exhibit P. 1, refers by those terms, what is called the specified description of a policy and then it refers to another series under the heading of special operations. What is the definition in the insurance world between the ordinary classified description of the business and the special operation? A The distinction is this. The general classification is used for the purpose of a rate upon which the policy is issued. If there are any special operations in addition to the business described there is an additional premium charged and under these special operations there would be a special rate for each one of these operations specified and if the holder of a policy was engaged in any of the businesses enumerated as a special they would be charged an additional premium in addition to the one relative to their general business.

20

Mr. Lum. I move to strike that out. We do not come under any of those special operations.

The Court. I will allow it to stand.

30 Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q It appears already from the policy no special operations were specified in the policy.

The Court. I will not allow that.

Q If special operations had been specified in this policy under the heading what effect, if any, would that have had under the rate of insurance?

Mr. Lum. I object.

40

The Court. I overrule the question.

J. Horace Shale, direct.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q You know that an accident happened up at Mr. Sommer's Company in December, 1912; I mean, the accident happened at that time? A It was reported to us on December 24, 1912. 10

Q I suppose in the usual course of business some investigation of the accident was made? A There was.

Q And thereafter a suit was brought by this injured man? A There was.

Q After the matter had been fully investigated by your company did you address a letter to the plaintiff company with reference to the question of any liability under your policy? A I did. 20

Q I show you a letter which is marked D. 2 for identification. Is that the letter? A Yes, sir.

Q That was written by you to the Sommer Company? A That was written to me by the Sommer Company.

Mr. English. I offer that in evidence.

Mr. Lum. I object to it. That is a self-serving declaration and can have no materiality to this case. It cannot be admissible under any possible contention. 30

The Court. I will allow the letter.

Mr. Lum. I ask on what possible theory the letter can be admissible?

The Court. A part of the whole transaction and I think it is perfectly competent, a letter written to you to which you didn't reply.

Mr. Lum. No objection.

(Letter read to the jury). 40

J. Horace Shale, direct.

Q Where did you get the information from which enabled you to say in this letter that the injuries were sustained by striking a—

Mr. Lum. I object to it.

10 *The Court.* Yes, I do not think that is proper. I do not think it is competent. You have not laid any foundation to show that this information came from the defendant.

Q Did you following or some time following this accident go to the plant of the claiming company?

A I did.

Q Did you interview either one of the Messrs. Sommer? A I interviewed Mr. John Sommer at the time.

20 Q First witness on this morning? A Yes, and another gentleman, who, I think to the best of my recollection, having only seen him once, was Mr. Michael Sommer. He was on the stand, I think, and as I recall it was Mr. Michael Sommer and Mr. John Sommer.

30 Q Did you and those gentlemen look over the ground? A Yes, they were very courteous, one took me over the whole plant. It was after all of the alterations had been made and they took me over the plant and showed me just what had been done.

Q The situation was then as it now is? A I haven't seen it since that time. As described here today I assume as it now is.

Q You were there looking over the ground, looking over this ground in the interest of your company? A I was.

40 Q Did you ask either of those gentlemen what use was made of that floor, what it was constructed for?

J. Horace Shale, direct.

Mr. Lum. I object to that question in that form.

Q I will scratch out "either of those gentlemen," and say, did you ask Mr. John Sommer? A I didn't ask that question. I received from either Mr. John Sommer, I cannot say positively whether it was Mr. John Sommer, Mr. Michael Sommer was the other gentleman, he was there. The information, they were asked— 10

Mr. Lum. I object to what information he received under such circumstances.

Q What relation did the information which you got from that business have to the statement of facts in this letter?

Mr. Lum. I object to that.

The Court. I think unless you can show that Mr. John Sommer made these statements it is not proper to show that the information he got from somebody else— 20

Q Was there an unknown person or Mr. Michael Sommer? A To the best of my recollection it was Mr. Michael Sommer, as I recall him, having seen him here today on the stand.

Q Can you say positively whether or not you had your conversation with Mr. John Sommer? A Oh, yes, I had a number of conversations with Mr. John Sommer. 30

Q Did you get any other information except from Mr. John Sommer? A May I make a statement?

The Court. You may state any conversation you had with Mr. John Sommer.

Q What did Mr. John Sommer say about this matter?

Mr. Lum. I think the time and place ought to be fixed. 40

J. Horace Shale, direct.

Q Did you talk with Mr. John Sommer more than once of this matter? A I did.

Q Where did you have the first conversation?

A At my office.

Q At your office? A Yes.

10 Q What was said by Mr. John Sommer in the first conversation at your office with reference to this matter?

Mr. Lum. I ought to know when it was.

A I think I can tell from my file. This letter was written before I had my conversation with Mr. Sommer. My talk with Mr. Sommer was on the 23d of September and that letter was written on July 2d.

20 Q Then you got this information from somebody else? A From the investigations which were made of the accident.

Q Were any other statements in this letter affirmed in any conversation with Mr. John Sommer?

Mr. Lum. I object as leading.

The Court. That is improper.

Q In any conversation which you had after the date of this letter with Mr. John Sommer did he say to you that the vault or cellar, which had there been constructed, was constructed for a coal pit?

30 *Mr. Lum.* I object. This witness has been asked this question and said he could not tell.

The Court. You may ask him to state his conversation with Mr. John Sommer in reference to this construction.

40 Q Please state any conversation you had with Mr. John Sommer with reference to the construction of this vault or cellar under the platform? A Mr. Sommer called at my office. I think I have the date here, if I may glance at the file. In Septem-

J. Horace Shale, direct.

ber some time, it was prior to September 23d, 1913, a few days, it may have been a week prior, something of that kind, Mr. John Sommer called at the office and I arranged to meet him at his plant on Central avenue. I went out there that day and had a talk with Mr. Sommer, the one I referred to here, and I went over the whole situation at the plant. He explained to me what had been done, the character of the work that had been done. He gave me the dimensions of the excavation and the number of cubic yards that had been removed from the cellar, whatever you might term it. 10

Q That was at the plant? A That was at the plant.

Q And you got this information from Mr. John Sommer? A Yes. Then, he arranged to call at my office afterward, Thursday afternoon, October 2d, he arranged to call. I don't recall exactly at that time whether his counsel was with him or not. 20

Q Mr. Lum? A Yes, this gentleman sitting here.

Q Did Mr. Wachenfeld, Mr. Lum's associate? A Yes.

Q Did I understand you to say when you called at the factory Mr. John Sommer gave you the dimensions of the place? A Yes, the dimensions of the excavation and the character of the work that had been done and also showed me the situation as it stood there at that time. 30

Q Did he tell you the number of cubic yards that had been taken out? A He did.

Q How many did he tell you? A 491½ cubic yards.

Q What figures did he give you for the size of the excavation? A The top of the platform measured 27 by 24 feet and the depth of the excavation was 10 feet. 40

J. Horace Shale, direct.

Q You said he told you the character of the work. What did he tell you about that? A He explained to me the situation as it existed prior to the time the work was done and, of course, I saw the situation as it existed then afterward.

10 Q At the time you were there in September was any use being made of this cellar or vault? A I was informed at that time.

Q By whom? A That was a conversation I spoke of before when the gentlemen were present.

Q I don't suppose under the ruling of the Court you can give that. Did you look at the place itself? A I did.

20 Q Was there any use being made of it that you could see? A There was some coal stored in the place.

Q Was there any objective means for transferring the coal from where it was stored to the boiler? A There was a door from the coal bin at the side next to the boiler-room.

By the Court.

30 Q Was there any other entrance excepting through this boiler-room? A I made no memorandum of it at the time, but if my recollection serves me right there was where the old retaining wall has been.

By Mr. English.

Q Where the areaway has been described? A Yes. Of course, it is some time since I saw it, three years.

40 Q Were you there when this storage room, as it is called, was over by the Morris avenue side of the plant, was that there or don't you remember about that? A That, I don't recall.

J. Horace Shale, cross.

Q Did Mr. Sommer describe to you how much dirt had previously been under the place? A He explained to me the situation as it existed prior to the time by informing me that the platform extended out to meet the earth. It had formerly run down as he explained at an angle of about 75 degrees and that the platform was built at a point to meet— 10

Q The level of the ground? A Yes, the level point of the earth, the ground, and he stated in wet weather the soil would wash down in there and that the old platform had become in bad shape and they were afraid on account of the teams and they decided to make this change.

Q Did he say to you about any instruction from the Department of Labor? A Yes.

Q That they requested it to be done? A Yes. 20

Q Did he say to you what the object of their new work was? A That would bring us, I fear, to the same point. My recollection is that I was told at that time.

Q You had some negotiations after that from time to time with Mr. Sommer and his counsel? A I had.

Q About which an arrangement was made by which this accident case was defended? A It was.

Q Then the question of the liability under the policy was left for future litigation and the Court, is that correct? A Yes, sir. 30

Cross examination by Mr. Lum.

Q Mr. Shale, when did you go to the Sommer plant first? A According to my reference the first trip to the Sommer plant was on September 23d, on Tuesday, September 23, 1913.

Q You received notice of this injury in December, you say, in 1912? A December 24th. 40

J. Horace Shale, cross.

Q And had your investigators go on it in the usual course? A That might have been. I would like to explain before I go into that, it wasn't the usual course.

10 Q When you receive notice of an injury it is your invariable custom? A Depending on the nature of the notice we receive. We have various methods of handling the matters.

Q You did in this case send out an investigator in this instance? A He verified the facts furnished by Mr. Sommer.

Q And it was furnished with the greatest of courtesies by the Sommer Company? A They have always been very courteous.

Q Then you communicated with the Italian? A No, sir.

20 Q Didn't you say that your company at that time didn't immediately take the matter up with the Italian who was injured? A I did.

Q You are sure? A I am. May I explain why?

Q Your man completed his investigation when he went up there? A As far as it should have been completed under the circumstances.

30 Q He saw the situation there, didn't he? A He did.

Q Shown through the plant?

The Court. Not what this man saw. You are speaking of somebody else.

Q You got reports from your man who made the investigation? A I did.

Q That was part of your duties? A It was.

40 Q Then you did nothing further in the matter, your company didn't notify Sommer Company in any way, did you, until this letter of January? A No.

J. Horace Shale, cross.

Q Some six months later? A For the reason that the report from the Sommer Company was to the effect that this man wasn't in their employ, was employed by an independent contractor to whom they had given a contract for the purpose of excavating this dirt. The report furnished by the Sommer Company was to that effect and we had no knowledge or any reason to believe that a claim would be made against the John Sommer Faucet Company inasmuch as this man was injured in the course of his employment and would undoubtedly be entitled to compensation under the Compensation Act; had no reason to expect until some time later when it was found that his employer wasn't financially responsible and that a claim could be made against the John Sommer Faucet people. 10

Q In other words, you didn't bother to write this letter of July 2d until you thought you were going to be held liable? A It wasn't a question of liability. It was a question of the claim being made against the John Sommer Faucet Company. 20

Q You didn't notify them when your man came back and gave his report to you as to work that was done there at that time, you didn't notify them about any cellar? A No, sir.

Q You went up there yourself in September following? A Yes. 30

Q And you can't say whether, you had your talk with John Sommer or somebody else? A Yes, I can say that I had a talk with John Sommer because he was there.

Q You can't recall whether it had reference? A I can't recall that the whole thing was discussed in Mr. John Sommer's presence.

J. Horace Shale, cross.

By Mr. English.

Q He referred to some report about this accident tending to show there was no liability against the Sommer Company. Is that report in writing?

A Yes, sir.

Q Got it there? A I have.

10 Q You referred to this yellow sheet? A I do.

Mr. Lum. We object. It is an insurance company blank probably filled out by one of their own men.

Q You have handed me a yellow paper entitled, "Immediate report of public accident." Is that the information which you referred to in the answer to the question by Mr. Lum? A That is the information upon which we acted in making our investigation of this.

20

Q How did that come to you? A Came by mail.

Q From whom? A The assumption is it came from the John Sommer Faucet Company. It is so signed.

Q That was the thing which started your company up in investigating, in taking up this matter? A It was.

30

Q That was received as by the stamp, "December 24, 1912?"

Marked D. 4 for identification.

Q This paper, which we have marked D. 4 for identification, you say came to you through the mail? A I would like to say that any mail in connection with the claim department is brought to me. I have, of course, no distinct recollection of this paper coming to me but it came to me in the course of business and it is the information upon which we acted in handling this matter.

40

J. Horace Shale, cross.

Q Then you said an investigation was made such as the report warranted and this was the report which inspired the character of the investigation which you made? A Yes, sir.

Q How long was it after the date of this paper, D. 4 for identification, which it appears was received on December 24th, how long after that date was it that your company discovered the fact that a serious claim for liability was made against the Sommer Company by this Italian, who was injured? 10

A I will have to refresh my recollection. The first record I have was on the 31st of March when Mr. Bedford, of the firm of Beecher & Bedford, March 31st, got in touch with me.

Q 1913? A Yes.

Q Then it was following that that a further investigation was made, I take it? A Yes. 20

Q Which is referred to in your letter of July 2d? A That is it.

Mr. English. I would like to formally offer in evidence this Exhibit D. 4 for identification.

Mr. Lum. It is absolutely inadmissible against us. We do not know who sent it, who made it out and we do not know where they got the information.

The Court. Offer refused. 30

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

By Mr. Lum.

Q You say you took this matter up with Beecher & Bedford? A In March, yes.

Q And they didn't write this letter until July? A Whenever the date of the letter is. 40

J. Horace Shale, cross.

Q You don't say that John Sommer said they excavated 490 cubic yards? A I don't mean to say it was John Sommer made that statement.

Q As a matter of fact, don't you recall that you made the statement to whomever you were talking just as the counsel has put it in the mouths of witnesses here today?

10

The Court. No, that is not fair.

Q Isn't it a fact that you yourself mentioned the 491 cubic yards excavated? A I had no information as to the number of yards excavated.

Q Didn't you get some such information in talking to Beecher & Bedford? A No.

Q Don't you know, as a matter of fact, that figuring on the whole dimension you have given, 27 by 24 by 10 you would not get anywhere near half of 491 cubic yards, don't you know that? A I think 240, I think would be correct.

20

Q 216 to be exact. 216 cubic yards if it was solid, the whole excavation? A Yes, when I got out there at the plant that time I made a note of it.

Q You didn't tell them they would have to excavate two or three times that amount? A I didn't figure it up. I took their statement for it.

Q Mr. Bedford was representing De Vincenzo when you saw him? A Yes, it might have been Mr. Beecher. I don't recall which one it was.

30

Adjourned until Friday, April 28, 1916.

William A. Weir, direct.

SECOND DAY.

Friday, April 28, 1916.

Met pursuant to adjournment.

Present, counsel as before stated.

WILLIAM A. WEIR, sworn in behalf of defendant. 10

Direct examination by Mr. English.

Q Mr. Weir, where do you live? A In Belleville.

Q Are you employed by the Commercial Casualty Insurance Company? A Yes, sir.

Q In what capacity? A As chief inspector.

Q To inspect what character of things, what do you inspect? A Everything; elevators, factories, tenement houses, contract jobs, general building. 20

Q Buildings and things of that character? A Yes, sir.

Q Did you at the request of the defendant company go to this John Sommer Faucet Company factory and look the ground over? A I did.

Q When did you do that? A On or about May 27, 1913.

Q That was following the accident? A That was following the accident. 30

Q You had been advised there had been an accident? A Yes, sir.

Q To an Italian laborer. Whom did you see on behalf of the John Sommer Company when you got there? A I asked for the superintendent and the young lady in the office said she would get Mr. Sommer and Mr. Sommer came out. That is the gentleman that I talked to about it. 40

William A. Weir, direct.

Q Two Mr. Sommers have testified in this case. Do you remember which one? A It was the junior Mr. Sommer.

Q Michael Sommer? A That is the gentleman.

10 Q Did he show you around the place? A He did.

Q Did you inspect this old platform or the new platform? A The new platform, we inspected that.

Q What was underneath the platform? A You mean the opening underneath the platform?

Q Yes, what was the character of the place under the platform? A It was a built up bin, I would call it, with a concrete floor. There was one wall in it.

20 Q You mean a division, divided it in two? A The wall which has been called the retaining wall I was making it an open vault with a deck on top and the deck supported by iron columns.

Q Walls on how many sides of it? A To the best of my knowledge there was walls four sides.

Q Back by the areaway, was that up solidly or open? A The building wall on one side, the main factory wall, and I believe that there was an L on the west side with a wall on that.

30 Q Then was there a wall on the north side? A The retaining wall on the north side.

Q What was overhead when you stood on the concrete floor and looked up? A The timber deck.

Q That was held up how? A By iron columns.

Q Did you go on the top of the platform? A Yes; walked on the surface of the deck.

Q What was there on the surface, up on the main level? A The top of the deck?

40 Q Yes; the top of the deck as you call it? A Nothing. That was to be used as a driveway.

William A. Weir, direct.

Q Was there anything, any arrangement by which you could get into the space below? A Yes.

Q What was that? A A stairway right at the L or at the wall of the building.

Q That is where the areaway was? A That is where the areaway was. Then there was a manhole. 10

Q Where were the manholes? A They were located nearer to the south wall, right at the north edge of the old areaway.

Q I show you one of the photographs in evidence, Exhibit P. 2. Can you indicate from this thing which you have referred to as a manhole? A That is it.

Q Which one you point to looks like a little square with a ring on it? A That is it.

Q I show you another photograph, Exhibit P. 4. Can you point out in that any of these manholes? A There is one there. There is apparently one in there. 20

Q You point to one at the right of the platform in the picture and one near the center of the picture. A One near the center.

Q Did you learn what those manholes were for? A Yes; for dumping coal in there.

Q Into the space beneath? A Yes, sir.

Q Did you measure the dimensions of the place? A I measured them by pacing them off. 30

Q Your paces undertake to be how wide, how long? A Do you mean the pace?

Q Yes. A I take a three-inch step, 2½ feet.

Q From that character of a measurement, what did you find? A I found the width to be approximately 24 by 27 feet.

Q Did you make any measurements of the slope of the thing? A I didn't measure the slope except take the superintendent's word for the slope. 40

William A. Weir, direct.

Q What he said it to be? A He stated it was 24 by 27 and 10 feet deep. My observation of this verified that; didn't measure it by rule.

Q Did you learn from the superintendent what the terms of the arrangement were between his company and the contractor with reference to the excavation?
10

Mr. Lum. I object to that.

The Court. The question is too broad.

Q Did the superintendent tell you how much had been excavated out from underneath the platform.

Mr. Lum. I object to that. What the superintendent told him would not bind us in any way at all. We have gone into the facts quite fully as to the size of the place.

20 *The Court.* I will allow it.

Mr. Lum. I object also on the ground there is no authority of the superintendent to bind the company by any statement he made.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q The question is, did he tell you how much had been excavated out from under the platform? A Yes, sir.
30

Q How much? A He said there had been 491½ cubic yards excavated.

Q Did he tell you how much he had paid for that excavation? A He said he had paid for it at the rate of \$1.25 a cubic yard.

Q He had paid for 491½ cubic yards? A Yes.

Q Did he tell you the total amount he paid the contractor? A I can't be positive of that, whether
40 I figured the account.

William A. Weir, cross.

By Mr. Lum.

Q You are quite positive you didn't tell him there were 491 yards? A Quite positive.

Q You have had considerable experience in examination of situations like this, haven't you? A Yes, sir.

Q When he told you that a place this size, they took 491½ cubic yards of dirt out what did you say to him? A I didn't say anything. I took his word for it. 10

Q Didn't you know immediately, from your experience, that 491 cubic yards, if it was all solid, would require two and a half times that space?

Mr. English. I object to that.

Q Didn't that occur to you?

Mr. English. I object. The question here is not a question of how much had been taken out, but what this man told him. If the Italian contractor took advantage of Mr. Sommer's innocence, that is not a concern to the jury one way or the other. The question is what these people intended to do. 20

The Court. I think it is a proper form of cross examination.

Defendant's counsel prays an exception to this ruling of the Court. 30

Exception noted as ground of appeal.

Q (Question repeated.) A No; because I didn't figure it.

Q Didn't they know it? A No; but that can be explained.

Q You have spoken of this as a vault. As a matter of fact, there is an open areaway along by the main building, 6, 7 feet? A Yes.

Q Simply a broad platform, not tongued and grooved, just ordinary boards that permitted any 40

William A. Weir, cross.

amount of water to come through? A It is not tongued and grooved.

Q It is not watertight? A Not ordinarily.

Q Not when the water comes; it is watertight in dry weather? A Yes.

10 Q That is what you call, in your experience, an inspection of a vault? A Yes.

Q How do you fix the time when you were up there? A Chiefly from data in my report.

Q When did you first go up there? A On this particular date?

Q Yes. A That date.

Q You were not the first inspector to be on this job? A Yes.

20 Q You were on this particular job. Didn't you know somebody had gone up there for an examination right after the accident was reported? A That was an investigation of the claim. This was a physical inspection of the job.

Q You figured this when? A On or about May 27th.

Q You have no recollection of that excepting from your report? A No; I have a memorandum.

Q You are sure it was 1913 and not 1914? A Surely.

30 Q You say you found manholes in this platform? A Yes, sir.

Q You are positive of that? A Quite positive.

Q How positive are you? A I made a sketch of it at that time.

Q Have you that sketch here? A The sketch is here.

Q The sketch you made at that time show manholes? A Yes, sir.

40 Q Did you find any coal under there? A My impression is that I did.

William A. Weir, cross.

Q How much coal? A I can't say exactly how much coal.

Q Well, why don't you remember how much coal as you remember about these holes or wall? A Because my sketch does not show any coal.

Q If there had been coal there under that your sketch would have shown it? A Not necessarily. 10

Q What denoted what you put in this sketch, just what you liked or what? A I noticed the condition that was there. I was sent there to inspect a vault. I saw the construction of the vault.

Q All right. If you wanted the sketch to show the conditions that were there and you found coal there you would have put coal on the sketch or noted it? A No.

Q Then that sketch would not show the conditions? A That was to show what had been built. That is what I wanted to find out. 20

Q It only showed what had been built? A Exactly.

Q Didn't it show coal there? A No.

Q You think as an inspector sent out to show the condition here of what has been built, if you had found some tons of coal there you would not show it or noticed any memorandum? A It is not shown. The sketch will show this to be used as a coal bin. 30

Q That is your idea of what you saw there. Did you see any coal there? A My impression is I did. I would not swear to it.

Q Did these holes that you saw in the platform indicate use? A Surely.

Q What had they been used for? A For dumping something apparently in there.

Q How did you see that? A By the wear on them. 40

William A. Weir, re-direct.

Q What was the wear on them? A Why, they showed they were not covered with dirt, showing they had never been opened, that would indicate they had never been opened if they were covered over, the square where they set into. The hole where the cover set into the hole would be all filled with dirt if they were not opened.

10 Q That is what you mean by wear? A Surely.

Q That they were not covered with dirt? A Yes, sir.

Q And if you don't find a thing covered with dirt that is all worn? A Not usually. That is explaining this situation.

Q It is not usual when a thing is covered with dirt it is all worn, but in this particular case— A Dirt would be an indication that it hadn't been used.

20 Q As a matter of fact, you didn't see any wear on it at all, did you? A I saw that it had been used. I would not call it wear.

Q I want you to answer my question. Did you see any wear shown on these holes? A Ordinary indications would show they had been worn by lifting in and out.

Q What were the indications? A Where the coverings fit into the deck was not covered over, showing that it wasn't covered with dirt, showing they had never been removed.

30 Q Because it wasn't covered with dirt you want to tell this jury they show wear? A That is what I call wear. Use is wear, isn't it?

Q That is what you mean by wear? A Surely, use.

By Mr. English.

Q You said that the seeming discrepancy of the extent of the cubic yardage would be explained? A The dimensions given of this vault are but inside

40

William A. Weir, re-direct.

dimensions to the best of my knowledge and naturally they would have to dig back further to make room for the wall on the north side. They would probably dig back 2 or 3 feet by 27 feet length, 10 feet high. They would also have to dig deeper than the 10 feet to put in the concrete floor and they would have to dig for the footings of the columns. 10

Q So that would make considerable more excavation than the rectangular space for the finished room? A That is what we are figuring on.

Q You said you made a sketch at the time you were up there. I show you a sketch. Is this what you made at the time you were up there? A Yes, sir.

Q That undertakes to set up the situation as you found it when you went around with Mr. Michael Sommer. You have indicated there the location of the walls, surrounding walls of the vault? A Yes, sir. 20

Q And the areaway? A Yes, sir.

Q The surface of the platform with reference to these manholes? A That is there.

Mr. English. I offer this in evidence.

Mr. Lum. I object to it. It shows the condition months after the accident. It would be improper to show what this man wrote down when he came away. 30

The Court. I do not think it is competent.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Paper marked D. 5 for identification.

Q Refreshing your recollection of the sketch which you made can you tell how many manholes there were in this platform? 40

William A. Weir, re-direct.

Mr. Lum. I object to it also because it shows the condition after the accident.

The Court. No, I think I will allow the condition, what he found there at that time.

A The sketch shows three manholes.

10 Q Where were they located with reference—
were they not located on the platform? A They were close to the south end of the platform.

Q When you say the south then you mean nearest the big factory building? A Nearest the big factory building or the old areaway. No, I will change that. I am looking at it the wrong way. It was on the north side. That is it.

Q They were nearest the north edge of the hole?

A That is it.

20 Q How were they located, in a regular row or how? A The sketch shows they were located in a regular row.

Q Along the north side? A Along the north side running east and west.

By Mr. Lum.

30 Q If the whole space excavated 27 by 24 by 10 only took 260 cubic yards you want to tell this jury that if they excavated a little additional dirt under posts that it would amount perhaps to 491 yards. Is that your testimony? A I think the figures showed 240 cubic yards.

Q If they excavated to make a little additional space for a post do you think it would make more than double the entire amount? A There were several of these footings.

Q How many? A To the best of my knowledge there were five of those footings.

40 Q You suppose those five footings would take over ten cubic yards of excavation? A Depending

Michael Sommer, direct.

upon the weight to be carried, columns, deck, and so forth.

Q To carry the columns there on that platform then would be a very liberal allowance? A Two yards to each footing.

Q Yes? A I don't want to answer that without seeing the size of the footing.

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Q Leaves you out 200 and some cubic yards? A You want to make some allowance for the retaining wall.

Q How much for that? A Depending upon the thickness of the wall.

Q 25 at the outside, cubic yards? A You have got the square of 27 by 10, 270 square feet, and the depth—they to go back. They didn't build that wall directly against the—

Q In other words, after my directing your attention to the situation, you still think your explanation is a pretty good one? A What explanation?

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Q Don't remember your explanation? Well, I won't bother you with it.

MICHAEL SOMMER, recalled on behalf of defendant.

Direct examination by Mr. English.

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Q Mr. Sommer, you had general oversight of the work and construction of the excavation and construction of this vault, didn't you? A Of the excavation, yes.

Q You were out, as you said yesterday, every day? A Well, nearly every day.

Q Do you remember how long it was from the time the Italians began to dig until they had completed their work?

Mr. Lum. This is mere repetition.

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Michael Sommer, direct.

A I don't know. I can't tell you without my notes.

Q It was about ten days, I should presume? A What ten days?

Q This man De Vincenzo was hurt towards the last of the excavation work? A The last day as I recall it.

10 Q Did you notice the place where the men were digging just prior to the accident? A No, I came out there after the accident.

Q Yes, I know you did, but you were also out there before the accident, were you not? A Yes.

Q About what time of the afternoon did the accident happen? A I think it was around five o'clock, quitting time.

20 Q About what time of the afternoon had you been out there previous to the time of the accident?

A I might have been out there in the morning. I can't say.

Q Were not you also out there in the afternoon? A Not that I remember.

Q At the time you were out there, whatever time of the day it was, how much of the space had been excavated? A You mean the last day?

Q Yes. A All but this pier. They had to clean up.

30 Q Pier of dirt? A Yes.

Q That was where, in what part of the excavation, north, east, south, or west? A On the north side.

Q So all the space had been excavated excepting the remaining pier of dirt? A Just this small piece of ground.

Q The north wall of the excavation? A I think it was.

40 Q And it was not finished that day that this accident happened? A Yes.

Michael Sommer, direct.

By the Court.

Q Was there a pillar on that pier? A Yes, there was a pillar there.

Q That supported the roof? A That supported the roof, yes.

DEFENDANT RESTS.

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MICHAEL SOMMER, recalled, in behalf of plaintiff, in rebuttal.

Direct examination by Mr. Lum.

Q When were these openings in the platform, referred to as manholes, made with reference to the completion of the work? A The same time the work was completed.

Q When was the door cut through? A There was no door cut through. 20

Q There was a door into the engine-room? A That was there.

Q Originally? A Originally, yes.

Q When was the place first used, were these manholes used at all? A They hadn't been used a long time afterward. We had no use for that bin there.

Q Was there any coal at all in there in May? A I can't recall that there was. 30

Q Are you quite sure the holes in the platform were cut in there?

Mr. English. I object to that. This is rebuttal.

Q What is your recollection?

Mr. English. I object to that.

Cross examination by Mr. English.

Q They were afterwards used to shoot coal through? A Not necessarily. 40

Motion for Direction of Verdict.

The Court. The question is were they?

Q As a matter of fact, you used to put coal in through those holes? A We did put some coal in there. They were not cut down for that purpose.

Mr. English. I move to strike that out.

The Court. Yes, that will be stricken out.
10 The answer is not responsive.

By Mr. Lum.

Q Why were they put there?

Mr. English. I object to that.

The Court. I will allow that.

Counsel for defendant prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

20 A Just for convenience, in case we wanted to put anything in there.

PLAINTIFF RESTS.

Mr. English. I would like to move for a direction of verdict in favor of the defendant on the ground that the facts here, which are undisputed, show that the work which was done was of such a character as not to have come within the description of the business of the plant as described in the policy. On 30 the other hand, not having come within the scope of the special operations as described in the policy they constitute a breach of warranty on the part of the plaintiff, and, therefore, he is not entitled to recovery.

Mr. Lum. I will only dignify that so-called argument by, in turn, applying to your Honor, and making a motion for direction of verdict in favor of the plaintiff. In the light of the 40 evidence of the expert, that in the ordinary

Motion for Direction of Verdict.

building business that such work as was done there would be considered a repair and alteration, usual and necessary to the maintenance of the plant, and on the evidence of Mr. John Sommer and Mr. Michael Sommer that the building department ordered this platform to be fixed; that any fixing which they made, these other changes as was incidental, the wall for the stronger support, and the fact that an opening happened to be there is merely an incident to the method of doing the work, which has been approved by the building expert. Mr. Winston said this was an approved way of doing this work, and he is one of the best experts that can be gotten, and there is nothing to contradict him. That evidence would prevent any possibility of a direction of verdict for the defendant, but there is no evidence to prevent the direction of a verdict in favor of the plaintiff. The facts in the case are practically not in dispute. The defendant calls no witnesses excepting one of their employees who went up months afterwards and states what he found there, which, of course, is really of no materiality as to the condition as it existed when this man was injured in December; but the law with reference to the case seems to be quite clearly settled in many jurisdictions in cases that are so well considered it seems to me should be followed by our trial courts. "That the insurance companies draw these policies and every clause in them is to be considered more strongly against them." They have the right of determining what shall be included and what shall be excluded. The man who takes his policy relies upon protection.

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Henry Zomrock, direct.

Therefore, I think in this case the direction of verdict should be made for the plaintiff.

The Court. I shall refuse both motions.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10 Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English. I would like to reopen the case to put in a material witness.

The Court. I will allow it.

HENRY ZOMROCK, sworn in behalf of defendant.

20 *Direct examination* by Mr. English.

Q Mr. Zomrock, you are a carpenter, aren't you?

A Yes.

Q Did you ever work for the John C. Sommer Faucet Company? A Yes, sir.

Q You remember when a shed fell down and a man was hurt in the winter of 1912 at their place?

A Yes.

30 Q He was hurt while the workmen were excavating a cellar?

Mr. Lum. I object to that. There is no evidence of a cellar being excavated.

The Court. Yes.

Q He was hurt while he was excavating under the old place where the old platform was.

Mr. Lum. That is all admitted in the pleadings.

40 *The Court.* That form of the question is all right.

Henry Zomrock, direct.

Q He was hurt while they were excavating dirt from under the place from where the old platform had been? A There wasn't a platform yet.

Q You remember there was an old platform there? A I think so.

Q They took that up and the Italians excavated under the place where it had been? A Yes. 10

Q After the excavation was all made did you do any work there? A Yes, I put up the new platform.

Q Who built the brick wall, the new brick retaining wall? A I don't know that.

Q Were there some masons? A They looked like masons.

Q After the excavation was all done what part of the work was done first? A The brick wall was fixed up so the ground would not fall down any more. 20

Q After the brick wall was built up what was done next? A Then we put posts on that.

Q What kind of posts were they? A Iron posts.

Q What did the iron posts rest on? A Concrete pier.

Q Do you remember how many iron posts there were? A Four. 30

Q After the iron posts had been put up what was done next? A I put two girders over.

Q What was done to the floor of the excavation? A As soon as the platform was done concrete came there.

Q When was the concrete floor put in? A When the platform was done.

Q Then the concrete floor was put in? A Yes.

Q Who built the platform? A I. 40

Henry Zomrock, cross.

Q Did you put anything in the floor of the platform to make it easier to get down into the place below? A I left an opening for a ladder.

Q Where was the opening? A Where the brick wall was there.

10 Q Which brick wall, the north one or the south one? A The north side.

Q How many openings did you make there on the north side? A Just one so that we can put a ladder in there.

Q Did you leave it open or was there a lid made to cover it over? A No lid.

Q Did you make any holes for which you also made lids? A Two, a place where the coal chute came in, the same place in the old part.

20 Q Two other coal chutes?

Mr. Lum. I object to that.

Q Tell us what the two holes were for? A So that you could chute in coal.

Q Chute in coal where? A In the boiler-room.

Cross examination by Mr. Lum.

Q The coal you referred to being shot in was coal into the old boiler-room? A Yes.

30 Q What did you do with this old excavation? A The old part.

Q The wall that you referred to was built long after the man was hurt, wasn't it? A Yes.

Q The concrete floor was put down a long while after the man was hurt? A Yes.

Q How long did you work there? A I worked there fourteen days, until that happened.

40 Q How many days did you work there after it happened? A I can't tell you exactly. Sometimes I do work, sometimes I do not.

Henry Zomrock, cross.

Q How long did you work at the Sommer plant, how many days or weeks after the man was hurt?

A A year, something like that.

Q A concrete floor wasn't put down until a long while after the excavation was made, was it? A Yes, I had to make a platform ready and then the concrete floor.

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Q The concrete floor wasn't put down until quite a long while after the platform was laid? A well, I don't know how long it was. It wasn't the same time. It took some time.

Q It wasn't put down until two or three months after? A If it was so long I don't know.

By Mr. English.

Q If you took up the lids of those coal holes which you made, what was underneath?

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Mr. Lum. Is this re-direct? It seems to me there ought to be an end some time.

The Court. You may ask him that question because there seems to be a misunderstanding as to where the holes were.

A The bottom.

Q Was the bottom underneath the bottom of this new excavation which had been dug out there?

Mr. Lum. I object to that as leading.

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The Court. Yes, that is leading.

Q And the bottom was what you saw underneath the lid, underneath the coal hole? A Before it was ground bottom but after concrete came up there it was concrete floor.

Q Where was this bottom with refernce to the old platform which had formerly been there? A It was ground bottom and afterwards a concrete floor came up.

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Motion for Direction of Verdict.

Q And these coal holes, which you made, led you down into this place underneath where the concrete floor was? A The holes, they came there, and then they shoot over to the old holes where the holes were before.

10 Q Now, did you ever see any coal in this new excavation after the concrete floor was put in?

Mr. Lum. I object.

The Court. No, you cannot go into that. It is not re-direct.

Q Were these coal holes made in the new platform which you built? A I made it myself.

Q Were they made in the new platform, which you built? A When I had laid the platform I made two holes.

20 Q What was that new platform for? A Over the old ground.

Q What was there where the old ground used to be? A On the old ground I put a platform up.

Q Was the old ground there when you put the platform up? A There was no ground any more afterwards.

Q What was there there? A The bottom was there.

Q And these coal holes were over that new bottom? A Platform was.

30 Q And the coal holes were in the platform which was over the new bottom? A Yes.

Mr. English. I would like to renew my motion for a direction of verdict in favor of the defendant on the ground mentioned before.

40 *Mr. Lum.* And I also wish to renew my motion for the direction of verdict in favor of the plaintiff on the same ground as stated before. I wish, however, to call your Honor's attention to the fact that the situation is some-

Charge to Jury.

what more radically changed, entitling the plaintiff to the direction of verdict in that this witness for the defendant has said that the brick wall was built up so the dirt would not come down any more. That being so that was the only question that possibly seems to me be left open and by their evidence, having closed that door, it seems to me we now are more particularly entitled to a verdict. 10

The Court. Same ruling as before in both cases.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 20

Charge to the Jury.

The Court charged the jury as follows:

CUTLER, J.

Gentlemen of the Jury: During the latter part of the year, 1912, John Sommer Faucet Company, a corporation of this state, was operating a manufacturing plant at the corner of Central avenue and Main street in the City of Newark. I do not understand that it is disputed that back of the main building and between the boiler-house on one side and another building, called by some witnesses, a stock-house, there was a platform level with the ground over which was a roof attached to the two buildings supported by one or more posts. This platform, was wood and it became either unsafe or unfit for use and it was decided to remove it and replace it 30
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Charge to Jury.

with another. The work was begun by plaintiff company, but before the work was finished a portion of it was given out by contract. The contractor employed his own men, and in doing certain excavation the roof over this platform became loosened and fell, injuring one of the contractor's employees. This workman brought a suit against the plaintiff company and recovered a judgement in the Essex County Circuit Court against the plaintiff company on June 9, 1914, for \$2,500 and \$75.16 costs of suit. The case was removed to the Court of Errors and Appeals and the judgment of the Circuit Court was affirmed on June 14, 1915. Thereupon the plaintiff company paid this injured workman \$2,765.71, amount of the judgment, costs and interest to the date of said payment, so that the plaintiff actually expended \$2,765.71 in settling for the accident, and which will be a total loss to the company unless the company is covered by the insurance in this case. On June 25, 1912, the defendant, the Commercial Casualty Insurance Company, of Newark, New Jersey, a corporation of this state, issued this policy to the plaintiff company whereby it agreed to indemnify the plaintiff company against loss and expenses resulting from claims against the assured for damages on account of bodily injuries, including death, accidentally suffered by any person or persons not employed by the assured by reason of the business described and conducted at the location named in said warranties, wherever said injuries or death are accidentally suffered at the location named, except claims arising by reason of, and then follows a number of provisos, which I do not understand, it is contended, apply to this case, but there are certain warranties which they claim do apply and they are the contract, which the assured made with the casualty company and are described

Charge to Jury.

on the third page of the policy as operations incidental to the following business, including repairs, and alterations usual and necessary to the care and maintenance of the premises or plant, manufacturers of piano backs and piano cases and wooden faucets. Now, that is the contract which the insurance company made at that time with this plaintiff company and which they are bound to carry out. They, however, exclude from this policy special operations which the plaintiff might have included in the policy if it so desired, but which it did not have included in the policy and the ones which apply to the present case are these: erection, construction, demolition or unusual alterations or repairs of premises or plant. Now, those items were not included in this policy. They were not paid for by the plaintiff and were especially excluded from the terms of this policy, so that it took the risk itself of those items just the same as though it took the risk itself as it did in this case because you will notice its own workmen were not insured in this policy. It was only these persons who came upon its premises and who were not employed by it. In other words, to sum it up, the insurance company insured the plaintiff company against loss and expenses from claims made by persons not in the company's employ who were injured or killed in any operation incidental to plaintiff's business as a manufacturer of piano backs, piano cases and wooden faucets at this place of business including repairs and alterations, usual and necessary to the care and maintenance of the premises or plants, but not including erections, constructions, demolitions, or unusual alterations or repairs of the premises or plant. Now, that is the substance of the contract which these people made and you are to determine by your verdict whether the conditions as existing

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Charge to Jury.

show that the company is liable under the insurance contract. If they are, then they should pay. If they are not liable, if they do not come under the terms of that policy then they should not pay. It is a matter for you to determine and that is why in this case there was neither a direction for the plaintiff or the defendant, because in my opinion it was a jury question and not a question for the Court. The policy was in force when the man was injured. You will recollect in this case the man himself has been paid. The man who was injured has received his money from the plaintiff in this case; and the plaintiff now says to the insurance company as it was obliged to pay this man for the injury, they should make it good under the terms of the policy. It makes no difference to the man who was injured for he has his money, but the question is now whether or not the plaintiff company, who paid this money, should recover it back from the insurance company and that is the matter disputed which you are to determine, so the questions you are to solve are, first, what work was actually done; and, second, was the work included or excluded under the terms of the policy. That is, was the work in which the man was engaged at the time, work which was included under the policy or excluded under the policy.

To decide the first question you must determine what was the condition of the platform and ground under it at the time the work was begun. On the one hand it is contended that there was some sort of a hole under the platform in which the dirt was washed by the rain, that the platform rested on one side on a wall and on the other side on the bank. You are to say from all the evidence what was the condition under the old platform. Was there a cellar there, was there a fill there or what

Charge to Jury.

was the condition before the work was begun? The old platform was removed, the earth excavated to a depth of 10 feet, a wall built on the north and south side, the bottom cemented and a door cut from the boiler-room to this room. Now, there may be some question as to when that door was cut. One witness tells the door was there before, another one tells it was there afterwards, so that is a matter for you gentlemen to determine. But, in the excavation of this platform one of the timbers which supported this roof was loosened and the roof fell and the man was injured. You see, the question for you to determine is, first, whether or not it was one of the acts in making this excavation which was covered by this policy; second, having determined first what act was done, decide whether this work was excluded or included under the terms of the policy. Was the work done incidental to plaintiff's business, for that is one of the terms of the policy. Was it a necessary or usual repair? You can ask yourself whether or not the cellar was there before to be repaired. Was it a necessary and usual alteration? Was it necessary to care for and maintain the plaintiff's plant? Now, if it comes under any one of those headings then the plaintiff is entitled to a verdict at your hands. If, however, you find it was either an erection, a construction, a demolition or unusual alteration or repair of the premises or plant then there can be no verdict in favor of the plaintiff, but the verdict should be in favor of the defendant, because it was not covered by the terms of the policy. It was expressly excluded. In determining this question you may consider the policy which was issued by the company and which you will have with you. The rule of law which governs such matters is the defendant is responsible for the language used in the policy, and the meaning most

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Charge to Jury.

- favorable to insured, the plaintiff in this case, and he is entitled to the benefit of that language. The policy was prepared by the defendant and where ambiguity occurs therein the words are to be read most favorable to the insured. The insurance companies are paid for protection. Their contracts are
- 10 to be construed when construction is possible most strongly against them and in favor of the insured but you cannot do anything to the policy. It is the contract which the parties made and you must take the policy just exactly as it has been written and prepared. It is the contract which both parties made and it is the contract on which this case is brought. The words of this policy should have their usual and ordinary meaning. The word "necessary" as used in this policy does not mean an absolute physical necessity nor something which is indispensable. It means something the doing of which is appropriate, suitable or proper. The word "alteration" means a change. The word "usual" in this policy means such as is in common use or such as occurs in ordinary practice or in the ordinary course of events, and unusual would be the opposite. The word "demolition" as used in this policy means the intentional tearing down or destroying a building or edifice or a part thereof.
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- 30 There is absolutely no evidence in this case that the plaintiff attempted to or did demolish the building or any part thereof, the falling of the shed merely having been an accident, could not come under this word. There is no evidence that they intended to tear down that roof; in fact, the roof fell as a result of the accidental tearing away of the earth. The only other term for us to consider is construction. The word "construction" and the word "erection"—referring to a building—have
- 40 sometimes been construed to be synonymous, to be

Charge to Jury.

the same, but I think in this policy it means something more than that. It means the making of anything, the making of something new. You speak of the erection of a building; you speak of the construction of a sewer or something of that kind. There is that distinction I think to be made in this case. You are now to consider just exactly as I have said what was done and whether it was construction work or usual repairs and usual alterations, or whether it comes under the other terms of the policy which I have read to you. If you find that the work that was done by the plaintiff upon this plant was for the purpose of making repairs or alterations which were appropriate, suitable and proper to the care and maintenance of the plaintiff's premises your verdict should be for the plaintiff. If this alteration which was done was usual, or made in the ordinary course of events, or was customary, then your verdict should be for the plaintiff. Before you can return a verdict for the plaintiff you must further find that the laborer who was injured was injured while working upon a series of repairs which were usual and necessary to the care and maintenance of the plaintiff's premises. If the work done in the course of which the laborer was injured, did, in your opinion, consist of an erection, construction or unusual alteration or repair to one or more of the plaintiff's buildings or plant, there has been a breach of the warranties in the policy and the verdict must be for the defendant. If the work, in the course of which the laborer was injured, involved repairs which were unusual as opposed to repairs which were usual and necessary to the care and maintenance of the plaintiff's plant, there was a breach of the policy and the verdict must be for the defendant. If the jury find that the work done in the course of which the

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Charge to Jury.

laborer was injured, in addition to repairing the platform, which was to make it safe to use to drive upon, included the construction of new work underneath the platform and comes under the head of construction which is new and excluded from the terms of the policy, then, of course, the verdict, as I have said before, should be for the defendant. If the jury find that the excavation was made under the platform and the construction of the north retaining wall and the laying of a concrete bottom were not necessary to the repairing of the platform, so as to make it safe to use and drive upon, then you will say whether or not that work was unusual work, and it makes no difference whether the work was completed at the time this man was injured or not. The injury was caused by the excavation, and if the excavation was not necessary in order to build the platform, but was made for the purpose of constructing new work of such a character as you say was not a usual alteration or repair, then your verdict should be for the defendant. You have to take this whole case. You are to consider all the testimony, remembering that the plaintiff has the burden of proving, by a preponderance of the testimony, that the company is entitled to a verdict at your hands. You are to consider not only the testimony which has been offered, but you are to consider all the exhibits and then say whether or not the work that was being done by this man when he was injured comes under the terms of the policy. If it does, then the plaintiff is entitled to a verdict at your hands for the amount that it had to pay, together with interest up to date, which has been computed at \$2,895.54. If you find that the work this man was doing at the time he was injured was not work which was covered by this policy then your verdict should be for the defendant. It is

Exceptions to Charge.

entirely a matter for you gentlemen to determine. Ascertain first what the work was and then if it comes under the terms of the policy, as I have explained it to you.

Mr. English. I would like to take an exception to the refusal of your Honor to charge as requested requests one, four, eight, nine, ten, eleven, twelve and thirteen. 10

The Court. You may take your exception as I have charged, and you make take exception to those requests which I charged in part.

Mr. English. I would like to except to the refusal of the Court to charge as requested as stated in the sixth and seventh requests.

The Court. Yes, and on my refusal to charge the first. 20

Exceptions noted as grounds of appeal.

Mr. Lum. I would like to except to your Honor's refusal to charge the tenth request to charge. I also desire an exception to that part of your Honor's charge in which you said that one of the questions for the jury to determine was whether or not the work that was done was incidental to the plaintiff's business on the ground it is perfectly immaterial whether or not it was, because if it was done for the purpose of making an alteration usual and necessary whether or not it was incident to the plaintiff's business it comes under the policy. 30

I desire also to take exception to that part of your Honor's charge in which you said that of the work which was done under the platform was work which was new then your verdict must be for the defendant.

I also desire to take an exception to that part of your Honor's charge in which you say that 40

Plaintiff's Requests to Charge.

a wall was built on the north and south sides of this excavation. There was but one wall built according to the testimony and that was on the north side.

The Court. You may take your exception to that and to my refusal to charge as requested.

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Exception noted as ground of appeal.

PLAINTIFF'S REQUESTS.

Plaintiff's counsel requests the Court to charge the jury as follows:

(1). This policy should be construed most strongly against the defendant and in favor of the plaintiff.

(2). The policy should be liberally construed.

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(3). The policy was prepared by the defendant, and where ambiguity occurs therein the words are to be read most favorably to the insured, the plaintiff in this case.

(4). The defendant is responsible for the language used in the policy, and the meaning most favorable to the insured, the plaintiff in this case, must be accepted.

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(5). Insurance companies are paid for protection. Their contracts are to be construed, when construction is possible, most strongly against them and in favor of the insured.

(6). The word "alteration" means a substantial change.

(7). The word "necessary" as used in this policy does not mean an absolute physical necessity nor something which is indispensable. It means and imports something the doing of which is convenient, appropriate, suitable or proper.

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(8). The word "usual" in this policy means such as is in common use or such as occurs in ordinary

Plaintiff's Requests to Charge.

practice or in the ordinary course of events; or customary.

(9). If you find that the work which was done by the plaintiff upon its plant was for the purpose of making repairs or alterations which were appropriate, suitable or proper to the care and maintenance of the plaintiff's premises or plant and which said repairs or alterations occur in ordinary practice or in the ordinary course of events or are customary, then your verdict must be for the plaintiff. 10

(10). The word "unusual" as used in this policy means uncommon or rare, and your verdict in this case must be for the plaintiff unless you find that the work done by the plaintiff was for the purpose of making a repair or alteration which was uncommon or rare.

(11). The words "erection" and "construction" 20 as used in this policy are synonymous, and mean the act of building or the form or manner of building; and there is no evidence in this case to show that the injury for which the plaintiff was obligated to pay and for which it is now seeking reimbursement was caused by any erection or construction, so that this defense of the defendant should be absolutely excluded by you and should be given no consideration.

(12). The word "demolition" as used in this 30 policy means, to intentionally pull down or destroy a building or edifice or a part thereof, and there is absolutely no evidence in this case that the plaintiff attempted to or did demolish the building or any part thereof, the falling of the shed merely having been an accident, which cannot come under the word "demolition" and you are to exclude this defense of the defendant and give it no consideration.

Defendant's Request to Charge.

DEFENDANT'S REQUESTS.

Defendant's counsel requests the Court to charge the jury as follows:

(1). There should be a verdict for the defendant.

10 (2). Before the jury can return a verdict for the plaintiff they must find that the laborer, DeVincenzo, was injured while working upon a course of repairs which were usual and necessary to the care and maintenance of the plaintiff's premises and plant.

20 (3). If the work done, in the course of which the laborer DeVincenzo was injured, did in the opinion of the jury consist of an erection, construction, demolition or unusual alteration or repair, one or more, of the plaintiff's premises or plant, then there has been a breach by the plaintiff of the warranties contained in the policy, and the verdict must be for the defendant.

(4). Repairs usual and necessary to the care and maintenance of the plaintiff's plant or premises consisted in making the platform safe to use and drive upon, and anything more than that was an unusual repair.

30 (5). If the work, in the course of which the laborer DeVincenzo was injured, involved repairs which were unusual, as opposed to repairs which were usual and necessary to the care and maintenance of the plaintiff's plant or premises, there was a breach of warranty of the policy, and the verdict must be for the defendant.

40 (6). If the jury find that the work done, in the course of which the laborer DeVincenzo was injured, in addition to repairing the platform itself so as to make it safe to use and drive upon, included the construction of a coal bin or storage cellar underneath the platform, then the work came within the definition of special operations as defined

Defendant's Request to Charge.

in the said policy, and the verdict must be for the defendant.

(7). If the jury find that the excavation which was made under the platform and the construction of the north retaining wall, and the laying of the concrete bottom were not necessary to the repairing of the platform so as to make it safe to use and drive upon, then the work done was not within the class of repairs usual and necessary to the care and maintenance of the plaintiff's plant or premises, and was not within the business described and conducted at the location named in the warranties, and the verdict should be for the defendant. 10

(8). If the jury find that the plaintiff intended to and did construct a coal bin or storage cellar underneath the platform, in addition to repairing the surface of the platform, so as to make it safe to use and drive upon, then the said work was not within the business described and conducted at the location named in the warranties, and the verdict must be for the defendant. 20

(9). The presence of the trap doors or covered holes in the surface of the platform is inconsistent with the plaintiff's theory of the case that the repairs to the platform were only such as were necessary to make the platform safe to use and drive upon, and hence repairs usual and necessary to the care and maintenance of the plaintiff's plant or premises. 30

(10). If the jury find that the work done to make the platform safe to use and drive upon was more extensive than was necessary or usual to that end, then the said repairs were not within the business described and conducted at the location named in the warranties, and the verdict must be for the defendant. 40

Defendant's Request to Charge.

(11). The repairs to the said platform as described in the evidence were not repairs usual and necessary to the care and maintenance of the premises or plant of the plaintiff, but were unusual repairs of the premises and plant, and constitute a breach of the warranties contained in the policy.

10 (12). The work done in connection with the repair of the platform as described in the evidence was of such a character as to constitute an unusual alteration of the premises or plant of the plaintiff, and so constitute a breach of the warranties of the policy.

(13). The work done in connection with the repair of the platform as described in the evidence was of such a character as to constitute an erection or construction on the premises or plant of the
20 plaintiff, and so constitute a breach of the warranties of the policy.

30

40

Exhibit P. 1.

Exhibits.

EXHIBIT P. 1.

COMMERCIAL CASUALTY INSURANCE
COMPANY

Newark, New Jersey

10

(Herein called the Company).

Manufacturers' Public Liability Policy.

IN CONSIDERATION of the premium herein provided, and of the statements in the Warranties herein, the Company does hereby agree to indemnify the Assured described herein, within the amounts as expressed herein, against loss and expense resulting from claims upon the assured for damages on account of bodily injuries, including death accidentally suffered by any person or persons not employed by the Assured, by reason of the business described and conducted at the locations named in said Warranties, whether said injuries or death are accidentally suffered at the locations named, except claims arising by reason of:

20

(1) Injuries or death caused by any person employed in violation of law as to age, or of any age under fourteen (14) years, where there is no legal restriction as to age of employment.

30

(2) The existence, maintenance or use of any elevator, elevator well or hoistway or equipment therein.

(3) Injuries or death caused by any draught or driving animal or vehicle, or by any person while driving or using same.

(4) Liability of others assumed by the Assured.

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Exhibit P. 1.

Subject to all agreements and conditions herein, claims are covered whenever arising, on account of accidents or alleged accidents occurring within the policy period stated herein.

This Insurance Is Subject to the Following Conditions.

10

Reporting Accidents and Claims.

A. Upon the occurrence of an accident covered by this Policy, the Assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the Company or its duly authorized agent. If a claim is made on account of such accident, the Assured shall give like notice thereof with full particulars. The Assured shall at all times render to the Company all co-operation and assistance in the Assured's power.

20

Report and Defense of Suits.

B. If suit is brought against the Assured to enforce a claim for damages covered by this Policy, the Assured shall immediately forward to the Company every summons or other process as soon as the same shall have been served on the Assured, and the Company will, at its own cost, defend such suit in the name and on behalf of the Assured.

30

Co-operation of Assured—Expense.

C. The Assured, whenever requested by the Company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals; but the Assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claim, except at the Assured's own cost, without the written consent of the Company previously

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Exhibit P. 1.

given, except that the Assured may provide at the Company's expense such immediate surgical relief as is imperative at the time of the accident.

Assured's Right of Recovery.

D. No action shall lie against the Company to recover for any loss or expense under this Policy unless it shall be brought by the Assured for loss or expense actually sustained and paid in money by the Assured after actual trial of the issue, nor unless such action is brought within two years after payment of such loss or expense. 10

Subrogation of Rights.

E. In case of payment of loss or expense under this Policy, the Company shall be subrogated, to the amount of such payment, to the Assured's rights of recovery against others for such loss or expense, and the Assured shall execute all papers required and shall co-operate with the Company to secure such rights. 20

Concurrent Insurance.

F. If the Assured carry a policy of another insurer, against any loss or expense covered by this Policy, the Assured shall not recover from the Company a larger proportion of the entire loss or expense than the amount hereby insured bears to the total amount of valid and collectible insurance applicable thereto. 30

Change of Interest.

G. No assignment of interest under this Policy shall be valid unless the written consent of the Company is endorsed herein, signed by its President, a Vice-President, Secretary or Assistant Secretary. 40

*Exhibit P. 1.**Basis of Premium.*

10 H. The premium is based on the entire compensation earned during the period of this Policy by all persons engaged in the business as described in the Warranties herein who are not specifically excluded. If such entire compensation exceeds the sum set forth in said Warranties, the Assured shall immediately pay to the Company the additional premium earned. If such entire compensation is less than the sum set forth in said Warranties the Company will return the unearned premium when determined, but in any event the Company shall retain the minimum premium stated in said Warranties.

Wage Statements.

20 I. The Assured shall, when requested, furnish the Company with a written statement of the amount of compensation, according to classifications described in the Warranties herein, earned by all persons engaged in the business covered by this Policy during the whole or any part of the policy period. The Company shall be permitted at all reasonable times to examine the books and records of the Assured as respects such compensation, provided a request for such examination is made within one year from the expiration of the policy period, and the Assured shall render all reasonable assistance. The rendering of any statement of such compensation, or any payment of premium thereon, shall not bar the examination herein provided for, nor the Company's right to any additional premium earned.

30

Inspection.

J. The Company shall be permitted at all reasonable times to inspect the plant, works, machinery

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Exhibit P. 1.

and appliances used in the business covered by this Policy.

Cancellation.

K. This Policy may be canceled at any time by either of the parties hereto upon written notice to the other party stating when thereafter cancellation shall be effective. The date of cancellation shall then be the end of the policy period. If such cancellation is at the request of the Assured and the Assured has not retired from the business described in the Warranties herein, the compensation for the full original policy period shall be computed upon the basis of the compensation to date of cancellation, and the earned premium calculated at short rates in accordance with the table printed herein. In any event where cancellation is at the request of the Assured, the Company shall retain not less than the minimum premium stated in said Warranties. Notice of cancellation mailed to the address of the Assured stated in said Warranties shall be sufficient notice, and the check of the Company similarly mailed a sufficient tender of any unearned premium, when determined.

Alterations in Policy.

L. No condition or provision of this Policy shall be waived or altered except by written endorsement attached hereto and signed by the President, a Vice-President, Secretary or Assistant Secretary of the Company; nor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract. Upon the acceptance of this Policy the Assured agrees that its terms embody all agreements then existing between the Assured and the Company or any of its agents relating to the insurance described herein.

*Exhibit P. 1.**Authorized Agents.*

M. No person shall be deemed an agent of the Company unless such person is authorized in writing as such agent by the President, a Vice-President, Secretary or Assistant Secretary of the Company.

10

Limits of Indemnity.

N. The Company's liability for loss on account of an accident resulting in bodily injuries or death to one person is limited to Five Thousand Dollars (\$5,000.00); and, subject to the same limit for each person, the Company's total liability for loss on account of any one accident resulting in bodily injuries or death to more than one person is limited to Ten Thousand Dollars (\$10,000.00). The Company will, however, as provided in Conditions B and C herein, pay the expense of litigation in addition to the sum herein limited and will also pay all costs taxed against the Assured in any legal proceeding defended by the Company, and interest accruing after entry of judgment upon such part thereof as shall not be in excess of the limits of the Company's liability herein expressed.

20

Policy Period.

O. The policy period shall be Twelve months, beginning on the Second day of August, 1912, at noon, and ending on the Second day of August, 1913, at noon, standard time at the location of the business described in the Warranties herein.

30

Warranties.

P. The Warranties herein, numbered 1 to 11 inclusive, are hereby made a part of this contract, and are acknowledged and warranted by the Assured to be true upon the acceptance of this Policy, except such as are declared to be matters of estimate only.

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Exhibit P. 1.

This space is intended for the attachment of such endorsements as may be executed as provided in the Policy, and when so executed and attached, they are to be construed as a part of the Policy.

Short Rate Cancellation Table.

To find the premium earned hereunder, multiply the whole premium for the full original policy period calculated as provided in Condition H, by the percentage opposite the number of days or months Policy has been in force. Periods not specifically named in this table must be charged at a rate proportionate to the rate charged for the next preceding and succeeding periods. 10

Policies Issued for Term of One Year.

| Policy in Force. | Per Cent. of Prem. | Policy in Force. | Per Cent. of Premium. | |
|------------------|--------------------|---------------------------|-----------------------|----|
| 10 days..... | 10% | 150 days or 5 months.... | 58% | 20 |
| 20 days..... | 15% | 180 days or 6 months.... | 68% | |
| 30 days..... | 20% | 210 days or 7 months.... | 75% | |
| 40 days..... | 24% | 240 days or 8 months.... | 80% | |
| 50 days..... | 27% | 270 days or 9 months.... | 85% | |
| 60 days..... | 30% | 300 days or 10 months.... | 90% | |
| 90 days..... | 40% | 330 days or 11 months.... | 95% | |
| 120 d or 4 m. | 50% | 360 days or 12 months.... | 100% | |

Policies Issued for Term of Three Years. 30

| Policy in Force. | Per Cent. of Premium. | Policy in Force. | Per Cent. of Premium. | |
|---------------------|-----------------------|------------------|-----------------------|----|
| 3 months or less... | 16% | 15 months..... | 56% | 40 |
| 4 months..... | 20% | 18 months..... | 63% | |
| 5 months..... | 24% | 21 months..... | 70% | |
| 6 months..... | 28% | 24 months..... | 76% | |
| 7 months..... | 32% | 27 months..... | 82% | |
| 8 months..... | 36% | 30 months..... | 88% | |
| 9 months..... | 39% | 33 months..... | 94% | |
| 12 months..... | 48% | 36 months..... | 100% | |

*Exhibit P. 1.**Warranties.*

1. Name of assured: John Sommer Faucet Company.

2. Address of assured: No. 355 Central avenue, Newark, Essex County, New Jersey. (Name street, town, county and state where head office is located).

10 3. The assured is: New Jersey Corporation. (State whether individual, estate, co-partnership or corporation, and if a corporation name State in which incorporated; if a co-partnership give the names of each member thereof).

4. Classified description of the business: All operations incidental to the following business, including repairs and alterations usual and necessary to the care and maintenance of the premises or
20 plant? Manufacturers of Piano Backs and Piano Cases and Wooden Faucets.

Estimated average number of employees: Varies.

Estimated entire compensation for 12 months: \$13,000.

Premium rate per \$100 of compensation: \$.03.

Estimated Premium: \$3.90.

Town, street and number where business is located: No. 355 Central avenue, Newark, New Jersey and Washington, New Jersey.

30

Special Operations.

Number of hand fed, power driven machines used for stamping metal, none.

Erection, construction, demolition or unusual alteration or repair of premises or plant, none.

Millright work, installation or mechanical demonstration away from the premises or plant named herein, none.

40 Operation of locomotive and cars by means of locomotives. none.

Exhibit P. 1.

All business operations performed for Assured under contract, none.

5. The foregoing statement correctly describes the business to be insured, including all usual or special operations incident thereto, and the locations at which said business is conducted. None of the special operations described will be covered unless the estimated average number of persons engaged in such special operations, their estimated compensation, and the premium rate, are specifically stated herein. 10

6. The estimated compensation includes that of all persons engaged in the business as described herein (whether compensated by salary, wages, for piecework, overtime or allowances, and whether paid in cash—in whole or in part—in board, store certificates, merchandise, credits or any substitute for cash), to whom compensation of any nature is paid, including President, Vice-President, Secretary, Treasurer and Clerical force, except as follows: Officers 20

7. If complete and accurate payroll records are not kept corresponding to the classifications herein described, the total actual payroll shall be considered as expended under the highest rated classification. 30

8. No dynamite, nitroglycerine or explosive powder is made, sold, kept or used in the business described herein, except as follows: No exceptions.

9. No Company has declined this risk or canceled Liability, Elevator, Fly Wheel or Boiler Insurance of the Assured during the past year, except as follows: No exceptions. 40

Exhibit P. 1.

10. The estimated premium for this Policy is Three and 90/100 Dollars (\$3.90), due and payable as follows:

(\$3.90), August 2d, 1912.

11. The minimum premium for this Policy shall be Two and 00/100 Dollars (\$2.00).

10 IN WITNESS WHEREOF, the Commercial Casualty Insurance Company, of Newark, New Jersey, has caused these presents to be signed by its President and Secretary, but the same shall not be binding unless countersigned by an authorized agent of the Company.

A. W. FEIGENSPAN,
President.

20 H. C. MITCHELL,
Secretary.

Countersigned at Newark, New Jersey, this ²⁵13th day of ~~August, 1915.~~

July 17/12 *H. C. Mitchell* Agent.

30

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Exhibit D. 2.

EXHIBIT D. 2.

C. W. Feigenspan, President.
 David O. Watkins, Vice-President.
 Harry C. Mitchell, Sec. & Gen. Manager.
 George W. Jagle, Treasurer.

COMMERCIAL CASUALTY INSURANCE 10
 COMPANY

of

NEWARK, NEW JERSEY.

D. 2, 4/27/16.

July 2nd, 1913.

John Sommer Faucet Company,
 No. 355 Central Avenue,
 Newark, N. J.

Gentlemen: 20

Re: No. 4257, Nicola Di Vincenzo *v.* John Sommer Faucet Company.

When this accident was reported by you to this Company under date of December 24th, 1912, we caused an investigation to be made and found that an employee of a contractor sustained an injury to his arm by the falling of a building while making an excavation at your plant.

We had no information at this time as to the exact nature of the work that was being done, but after the injured man had placed his claim in the hands of an attorney, we caused a complete and thorough investigation to be made, and found that the injuries were sustained while constructing a coal pit in the factory yard, 24' x 27' x 10' deep. 30

In the application for the Manufacturers' Public Policy, issued to you by this Company, in the statement of warranties forming a part thereof, you represented that during the life of the policy, there 40

Exhibit D. 4.

would be no erecting, construction, demolition or unusual alterations or repairs to the premises or plant.

10 As this accident occurred in connection with the building or erection of an addition to your plant, and injected into the risk a hazard not incidental to your business of the manufacturing of piano backs, piano cases and wooden faucets, it would, therefore, be a matter not covered by the terms of your Policy.

We have, as hereinbefore stated, made as complete an investigation as possible of the accident, which we would be very much pleased to place at your disposal, if you so desire, and would also be very glad to render you any assistance in our power.

20

Very truly yours,

J. HORACE SHALE,

C.

Manager Claim Department.

EXHIBIT D. 4.

IMMEDIATE REPORT OF PUBLIC ACCIDENT.

Name of assured, John Sommer Faucet Co.

P. O. address, 355 Central avenue, Newark, N. J.

30

Date of accident, December 21, 1912.

Date of this report, December 23, 1912.

Hour of day, 4:50 P. M.

The Injured Person.

Name..... Address.....

Occupation, excavator.

Employed by Tony La Conta, contractor for the work.

Weekly wages, \$. Married or single. Apparent age.

40

What was injured doing when hurt? Excavating.

*Exhibit D. 4.**The Injury.*

Nature and extent, fractured arm.

Was surgical aid rendered? Yes. When? At once. By whom? Dr. At. St. Michaels Hospital.

Taken home or to hospital? Hospital (If hospital, give name).

Probable disability, few weeks. Has injured resumed work? No. 10

The Accident.

Place, 355 Central avenue.

Whose negligence caused accident? (Give, name, address and employer).

What guards, lights, etc., were at place of accident?

Who can prove this?

What agreement exists with owners or contractors as to responsibility for such accidents? 20

Who owns the premises? John Sommer Faucet Co.

Names and addresses of all witnesses.

Statement of injured.

Injured's statement heard by. (Give names and addresses).

Description of Accident.

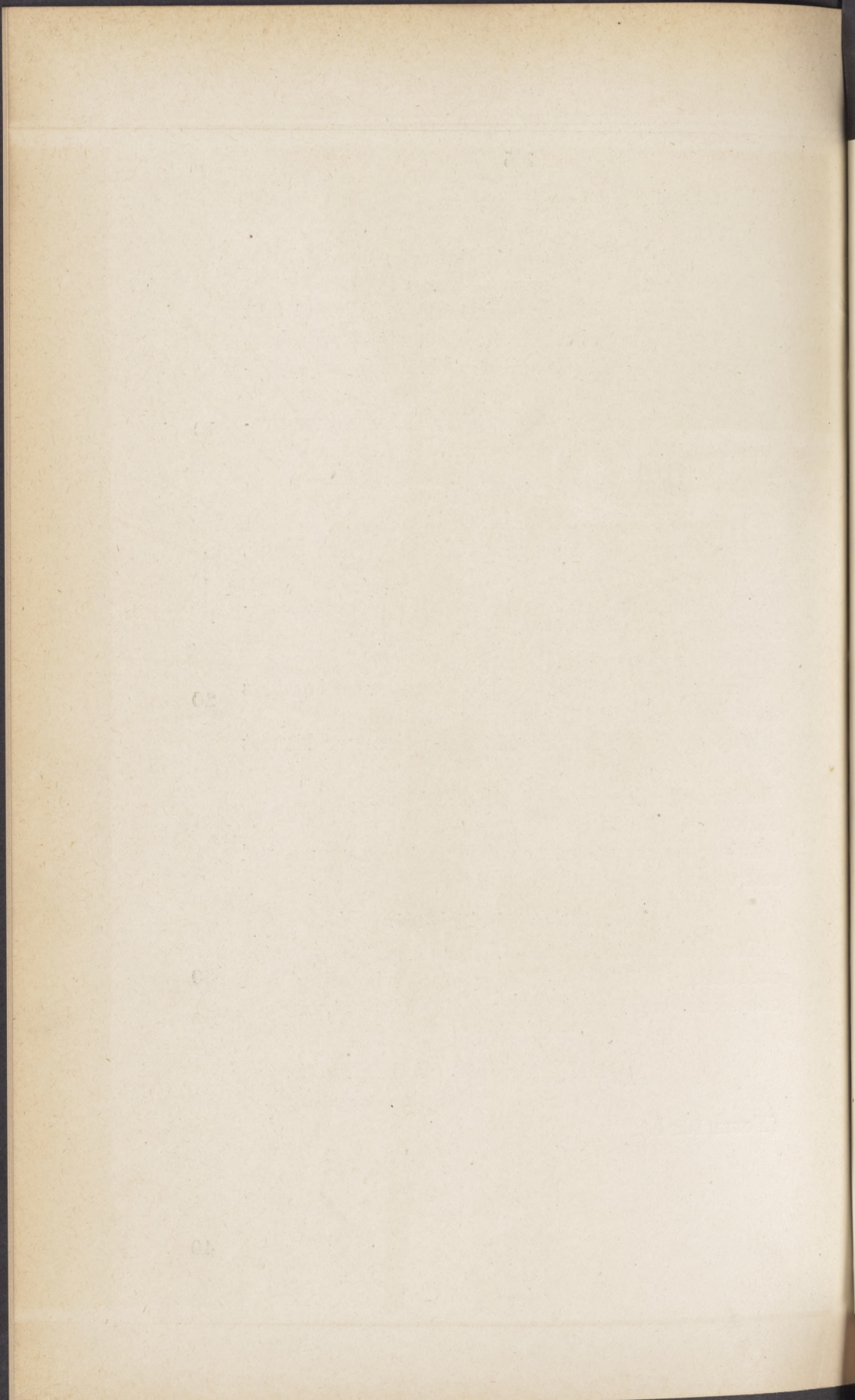
Tony La Conta, contractor was hired to do some excavating in the yard, rear of our building, and one of his employees was injured while at work. 30

This remit made out by

JOHN SOMMER FAUCET CO.,

(State occupation).

(Form 101-L).



E. P. 2.

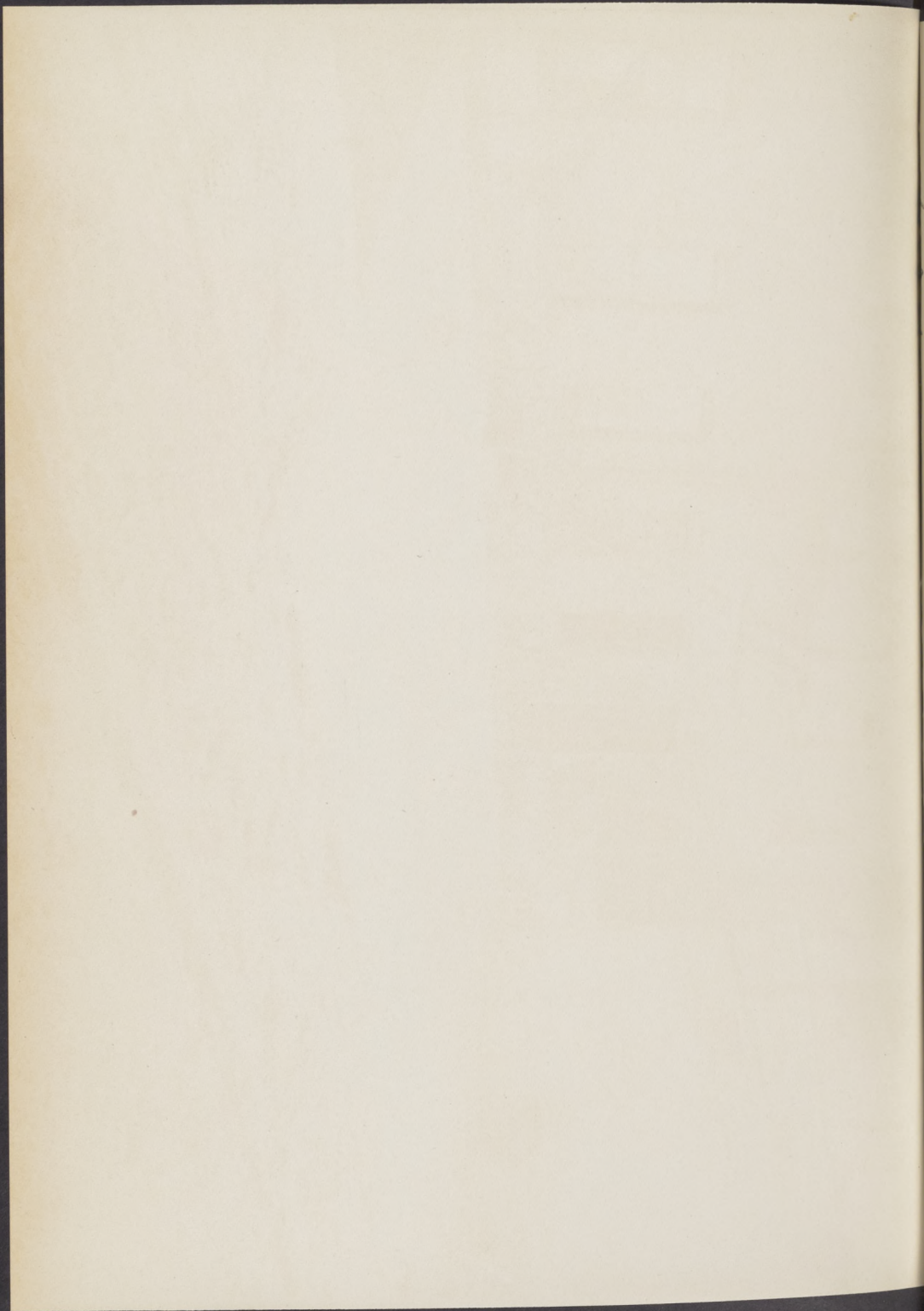


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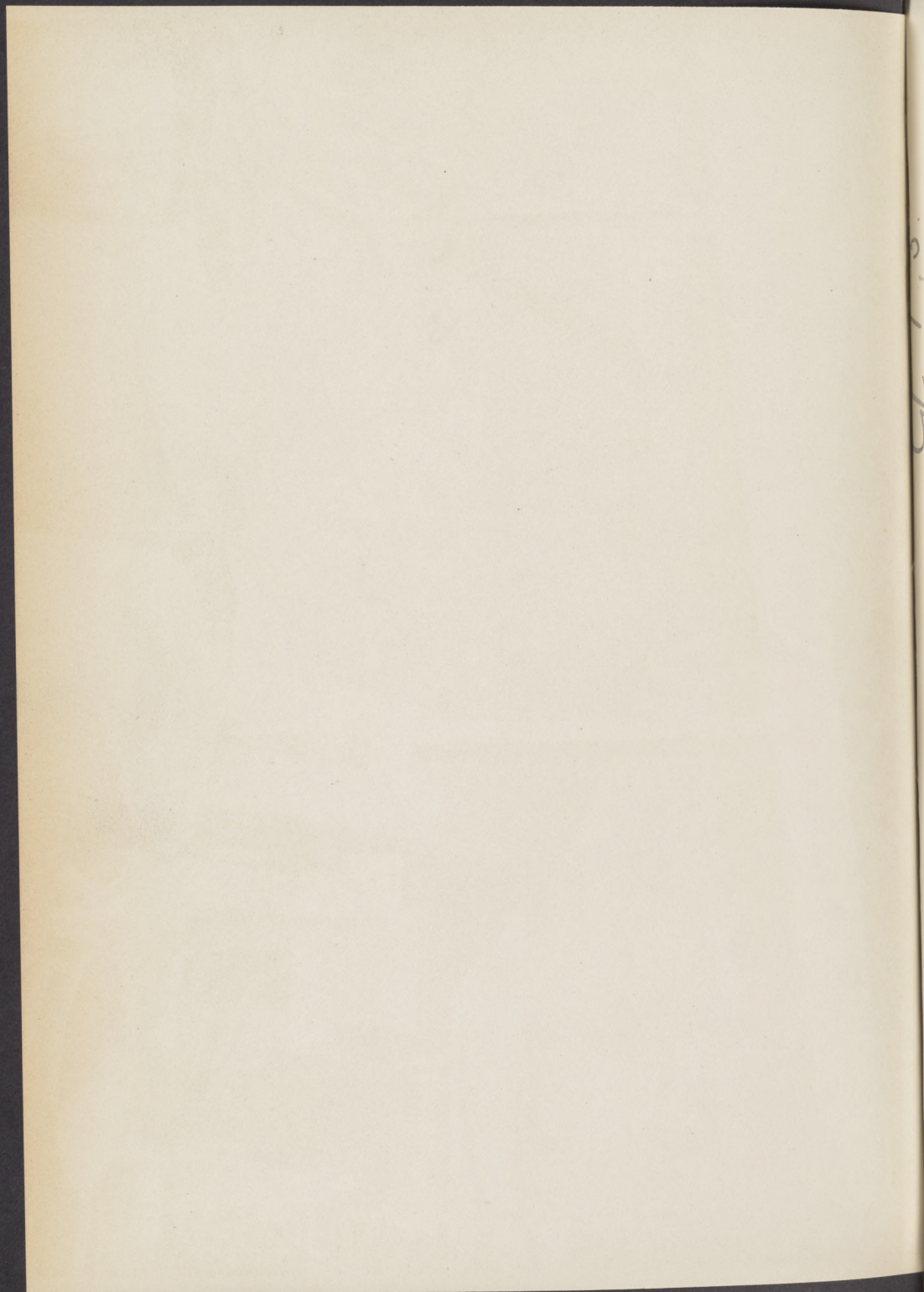


Ex. P. 3









Et. P. 5.



