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NOTICE OF APPEAL.

**New Jersey Supreme Court**

ESSEX CIRCUIT.

|   |   |   |
|---|---|---|
| FLORENCE REALTY Co., a corporation,<br><br><i>Plaintiff,</i><br><br><i>vs.</i><br><br>BARNES MANUFACTURING Co., a corporation,<br><br><i>Defendant.</i> | } | 10<br><br><i>Action<br/>at Law.</i><br><br><i>Notice<br/>of Appeal.</i> |
|---|---|---|

To Arthur T. Vanderbilt, Esq., attorney for the defendant, or To Whom It May Concern: 20

SIR:

PLEASE TAKE NOTICE that Florence Realty Co., a corporation, the plaintiff in the above-entitled cause appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes from the judgment entered in this cause in favor of the defendant.

Dated December 26, 1930. 30

PHILIP J. SCHOTLAND,  
Attorney for and of Counsel  
with Plaintiff.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 26th day of December, 1930.

ARTHUR T. VANDERBILT,  
Attorney for the Defendant. 40

**GROUNDS OF APPEAL.**

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

|    |   |   |
|----|---|---|
| 10 | FLORENCE REALTY Co., a corporation of the State of New Jersey,<br><div style="text-align: right; padding-right: 20px;"><i>Plaintiff-Appellant,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> BARNES MANUFACTURING Co., a corporation of the State of New Jersey,<br><div style="text-align: right; padding-right: 20px;"><i>Defendant-Respondent.</i></div> | <i>Action at Law.</i><br><br><i>On Appeal from the Supreme Court, Essex Circuit.</i><br><br><i>Grounds of Appeal.</i> |
|----|---|---|

20 Appellant specifies the following grounds why the judgment rendered in the above-entitled cause should be reversed:

1. Because the learned trial judge refused on objection by counsel for the defendant, to permit an answer to the following question put by appellant to the witness Ernest A. Marvin—"When you first were employed there as a chauffeur were the trucks being stored in the warehouse?"

30 2. Because the learned trial judge refused, on objection by counsel for the defendant, to permit an answer to the following question put by appellant to the witness Ernest A. Marvin—"Were you getting the gasoline at the warehouse during the entire time that you were employed as the chauffeur of one of the trucks?"

3. Because the learned trial judge, over the objection of the appellant permitted the witness Ernest A. Marvin to answer the question—"Are

40

*Grounds of Appeal.*

you as sure of the fact that there was a dripping out of the hose where it was connected to the top of the pump as you are sure of this flow from the middle of the hose where the two pieces were coupled together?" to which the witness answered—"I am surer of the middle than I am of the top." 10

4. Because the learned trial judge over the objection of the appellant permitted the witness Ernest A. Marvin to answer the question—"Well, in the light of those questions and those answers do you want to change any of the answers which you made to the questions that I have just asked you on cross examination?" to which the witness answered—"No, sir."

5. Because the learned trial judge over the objection of the appellant permitted the witness Raymond F. Barnes to answer the question—"Did they or did they not ever direct you not to use the pump?" (Referring by "they" to the officers of the appellant corporation—the landlord) to which the witness answered—"Neither Mr. Curtis nor Mr. Warner, nor anyone else ever directed us not to use the pump." 20

6. Because the learned trial judge over the objection of the appellant permitted the witness Albert H. Charman to answer the question—"When you made that inspection, in what condition did you find the plant?" to which the witness answered—"Excellent condition." 30

7. Because the learned trial judge over the objection of the appellant directed a verdict on the first count of the complaint in favor of the defendant. 40

*Grounds of Appeal.*

8. Because the learned trial judge refused to grant the motion made by appellant for the direction of a verdict in favor of the appellant, upon the grounds stated in the motion.

10 9. Because the learned trial judge refused to charge as requested by appellant—"If you find that the fire which destroyed this building was caused by gasoline which leaked from the pump or hose connection, igniting, then your verdict should be for the plaintiff in such amount as you find the value of the building at the time of the fire," to which refusal objection was duly made and noted.

20 10. Because the learned trial judge refused to charge as requested by appellant—"If you find that the fire was caused by the gasoline which flowed on the floor, igniting, and such gasoline got on the floor through the careless or negligent operation of the pump by either of the chauffeurs who were using the pump, then your verdict should be for the plaintiff," to which refusal objection was duly made and noted.

30 11. Because the learned trial judge refused to charge as requested by appellant—"If you find that the fire which destroyed the building in question started by gasoline which flowed on the floor, becoming ignited, and the defendant has not shown that the gasoline got on the floor without any negligence on the part of the defendant or any of its employees or agents, then your verdict should be in favor of the plaintiff, in such amount as you find the value of the building at the time of its destruction by the fire," to which refusal objection was duly made and noted.

40 12. Because the learned trial judge charged the jury: "Negligence is never presumed in the

*Grounds of Appeal.*

law, but must be proven by the party who alleges negligence—in this case, the plaintiff. You must be satisfied before you bring in a verdict for the plaintiff that the plaintiff has established by the clear weight of the testimony the truth of its charge that there was negligence on the part of the defendant or its employees, which negligence was the proximate cause of this fire," to which charge objection was duly made and noted. 10

13. Because the learned trial judge charged the jury: "If you find that the act of the defendant—and when I say 'act of the defendant' I mean the act of the defendant or its servants and employees—did nothing more than furnish a condition by which the fire was made possible, and that the fire was caused by a subsequent independent act of a third party or agency, and the two acts were not concurrent, and the existence of the condition was not the proximate cause of the fire, then your verdict must be for the defendant," to which charge objection was duly made and noted. 20

PHILIP J. SCHOTLAND,  
Attorney for and of Counsel with  
Plaintiff-Appellant. 30

Service of a true copy of the within Grounds of Appeal is hereby acknowledged this 30th day of December, 1930.

ARTHUR T. VANDERBILT,  
Attorney of Defendant-Respondent. 40

*Complaint.*

**TRANSCRIPT OF PLEADINGS FOR TRIAL.**

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

|    |   |   |   |
|----|---|---|---|
| 10 | FLORENCE REALTY Co., a corporation,<br><div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 0 10px;"><i>vs.</i></div> BARNES MANUFACTURING Co., a corporation,<br><div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div> | } | <i>Transcript<br/>of Pleadings<br/>for Trial.</i> |
|----|---|---|---|

Philip J. Schotland, attorney for plaintiff.

20 Darling, Barnes and Dowden, attorneys for defendant.

(Summons issued February 3, 1927.)

**Complaint.**

30 Plaintiff, Florence Realty Co., a corporation, duly organized and existing under the laws of the State of New Jersey, and having and maintaining its principal office in the City of Newark, County of Essex and State of New Jersey, says:

FIRST COUNT.

40 1. On the 17th day of November, 1920, the American Grocers Society, a corporation, then the owner of the land and premises commonly known and designated as 247-253 West Side avenue, in the City of Jersey City, County of Hudson and State of New Jersey, demised and leased

*Complaint.*

to the Barnes Manufacturing Co., a corporation, duly organized and existing under the laws of the State of New Jersey, the said lands and premises, for a period of ten years from the first day of March, 1921, as will more fully and at large appear in the Indenture of Lease entered into between said parties, on said date, a true copy of which is hereto annexed, made a part hereof, and marked Schedule "A." 10

2. On the 21st day of April, 1922, the plaintiff herein purchased said lands and premises from the said American Grocers Society, subject to said lease, and became the assignee of said lease, and thereafter said defendant attorned to the plaintiff, and paid the rent reserved in said lease to the plaintiff, until June, 1925. 20

3. Said lease, among other covenants, contained a covenant on the part of the defendant that "it will not do or cause to be done any matter or thing in and upon the said demised premises, by which the risk or hazard by fire over and above the risk and hazard incidental to the ordinary conduct of the business specified in this lease may be increased or enlarged." Also, that said defendant, will, during the term of the said demise, in all respects do and perform the matters and things required by Insurance Companies writing risks in the City of Jersey City aforesaid, to render the demised premises insurable against loss or damage by fire at minimum costs; also a covenant that it will not use or occupy the said premises for any business or purpose other than mercantile or manufacturing business not more hazardous than the manufacture or storage of sashes, doors, blinds, etc. 30

*Complaint.*

4. Said defendant, notwithstanding its said covenants, did, during the month of June, 1925, and at other times prior thereto, without the knowledge or consent of said plaintiff, and in violation of the terms of said lease, use the space provided in said building for trucks to be brought into said building, to the loading platform (for the purpose of loading and unloading merchandise), as a garage for the storage of automobile trucks, and did, in violation of its said covenants and the terms of the said lease, maintain a gas tank for the storage of large quantities of gasoline for the use of its automobile trucks, and a gasoline pump with connections to said tank, for the purpose of supplying gasoline to its said automobile trucks, and did in violation of the terms of said lease fill the gas tanks of its trucks inside of the building instead of outside.

5. That on the 23rd day of June, 1925, while the defendant, by its agents and employees, was engaged in filling the gas tanks of its trucks on the inside of said building, in violation of the terms of its said lease, the vapor arising from the gasoline which escaped became ignited and a fire broke out which completely destroyed the said building, to the damage of the plaintiff, the value of the building, to wit, \$175,000.

Judgment will be asked by the plaintiff against the defendant, on this count, in the sum of \$175,000.

## SECOND COUNT.

1. On the 17th day of November, 1920, the American Grocers Society, a corporation, then the owner of the lands and premises commonly

*Complaint.*

known and designated as 247-253 West Side avenue, in the City of Jersey City, County of Hudson and State of New Jersey, demised and leased to the Barnes Manufacturing Co., a corporation, duly organized and existing under the laws of the State of New Jersey, the said lands and premises, for a period of ten years from the first day of March, 1921, as will more fully and at large appear in the Indenture of Lease entered into between said parties, on said date, a true copy of which is hereto annexed, made a part hereof, and marked Schedule "A." 10

2. On the 21st day of April, 1922, the plaintiff herein purchased said lands and premises from the said American Grocers Society, subject to said lease, and became the assignee of said lease, and thereafter said defendant attorned to the plaintiff and paid the rent reserved in said lease to the plaintiff, until June, 1925. 20

3. Said lease, among other covenants, contained a covenant on the part of the defendant that "it will not do or cause to be done any matter or thing in and upon the said demised premises, by which the risk or hazard by fire over and above the risk and hazard incidental to the ordinary conduct of the business specified in this lease may be increased or enlarged." Also, that said defendant will, during the term of the said demise, in all respects do and perform the matters and things required by Insurance Companies writing risks in the City of Jersey City, aforesaid, to render the demised premises insurable against loss or damage by fire at minimum costs; also a covenant that it will not use or occupy the said premises for any business or purpose other than mercantile or manufacturing 30  
40

*Complaint.*

business not more hazardous than the manufacture or storage of sashes, doors, blinds, etc.

10 4. Said defendant, notwithstanding its said covenants, did, during the month of June, 1925, and at other times prior thereto, without the knowledge or consent of said plaintiff, and in violation of the terms of said lease, use the space provided in said building for trucks to be brought  
20 into said building, to the loading platform (for the purpose of loading and unloading merchandise), as a garage for the storage of automobile trucks, and did, in violation of its said covenants and the terms of the said lease, maintain a gas tank for the storage of large quantities of gasoline for the use of its automobile trucks, and a  
30 gasoline pump with connections to said tank, for the purpose of supplying gasoline to its said automobile trucks, and did in violation of the terms of said lease fill the gas tanks of its trucks inside of the building instead of outside.

30 5. That said gasoline pump, and its connections, so maintained on said premises, by the said defendant, was on the 23rd day of June, 1925, and had been for a long time, in a leaky and defective condition, permitting gasoline to leak out in the center at the coupling; that defendant well  
40 knowing the said dangerous and leaky condition of said gasoline pump and hose attached thereto, neglected to have same repaired, and on the 23rd day of June, 1925, while the defendant, by its agents and employees, was engaged in filling the gas tanks of its automobile trucks on the inside of said premises, the vapors, arising from said gasoline leaking out as aforesaid, ignited, causing a fire which destroyed said entire building, to the damage of the plaintiff, in the sum of \$175,000.

*Complaint.*

Judgment will be asked by the plaintiff against the defendant on this count, in the sum of \$175,000.

## THIRD COUNT.

1. On the 17th day of November, 1920, the American Grocers Society, a corporation, then the owner of the land and premises commonly known and designated as 247-253 West Side avenue, in the City of Jersey City, County of Hudson and State of New Jersey, demised and leased to the Barnes Manufacturing Co., a corporation duly organized and existing under the laws of the State of New Jersey, the said lands and premises, for a period of ten years from the first day of March, 1921, as will more fully and at large appear in the Indenture of Lease entered into between said parties, on said date, a true copy of which is hereto annexed, made a part hereof, and marked Schedule "A." 10 20

2. On the 21st day of April, 1922, the plaintiff herein purchased said lands and premises from the said American Grocers Society, subject to said lease, and became the assignee of said lease, and thereafter said defendant attorned to the plaintiff, and paid the rent reserved in said lease to the plaintiff, until June, 1925. 30

3. Said lease, among other covenants, contained a covenant on the part of the defendant that "it will not do or cause to be done any matter or thing in and upon the said demised premises, by which the risk or hazard by fire over and above the risk and hazard incidental to the ordinary conduct of the business specified in this lease may be increased or enlarged." Also, that said defendant will, during the term of the said 40

*Complaint.*

demise, in all respects do and perform the matters and things required by insurance companies writing risks in the City of Jersey City aforesaid, to render the demised premises, insurable against loss or damage by fire at minimum costs; also a covenant that it will not use or occupy  
10 the said premises for any business or purpose other than mercantile or manufacturing business not more hazardous than the manufacture or storage of sashes, doors, blinds, etc.

4. Said defendant, notwithstanding its said covenants, did, during the month of June, 1925, and at other times prior thereto, without the knowledge or consent of said plaintiff, and in violation of the terms of said lease, use the space provided in said building for trucks to be brought  
20 into said building, to the loading platform (for the purpose of loading and unloading merchandise), as a garage for the storage of automobile trucks, and did, in violation of its said covenants and the terms of the said lease, maintain a gas tank for the storage of large quantities of gasoline for the use of its automobile trucks, and a gasoline pump with connections to said tank, for the purpose of supplying gasoline to its said automobile trucks, and did in violation of the  
30 terms of said lease fill the gas tanks of its trucks inside of the building instead of outside.

5. That on the 23rd day of June, 1925, while the defendant, by its agents, and employees, was engaged in the act of filling the gas tanks of its automobile trucks, on the inside of said premises, the said defendant, by its agents and employees, so carelessly and negligently used said pump in filling said automobile truck gas tanks, as to  
40 allow large quantities of gasoline to overflow,

*Complaint—Schedule A.*

and flow down on the floor of said loading space, and out to the street, the vapors of which ignited, causing a fire which completely destroyed said building. That on account of the said negligence of the said defendant, the plaintiff has been deprived of, and has lost the value of said building, to wit, \$175,000. 10

Judgment will be asked by the plaintiff against the defendant on this count, in the sum of \$175,000.

PHILIP J. SCHOTLAND,  
Attorney for Plaintiff.

## SCHEDULE "A."

20

THIS INDENTURE, made this seventeenth day of November, in the year one thousand nine hundred and twenty, between

## AMERICAN GROCERS SOCIETY,

a corporation duly authorized and existing under the laws of the State of New Jersey, and having its principal office in the City of Newark, County of Essex and State of New Jersey, Party of the First Part; and 30

## BARNES MANUFACTURING COMPANY,

a corporation duly organized and existing under the laws of the State of New Jersey, and having its principal office in the City of Jersey City, County of Hudson and State of New Jersey, Party of the Second Part, WITNESSETH:

1. That the said party of the first part, for and in consideration of the rents and covenants hereinafter reserved, and contained, does hereby demise, lease and to farm let, unto the party of 40

*Complaint—Schedule A.*

the second part, and its successors, all that certain tract or parcel of land, situate, lying and being in the City of Jersey City, County of Hudson, and State of New Jersey commonly known and designated as 247-253 West Side avenue, together with the building now standing thereon and the rights of the party of the first part to the use of the railroad siding and platform in the rear of said building. To have and to hold unto the said party of the second part, and its successors, from the first day of March, nineteen hundred and twenty-one, for and during, and until the full and term of ten years next then ensuing, yielding and paying therefore to the said party of the first part, its successors and assigns, the following annual rental, to wit:

20 Twenty-two thousand five hundred dollars payable in twelve equal monthly instalments of eighteen hundred and seventy-five dollars each, in advance, on the first day of each calendar month, and in addition thereto, the amount charged by the City of Jersey City, for water consumed in said premises during the term of the demise.

2. And the said party of the second part, for itself, and its successors, doth covenant and agree to and with the said party of the first part, its  
30 successors and assigns, as follows:

a. That the said party of the second part shall and will, during the term hereby granted, well and truly pay or cause to be paid, unto the said party of the first part, its successors and assigns, the said yearly rental above reserved, on the days and in the manner mentioned and prescribed as aforesaid, for the payment thereof, without any deduction, fraud or delay, according to the true intent and meaning of these presents.

*Complaint—Schedule A.*

b. That the said party of the second part will quit and surrender the premises at the expiration of the term herein provided for, or other determination of this lease, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted, and that during the demise, it will, at its own cost, 10  
make all necessary or reasonable inside repairs, and that it will not use or occupy the said premises for business or purpose, other than mercantile or manufacturing business not more hazardous than the manufacture or storage of sashes, doors, blinds, etc.

c. The said party of the second part will permit the said party of the first part, or its agents, to enter said premises for the purpose of inspecting same, or making such repairs and alterations as it may desire to make for the preservation of said premises, but it shall not be required to make any repairs or alterations except outside repairs unless herein elsewhere expressly agreed upon; party of the second part will also permit party of the first part, or its agents, to show the premises to persons wishing to hire or purchase same on or after the first day of December, nineteen hundred and thirty, and after said date will permit the usual notice of "to let" or "for sale" to be placed on the walls of said premises, and remain thereon without hindrance or molestation. 20  
30

d. That the party of the second part will, during the term of the said demise, comply with all rules, regulations, edicts, and ordinances made or promulgated by lawful authority which may become applicable to the use the party of the second part makes of the demised premises, and that it will not do, or cause to be done, any 40

*Complaint—Schedule A.*

matter or thing in and upon the said demised premises by which the risk or hazard by fire over the above the risk and hazard incidental to the ordinary conduct of the business specified in this lease may be increased or enlarged.

10 e. That the party of the second part will, during the term of the said demise, in all respects, do and perform the matters and things required by insurance companies writing risks in the City of Jersey City aforesaid, to render the demised premises insurable against loss or daamage by fire at minimum costs, provided always that said party of the second part shall not be required, at its own cost, to install apparatus or make alterations or additions to the demised premises, for the purpose of enabling the said party of the  
20 first part to secure insurance at such minimum cost.

f. That if the said rent or any part thereof shall be unpaid on any day whereon the same ought to be paid as aforesaid, or if the premises shall become vacant or be deserted during the term hereby granted, or if the party of the second part shall be adjudicated a bankrupt, either voluntary or involuntary, or if a transfer of the leasehold estate hereby granted shall be attempted  
30 to be made by the enforcement of any judgment or any decree of any court, or if default shall be made in any of the covenants herein contained on the party of the second part to be done and performed, then and in any, or either, of said events, it shall be lawful for the said party of the first part, its successors and assigns, agents or attorneys to re-enter the demised premises and remove all persons therefrom, and to recover the possession thereof by legal proceedings or to re-  
40 enter the same and use such force for the pur-

*Complaint—Schedule A.*

pose, as it or they shall think fit, and to repossess the said demised premises, and at its option to relet the said premises as agent of the party of the second part, in its own name, or in the name of the party of the second part, applying the rents so received, first, to the expenses of re-entering, and then to the payment of the rent reserved by this lease, and the balance, if any, to pay over to the said party of the second part; and the said party of the second part hereby covenants to pay to the said party of the first part any deficiency between the amount received on said reletting and the rent reserved, together with the expenses of re-entering. And it is further agreed that in case of re-entry by the said party of the first part, and whether it shall relet the premises, as agent of the said party of the second part, or not, that the said party of the second part shall be and remain liable to the said party of the first part for a sum equal to the rent hereby reserved, together with the expenses of re-entry, and payable at the same period, less any sum that shall be received by the said party of the first part as rent of said premises, for said periods.

3. It is hereby expressly understood and agreed that the said party of the second part may assign the within lease or sublet or underlet the whole or any part of said premises for any mercantile or manufacturing business, not more hazardous than the Sash, Door and Blind Business, but in the event of such assignment, sub-letting or under-letting, the party of the second part shall continue to be held to pay the rent, and to do and perform the matters and things to be done and performed by it, under this indenture of lease, as fully as if such assignment of lease or

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30

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*Complaint—Schedule A.*

sub-letting or under-letting had not been made, and the rights and remedies of the said party of the first part against the said party of the second part shall continue as if there had been no assignment of lease or sub-letting or under-letting.

10 4. And the said party of the first part for itself, its successors and assigns, doth covenant and agree to and with the said party of the second part and its successors as follows:

20 a. In case the building or buildings erected on the premises hereby leased shall be partially damaged by fire, the same shall be repaired as speedily as possible, at the expense of the party of the first part; that in case the damages shall be so extensive as to render the building untenable, the rent shall cease until such time as the building shall be put in complete repair; but in case the damage by fire or other elements shall amount substantially to the destruction of the building, the rent shall be paid up to the time of such destruction, and then and from thenceforth this lease shall cease and come to an end;

30 b. The party of the first part will lay down sidewalks along the north side and the south side or along either of said sides of the within described premises at any time during the term of this lease upon request of the party of the second part.

c. It is represented by the party of the first part that the floors of said building will sustain a weight of 250 pounds to the square foot.

d. The said party of the first part is to keep the outside of said building in repair.

The said party of the second part is to keep the inside of said building in repair.

*Complaint—Schedule A.*

e. In case the party of the first part secures a purchaser for the premises described herein, the party of the second part is to have the option of buying said premises for the price offered by said prospective purchasers upon receiving from the party of the first part a notice of said proposed sale. If the party of the second part does not agree to purchase said premises within ten days after such notice, this option shall be considered to be waived. 10

f. The party of the first part gives permission to the party of the second part to change the elevators so that the doors may open otherwise than at present and to install chutes and conveyors in said building.

g. The party of the first part agrees to pay all taxes upon said premises when due, during the term of this lease. 20

5. And the said party of the first part agrees for itself, its successors and assigns, that the said party of the second part, and its successors, faithfully paying the rent and performing the covenants aforesaid, in manner aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term hereby created and for the performance hereof and of any covenant herein, each of the parties hereto bind themselves and their successors and legal representatives, to the other of them and their successors and legal representatives. 30

IN WITNESS WHEREOF, on the day and year aforesaid, the respective parties have hereunto, pursuant to authority granted by the respective boards of directors, authorizing the making of the aforesaid lease, caused these presents to be signed by the officers directed to execute this 40

*Complaint—Schedule A.*

lease, and their common seals to be hereto affixed.

AMERICAN GROCERS SOCIETY,

Per PHILIP J. SCHOTLAND,  
Vice President.  
(Corporate Seal)

10

Attest:

LLOYD CURTISS,  
Secretary.

BARNES MANUFACTURING COMPANY,

Per JAMES T. BARNES,  
President.  
(Corporate Seal)

20 Attest:

HORACE C. MARCH,  
Secretary.

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.

BE IT REMEMBERED, that on this 26th day of  
November, in the year of Our Lord, One Thou-  
30 sand Nine Hundred and Twenty, before me, the  
subscriber, a Master in Chancery of New Jersey,  
personally appeared Lloyd Curtiss, who, by me  
duly sworn, doth depose and make proof to my  
satisfaction that he well knows the corporate  
seal of American Grocers Society, the lessor  
mentioned in the within Indenture of Lease; that  
the seal thereto affixed is the proper corporate  
seal of the said company; that the same was so  
affixed thereto and the said lease signed and  
40 delivered by Philip J. Schotland who was at the

*Complaint—Schedule A.*

date and execution thereof, the vice president of said company, in the presence of the said deponent as the voluntary act and deed of the said company, and that the said deponent thereupon signed the same as subscribing witness.

LLOYD CURTISS.

10

Sworn and subscribed to before me on the day and year aforesaid.

BENJ. J. DARLING,  
Master in Chancery of New Jersey.

STATE OF NEW JERSEY, }  
COUNTY OF HUDSON. } ss.

20

BE IT REMEMBERED, that on this 26th day of November, in the year of Our Lord One Thousand Nine Hundred and Twenty, before me, the subscriber a Master in Chancery of New Jersey, personally appeared Horace C. March, who by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of Barnes Manufacturing Company, the lessee mentioned in the within Indenture of Lease; that the seal thereto affixed is the proper corporate seal of the said company; that the same was so affixed thereto and the said lease signed and delivered by James T. Barnes, who was at the date and execution thereof, the president of said company, in the presence of the said deponent as the voluntary act and deed of the said company, and that the said deponent signed the same as subscribing witness.

30

HORACE C. MARCH.

40

*Answer.*

Sworn and subscribed to before  
me on the day and year afore-  
said.

FREDERICK M. BARNES, JR.  
Master in Chancery of New Jersey.

10 Filed February 16, 1927.

**Answer.**

Defendant, Barnes Manufacturing Co., a cor-  
poration duly organized and existing under the  
laws of the State of New Jersey, and having  
and maintaining its principal office in the City  
of Jersey City, County of Hudson and State of  
20 New Jersey, answering the complaint herein says  
that:

It denies the truth of the matters contained  
in the complaint.

FIRST DEFENSE TO THE FIRST COUNT.

1. Defendant admits paragraphs 1, 2 and 3  
of the first count.

30 2. Defendant denies paragraphs 4 and 5 of  
the first count.

SECOND DEFENSE TO THE FIRST COUNT.

1. Defendant admits paragraphs 1, 2 and 3 of  
the first count.

2. Defendant denies using space provided in  
said buildings for trucks to be brought into said  
building, as a garage for the storage of auto-  
mobile trucks. Any gas tank for the storage of

40

*Answer.*

gasoline for the use of the automobile trucks of defendant and any gasoline pump with connection to said tank for the purpose of supplying gasoline to the automobile trucks of the defendant were placed in said building by the American Grocers Society, a corporation or the Florence Realty Co., a corporation, the plaintiff herein and were used by the American Grocers Society in exactly the same manner as the said gasoline tank and pump were used by the defendant, and the use of the said tank and pump was consented to by the plaintiff and its predecessor in title. 10

3. Defendant denies paragraph 5 of the first count.

#### THIRD DEFENSE TO THE FIRST COUNT. 20

Defendant will object that the first count of the complaint discloses no cause of action because it fails to show that the fire occurred on June 23, 1925, and any loss which may have been sustained by the plaintiff as a result thereof was the direct and proximate result of the breach of the said covenants by the defendant, or of any act or negligence of the defendant.

#### FIRST DEFENSE TO THE SECOND COUNT. 30

1. Defendant admits paragraphs 1, 2 and 3 of the second count.

2. Defendant denies paragraphs 4 and 5 of the second count.

#### SECOND DEFENSE TO THE SECOND COUNT.

1. Defendant admits paragraphs 1, 2 and 3 of the second count.

*Answer.*

2. Defendant denies using space provided in said building for trucks to be brought into said building, as a garage for the storage of automobile trucks. Any gas tank for the storage of gasoline for the use of the automobile trucks of defendant and any gasoline pump with connection to said tank for the purpose of supplying gasoline to the automobile trucks of the defendant were placed in said building by the American Grocers Society, a corporation, or the Florence Realty Co., a corporation, the plaintiff herein and were used by the American Grocers Society in exactly the same manner as the said gasoline tank and pump were used by the defendant and the use of the said tank and pump was consented to by the plaintiff and its predecessor in title.

10  
20

3. Defendant denies paragraph 5 of the second count.

#### THIRD DEFENSE TO SECOND COUNT.

Defendant will object that the second count of complaint discloses no cause of action because it fails to show that the fire which occurred on June 23, 1925, was a direct and proximate result of any act or any negligence of the defendant.

30

#### FIRST DEFENSE TO THIRD COUNT.

1. Defendant admits paragraphs 1, 2 and 3 of the third count.

2. Defendant denies paragraphs 4 and 5 of the third count.

*Answer.*

## SECOND DEFENSE TO THE THIRD COUNT.

1. Defendant admits paragraphs 1, 2 and 3 of the third count.

2. Defendant denies using space provided in said building for trucks to be brought into said building as a garage for the storage of automobile trucks. Any gas tank for the storage of gasoline for the use of the automobile trucks of defendant and any gasoline pump with connection to said tank for the purpose of supplying gasoline to the automobile trucks of the defendant were placed in said building by the American Grocer Society, a corporation, or the Florence Realty Co., a corporation, the plaintiff herein and were used by the American Grocers Society in exactly the same manner as the said gasoline tank and pump were used by the defendant and the use of the said tank and pump was consented to by the plaintiff and its predecessor in title.

3. Defendant denies paragraph 5 of the third count.

## THIRD DEFENSE TO THE THIRD COUNT.

Defendant will object that the third count of complaint discloses no cause of action because it fails to show that the fire which occurred on June 23, 1925, and any loss which may have been sustained by the plaintiff as a result thereof was a direct and proximate result of a breach of the covenants therein mentioned by the defendant or any act or negligence of defendant.

DARLING, BARNES & DOWDEN,  
Attorneys of Defendant.

Filed February 28, 1927.

*Reply.*

**Reply.**

The plaintiff denies every allegation in the answer and defenses affirmatively pleaded by the defendant in the above entitled cause.

10

PHILIP J. SCHOTLAND,  
Attorney for Plaintiff.

Filed March 2, 1927.

I, EDWARD J. KELLEHER, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office.

20

IN TESTIMONY WHEREOF I have set  
(SEAL) my hand and the seal of said Court at Trenton, this eighteenth day of April, A. D. nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,  
Clerk.

30

40

**POSTEA.**

Filed November 28, 1930.

## NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

---

FLORENCE REALTY Co., a corporation,

*Plaintiff,**vs.*

BARNES MANUFACTURING Co., a corporation,

*Defendant.**Action  
at Law.**Postea.*

10

This case was tried before Circuit Court Judge Newton H. Porter (to whom the case was referred for trial) and a jury at the Essex Circuit on November 24 and 25, 1930.

20

Plaintiff and defendant having submitted their evidence and the Court being of opinion that the defendant was entitled to a direction of a verdict against the plaintiff on the first count of the complaint directed the jury to render a verdict in favor of the defendant and against the plaintiff on the first count of the complaint and left the case to the jury on the second and third counts of the complaint.

30

The jury then rendered a verdict in favor of the defendant and against the plaintiff, pursuant to the instructions of the Court, on the first count of the complaint, and a general verdict in favor of the defendant and against the plaintiff on the second and third counts of the complaint.

NEWTON H. PORTER,  
Circuit Court Judge.

40

## JUDGMENT.

## NEW JERSEY SUPREME COURT.

|    |   |   |   |
|----|---|---|---|
| 10 | BARNES MANUFACTURING Co., a<br>corporation,<br><br><i>Defendant,</i><br><br><i>ads.</i> | } | <i>Action<br/> at Law.</i><br><br><i>On Postea.</i> |
|    | FLORENCE REALTY Co., a cor-<br>poration,<br><br><i>Plaintiff.</i>                       |   |   |

Costs \$51.50.

20 It is ordered that judgment be and hereby is  
entered in favor of defendant and against the  
plaintiff with costs to be taxed nisi.

Entered November 28, 1930.

On motion of

ARTHUR T. VANDERBILT,  
Attorney.

30

40

## TESTIMONY.

## NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

November 24, 1930.

10

FLORENCE REALTY Co., a corporation of the State of New Jersey,

vs.

BARNES MANUFACTURING Co., a corporation of the State of New Jersey.

*Action  
at Law.*

20

Before Hon. Newton H. Porter, J., and a jury.

For plaintiff appears Philip J. Schotland.

For defendant appears Arthur T. Vanderbilt.

(A jury is called and sworn.)

Mr. Schotland opens for plaintiff.

Mr. Vanderbilt opens for defendant.

Mr. Schotland: Under the pleadings the change of ownership and the execution of the lease are admitted. I therefore offer the lease in evidence. 30

(The same is received in evidence and marked Exhibit P. 1.)

(Thereupon Mr. Schotland read excerpts of Exhibit P. 1 to the jury.)

40

*Ernest A. Marvin, direct.*

ERNEST A MARVIN, sworn in behalf of plaintiff.

*Direct examination by Mr. Schotland.*

10 Q Mr. Marvin, where do you live? A I live at Cornwall on the Hudson, New York.

Q And what is your business at present? A I am the manager of a bus transportation company.

Q In 1923 what was your business? A I was a chauffeur for the Barnes Manufacturing Company.

Q Where were they located then? A West Side and Audubon avenue, Jersey City.

20 Q Do you remember a fire occurring in the premises? A Yes, sir.

Q Do you recall the date when it occurred? A It was around June 24th or 23rd.

*By the Court.*

Q What year? A. 1925.

*By Mr. Schotland.*

30 Q How long before the date of the fire had you been employed by the Barnes Manufacturing Company? A From four to five years, I imagine.

Q What was your work during that period for the Barnes Manufacturing Company? A I was a chauffeur.

Q What were you driving? A Well, I drove three or four different trucks.

40 Q Well, what were you driving about the time of the fire? A A five-ton White.

*Ernest A. Marvin, direct.*

Q How long had you been driving that five-ton White truck? A I guess about six or seven months.

Q Where were you storing that truck at night? A Right in the plant, in the warehouse.

Q What part of the warehouse? A We 10 called it the loading platform.

Q In front of the loading platform? A In front of it.

Q When you first were employed there as a chauffeur, were the trucks being stored in the warehouse?

Mr. Vanderbilt: I object to that as immaterial.

The Court: What difference does it make? 20  
The question is where they were stored at the time of the fire.

Mr. Schotland: It ordinarily would not make any difference. This witness is from out of town, and I expect to let him go as soon as he is through. I may not have him here for rebuttal. From Mr. Vanderbilt's opening, I suppose he is going to show that they immediately used this for garage and gasoline filling purposes after entering into 30  
the lease, notwithstanding the fact that the lease not only is silent as to that privilege but is affirmatively strong as against such a privilege.

The Court: You are anticipating rebuttal? You are using him now in rebuttal?

Mr. Schotland: No, if your Honor please, I am anticipating that is part of the case, in view of Mr. Vanderbilt's opening.

The Court: Then it would be rebuttal? 40

*Ernest A. Marvin, direct.*

Mr. Schotland: Well, practically.

The Court: I sustain the objection.

Mr. Schotland: I ask for an exception.

The Court: You may have it.

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

Exception noted as ground of appeal.

*By Mr. Schotland.*

Q Where were you getting the gasoline for the truck at or about the time of the fire? A Right at the warehouse.

Q By what means? A By a five-gallon pump.

20 Q Were you getting the gasoline at the warehouse during the entire time that you were employed as the chauffeur of one of the trucks?

Mr. Vanderbilt: I object to that as immaterial.

The Court: Same ruling, objection sustained.

Mr. Schotland: I asked the question for the same reason.

30 The Court: You may have your exception.

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

Exception noted as ground of appeal.

Q Where was this five-gallon pump located? A It was inside the loading platform, about four foot inside of the building.

40 Q How high was the loading platform with reference to the body of the truck? A I should

*Ernest A. Marvin, direct.*

judge about four and a half foot high from the floor.

Q Would it be on a level with the floor of the truck? A Just about the level of the truck.

Q This space in front of the loading platform, was that open or were there any doors there? 10  
A Four big doors you could close.

Q How did they close? A They folded down. They folded in half up against the ceiling.

Q What was your custom as to storing the truck and as to taking your gasoline supply at or about the time of the fire? A Well, when we came in at night, naturally when we got back the shop was closed. There was nobody there. We used to have to open the end door on the far end so we could swing in and get alongside of these doors to park our three trucks in there. 20

Q After you got the trucks in, swung in as you say, were the front doors closed and locked, or left open? A They had to be closed to get the truck in, all but the end one, and we closed that when we got in.

Q The doors were closed? A Yes, sir.

Q When would you fill your gas tanks? A Well, if we got in early enough in the afternoon we would fill them then, but most of the time we got in late and had to fill them in the morning before we got out. 30

Q On the day of the fire was anyone filling any gas tanks that morning? A Yes, sir.

Q What time did you get there? A I got there around 7:15.

Q Was anyone else there when you were there? A Not then, not in the loading platform. 40

*Ernest A. Marvin, direct.*

Q Did anyone else arrive while you were there at the loading platform? A Yes.

Q Who? A Mr. Coriell.

Q What was he? A He was a chauffeur.

Q Driving another truck? A Yes, sir.

10 Q Was the truck he was driving there at the time? A Yes, sir.

Q What did you do after you arrived at 7:15? A I was on a long trip the day before, and I filled my truck with gas.

Q When did you fill your truck with gas? A As soon as I got in, around 7:20.

Q You are talking now of the morning of the fire? A Yes, sir.

20 Q Did anyone else fill their tanks with gas at that time? A Well, about five minutes later Mr. Coriell came in, and he was filling his.

Q You saw him filling his? A I know he was filling his.

Mr. Vanderbilt: I object to that. The answer is not responsive.

The Court: Strike it out.

30 Mr. Schotland: If your Honor please, I am the only one who could object if the answer is not responsive to my question. I am satisfied with it.

Q Did you see Coriell filling his tank? A Yes, sir.

Q How many gallons of gas did you put in? A I will say from 25 to 30 gallons.

Q Would you put in a limited quantity, or would you continue to fill it until the tank was full? A I would fill it right up to the top.

40 Q What if anything happened this particular morning of the fire, just before the fire? A What do you mean by that?

*Ernest A. Marvin, direct.*

Q Did you see anything out of the ordinary?

A Yes.

Q What? A Gas on the floor.

Q Where did that gas on the floor come from? A It came from the connections in the pump, probably some we spilt.

Q Did you see any come from the connections in the pump? A Yes, sir, it always came from there. 10

Q For how long a period had you seen the gas come from the connections in the pump?

A Oh, I should judge for about three to six months.

Q Before the fire? A Yes, sir.

Q Just what connections are you referring to from which the gasoline came? A Well, we had two lengths of hose on this pump. 20

Q Is that the way it was installed? A No, sir, there was only one. When we had one of our large trucks, which were these five-ton Whites, backed at the end platform, alongside of this platform, we could not gas another truck if he was loading ahead of the one in there, so we had to put an extension on it to reach a truck out on the sidewalk.

Q Where were the leaks? A That was in the connections between these two hose and at the top connection on the top of the pump. 30

Q Have you told us for how long a period there were leaks in those connections? A Yes, sir, from three to six months.

Q On this particular occasion, just before the fire, did much gasoline spill? A Well, quite a little.

Q What was the first thing you saw of the fire? A The first thing I seen of the fire, Mr. Coriell hollered out, "I am on fire," and I looked down and the whole pump was on fire. 40

*Ernest A. Marvin, cross.*

Q What did you do? I jumped out of my truck and grabbed hold of the hose and tried to pull the pump down from the wooden partition on the wall. After getting my hand burned, I decided it was too hot.

Q So what did you do? A I left.

10 Q How did you leave? A Out the door that was open.

Q Then what happened? A I went to the hospital to have my hand dressed.

Q Then did you come back? A Yes, sir.

Q Did you see what was left of the building?  
A Yes, sir.

Q What had happened to the building? A It was all burned up, and the walls fell down, and the only things that stood were the staircases and the elevator shafts.

20 Q The entire rest of the building all burned down? A Yes, sir.

Mr. Schotland: You may cross examine.

*Cross examination by Mr. Vanderbilt.*

Q This space where the trucks were stored was how large, Mr. Marvin? A I will say it was about 48 feet long and about 20 feet deep.

30 Q Of what was the floor made? A Concrete.

Q That concrete ran right up to the loading platform? A Yes, sir.

Q This space that you have just given us the dimensions of was enclosed and part of the building when these four big doors were closed down? A Yes, sir.

Q And the doors were doors which closed down from the ceiling; is that correct? A That is right. They folded up and closed from the  
40 inside down.

*Ernest A. Marvin, cross.*

Q With respect to this space, where was the pump located? A The pump, I am pretty sure, was in the south corner of the building inside the doors.

Q How far from the street side? A I should judge about four feet.

Q And how far from the end of the building? 10

A Well, there was a staircase right next to it, I should say about 20 or 30 feet.

Q On the morning of the fire, how many trucks were there in there? A There was three.

Q These were the three trucks which were customarily stored there? A Yes, sir.

Q Who loaded his truck first? A Well, that all depended.

Q I mean on that morning, the morning of the fire. A Nobody loaded their trucks, because the place burned down. 20

Q I meant who gassed up his truck first? A I gassed up mine first on the morning of the fire.

Q And Mr. Coriell was second? A Yes, sir.

Q At the time you filled your truck up, did you spill any gasoline over? A I probably did. I am not sure.

Q Well, now, don't you know? A Well, I couldn't say for sure. It is quite a while ago. 30

Q Have you any memory that you did spill any gasoline on the floor? A Well, I wouldn't say I did, and I wouldn't say I didn't. I am not sure.

Q You can't recall? A No, sir.

Q Did you see Mr. Coriell loading his truck? A Yes, sir.

Q Can you say whether or not he spilled any gasoline on the floor? A No, I can't say whether he spilled it from the tank. 40

*Ernest A. Marvin, cross.*

Q When I say "spill" I mean letting it overflow in the tank of his car. You understand what I mean by that? A Yes, sir, I understand.

10 Q With respect to this leak that you told us about, will you describe just where that leak was? A Well, on this five-gallon Standard Oil pump—

Q By the way, do you know how long that pump had been in there? A Well, probably there a year.

Q That is your best recollection? A Yes, sir.

Q It was there about a year? A Yes, sir.

20 Q Were you familiar with the one-gallon pump that was there before the five-gallon pump? A Yes, sir, there was a pump there, but we never used it.

Q Was it in the same place where the five-gallon pump was put? A The same place.

Q Now, will you describe to the Court and the jury just where these leaks were in the hose or anywhere else connected with this pump? A Well, when we first got the pump—

30 Q I mean at the time of the fire. A At the time of the fire we had two lengths of hose on it. I should judge the hose was in length about 12 feet in all. It had a coupling in the very middle of it, and also a coupling at the top of the pump. That is where we got the leaks.

Q Now, let me see if I understand you. Do you say that each of these two lengths of hose was 12 feet, or were the two sections of hose 12 feet altogether? A Over all it was 12 feet.

40 Q Two sections together aggregated 12 feet? A Yes, sir.

*Ernest A. Marvin, cross.*

Q So that when the two were coupled together, the entire hose from where it was connected at the top of the tank to where you put it into your truck was 12 feet altogether? A Yes, sir, about that.

Q Were these two sections of hose about equal in length? A I imagine they were. 10

Q The leaks, you say, came from where the hose was connected to the tank. I suppose that was at the top of the tank? A Yes, sir.

Q And also where the two pieces of hose were fitted together? A Yes, sir.

Q And you are absolutely sure that there were two pieces of hose? A Yes, sir.

Q Can you tell us how long there had been two pieces of hose there connected to the gas tank? A Well, I don't think I can tell you that. 20

Q Well, can you tell us whether it was a period of a month or six months or a year, or some longer period? A Probably from three to six months.

Q In other words, for this period of three to six months there was a hose made up of two separate pieces? A Yes, sir.

Q Coupled together? A Yes, sir.

Q How long had you observed this leak between the two pieces of hose? A Well, I guess about three months to six months, I don't know just how long it was. 30

Q Just how bad was that leak where the two pieces of hose were coupled together, at the time of the fire or a day or two before? A It was quite bad.

Q How much gasoline leaked out? Can you give us any idea as to the quantity? A Probably a quart to every five gallons. 40

*Ernest A. Marvin, cross.*

Q It would probably leak out a quart to every five gallons? And this you say had been going on for a period of three to six months?

A About that.

Q How bad was the leak up at the top of the hose where it was joined onto the pump?

10 A Well, that wasn't as bad as the one in the middle.

Q That wasn't as bad as the one in the middle. Can you tell us at the time of the fire, and for a day or two preceding, if you recall, just how bad that leak was where the hose was joined to the top of the pump? A Well, I couldn't say how bad it was at all.

Q Did it just drip out, drop by drop, or was it a steady flow when you used the pump? A

20 Well, the top just about dripped out.

Q Are you as sure of the fact that there was a dripping out of the hose where it was connected to the top of the pump as you are sure of this flow from the middle of the hose where the two pieces were coupled together?

Mr. Schotland: I object to that. That is purely argumentative.

The Court: I shall allow it.

30

Mr. Schotland: Exception.

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

Exception noted as ground of appeal.

(Question repeated.)

A I am surer of the middle than I am of the top.

Q You are more sure of the middle than you are of the top? A Yes, sir.

40

*Ernest A. Marvin, cross.*

Q In other words, you are not sure that there was any dripping from the place where the hose was connected to the top of the pump? A I am not positive.

Q You are not positive of that. But you are very positive that there was a very substantial flow from the middle of the hose where the two pieces of the hose were coupled together; is that correct? A Yes, sir. 10

Q And that flow from the middle of the hose where the two pieces were coupled together had been going on for from three to six months; is that correct? A About that.

Q Did you ever call to the attention of anyone connected with the Barnes Manufacturing Company the fact of this flow from the middle of the hose? A I often passed a remark about it in the shipping room. I never said it to no one directly. 20

Q You never called it to the attention of anyone in authority over you? A No, sir.

Q Prior to the time when two lengths of hose were used there and coupled together, what was the way in which you drew gas from the pump? A There was a single hose on there.

Q Then this additional hose was coupled onto the single hose that was there originally? A Yes, sir. 30

Q And that single hose that was there in the first place was a hose six feet long, or thereabouts? A About that.

Q And this other length of about six feet was added to it so it could reach a greater distance? A Yes, sir.

Q How long before the fire do you say this extra length of hose was attached? A Well, 40

*Ernest A. Marvin, cross.*

it must be between six months and a year. I am not sure.

Q Prior to that, how long did you use that single length of hose that was about six feet in length? A Well, I should judge about six months on that five-gallon pump.

10 Q You testified, did you not, Mr. Marvin, at the last trial of this case? A Yes, sir.

Q Before Judge Mountain? A Yes, sir.

Q On October 21, 1926? A I do not know when the date was.

Q Do you recall being asked these questions—page 20—and giving these answers:

“Q It was after the squeezing together you say this coupling leaked? A Yes, sir, and the top of the pump leaked.

20 “Q Where the hose goes into the pump? A Some place right at the top because sometimes you had to stand away from the pump or you would get a bath.

“Q It was a shower bath of gasoline? A Not exactly a shower but enough that you didn't want to get it.

“Q It just squirted out? A It came out enough to wet you.

30 “Q Enough so you had to stand away to keep it from pouring on you? A At times.

“Q How about the hose part, how did that leak? Describe the manner of the leaking. A The connection?

“Q Yes. A That leaked quite a little gasoline.

“Q Did that squirt out? A It ran out in drops, kept dripping quickly.

40 “Q Did you ever see it happen while you were filling a truck? A The connection leaking?

*Ernest A. Marvin, re-direct.*

“Q Yes. A Yes, sir.”

Q Do you remember being asked those questions and giving those answers at the prior trial?

A Yes, sir.

Q Are those answers which you gave to those questions that I have just read correct and true? A To the best of my knowledge they are. 10

Q Well, in the light of those questions and those answers do you want to change any of the answers which you made to the questions that I have just asked you on cross examination?

Mr. Schotland: I object to that, if your Honor please. That implies that the testimony today is different, and there is no basis for that at all. 20

The Court: Except that in the former trial he was likening the leak at the top almost to a shower bath, and today he is not quite sure whether there was much of a leak at the top or not. I think that is quite a difference. I shall allow the question. 20

Mr. Schotland: Exception.

Plaintiff's counsel prays an exception to this ruling of the Court. 30

Exception noted as ground of appeal.

(Question repeated.)

A No, sir.

Mr. Vanderbilt: That is all.

*Re-direct examination* by Mr. Schotland.

Q At the time of the fire, while the gasoline was being put into the gas tanks of the trucks, 40

*Ernest A. Marvin, re-cross.*

were the front doors opened or closed? A They were closed.

Q Just before the fire did you see much or little gasoline on the floor?

10 Mr. Vanderbilt: I object to that as not proper re-direct.

The Court: I shall allow it.

A There was quite a little on the floor.

Mr. Schotland: That is all.

*Re-cross examination by Mr. Vanderbilt.*

20 Q Are you familiar with any water hose which was there? A Yes, sir.

Q Do you know whether there was any water on the floor that day or not? A No water on the floor that day, because we didn't have time to use it.

Q Well, you had finished filling up your car? A Yes, sir.

30 Q You hadn't had time to use the water? A No, sir, I was putting my cap on my tank when the fire started.

Q Are you familiar with the fact that the water hose had a connection or coupling in it? A We had a hose there, and of course there must be a connection to put a water hose on the faucet.

40 Q I mean not only in the faucet but also in the length of hose there was a coupling where two pieces of hose were joined together? A We may have taped up leaks, but there was never a connection.

*John Coriell, direct.*

Q You don't remember any connection in the water hose? A No, sir.

Mr. Schotland: That is all.

---

JOHN CORIELL, sworn in behalf of plaintiff. 10

*Direct examination by Mr. Schotland.*

Q Mr. Coriell, where do you live? A 185 Garfield avenue, Jersey City.

Q What is your business? A Chauffeur.

Q By whom are you employed? A Well, I am not employed just now.

Q In June, 1925, by whom were you employed? A Barnes Manufacturing Company. 20

Q Do you remember the occurrence of a fire in the building there? A Yes, sir.

Q Where was this place of business? A 247 Westside avenue, Jersey City.

Q How long before the fire had you been employed there as chauffeur? A About fifteen months.

Q By the Barnes Manufacturing Company? A Yes, sir. 30

Q At that warehouse in Westside avenue? A Yes, sir.

Q What truck did you drive? A I drove one of the White trucks, they had a five-ton truck.

Q Were you there at the time of the beginning of the fire? A Yes, sir.

Q Where were you? What part of the building were you in? A I had hold of the gasoline pump, pumping gas when the fire occurred. 40

*John Coriell, direct.*

Q Where were you pumping the gas to? A Into my truck.

Q When the fire occurred? A Yes, sir.

Q What did you see of the fire? Where did you see the fire? A The first I saw of it, I had my head kind of bent a bit, and I seen it  
10 shoot up from the ground.

Q What did you see shoot up from the ground? A The flames.

Q What were the flames traveling on? A They were traveling on gasoline.

Q Was there any gasoline on the ground? A There must have been.

Q Did you see any? A Yes, sir.

Q Much or little? A Quite a bit.

Q What did you do when you saw the flames  
20 shoot up from the gasoline? A I hollered to Mr. Marvin, and I jumped away.

Q Then what did you do? A We tried to put it out with a piece of canvas, and we couldn't do it. We tried pulling the pump down, and it got too bad, and we had to get out ourselves.

Q So you ran out of the building? A Yes, sir.

Q What happened to the building? A It burnt down to the ground.

30 Q Completely? A Yes, sir.

Q What time of the day was this? A About 7:30 in the morning.

Q What time did you get there? A About twenty-five after seven or twenty after seven.

Q Do you know how the gasoline got on the floor? A Well, to my knowledge it got on through the leaks.

40 Q Did you spill any while you were filling your tank? Do you know? A Well, I might have spilt some, but quite a bit leaked out of the pump, too.

*John Coriell, direct.*

Q How long had that pump been leaking?

A Three months or more.

Q From what part of the pump were the leaks? A It leaked from the connections in the center of the hose, two pieces of hose that were connected together, and it would leak from the top.

10

Q Are you sure of that? A Yes, sir.

Q Did you notice whether or not there was any gasoline on the floor before you started to fill the tank in your truck with gasoline? A The floor was all wet from the gas that had already been leaking.

Q The floor was then all wet did you say? A Yes, sir.

Q Where did the gas flow to when it got down on the floor? A It flowed out underneath the doors, out down the sidewalk into the gutter.

20

Q What made it flow that way? A There was a slight grade there, a down grade.

Q There was a pitch to the concrete floor? A Yes, sir.

Q Were the doors open or closed at the time you were filling your tank? A Three of the doors were closed, but the end one we had opened, the one that we used to go in and out with, with the trucks.

30

Q The one through which you personally went in and out? A Yes, when we wanted to put them inside for the night and take them out in the morning.

Mr. Schotland: That is all. You may cross examine.

40

*John Coriell, cross.*

*Cross examination by Mr. Vanderbilt.*

Q How long had you been with the Barnes Manufacturing Company prior to the fire? A About 15 months.

10 Q On the morning of the fire had you completely filled your truck before the fire started? A It wasn't completely filled, no. I had about 15 gallons pumped in there.

Q And how many gallons would your truck hold? A 30 gallons.

Q So there wasn't any gas spilled over from your truck? A Well, I couldn't say there was, and I couldn't say there wasn't. There might have been some.

20 Q How could there be any gas spilled over from your truck if it would hold thirty gallons and you had only put fifteen in it? A If you pumped fast, sometimes some would jump out from the top when it was pretty near filled.

Q Well, it was not pretty near full, was it? A No, sir.

Q So it didn't jump out, did it? A I guess not.

Q No gasoline spilled out from your truck that morning, did it? A No, sir.

30 Q How many trucks had loaded before yours that morning? A There weren't any trucks loaded that morning yet.

Q I mean filled with gas. A Mr. Marvin's truck was the only one.

Q Did you see his being filled? A Yes, sir.

Q Did you see him fill it? A Well, he was filling it when I came in there.

Q Did you watch him? A Yes, sir.

40 Q Did you help him? A I don't think I helped him, no, sir.

*John Coriell, cross.*

Q Do you know whether or not any gasoline spilled out while he was filling his tank? A I didn't notice any.

Q If any had spilled out you would have noticed it, wouldn't you? A I guess so, yes, sir.

Q It would draw your attention, wouldn't it?  
A Yes, sir. 10

Q Aside from your truck and Marvin's truck, had any other trucks loaded that morning? A No, sir.

Q Now, will you tell us just where the leaks were that you have been talking about in this hose? A The leak was at the center where the two hoses were connected, and it leaked at the top of the pump.

Q It leaked at the center of the hose where the two pieces of hose were joined together, and also at the top of the pump where the hose was connected to the pump; is that right? A Yes, sir. 20

Q How long was the hose, taking the two pieces together? A About 12 feet.

Q The two pieces of hose were about equal in length? A Yes, sir.

Q About 6 feet apiece? A Yes, sir.

Q How long had they had the two pieces of hose there? A I guess six months or more. 30

Q Prior to the second piece of hose being added on about six months before the fire you had used just the one piece six feet in length? A Yes, sir.

Q How soon after the two pieces of hose were joined together did you first notice any leak at the connection of the two pieces of hose? A It leaked three months or more, to my knowledge. 40

*John Coriell, cross.*

Q And how much would you say that that leak in the coupling of the two pieces of hose amounted to? A It is all according to how much gas you pumped.

Q I am asking you to give us the quantity. You had been using it three months or more.

10 A A quart or more to every five gallons.

Q Did you ever call the leak to the attention of anyone in the Barnes Manufacturing Company in authority? A No, sir, I didn't.

Q How long had the leak been going on that you told us about up at the top of the pump?

A About six months.

Q How severe was that leak or what was the extent of that leak at the top of the pump? A It used to drip out of the top.

20 Q Was it a continuous drip, or just an intermittent drip? A It was a continuous drip when you were pumping gas.

Q Well, how fast did it drip? There are all kinds of drips, I suppose. How many drops a minute were there? A I couldn't say.

Q Well, give us your best idea. A It would drip enough that you would get wet with the gas when you were pumping it.

30 Q It dripped so fast that you got wet with the gas when you were pumping it? A Yes.

Q Well, it must have been more than a drip up there, it must have been a stream, to wet you. I am speaking about the leak you tell us about at the top of the pump where the hose joined onto the top of the pump. Did you get wet from that? A Yes, sir.

Q You wouldn't describe that as a drip, would you? A It dripped pretty fast.

40 Q It must have dripped pretty fast. Did it drip fast enough to make a steady stream? A Not a steady stream, no.

*John Coriell, cross.*

Q Just an intermittent drip? A Yes, sir.

Q Do you want to describe it, whether it was a slow drip or a fast drip or an intermittent drip? What kind of a drip was it? A It was a fast drip.

Q Did you ever call that to anyone's attention? A No, sir.

10

Q You said that the floor at the time you were filling your truck was all wet from gasoline. How do you know it was gasoline on the floor? A I know the pump always leaked before, and Mr. Marvin already had pumped about 25 gallons or more in his truck. It must have been the gasoline leaking from the pump.

Q In other words, you conclude it was gasoline, but you don't know it was gasoline; is that it? A I don't know exactly, no.

20

Q It might have been water? A I don't think it was water.

Q Well, it might have been? A It might have been.

Q There was a water hose there, wasn't there? A Yes, sir.

Q Did that water hose, in addition to the connection where it was coupled onto the faucet, also have a coupling in the middle of it? A No, sir.

30

Q It was just a single length of water hose? A Yes, sir.

Q Was there any leak from that water hose? A No, sir.

Q There had never been a leak from the water hose that you know about from the time you were there? A Not to my knowledge, no.

Q What makes you think this was gasoline on the floor? A Mr. Marvin pumped about 25 gallons. I knew the pump leaked all the time.

40

*John Coriell, cross.*

Q That is the only way you have of telling that it was gasoline? A Yes, sir.

Q From the fact that Mr. Marvin had pumped his tank full before you started to pump into your tank; is that it? A Yes, sir.

Q How much did you pump in that morning?

10 A I had about 15 gallons in.

Q Did you testify at the last trial back in 1926 before Judge Mountain? A Yes, sir.

Q Do you recall being asked this question and giving this answer:

20 "Q Describe the leaks. Describe how it would leak and when it would leak. A It used to leak when you forced it through this flattened part of the hose, and used to spurt out the top part of the tank when the hose was fastened on the top or middle. That morning in pumping 30 to 40 gallons it leaked a couple of gallons on the ground."

Q Did you give that answer? A Yes, sir.

Q Did you pump 30 or 40 gallons that morning? A No, I pumped 15 gallons. By 30 or 40 I mean Mr. Marvin had pumped 25, and then I had pumped 15.

Q How do you know what he pumped in that morning? A Well, he said so.

30 Q You are testifying as to something Mr. Marvin told you? A That he had about 25 gallons or more.

Q You are taking from him his estimate of the leak also? A No, I am taking that from the amount of gas he pumped.

Q That is your conclusion from what he told you as to the quantity of gas he pumped, is that it? A Yes, sir.

40 Q What kind of a connection was there on the hose between the two parts of it? A It was a metal connection.

*John Coriell, cross.*

Q Do you know whether or not any gasoline spilled out while he was filling his tank? A I didn't notice any.

Q If any had spilled out you would have noticed it, wouldn't you? A I guess so, yes, sir.

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20 40 gallons it leaked a couple of gallons on the ground.”

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Q You are taking from him his estimate of the leak also? A No, I am taking that from the amount of gas he pumped.

Q That is your conclusion from what he told you as to the quantity of gas he pumped, is that it? A Yes, sir.

40 Q What kind of a connection was there on the hose between the two parts of it? A It was a metal connection.

*John Coriell, re-direct—re-cross.*

Mr. Vanderbilt: That is all.

*Re-direct examination* by Mr. Schotland.

Q Did you ever see water burn? A No, sir.

Q Did you see the liquid that was on the floor that morning burn? A Yes, sir. 10

Mr. Schotland: That is all.

*Re-cross examination* by Mr. Vanderbilt.

Q When did you leave the employ of the Barnes Manufacturing Company? A About a month after the fire.

Mr. Vandervilt: That is all.

Mr. Schotland: If your Honor please, I had two experts. I did not think we would reach this stage yet. If there is no objection, I shall put them on later, and Mr. Vanderbilt can now go on with the defense. 20

Mr. Vanderbilt: I must confess that catches me somewhat by surprise, because I thought that was an essential part of the plaintiff's case.

The Court: Why not put them on now? 30

Mr. Schotland: Because I do not have them here. I did not expect to reach this stage so quickly. It has nothing to do with the merits. It is only as to the amount of the damages.

The Court: Except that you both are probably in the same position as far as having witnesses is concerned.

Mr. Vanderbilt: We can start, your Honor. We can have it understood that the 40

*Motion for a Non-suit.*

only two witnesses for the plaintiff will be the two experts.

Mr. Schotland: Yes.

10 Mr. Vanderbilt: If the Court please, I move for a non-suit on the ground that there is nothing in the evidence to prove that there has been any violation of any of the covenants of the lease, that being addressed to the first count.

20 I also move for a non-suit on the ground that there is no proof as to the origin of the fire and nothing which would couple the fire with any act or alleged neglect of the defendant. There was an entire want of showing the cause of the fire.

I further move for a non-suit on the ground that any loss which may have been sustained by the plaintiff is not shown to have been the direct and proximate result either of any breach of a covenant by the defendant, or of any act or neglect of the defendant.

The Court: Motion denied, exception granted.

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

Exception noted as ground of appeal.

Mr. Vanderbilt: I should like to call Captain Caesar.

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*Edward P. Caesar, direct.*

EDWARD P. CAESAR, sworn in behalf of defendant.

*Direct examination by Mr. Vanderbilt.*

Q Captain, you are connected with the Jersey City Fire Department? A Yes, sir. 10

Q How long have you been connected with it? A Fifteen years past.

Q What is your position in the department? A Captain.

Q Did you have that position back in 1925? A Yes, sir, since 1921.

Q What were your duties in 1925? A Just the usual duties of a fire captain in the department, making his usual inspections of his district that he is assigned to. 20

Q Where was your fire company located in 1925, captain? A Bergen and Van Nostrand avenue.

Q Did that district include the premises occupied by the Barnes Manufacturing Company? A Yes, sir.

Q As part of your duties as captain, were you required to make inspections of the factories and other premises in your territory? A Yes, sir.

Q In the course of your duties in 1925 did you inspect the premises of the Barnes Manufacturing Company? A Yes, sir. 30

Q How often did you inspect their premises, captain? A Once a month.

Q Do you remember when the fire occurred at the Barnes plant? A Yes, sir.

Q When was it, captain? A 7:35, June 23, 1925.

Q How long before that fire was it that you had made your last inspection of the Barnes 40

*Edward P. Caesar, direct.*

Manufacturing Company's plant? A About ten days previous to the fire.

Q On that inspection what did you inspect or look at? A We generally went all through the entire plant. We had one of the Barnes people go with us. We generally looked for either  
10 the Barnes man himself or the foreman of the plant.

Q What is the purpose of your inspection, captain? A To find violations.

*By the Court.*

Q Violations of what? A Fire violations.

Q Violations of city ordinances you mean?  
A Yes, sir, fire hazards.

20 *By Mr. Vanderbilt.*

Q Did you when you were making the last inspection at the Barnes plant before the fire include in your inspection the part of the plant where the gasoline pump was located? A Well, we just walked through the entire plant.

Q Did you look at the gasoline pump there?  
A I don't know as we looked at it any more than we did any other part of the building.

30 Q Well, did you see anything out of the way connected with it? A No, sir, nothing that we had not seen in our previous inspection.

Q What would you say as to the condition of the gasoline pump at the time you saw it?

Mr. Schotland: I object to that on the ground that the witness does not claim to have inspected it.

*Edward P. Caesar, direct.*

*By the Court.*

Q Do not guess, captain. If you can visualize it, tell us what you saw.

Mr. Vanderbilt: May I withdraw that question?

The Court: Certainly.

10

*By Mr. Vanderbilt.*

Q Do you remember what kind of a pump it was, captain? A No, only that it was an ordinary gas pump, that is all.

Q Do you remember what make it was? A Standard I believe it was.

Q Standard Gasoline Company? A Standard gas.

Q Did you notice anything unusual about the hose connected with it? A No, sir. 20

Q Did you notice anything unusual about the pump itself? A No, as I say we made no thorough inspection of anything, just the casual inspection of the building to find fire hazards.

Q Did you see any trace of gasoline on the floor? A Not during my inspection.

Q If that had been there, would you have noticed it? A I certainly must have noticed it. I would have noticed it if it had been there. 30

Q And you didn't notice any at the time you were there? A No, I did not.

Q What was the general condition of this bay and loading platform at the time that you last inspected it? A Well, we took no particular notice of just what was going on. There might have been a truck backed in there, loading or something like that.

Q I mean as to the general conditions with respect to which it was kept. Was it kept in 40

*Edward P. Caesar, cross.*

good condition or poor condition? A Very good.

Q Was it clean or dirty? A It was clean. We never had any trouble with the Barnes inspections.

10 Mr. Vanderbilt: You may cross examine.

*Cross examination by Mr. Schotland.*

Q Captain, you made no particular inspection of the apparatus used in the building, did you? A Oh, yes.

Q Did you ever test this gasoline pump in action? A No, sir.

20 Q Did you ever see it while it was being used, to see if any gasoline leaked out? A No, I don't know as I have.

Q You simply passed by. You saw there was a pump there? A Yes.

Q You didn't even go over and examine it? A No, we didn't.

Q You don't know whether the hose there had two couplings or a single coupling, or no couplings? A I couldn't say that.

30 Q You didn't make a particular inspection of this? A Not of the gas pump, no.

Q On any occasion when you were there, the floor was not wet, was it? A No.

Q What time of day did you usually make your inspections? A Well, that is hard to tell. Sometimes we would start at the other end of the district and work that way. At other times we would start at the other end and work the opposite way. From time to time it would vary. We generally started our inspections at nine o'clock.

40

*Frederick A. Peters, direct.*

Q Were you there when anyone was filling his gas tank with gasoline? A I don't know as I ever saw that.

Mr. Schotland: That is all.

Mr. Vanderbilt: I should now like to call Captain Peters. 10

FREDERICK A. PETERS, sworn in behalf of defendant.

*Direct examination by Mr. Vanderbilt.*

Q Captain Peters, what is your business, please? A Captain, Jersey City Fire Department. 20

Q How long have you been a captain in the Fire Department of Jersey City? A Twenty-five years a captain.

Q Are you assigned to the same fire house as Captain Caesar who was just on the stand? A Yes, sir, it is a double company.

Q What do you mean by that? A There are two apparatuses in the house.

Q Was your district the same as his? A Yes, sir. 30

Q And did you have the same type of duties to perform as Captain Caesar did? A Yes, sir.

Q Did you have occasion in the course of your regular duties to inspect and examine the plant of the Barnes Manufacturing Company? A Yes, sir.

Q How often did you inspect it? A About once a month.

Q And how long before the fire, in June, 1925, were you there? A I would say probably 40

*Frederick A. Peters, cross.*

ten or fifteen days, something like that. It might have been twelve days.

Q Do you remember seeing a gasoline pump there? A Yes, sir.

Q About how many times have you seen that pump? A I would say offhand at least a half  
10 a dozen times anyhow, if not more.

Q Did you ever see anything wrong about the pump? A No, sir.

Q Did you ever observe anything wrong about the hose connected with it? A No, sir.

Q Did you ever see any gasoline on the floor? A No, sir.

Q What was the condition of the loading floor where this pump was? What type of floor was it? A If I remember right, it was  
20 a concrete floor. In fact, it should be.

Q Was there ever any liquid of any kind on the floor that you observed? A No, sir.

Q With respect to the hose, was there anything out of the way about that? A I don't think there was. If there was, I probably would have noticed it.

Q Do you recall whether or not there was any coupling in the hose, or any lengthening of it beyond the direct hose length? A No, I do  
30 not. I don't recall that there was.

Mr. Vanderbilt: That is all.

*Cross examination by Mr. Schotland.*

Q Captain, you made no inspection or examination of this pump or hose? A You mean in operation?

Q Yes. A No, sir.

Q You simply saw it as you passed by?  
40 A Saw it was there, yes, sir.

*Raymond F. Barnes, direct.*

Q And you never saw this pump and hose in actual operation? A No, sir.

Q So that you were never there while it was in use? A No, sir.

Q You know as a result of your experience that the gasoline has to be pumped up when those pumps are used? A Yes, sir. 10

Q If the pump is not in action, whether the hose is leaky or whether the pump is leaky you couldn't tell, could you? A I don't suppose I could, no.

Mr. Schotland: That is all.

---

RAYMOND F. BARNES, sworn in behalf of defendant. 20

*Direct examination by Mr. Vanderbilt.*

Q Mr. Barnes, in 1925 what position did you have in the Barnes Manufacturing Company? A I was the general manager.

Q At the time of the making of the lease, Exhibit P. 1, what was your position in that company? A Same position.

Q At the time that the Barnes Manufacturing Company took possession of the premises under the lease, was there a gasoline tank installed underground connected with the premises? A There was. 30

Q Do you know what the size of that tank was, Mr. Barnes? A I do not.

Q At the time that you took possession of the premises, can you tell us whether or not there was any gasoline in that tank? A There was. 40

*Raymond F. Barnes, direct.*

Q Can you tell us how much? A Mr. Curtis told me that they were making us a present of about 125 gallons, and Mr. Warner, his partner, stated that he thought it was more than that.

Q Who were Mr. Curtis and Mr. Warner?  
10 A They were supposed to be the owners of the property.

Q Do you know whether or not they were officers of the Florence Realty Company? A They were both officers.

Q I am in error. Were they officers of the American Grocers? A Yes, at that time.

Q They were the gentlemen with whom you had dealings in negotiating this lease? A Yes, sir, and Mr. Schotland and the real estate men.  
20

Q Do you recall what position Mr. Curtis occupied with the company? A I don't think I remember his office.

Q Can you refresh your recollection by looking at the lease? A Oh, yes.

Q That is, provided you can read the signatures (handing Exhibit P. 1 to witness).

*By the Court.*

30 Q Look at the printing at the beginning of the acknowledgment.

Mr. Schotland: The lease shows he was secretary.

*By Mr. Schotland.*

Q Were both Mr. Curtis and Mr. Warner there? A Yes.

*Raymond F. Barnes, direct.*

*By Mr. Vanderbilt.*

Q Were both Mr. Curtis and Mrs. Warner there at the time the statement was made about giving the Barnes Manufacturing Company 125 or more gallons of gasoline that were in the tank? A They were both there.

10

Q After you took possession of the property under the lease, Mr. Barnes, what did you do with reference to the use of the gasoline tank and pump and so forth? A The American Grocers came there to get some goods and used the tank to gas one of their own trucks. We also used some of the 125 gallons in gassing one of our cars.

Q When did you move in the premises? A I think it was in December. I am not sure. That was in part. We did not move entirely.

20

Q You really went in before the lease became effective; is that correct? A Yes, sir.

Q Do you recall what year that was? You said December. A That was the year previous to the signing of the lease. That was the year previous to the lease taking effect, I mean.

*By the Court.*

Q That would be December, 1920? A Yes, sir.

30

*By Mr. Vanderbilt.*

Q From the time you went in, did the Barnes Manufacturing Company continue to use the tank? A We did.

Q Was that use of the tank continued up to the time of the fire? A Yes, sir.

Q When was the change made from the one-gallon pump to the five-gallon pump? A I couldn't tell you.

40

*Raymond F. Barnes, direct.*

Q Well, can you say how long it was before the fire? A Well, I would estimate approximately a year, or possibly a little more.

Q What kind of a pump was installed? A The best up-to-date Standard Oil pump that could be secured.

10 Q Can you describe its appearance? A It looked like most all other Standard Oil pumps, red, tall, upright.

Q Did it resemble the ordinary Standard Oil pump that we see at the roadside filling station? Was it the same type? A Very similar, yes. Practically the same thing.

Q Can you tell us whether or not that was a new pump at the time it was installed? A So far as you could observe it was new, and I was  
20 told that it was new.

Q Where was this pump located, the same position as the old pump? A Exactly the same.

Q Will you describe just where its location was with respect to the building? A As you approach the front of the building, it was on the left-hand side of what was known as the loading bay, a very short distance in from the front of the building, perhaps four or five or maybe six feet.

30 Q What was done with the old pump? A The old pump was retained, put on a platform just beside the new pump so that it could be replaced if the question ever came up at any time about the expiration of our lease and the new pump returned to the Standard Oil Company.

Q Did you have occasion, Mr. Barnes, in the course of your duties to inspect the loading bay and the platform there from time to time?

40 A Yes, sir.

*Raymond F. Barnes, direct.*

Q How often were you down there? A Approximately every morning between 8:45 and 9:30; always in the afternoon between two and five o'clock; usually at some other inspection in between.

Q When you were down there, in what condition did you find the pump? A That pump had to be in perfect condition, always without any exception. 10

Q Had you ever seen the men loading with it? A Yes, sir, lots of times.

Q Within what period of the fire? A The day before the fire, and the days before that.

Q Did you see any leaks? A No, sir.

Q Will you describe the hose which was connected to this pump, Mr. Barnes? A Standard hose that was used in all those pumps. 20

Q Was it Standard equipment with the pump itself? A Yes, sir, furnished by the Standard Oil Company.

Q About what length was it? A I don't know how long those hoses are; nine or ten feet, something like that, I am not sure.

Q Can you tell us whether or not it was all one length, or whether it was coupled together? A It was only one length.

Q There was no coupling in the hose? A Not that ever I saw, in the gasoline hose, no, sir. 30

Q There was of course a coupling where it joined with the pump? A Oh, yes.

Q And that was the only coupling connected with that hose? A Unless possibly you might call the nozzle at the end of the hose a connection.

Q What I am driving at is that there was no intermediate connection in the middle of the hose? A No, sir, not that I ever saw. 40

*Raymond F. Barnes, direct.*

Q The only connections were at the two ends, one where it joined the pump itself, and the other where it was inserted into the filling tank of the motor truck? A Yes, sir.

10 Q Was that so during all the time that the five-gallon pump was in operation? A Yes, sir, I never saw it otherwise.

Q Did you or did you not ever see any leaks from the connection between the pump and the hose? A No, never.

Q Did you ever have occasion to go through the premises with the fire captains? A Yes, sir.

20 Q Did you ever have occasion to go through the premises with Mr. Warner or Mr. Curtis or any officers of the American Grocers Society or of the Florence Realty Company? A I did.

Q Can you tell us about how often Mr. Warner and Mr. Curtis came around? A At the first part of our occupancy they were there quite often. I should think they were there fifteen or twenty-five times.

Q Were they also there after the Florence Realty Company took over the ownership of the property? A Yes, sir.

30 Q What was the occasion of their coming there so often? A Well, there were a great many occasions. In the first place, the foundation of the building leaked. I recollect Mr. Curtis coming down to look at that. He was followed by Mr. Warner. Both Mr. Curtis and Mr. Warner came. I think if you will look at the lease you will find that that called for a sidewalk or a walk of some kind around a certain part of the building where there was a roadway and no sidewalk. They came down and  
40 wanted to waterproof the foundation and not put

*Raymond F. Barnes, direct.*

the sidewalk down, and so forth. But finally the whole side of the building was dug up—that is, the dirt on the outside of the building, I presume it would be the north side, was excavated.

Mr. Schotland: How long was this before the fire, and what has this to do with this case? 10

The Court: Only with respect to their being there.

Q Did they have any occasion, Mr. Barnes, to visit the loading bay and the loading platform? A Yes, sir, they did, on numerous occasions.

Q What was it that called for them coming down to the loading bay in particular? A The difficulty of the jack-knife doors operating, and the question of whose responsibility it was to repair those doors. That was in the front of the bay. 20

Q In the course of their trips over there, how many times would you say that they inspected the loading bay and that part of the building where the gasoline pump was installed? A I should think that one or the other of them was there six times— 30

Mr. Schotland: Just a minute, I object to that question. There is no evidence that they inspected it. This witness said they came there on account of trouble with the jack-knife doors.

The Court: Yes.

*Raymond F. Barnes, direct.*

*By the Court.*

Q How many times were they there? A I should say about six.

*By Mr. Vanderbilt.*

10 Q Were they where they could see and observe the pump? A Mr. Curtis stood alongside of the pump one day talking to me. I should think he was possibly eight or ten inches from the pump, or as near as the hub of an automobile wheel would be to the pump, with his foot on the wheel, and he explained to me what a fortunate thing it was that the company had put in this pump in such a convenient place so that the trucks could be filled. While he was explaining this, a truck was actually being filled, and  
20 he drew my attention to that convenience.

*By the Court.*

Q How long before the fire was that? A I don't know. I think approximately between a half a year and a year. It was one of these days where we were having difficulties with the jack-knife doors.

30 *By Mr. Vanderbilt.*

Q Did either Mr. Curtis or Mr. Warner say anything to you to the effect that you should not use the gasoline tank or the gasoline pump? A No one said that.

Mr. Schotland: I object to that. That is entirely immaterial.

The Court: He has answered it. I shall  
40 let it stand.

*Raymond F. Barnes, direct.*

*By the Court.*

Q Don't answer when an objection is made, Mr. Barnes. A All right.

Mr. Schotland: Besides, they are leading questions.

10

*By Mr. Vanderbilt.*

Q Did they or did they not ever direct you not to use the pump?

Mr. Schotland: I object to that.

The Court: I shall allow it.

Mr. Schotland: Exception.

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

20

Exception noted as ground of appeal.

A Neither Mr. Curtis nor Mr. Warner nor anyone else ever directed us not to use the pump.

Q Was there anything said between you on any of these occasions with reference to the use of this enclosed space for purposes of storing trucks? A Yes, sir, it began with the signing of the lease. That was one of the reasons that they used as a proper argument for the value of that building for a lease for our purposes, because of the fact that they were then themselves using it as a loading bay, and it had been designed by the architect that way. This bay set back from the front doors a sufficient distance as they told us and explained by measurements to back a truck in there and store it, and that was the reason it was built that way, so that this truck could be stored and loaded at night-time, and further it could be filled from a gaso-

30

40

*Raymond F. Barnes, direct.*

line tank which was alongside of it. And they also pointed out the fact that they had a water connection there so that the radiator of the car could be filled with water.

10 Q On the occasions when Mr. Curtis and Mr. Warner came over to see you after you became tenants, did they ever refer to your use of part of the premises for the purpose of storing your trucks? A They did. They said, "Wasn't it very fortunate that the building was designed that way, so that it can be used as you are using it?"

20 Mr. Schotland: If your Honor please, I move that all this be stricken out. It is contrary to the written lease, contrary to the provisions of the lease, and it is immaterial so far as the issues of this case are concerned.

The Court: I did not see anything in the lease that said anything about not storing cars there.

30 Mr. Schotland: There is nothing in the lease that they should use this for anything else more hazardous than the manufacture and storage of sashes, planes, and so forth.

The Court: They may have thought that it was not hazardous to store cars there. I think it is all right. I shall allow it.

*By Mr. Vanderbilt.*

40 Q Did Mr. Curtis and Mr. Warner or either of them on any of these occasions when they were over to see you after you became tenants speak of the condition in which the premises were kept? A Yes, sir, lots of times—

*Raymond F. Barnes, direct.*

Mr. Schotland: If your Honor please, this witness is surely intelligent enough to tell his story, and does not have to be led to say whatever counsel wants to put on the record.

(Question repeated.)

The Court: I do not know how he could bring it out except by that method.

10

Mr. Vanderbilt: If I did not do that, I would be leading.

The Court: I shall allow it.

A Mr. Curtis and Mr. Warner, whether separately or together, never neglected to refer to the fact of the splendid and cleanly condition in which we kept the building, what fine tenants we were, and how fortunate they considered themselves to have someone in the building who always paid the rent on the specified time and date. They never failed to refer to that.

20

Mr. Schotland: If your Honor please, this is just an attempt to prejudice the case.

The Court: I think the latter part of the answer might be stricken out, about the payment of the rent.

30

Mr. Schotland: That was just to make a speech for himself. If the Court is going to allow the witness to refer to such conversations, I think the witness ought to be instructed to state what either Mr. Curtis or Mr. Warner said to him, when it was said, where it was said, and so forth, so we can have some means of meeting it, and some means of determining whether it is competent.

40

*Raymond F. Barnes, direct.*

The Court: The paying of the rent is immaterial. Strike that part out.

Mr. Schotland: Aren't we entitled to have the time fixed when this alleged conversation took place?

10 *By the Court.*

Q When was that, about? A I can remember that Mr. Curtis and Mr. Warner were there the first time that we had difficulties with the jack-knife doors in front of the building.

Q About when was that with reference to the time of the fire? A I should say that the first time that I can recollect was more than two years previous to the fire.

20 Q That is the first. Now, when was the last, if there was more than one? A I say that the last case was probably two months and a half or three months before the fire. It was in the spring of that year of the fire.

Q And such a conversation was had? A Yes, sir. I can fix the date accurately—

Q That is close enough.

*By Mr. Vanderbilt.*

30 Q How long has the Barnes Manufacturing Company been in business? A Between fifty-one and fifty-two years, I think, 1876, a little over fifty-one years.

Q As part of their business do they bring in raw material and deliver the finished material? A We truck over the Metropolitan zone, within about 150 miles of City Hall, New York.

40 Q And that was true both before the lease as well as after the lease? A It has always been the policy of the company to make deliveries by truck.

*Raymond F. Barnes, cross.*

Q What was this particular warehouse used for, Mr. Barnes? Was it used for manufacturing or storage, or both? A It was used for a very small reconditioning manufacturing plant on the top floor in one corner where we would take out the panel of a door, for instance, or remove a sash bar from a two-light window to make it a one-light window. The balance of the building was used for the storage of doors, sash, glass, and for office space. In the bay that was provided, we stored some trucks there over night. The shipping department was alongside of the bay. 10

*By the Court.*

Q It was used almost exclusively as a warehouse? A Oh, yes. The manufacturing was done at the mill which was three miles further over on Westside avenue, Jersey City. 20

Mr. Vanderbilt: That is all.

*Cross examination by Mr. Schotland.*

Q Mr. Barnes, this building burnt down, didn't it? A Yes, sir.

Q On June 31, 1925? A That is my recollection of the date. 30

Q Were you there at the time of the fire? A No, sir. I got there after it started. I arrived there about ten minutes past night that morning.

Q Do you know what started the fire? A No, sir.

Q Don't you know that it started from the gasoline lighting up? A I do not.

Q Did you ever see any gasoline overflow onto the concrete floor? A From what? 40

*Raymond F. Barnes, cross.*

Q From anything. A No, sir.

Q You never saw any gasoline on that concrete floor? A No, sir.

Q You are positive of that? A Unless possibly sometime there might have been a drip come out of a tank, or something like that. If  
10 I saw that, it was immediately swept up.

Q Did you ever see any gasoline on the floor, or was it always immediately swept up? A I say I don't remember seeing any.

Q Did you personally ever test that pump? A Yes, sir.

Q What did you do in order to test it? A Turned the handle.

Q And did what? A That is all.

Q Did you pump gasoline into anything? A  
20 Sir?

Q Did you pump gasoline into anything? A No, sir. I don't think I did.

Q You never pumped gasoline? A I tested it with the handle.

Q How could you test it without pumping gasoline? A Because the end of the hose was shut off with a nozzle, and I simply pulled the handle under pressure.

Q You did what? A Pulled the handle under  
30 pressure.

Q Pulled the handle under pressure? A Yes, sir.

Q And what did that indicate? A Whether the thing was tight or not.

Q But you never pumped gasoline through it? A I never filled a gasoline tank from that pump that I know of. We have men for that.

Q Did you have anyone else make tests of that pump for you? A No more than the re-  
40

*Raymond F. Barnes, cross.*

port of the Standard Oil man who told me it was satisfactory and in perfectly good condition.

Mr. Schotland: I did not ask that.

The Court: Strike it out.

Q You had been around there every single day? A No, sir. 10

Q Didn't you say you were there from eight till half-past eight in the morning, and from two till five in the afternoon every day? A The days I was there.

Q Weren't you there practically every day? A I presume I might have been away a day a week, or a day a month, or something like that. But that was my business headquarters.

Q Outside of a rare absence, you were there practically every single day? A Yes, sir, with an inspection twice a day or oftener. 20

Q What did you inspect twice a day? A I inspected the glazing department, the sash department, the oak door department, the birch door department, the fir door department, the white pine door department, the shipping department, the storage department. Then I went down in the basement and examined always in the winter time the furnace room. That was always a constant inspection. The balance of the building I also covered. In fact, I covered the entire building. 30

Q You did that twice a day? A No, I did not.

Q Isn't that what you said? A No, I did not mean to, if I said it.

Q How often did you do that? A Usually about once a day the entire building. I said I examined this front bay twice a day. 40

*Raymond F. Barnes, cross.*

Q You examined the entire building once a day, and you examined this front bay twice a day? A As a rule.

Q By this inspection you mean you were going through it as the general manager of the business— A I don't mean anything of the sort.

10 Q Will you permit me to ask the question first? A I will be pleased to.

Q You mean you were going through as the general manager of this business to see that the stuff that was stored was in the places you had directed it to be put, that the things to be shipped were shipped, that the men who were working there were doing what they had been told to do? A No, I do not. I mean I made an inspection. That, as you say, was  
20 a part of the work that I did. The particular inspection that I made of those buildings was to see that the floor and all the rest of that building was clean. We had to be very careful about that, because dirt and dust was quite damaging to our goods. That is the reason I made these inspections.

Q This is a four-story and basement building? A Correct.

30 Q You were not doing any manufacturing there? A No more than I testified.

Q Except just in one corner on the top floor; is that right? A I testified to that, yes.

Q Just please answer my questions and not try to be technical. A I thought I had answered them.

Q Where would dirt on all the other floors come from? A The Central Railroad, an exposed open piece of property between the building and the Ryerson office building. Westside  
40

*Raymond F. Barnes, cross.*

avenue, and a carpet factory and an open street that was on the other side.

Q You mean dust would fly in through the windows? A Dirt and coal cinders from the railroad, which are very bad when they get on the doors, because the soft coal smudged, and we had to be exceedingly careful about all those things. 10

Q Were the windows kept open in this warehouse? A Yes, both open and closed.

Q What is that? A Both open and closed, depending upon the season, the conditions, and the time and so forth.

Q What did you do if soot would come in from the Central Railroad trains, or dust would fly in through the windows? A We carefully brushed off the door and took what is known as sheathing paper and laid the paper over the top of the doors that were vitally affected by this soot, and laid a heavy cross stick on it, a piece of wood about an inch and a half or an inch thick by approximately one and three-quarters to two inches wide, so as to keep the paper from being blown off or knocked off until the doors were taken away. 20

Q When you did that once, you did not have to do that again, did you? A Yes, we had to do it very often, sometimes a great many times a day. 30

Q You mean you had to replace that every time you moved something from underneath it? A Yes, sir.

Q That is the way you kept care over your stock? A Every time when it was necessary. It was not necessary to do that at all times.

Q And you made your inspections every single day for that purpose? A No, sir, I did not. 40

*Raymond F. Barnes, cross.*

I made it approximately every day for that purpose and for other purposes.

Q Every day that you were there? A Yes.

Q What else did you have to see was done, in your inspections? A Well, I can't very well tell you what else I had to see. I naturally  
10 observed everything I could look at.

Q What did you inspect about these doors? A Well, I can't answer that except to give an incident. We will presume that a report came to my desk from the receiving department which was the same as the shipping department to the effect that certain doors had come in a certain car under certain conditions. Then I would go up and inspect those doors with reference to  
20 whether the molding heads had come off or something of that kind. Sometimes it might be breakfast nooks. I would have to go up and inspect those. These inspections were so common and so known that these memorandums were left on my desk so that I could go about and make these inspections when I usually went around the building.

Q These are the inspections of the material used in your business? A We always kept the place clean. That was one of our most principal  
30 inspections.

Q Keeping the building clean, or the stock clean? A The building. If we kept the building clean we would not be very apt to have dirty stock.

Q You have just explained that the dirt came through the open windows. A Yes, sir, and when it would we took the precautions I told you. But that does not apply to every kind of a wood nor every kind of a door or sash. I do not think  
40 I quite understand what you want. I am trying

*Raymond F. Barnes, cross.*

to show you that we took every possible precaution.

Q You are trying to show me that you were a good, careful, conscientious general manager—

A That is what your clients told us we were.

Q (Continuing)—of this business, which I am not questioning. But I am questioning what your inspection of the building consisted of every day why it was necessary to make it daily separate and apart from examining the merchandise necessarily used in your business. That is what I am trying to get at. A I have repeatedly told you that in the movements we wanted to keep everything as clean as possible. Perhaps you could realize that if the dust on that floor was allowed to be two inches thick and you should move a door through it on the flat of the door, it would not be very good for the door. It is very natural that we should endeavor to see that every precaution was taken to keep the building that we occupied, your building that we occupied, in the best of condition. Consequently there were these inspections. It was our great aim to keep all of our plants in the best of condition, not only that one but every other.

Q I am satisfied with your aims. Were your doors painted or varnished, or anything like that? A I presume that practically every door we ever sold was varnished or painted, or something like that. Almost all doors you know are filled, Mr. Schotland, or varnished, but not when we handle them.

*By the Court.*

Q He was asking you what their condition was when you handled them. A We did not carry paint at all.

*Raymond F. Barnes, cross.*

*By Mr. Schotland.*

Q Just the raw wood? A Yes.

Q And that was what you were so afraid of the dust getting on? A Absolutely.

10 Q Can you account for the fire destroying our building with all this care that you took?

Mr. Vanderbilt: I object to that.

The Court: Objection sustained.

Q Do you know what caused that fire? A I think I testified that I didn't; I meant to.

Q You testified that you did not know? A I meant to testify that I didn't know what caused the fire.

20 Q With all these inspections, you say you never saw gasoline spilled on the floor, you never saw one of the chauffeurs overfill his tank and the gasoline overflow on the floor, you never saw him carelessly handle the hose before hanging it up and spill some gasoline on the floor? A I don't think I remember anything of the kind.

Q Nothing like that ever happened? A I don't say that. I say I don't remember anything of the kind.

30 Q Nothing like that ever happened in your presence? Is that what you want to say? A I don't know. I don't remember anything of the kind.

Q What I am trying to differentiate is between your receiving reports and your personal knowledge. Did anything like that every happen in your presence? A The answer is, "I do not think so," nor do I know of any time.

40 Q Do you know of anyone that you delegated to test this pump in action? A No, sir.

*Raymond F. Barnes, cross.*

Q What is that? A No.

Q There was no man delegated to do that?  
A I didn't say that. I don't know of anyone that I delegated, no, sir.

Q You didn't delegate anyone? A I don't know.

Q And you would know whether you did delegate someone? A No one but me. 10

Q Did you delegate anyone? A I said no, not that I know of. I don't remember delegating anyone to test the pump.

Q When you first moved into this building, you didn't store any cars there, did you? A Yes.

Q Didn't you store them in Ryerson's garage? A No, sir. 20

Q You never stored them there? A Yes, sir, we did. We had some cars in Ryerson's garage.

Q But you also stored cars in this building?  
A We had some cars in your building all the time.

Q Did you always use the gasoline there, too? A Sometimes we did, and sometimes we used other gasoline.

Q Didn't you for a period of several years get your gasoline from McLaughlin's service station, and not have gasoline there? A No, sir, we did not. We always had gasoline from the tank, and we always used it from the tank. 30

Q Within the last three months before the fire how many chauffeurs were using this gas pump, driving in trucks there? A I don't know.

Q You don't know? A No.

Q Why don't you know? A Well, I haven't the records to check up on the number of chauff- 40

*Raymond F. Barnes, cross.*

feurs we had. They were burned up in the fire. Is that the answer you want?

Q Can you tell us approximately? A Well, I can't, no. We might have had six or eight, maybe ten, I don't know. I have forgotten. This was in 1925. That is a long time to remember.

*By the Court.*

Q How many cars did you store in that plant? A I couldn't answer that, sir. I think usually three.

Q And you have always had more cars than that? A Yes, sir. We had cars stored in our other buildings.

20 *By Mr. Schotland.*

Q Were you there in the mornings when the chauffeurs would fill their tanks with gas? A Not very frequently, but sometimes; more usually during the day.

Q Were you there and did you see the chauffeurs fill their tanks in the trucks with gas during the last three months before the fire? A Well, not every day.

30 Q At any time were you there during the last three months? A Why, yes.

Q You were there? A Not in the morning; during the day.

Q During the day? A Oh, yes.

Q Did you ever see any gasoline spilled? A I have already testified to that, Mr. Schotland. No, I don't remember ever seeing any gasoline spilled there.

40 Mr. Schotland: That is all.

*James T. Barnes, direct.*

JAMES T. BARNES, sworn in behalf of defendant.

*Direct examination by Mr. Vanderbilt.*

Q Mr. Barnes, what position did you occupy in the Barnes Manufacturing Company? A I was president of the company. 10

Q How long were you president of the company? A From the time it was formed.

Q When was that? A Well, now, I don't remember exactly when that was. I suppose it was twenty years before.

Q How long had you been engaged in the sash and door business? A Up to the time of the fire?

Q Yes. A Fifty-one or fifty-two years. 20

Q Did you go through the plant before the fire at any times, Mr. Barnes? A Yes, sir.

Q When were you in the habit of going through the plant? A Well, purposely I went when I was not expected. I would go at times when I thought I was not being watched.

Q You did not have any regular time then? A No, sir.

*By the Court.* 30

Q You were a sort of a surprise to the boys; is that it? A That is the idea.

*By Mr. Vanderbilt.*

Q Did you ever go through the shipping department and this place where the trucks were kept? A Yes.

Q How often would you go down there before the fire? A Every day. 40

*James T. Barnes, cross.*

Q Did you ever observe the gasoline pump in operation? A Not in particular, no, sir.

Q Did you ever see any gasoline on the floor? A No.

Q Did you ever see the gasoline flow or leak? A No, sir.

10 Q In what condition was your plant kept, Mr. Barnes? A I do not think anything could be found fault with at all. It was inspected thoroughly all the time. I went over it myself from top to bottom. We made a point of having one of the best places there was in the line, in our line.

Q Did anyone ever make any report to you about any leak in the gasoline pump or the gasoline hose? A No, sir.

20 *By the Court.*

Q Your customers did not come in there and go through the plant, did they? A Oh, yes, sometimes they did.

Q It was not a retail place, was it? A Well, no, hardly a retail place, but at the same time we had customers go through our plant.

30 Q Is that why you kept it clean, because customers would like to take a look at it? A We would like to have them see it.

Q Was that the purpose of keeping it clean? A No, for the purpose as the previous witness testified.

Q Why? A Because it was our business.

Q You mean to protect your stock? A Yes, sir.

*Cross examination by Mr. Schotland.*

40 Q You made no personal inspections of this gasoline pump? A No, I did not.

*James T. Barnes, cross.*

Q You haven't any recollection of seeing it in actual use? A Oh, no; if I had I would have stopped it immediately.

Q What is that? A If I had, would have stopped it immediately.

Q You didn't understand my question, Mr. Barnes. I say you have no personal recollection of seeing it in operation? A Oh, yes. I saw it in operation. 10

Q When was the last time? A I couldn't say that.

Q How long before the fire? A I should say the week before. I couldn't say that because I was away. At the time of the fire I was away in Buffalo.

Q How long before the fire? A Repeatedly I had seen them fill the cars. 20

Q How long before the fire was the last time you saw them filling the cars? A Certainly not more than two or three weeks.

Q Do you remember when you left? A When I left?

Q Yes. A I think it was the 4th of June.

Q You remember you testified in this case when it was tried before? A What is that?

Q You recall testifying in this case on the previous trial? A Oh, yes. 30

Q You were asked this question:

"When was the last time that you have a distinct recollection of having seen the pump in action?"

Your answer was:

"The third day of June."

The next questions and answers were:

"What happened on the third day of June which impresses it on your mind?" 40

*James T. Barnes, cross.*

Your answer was:

"I went away for a vacation."

The next questions and answers were:

"Q You were away at the time of the fire?

A I was.

10 "Q The third of June is the last time before the fire you were at this building? A Exactly."

Q Do you recall that? A Well, I think that is carrying out the answer I just gave.

Q I am asking you if you recall that testimony? A I do not, but I should judge that is right.

Q The next question you were asked was:

"Did you on that occasion observe the pump in action? A No, sir, I couldn't say I did.

20 "Q What I ask you is if you have any recollection when was the last time that you actually saw the pump being used. A No, I couldn't tell you that. I was there every day. Every so often that it would come into my mind to examine it, I would go to every department.

"Q You haven't any distinct recollection as to when it was? A No.

30 "Q As a matter of fact, did you make it your business to test the pump yourself? A No.

"Q You saw it was there and know it was there? A I hired a man for that purpose, to manage the warehouse, and he was supposed to take care of his business, and if he didn't he would hear from me."

A That sounds natural.

Q Do you recall that? Do you recall so testifying? A Probably I did.

40 Q Is your recollection better today than it was in 1926 when you gave this testimony? A

*James T. Barnes, cross.*

I do not know how to answer that. I hardly think it is as good as it was at that time.

Q I have called you attention to the fact that when you testified in 1926 you were unable to say when you had last seen the pump in action. Do you now say that you saw it in action two or three weeks before the fire? A 10  
I should say two or three weeks, yes, sir, certainly I did. I saw it every day, more or less. I couldn't go in the place, I couldn't go upstairs without seeing it.

Q Well, how do you explain this:

"What I ask you is if you have any recollection when was the last time that you actually saw the pump being used. A No, I couldn't tell you that."

Back in 1926, four years ago, you couldn't 20  
tell us when was the last time that you saw the pump in use. You now say it was two or three weeks before the fire? A I think you have an answer before that which is just what I told you now. If my recollection is right, you read such an answer before.

Q I haven't any such answer. I read to you the entire question and answer, Mr. Barnes. I did not hold anything back from you. You testified in October, 1926, as I have read to you. 30  
At that time you said that you left for your vacation on the third of June. That is about three weeks before the fire.

Mr. Vanderbilt: I think, Mr. Schotland, there was a question before the one you just read to the witness to which question he answered that he examined it.

The Court: That was one of the very first answers you read.

*James T. Barnes, cross.*

Mr. Schotland: I read that—

The Court: That is what the witness says.

Mr. Schotland: Then afterward he changed that.

10 *By the Court.*

Q Do you understand the question, Mr. Barnes? Are you sure now that it was three weeks before the fire that you saw this pump in operation, or can't you recall when you last saw it in operation? A Your Honor, I couldn't say exactly about that. You know how that is. I went in and out every day, but always looked around, especially when I came in.

20 *By Mr. Schotland.*

Q What time of day was it that you went in and out there? A In the morning from I guess about eight or half-past eight till noon-time. In the afternoon I was there three or four hours. I was there very regularly.

Q Would the truck drivers be coming in or leaving with their trucks at those hours? A They came and went. I couldn't tell you anything about that, you know. Trucks will come in and go out at all times of the day. On different days it would be different times.

30 Q You saw them frequently? A Oh, yes.

Mr. Schotland: That is all.

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*James C. Barnes, direct.*

JAMES C. BARNES, sworn in behalf of defendant.

*Direct examination by Mr. Vanderbilt.*

Q Mr. Barnes, what is your business at the present time? A I am the president of the Morristown Lumber and Supply Company. 10

Q Back in 1925 what was your business? A I had charge of the warehouse of the Barnes Manufacturing Company.

Q In connection with your duties as manager of the warehouse, did you have to go around this shipping bay and receiving platform? Was that part of your work? A Many times a day. In fact, if I stood in the shipping department, there was a window that overlooked the bay, and when I was in the shipping department it was my habit to occasionally glance out there and see what was going on, besides inspecting it. 20

Q Did you have anything to do with the loading and filling of gasoline in the trucks? A Occasionally.

Q Did you ever at any time see the pump leaking? A I never did, no, sir.

Q Did you ever at any time see gasoline on the floor? A No, sir. 30

Q Will you describe the pump? A When I took charge of the warehouse for the company there was a one-gallon pump there. You had to turn it five times to pump five gallons. So I made arrangements with the Standard Oil Company to put in a modern up-to-date pump which would pump five gallons at one lift and that I could keep locked, and that also had a register that showed the number of gallons of gasoline that we used. 40

*James C. Barnes, direct.*

*By the Court.*

Q When was that? How long before the fire?

A I would judge it was about a year prior to the fire.

*By Mr. Vanderbilt.*

10

Q Did you keep a record of the gasoline used?

A I kept a separate book for every truck showing the quantity of gasoline that they used, and I compared that monthly with the amount of gasoline that was delivered to us by the Standard Oil Company. An accurate check was kept at all times on that.

Q How close would that check? A That would vary two to three gallons a month.

20

Q How many gallons would you use there in the course of a month? A I don't know as I could tell you that exactly. I would think that we filled in the neighborhood of 11 to 15 cars of various descriptions during the day. I would imagine that we would use in the neighborhood of—well, I couldn't tell by the month. It was several hundred gallons that we used weekly there.

30

Mr. Schotland: If your Honor please, the witness has testified he kept a check, an accurate account. Instead of the witness being permitted to guess—

The Court: He is not guessing; he says he does not know.

Mr. Schotland: I ask that he produce the record that he says he kept.

*By Mr. Vanderbilt.*

Q Have you got that check? A The records  
40 which I had were kept in little brown books—

*James C. Barnes, direct.*

*By the Court.*

Q The question is: Have you got them? A  
The records were destroyed in the fire.

*By Mr. Vanderbilt.*

Q Will you describe the hose attached to this 10  
five-gallon pump? A The hose that was at-  
tached to the pump was an ordinary hose which  
was supplied and furnished by the Standard Oil  
Company, as was all other equipment.

Q About what length was it? A I would say  
it was about ten feet long.

Q Was there any division in the middle of it,  
or was it one single hose? A I never saw any  
division in the middle of it.

Q How many times did you see this hose? 20  
A Several times every day.

Q Then you know that there was no division  
in it; is that right? A Yes, sir.

Q The hose was connected to the upper part  
of the pump? A Yes, sir.

Q And the other end of it would be inserted  
in the filling tank of the car? A That is right.

Q And there were no other connections on  
the hose except at these two ends? A No, sir.

Q Did you ever observe any leaks from this 30  
hose? A No, sir.

Q Did you ever see any gasoline on the floor?  
A No, sir.

Q How often was the hose that was attached  
to the pump replaced, and new hose obtained?  
A The hose was inspected, the equipment was  
inspected periodically by the Standard Oil people.  
I would imagine the inspector was there about  
every two to three weeks. If my knowledge  
serves me correctly, there was a new hose put 40

*James C. Barnes, direct.*

on the pump two or three days prior to the time of the fire.

Q Who took care of that work? A The Standard Oil Company did all of that work.

Q Were you ever present when Mr. Curtis and Mr. Warner came around? A I usually took  
10 them through the plant.

Q Do you recall any conversations with them with respect to the use of the tank and the use of the pump? A I do, sir. It was my custom when we came out to come out the front door and turn left by the loading bay. I would climb up on the platform and go back to the shipping department. At one time they stood and talked to me while a truck was being filled. I don't  
20 know the gentlemen apart, but the tall gentleman stood with his foot on the running board and I had mine alongside of his at the time. The truck was being filled. It stuck in my memory because his foot was so much larger than mine.

Q What did he say? A They always admire the condition that the premises—

Mr. Schotland: I object to that.

*By the Court.*

30 Q What did they say? What was said? A At the time—

Q At the time you looked at his feet. What was said by him if anything at that time? A There was nothing said at that time about the tank.

Q What did he say at any other time? A There was never any conversation as far as my knowledge goes about the tank between any of us. He was just around at the time, and looked at  
40 the truck being filled.

*James C. Barnes, cross.*

Q And said nothing? A Said nothing as regards to filling the tank.

Q Well, did he say anything with reference to the location of the tank? A No, sir, we were standing right alongside of it.

*By Mr. Vanderbilt.*

10

Q They saw it in operation? A Yes, sir.

Q Did you have any water cap there and a hose connected to it? A Yes, sir, we did.

Q What was that used for? A Filling of the trucks and to wash the dirt which accumulated out of the loading bay and also occasionally people came in there and took a drink. We had to keep that thing flushed.

Q Was there any leak in connection with that water hose? A As far as my knowledge goes there was not. But the hose was turned on and turned off a great many times a day, and the slope was toward the street. If there was any water in the hose, there would be a tendency for the water to run down the loading bay.

20

Mr. Vanderbilt: That is all.

*Cross examination by Mr. Schotland.*

30

Q Mr. Barnes, you now say that you never saw gasoline spilled on the floor, do you? A I believe that is what I said.

Q You have just sworn that you never saw gasoline spilled on the floor, and that there was a new hose put on three or four days before the fire? A I did not say that there was a new hose put on, but I believe that one was installed shortly before the fire.

40

*James C. Barnes, cross.*

Q Do you recall testifying in October, 1926, in this case? A I recall the fact that I did testify.

10 Q Do you remember being asked by counsel for your own company this question: "Q Have you seen the men spill gasoline from the end of the pump after filling and pulling it out? A I have seen a little occasionally." Do you remember so testifying? A I do not recall that, no, sir.

Q Which is true, that you did see gasoline spilled on the floor, or that it never happened? A No, I never saw gasoline spilled on the floor from the pump.

20 Q Then when you testified here on direct examination back in 1926 that you did, you now claim you were mistaken? A I have seen gasoline when they put the hose up, when they went to put the hose up, drop on the floor. But I never have seen any gasoline spilled from the pump. I have seen a little drop out when they put the top back on the hook occasionally.

30 Q Just a moment. I repeated to you the question that was asked by the counsel for your company the last time you testified. I will do so again: "Q Have you seen the men spill gasoline from the end of the pump after filling and pulling it out? A I have seen a little occasionally." A That is from the end of the hose?

Q It is just what the question asks. Is that true? A If it is from the end of the hose, I would say that it was.

Q And where would that gasoline go to, when it was spilt? A It would go on the floor.

40 Q And then what would be done? A It would be cleaned up immediately.

*James C. Barnes, cross.*

Q How often do you now say that you saw that happen? A That I could not tell.

Q Why did you testify today that you never saw gasoline spilled on the floor? A I understood you to say gasoline—

Q Not in answer to my question, but in answer to Mr. Vanderbilt's question. A Because 10  
I thought he meant from the pump, from the leak in the pump.

Q You used this particular pump a little over a year before the fire, did you not? A I couldn't give you the exact date.

Q What is the best of your recollection? A I said about a year.

Q Was anything done to it in that year? A It was inspected and kept in repair by the Standard Oil Company. As to what they did, I 20  
couldn't tell you.

Mr. Schotland: I ask that that be stricken out.

Q I am asking you whether anything was done to the pump during that year. Did it ever get out of order, to your knowledge? A The pump was kept in repair.

*By the Court.*

30

Q The question is: Did it ever get out of order? A The pump always worked while I was there.

Q It never got out of order? A No, sir, not as far as actual operations are concerned.

*By Mr. Schotland.*

Q The pump never got out of order during all the time it was use?

40

*James C. Barnes, cross.*

The Court: He said, "Not as far as actual operations are concerned."

Q How were the tanks in the trucks filled from this hose if it was not lengthened? A How were they filled from the hose?

10 Q Yes. A The trucks would drive—they were usually filled in the morning. That is, some were filled in the morning, and some were filled during the day. Sometimes they were filled when they drove out—

*By the Court.*

Q How could you pump the gas from the pump to the gas tank in the car? A With the hose which was attached to the pump.

20 Q So that the automobile had to get within reaching distance of that one piece of hose; is that it? A Yes, sir.

*By Mr. Schotland.*

Q Then when you had two trucks or three trucks in this bay, could you fill the gas tank of a second truck without moving the first truck out, the one that was near the pump out of the way?

30 A A truck couldn't be filled unless it was close to the pump. That was the place it was supposed to be filled.

Q What I want to know is this: Was that hose that you are describing long enough to fill a second truck while the first truck that was filled remained in its original position? A You are asking me a question that I can't answer, that I can't understand.

*James C. Barnes, cross.*

*By the Court.*

Q Here is a car that goes up to the pump and has its gas tank filled. Could you fill another truck while that car stood there? A No, sir.

Q Why couldn't you? A Because it wouldn't reach far enough. 10

Q What wouldn't reach far enough? A The hose.

*By Mr. Schotland.*

Q The morning of the fire wasn't Marvin's truck there, the one that he was driving? A Was it where?

Q In this bay. A It was there when I left the night before.

Q And wasn't Coriell's truck in this bay when you left the night before? A Yes, sir. 20

Q They were both in there? A Yes, sir.

Q What time did you get there the morning of the fire? A Shortly after eight.

Q By that time the building had been burnt down? A No, it was burning.

Q Were there any trucks in the bay? A That I couldn't tell. You couldn't see for the flames.

Q The Barnes Company are not in business any more, are they—the Barnes Manufacturing Company? 30

Mr. Vanderbilt: I object to that.

The Court: What difference does that make?

Mr. Schotland: They were making such a point about their being in business.

The Court: Oh, no, I do not think so. They said how long they were in business. 40

*William Belloff, direct.*

(Argument.)

The Court: We shall take a recess now until tomorrow morning.

10 At one o'clock, P. M., a recess is taken until tomorrow, November 25, 1930, at ten o'clock, A. M.

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SECOND DAY.

November 25, 1930.

Continued pursuant to adjournment.

Present, counsel as before stated.

20 WILLIAM BELLOFF, sworn in behalf of defendant.

*Direct examination* by Mr. Vanderbilt.

Q Mr. Belloff, by whom are you employed? A Standard Oil Company of New Jersey.

Q And how long have you been employed by that company? A It will be eleven years this January.

30 Q What is your business? A Pump repairman.

Q Were you familiar with the pump and the hose used by the Barnes Manufacturing Company in the loading bay of the building occupied by them at 247 Westside avenue, Jersey City? A Yes, sir.

40 Q Over how long a period prior to the fire which occurred on June 23, 1925, were you familiar with that pump and the hose connected with it? A I was over there several times.

*William Belloff, direct.*

Q Over how long a period of time? A Before the fire?

Q Yes. A Three days before the fire.

Q That was the last time you were there? A Yes, sir.

Q When you were there three days before the fire, what was the condition of the pump? A 10  
The pump was in fine condition.

Q What if anything did you do three days before the fire with respect to the hose? A Only changed it.

Q What kind of a hose did you put on three days before the fire? A Fifteen foot length of one inch hose.

Q Was that hose in one or more pieces? A That was in one piece.

Q Was the hose that you put on three days 20  
before the fire, this fifteen foot one inch hose, a new hose? A Yes, sir.

Q Was it of Standard equipment? A Yes, sir.

Q Prior to three days before the fire when you went there and put on the new hose, what kind of hose had been on the pump? A There was another length of fifteen feet, but it was squashed and we had to change it.

Q Was that piece of fifteen foot hose that you 30  
just referred to, which you say was squashed and you had to change, in one piece or two pieces? A Well, there was one there with two pieces for over a night or so.

Q I am asking you about the hose that you replaced three days before the fire. A That was one piece.

Q That was one piece? A Yes, sir.

Q That was replaced because it had been squashed and the gas wouldn't go through it? 40

A That is the idea, yes, sir.

*William Belloff, direct.*

Q How long had this piece of hose which was squashed and which you say was a single fifteen foot length, how long had that been on? A I should judge about week, that is all.

Q It had been on about a week? A Yes, sir.

10 Q Prior to that what kind of hose had been connected to the pump? A There was a two-piece length of hose on there for about a night or so, that is all. We didn't have the length of hose on the car at that time.

Q Why do you say that that two-piece length of hose which was the third one back from the time of the fire, going back in point of time, was only on there for a night or so? A Well, we didn't have the length of hose on the car, so we just left it on temporarily for the night.

20 Q Why was it only left on temporarily over night? A It is against the rules of the company to leave two pieces of hose on the pump.

Q What was the condition of the pump at the various times that you saw it? A The pump was in first-class condition at all times. It was just the hose.

Q What was the condition of this loading bay at the various times that you saw it? A Everything was all right when I was there.

30 Q Did you or did you not at any time see any evidence of gasoline loose on the floor? A Not, while I was there, no, sir.

Q At the time you put on this new fifteen foot one inch single length of hose three days before the fire, did you test it before you left the place? A Yes, sir, we always test them to see if they do leak.

40 Q Was it working in good condition at that time? A Yes, sir, we wouldn't leave it if it wasn't.

*William Belloff, cross.*

Q Did it or did it not leak when you left it three days before the fire? A It did not leak. We tested it always.

Mr. Vanderbilt: You may cross examine.

*Cross examination by Mr. Schotland.* 10

Q You are still employed by the Standard Oil Company? A Yes, sir.

Q About how many pumps do you examine a day? A We just go by calls.

Q By calls? A Yes, sir.

Q Have you any record of when you received any calls for this pump and this hose? A I haven't got them with me, no, sir.

Q What makes you remember the exact time when you put on the hose on this pump? A Well, I can just about judge that it was around that time, three or four days before the fire, because I was down there and made sure. 20

Q Did you know when the fire occurred? A Yes, sir, I went down there that morning and looked at it.

Q What time that morning? A I think we went down there around twelve o'clock.

Q What did you go down there for? A We heard that there was a fire there. 30

Q Where is your office? A 90 Hoboken avenue.

Q Jersey City? A Yes, sir.

Q You went down there and looked at it the day of the fire? A Yes, sir.

Q You remember that? A Yes, sir.

Q And you remember when the fire occurred? A I do not know exactly the time it started, no.

Q I mean the date. A Yes, sir. 40

*William Belloff, cross.*

Q When did it occur? A June 24th, I think.

Q What year? A 1925.

Q You just heard Mr. Vanderbilt tell you that it occurred on June 23, 1925, in asking you a question, didn't you? A I don't recall.

10 Q What is that? A I don't recall it just now.

Q Isn't your memory good? A I think so.

Q What is that? A I think so.

Q And yet you didn't recall that you had been informed less than five minutes ago that the date of the fire was June 23rd? A (No answer.)

Q How many days before the fire were you at this place? A About a week before that.

Q A week? A Yes, sir.

20 Q You said three or four days on direct examination. A Before the fire?

Q Yes. A Yes, that is when I changed the hose.

Q I just asked you how many days you were there before the fire. A Three days before the fire.

Q Why did you just say a week? A I mean the other length of hose that I changed.

Q You thought I asked you about the other length? A That is what I understood.

30 Q That is what you understood when I asked you how long before the fire you were there? A I understand it now.

Q You were there three days before the fire? A Yes, sir, three days.

Q You are sure of that? A Yes, sir.

Q You have a positive recollection of having been there three days before the fire? A Yes, sir.

40 Q How did you come to go there three days before the fire? A There was a call there.

*William Belloff, cross.*

Q Have you got a record anywhere of such calls? A Not here.

Q Have you got a record anywhere? A I might have in the office.

Q You knew you were to come here to testify about the condition of this hose and pump, didn't you? A Yes, sir. 10

Q Why didn't you bring your records with you to give us the dates when you were there and when you did things to it? A That is up to the company. They didn't give me that.

Q What is that? A I say the company didn't give me that.

Q Did you look up anything to refresh your recollection before you came here? A I never have anything like that. I turn it into the office when I am finished with it. 20

Q When you were told that you were coming here this morning to testify about the condition of this pump and hose, did you before coming here look over the records in the office to refresh your recollection? A No, sir, I did not.

Q You did not? A No.

Q Are you sure of that? A Positive.

Q And you now have a positive recollection that three days before the fire you were there and changed that hose? A Yes, sir. 30

Q Is that the only hose you changed on that day? A No, we do other work besides changing hose.

Q What is that? A We do other work besides changing hose.

Q Why don't you listen to the question, please? Is that the only hose that you changed on that day? A At that place, yes, sir. 40

*William Belloff, cross.*

Q At any place, anywhere, did you change a hose at any other place that day? A That I couldn't say.

Q Why not? A I would have to go and get the calls and look that up.

10 Q What is that? A I would have to look the calls up.

Q How do you know this one without looking it up? A I can just about remember.

Q This is the only one you remember out of all your work, is it? A Not all of them, no.

Q Do you remember any other work you did on that same day? A Yes, I tested a pump on the Boulevard.

20 Q You did what? A I tested a pump at the Audubon garage on the Boulevard. That is how we knew that there was a fire there.

Q Now you are talking about the day of the fire? A Yes, sir.

Q I am talking about the day that you changed this hose. Do you remember any other work you did anywhere that day? A I don't think I can.

Q You also remember distinctly that a week before you also changed the hose? A About a week, yes, sir.

30 Q That was also on a call? A Yes, sir.

Q That is, there was a complaint from the Barnes Manufacturing Company that the hose was out of order; is that it? A That they wanted a new hose, yes, sir.

Q You recall that distinctly now? A Yes, sir.

40 Q Do you recall any other work you did that day when you changed this for the Barnes Manufacturing Company? A I went down to the Bayonne Refinery that day.

*William Belloff, cross.*

Q What is that? A I think we went to the Bayonne Refinery that day and fixed a leak in the cellar.

Q You think so? A Yes, sir.

Q Are you positive of it? A I imagine I would be.

Q I did not get that. A I said I imagine so. 100

Q You imagine so. Do you remember anything else? A No.

Q When had you been to this Barnes warehouse before, going back of the week and three days before the fire? A I judge about a month or so after.

Q You judge about a month or so? A Yes.

Q What did you do then? A I think the nozzle was broke, we had to put a new nozzle there. 20

Q Are you sure of it? Do you remember it? A Yes, sir, positively.

Q And you went there on a call, too? A Yes, sir.

Q You never went there except on a call? A No, sir, that is the only way we go to places.

Q You don't go around to these private stations and make any inspections as a regular thing? A No, sir, just calls.

Q When the hose that was on there only a week was squashed, did it leak? A No, sir, it did not leak. 30

Q What effect did the squashing of it have? A They couldn't get any gas through it at all.

Q The gas wouldn't flow at all? A No, sir.

Q That is the only effect it had on it? A Yes, sir.

Q And you are positive that there was a hose there with another hose coupled on for only one night? A That is all. 40

*William Belloff, cross.*

Q When was that? A That was the day before we changed that other hose that was squashed.

Q You are making that about ten days before the fire? A Around that time, yes, sir.

10 Q What is the objection to a hose with another hose coupled onto it? A The company won't stand for it, for some reason, I don't know. It was always against the rules to have two of them connected together.

Q They don't leak between the couplings, do they? A If they are not made tight, they do. We always make sure. We test them out before we leave.

20 Q How many times in all do you remember having been at this Barnes Company warehouse? A About six times I guess.

Q Three times? A Six.

Q You told us of three times. Once you fixed the nozzle or changed the nozzle. Once you changed the hose when it was squashed. Why did you change the hose a week later, or three days before the fire? A Well, that was squashed, that hose that was on there.

30 Q A week before, the hose was also squashed? A Yes, sir, that is why we put the two pieces on there.

Q When were the other three times you were there? A I think we had to put two plugs in the fill pipe.

Q Do you recall when you did that? A I don't remember the dates.

Q You don't recall the dates, not even the year? A No.

40 Q Was it the same year? A I think it was early that year, 1925, around that time.

*Kenneth Clifford Hunt, direct.*

Q What did you do on the other two occasions? A I think the other two were handles that we had to change.

Q You are not sure of it? A I know once we had to change the handle.

Q Do you recall when you did that? A I think the same time we had a plug there, about a day after. We didn't have any on the car. 10

Q Then that would not make six visits if it was on the same visit as the time you put in the plugs? A We didn't have the handle on the car at that time.

Q Now, what is the other occasion? A I think it was a handle, too. I know we had two handles down there.

Q Do you recall when that was? A No, I can't. 20

Q You never went there without a call from the company? A No, sir.

Mr. Schotland: That is all.

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KENNETH CLIFFORD HUNT, sworn in behalf of defendant.

*Direct examination* by Mr. Vanderbilt. 30

Q Mr. Hunt, where do you live? A 237 Fowler avenue, Jersey City.

Q By whom are you employed? A Pennsylvania Railroad.

Q In what capacity? A Fireman.

Q Were you formerly employed by the Barnes Company? A Yes, sir.

Q And in what capacity? A Why, I was one of the drivers. 40

*Kenneth Clifford Hunt, direct.*

Q How long did you work for the Barnes Company? A About five years.

Q When did you leave their employ? A Two weeks after the fire.

10 Q Were you familiar with the gasoline pump that was installed there on their premises at 247 Westside avenue, Jersey City? A Yes, sir.

Q Did you use it from day to day in loading your truck? A Yes, sir.

20 Q Will you describe to the Court and the jury just what that pump was, and what the hose was at the time of the fire—what kind of a pump it was and what kind of a hose it was? A The pump itself I believe was a one gallon capacity pump. That is, when you turned the handle up, you would get one gallon at a time. The hose was about fifteen feet.

Q What was the condition of the pump? Was it in good working order or not? A Good working order.

Q Did you or did you not see gasoline on the floor of this loading bay? A Well, no, I never saw gasoline on that loading floor.

30 Q Will you describe the hose? What length of hose was it? A It was a piece of hose about fifteen feet long, one piece.

Q Did you or did you not see what was the condition of the hose? A The hose was, as far as I know, always in good condition.

Q Did either the pump or the hose leak while you were using it? A No, sir.

40 Q In addition to the gasoline hose, was there any other around there? A There was a water hose right alongside the gasoline pump, a spigot in the wall with quite a bit of hose attached to it. We used to use that for washing the trucks

*Kenneth Clifford Hunt, cross.*

and the watchman washed the gangway down with it.

Q Did that water hose ever leak? A No.

Mr. Vanderbilt: You may cross examine.

*Cross examination by Mr. Schotland.*

10

Q Mr. Hunt, the pump that you described—is that the pump that was there at the time of the fire? A Yes, sir.

Q A one gallon pump? A As far as I know, it was a one gallon pump.

Q Did you fill your tank in your truck that you were driving from that pump? A Yes, sir.

Q How often? A I used to fill it every morning.

20

Q Every morning? A Every morning.

Q What time in the morning? A Well, I was always pretty near the first driver there. My truck was the last one in at night. The other trucks used to park in there, and I couldn't get to the pump right away.

Q You were the first one on the job in the morning? A Well, I was about the first driver to get my truck out in the street.

Q Did you miss out this morning of the fire? A No, sir. 30

Q Were you there at the time of the fire? A Yes, sir.

Q You got your truck out? A My truck was out about a half an hour before the fire started, out on the street.

Q Your truck was out on the street? A Yes, sir.

Q And Marvin's truck was inside? A His truck was inside.

40

*Kenneth Clifford Hunt, cross.*

Q And Coriell's truck was inside? A Yes, and a little light tractor was inside.

Q And the doors were shut down, these jack-knife doors? A Two doors were open.

Q Which doors were open? A The doors on the north side of the building.

10 Q Then you saw the fire, did you? A No, I didn't exactly see it. I was in the office at the time I heard them holler.

Q What did you hear? A I heard somebody yell, "Fire!" and I looked out the window and I seen everything blazing.

Q Where did the blaze come from? A Right around the truck.

Q At this loading bay?

20 Mr. Vanderbilt: I object. The witness did not say that. This is not cross examination. Apparently counsel is making this man his own witness.

The Court: Yes, this is not cross examination with respect to the fire. Nothing was asked him about the fire.

30 Mr. Schotland: Except as to the pump that was there, and the conditions, and the fact that he never saw any gasoline on the floor.

The Court: He said he never saw any gasoline before the fire.

Mr. Schotland: He did not limit it. He said he never saw any gasoline on the floor. This is cross examination of that statement.

40 The Court: No, I think not. I sustain the objection. You may ask him what he saw while he was there. He could not see gasoline on the floor when it was blazing and he was in the office.

*Kenneth Clifford Hunt, cross.*

The Witness: I was trapped in that office, I couldn't get out.

The Court: I shall let the testimony that he has given stand, but do not pursue it any further because it is not proper cross examination.

Mr. Schotland: May I know what the last question and answer were which your Honor is allowing to stand? 10

The Court: Certainly.

(Question and answer repeated as follows:  
"Q Where did the blaze come from? A Right around the truck.")

*By the Court.*

Q Where was the truck standing when you saw the blaze? A Right over at the corner, by the pump. 20

*By Mr. Schotland.*

Q Was anyone else in there besides Marvin and Coriell? A I don't know. I was too busy sending in a fire alarm at the time.

Q Before you got busy sending in the fire alarm, do you know whether anyone else was in there besides Marvin and Coriell? A No, Coriell and Marvin. 30

Q They were the only ones in there? A Yes, sir.

Q Now, Mr. Hunt, loading up there every morning for years you say you never saw gasoline on the floor? A No, sir.

Q It never happened that any driver in your presence spilled any gasoline while he was filling his tank? A No, sir. 40

*Kenneth Clifford Hunt, cross.*

Q And it never happened in your presence that any driver overfilled the tank so that it overflowed and gasoline flowed down on the floor?

A No, sir.

Q That never happened? A No, sir, not in my time.

10 Q And you were there five years? A Yes, sir.

Q It never even happened that after you got through filling the tank and you were putting the hose up some gasoline dropped down? A You don't drop the hose on the floor. When you take it out of the tank you hold it up in the air, don't you?

Q You hold it up in the air. Then how does the hose get squashed? A Well, it was a long  
20 hose, fifteen foot.

Q What squashes it? A Possibly some man would come in there and maybe run over it with the front wheel of the truck, or something.

Q How could he run over it if it wasn't on the floor? A It might be sticking on the floor about that much (indicating).

Q What do you mean? A It could be hanging up on the gas pump and just hang over enough to be crushed, because it was a tight  
30 place to get trucks in. There were four trucks to be put in there.

Q You mean if anyone jammed up against the pump? A No, over the hose. You couldn't jam up against the pump because it was right tight against the wall.

Q Wasn't the hose hanging onto the pump? A Yes, but it was a fifteen foot hose.

Q When it was hanging on the pump it was not stretched out for a fifteen foot length, was it?

40 A No, not when it was hanging on the pump,

*Wayne Morrell, direct.*

but there would be a little overlap where it would hang on the ground.

Q Did you ever see the hose squashed? A I saw the hose squashed once, yes.

Q When? A About three weeks before the fire.

Q Three weeks before the fire? A Yes. 10

Q You didn't see it squash a week before the fire? A Well, there were several hoses put on, but I don't know the exact dates of them.

Q You saw it squashed three weeks before the fire? A I saw it squashed once.

Q That is the only time? A That is the only time.

Q You didn't see it squashed a week before, and you didn't see it squashed three days before? A No. 20

Mr. Schotland: That is all.

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WAYNE MORRELL, sworn in behalf of defendant.

*Direct examination by Mr. Vanderbilt.*

Q Mr. Morrell, what is your business? A Insurance. 30

Q With what companies are you connected? A With the Associated Mutual Insurance Companies.

Q What is your connection with those companies? A As Newark manager for the Lumbermen's Mutual Casualty Company.

Q In connection with your work, did you ever visit the Barnes Manufacturing Company in Jersey City? A I did. 40

*Wayne Morrell, direct.*

Q Did your company insure their trucks and automobiles? A We did.

Q Did you have occasion to look at those trucks in the warehouse and factory at 247 West Side avenue, Jersey City?

10 Mr. Schotland: I object to that as immaterial. We are not interested in the trucks.

Mr. Vanderbilt: I am leading up to something.

The Court: Standing by itself perhaps that is not important, but what follows may be. I shall allow it.

*By the Court.*

20 Q Did you? A I did not.

*By Mr. Vanderbilt.*

Q You did not see the trucks there? A I saw trucks standing there from time to time, but not with any intent on my part to investigate.

Q Did you ever notice the gasoline pump in the loading bay? A I did.

30 Q Were you ever in the loading bay of that factory to look it over? A I was in it to look into the plant, but not to make a special investigation of the loading bay.

Q Did you ever see any leaks of gasoline from the tank or the hose, or any gasoline on the floor?

40 Mr. Schotland: I object to that. This witness has testified that he did not make an inspection.

*Wayne Morrell, direct.*

The Court: But he was there. For what it may be worth, I shall allow him to tell what he saw when he was there.

Mr. Schotland: You can call the other 123 million residents of this country who did not inspect it.

The Court: But they were not all there. This man was there. He was an insurance man that went there to insure. It is for the jury to say whether a man that was insuring property would be observant of conditions, or otherwise. I shall allow it. 10

Q (Question read.) Did you ever see any leaks of gasoline from the tank or the hose, or any gasoline on the floor? A I did not. 20

*By the Court.*

Q How many times were you there? A My answer will of necessity have to be a guess, but it would be at least a hundred times.

Q Were you in the bay that many times? A I was in the bay in crossing toward the entrance, probably talking to some of the men, two or three times at least in the years that I went over there. But we passed the bay almost every time I went into the entrance. The bay was right in front of the plant. 30

*By Mr. Vanderbilt.*

Q What was the condition of the floor of this bay? A All that I could say would be that it was a concrete floor and the housekeeping of the plant was always very good.

Mr. Vanderbilt: You may cross examine. 40

*Wayne Morrell, cross.*

*Cross examination by Mr. Schotland.*

Q You never made any inspection of this floor? A Nothing but a casual inspection.

Q As you passed through to go upstairs to the office or to go into the office, wherever it was?

10 A Any inspection that I would make would be just in the nature of a casual inspection, glancing around or looking at it.

Q You never tested the pump in operation?

A No, sir.

Q You never saw the pump in operation? A I saw the men filling the trucks probably a hundred times, but did not make a mental note of it.

20 Q Will you now say that you saw the pump in operation, or did not? A I would rather that that be held in abeyance, that question. I wouldn't want to say under oath that I did.

Q Unless I misunderstood you, I understood you to say that you were in this loading bay two or three times? A I was.

Q So that what other times you referred to means that you were in the plant? A Visited the plant, went up into the office.

30 Q That was not visiting the plant for the purpose of inspection, was it? A No, sir.

Q It was because of your relations with one of the officials of the Barnes Company, wasn't it? A It was because of our company insuring their equipment in its entirety. It was in the nature of a fleet coverage of all the automobiles. From time to time there were replacements, and information was necessary toward the keeping of the contract in order.

40 Q The Barnes Company were members of your company, were they not? A Absolutely.

*Albert H. Charman, direct.*

Q Were any of them officials of your company? A No, sir.

Q But you went there simply— A Regular routine.

Q Not for the purpose of making inspections? A No.

Q You didn't make the inspections? A I didn't make inspections. 10

Mr. Schotland: That is all.

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ALBERT H. CHARMAN, sworn in behalf of defendant.

*Direct examination by Mr. Vanderbilt.* 20

Q Mr. Charman, what is your business? A Agent for a group of Mutual Insurance Companies, fire I should say.

Q Did you have that business in 1925? A I did.

Q And in connection with your business, did you inspect the Barnes Manufacturing Company's plant on Westside avenue in Jersey City? A I did. 30

Q How many times were you there? A That is pretty hard to say.

Q Approximately? A I made a regular inspection once a year, and possibly made a casual inspection two or three times in addition to that.

Q What is the purpose of your inspection? A Our companies were insuring the Barnes Company against fire. The inspection of course was to see whether the conditions were right, whether they kept the place in good shape. 40

*Albert H. Charman, direct.*

Q Does your inspection have any bearing on the rate which is charged? A Yes.

Q When you made these inspections, in what condition did you find the place? A Excellent.

10 Mr. Schotland: Let us have the time when the inspections were made.

Q When was the last inspection you made before the fire? A I couldn't say exactly, but I should say within possibly three or four months.

Q When you made that inspection, in what condition did you find the plant?

Mr. Schotland: I object, if your Honor please. It is too remote.

20 The Court: In view of the witness' statement that he made not only this one inspection, but once a year made a regular inspection, and made casual inspections two or three times a year, I think it is evidential as to what he found on those occasions, because they are cumulative. I think the jury may know if he made several inspections and always found it in the same condition, and if one was made three or four months  
30 before the fire the jury may infer from that what the condition might have been at the time of the fire.

Mr. Schotland: If your Honor please, I do not think your Honor got the point of my objection. My objection is not to his testifying to cumulative inspections if he can. My objection is that the last inspection he made is too remote from the date of the fire to be of any evidential value, or to  
40 be proper and competent evidence.

*Albert H. Charman, direct.*

The Court: I understood that point, and you would be right if that was the only inspection he made. I amplified my reasons for allowing it by saying that if his testimony is that he made other inspections prior to that time, that would have evidential value. It is for the jury to say how much weight it is entitled to. 10

Mr. Schotland: Let us ascertain when he made a previous inspection.

The Court: He has already said that he made a regular inspection once a year, and he made casual inspections two or three times a year. I shall allow him to answer the question.

Mr. Schotland: I pray an exception.

Plaintiff's counsel prays an exception to this ruling of the Court. 20

Exception noted as ground of appeal.

(Question read as follows: "When you made that inspection, in what condition did you find the plant?")

A Excellent condition.

Q Did you know that gasoline was being used on the premises? A In our—

Q Yes or no. A No. 30

Q Did you know that there was this gasoline pump there? A Yes.

Q Did you know that it was being used to fill the automobiles? A Yes.

Q Did you inspect the condition of that pump along with the rest of the factory? A In a casual way.

Q Did you inspect the condition of the loading bay? A Yes. 40

*Albert H. Charman, direct.*

Q In what condition did you find the loading bay? A Very good.

Q Did you ever see any indication of gasoline on the floor? A None whatever.

Q On any of your inspections? A None at all.

10 Q Did you ever see anything out of order either with the pump or the hose connected to it? A As far as I could see, no.

*By the Court.*

Q What did you mean when you said that you did not know that gasoline was used on the premises?

20 Mr. Vanderbilt: I may have misled the witness. He might have thought I meant in connection with the manufacturing there.

Q What did you mean when you said you did not know whether gasoline was used on the premises? A In our interpretation of the use of gasoline on the premises, it would mean that they were using it in the building for some purpose such as possibly cleaning the machines if there were any there.

30 Q But you did know that it was used in the trucks? A Oh, yes. A tank buried under the street and a Standard pump as that was, our company does not consider that as gasoline used on the premises.

Q But you did consider it more or less hazardous, did you not? A To a certain extent.

Q Would that have made you inspect it with any more care than any other part of the premises? A No.

40

*Albert H. Charman, cross.*

The Court: Are there any other questions, Mr. Vanderbilt?

Mr. Vanderbilt: No, that is all.

*Cross examination by Mr. Schotland.*

Q Mr. Charman, didn't you mean when you said you didn't know that gasoline was used on the premises that the filling of the trucks from the pump was not to be done inside of the premises? A There was no special agreement as to that. 10

Q I am not asking you about any agreement. I am asking you as to the fact. Don't you differentiate as an insurance man between filling the gas tanks of the trucks inside of the premises or having them filled on the outside from a pump? A Yes. 20

Q Isn't that what you supposed was being done?

Mr. Vanderbilt: I object to that as not cross examination, and not material to the issues.

The Court: I do not know that it makes any difference what he supposes was being done. However, he has said that he knew that the tanks were being used for the filling of the cars. I think I shall allow it. 30

Mr. Vanderbilt: If the Court please, that would simply go to other questions which are of interest to him as an insurance man but which are not within the issues here.

The Court: I think when he answered that the tank was there and that he knew that the tank was being used to fill auto- 40

*Albert H. Charman, cross.*

mobiles, he might be asked whether the automobiles were filled, as he understood it, inside or outside. That is what the question really means. In that form I think it is proper.

10 Mr. Vanderbilt: May I have my exception?

The Court: Certainly.

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

Exception noted as ground of appeal.

*By the Court.*

Q You may answer.

20 (Question repeated as follows: "Isn't that what you supposed was being done?")

A Your Honor, I do not know just how to answer it. The conditions makes the difference in that answer.

Q Did you ever see an automobile tank filled while you were there? A No.

Q Then you did not know whether the automobile tanks were filled inside or outside? A No.

30 Q Did you see the size of the hose? A Yes.

Q And you saw that it would not reach outdoors, did you not? A No, the hose would reach outside.

Q It would reach outdoors? A Up close to the building.

*By Mr. Schotland.*

40 Q You know that it would reach outdoors if you put a truck up close the building? A If the

*Jack H. Lehman, direct.*

truck was up close to the building, I think the hose was long enough to reach it.

Q You never saw the pump in use? A No, not that I remember.

Q While you were there you never saw the gasoline being used from the pump? A Not that I remember. 10

Q And therefore you never saw any gasoline on the floor, did you? A No.

Mr. Schotland: That is all.

Mr. Vanderbilt: That is our case, your Honor.

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JACK H. LEHMAN, sworn in behalf of plaintiff. 20

*Direct examination by Mr. Schotland.*

Q What is your business, Mr. Lehman? A I am in the real estate business now.

Q How long have you been in the real estate business? A Since the latter part of 1925.

Q What was your business before that? A General contractor.

Q You mean a building contractor? A A building contractor. 30

Q How long were you in the building contracting business? A From 1904 until July 15, 1925.

Q Did your company erect this building in question at 247 Westside avenue? A They did.

Q When was that building erected? A Either 1919 or 1920.

Q Will you just describe the character of the building, its size and its construction? A This 40

*Jack H. Lehman, direct.*

is some years ago. I didn't know I was going to testify to that. What I remember now is that the building was a four story and basement brick building, approximately 100 by 100, steel sash, three-inch plank floors, maple floor, with a loading room, offices, boiler room and so forth.

10

*By the Court.*

Q How many stories was it? A Four stories and basement.

*By Mr. Schotland.*

Q When did you last see the building before the fire? Do you recall that? A I might have seen it once or twice after I built it. I don't know just when. It might have been just after I built it, after the owners took possession of it.

20

Q Allowing for wear and tear from the time you built the building up to June 23, 1925, what was the value of that building on June 23, 1925?

Mr. Vanderbilt: I object to that. The witness has not qualified as a real estate expert.

30

The Court: You might examine him on that.

*By Mr. Vanderbilt.*

Q Mr. Lehman, your sole business has been building and construction work, as an architect? A It has.

The Court: I think he is qualified. He was engaged in the building business for twenty years.

40

*Jack H. Lehman, direct.*

Mr. Schotland: And he has been in the real estate business since.

The Court: I do not think that his activity in the real estate business helps very much. I can conceive that a lot of real estate men would not know anything about the cost of a building. 10

The Witness: I just finished a building for the telephone company.

The Court: I shall allow you to testify and give your opinion. You were twenty years building buildings, and I think you ought to know something about the cost of them.

Mr. Schotland: Suppose I reframe the question and put it in this way: 20

*By Mr. Schotland.*

Q What would be the cost on June 23, 1925, of replacing this particular building?

Mr. Vanderbilt: I object to that.

The Court: Objection sustained. I do not think that is the rule. The question is: What was its value as of that time? 30

Mr. Schotland: All right, I will stick to the original question.

*By the Court.*

Q In your opinion, allowing for wear and tear, what was its value? A Between \$180,000 and \$185,000.

Mr. Schotland: That is all. You may cross examine. 40

*Ernest A. Marvin, John Coriell, direct.*

Mr. Vanderbilt: No cross examination.

Mr. Schotland: Is Mr. Mayberry here?

(No response.)

The Court: Have you any rebuttal, Mr. Vanderbilt?

10 Mr. Vanderbilt; No rebuttal, your Honor.

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ERNEST A. MARVIN, recalled in behalf of plaintiff in rebuttal.

*Direct examination* by Mr. Schotland.

Q Mr. Marvin, the morning of the fire was your truck moved out of the way for Coriell to be able to fill the tank in his truck? A No, sir.

Mr. Schotland: That is all.

The Court: Is there any cross examination?

Mr. Vanderbilt: No cross examination.

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JOHN CORIELL, recalled in behalf of plaintiff in rebuttal.

*Direct examination* by Mr. Schotland.

Q The morning of the fire, was either your truck or the truck Marvin was driving moved out of the way so you could fill the gasoline tank in your truck? A No, sir.

Q Neither of them was moved? A No, sir.

40 Mr. Schotland: That is all.

*John Coriell, By the Court.*

Juror No. 2: Your Honor, may I ask the witness a question?

The Court: What is the question you would like to ask?

Juror No. 2: It is in regard to his duties as a chauffeur. What were his instructions when he was employed as to his actions as a chauffeur? 10

The Court: Is there any objection to his answering that question?

Mr. Schotland: I have no objection.

*By the Court.*

Q What were your instructions?

The Court: I suppose you mean with respect to the filling of the tank? 20

Juror No. 2: Yes, as to who was his immediate superior and what were his duties?

The Court: I do not know that that will help us very much.

Mr. Vanderbilt: He has already testified, your Honor, that he did not report to anybody any of the leaks that he said he saw. That was his testimony. 30

Juror No. 2: What I am getting at is whether he was supposed to make repairs if he found things not in the proper shape, whether he received any definite instructions with regard to that.

*By the Court.*

Q You might answer that. A I never did.

Q You never had any such instructions? A Not to do any repairs on leaks to pumps, no, sir. 40

*John Coriell, By the Court.*

Q Suppose your car was broken down. You would report that, would you not? A I would report it, yes, sir.

Q Suppose the tires were bad. You would report that, would you not? A Yes, sir.

10 Q If you saw anything wrong about the place you would report that, would you not? A Well, they had a man in the building—

Q Would you or would you not?

Mr. Vanderbilt: Your Honor, he has already testified that he did not.

The Court: I am asking him now whether he would. That is the question the juror wants answered.

20 Q You did not. That is the answer, is it not?

A I didn't, no, sir.

Q You did not? A No, sir.

*By Mr. Schotland.*

Q Did you consider it your business to? Had you received any instructions—

Mr. Vanderbilt: I object to that.

30 The Court: Objection sustained.

Mr. Schotland: If your Honor please, I think that is what Juror No. 2 wants to know, if he received any instructions from his superior in his employment that if he noticed anything around the building out of order he was to report that to his superior.

The Court: Is that what you mean?

40 Juror No. 2: What I wanted to get at was whether he had received any specific instructions to report anything that was wrong, in

*Defendant's Motion for direction of a Verdict.*

the performance of his duty as chauffeur. If he was instructed to fill the tank in his car with gasoline, that was part of the performance of his duty as chauffeur.

*By the Court.*

Q You might answer that. Did you have any specific instructions from anyone to report anything that might be wrong? A No, sir, I did not.

10

Mr. Schotland: Your Honor, both of us would like to argue some legal questions.

The Court: The jury may retire.

(Thereupon the jury retired.)

Mr. Vanderbilt: If the Court please, there are three counts in the complaint. The first count sounds solely, as I read it, on the question of the breach of the covenants of the lease. The other two counts, as I read them, sound in negligence in connection with the use of the property.

20

My first motion is addressed to the first count of the complaint dealing with the question of the alleged violations of the terms of the lease.

Mr. Schotland in offering the lease in evidence read to the Court and the jury the pertinent sections of the lease.

30

The testimony on the question of the use of the premises and the testimony as to the lease of course is uncontradicted. There is nothing in this suit with respect to it.

The lease provides that the premises shall be used by the Barnes Manufacturing Company and that it will not use or occupy—I am now referring to the second page of the lease, paragraph 2,

40

*Defendant's Motion for direction of a Verdict.*

subsection B, the last four lines—it will not use or occupy the said premises for any business or purposes other than mercantile or manufacturing business more hazardous than the manufacture or storage of sash doors, blinds, and so forth.

10 The other two sections which were read and quoted are D and E on the succeeding page, and bear directly in line with that.

In addition to the written provisions of the lease, we have the uncontradicted testimony of Mr. Raymond F. Barnes, supplemented by the testimony of Mr. James C. Barnes, that the officers of the lessor company and of its successor in title, the Florence Realty Company, visited the premises, saw how they were using this particular loading bay, and approved it.

20 In addition to that, at the time they entered into the lease they gave the Barnes Manufacturing Company some 125 gallons of gasoline. They said, "Go ahead and use it." They saw the pumps in use, both the original pump and the five-gallon pump which replaced it, and they raised no objections of any kind whatsoever.

30 As to the terms of the lease, it is clearly a part of the business of the Barnes Manufacturing Company to get its material into its storehouse and to get it out. The very construction of this loading bay of such considerable size that four large trucks could be accommodated in it, the presence of the gasoline tank underground, with the pump above ground and the hose connected with it, all make it very clear that it was the intention of both parties to this agreement that the lessee, the Barnes Manufacturing Company, was to have the right as part of its lease to

40 use the loading bay for the storage of its cars

*Defendant's Motion for direction of a Verdict.*

at night, and also that it had a right to use the gas tank, the gas pump and the hose connected with it in the ordinary course of its business.

They not only by their lease agreed to that, but also by their subsequent visits ratified and confirmed the use which the lessee was making of the premises without objection on their part. 10

I therefore respectfully submit that as to the first count which deals with alleged violations of the covenants of the lease there should be a directed verdict for the defendant.

The Court: What do you say, Mr. Schotland?

Mr. Schotland: Is that the only motion?

Mr. Vanderbilt: That is addressed to the first count.

The Court: What have you to say with regard to that count, Mr. Schotland? 20

Mr. Schotland: If your Honor please, I am not very much interested in whether the first count remains in or not, but as a legal principle the lease contains its positive provisions and it becomes a question of fact for the jury whether using the space in front of the loading platform as a garage and using that as the place for filling the tanks of the trucks with gasoline instead of the other way, as the insurance man described, is or is not an extra hazard and a violation of the terms of the lease. It is a jury question. 30

The Court: I think not.

Mr. Schotland: It is for them to draw the inference. The lease contains positive provisions. While your Honor did permit over my objection the Barneses to testify to parole contemporaneous arrangements about the gasoline contrary to the terms of the lease, I did not want 40

*Defendant's Motion for direction of a Verdict.*

to put in evidence as against it to cure the other part.

10 The Court: I have not any doubt that there is no question of fact for the jury on that proposition because of the uncontradicted testimony that the landlords came there and acquiesced in the use of it; in fact, gave them gasoline. The pump was in precisely the same situation. I have not any doubt of the propriety of granting that motion.

Mr. Schotland: The motion is not for a directed verdict. It strikes out the first count.

The Court: Mr. Vanderbilt asks for a directed verdict on that.

20 Mr. Schotland: If your Honor please, we are not suing for cumulative damages.

The Court: I do not think it makes any difference, because the statute has run away. If he receives a directed verdict, that settles it.

Mr. Vanderbilt: It has not run yet.

The Court: Then I shall direct a verdict on that point. If I strike it out, you will come right back.

30 Mr. Schotland: I am not coming back, because I want to get what I am suing for right here in this action.

A directed verdict is entered where it disposes of the case. Here are three counts seeking the same remedy.

The Court: On different ground. One is in contract and one is in tort.

I shall grant the motion.

Mr. Schotland: I ask for an exception.

The Court: You may have it.

*Defendant's Motion for direction of a Verdict.*

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

Exception noted as ground of appeal.

Mr. Vanderbilt: If the Court please, with respect to the second and third counts of the complaint, I ask for a directed verdict on this ground:

10

There is absolutely no evidence in this case as to the cause of the fire. Taking the plaintiff's testimony at its best, the only force and effect of that is to prove that there was a certain amount of gasoline spilled on the floor of the loading bay. That in itself is not the cause of a fire. Gasoline in and of itself does not result in spontaneous combustion. There must be some other cause to produce a fire.

20

The only thing seriously before us is the fact that here was a quantity of gasoline. There is no proof as to how the fire originated. The Court takes judicial notice of the ordinary facts of life.

If I open the tank of my car which is filled with gasoline, nothing happens. I can stand and gaze into that just as long as I want, and nothing will ever happen. But if I do as a friend of mine did—look into it while there was a cigarette in his mouth—something does happen. My friend lost his eyebrows.

30

But there is absolutely no proof in this case of a cause of the fire, and absolutely no proof that we did anything negligent that was the cause of the fire.

If there is any fundamental rule, as I understand the law of torts with respect to the damage end of it, it is that the plaintiff must prove that the act or neglect of the defendant is the proxi-

40

*Plaintiff's Motion for direction of a Verdict.*

mate cause of the loss sustained. There is no proof in this case that anything that we did was the proximate cause of the fire.

10 They have to show an uninterrupted chain of causation between our act and neglect and their damage. Here there is not a thing of the sort, taking the plaintiff's case at its best by the spilling of gasoline, as they allege, on the floor of that loading bay.

That in itself does not render us liable at all. There is nothing that we have done by that single act that caused the fire. And there is no other act by anybody else shown to your Honor, and certainly no act or neglect on our part that was the cause of the fire.

20 The Court: I shall deny that motion. I think the inference that might be drawn from the facts that are before the Court is that there was an act of negligence on the part of the defendant or its servants or agents. The motion is denied. That refers to the second and third counts.

Mr. Vanderbilt: May I have my exception noted?

The Court: You may.

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

Exception noted as ground of appeal.

Mr. Schotland: Now, if your Honor please, I move for a direction of a verdict for the plaintiff on this ground:

40 The plaintiff has shown a case which comes under the doctrine of *res ipsa loquitur*. We have leased them a building in good condition and they were required to take care of it. A fire has occurred. We have shown, it is uncontradicted,

*Plaintiff's Motion for direction of a Verdict.*

that the fire occurred through gasoline getting onto the concrete floor and running out underneath the closed doors and the flame then appearing on the top of this gasoline, traveling inside to the two employees of the defendant that were there, and then around this pump, and around the truck, and that flame traveled on this gasoline which had been split there and caused the entire destruction of the building, to our loss of the value of the building. We have shown that. 10

We have shown and claim that the defendant is responsible for that in one of two ways, either because the pump and its connections were out of order and for so long a time that the defendant should have known of it and repaired it, or that the chauffeurs and the drivers in using it were careless and spilled it on the floor. It got on the floor; they admit it was there. Then they saw the flame come over it. 20

It is true that the defendant has met that part of the case which charges the pump and the coupling with having been neglected by a great deal of evidence which certainly makes it a question for the jury to decide whether it was or was not. But that the fire occurred through the spilling of the gasoline they have not met at all. 30

It does not make any difference, so far as the plaintiff's right of recovery is concerned, whether his building was destroyed because the couplings connected with the hose in the pump were out of order and allowed the gasoline to spill on the floor which, through something on the outside, became ignited or that that gasoline spilt because the employee of the defendant care- 40

*Plaintiff's Motion for direction of a Verdict.*

lessly handled the gasoline and spilled it. It is the defendant's negligence either way.

10 Let us reason this out. The fact that the gasoline was spilt there, the fact that the fire arose from that gasoline, is undisputed. The defendant has to establish affirmatively that the fire occurred in some other way than one in which he could be held responsible. If he does that, he raises a question to go to the jury. If he does not do it, there is nothing for the jury to decide.

20 To put the same thing in another way, it is clear in this case that the fire started from the gasoline which was spilt on the floor running out under the doors. That is how the fire started. The fire started that way, and with the defendant's employees in charge of the gasoline at the time, that is a *prima facie* case of negligence.

We were not there. The whole thing was in the control of the defendant. A building does not ordinarily burn. This building burned down. The very fact that it burned down presumes negligence on the part of the defendant or its agents or employees in charge of the building.

30 The defendant can meet that presumption by showing how the fire did occur, and that the way in which it did occur was something for which it was not responsible. But the defendant does not do that. All it attempts to do is to raise a jury question as to whether or not the pump and coupling leaked. The defendant does not attempt to show that its employees did not on this particular occasion spill the gasoline on the floor, which gasoline was there and caused the fire.

40 With no evidence at all to show that the spilling of that gasoline on the floor was not the neglect of the defendant's employees, what is there to leave

*Plaintiff's Motion for direction of a Verdict.*

to the jury to decide on the question of the defendant's negligence?

We can assume that the pump was in good order, we can assume that the hose was in good order, that it was in perfect condition, that it did not leak, that it never leaked; but the gasoline was spilt, and it would not spill itself on the floor, so it must have been due to the negligent handling by these two employees, or one of them, of the apparatus supplied by their master. They handled it negligently, and that caused the gasoline to be spilt, and that was the cause of the fire.

10

What evidence has the defendant introduced to meet that? What evidence would the jury have to consider as against that which was introduced on which they could possibly base a verdict that the defendant is not responsible for this fire? They cannot base their verdict on guesswork. They have to base it on positive evidence.

20

In this state, in the case of *Dorr v. Harkness*, in 79 N. J. L., in the opinion by Judge Magie, afterwards Chief Justice and Chancellor, we have the law settled that where the property burns down through the negligence of the tenant, he is responsible to the landlord for the value of the property, not only by statute but at common law.

30

The Court: Yes, if done through his fault.

Mr. Schotland: If done through his negligence.

On this question of *res ipsa loquitur*, I think the most enlightening case is the opinion of Chief Justice Gummere in *Rapp v. Butler-Newark Bus Line*, reported in 103 N. J. L.

The Court: That is where the wheel came off?

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*Plaintiff's Motion for direction of a Verdict.*

Mr. Schotland: Yes, and that was affirmed by the Court of Errors on the Chief Justice's opinion.

The opinion is very enlightening because he deals very carefully with the doctrine, and he lays down the rules that apply in connection with  
10 a case where *res ipsa loquitur* applies.

He quotes from the case of *Mumma v. Easton and Amboy Railroad Company*, in 73 N. J. L., and says:

“The underlying principle of this maxim (referring to *res ipsa loquitur*) is that when, through any instrumentality or agency under the management or control of a defendant or his servants, there is an occurrence, injurious to the plaintiff, which, in the ordinary course of things, would  
20 not take place if the person in control was exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care.”

That is just this case. We have got that. The occurrence is the fire by the gasoline that was spilt on the floor becoming ignited. What has the defendant brought in to meet that?

I respectfully submit, if your Honor please,  
30 that in charging the jury you could not refer to any evidence that the defendant has brought in to meet that. Therefore, the only verdict that could stand on the evidence is a verdict in favor of the plaintiff.

When the situation is such that one verdict and only one verdict can stand, it is the duty of the Court to direct that verdict.

The Court: No, I do not consider this is a *res ipsa loquitur* case. The Chief Justice's opinion  
40

*Plaintiff's Motion for direction of a Verdict.*

in the case that you read shows the well-known definitions of *res ipsa loquitur*. He gives the language of Thompson. I have his definition here. I do not conceive that that is this situation.

I am not going to argue it with you, but there is a great difference between a fire and the management and control of such an instrumentality as a motor truck the wheel of which comes off. 10

I think that the case is an ordinary negligence case. I do not see how you could say that the burden of proving how this fire took place was shifted to the defendant on the theory of *res ipsa loquitur*.

You say that this fire took place because of the negligence of the defendant. That is your case. Then the defendant says it did not. That is the question of fact for the jury to determine. 20

The motion is denied with an exception allowed.

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

Exception noted as ground of appeal.

Mr. Schotland: I have a number of cases on the point.

The Court: I can reason it out aside from the cases. I have just looked at my definition by Thompson which seems to be on all fours with the opinion of the Chief Justice. I do not think this is a case where the doctrine of *res ipsa loquitur* should be applied. 30

You may have an exception.

(The jury thereupon returned to the court room.)

*Court's Charge to Jury.*

Mr. Vanderbilt sums up for defendant.

Mr. Schotland sums up for plaintiff.

**COURT'S CHARGE TO JURY.**

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The Court charges the jury as follows:

PORTER, J.: Gentlemen of the Jury:

This is a suit brought by the Florence Realty Company, the owners of the premises in question, against the Barnes Manufacturing Company to whom it leased the premises. The action is for damages which the plaintiff claims it suffered because of a fire which demolished the building, the plaintiff alleging that the fire was the proximate result of negligence on the part of the defendant, the Barnes Manufacturing Company, or its employees.

20

On the 23rd of June, 1925, there was a fire. At that time the defendants were occupying the premises as a warehouse for sashes, blinds, and doors, the occupancy being under a lease for ten years commencing March 1, 1921, the lease being from the plaintiff to the defendant.

30

The suit is for \$175,000 which is the amount the plaintiff contends the building was worth. The recovery, if any, is limited to that amount in spite of the fact that Mr. Lehman, who gave the only testimony with respect to the value of the building, said it was worth from \$180,000 to \$185,000. The plaintiff is also entitled, if it is entitled to a verdict, to interest at six per cent. from the date of the fire.

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There are two matters alleged in the complaint as the basis for a recovery:

*Court's Charge to Jury.*

First: That there was a violation of the terms of the lease between these parties, and by reason of the violation of the lease by the tenant this damage resulted.

Second: That there was negligence which resulted in loss to the plaintiff.

With respect to the first cause of action, I direct you to find a verdict of "no cause of action," no matter what your verdict may be on the second count. In that first cause of action there develops simply a question of law; and the Court is the sole judge of questions of law. The Court has decided that question of law adversely to the plaintiff. Therefore, there will be a verdict of "no cause of action" on that branch of the case.

You will take the rulings that the Court has made in your presence—for instance, the denial of the motion for a non-suit which was made by the defendant at the close of the plaintiff's case—as evidential of nothing as far as you are concerned. You are only concerned with questions of fact and not with questions of law. The Court denied that motion for a non-suit because the Court felt that there was a question of fact presented here and not a question of law; and wherever there are questions of fact it is the duty of the Court to submit those questions of fact to the jury.

This case has been very ably tried and very ably summed up. The facts and the testimony have been very thoroughly discussed and analyzed. Consequently, it is unnecessary for me further to analyze or refer to the testimony.

If I have in any respect misstated the testimony, you will disregard such misstatement and

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*Court's Charge to Jury.*

depend entirely on your own recollection of what the testimony was.

10 Suffice it to say that the plaintiff's contention is that this fire occurred through the negligence of the servants of the defendant company for which the defendant company is responsible, and that the negligence of the defendant's servants was the proximate cause of this fire. The plaintiff brings evidence here to prove that contention and says that from the testimony and the proper inferences which you may draw from the testimony you are bound to find their contention to be correct.

20 The defendant says, "We deny any negligence on our part or on the part of any of our servants, and therefore we say there should be no recovery."

Negligence is never presumed in the law, but must be proven by the party who alleges negligence—in this case, the plaintiff. You must be satisfied before you bring in a verdict for the plaintiff that the plaintiff has established by the clear weight of the testimony the truth of its charge that there was negligence on the part of the defendant or its employees, which negligence was the proximate cause of this fire.

30 Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or the doing of something which a reasonably prudent person would not do. The test you will observe is not how a "super-particular" person would act, or how the most skillful person would act. The test is: how would the reasonable person act under a given set of circumstances?

*Court's Charge to Jury.*

The plaintiff says that the employees of the defendant here did not act as the law requires them to act, that they did not use that degree of care which reasonably prudent persons would use; and hence there was this loss as a proximate result of that negligence.

On the other hand, the defendants say they used all the care and took all the precautions that reasonably prudent people would. 10

That is the question of fact that you are called upon to decide.

The case is important both from the standpoint of the plaintiff and from the standpoint of the defendant. Large figures are involved. You must decide the case, be the consequences what they may.

You are not called upon to say how this fire occurred. Perhaps no one knows. You are called upon to answer this one question: Did the fire occur, as the plaintiff says it did, through the negligence of the defendant's servants? 20

If you find that to be so, then of course you will find a verdict for the plaintiff. If you do not find that to be so, then you will find a verdict in favor of the defendant.

In other words, if you find that the defendant in the maintenance and use of the pump used that care which an ordinarily prudent person would have used, then you will find for the defendant; if you find that the fire was not caused by any act or neglect on the part of the defendant, then you will find for the defendant. 30

If you find that the act of the defendant—and when I say “the act of the defendant” I mean the act of the defendant or its servants and employees—did nothing more than furnish a condi- 40

*Exceptions to Charge.*

tion by which the fire was made possible, and that the fire was caused by a subsequent independent act of a third party or agency, and the two acts were not concurrent, and the existence of the condition was not the proximate cause of the fire, then your verdict must be for the defendant.

You may retire.

(The jury retires.)

Mr. Schotland: I ask for an exception to your Honor's refusal to charge as requested in my requests one, two and three.

I also want to except to that portion of your Honor's charge in which you charged the law regarding negligence, on the ground that it is correct abstractly, but does not apply to the facts in this particular case.

I also except to that part of your Honor's charge in which you deal with the outside condition on the ground that there was absolutely no evidence in the case of anything from which there could be any inference that there was any outside condition that occurred with the acts of the defendant's employees in causing the fire.

Exceptions noted as ground of appeal.

Mr. Schotland: Then as to interest, I think in an action of this sort we are not entitled to interest.

(Argument.)

Mr. Vanderbilt: Suppose we stipulate on the record that if the verdict is in favor of the plaintiff we will mold the verdict to exclude the interest. I have no exceptions.

*Plaintiff's Requests to Charge.*

## PLAINTIFF'S REQUESTS TO CHARGE.

1. If you find that the fire which destroyed this building was caused by gasoline which leaked from the pump or hose connection, igniting, then your verdict should be for the plaintiff in such amount as you find the value of the building at the time of the fire. 10

2. If you find that the fire was caused by the gasoline which flowed on the floor, igniting, and such gasoline got on the floor through the careless or negligent operation of the pump by either of the chauffeurs who were using the pump, then your verdict should be for the plaintiff.

3. If you find that the fire which destroyed the building in question started by gasoline which flowed on the floor, becoming ignited, and the defendant has not shown that the gasoline got on the floor without any negligence on the part of the defendant or any of its employees or agents, then your verdict should be in favor of the plaintiff, in such amount as you find the value of the building at the time of its destruction by the fire. 20

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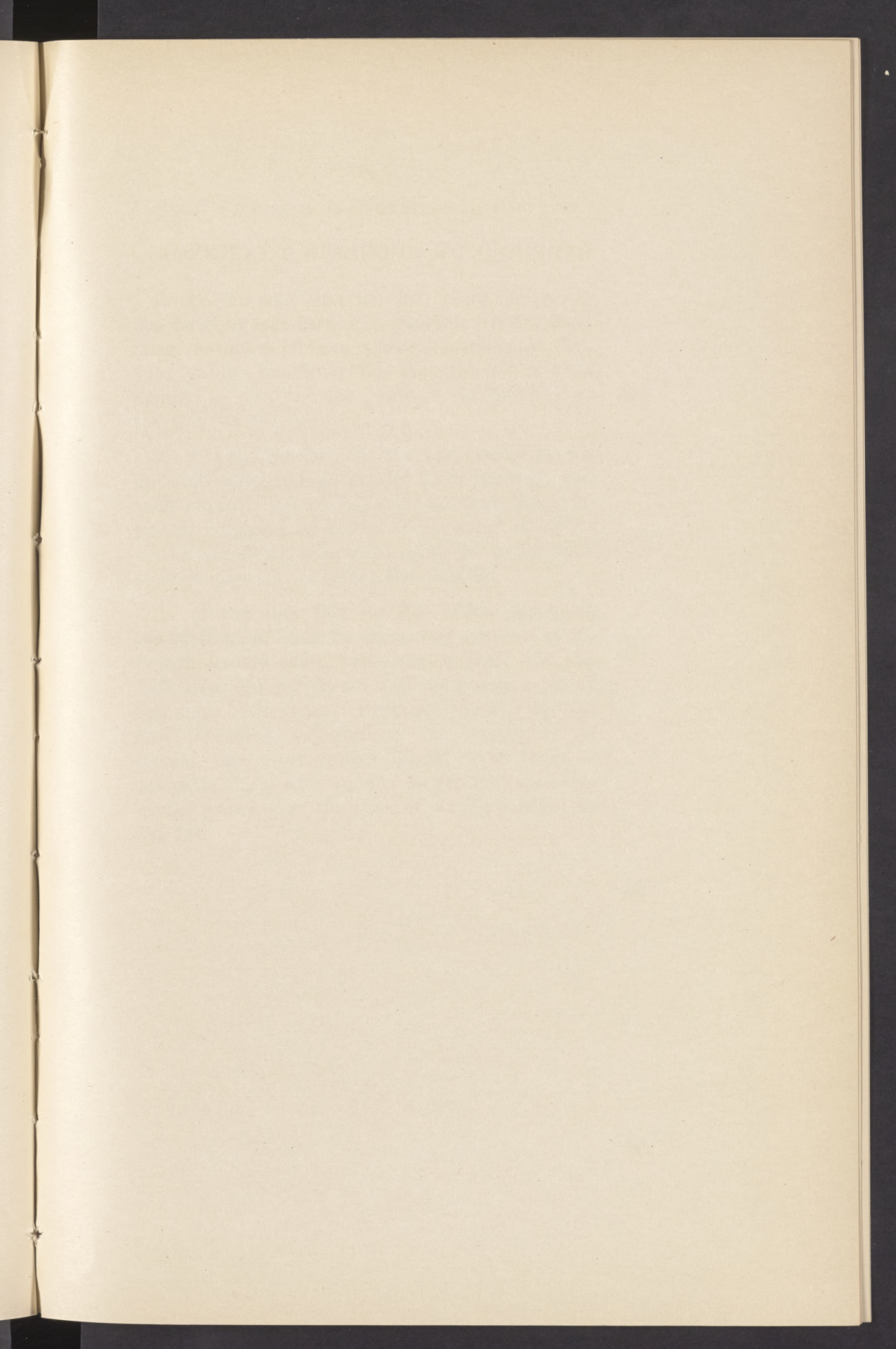
*Defendant's Requests to Charge.*

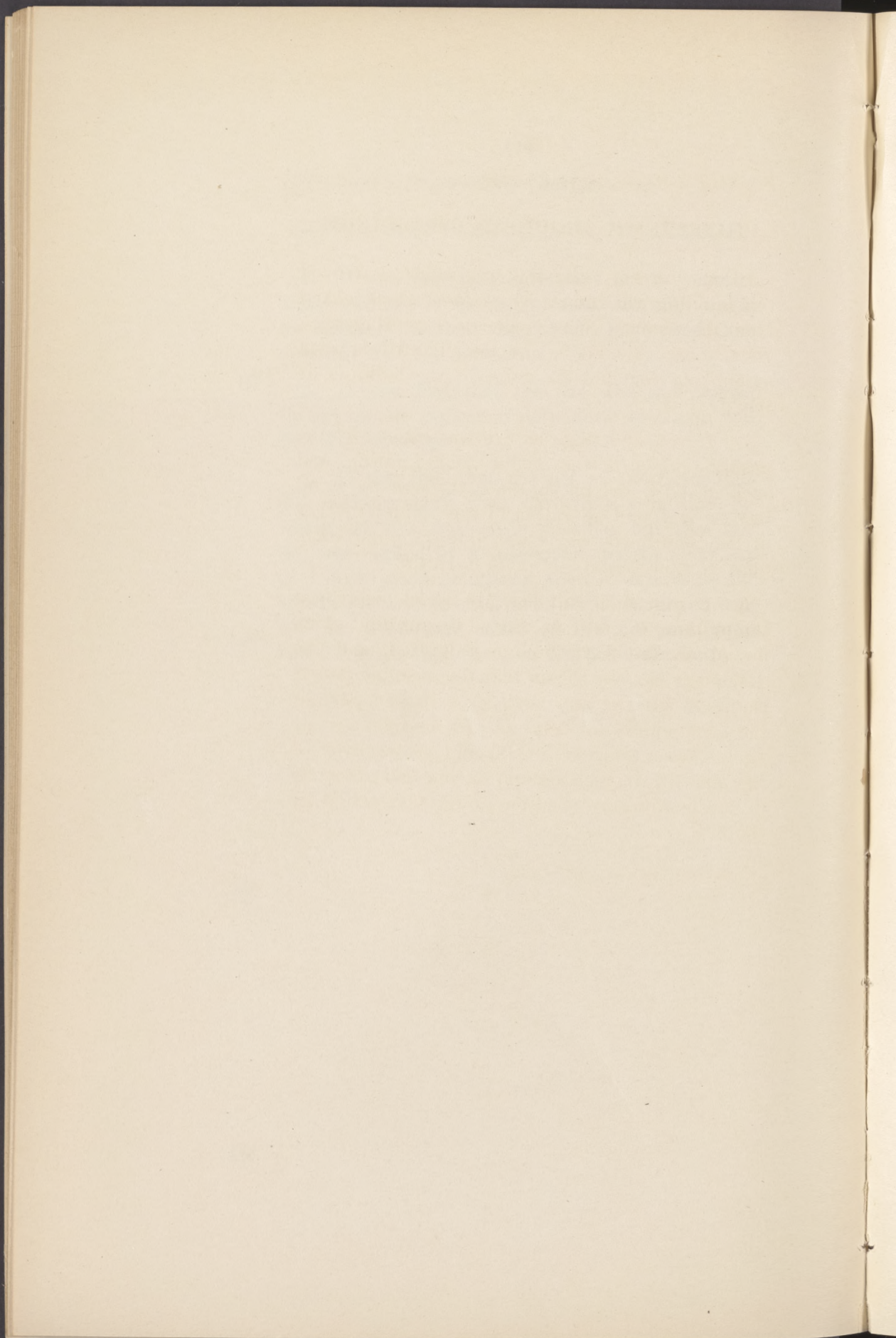
## DEFENDANT'S REQUESTS TO CHARGE.

1. If you find that defendant in the maintenance and use of the pump, used that care which an ordinary prudent man would have used then you will find for defendant.
- 10 2. If you find that the fire was not caused by any act or neglect of defendant, then you will find for defendant.
- 20 3. If you find that the act of the defendant did nothing more than furnish a condition by which the fire was made possible, but that the fire was caused by a subsequent independent act of a third party or agency, the two acts were not concurrent and the existence of the condition was not the proximate cause of the fire and your  
verdict must, therefore, be for the defendant.

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*Plaintiff's Requests to Charge.*

## PLAINTIFF'S REQUESTS TO CHARGE.

1. If you find that the fire which destroyed this building was caused by gasoline which leaked from the pump or hose connection, igniting, then your verdict should be for the plaintiff in such amount as you find the value of the building at the time of the fire. 10

2. If you find that the fire was caused by the gasoline which flowed on the floor, igniting, and such gasoline got on the floor through the careless or negligent operation of the pump by either of the chauffeurs who were using the pump, then your verdict should be for the plaintiff.

3. If you find that the fire which destroyed the building in question started by gasoline which flowed on the floor, becoming ignited, and the defendant has not shown that the gasoline got on the floor without any negligence on the part of the defendant or any of its employees or agents, then your verdict should be in favor of the plaintiff, in such amount as you find the value of the building at the time of its destruction by the fire. 20

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*Defendant's Requests to Charge.*

## DEFENDANT'S REQUESTS TO CHARGE.

1. If you find that defendant in the maintenance and use of the pump, used that care which an ordinary prudent man would have used then you will find for defendant.

10 2. If you find that the fire was not caused by any act or neglect of defendant, then you will find for defendant.

3. If you find that the act of the defendant did nothing more than furnish a condition by which the fire was made possible, but that the fire was caused by a subsequent independent act of a third party or agency, the two acts were not concurrent and the existence of the condition was not the proximate cause of the fire and your  
20 verdict must, therefore, be for the defendant.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

FLORENCE REALTY Co., a corporation of the State of New Jersey,

*Plaintiff-Appellant,*

*vs.*

BARNES MANUFACTURING Co., a corporation of the State of New Jersey,

*Defendant-Respondent.*

*Action  
at Law.*

### BRIEF OF PLAINTIFF-APPELLANT.

#### Facts.

On November 17, 1920, the Barnes Manufacturing Co., the defendant-respondent, leased from the American Grocers Society a four-story and basement brick building, located at 247-253 West Side avenue, Jersey City, New Jersey, for the term of ten years, from March 1, 1931 (State of Case, Schedule "A" pp. 13-22). On April 21, 1922, the Florence Realty Co., the plaintiff-appellant, purchased the demised premises from the American Grocers Society and took an assignment of the lease. The Barnes Manufacturing Co. attorned to the plaintiff and paid the rent reserved by the terms of the lease to the plaintiff-appellant from the date of said assignment up to and including June, 1925.

On June 23, 1925, while the Barnes Manufacturing Co., the defendant, was in possession of the premises under the terms of the said lease the building was completely destroyed by fire. The only evidence in the case as to how the fire occurred is that given by two eye-witnesses,

employees of the defendant, who were called as witnesses by the plaintiff-appellant, and who testified that there were three trucks belonging to the defendant stored overnight in the bay on the ground floor between the front doors and the loading platform and that on the morning of June 23, 1925, they filled the gasoline tanks in two of the trucks from a five-gallon pump installed on the premises; that they were filling the tanks in the trucks with the front doors of the building closed; that the gasoline leaked around the pump and hose, and that they probably spilled some, so that a quantity of gasoline flowed on the concrete floor and, owing to the pitch, flowed out underneath the doors onto the sidewalk, and they saw flames travelling on top of the gasoline, along the floor, which soon enveloped the pump, and so spread that the entire building and contents were destroyed. The lease for the demised premises provided in subdivision B of paragraph 2 that the defendant-respondent "will not use or occupy the said premises for any business or purpose other than the mercantile or manufacturing business not more hazardous than the manufacture or storage of sashes, doors, blinds, etc." (State of Case, p. 15, ll. 10-16).

The complaint is in three counts: the first count sets up the making of the lease, the assignment to the plaintiff, the covenants of the lease, and charges the defendant specifically with violating the particular covenant wherein the defendant undertook that "it will not do or cause to be done any matter or thing in and upon the said demised premises by which the risk or hazard by fire over and above the risk and hazard incidental to the ordinary conduct of the business specified in this lease may be increased

or enlarged." It also refers to the other covenants of the lease, and charges that the defendant, in violation of the covenants, used the space provided in the building for trucks to be loaded and unloaded as a garage for the storage of automobile trucks, and filled the gas tanks of the trucks inside the building, instead of outside, and that on the 23rd of June, 1925, while the defendant's agents and employees were filling the gas tanks of its trucks on the inside of the building the vapor arising from the gasoline became ignited, destroyed the building, and sues for \$175,000.00 damages, the undisputed value of the building.

The second and third counts also set up the lease and charge negligence in the use of the pump in allowing large quantities of gasoline to overflow and flow down on the floor of the loading space and out to the street, the vapor of which ignited, causing the fire which completely destroyed the building.

At the close of the case the Court directed a verdict for the defendant on the first count, and allowed the case to go to the jury on the second and third counts in a charge which will be dealt with in the argument.

There was no evidence introduced on the part of the defendant as to how the fire occurred, and nothing in the case to refute the testimony of the two eye-witnesses, which showed clearly that the fire occurred either through their own negligence in the performance of and within the scope of their duty to the defendant, or by the defendant's negligence. The jury, however, brought in a verdict on the second and third counts for the defendant. From the judgment entered on that verdict this appeal has been taken by the plaintiff, and is based on the direction of the Court,

directing a verdict on the first count in favor of the defendant, the refusal to direct a verdict for the plaintiff, the charge of the Court and the refusal by the Court to charge the plaintiff's requests.

## ARGUMENT.

### I.

**The Court erred in charging the jury, as applied to the facts of the instant case:**

“If you find that the act of the defendant—and when I say ‘the act of the defendant’ I mean the act of the defendant or its servants and employees—did nothing more than furnish a condition by which the fire was made possible, and that the fire was caused by a subsequent independent act of a third party or agency, and the two acts were not concurrent, and the existence of the condition was not the proximate cause of the fire, then your verdict must be for the defendant” (State of Case, p. 143, ll. 36 to bottom of page, and top of p. 144 to l. 10).

The evidence before the Court and jury as to the fire and its cause was the testimony of Ernest A. Marvin who testified that at the time of the fire he was employed by the defendant company as a chauffeur, driving one of its automobile trucks, and had been so employed for four or five years previous to the fire; that about the time of the fire he was driving a five-ton White truck; that he was storing the truck at night in front of the loading platform in the building; that the loading platform was about on a level with the floor of the truck and on page 33, beginning with line 35, and including pages 34, 35, up to line 10, he testified as follows:

“Q On the day of the fire was anyone filling any gas tanks that morning? A Yes, sir.

Q What time did you get there? A I got there around 7:15.

Q Was anyone else there when you were there? A Not then, not in the loading platform.

Q Did anyone else arrive while you were there at the loading platform? A Yes.

Q Who? A Mr. Coriell.

Q What was he? A He was a chauffeur.

Q Driving another truck? A Yes, sir.

Q Was the truck he was driving there at the time? A Yes, sir.

Q What did you do after you arrived at 7:15? A I was on a long trip the day before, and I filled my truck with gas.

Q When did you fill your truck with gas?

A As soon as I got in, around 7:20.

Q You are talking now of the morning of the fire? A Yes, sir.

Q Did anyone else fill their tanks with gas at that time? A Well, about five minutes later Mr. Coriell came in, and he was filling his.

Q You saw him filling his? A I know he was filling his.

Mr. Vanderbilt: I object to that. The answer is not responsive.

The Court: Strike it out.

Mr. Schotland: If your Honor please, I am the only one who could object if the answer is not responsive to my question. I am satisfied with it.

Q Did you see Coriell filling his tank? A Yes, sir.

Q How many gallons of gas did you put in? A I will say from 25 to 30 gallons.

Q Would you put in a limited quantity, or would you continue to fill it until the tank was full? A I would fill it right up to the top.

Q What if anything happened this particular morning of the fire, just before the fire? A What do you mean by that?

Q Did you see anything out of the ordinary? A Yes.

Q What? A Gas on the floor.

Q Where did that gas on the floor come from? A It came from the connections in the pump, *probably some we spilt.*"

And also on page 35, beginning with line 35, to the bottom of the page, and on page 36, to line 22:

"Q On this particular occasion, just before the fire, did much gasoline spill? A Well, quite a little.

Q What was the first thing you saw of the fire? A The first thing I seen of the fire, Mr. Coriell hollered out, 'I am on fire,' and I looked down and the whole pump was on fire.

Q What did you do? A I jumped out of my truck and grabbed hold of the hose and tried to pull the pump down from the wooden partition on the wall. After getting my hand burned, I decided it was too hot.

Q So what did you do? A I left.

Q How did you leave? A Out the door that was open.

Q Then what happened? A I went to the hospital to have my hand dressed.

Q Then did you come back? A Yes, sir.

Q Did you see what was left of the building? A Yes, sir.

Q What had happened to the building? A It was all burned up, and the walls fell down, and the only things that stood were the staircases and the elevator shafts.

Q The entire rest of the building all burned down? A Yes, sir."

And the testimony of John Coriell, who testified that at the time of the fire he was employed as chauffeur by the defendant and was driving a five-ton White truck for the defendant, and on page 45, beginning with line 35, and all of page 46, he testified as follows:

"Q Were you there at the time of the beginning of the fire? A Yes, sir.

Q Where were you? What part of the building were you in? A I had hold of the gasoline pump, pumping gas when the fire occurred.

Q Where were you pumping the gas to?  
A Into my truck.

Q When the fire occurred? A Yes, sir.

Q What did you see of the fire? Where did you see the fire? A The first I saw of it, I had my head kind of bent a bit, and I seen it shoot up from the ground.

Q What did you see shoot up from the ground? A The flames.

Q What were the flames travelling on?  
A They were travelling on gasoline.

Q Was there any gasoline on the ground?  
A There must have been.

Q Did you see any? A Yes, sir.

Q Much or little? A Quite a bit.

Q What did you do when you saw the flames shoot up from the gasoline? A I hollered to Mr. Marvin, and I jumped away.

Q Then what did you do? A We tried to put it out with a piece of canvas, and we couldn't do it. We tried pulling the pump down, and it got too bad, and we had to get out ourselves.

Q So you ran out of the building? A Yes.

Q What happened to the building? A It burnt down to the ground.

Q Completely? A Yes, sir.

Q What time of the day was this? A About 7:30 in the morning.

Q What time did you get there? A About twenty-five after seven or twenty after seven.

Q Do you know how the gasoline got on the floor? A Well, to my knowledge, it got on through the leaks.

Q Did you spill any while you were filling your tank? Do you know? A Well, I might have spilt some, but quite a bit leaked out of the pump, too."

The testimony of the two witnesses referred to above is, as aforesaid, the only testimony in the case as to how the fire started which destroyed plaintiff's building. The plaintiff respectfully contends that the charge of the Court in no way applies to the facts of this case. The legal question involved under this portion of the Court's charge is: what was the proximate cause of the fire? In *Collins v. West Jersey Express Co.*, 72 N. J. L. 231; 62 Atl. 675, Justice Garrison, speaking for this Court, in a case where the plaintiff was injured through falling over a pile of lumber in an attempt to avoid injury by a runaway horse which was frightened by the defendant's express wagon striking the hind wheel of the wagon to which the runaway horse was attached, says:

"We think that this non-suit was wrong. The striking of the standing wagon by the defendant's wagon was unquestionably the initial force that set in motion the train of circumstances by which the plaintiff was injured, none of which had their rise in any intervening force or other cause.

"The board pile over which the plaintiff fell, while it was a condition of his injury, was not its cause. 21 Ency. Law, p. 494.

"Likewise, the circumstance that the horse was standing unhitched, while it was a condition that rendered its running away more likely, was not the cause of that occurrence."

In *D. L. & W. Railroad Co. v. Salmon*, 39 N. J. L. 299, Justice Depue, in a very carefully prepared opinion for this Court, in a case where the plaintiff sued to recover damages to his property caused by a fire started on the right-of-way of the defendant and communicated to the plaintiff's property, because lands between the right-of-way of the defendant and plaintiff's property

were overgrown with weeds which were very combustible, held the railroad company liable, and on page 309, stated the law:

“The cases in which the responsibility is laid on the original wrong-doer, though intervening agencies without fault have interposed, are quite numerous. Indeed, cases of this class are only instances of the application of the principle adjudicated in the well-known Squib case, as expressed in the opinion of Chief Justice DeGrey. *Scott v. Shepard*, 2 W. Bl. 892.”

In *Davenport v. McClellan*, 88 N. J. L. 653, 96 Atl. 921, Justice Bergen, speaking for this Court, says:

“An intervening cause is the act of an independent agency which destroys the causal connection between the negligent act of the defendant and the wrongful injury, the independent act being the immediate cause, in which case damages are not recoverable because the original wrongful act is not the proximate cause. *Cuff, Adm’x v. Newark & N. Y. R. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205; *Claypool v. Wigmore*, 34 Ind. App. 35, 71 N. E. 509. In *Scott v. Sheppard*, 2 Blackstone R. 892, Smith’s Leading Cases, 797, the defendant was held liable for injuries arising from the throwing of a lighted squib, although it had passed through the hands of at least two persons before it exploded, each adding a new propelling force, which the court held was but the continuance of the original wrong, the unlawful throwing of the lighted squib, and that the proximity of defendant’s act was not destroyed by what happened between the throwing and the explosion of the squib. The starting of a fire in a public street is the committing of a nuisance, and the wrong-doer in leaving it still burning and unguarded is responsible for the consequential damages which may be reasonably apprehended will result from such an act; one of them being that very young

children without capacity to estimate or appreciate the danger may, while playing in the street, interfere with it. The act of the child in the present case was not an 'intervening cause' in that it destroyed the causal connection between defendant's negligent act and the resulting injury \* \* \*."

In the instant case, the uncontradicted proof is that gasoline was allowed to lie on the ground and flow out under the closed doors to the sidewalk. Can it be said that it is unexpected or unexpectable that persons walking along city sidewalks throw partly-smoked cigarettes, partly-smoked cigars, and hot ashes from a pipe, or a lit match, after having used it to light a pipe, cigarette, or cigar, on the sidewalk. It must be admitted as common knowledge that people do walk along the streets smoking cigarettes, cigars, or pipes, in great numbers and do throw away the match after using it, or a partly-smoked cigar or cigarette, or the hot ashes of their pipes; that is, therefore, a condition that is the usual, non-negligent act to be expected. The unusual act, the one that makes the extraordinary result in the particular case, the one that really caused the trouble is that of allowing gasoline to flow onto the public sidewalk where the slightest ordinary occurrence will cause it to ignite. The man who spills the gasoline knows and is legally bound to know that people passing along the sidewalk who are smokers do throw away partly-smoked cigars, cigarettes, etc., but such persons do not know and are not bound to know legally that somebody is permitting gasoline to flow on the sidewalk so that a fire will start and destroy a building.

There is no evidence in this cause of any independent act of a third party or agency, whether concurrent or not, and there is no evidence in

this case which justifies the charge of the Court to tell the jury that they may find that the act of the defendant or its servants and employees (and the act referred to can only be allowing the gasoline to flow out over the sidewalk) did nothing more than furnish a condition by which the fire was made possible. Plaintiff respectfully contends that the law as settled by the cases above cited makes the flowing of the gasoline over the sidewalk, under the facts of this case, the proximate cause of the fire, and this charge to the jury was very prejudicial to the plaintiff, for the verdict may very well be the attempt by the jury to follow this charge. The jury may have found the defendant, by its servants or agents, guilty of negligence in allowing the gasoline to get on the floor in such quantities as to flow out to the sidewalk, and that the fire started by this gasoline becoming ignited; and then the jury may have speculated as to how the gasoline became ignited (and there is no evidence in the case) and come to the conclusion that someone walking along the sidewalk, unconscious of the presence of the gasoline, threw a partly-smoked cigarette away, and that that caused the gasoline to ignite. That being the case, the jury considering the charge as given could very readily understand that that meant it was a subsequent, independent act of a third party or agency, and that the verdict must be for the defendant, and they may have so rendered their verdict for that very reason. Whether the verdict for the defendant is based on a finding that no gasoline was spilt or on a finding that the spilt gasoline was ignited by some other agency than the act of the defendant cannot be ascertained. If the verdict is based on the second hypothesis, it is clearly erroneous in law, and if based on the first, there is no legal

evidence to support it, for the only evidence is that the gasoline was spilt.

In *Lambert, et al. v. Trenton & Mercer County Traction Corporation*, 127 Atl. 674 (not officially reported) the Supreme Court held:

“Where an erroneous principle of law is laid down by a trial court, a verdict which may have been the result of the erroneous instruction cannot be supported, and this, we think, is equally true where a principle of law, which has no bearing upon the issues involved in a litigation, is stated by the trial court to the jury as a rule which should govern them in their consideration of the cause.”

In *Kelley v. Ryan, Inc.*, 139 Atl. 894 (not officially reported) the Supreme Court held that where a general verdict might have been based on an erroneous instruction it cannot stand, although there were other issues on which the verdict might properly have been based.

Plaintiff-appellant therefore respectfully submits that the charge above quoted was erroneous; that the judgment should be reversed, and a new trial ordered.

## II.

**The Court erred in refusing to charge as requested by the plaintiff-appellant:**

“If you find that the fire was caused by the gasoline which flowed on the floor, igniting, and such gasoline got on the floor, through the careless or negligent operation of the pump by either of the chauffeurs who were using the pump, then your verdict should be for the plaintiff” (State of Case, p. 145, ll. 12-17).

This request to charge plaintiff-appellant respectfully submits correctly applies the law of the

case to the facts, and the cases cited and quoted under Point I, viz., *Collins v. West Jersey Express Co., D. L. & W. Railroad Co. v. Salmon*, and *Davenport v. McClellan*, clearly show that this request should have been charged. It is apparent that had this request been charged the jury would have been given the correct legal principle, as applied to the facts of this case. It may be argued that what the Court said in its charge, on page 143, lines 20-30:

“You are not called upon to say how this fire occurred. Perhaps no one knows. You are called upon to answer this one question: Did the fire occur, as the plaintiff says it did, through the negligence of the defendant’s servants?”

“If you find that to be so, then of course you will find a verdict for the plaintiff. If you do not find that to be so, then you will find a verdict in favor of the defendant.”

includes the requested charge, but when that part of the Court’s charge is taken in connection with the last paragraph of the charge of the Court, in which the Court says:

“If you find that the act of the defendant—and when I say ‘the act of the defendant’ I mean the act of the defendant or its servants and employees—did nothing more than furnish a condition by which the fire was made possible, and that the fire was caused by a subsequent independent act of a third party or agency, and the two acts were not concurrent, and the existence of the condition was not the proximate cause of the fire, then your verdict must be for the defendant.”

then it is readily seen that the instruction to the jury, as originally given was modified by this paragraph, so that even if the jury would find that the fire occurred as the plaintiff says it did and then should come to the conclusion that

somebody threw away a cigarette partly smoked while walking along the sidewalk at the time when the gasoline was flowing over, which caused the gasoline to ignite, they would render a verdict for the defendant, as they did in this case, and probably for the reason that they knew gasoline does not of itself ignite, and they may have very well have treated this part of the charge of the Court as instructing them that under the law they may consider the negligent acts of the defendant, or its servants and employees, as doing nothing more than to furnish a condition by which the fire was made possible, and that the fire was caused by a subsequent, independent act of a third party or agency, although there was no evidence whatsoever in the case upon which such a finding could be based.

It is therefore respectfully submitted that the charge was erroneous in refusing to charge the request made on behalf of the plaintiff-appellant.

### III.

**The Court erred in refusing to direct a verdict in favor of the plaintiff, as requested.**

When this motion was made all of the evidence was in, and the undisputed facts were that the defendant was in possession of a valuable building under the terms of a written lease, which required it by subdivision B of paragraph 2 (State of Case, p. 15):

“That the said party of the second part will quit and surrender the premises at the expiration of the term herein provided for, or other determination of this lease, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted, and that during the demise, *it will, at its own cost, make all*

*necessary or reasonable inside repairs, and that it will not use or occupy the said premises for business or purpose, other than mercantile or manufacturing business not more hazardous than the manufacture or storage of sashes, doors, blinds, etc."*

and that on June 23, 1925, the building was destroyed by gasoline which had been permitted to flow on the floor and onto the sidewalk, becoming ignited, the fire travelling on the surface of the gasoline until it got inside the building to the gasoline pump and resulted in the complete destruction of the building; that the gasoline got on the floor and flowed onto the sidewalk either through the pump being defective and leaking, or because the two employees of the defendant who were using the gasoline at the time carelessly spilt it on the floor or negligently allowed it to overflow from the gasoline tank of the truck (State of Case, p. 35, ll. 7-9).

"Q Where did that gas on the floor come from? A It came from the connections in the pump, *probably some we spilt.*"

and State of Case, p. 46, ll. 34-40:

"Q Do you know how the gasoline got on the floor? A Well, to my knowledge, it got on through leaks.

Q Did you spill any while you were filling your tank, do you know? A Well, I might have spilt some, but quite a bit leaked out of the pump, too."

and State of Case, p. 46, ll. 7-18:

"Q What did you see of the fire? Where did you see the fire? A The first I saw of it I had my head kind of bent a bit, and I seen it shoot up from the ground.

Q What did you see shoot up from the ground? A The flames.

Q What were the flames travelling on? A They were travelling on the gasoline.

Q Was there any gasoline on the ground?

A There must have been.

Q Did you see any? A Yes, sir.

Q Much or little? A Quite a bit."

The only thing the defendant endeavored to establish before the jury was that it kept the building in a clean condition and that the pump was in good condition. It did not introduce any evidence to meet the affirmative proof put in by the plaintiff through the defendant's own employees that gasoline was spilt on the floor, did flow out to the sidewalk and did ignite. The fact that the gasoline was spilt there by the employees was undisputed; the fact that the fire which destroyed the building started on the spilt gasoline was undisputed. There was nothing in the case to show if the pump was in good condition, how the gasoline could possibly get on the floor in such quantities as to flow out to the sidewalk and become ignited, except the evidence of the defendant's employees that they probably spilt it. This established a clear case of negligence on the part of the employees of the defendant, for which the defendant is liable. There is not one iota of evidence in the defense to meet this proof, and therefore there was no disputed question of fact to leave to the jury as to the negligence of the defendant. The value of the building destroyed was also not disputed.

This case is not controlled by *Hughes v. Atlantic City and S. R. Co.*, 85 N. J. L. 212, 89 Atl. 769, because there was a case of an electric light bulb in the ceiling of a railroad car exploding without any proof of the cause of the explosion, and the Court held that the question of the defendant's negligence had to be submitted to the jury, as a question of fact. In the instant case, the plaintiff has proven, assuming that the pump was in good order, that the hose was in good

order, in perfect condition; that it did not leak, and had never leaked; that nevertheless, the gasoline was spilt while two employees of the defendant using the gasoline within the scope of their employment, and their own explanation is that they probably spilt some. There was no evidence to meet this affirmative proof of negligence, and therefore no evidence which the jury could legally consider against this affirmative proof of negligence; and as juries are not permitted to base their verdict on guesswork, the only verdict that could legally be rendered is one for the plaintiff; and where, as in the instant case, one verdict and only one verdict can stand, it is the duty of the Court to direct that verdict.

In *Crue v. Caldwell*, 52 N. J. L. 215, 19 Atl. 188, Chancellor McGill, speaking for this Court, lays down the rule:

“It is well settled that a jury should be controlled in its verdict by a peremptory instruction, only where the testimony is of such a conclusive character as would compel the Court, in the exercise of a sound legal discretion, to set aside a verdict if one were returned, in opposition to such testimony. (*Montclair v. Dana*, 107 U. S. 162, 2 Supp. Ct. Rep. 403; *Railroad Co. v. Moore*, 24 N. J. Law 824, 830; *Ayerigg’s Ex’rs v. Railroad Co.*, 30 N. J. L. 460; *Baldwin v. Shannon*, 43 N. J. Law 596, 602; *Neuendorff v. Insurance Co.*, 69 N. Y. 389); or, to put it more forcibly and more accurately, if the evidence be such that the court would set aside any number of verdicts rendered against it, the jury may be controlled (*Baldwin v. Shannon*, 43 N. J. Law, 596, 602; *Denny v. Williams*, 5 Allen, 1, 5; *Brooks v. Somerville*, 106 Mass. 271, 275).”

In *Cirpriano v. Casalla*, 3 N. J. Misc. 1174, 130 Atl. 885, the trial court had charged the jury that there was no evidence of contributory negli-

gence. The Supreme Court in a per curiam opinion held that such a charge was proper:

“Proximate cause and contributory negligence are questions ordinarily for the jury, but, where facts are undisputed, and susceptible of but one inference, the question then becomes one of law for the Court. *Mayor, etc. Baltimore v. Merio* (Md.) 128 Atl. 353.”

In *Sharpe v. Public Service Railway Co.*, 103 N. J. L. 583, 137 Atl. 526, the plaintiff appealed from a judgment of non-suit, which had been entered because the trial court deemed the plaintiff guilty of contributory negligence. The Supreme Court affirmed this judgment, and in the opinion written by Mr. Justice Lloyd the rule is laid down thus:

“It is settled that two questions are always involved where negligence or contributory negligence is alleged. The first is whether the conduct of the person so charged constituted negligence. The second is whether that negligence contributed to the injuries sustained. Under ordinary conditions these questions are for the determination of the jury, and not for the Court. *Smith v. Public Service Corporation*, 78 N. J. L. 478, 75 Atl. 937, 20 Am. Cas. 151.”

“If, however, upon the evidence adduced, it shall clearly appear that such negligence does exist, and that it has a causal relation to an injurious accident, the question becomes one of law for the court. *N. J. Express Co. v. Nichols*, 33 N. J. Law 434, 97 Am. Dec. 722.”

This language is quoted with approval by the Court of Errors and Appeals in the case of *German v. Harris*, 8 Adv. Rep. 36, 148 Atl. 619, in which case a refusal to non-suit was affirmed.

It is immaterial whether the rule is applied to the plaintiff as to hold that as a matter of law

he is guilty of negligence which has a causal relation to the accident or applies to the defendant, and the decision be that as a matter of law he is guilty of negligence which caused the accident. The law does not distinguish between persons or as to what side of a case they may be on, whether they are plaintiff or defendant. When the facts are as in the instant case—gasoline allowed to lay loose on a concrete floor and flow out to the street—*only one* inference can be drawn from them, to wit: the defendant was guilty of negligence which caused the fire.

Plaintiff-appellant therefore respectfully submits that the learned trial judge erred in denying the motion to direct a verdict in favor of the plaintiff, and that the judgment for the defendant should be reversed and either a judgment *non obstante veredicto* entered in favor of the plaintiff, or a new trial ordered.

#### IV.

**The learned trial judge erred in directing a verdict in favor of the defendant on the first count of the complaint.**

The first count of the complaint alleged that plaintiff had leased the property to the defendant; that in the lease which was offered in evidence and marked Exhibit "P. 1" and is printed in the case, as Schedule "A" annexed to the complaint, on pages 13-22, the defendant undertook:

"That it will not do or cause to be done any matter or thing in and upon the said demised premises by which the risk or hazard by fire over and above the risk and hazard incidental to the ordinary conduct of the business specified in this lease may be increased or enlarged;"

that the defendant used the space provided in said building for trucks to be brought into said building to the loading platform for the purpose of loading and unloading merchandise as a garage for the storage of automobile trucks, and in violation of its covenants and of the terms of the lease, filled the gas tanks of its trucks with gasoline inside the building, instead of outside, and that while the defendant by its agents was filling the gas tanks of its trucks on the inside of the building, in violation of the terms of its lease, vapor arising from the gasoline which escaped became ignited, and a fire broke out which completely destroyed the building on the 23rd of June, 1925, and sues as damages for the value of the building—\$175,000.00. The defendant evidently realized that by using the loading space for a garage it was increasing the hazard, and therefore especially pleaded as paragraph 2 of its second defense to the first count, after admitting paragraphs 1, 2 and 3 of the first count, that:

“Defendant denies using space provided in said buildings for trucks to be brought into said building, as a garage for the storage of automobile trucks.”

Defendant's general manager, Raymond F. Barnes, testified, at the top of page 64 of the State of Case, that about a year before the fire, defendant moved the one-gallon pump that was on the premises at the time the lease went into effect, and installed a five-gallon pump, and on page 82, lines 11-20, as follows:

“*By the Court.*

Q How many cars did you store in that plant? A I couldn't answer that sir; I think usually three.

Q And you have always had more cars than that? A Yes, sir; we had cars stored in our other buildings.”

The plaintiff also proved on page 31, lines 7-13 of the State of Case, the following:

“Q Where were you storing that truck at night? A Right in the plant, in the warehouse.

Q What part of the warehouse? A We called it the loading platform.

Q In front of the loading platform? A In front of it.”

The defendant's own witness, Mr. Charman, testified on page 121, lines 15-21, as follows:

“Q I am not asking you about any agreement. I am asking you as to the fact. Don't you differentiate as an insurance man between filling the gas tanks of the trucks inside of the premises or having them filled on the outside from a pump? A Yes.”

and the same witness, on page 120, of the State of Case, lines 30-38, testified:

“Q But you did know that it was used in the trucks? A Oh, yes. A tank buried under the street and a Standard pump as that was, our company does not consider that as gasoline used on the premises.

Q But you did consider it more or less hazardous, did you not? A To a certain extent.”

On these facts the plaintiff-appellant respectfully submits that a jury question was raised as to whether or not the use of the premises as a garage and gasoline filling station with an increased pumping capacity was or was not “doing or causing to be done any matter or thing upon the said demised premises by which the risk or hazard by fire over and above the risk and hazard incidental to the ordinary conduct of the business specified in this lease may be increased or enlarged.” It was not so clearly a matter of law that the Court could decide that such use did not increase the risk by fire, especially in

view of the fact that the evidence showed that the fire actually occurred through that very use. It is apparent that from this state of facts different inferences could be drawn, and men's minds come to different conclusions; and the jury, had it been permitted to pass upon the question, might very well have found that such use was, in fact, more hazardous than that provided for in the lease, and that the defendant was liable for the damages sustained by the plaintiff, because of the breach of this covenant, and because of this very use. The law is well settled, as was stated in *Montecalvo v. Wahl*, 97 N. J. L. 554, by this Court, on page 559:

“Where fair-minded men might honestly differ as to the conclusions to be drawn from the facts, whether controverted or uncontroverted, the question at issue should go to the jury. *McCarthy v. Metropolitan Life Insurance Co.*, 75 N. J. L. 887.”

It is respectfully submitted therefore that it was error for the learned trial judge to direct a verdict against the plaintiff on this count.

For the reasons above stated, it is respectfully submitted that the judgment under review should be reversed.

Respectfully submitted,

PHILIP J. SCHOTLAND,  
Attorney for and of Counsel  
with the Plaintiff-Appellant.

## New Jersey Court of Errors and Appeals

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FLORENCE REALTY Co., a corporation of the State of New Jersey,

*Plaintiff-Appellant,*

*v.*

BARNES MANUFACTURING Co., a corporation of the State of New Jersey,

*Defendant-Respondent.*

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Action at Law.

### BRIEF OF DEFENDANT-RESPONDENT.

#### Facts.

This is an appeal for the reversal of a judgment rendered in the Supreme Court, Essex Circuit, in an action brought by the plaintiff-appellant against the defendant-respondent to recover the sum of \$175,000 for the destruction by fire of a warehouse building occupied by the defendant-respondent as a tenant. The complaint contained three counts, upon the first of which the Court directed a verdict for the defendant-respondent, and the second and third counts of which were allowed to go to the jury which brought in a verdict in favor of the defendant-respondent on the first count, as directed, and upon the second and third counts as a result of their consideration of the evidence. The attorneys of record for the defendant-respondent throughout the conduct of the case have been

Darling, Barnes & Dowden, with Frederick M. Barnes, of counsel. At the trial, Mr. Arthur T. Vanderbilt was associated with the attorneys for the defendant-respondent, and his name appears as counsel for defendant-respondent on the State of Case as a result of a misunderstanding on the part of the attorney for the plaintiff-appellant.

On June 23, 1925, the Barnes Manufacturing Co., the defendant-respondent, occupied a four-story and basement brick building, approximately one hundred feet square on the westerly side of West Side Avenue, known by the street number 247 West Side Avenue, Jersey City, N. J. The tenancy was created by a lease entered into between the American Grocers' Society and the Barnes Manufacturing Co. on November 17, 1920, for a term of ten years beginning March 1, 1921. Subsequent to the execution of this lease, the property was sold by the American Grocers' Society to the Florence Realty Co., the plaintiff-appellant. Rent thereafter to and including the month of June, 1925, was paid by the Barnes Manufacturing Co. to the Florence Realty Co.

In the front of the building, on the level of the street, there was a loading bay or recess deep enough for large trucks to back into a loading platform in the rear of the loading bay, and wide enough across the front of the building to permit four trucks to be loaded at one time. The front of this loading bay or recess could be closed by lowering doors which folded in the middle and raised to the ceiling of the loading bay when the loading bay was being used.

At the southerly end of this loading bay, close to the southerly wall thereof and buried beneath the ground, there was a five-hundred-gallon tank for the storage of gasoline used for fuel for the motor trucks. From this tank a pipe ran to a point close

to the southerly wall of the loading bay and approximately five feet from the front of the building. At the time of the execution of the lease, there was attached to this pipe a gasoline pump of one-gallon capacity, used to pump gasoline from the storage tank to the tanks of the motor trucks operating from the building, and in the storage tank, when the lease was executed, there were approximately 125 gallons of gasoline which the lessor drew to the attention of the Barnes Manufacturing Co. Early in 1924, the Barnes Manufacturing Co. had the gasoline pump of one-gallon capacity removed by the Standard Oil Company, and had substituted for it a Standard Oil gasoline pump of five-gallon capacity of the type used by the Standard Oil Company at its roadside service stations. The new pump was in the same location as the original pump. To this pump was attached a standard 15-foot flexible hose. Alongside the gasoline pump was a faucet with a rubber hose attached for putting water in the radiators of the motor vehicles and for washing down the floor of the loading bay.

The defendant-respondent used the storage tank and gasoline pump for supplying gasoline to its motor vehicles. At night, some of the motor vehicles of the defendant-respondent were kept in the loading bay with the front doors thereof closed down.

The loading bay, gasoline pump and the entire building were inspected daily by the officers of the defendant-respondent and periodically by the captains of the Fire Department district in which the building was located; by representatives of the insurance companies carrying insurance on the property of the defendant-respondent; and by repairmen of the Standard Oil Company. Each testified that the pump and loading bay were main-

tained in a proper and safe condition. William Belloff, a Standard Oil repairman, testified that he installed a new hose on, and inspected, the pump three days before the fire, and that the pump was in perfect condition at that time.

At approximately 7:30 on the morning of June 23, 1925, a fire started in the loading bay of the building, which fire completely destroyed the building. At the time of the fire, two trucks and a small tractor were in the loading bay. The two doors in the northerly end of the loading bay (the end opposite the end in which the gasoline pump was located) were open, and one truck, which had been stored in the loading bay the previous night, had been removed. Two of plaintiff-appellant's witnesses, who were truckmen formerly employed by the defendant-respondent, testified that they may have spilled some gasoline on the floor of the loading bay in filling the tanks of their cars. There was no testimony offered as to how this gasoline, if it had been spilled, became ignited.

## ARGUMENT.

### I.

**The Court properly directed a verdict for the defendant-respondent on the first count of the complaint.**

The first count is laid in contract. Referring to the lease, marked Schedule A (pp. 13-22), it quotes a covenant on the part of the defendant-respondent that "it will not do or cause to be done, any matter or thing in and upon the said demised premises by which the risk or hazard by fire over and above the risk and hazard incidental to the

ordinary conduct of the business specified in this lease may be increased or enlarged." Said count refers also to an agreement by the defendant-respondent that it would, in all respects, do and perform the matters and things required by Insurance Companies writing risks in the City of Jersey City, aforesaid; to render the demised premises insurable against loss or damage by fire at minimum costs; also a covenant that it would not use or occupy the said premises for any business or purpose other than mercantile or manufacturing business not more hazardous than the manufacture or storage of sashes, doors, blinds, etc.

The count sets up, as a violation of these covenants, the use of the loading bay for the storage of automobile trucks and the maintenance of a gas tank for the storage of large quantities of gasoline for the use of defendant-respondent's automobile trucks and a gasoline pump for the purpose of supplying gasoline to said trucks and the filling of gas tanks of trucks inside the building, instead of outside; and that the violation of these covenants on the morning of June 23, 1925, resulted in the destruction of the building.

Raymond F. Barnes, beginning at line 30 of page 61, and continuing through page 62 to line 20 of page 63, testified as follows:

"Q. At the time that the Barnes Manufacturing Company took possession of the premises under the lease, was there a gasoline tank installed underground connected with the premises? A. There was.

"Q. Do you know what the size of that tank was, Mr. Barnes? A. I do not.

"Q. At the time that you took possession of the premises, can you tell us whether or not there was any gasoline in that tank? A. There was.

"Q. Can you tell us how much? A. Mr. Curtis told me that they were making us a present of about 125 gallons, and Mr. Warner, his partner, stated that he thought it was more than that.

"Q. Who were Mr. Curtis and Mr. Warner? A. They were supposed to be the owners of the property.

"Q. Do you know whether or not they were officers of the Florence Realty Company? A. They were both officers.

"Q. I am in error. Were they officers of the American Grocers? A. Yes, at that time.

"Q. They were the gentlemen with whom you had dealings in negotiating this lease? A. Yes, sir, and Mr. Schotland and the real estate men.

"Q. Do you recall what position Mr. Curtis occupied with the company? A. I don't think I remember his office.

"Q. Can you refresh your recollection by looking at the lease? A. Oh, yes.

"Q. That is, provided you can read the signatures (handing Exhibit P-1 to witness).

*"By the Court:*

"Q. Look at the printing at the beginning of the acknowledgment.

"Mr. Schotland: The lease shows he was secretary.

*"By Mr. Schotland:*

"Q. Were both Mr. Curtis and Mr. Warner there? A. Yes.

*"By Mr. Vanderbilt:*

"Q. Were both Mr. Curtis and Mr. Warner there at the time the statement was made about giving the Barnes Manufacturing Company 125 or more gallons of gasoline that were in the tank? A. They were both there.

"Q. After you took possession of the property under the lease, Mr. Barnes, what did you do with reference to the use of the gasoline tank and pump and so forth? A. The American Grocers came there to get some goods

and used the tank to gas one of their own trucks. We also used some of the 125 gallons in gassing one of our cars.

“Q. When did you move in the premises?

A. I think it was in December. I am not sure. That was in part. We did not move entirely.”

This testimony was not contradicted. The defendant-respondent, in leasing the premises with the gasoline tank and gasoline pump installed in the building, would have just as much right to use this tank and pump as would a tenant in a dwelling to use such fixtures as a bath-tub or gas range or other fixtures appropriate to the use for which the building is to be used. It is to be presumed that when a building is leased with certain fixtures therein, the lessee is to have the right to use those fixtures.

The plaintiff-appellant acquiesced in the use of these fixtures. Mr. Raymond F. Barnes, general manager of the defendant-respondent, testified on page 68, lines 10-35, with reference to the knowledge of the secretary of the plaintiff-appellant, Mr. Curtis, with reference to the use of the gasoline pump, as follows:

*“By Mr. Vanderbilt:*

“Q. Were they where they could see and observe the pump? A. Mr. Curtis stood alongside of the pump one day talking to me. I should think he was possibly eight or ten inches from the pump, or as near as the hub of an automobile wheel would be to the pump, with his foot on the wheel, and he explained to me what a fortunate thing it was that the Company had put this pump in such a convenient place so that the trucks could be filled. While he was explaining this, a truck was actually being filled, and he drew my attention to that convenience.

*“By the Court:*

“Q. How long before the fire was that? A. I don't know. I think approximately between a half a year and a year. It was one of these days where we were having difficulties with the jack-knife doors.

*“By Mr. Vanderbilt:*

“Q. Did either Mr. Curtis or Mr. Warner say anything to you to the effect that you should not use the gasoline tank or the gasoline pump? A. No one said that.”

This testimony was not contradicted.

As to the use of the loading bay for the storage of trucks, Mr. Raymond F. Barnes, general manager of the defendant-respondent, referring to representations by the officers of the lessors, who were also officers of the plaintiff-appellant, as to the use of the loading bay for the storage of trucks and plaintiff-appellant's acquiescence therein, testified as follows:

*“By Mr. Vanderbilt:*

“Q. Was there anything said between you on any of these occasions with reference to the use of this enclosed space for purposes of storing trucks? A. Yes, sir, it began with the signing of the lease. That was one of the reasons that they used as a proper argument for the value of that building for a lease for our purposes, because of the fact that they were then themselves using it as a loading bay, and it had been designed by the architect that way. This bay set back from the front doors a sufficient distance as they told us and explained by measurements to back a truck in there and store it, and that was the reason it was built that way, so that this truck could be stored and loaded at night-time, and further it could be filled from a gasoline tank which was alongside of it. And they also pointed out the fact that they had a water connection there so that

the radiator of the car could be filled with water.

“Q. On the occasions when Mr. Curtis and Mr. Warner came over to see you after you became tenants, did they ever refer to your use of part of the premises for the purpose of storing your trucks? A. They did. They said, ‘Wasn’t it very fortunate that the building was designed that way, so that it can be used as you are using it?’”

This testimony was not contradicted.

No evidence was introduced to show that the defendant-respondent failed to do those things necessary to render the demised premises insurable, or that the premises were used for any purpose more hazardous than the manufacture of sashes, doors, blinds, etc. The building in question was designed as a storage warehouse with provision for the storage and loading of trucks in the loading bay and supplying of gasoline. There was no evidence introduced from which the conclusion might be drawn that the use of the premises by the defendant-respondent in any way violated the covenants of the lease, and it is therefore respectfully submitted that the direction of a verdict in favor of the defendant-respondent upon the first count, which is based on the covenants in the lease, was not erroneous.

## II.

### **The Court properly refused to charge plaintiff-appellant’s request to charge as follows:**

“If you find that the fire was caused by the gasoline which flowed on the floor, igniting, and such gasoline got on the floor through the careless or negligent operation of the pump by either of the chauffeurs who were using the pump, then your verdict should be for the plaintiff” (p. 145, lines 12 to 17).

This request to charge is based upon the assumption that the presence of gasoline on the floor of the loading bay was a negligent act which resulted in the destruction of the building. It assumes that the presence of gasoline on the floor was the proximate cause of the fire.

In *Migliaccio v. Public Service Ry. Co.*, 101 N. J. L. 496, at page 499, aff. 102 L. 442, Justice KATZENBACH discusses the question of proximate cause as follows:

“The question of proximate cause in negligence cases presents as delicate a question as exists in the law. It is difficult to lay down any general rules which will act as a guide in all cases, as much depends upon the facts of the individual cases. It is necessary for a plaintiff, in order to recover, to prove that the defendant did an act or omitted to do an act which a person of ordinary prudence could foresee might naturally and probably produce the injury complained of; and that such act or omission did actually cause the injury. In many cases, perhaps the majority of cases, the inquiry turns upon the question as to whether there exists an intervening cause efficient in itself to produce the injury complained of. But it is as necessary for the plaintiff to establish the fact that the injury is one which might have been reasonably anticipated by the wrong-doer as it is to show that there was no other intervening cause efficient in itself to work the injury complained of. Anticipation is an essential element of proximate cause.

“Of the text writers, Cooley, in his work on Torts (third edition, p. 73), best expounds the principle. He uses the following language taken from *Add. Torts*: ‘If the wrong and the resulting damage are not known by common experience to be natural and usually in sequence, and the damage does not, according to the ordinary course of events, follow from

the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action.’”

In the case of *Cole v. German Savings and Loan Asso.*, 124 Fed. Rep. 113, Circuit Judge SANBORN defined a probable cause as one that is more likely to follow its supposed cause than it is to fail to follow it. In the citations supporting this doctrine he refers to the leading case of *Milwaukee and St. Paul Railroad Co. v. Kellogg*, 94 U. S. 469, where Mr. Justice STRONG laid down the principle in the following terms:

“It is generally held that, in order to warrant a finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.”

In our own State, Mr. Justice DIXON said, in *Wiley v. West Jersey Railroad Co.*, 44 N. J. L. 247:

“The law requires that the damages chargeable to a wrong-doer must be shown to be the natural and proximate effects of his delinquency. The term ‘natural’ imports that they are such as might reasonably have been foreseen and such as occur in an ordinary state of things; the term ‘proximate’ indicates that there must be no other culpable and efficient agency intervening between the defendant’s dereliction and the loss.”

The natural result of the spilling of gasoline is the evaporation of the liquid. Gasoline in itself does not cause a fire.

“Gasoline is a motive fluid in general use, as was kerosene in the days preceding the introduction of gas and electricity—there is nothing inherently dangerous in its ordinary use,

removal or carriage, as is attested by the thousands of gasoline vehicles in daily use in the State as the prime means of transportation and travel."

*Sarno v. Gulf Refining Co.*, 99 N. J. L. 340;  
aff. 102 N. J. L. 223.

Gasoline, when lying on the ground, may be the instrumentality as it was in the *Sarno v. Gulf Refining Co.* case, in carrying flames from one place to another, but the gasoline itself, or its presence on the ground, is not the natural proximate cause of a fire. The proximate cause of the resultant fire is the igniting of the gasoline by an independent agent. In the instant case, the gasoline on the floor of the loading bay, if there were any there, would correspond to the persons in the famous *Squib* case, in which the last person to touch the squib was not responsible for the resultant explosion, but the person who originally threw the squib was responsible. The gasoline itself did not cause the fire, although it may have acted as a means of conveying from one place to another the fire started by an independent agent. The responsibility for the fire would therefore be upon the person who ignited the gasoline, and no evidence was adduced as to the manner in which the gasoline itself became ignited.

"The general rule is that the damage to be recovered must be the natural and proximate sequence of the act complained of."

2 *Greenl., Evidence*, 256.

"It is not enough if it be the natural consequence; it must be both natural and proximate," quoting *Richardson v. Dunn*, 8 C. B., N. S. 665. *Cuff, Adm'x. v. Newark and New York R. R. Co., et al.*, 35 Law 17.

Counsel for the plaintiff-appellant, in Point I of his brief, cites cases on the question of proximate cause. The gasoline alleged to have been on the floor of the loading bay, in the instant case, corresponds to the unhitched horse in the case cited by plaintiff-appellant of *Collins v. West Jersey Express Co.*, 72 Law 231, which ran away as a result of the rear wheel of the wagon, to which the runaway horse was attached, being struck by the defendant's express wagon. In that case, the defendant express company, whose wagon started the train of circumstances which resulted in the injury to the plaintiff, was held liable.

The gasoline on the floor, in the instant case, corresponds to the overgrown weeds in the case cited of *D. L. & W. R. R. Co. v. Salmon*, 39 Law 299, in which the railroad company was held liable for a fire started on its right of way, communicated to the plaintiff's property by the weeds.

It is therefore respectfully submitted that the Court properly refused to charge the request quoted.

### III.

#### **The Court did not err in charging the jury as follows:**

“If you find that the act of the defendant—and when I say ‘the act of the defendant’ I mean the act of the defendant or its servants and employees—did nothing more than furnish a condition by which the fire was made possible, and that the fire was caused by a subsequent independent act of a third party or agency, and the two acts were not concurrent, and the existence of the condition was not the proximate cause of the fire, then your verdict must be for the defendant” (p. 143, line 36, to p. 144, line 10).

The argument under Point II of this brief, with reference to proximate cause, is applicable to this Point. However, it will be noted that this portion of the charge, referring to the condition, concludes as follows:

“If you find that the existence of the condition was not the proximate cause of the fire, then your verdict must be for the defendant.”

At page 143, on lines 20 to 30, the Court charged as follows:

“You are not called upon to say how this fire occurred. Perhaps no one knows. You are called upon to answer this one question: Did the fire occur, as the plaintiff says it did, through the negligence of the defendant’s servants?”

“If you find that to be so, then, of course, you will find a verdict for the plaintiff. If you do not find that to be so, then you will find a verdict in favor of the defendant.”

The jury, therefore, in arriving at a verdict, decided that the fire did not result from the negligence of the defendant-respondent or its servants or employees, and also that the presence of any gasoline upon the floor of the loading bay was not the proximate cause of the fire.

It is therefore respectfully submitted that the portion of the charge quoted was proper.

#### IV.

**The Court’s refusal to direct a verdict in favor of the plaintiff-appellant, as requested, was proper.**

This motion was made after all the evidence was in. If the plaintiff-appellant, in making the motion, was relying upon the doctrine of *res ipsa*

*loquitur*, the rule laid down in *Hughes v. Atlantic City and S. R. Co.*, 85 N. J. L. 212, would govern. This rule is stated by Justice SWAYZE in 85 N. J. L. 214, as follows:

“He (the Court) is called on in the first instance to say whether there is any evidence of negligence to go to the jury; in the absence of direct evidence, he may, in cases where the maxim applies, hold that the circumstances are such as will, unexplained, permit the jury to draw the inference of negligence; but that inference is still one for the jury and not for the court. They may not believe the witnesses; the circumstances may be such that the jury will attribute the injury to some cause with which the defendant has nothing to do; they may find the inference of negligence too weak to persuade their minds; they may think a reasonably prudent man would have been unable to take precautions to avoid the injury; and in any event they may render a verdict for the defendant. This is within their province even when there is no explanation by the defendant. When there is such explanation, it is for the jury to decide just as in the ordinary case of whatever kind, what the actual facts are and what inference should be drawn therefrom. The most that is required of the defendant is explanation, not exculpation; and that explanation may leave the mind in equipoise in which case the defendant would be entitled to a verdict because the plaintiff has failed to prove his case by the weight of the evidence.”

This rule has been followed in numerous cases in this Court, particularly, *Fanshawe v. Rawlins*, 89 N. J. L. 344; *Sniebel v. Winslow*, 88 N. J. L. 191; *Mannon v. Oddfellows, etc.*, 97 N. J. L. 215; *Russell v. Public Service Ry. Co.*, 101 N. J. L. 34; *Noonan v. Great Atlantic & Pacific Tea Co.*, 104 N. J. L. 136. Under the doctrine of *res ipsa loquitur*, the most

that the plaintiff-appellant could ask was that the evidence be submitted to the jury.

If the plaintiff was relying upon the absence of testimony showing due care on the part of the defendant-respondent, the plaintiff-appellant would not be entitled to a direction of verdict.

The testimony of Fire Captain Edward P. Caesar (p. 57, line 20, to p. 58, line 10) was that the loading bay and building were kept clean and in good condition.

Fire Captain Frederick A. Peters (p. 60, top of page, to line 30) gave similar testimony.

Raymond F. Barnes, general manager of defendant-respondent (p. 64, line 37, to p. 65, line 16), testified to frequent inspections of the loading bay and gasoline pump, and on cross examination (p. 73, from line 39, to p. 74, line 40) testified that he tested the pump frequently and that it and the loading bay were maintained in proper condition.

Mr. James T. Barnes, president of the defendant-respondent (p. 83, line 20, to p. 84, line 20), testified to inspections of the loading bay and gasoline pump and to the perfect condition in which both were kept.

James C. Barnes, warehouse manager of the defendant-respondent (p. 89, lines 15 to 30), testified to inspecting the loading bay and pump; that both were in perfect condition. On page 90, at lines 10 to 30, he testified that he checked the gasoline consumed and that there was a loss from evaporation or otherwise of only two to three gallons a month out of several hundred gallons used.

William Belloff, a pump repairman employed by the Standard Oil Company of New Jersey (beginning at p. 98, line 20, and continuing to line 5

on p. 101), testified to having made frequent inspections of the pump; that these inspections showed that the pump was in first-class condition at all times; that occasionally a new hose had to be connected to the pump; and that, three days before the fire occurred, he connected a new hose to the pump; and that the pump, at that time, was in perfect condition.

Kenneth C. Hunt, a driver formerly employed by the defendant-respondent (p. 108, line 20 to line 35), testified that the pump and hose did not leak and that he never saw any gasoline on the floor of the loading bay.

Wayne Morrell, Newark manager for the Lumbermen's Mutual Casualty Company (beginning at p. 113), testified to inspections of the building and loading bay made by him.

Albert H. Charman, agent for a group of mutual fire insurance companies (beginning at p. 117), testified to inspections made of the building and (on p. 120, lines 1 to 15) testified that the loading bay and pump were in good condition when he made his inspections, and that he never saw any gasoline or indication of gasoline on the floor of the loading bay.

From the testimony of the defendant-respondent's witnesses, there was sufficient evidence of due care by the defendant-respondent adduced to create a question of fact for the jury. The plaintiff-appellant's testimony was not of conclusive character. It is therefore respectfully submitted that the Court properly refused to direct a verdict in favor of the plaintiff-appellant.

For the reasons above stated, it is respectfully submitted that the judgment under review should be affirmed.

Respectfully submitted,

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For the reasons above stated, it is respectfully submitted that the judgment under review should be affirmed.

Respectfully submitted,

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