

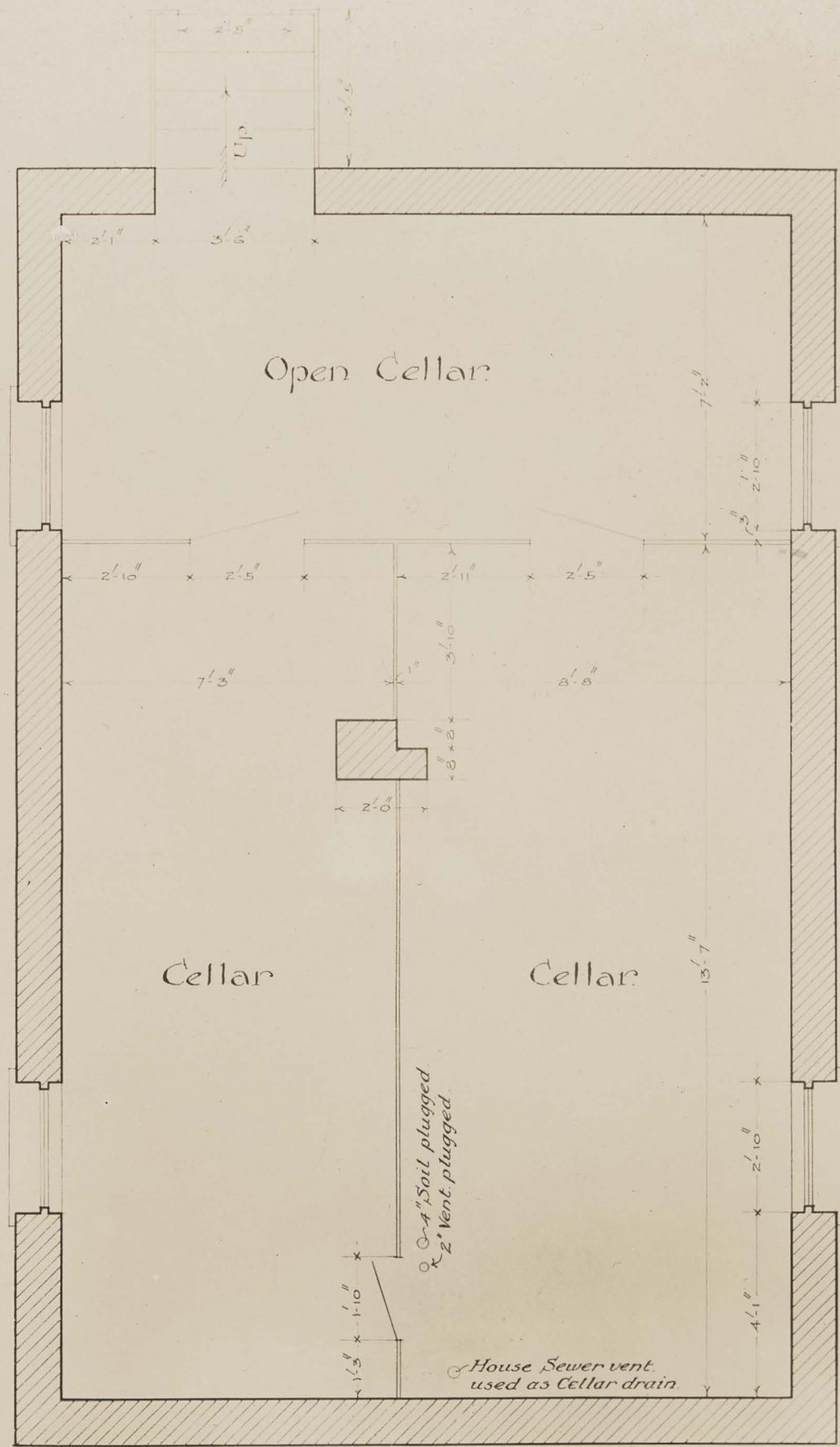
No. 1335.- 1 and 3 Salem Street, Carteret, N. J.

Ex C-5

Detail view in cellar, showing old toilet waste and vent pipe plugged--where old toilet was located being removed to rear yard.



No. 1884 - 1 and 3 Salem Street, Carteret, N. J.
 Detail view in cellar, showing fresh air outlet of
 house sewer used as a drain for cellar, instead of being
 connected with pipe to outer air.



Ident — Plan of Cellar —
 Scale $\frac{3}{8} = 1.0$

No. 1 & 3 Salem St. Carteret, N. J.
 Kelyk & Perth Amboy Gas Co.

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**ORDER TO SHOW CAUSE AND
RESTRAINING ORDER.**

Filed January 12, 1927.

In Chancery of New Jersey

10

Between

PERTH AMBOY GAS LIGHT
COMPANY, a corporation,
Complainant,

and

ALEXANDER KILEK, individu-
ally and as administrator
ad prosequendum of the
estate of Eva Kilek, de-
ceased, and EDWARD T. HAN-
SON, one of the coroners of
Middlesex County,
Defendants.

On Bill, &c.

*Order to
Show Cause
and
Restraining
Order.*

20

This matter being opened to the Court by Collins & Corbin, solicitors for and of counsel with complainant, and the Court having read the bill of complaint in the above-entitled cause and the affidavits thereto annexed: 30

It is on this 12th day of January, A. D. 1927, ORDERED that the defendants, Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased, and Edward T. Hanson, one of the coroners of Middlesex County, show cause before the Chancellor at the Chancery Chambers in the City of Jersey City, at No. 1 Exchange Place, the 24th day of January, 1927, at the hour of ten o'clock in the 40

Order to Show Cause and Restraining Order.

forenoon or as soon thereafter as counsel can be heard, why the said defendant, Alexander Kilek, individually and as administrator as aforesaid, should not be restrained and enjoined according to the prayer of said bill.

10 And it is FURTHER ORDERED that the said defendant, Alexander Kilek, individually and as administrator *ad prosequendum* as aforesaid, his attorneys, agents, servants and confederates, in the meantime and until the further order of this Court in the premises, desist and refrain from prosecuting or proceeding with the action at law begun by said defendant in the New Jersey Supreme Court, Middlesex County, against complainant.

20 And it is FURTHER ORDERED that a copy of the bill of complaint and affidavits and of this order (all of which may be certified by the solicitors of complainant) be served on said defendants within five days from the date hereof either personally or by leaving the same at their residences in the State of New Jersey, or in the case of said defendant Alexander Kilek, by serving the same upon Thomas Brown, his attorney in said action at law.

30 E. R. WALKER,
C.

Respectfully advised,

JAMES F. FIELDER,
V.-C.

We certify the foregoing to be a true copy of the original.

40 COLLINS & CORBIN,
Solicitors of Complainant.

BILL AND SUPPORTING AFFIDAVITS.

Filed January 12, 1927.

IN CHANCERY OF NEW JERSEY.

To his Honor Edwin Robert Walker, Chancellor 10
of the State of New Jersey:

Perth Amboy Gas Light Company, complainant, a corporation of the State of New Jersey, having its principal office at Perth Amboy, in the County of Middlesex and the State of New Jersey, respectfully shows:

1. On August 16, 1926, Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of his wife, Eva Kilek, deceased, began an action at law in the New Jersey Supreme Court against complainant to recover damages for the death of his said wife, alleging that complainant had negligently permitted and suffered illuminating gas to escape from its main in and around No. 1 Salem avenue, in the Borough of Carteret, County of Middlesex and State of New Jersey, where said Eva Kilek resided at the time of her death, and that as a result of such negligence said decedent, Eva Kilek, was poisoned and suffocated to death on February 15, 1926, in the Borough of Carteret aforesaid. 20 30

2. Complainant's investigation of the death of said Eva Kilek disclosed that there are no gas pipes or facilities for furnishing gas in said premises, #1 Salem avenue aforesaid, and an inspection of said premises on February 14, 1926, by one of complainant's workmen at 11:00 A. M. on that day disclosed that there was no gas leak 40

Bill of Complaint.

in the cellar or other part of said building. Complainant's workmen also inspected the gas main in Salem avenue and found no evidence of any leak. The investigation also disclosed that the premises which are known as Nos. 1 and 3 Salem avenue contain a cellar in which was a toilet used by the occupants and that the toilet and plumbing in the cellar were not properly trapped nor was there any ventilation into the outer air.

3. Said Eva Kilek died on February 15, 1926, or more than twelve hours after the inspection of said premises by complainant's workmen. The certificate of death is signed by J. S. Hay, Coroner of Perth Amboy, N. J., and gives as the cause of death, "Suffocated by illuminating gas. Accident."

4. Complainant is informed by Dr. Otto Schultze, medical assistant to the District Attorney of New York County, who has performed thousands of autopsies, that the cause of death may be determined by an autopsy on the body of said Eva Kilek.

5. Complainant is informed by neighbors of said Eva Kilek that she was suffering from diarrhoea or dysentery on February 14 and 15, 1926, and made frequent visits to the toilet in the cellar on February 14th. These neighbors have refused to make any affidavits for complainant.

6. No autopsy was performed on the body of said Eva Kilek at the time of her death and evidence as to the cause of her death can only be had by an exhumation and autopsy on her body, and complainant cannot fairly defend said action at law begun against it unless discovery

Bill of Complaint.

is made of the cause of death by exhumation and autopsy as aforesaid.

7. On December 31, 1926, Collins & Corbin, attorneys for complainant in said action at law, requested Thomas Brown, attorney for the plaintiff in said action, to permit an autopsy. On January 3, 1927, said Thomas Brown wrote the attorneys for complainant that said Alexander Kilek saw no need for an autopsy and did not care to have the body of his wife disturbed. A true copy of said letter is annexed hereto and made part hereof and marked Schedule "A."

8. On January 6, 1927, complainant made demand on Edward T. Hanson, one of the present coroners of the County of Middlesex, for an inquest and post mortem examination of the body of said Eva Kilek. A true copy of said demand together with the refusal of said coroner to accede to the same is annexed hereto and made part hereof and marked Schedule "B."

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased, and Edward T. Hanson, one of the coroners of the County of Middlesex, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That said Alexander Kilek, individually and as administrator as aforesaid, may be ordered to permit the exhumation of the body of said Eva Kilek and the performance of an autopsy thereon at the expense of the complainant;

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Bill of Complaint.

such autopsy to be performed by a physician or pathologist selected by complainant in the presence of any physician or pathologist selected by said defendant, Alexander Kilek; and that said defendant Edward T. Hanson, coroner as aforesaid, be ordered to permit the exhumation and autopsy on said body as aforesaid. 10

3. That a writ of injunction or injunctive order may issue restraining the said defendant Alexander Kilek, his attorneys, agents and servants from prosecuting said action at law in the New Jersey Supreme Court against complainant until the performance of said autopsy.

4. That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises. 20

COLLINS & CORBIN,
Solicitors for and of Counsel with Complainants.

30

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Schedule A.

SCHEDULE "A."

THOMAS BROWN

Attorney and Counsellor at Law.
174 Smith St. Perth Amboy, N. J.

January 3rd, 1927. 10

Collins & Corbin, Esqs.,
1 Exchange Place,
Jersey City, N. J.

Re: Kilek v. P. A. Gas Light Co.

Dear Sirs:

Mr. Kilek sees no need for an autopsy and therefore does not care to have the body of his wife disturbed. This will answer your letter of December 31st, 1926. 20

Truly yours,

THOMAS BROWN.

TB-FF

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Schedule B.

SCHEDULE "B."

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

10	ALEXANDER KILEK, administrator <i>ad prosequendum</i> of the estate of Eva Kilek, deceased, and ALEXANDER KILEK, individually,	}	<i>Action at Law. Demand.</i>
	<i>Plaintiff,</i>		
	<i>v.</i>		
20	PERTH AMBOY GAS LIGHT COMPANY, a corporation,	}	<i>Defendants.</i>

To Edward T. Hanson, Coroner, Middlesex County, N. J.

SIR:

WHEREAS, one Eva Kilek, did on or about February 15, 1926, depart this life and was at that time residing at No. 1 or 3 Salem Street, Carteret, County of Middlesex, New Jersey, and has been since February 17, 1926, interred in Holy Virgin Cemetery, and it appearing that the demise of said Eva Kilek is alleged to have been caused by the negligence of the Perth Amboy Gas Light Company, in that said company did negligently maintain its gas service pipes in and about the vicinity of No. 1 or 3 Salem Street, Carteret, Middlesex County, New Jersey, aforesaid, and

WHEREAS, an action at law was brought by Alexander Kilek, individually and as administra-

Schedule B.

tor *ad prosequendum* of the estate of Eva Kilek, deceased, in the New Jersey Supreme Court, Middlesex County, for damages for the alleged negligence of said Perth Amboy Gas Light Company, which said alleged negligence is supposed to have brought about the death of said Eva Kilek, and

WHEREAS, said action at law is now pending and still undetermined, and

WHEREAS, the said Perth Amboy Gas Light Company denies that said Eva Kilek died of illuminating gas or died through the alleged negligence of said Perth Amboy Gas Light Company.

THEREFORE, Perth Amboy Gas Light Company, in accordance with statutes in such cases made and provided, and more particularly in accordance with Section 15, Comp. Stat. 1910, p. 1588, demands that you, Edward T. Hanson, Coroner of Middlesex County, forthwith order an inquest, post mortem examination of the body of said Eva Kilek, or an autopsy of said body, to determine the efficient cause of the demise of Eva Kilek, aforesaid.

Dated January 6, 1927.

Perth Amboy Gas Light Company,
by its attorneys,

COLLINS & CORBIN.

Refuse to accede to the above demand to exhume the body of said Eva Kilek for purpose of an inquest or an autopsy without the authority of a court order.

EDW. T. HANSON,
Coroner County of Middlesex.

Schedule C.

SCHEDULE "C."

STATE OF NEW JERSEY.

STATE DEPARTMENT OF HEALTH

BUREAU OF VITAL STATISTICS

- 10 1. Place of Death—County Middlesex State
New Jersey Registered No. 2096 Town-
ship or Borough City Car-
teret No..... St., Ward.
(If death occurred in a hospital or in-
stitution, give its NAME instead of street
and number.)
2. Full Name Eva Kilik
3. Residence, No. 1 Salem St. Ward
(Usual place of abode.) (If non-resi-
20 dent give City, town and State.)
Length of residence in city or town where
death occurred yrs. mos. days. How
long in U. S. if of foreign birth yrs.
mos. days.

PERSONAL AND STATISTICAL PARTICULARS

4. Sex—Female
5. Color or race—White
- 30 6. Single, Married, Widowed or Divorced
(write the word)—Married.
7. If married, widowed or divorced Husband
of (or) wife of Ilia Kilik (give full
maiden name)
8. Date of Birth (month, day and year)
9. Age Years About 35 Months Days if LESS
than 1 day hrs. or min.
- 40 10. Occupation of Deceased. (a) Trade, profes-
sion or particular kind of work. House-
wife.

Schedule C.

- (b) General nature of industry, business or
establishment in which employed (or em-
ployer
- (c) Name of employer
11. Birthplace. (city or town) (State or coun-
try) Poland. 10
12. Name of father Hrehory Yakubowicz
13. Birthplace of Father (city or town) (State
or country) Poland.

Parents—

14. Maiden Name of Mother Irene Kilik
13. (a) Birthplace of Mother (city or town)
(State or country) Poland
15. Signature of Informant Ilia Kilik (address)
Carteret. 20
16. Received Feb. 16, 1926

E. S. WILGUS
Local Register.

MEDICAL CERTIFICATE OF DEATH

17. Date of Death. (Month, day and year) Feb.
15, 1926.
18. I Hereby Certify That I viewed deceased
from 19 , to 19 , that I
last saw h alive on Feb. 15, 1926 and 30
that death occurred on date stated above,
at m.
The Cause of Death was as follows:
Suffocated by illuminating gas. Accident.
.... (Duration) .. yrs. .. mos. .. ds.
Contributory (secondary)
.... (Duration) .. yrs. .. mos. .. ds.
19. Where was diseases contracted, if not at
place of death? Did an operation precede 40

Schedule C.

death? date of Was there an autopsy? What test confirmed diagnosis?

(Signed) J. S. Hay, Coroner M. D.
(address) Perth Amboy, N. J.

- 10 20. Place of Burial Cremation or Removal Holy Virgine Cemetery Date of Burial Feb. 17, 1926
- 21. Undertaker Michael Zylka Address Perth Amboy, N. J. New Jersey License Number 210

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30

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Affidavit of Edward A. Markley.

IN CHANCERY OF NEW JERSEY.

Between

PERTH AMBOY GAS LIGHT COMPANY, a corporation,
Complainant,

and

ALEXANDER KILEK, individually and as administrator ad pros. of Eva Kilek, deceased, and EDWARD T. HANSON, one of the coroners of Middlesex County,
Defendants.

10

On Bill, &c.

Affidavit.

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

EDWARD A. MARKLEY, of full age, being duly sworn according to law, on his oath deposes and says:

1. I am a member of the firm of Collins & Corbin, solicitors of complainant in the above-entitled cause. The facts, matters and things in said bill of complaint stated are true to the best of my knowledge, information and belief.

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2. Particularly is it true that on August 16, 1926, said defendant Alexander Kilek began an action in the New Jersey Supreme Court against complainant to recover damages for the death of his wife as in said bill of complaint stated. Defendant has filed an answer in said action denying that the death of said defendant's intestate was caused by gas poisoning as alleged in the

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Affidavit of Edward A. Markley.

complaint, and denying that complainant was guilty of negligence as charged in the complaint in said action at law.

10 3. Complainant caused an investigation to be made of the premises No. 1 Salem avenue in Carterest, New Jersey, on February 14, 1926. No evidence of any leaks of illuminating gas in the premises or in the vicinity were observable at that time and an investigator of complainant was informed by neighbors in the vicinity that said Eva Kilek was suffering from diarrhoea or dysentery on February 14, 1926. She died on February 15, 1926, as appears by certificate of death, a true copy of which is annexed hereto, made part hereof and marked Schedule "C."

20 4. On December 31, 1926, I wrote to Thomas Brown, attorney of the plaintiff in said action at law, and on January 3, 1927, received from him the letter, copy of which is annexed hereto, made part hereof and marked Schedule "A."

EDWARD A. MARKLEY.

Sworn to and subscribed at Jersey City, N. J., this 8th day of January, 1927, before me,

30 FRANK A. BOEHLER,
Attorney at Law of N. J.

Affidavit of Howard F. McIntyre.

IN CHANCERY OF NEW JERSEY.

Between

PERTH AMBOY GAS LIGHT
COMPANY, a corporation,
Complainant,

and

ALEXANDER KILEK, individu-
ally and as administrator
ad pros. of Eva Kilek, de-
ceased, and EDWARD T.
HANSON, one of the coro-
ners of Middlesex County,
Defendants.

10

On Bill, &c.
Affidavit.

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

HOWARD F. McINTYRE, of full age, being duly sworn according to law, on his oath says:

I am an attorney at law of the State of New Jersey, employed by Collins & Corbin, solicitors of the complainant herein. I served the demand annexed to the bill of complaint herein and marked Schedule "B" on Edward T. Hanson, one of the coroners of Middlesex County, New Jersey, and thereupon said coroner dictated to me the refusal of the demand endorsed thereon, which I then wrote and he thereafter signed.

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I have communicated with Dr. Otto Schultze, medical assistant to the District Attorney of New York County, who is recognized as a man of wide experience in autopsies, and who has performed thousands of them, and he informed

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Affidavit of Howard F. McIntyre.

me that an exhumation and autopsy of said body will definitely determine the cause of death and whether or not it was from illuminating gas poisoning.

HOWARD F. McINTYRE.

10 Sworn to and subscribed at Jersey City, N. J., this 8th day of January, 1927, before me,

FRANK A. BOEHLER,
Attorney at Law of N. J.

We certify the foregoing to be a true copy of the original.

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COLLINS & CORBIN,
Solicitors of Complainant.

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Affidavit of Joseph Wantach, M. D.

ANSWERING AFFIDAVITS.

Filed January 25, 1927.

IN CHANCERY OF NEW JERSEY.

Between

PERTH AMBOY GAS LIGHT
COMPANY, a corporation,
Complainant,

and

ALEXANDER KILEK, individu-
ally and as administrator
ad pros. of Eva Kilek, de-
ceased, and EDWARD T.
HANSON, one of the coro-
ners of Middlesex County,
Defendants.

10

On Bill, &c.
Affidavit.

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STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX. } *ss.*

JOSEPH WANTACH, M. D., of full age, being
duly sworn, on his oath deposes and says:

(I am a practicing physician in the Borough
of Carteret and have practiced medicine for 22
years. I attended Eva Kilek at #1 Salem ave-
nue, on February 14, 1926, and found her suffer-
ing from illuminating gas poisoning after apply-
ing the usual and orthodox tests to aid me in
my diagnosis. I was recalled on February 15,
1927, and found Eva Kilek dead. My examina-
tion, according to the accepted medical theories,
disclosed the woman had been overcome by il-
luminating gas.

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Affidavit of Joseph Wantach, M. D.

I have treated several cases of illuminating gas poisoning during my career. I have a knowledge of autopsies and have attended at least 50 autopsies. My experience convinces me that after practically a year's interment the exhumation of Eva Kilek's body and an autopsy performed thereon would elicit no further information concerning the death of the said Eva Kilek, and further than an autopsy at this time would be entirely valueless, and I am entirely satisfied that my diagnosis was the correct one and have no reason for believing the contrary.)

JOSEPH WANTACH, M. D.

Sworn and subscribed before me this 22nd day of January, 1927.

JOHN C. STECKEL,
Notary Public of New Jersey.

30

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Affidavit of Michael Zylka.

Filed January 25, 1927.

IN CHANCERY OF NEW JERSEY.

Between

PERTH AMBOY GAS LIGHT
COMPANY, a corporation,
Complainant,

and

ALEXANDER KILEK, individu-
ally and as admin. *ad pros.*
Eva Kilek, dec'd, *et als.*,
Defendants.

On Bill, etc.
Affidavit.

10

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX. } *ss.*

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(MICHAEL ZYLKA, of full age, being duly sworn, on his oath deposes and says he is a licensed undertaker and embalmer and has been such for twenty-two years. I was summoned on February 15, 1926, to care for the body of Eva Kilek, who I was informed had died of illuminating gas poisoning. I performed the usual functions of an undertaker and embalmer and embalmed the woman according to the accepted methods of embalming, which necessitated the injection of approximately one gallon of embalming fluid and the withdrawal of all blood from the body; there was no evidence that I could see of this woman having been subject to any disease, but the corpse had the appearance of being that of a normal and quite healthy woman. In my normal practice I have embalmed an average of about one hundred and fifty bodies a year.)

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MICHAEL ZYLKA.

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Affidavit of Michael Zylka.

Sworn and subscribed to before me
this 22nd day of January, 1927.

ANDREW D. DESMOND,
Notary Public of N. J.

10 A true copy,
THOMAS BARBER,
Clerk.

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ANSWER.

IN CHANCERY OF NEW JERSEY.

Between

PERTH AMBOY GAS LIGHT
COMPANY, a corporation,
Complainant,

10

and

ALEXANDER KILEK, individu-
ally and as administrator
ad prosequendum of the
estate of Eva Kilek, de-
ceased, and EDWARD T. HAN-
SON, one of the coroners of
Middlesex County,
Defendants.

On Bill, &c.
Answer.

20

The defendant Alexander Kilek, individually and as administrator *ad prosequendum* of Eva Kilek, deceased, residing in the Borough of Carteret, County of Middlesex and State of New Jersey, answering the bill of complaint herein, respectfully says:

(1. He admits the allegations in paragraph 1 of said bill except the allegation in the action at law therein referred to describing the date of Eva Kilek's death as being on or about February 15, 1926. 30

2. Defendant denies the allegations in the second paragraph of the complaint and further answering says that on the 14th day of February, 1926, and for several days previous thereto and since said date, Perth Amboy Gas Light Com- 40

Answer.

pany in the ordinary course of its business was furnishing illuminating gas to the inhabitants of the Borough of Carteret and for that purpose said gas company laid and maintained gas mains and service pipes along and upon Salem avenue in said Borough of Carteret and also in Mercer street, an intersecting street near the home of the decedent Eva Kilek at #1 Salem avenue; and that on or about the 15th day of February, 1926, the said complainant was the owner and possessor and had the control, management and use of the said gas mains and service pipes which were laid by said complainant in, along and upon Salem avenue and Mercer street in said Borough of Carteret for the sale and distribution of illuminating gas of the said complainant in transmitting dangerous and deadly gases in the conduct of its business and which gas and gas pipes unless properly protected were dangerous to the life of said persons in and near said streets. It thereupon became and was the duty of said complainant to use reasonable care in that said gas mains and all connections thereto in said streets should be of reasonably safe and sound material properly connected and of sufficient strength and should be installed in a reasonably careful manner and should be inspected at reasonable intervals in order to discover any leakage of gas from said mains and pipes by which the lives of the decedent and others might be endangered and to take necessary steps to stop said leakage and said gas pipes should be properly laid and maintained and the materials thereof selected with reasonable care so that the gas is transmitted by the complainant through said pipes would not be dangerous to the life of decedent Eva Kilek. The said complainant

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Answer.

disregarded its duty in that behalf by its agents and servants, negligently failed to use reasonable care in the laying of said gas mains, in the maintenance of said gas mains and in the selection of materials for said mains so that the same should be of sufficient strength and installed and protected in a reasonably safe and proper condition and to inspect the said gas mains at reasonable intervals in order to discover any leakage of gas and particularly to prevent and guard against the escape of illuminating gas in dangerous quantities so as not to become dangerous to the lives of decedent Eva Kilek or persons lawfully in and about said Salem avenue and Mercer street or in or about the premises abutting on said streets.

3. He admits that the certificate of death signed by J. S. Hay, M. D., coroner of Perth Amboy, gives as the cause of death "suffocation by illuminating gas, accident," but denies the rest of paragraph 3.

4. What Dr. Otto Schultze informed the complainant is irrelevant and immaterial to the issue in this cause and is an hearsay statement without any foundation in fact or in law and further answering this defendant says that death caused by being poisoned and suffocated by illuminating gas cannot be determined by an autopsy, such as referred to in paragraph 4 of the complaint, and particularly is this true in the case of Eva Kilek, who died on or about the 15th day of February, 1926, and whose body was embalmed with a fluid usually used by undertakers for that purpose and was buried a few days thereafter.

5. The allegations in paragraph 5 of the complaint are irrelevant and immaterial to the issue in this cause and are denied.

Answer.

6. The defendant denies that evidence as to the cause of the death of Eva Kilek can only be had by an exhumation and autopsy on her body, and he further denies that complainant cannot fairly defend said action unless a discovery is made of the cause of death by exhumation and autopsy, as aforesaid, and by way of further answer, the defendant says that the attending physician upon an examination of the deceased based upon separate examinations, unhesitatingly assigned the cause of her death to the inhalation of illuminating gas; that the coroner and county physician made an inspection with a like result, and that the complainant knew of the claims of this defendant and of the death of the decedent, but raised no question as to the cause of her death. Action of this defendant at law was commenced over five months before demand was made for an autopsy and the decedent had been dead over eleven months before any such demand was made. Issue was joined in the action at law, a demand made for particulars of the damage claimed and the particulars furnished, and still no demand was made for an autopsy until the action at law was listed in the court calendar and within one day of being reached.

7. The defendant admits paragraph 7.

8. The defendant Alexander Kilek, individually and as administrator *ad prosequendum* of Eva Kilek, deceased, has no knowledge or information sufficient to form a belief with regard to the allegation contained in paragraph 8 of the complainant's bill.

9. The defendant further answering, says that the bill of complaint herein does not disclose

Answer.

any equitable cause of action or set forth sufficient allegations upon which to found the relief prayed for in said bill of complaint. This defendant therefore prays that the bill of complaint be dismissed with costs in favor of this defendant.

THOMAS BROWN,
Solicitor of Defendant.

The entry of the within answer is consented to as within time.

COLLINS & CORBIN,
Sol'rs of Complainant.

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REPLICATION.

IN CHANCERY OF NEW JERSEY.

10 *Between*

PERTH AMBOY GAS LIGHT
COMPANY, a corporation,
Complainant,

and

ALEXANDER KILEK, individu-
ally and as administrator
ad prosequendum of the
estate of Eva Kilek, de-
ceased, and EDWARD T. HAN-
SON, one of the coroners of
Middlesex County,
20 *Defendants.*

On Bill, &c.
Replication.

The complainant joins issue on the answer of the defendant Alexander Kilek, individually and as administrator *ad prosequendum* of Eva Kilek, deceased.

30 COLLINS & CORBIN,
Solicitors of Complainant.

ORDER.

Filed February 1, 1927.

IN CHANCERY OF NEW JERSEY.

Between 10

PERTH AMBOY GAS LIGHT
COMPANY, a corporation,
Complainant,

and

ALEXANDER KILEK, individu-
ally and as administrator
ad prosequendum of the
estate of Eva Kilek, de-
ceased, and EDWARD T. HAN-
SON, one of the coroners of
Middlesex County,
20 *Defendants.*

On Bill, &c.
Order.

This matter being opened to the Court by Collins & Corbin, solicitors for and of counsel with the complainant, in the presence of Thomas Brown, solicitor for and of counsel with the defendant Alexander Kilek, individually and as administrator as aforesaid; and the Court having considered the bill of complaint and affidavits filed herein and the answering affidavits on the part of the said defendant Alexander Kilek and having heard and considered the arguments of counsel and being satisfied that the complainant is entitled to the relief hereinafter ordered;

It is on this 1st day of February, A. D. 1927, ORDERED that the said defendant Alexander Kilek, his attorney, agents and servants do desist and

Order.

refrain from prosecuting an action at law now pending in the New Jersey Supreme Court against the plaintiff, arising out of an action for damages caused by the death of Eva Kilek, the wife of the said Alexander Kilek, unless and until the said Alexander Kilek, individually and as administrator as aforesaid, does consent to the exhumation of the body of said Eva Kilek and the performance of an autopsy thereon at the expense of the complainant unless the Court shall otherwise order, such autopsy to be performed by a physician or pathologist selected by complainant in the presence of any physician or pathologist selected by said defendant Alexander Kilek and also in the presence of the defendant Edward T. Hanson, one of the coroners of Middlesex County, if his attendance can be procured.

It is FURTHER ORDERED that this order shall not become effective and is made upon condition that the complainant pay the costs at law of the term at which the cause aforesaid between the parties herein now pending in the New Jersey Supreme Court was noticed, which costs have accrued up to the time of service of this order.

And it is FURTHER ORDERED that this order shall not restrain the defendant from noticing said cause for trial in the New Jersey Supreme Court from term to term until the further order of this Court.

E. R. WALKER,
C.

Respectfully advised,
JAMES F. FIELDER,
V.-C.

A true copy,
THOMAS BARBER,
Clerk,

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

<i>Between</i>	PERTH AMBOY GAS LIGHT COMPANY, <i>Complainant,</i> <i>and</i> ALEXANDER KILEK, individu- ally and as administrator <i>ad prosequendum</i> of the estate of Eva Kilek, de- ceased, and EDWARD T. HAN- SON, one of the coroners of Middlesex County, <i>Defendants.</i>	10 63-3 <i>On Bill, &c.</i> <i>Final Decree.</i> 20
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This cause coming on to be heard on bill, answer and replication in the presence of Collins & Corbin, solicitors for and of counsel with the complainant, and Thomas H. Brown, solicitor for and of counsel with Alexander Kilek, individually and as administrator aforesaid, and the pleadings having been read and evidence having been taken and arguments of counsel thereon having been heard, and the Court having duly considered the said pleadings, proofs and arguments and being satisfied that the complainant is entitled to the relief hereinafter ordered;

It is, on this 9th day of December, A. D. 1927, on motion of Collins & Corbin, solicitors for and of counsel with the complainant, by his Honor Edwin Robert Walker, Chancellor of the State

Final Decree.

of New Jersey, hereby ORDERED, ADJUDGED and DECREED, and the said Chancellor does by virtue of the power and authority of this Court hereby ORDER, ADJUDGE and DECREE that the said defendant Alexander Kilek, his attorneys, agents and servants, do desist and refrain from prosecuting an action at law now pending in the New Jersey Supreme Court, Middlesex County, against the complainant, arising out of an action for damages caused by the death of Eva Kilek, wife of said Alexander Kilek, until the further order of this Court and until the said Alexander Kilek, individually and as administrator as aforesaid, does consent to the exhumation of the body of said Eva Kilek and the performance of an autopsy thereon and until such autopsy shall be performed, such autopsy to be performed by a physician or pathologist selected by complainant in the presence of any physician or pathologist selected by said defendant Alexander Kilek, and also in the presence of the defendant Edward T. Hanson, one of the coroners of Middlesex County, if his attendance can be procured, and the expense of such autopsy, including the opening, closing and restoration of the burial plot, to be borne by the complainant.

And it is FURTHER ORDERED that this decree shall not restrain the defendant from noticing said cause for trial in the New Jersey Supreme Court from term to term until the further order of this Court.

And it is FURTHER ORDERED that this decree is made upon condition that the complainant pay the costs at law of the term at which the cause aforesaid between the parties herein now pending in the New Jersey Supreme Court was no-

Final Decree.

ticed, which costs have accrued up to the time of service of this order.

E. R. WALKER,
C.

Respectfully advised,

JAMES F. FIELDER,
V.-C.

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CONCLUSIONS.

(Not to be published in any report.)

November 7, 1927.

IN CHANCERY OF NEW JERSEY.

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63-3.

*Between*PERTH AMBOY GAS LIGHT
COMPANY,*Complainant,**and*ALEXANDER KILEK, individu-
ally, etc., *et al.*,

20

*Defendants.**On Bill, &c.**Conclusions.*

Messrs. Collins & Corbin for complainant.

Mr. Thomas Brown for defendant Kilek.

FIELDER, V.-C.

Counsel for the defendant has informed me that he contemplates taking an appeal from the final decree entered herein and he has requested me to state my reasons for advising such decree.

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It appeared from the testimony that Eva Kilek, wife of Alexander Kilek, died on or about February 15, 1926, and that said husband, individually and as administrator *ad prosequendum*, brought suit in August, 1926, in the New Jersey Supreme Court against the Perth Amboy Gas Light Company to recover damages for the death of his wife, alleging in said action that Eva Kilek was asphyxiated by illuminating gas produced and negligently permitted to escape from a main

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Conclusions of Vice-Chancellor.

owned by the gas company, into the premises wherein the deceased resided. The Gas Company, by answer filed in said suit, denied that the deceased's death was due to the cause alleged and in December, 1926, it requested the defendant and the coroner of the county to permit the body to be exhumed for the purpose of having an autopsy made to determine whether or not said death resulted from illuminating gas poisoning. The request was refused and the Gas Company thereupon filed its bill in this cause, praying for a discovery of the cause of said death, by the exhumation of the body and an autopsy thereon and also praying that the action at law be stayed until the performance of such autopsy.

10

In suits at law and in equity, provision is made whereby a party to a suit may be required to produce or disclose to the opposing party before trial evidence in his possession or under his control, where such evidence is necessary to the opposing party in the presentation of his side of the case. Under the practice in suits at law to recover damage for personal injuries, the plaintiff may be required to submit to a physical examination on the defendant's application and in this Court, in a suit to annul a marriage on allegations of the defendant's impotence, an inspection of the defendant's person may be ordered. In homicide cases a Supreme Court Justice may permit or order the exhumation of the body of the person killed, for the purpose of an autopsy which will disclose or aid in determining the cause of death. If an inspection of inanimate objects and the person of a party to a suit and of the body in a homicide case can be ordered and if disclosure of the contents of books, docu-

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Conclusions of Vice-Chancellor.

ments and other evidence in the possession or under the control of party to a suit, can be required, it seemed to me in the suit at law here in question, if evidence material to and perhaps vital to the issue, can be discovered by an autopsy on or examination of the body of the person whose death the Gas Company is charged to have caused, it was but fair and equitable that the company should be given the opportunity to make such examination. The suit at law was brought by the husband, individually and as administrator, for damages consequent on the death of his wife, and the exhumation and autopsy desired are to a large extent under his control.

Considerable time has elapsed since the death of Eva Kilek and the body was embalmed after death. Counsel for the defendant herein argued that because of the lapse of time and the embalming process, it is now impossible to discover by an examination of the body whether or not death was caused by asphyxiation from illuminating gas and that an autopsy will be valueless. Any application for discovery, examination or inspection before trial might be resisted on the plea that the party applying will find nothing if the order be made, but such a plea ought not to prevail if it appears that the evidence sought is in the possession or under the control of a party to a suit and that there is a possibility that an examination will disclose what the party applying therefor needs to complete his case. It might be noted here that the bill of complaint herein was filed January 12, 1927, and an order was entered February 1, 1927, restraining the defendant herein from prosecuting his action at law until final hearing or until he should consent to the exhumation and autopsy desired by

Conclusions of Vice-Chancellor.

the complainant and that an appeal was taken from such order, on which appeal the Court of Errors and Appeals set the order aside (see opinion filed October 17, 1927, Vol. 5, No. 43, page 1349, N. J. Adv. Rep.), so that the complainant is not wholly at fault for the lapse of time. It appeared from the testimony that there was no connection between the gas main in the street and the residence of the deceased and it was in sharp dispute whether any illuminating gas has escaped or could escape through the earth and into said residence and it seemed to me that that question was for a jury to determine on the trial of the action at law. The testimony of a physician produced by the complainant was to the effect that an autopsy might even now disclose whether death was caused by asphyxiation from illuminating gas, notwithstanding the embalming of the body and the lapse of time and would disclose any other causes of death. A physician produced by the defendant was of the opinion that an autopsy could not now disclose gas poisoning but that his experience, while large, would not justify a positive opinion on that point, and he conceded that if death ensued from any other cause, an autopsy might disclose such other cause. Since the weight of the expert testimony seemed to be that an autopsy would disclose whether death followed a cause other than gas poisoning and might disclose evidence that gas poisoning was not the cause of death, I concluded that it was equitable that the defendant should do his part toward granting the complainant discovery by way of autopsy, but I doubted the power of this Court to say to the defendant: "You must consent to an autopsy. We will order the body exhumed

Conclusions of Vice-Chancellor.

and the autopsy made and you must not interfere." I was of the opinion, however, that this Court has the power to say to the defendant: "Unless you are willing that the complainant shall inspect the evidence which you have under your control, namely, the dead body of your wife, and unless you will co-operate with the complainant to the extent of your ability in procuring such inspection, this Court will restrain you from proceeding further with your action at law," and therefore I advised a final decree in the form entered herein.

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NOTICE OF APPEAL.

Filed December 15, 1927.

IN CHANCERY OF NEW JERSEY.

PERTH AMBOY GAS LIGHT
COMPANY, a corporation,
Complainant,

and

ALEXANDER KILEK, individu-
ally and as administrator
ad prosequendum of the
estate of Eva Kilek, de-
ceased, and EDWARD T. HAN-
SON, one of the coroners of
Middlesex County,
Defendants.

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On Bill, &c.

*Notice of
Appeal.*

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This is an appeal from a final decree made by the Chancellor on the advice of Vice-Chancellor Fielder:

Defendant Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased, hereby appeals from so much of the final decree made in the above-entitled cause on the 9th day of December, 1927, as directs said defendant to desist and refrain from prosecuting an action at law now pending in the New Jersey Supreme Court, against the complainant, arising out of an action for damages caused by the death of Eva Kilek, the wife of the said Alexander Kilek, unless and until the said Alexander Kilek, individually and as ad-

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Notice of Appeal.

10 administrator *ad prosequendum* of the estate of Eva Kilek, deceased, aforesaid, does consent to exhumation of the body of said Eva Kilek and the performance of an autopsy thereon at the expense of the complainant, such autopsy to be performed by a physician or pathologist selected by complainant, to the Court of Errors and Appeals in the last resort in all causes.

Dated:

THOMAS BROWN,
Solicitor for and of Counsel with Defendant Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, dec'd.

20 Service of the within notice is hereby acknowledged this 13th day of December, 1927.

COLLINS & CORBIN,
Sol'rs for Complainant.

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PETITION AND GROUNDS OF APPEAL.

Filed December 20, 1927.

New Jersey Court of Errors and Appeals

Between

PERTH AMBOY GAS LIGHT
COMPANY, a corporation,
Complainant-Respondent,

vs.

ALEXANDER KILEK, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased, and EDWARD T. HANSON, one of the coroners of Middlesex County,
Defendants-Appellants.

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On Appeal from the Court of Chancery.

Petition and Grounds of Appeal.

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To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Alexander Kilek, individually and as administrator *ad prosequendum* of Eva Kilek, deceased, the appellant in the above-entitled cause, respectfully shows that: 30

1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 9th day of December, 1927, in a certain case in said Court of Chancery, wherein the said Perth Amboy Gas Light Company is complainant and the said Alexander Kilek, individually and as ad- 40

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Petition and Grounds of Appeal.

10 administrator *ad prosequendum* of the estate of Eva Kilek, deceased, is defendant in this respect, to wit, that the said decree orders and directs the said defendant to desist and refrain from prosecuting an action at law now pending in the New Jersey Supreme Court against the complainant arising out of an action for damages caused by the death of Eva Kilek, the wife of said Alexander Kilek, unless and until the said Alexander Kilek, individually and as administrator *ad prosequendum* of the estate of Eva Kilek, deceased, aforesaid, does consent to the exhumation of the body of the said Eva Kilek and the performance of an autopsy thereon at the expense of the complainant, such autopsy to be performed by a physician or a pathologist selected by the complainant.

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2. The petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that:

1. The testimony adduced before the Chancellor to support the complainant's bill did not warrant the entry of the aforesaid decree.

2. There were no facts before the Court to support the making of the decree in favor of the complainant.

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3. The facts before the Court warranted a decree in favor of the defendants.

4. The complainant was guilty of laches in asking its remedy.

5. The relief sought by the complainant and granted by this decree is not necessary nor essential to the complainant's defenses of the action at law.

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Petition and Grounds of Appeal.

6. The relief sought by the complainant is impossible of attainment because of the long delay and laches of the complainant.

7. The decree is contrary to the decisions of this Court and the law of this State.

Petitioner therefore prays that the said decree of the said Chancellor may be in the particulars aforesaid, reversed, set aside and for nothing holden and that petitioner may have such other relief in the premises as to this Court shall be proper.

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THOMAS BROWN.

Solicitor for and of Counsel with Defendant Alexander Kilek, individually and administrator *ad prosequendum* of the estate of Eva Kilek, deceased.

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ACKNOWLEDGEMENT OF SERVICE.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10 *Between*
 PERTH AMBOY GAS LIGHT
 COMPANY, a corporation,
Complainant-Appellee,
 and
 ALEXANDER KILEK, individu-
 ually and as administrator
ad prosequendum of the
 estate of Eva Kilek, dec'd,
 and EDWARD T. HANSON,
 one of the coroners of
 Middlesex County,
 20 *Defendants-Appellants.*

*On Appeal
from Court
of Chancery.*

*Petition and
Grounds of
Appeal.*

*Acknowledg-
ment.*

Collins & Corbin, attorneys for the complain-
ant-appellee, in the above-entitled cause, hereby
acknowledge service of the petition and grounds
of appeal in said cause this 20th day of Decem-
ber, 1927.

30 COLLINS & CORBIN,
Solicitors of Complainant-Respondent.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between
 PERTH AMBOY GAS LIGHT
 COMPANY,
Complainant-Respondent,
 and
 ALEXANDER KILEK, individu-
 ually and as administrator
ad prosequendum of Eva
 Kilek, deceased, and ED-
 WARD T. HANSON, one of
 the coroners of Middlesex
 County,
 20 *Defendants-Appellants.*

*On Appeal
from the
Court of
Chancery.*

*Answer to
Petition of
Appeal.*

The answer of the above-named respondent to
the petition of appeal of the above-named ap-
pellant.

This respondent, not acknowledging all or any
of the matters which in the said petition of ap-
peal are contained to be true, for answer thereto
nevertheless says and admits that a final decree
was on the 9th day of December, 1927, made
and entered in the Court of Chancery in the
cause for that purpose mentioned in the said
petition as is therein stated; but as to the sub-
stance and form thereof, this respondent prays
to refer thereto when the same shall be pro-
duced. And this respondent is advised and be-

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Answer to Petition of Appeal.

believes that the said decree is agreeable to equity and its prays that the same may be affirmed with costs to be adjudged to this respondent.

COLLINS & CORBIN,
Solicitors for and of Counsel wth
Complainant-Respondent.

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TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between

PERTH AMBOY GAS LIGHT
COMPANY, a corporation,
Complainant,

and

ALEXANDER KILEK, individu-
ually and as administrator
ad prosequendum of Eva
Kilek, deceased, *et als.,*
Defendants.

On Bill, &c.

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Transcript of shorthand notes of testimony taken on final hearing in above cause, October 24, 1927, at Chancery Chambers, Jersey City, before his Honor James F. Fielder, V.-C.

Appearances:

David A. Newton, Esq. (Collins & Corbin), for complainant.

Hon. Thomas Brown, for defendant Alexander Kilek.

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COMPLAINANT'S CASE.

Mr. Newton: I offer in evidence copies of pleadings in the suit at law by Alexander Kilek, individually and as administrator *ad prosequendum* of Eva Kilek, deceased, against Perth Amboy Gas Light Company, in the New Jersey Supreme Court, Middlesex County.

(Marked Exhibit C. 1.)

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George M. Amouroux, direct.

Mr. Newton: I offer in evidence certificate of the Department of Health, State of New Jersey, Bureau of Vital Statistics, under the seal of the Medical Superintendent, dated August 26, 1926, showing that Eva Kilek died February 15, 1926, the certificate of death being signed by J. F. Hay,
10 Coroner, Perth Amboy, N. J., and the cause of death being stated "Suffocated by illuminating gas."

(Marked Exhibit C. 2.)

Mr. Brown: May I ask whether there was a demand for an autopsy.

Mr. Newton: The summons is annexed to the complaint, August 16, 1926.

Mr. Brown: And the bill of complaint was
20 filed in this case—

Mr. Newton: January 12, 1927.

Mr. Brown: So that no demand was made between those dates for an autopsy.

Mr. Newton: But we wrote a letter.

Mr. Brown: The letter was a few days before—

Mr. Newton: Whatever the date of the letter is.
30

GEORGE M. AMOUROUX, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Newton.

Q Where do you live? A 35 West Ninety-sixth street, New York City.

Q What is your occupation? A Engineer and architect.
40

George M. Amouroux, direct.

Q How long have you been such? A More than thirty years.

Q Did you inspect the premises Nos. 1 and 3 Salem street, Carteret, New Jersey? A Yes.

Q In September, 1926? A Yes.

Q Did you take any photographs at that time of the premises? A I did. 10

Q I show you four photographs and ask you if those photographs were taken and developed by you? A They were.

Q I call your attention to photograph No. 1333. What does that represent? A General view showing front and side of the house, 1 and 3 Salem street, Carteret, New Jersey.

Q What does photograph No. 1333-A show? A General view showing rear and side of the house 1 and 3 Salem street, Carteret, New Jersey. 20

Q And No. 1334, what does that show? A Detail view of the cellar, showing fresh air outlet of house sewer used as a drain for cellar instead of being connected with pipe to outer air.

Q And No. 1335, what does that represent? A Detail view in cellar, showing old toilet waste and vent pipe plugged—where old toilet was located, being removed to rear yard. 30

Mr. Newton: I offer the photographs in evidence.

Mr. Brown: I object upon the ground that the situation was not the same.

The Court: Let the photographs be marked for identification now. You can offer them later on.

Mr. Brown: I want to test the credibility of the witness. 40

George M. Amouroux, direct.

The Court: Don't you know whether the photographs show the front and rear of the house in question?

Mr. Brown: It is the same house.

(Photographs marked C. 3, C. 4, C. 5 and C. 6 for identification.)

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Q Did you make a plan of the cellar of that building? A I did.

Q When did you get the data for making that plan? A On September 21, 1926.

Q You made it by actual inspection of the premises at that time? A I did.

Mr. Newton: I offer the plan in evidence. (Marked Exhibit C. 7.)

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Q Did you inspect all the piping and plumbing in the cellar at that time? A I did.

Q And what did that inspection disclose?

Mr. Brown: I object to that as not being material in this case. It is quite sometime after this death took place.

The Court: Objection overruled.

30

A I found the plumbing to be in an unsanitary condition by reason of the house sewer not being connected with a vent pipe to the outer air, which is called for in all plumbing rules and regulations and sanitary codes.

Q Did you find any vent in the cellar? A No, sir.

Q Did you find any vent into the outer air outside of the cellar? A Not outside of the cellar; no, sir.

40

George M. Amouroux, direct.

Q Where did you find the vent? A That vent was ventilating in the cellar itself.

Q Is that shown on any of the photographs?

A Yes; it is shown on photograph No. 1334.

Q Will you put a pencil mark around the vent shown on the photograph? Just put a ring in pencil around it. A (Witness does as requested.)

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Q Is that vent also shown on photograph 1335? A It is.

Q Will you put a ring around that in pencil? A (Witness does as requested.)

Q Now, on this ventilation outlet was there any covering? A There was a strainer, a perforated strainer.

Q Was that fastened or loose? A Loose.

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Q What system or on what piping did that drain appear to act as the outlet for? A It was used as an outlet to drain any surface water from the cellar; in other words, it was used as a cellar drain.

Q Did it have any connection with the plumbing system of the house? A Why, yes; it is directly connected with the house soil; that is, the vent outlet; it should have been used as a vent pipe and not as a house drain.

30

Q Did you discover any illuminating gas pipes in the cellar? A No, sir.

Q In your opinion, would it have been possible for any illuminating gas to have had outlet through that vent?

Mr. Brown: I object to the question because it does not appear that this man is qualified to express an opinion upon that.

The Court: Objection sustained.

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George M. Amouroux, cross.

Q Have you had any experience in making plans for gas pipes? A I was connected with the Bureau of Buildings of the City of New York for about sixteen years, as plan examiner and expert of construction, ventilation and sanitary conditions.

10 Q And did your duties in that position include, for that work, an examination of buildings? A Most assuredly.

Mr. Brown: May I cross examine?

The Court: Yes.

By Mr. Brown.

Q Have you ever had any experience where a gas main has been laid in a street; that is, in a country section, where there is earth around the house instead of pavement? A Yes. One moment. I do not quite understand your question.

Mr. Brown: Question withdrawn.

Q Did you ever have a case similar to the one that is here? I mean the situation where there is a house built on a lot and the soil leading from the street to the house and all about the house is in its natural state? A Yes.

30 Q The soil pipes—I mean the outlet pipes, both the water and the sewer, are laid in a trench, that is, covered over with earth and extend into the house? A Yes.

Q And a situation where the street is paved with a thin coat of concrete over the mains? A Yes.

Q And the situation where the mains of the gas company are worked under high pressure? A The question of high pressure I could not say.

40

George M. Amouroux, cross.

Q That would have very much to do with it, would it not? A The question of where there are gas mains, yes.

Q But high pressure, of course, is much different from— A I know nothing about the pressure of the gas in Carteret.

Q You do not? A No, sir.

10

Q Then, in the experience you have had, have you had a case where there has been high pressure gas? A I cannot say yes or no to that question. I most probably have.

Q You cannot say yes or no? A No.

Q In most cases, where you have made your examinations, has the gas escaped through the street, through the pavement, to such an extent that the first department has been called out to put out the fire? A I have known of such cases.

20

Q Have you had that experience? A Not personally interested; no.

Q Was there such a condition where the gas company followed the main in, dug about the main and about the sewer outlets and other outlets and vents, and made it possible to see that the gas would not escape along the pipes into the house and cellar? A I never heard of gas escaping along the pipes into the house, except they had to go by a gas pipe, through a leak in the pipe, not through the earth in through in the foundation wall; that is impossible.

30

Q How would it escape from the street?

The Court: Wait a moment. You were only to cross examine the witness on his qualifications as an expert.

Mr. Brown: I submit he is not qualified to testify to the condition that exists here. I think my adversary will admit that this

40

George M. Amouroux, cross.

is a high-pressure system which, as I understand it, is a great deal different than low pressure.

Mr. Newton: All I expected to ask him is whether illuminating gas could escape through the cellar into this vent pipe.

10 The Court: I will allow this witness to testify to that question.

By Mr. Newton.

Q Do you understand the question? A Please repeat it.

Q Could illuminating gas escape through the cellar into this vent pipe? A No, sir; it could not.

20 *Cross examination by Mr. Brown.*

Q You were there in September, I understand, about these premises? A May I look at the photograph?

Q Yes. A I was there on September 21, 1926.

Q Did you see any marks there where there had been digging and the soil had been upturned from the street into the building? A
30 Outside of the building line?

Q Yes. A No, sir.

Q I show you a photograph and ask you if that was not the condition of the premises when you got there, showing in the front and near the left-hand side of the porch the upturned earth into the building proper? A I cannot say that. I am not familiar enough with that print to tell whether the yard was in that condition at the time I was there on September 21st. I don't
40 know what the date of that photograph is, when

George M. Amouroux, cross.

that was taken. If you will tell me that it was taken on the 21st of September, 1926, I will say yes.

Mr. Brown: I ask to have this photograph marked for identification.

(Photograph is marked D. 1 for identification.) 10

Q I also ask you if this photograph represents the condition of the street, right in front of this property, at the time you were there? A I cannot say that unless you tell me that that photograph was taken on the 21st of September, 1926, in which case I will say yes.

Q What has that to do with it, whether it was taken on the 21st of September, 1926? A Well, it shows how this street was cut up on the photograph. 20

Q I am not asking you about that. I am asking you whether that was the condition of the premises when you were there? A I cannot tell you from that photograph.

Mr. Brown: I ask that this photograph be marked for identification.

(Photograph is marked D. 2 for identification.) 30

By the Court.

Q Senator Brown is asking for your recollection of the condition of the soil around the house and the condition of the street on September 21, 1926. A May I refer to my photographs? It is over a year since I was down there. It will refresh my memory. 40

George M. Amouroux, cross.

Q He is asking you to tell whether the conditions shown in the photograph he presents to you are the conditions as of September 21, 1926? A I cannot say.

By Mr. Brown.

10 Q You did not make any examination of the exterior of the cellar? A I did up to the sidewalk and casually observed the street, because we went there in an automobile, I recall.

By the Court.

Q You made an examination from the foundation line of the house out to the sidewalk? A Yes.

20 The Court: How far does this house sit back from the sidewalk?

Mr. Brown: For the purpose of the record, I shall say ten or fifteen feet back.

Mr. Newton: We have a workman of the company here who will prove that.

By Mr. Brown.

30 Q What was the condition of the street in front of this house at the time you were there? A I say I did not know anything about the street; that I did not make an examination beyond the curb.

Q What was the purpose of your visit? A In a general way to examine the plumbing system of that house.

40 Q Are you a licensed architect of the State of New Jersey? A Not in the State of New Jersey. I have been practicing architecture for more than thirty years.

George M. Amouroux, cross.

Q Are you licensed in the State of New York? A No, sir; not in the State of New York.

Q Are you licensed anywhere? A They do not require licenses in the other states.

Q Will you answer the question: Are you licensed anywhere? A No; it is not required.

10 Q You have never performed or done any work in the borough of Carteret, have you? A No, sir.

Q You know nothing of the health board regulations of that place as to sewer connections and the like? A No, sir.

Q Was your purpose in visiting that place to ascertain about gas leaks? A Yes, sir; in a way.

20 Q You were instructed to find out if there was escaping illuminating gas there? A A general outline of this case was given to me, that a claim had been made that someone in the house had died from gas asphyxiation. I made an examination of the entire cellar and part of the first floor and, as I said before, up to the sidewalk in front of the house.

30 Q What colleges did you graduate from? A Well, I had a special course in Columbia and also with the firm of Carrere & Hastings, architects, where they have a school of architecture.

Q I am asking you what colleges you have graduated from? A I have never graduated from any college.

Q What education have you received for your degree as architect? A I never received any degree.

40 Q Who gave you the title of engineer? A I have been practicing it for more than thirty years and I have built about probably fifty or sixty houses.

George M. Amouroux, cross.

Q Fifty or sixty houses? A Yes.

Q I am asking you who gave you the title of engineer? A That is the business I have been following. I have no title.

10 Q Didn't you say that you were an engineer and architect? A I assumed that title and I passed the examination of the City of New York and among over eighty competitors I was—

Q I asked you where did you get the degree of engineer? A I have not got the degree.

Q So, that when you say you are an engineer that is a self-imposed title? A Yes; with over thirty years' experience.

20 Q Your purpose in visiting this place was to find out some other cause, if you could, for this gas, or this poisoning other than illuminating gas? A No, sir; my purpose was to find out the exact conditions that existed, all of which I have stated.

Q If you were looking for illuminating gas poisoning, you would examine carefully the street about there to see whether there was any gas escaping? A No, sir; you would not look out there for a gas leak when it is claimed the gas leaked into the house.

30 Q Would you not do that in order to find where the main was? A No.

By the Court.

Q Did you drive up to this house in an automobile? A Yes.

Q Did you stop in front of the house? A Yes, sir.

Q And the car remained there until you got through with your work? A Yes, sir.

40 Q When you got out of the car you went into the house in the front of the house, did you? A Yes, sir.

George M. Amouroux, cross.

Q How long were you in the house? A I should say about an hour and a half to two hours.

Q When you came to the house and when you went out again to the automobile in front of the house, did you notice any odor of escaping gas in the street? A No, sir. 10

By Mr. Brown.

Q As I understand you, you were not there in February or in the winter time, were you? A No, sir.

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

Q That was almost eleven months afterwards?

The Court: The Court will take judicial notice of that. 20

Q The ground was not frozen when you were there? A No, sir.

Q Did you notice or make any examination as to how far the gas mains did extend towards the building? A No, sir. They were not uncovered.

30 Q I am not asking you that. I am asking you: Did you make any examination? A No.

Q Do you know whether the gas mains extended beyond the curb line or not? A I do not.

Q Did you ascertain where the water pipes and the sewer pipes led, in relation to the gas main or any extension of it towards the building? A Not beyond the building line; no, sir.

40 Q So that the examination you made was confined to the interior of the cellar? A Yes, sir. 40

George Szul, direct.

Q And what you found there was a drain that is customarily used for surface water in the cellar that led or was connected to the sewer pipe? A No, sir; I found the outlet which is used as a vent outlet to the house sewer, was used as a house drain.

10

By the Court.

Q That is, it was really an inlet instead of an outlet? A Yes, sir.

By Mr. Brown.

Q Do you know when that was placed there? A I do not.

Q Well, of course, you do not mean to be understood that there was no illuminating gas in that building on the 14th of February, 1926? A That I do not know. I was not there in February.

20

By the Court.

Q I understood you to testify that you found no gas pipe leading from outside the foundation wall to the inside of the cellar? A No.

Q You found none? A None.

30

GEORGE SZUL, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Newton.

Q Are you employed by the Perth Amboy Gas Company? A Yes, sir.

Q What do you do for them? A I help the pipefitters and I am a handy man all around.

40

George Szul, direct.

Q Do you remember going to Carteret, New Jersey, on February 14, 1926? A Yes, sir.

Q Which house did you go to in Carteret? A No. 3 Salem avenue.

Q Who went with you? A Mike Putorick.

Q When you got there did you see anybody on the outside of the building? A A lady was outside.

10

Q A lady was outside? A Yes.

Q Did you go into the building? A Yes, sir; I went in.

Q What part of the building did you go into first? A Down in the basement.

Q The basement—do you mean the cellar? A The cellar; yes.

Q What did you do when you went into the cellar? A First I looked for a gas connection. So I did not find no gas connection. I smelled around the sewers and toilets and the water service.

20

Q Did you smell all around the pipes in the cellar? A Yes.

Q Did you smell the toilet? A Yes, sir.

Q Did you find any smell of gas? A Absolutely no.

Q Did you stick your head in the toilet? A Yes, sir.

30

Q And did you find any smell of gas? A No.

Q Were there any gas pipes in the cellar? A No.

Q Did you look at the water? A Yes.

Q Where did you look at the water? A The water service was even with the cellar floor and the water pipe was covered up with water. So I looked around for the gas and to see whether

40

George Szul, direct.

the water would bubble, but the water was not bubbling.

Q You looked for bubbles in the water? A Yes.

Q Why did you look for bubbles in the water?

A If I see bubbles then I know the gas followed the water service. 10

By the Court.

Q Was the whole surface of the cellar covered with water? A Yes; the water service.

Q So that you had to walk in the water? A Well, I had boots on, anyhow.

Q How deep was the water? A About an inch over the service.

20 *By Mr. Newton.*

Q An inch over the service? A Yes.

Q Did you see any bubbles in that water? A No, sir.

Q Did you smell all around the pipes in that cellar? A Yes, sir; I did.

Q Did you detect any odor of gas? A No, sir.

Q Now, did you go upstairs? A Yes.

Q Where did you go? A I went first in the kitchen. 30

Q Did you see anybody in the kitchen? A Yes; I saw the wife and four kids.

Q What was the name of the family? A I could not tell you.

Q What did the wife say to you? A She told me she is sick; she is weak and got a headache.

Q What was she doing in the kitchen? A She was preparing something to eat for the children. 40

George Szul, direct.

Q Preparing food? A Yes.

Q What time of the day was that? A That was between about fifteen after twelve, daytime.

Q Did her husband come in while you were there? A Yes, sir; he came in.

Mr. Newton: Is the husband, Mr. Kilek, in court? 10

Mr. Brown: I don't know; I don't think so; I didn't see him this morning. I will call and find out.

(The name of Alexander Kilek being called, a man in the audience stands up.)

Q Is the man now standing up the man you saw? A Yes.

Q You saw a woman in the kitchen with him? A Yes, sir; he came in. 20

Q That was the woman that said to you that she was sick; is that right? A Yes.

Q Now, then, what did you do up in the apartment to see whether there was any gas escaping? A I went down in the cellar again and I closed all the windows and doors and I went outside and waited for about fifteen minutes. Then I go back in the cellar again. I thought I might smell some gas then when everything was closed, but I did not smell anything. 30

Q You did not smell any gas? A No.

Q Were there any gas pipes upstairs? A No, sir.

Q What time did you leave there? A I left one o'clock.

Q Where was the woman when you left there? A The last I seen the woman was in the kitchen.

Q Was she up? A She was up; yes. 40

George Szul, cross.

Q How many people were in the house when you were there? A There was the husband and wife and four children.

Q Anybody else? A No.

Cross examination by Mr. Brown.

10

Q What day were you there? A February 14, 1926.

Q You were not there when the five men from the gas company came in the evening, were you? A No; I was not.

Q You were not there at five o'clock that afternoon? A No; I was not there.

Q When the four children and the wife were taken down sick? A No.

20 Q You were not there when the fire department came there, were you, to put out the gas fire? A No; I was not there.

Q How long have you worked for the gas company? A Twelve years.

Q You know it is a high pressure system on Salem street? A Yes.

Q You know that the gas is shut off on that street, do you not, since this fatality happened? A No; I do not.

30 Q And that they are not serving gas there any more? A No; I do not.

Q Where do you say the water was in the cellar? A Around the water pipe that comes into the cellar, the water service, what they call it.

Q What about that? A It was even with the cellar floor.

Q Why did you look around the water service? A Because a lot of times the gas follows the water service.

40

George Szul, cross.

Q The gas follows the water service from the water main into the building? A Yes.

Q Is that right? A Yes.

Q It follows the sewer line, too, does it not; isn't that so? A I don't have any practice for that; I never found out anything like that yet.

Q You have been inspector for many years? A I was not on that job very long. I did different work.

Q Gas escaping from the gas mains of the company will follow the water mains or sewer mains into the building, won't it? A Yes.

Q And when the ground is frozen it is more apt to do that than when it is soft top, isn't that so? A I could not tell you.

Q When the ground is hard in the winter time and it is soft underneath where the pipes are, the gas is very apt to follow along the soft earth, is it not? A I could not tell you.

Q However, you looked around the water connections to see if the gas was coming in there and you could not smell it? A Yes.

Q At twelve o'clock? A At twelve o'clock.

Q Why did you come there; who sent for you? A I had been notified by a man that had charge of the place to go there to inspect, a leak.

Q What was the man's name? A Charles Post.

Q Is he in court here? A No.

Q He is the company's man that had charge of that matter? A No; he has charge of any calls that come in during the day.

Q How did they get the information that this gas was escaping and required your inspection? A They got a telephone call.

Q That the gas was escaping? A Yes.

40

George Szul, cross.

Q You say that where this connection was, that is, where the water came in the cellar, that there was water there? A Yes.

Q Did that cover the entire connection where the water was? A Yes; it was an inch above the water line.

10 Q There was an inch of water above the—
A The water was about an inch above the water pipe, and there was so much water in the cellar, in the basement, that the pipe was covered with that water.

Q Do you mean the floor of the cellar was covered with water? A There was a hole and the water was in that hole; the water pipe was in the hole.

20 Q Where was the sewer outlet? A The
sewer outlet was about in the middle of the cellar, in the front wall.

Q And the toilet was in the cellar? A Yes.

Q It was not out in the yard? A No.

Q The toilet had a direct connection to the street, had it not, with the sewer? A It must have.

30 Q You did not examine around the toilet, did you? A Well, I examined, I stuck my head down in the toilet; I wanted to smell the gas, but I could not.

Q You did not light any matches around there? A I did not.

Q Why didn't you light a match around there? A That is not possible. There is a rule not to use matches around gas.

Q You can tell by lighting a match whether the gas is leaking? A I could tell different ways.

40 Q Don't you ever light a match? A No.

George Szul, cross.

By the Court.

Q There is a rule not to light matches and you took no chances? A No chances.

By Mr. Brown.

Q This sewer connection was not in the water, 10
was it? A No.

Q How many sewer connections were there?
A I could not tell you; I was not interested to inspect the sewer.

Q Didn't you inspect that? A Well, I could not recollect just how many connections there was.

Q Was the only connection you can remember the water connection? A The water connection and the toilet. That is what I was instructed 20
to inspect.

Q I mean the connections that led from the street into the house; you don't know how many there were? A No; I do not.

Q You did not examine them all, did you? A No.

Q You know that five men or more came after the death of this woman that same night? A No.

30 Q And dug up the connections from the
street—you don't know that? A No; because I was home; I don't know anything about that.

Q This woman was sick then, was she? A Yes.

Q How about the children—were they sick at the hour you got there? A One out of the four was sick, but they were all walking around.

Q What was that child sick with? A She told me he got gas, too.

George Szul, re-direct.

Re-direct examination by Mr. Newton.

Q I show you that picture, No. 1334. Where was the water? A (Indicating.) Here.

Q Around that vent pipe? A Yes.

10 Q I show you another picture. Where was the water? A (Indicating.) That is the water.

By the Court.

Q That is the water pipe? A The water pipe.

By Mr. Newton.

Q Where was the water that you saw? A (Indicating.) It was down here.

20 Q The whole cellar was not covered with water? A No; the whole cellar was not covered with water. It was low here (indicating) and the water was over that pipe.

Q Where was the toilet bowl? A It was somewhere around here, I think.

By the Court.

Q To the left of the vent? A Yes; to the left.

30 *By Mr. Newton.*

Q And is that about the way it was when you were there; except for the toilet and the water? A Yes.

By the Court.

Q Was the toilet bowl at a place on this picture, No. 1334 where you could see it if it had not been removed? It would show on that

40

William Grace, direct.

photograph, would it, if it had not been taken out? A I remember there was only a little passage from the water pipe on the left—the toilet—

By Mr. Newton.

Q It was not this way, was it? A No. 10

Mr. Newton: I offer the photograph in evidence.

Mr. Brown: I object as not being connected up.

Q Were these two pipes exposed that time when you were there? A I could not remember.

Q You do not remember that? A No.

20

WILLIAM GRACE, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Newton.

Q What is your business? A Street foreman for the Perth Amboy Gas Company.

Q Did you go to the premises, No. 3 Salem street, following February 14, 1926? A I did; that night. 30

Q What time did you get there? A About eleven o'clock—between ten and eleven.

Q Between ten and eleven o'clock at night? A Yes.

Q Did you go into the cellar? A Yes.

Q Tell us what you did in the cellar? A When we went in we looked to see if we could smell gas. We went all through the place. The only thing we could get would be around the 40

William Grace, direct.

toilet where we could get sewer gas with a slight trace of illuminating gas if you looked for it.

By the Court.

Q I don't understand whether you say you did
10 smell sewer gas? A Yes, sir; I did smell sewer
gas at the time.

Q And do you say that you smelled illumi-
nating gas, too? A Yes.

By Mr. Newton.

Q Did you inspect the cellar at that time?
A Yes.

Q Did you have any light with you? A
Yes.

Q How did you inspect it? A With a flash-
20 light.

Q Does that picture, No. 1334 disclose the
condition of that cellar? A While we were in-
specting it, someone came down smoking a pipe.

Q Does that picture show the condition as it
existed then with the exception of the toilet? A
Yes.

Q Where was the toilet at that time? A
30 The toilet was here (indicating) if I do not mis-
take—this one.

Q Do you mean one of these two outlets?
A Yes; this one.

Q The one nearest the top of the photograph,
is that where the toilet was? A Yes.

Q Was there any water there? A Not here.

Q Where was the water; was there any water
in the cellar; was there any water in the cellar
when you were there that night? A No; with
the exception of this water here around this
40 water pipe, around here. That was the only

William Grace, direct.

place that there was any dampness at all, in that
corner.

Q By the water pipe, you mean the pipe
going through the wall? A Yes.

Mr. Newton: I again offer the photo-
10 graphs in evidence.

Mr. Brown: I still object. This witness
does not show that the photographs show
the conditions that existed that night.

The Court: He does, except that there is
no toilet shown in the photograph.

Mr. Brown: May I cross examine him on
that?

Mr. Newton: I am not through with him.

Q Did you go upstairs in the house? A Yes. 20

Q What did you discover upstairs? A Why
there was a whole lot of people up there—how
many I could not say. We looked up there and
we could not get no gas, and the people were
walking back and forth in through the house,
and the children, and then we went down—

By the Court.

Q When you say there was a whole lot of
people, how many people would you say were
30 there? A I mean there was about six or eight.

By Mr. Newton.

Q Six or eight people in the house? A Yes.

Q Did you see this woman at that time?
A No; I did not see the woman at all.

The Court: Are you speaking of Mrs.
Kilek?

Mr. Newton: Mrs. Kilek. 40

William Grace, direct.

Q Did you see Mrs. Kilek at that time? A No.

Q Are you familiar with the layout of the mains, the sewer and water pipes, in Salem street, in front of this building? A With the gas pipes I am, and the water pipes. The sewer pipe I am not.

Q Where is the water pipe? A On the opposite side.

Q On the opposite side from this building? A Yes.

Q Where is the gas main in Salem avenue? A In the west side of Salem avenue, which was near the house.

Q That is, is that house on the west side of Salem avenue? A Yes; that house is on the west side. The house is on the west side. Approximately three to four feet out from the curb.

Q It is four feet east of the curb? A Yes.

Q Is that right? A Yes.

Q How big a main is it? A Two inch.

Q There was no gas from that main into this house? A No.

Q And there are no gas pipes in this house?

Mr. Brown: That is leading.

30 A Well, there was no gas pipes in the house, but they led into an extension. There is an extension from the curb box.

Q Is there any connection, any gas connection, between 3 Salem avenue by pipe with the main of your company in Salem avenue? A No.

Q Did you make any examination along the street? A Yes.

40 Q What did you do? A Drove bars along there.

William Grace, direct.

Q You drove bars down? A Yes, sir.

Q How deep did you drive them down? A Two feet.

Q How far underneath the level of the street is that gas main? A About two feet.

Q At what intervals did you drive these bars down? A Why, approximately four feet apart.

Q What was the result of driving these bars down? A No gas.

Q No gas? A No gas.

Q You could not smell any gas? A Not there.

Q Where could you smell gas around there? A In the sewer.

Q In what sewer? A The sewer going into that house.

Q Where did you smell it at, at what point? A At the toilet.

Q At the toilet? A Yes.

Q What kind of gas could you smell? A I think it was sewer gas.

Q How long have you been employed by the Perth Amboy Gas Light Company? A About twenty years.

Q What has your duties consisted of in that time? A Gas fitting, now reading meters; I have done every thing for the gas company, that is, in that line of work.

Q You have inspected cellars? A Yes.

Q And smelled cellars in that time? A Yes.

Q You had a gang of men with you there? A Yes.

Q What did you and these men do around the house? A The first thing I did was to see if we could locate gas in the house. When we could not locate it in the house, we went outside of the house.

William Grace, direct.

Q You went where? A Outside of the house.

Q What did you do when you went outside of the house? A Dug up around the sewer.

Q Where was the sewer in relation to the house? A It runs straight on out from the house.

Q Out across the sidewalk? A Yes, sir; under the porch and out.

Q To what extent did you dig up? A Well, down until we found the sewer.

Q How far was that? A Well, that was about the bottom of the cellar; I would say about four feet.

Q What did you find when you dug down four feet? A There was gas in the sewer.

Q There was gas in the sewer? A Yes.

Q Was it observable without getting close to it? A No.

Q How did you discover the presence of gas? A By digging down there.

Q By digging down under the ground? A Yes.

By the Court.

Q How did you determine there was gas there? A What is that?

Q Digging a hole did not tell you there was gas? A Putting bars down the way we done at first.

Q Mr. Newton is asking you about this hole you dug down to the sewer pipe and you said there was gas there? A Yes.

Q How did you determine there was gas? A We tapped it.

Q What do you mean by tapping it? A We tapped the sewer.

William Grace, direct.

Q How did you determine there was gas in it?

A Because we made a—

Q How did you know it was gas? A Smelled it.

By Mr. Newton.

Q What kind of gas was that? A I would say it was sewer gas.

Q Did your men do anything else on the outside of the house? A Yes; we dug up along the curb.

Q What did you do? A We dug up along the curb.

Q Where? A In between the sidewalk and the street.

Q In between the sidewalk and— A Yes.

Q And the curb? A Yes. There is a space there of about two feet.

Q What did you do there? A To see if we could find any gas there, and we could not.

Q What did you do? Did you dig up at that point? A Yes.

Q How deep? A Probably about two feet.

By the Court.

Q At what point did you dig? A Straight out from the house.

Q Anywhere near the sewer pipe? A No.

Q The water pipe? A Along the water pipe; yes.

Q Did you go down to the water pipe? A Yes.

By Mr. Newton.

Q Did you discover any gas there? A No.

Q Well, then did you do anything around the house at that time? A No; nothing more.

William Grace, direct.

By the Court.

Q Is there a gas connection, do you know, that leads from the gas main in the street towards the house? A Yes; to the curb.

10 Q How far from the gas main, in the direction of the main line in the street, does this connection lead toward the house? A About four feet approximately, or five feet—between four and five feet.

Q What does that end in? A With a plug and cap.

Q How do you know there is a plug and cap? A They always put them there.

Q I know they always do, but did you examine it to see? A Yes.

20 Q Was there any odor of gas in there? A No.

By Mr. Newton.

Q That connection that you speak of that ended in a plug was outside the house; is that right? A Yes.

30 Q And how far from the front wall of the house? A From the sidewalk there is ten feet; I would say from the sidewalk back to the house would be ten feet more.

By the Court.

Q How far, then, was the plug from the house, about? A About twenty feet.

By Mr. Newton.

Q And between where this plug was and the the house wall was what—earth? A Yes.

40 Q There was not any connection? A No; there is earth; there is a concrete sidewalk. The

William Grace, cross.

curb is first and then about two feet and then the sidewalk of about five feet and then earth.

Mr. Newton: I again offer these two photographs in evidence.

The Court: I will determine that after the cross examination. 10

Cross examination by Mr. Brown.

Q Why did you dig outside of the building from the building proper out to the gas main? A We did not dig from the building proper out to the gas main.

Q How much digging did you do under the porch? A Where the sewer was.

Q Well, you went down to the sewer connection? A Yes. 20

Q You did not go down to the water connection? A Both were close together.

Q Both together? A They are both in the same trench. The water is a little higher than the sewer.

Q So that the water is higher than the sewer? A Yes.

By the Court.

30 Q They are both in the same trench, do I understand? A Yes.

By Mr. Brown.

Q These pipes, did you follow them across the street? A No.

Q You are acquainted with Salem street, are you not? A Yes.

Q (Showing witness.) I show you here a photograph and ask you if that is a photograph 40

William Grace, cross.

of the condition of that street at that time that this thing occurred, the accident which resulted in Mrs. Kilek's death? A I could not say that time.

Q That is a paved street, is it not? A Yes.

10 Q Will you please explain to the Court how you examine with your bars through the street to ascertain if there was a gas leakage in a public highway? A By driving down with a sledge hammer.

Q Through the pavement? A Yes; through the pavement.

Q I show you again this photograph and ask you if this shows where you drove the bars through that you used to perform your duties? A I cannot say that they are or are not.

20 Q However, you did break through the pavement, didn't you? A Yes.

Q In squares? Did you break through the pavement for several feet in squares? A In places where we went down, we would take a square.

Q How big? A According to how far we had to go with it.

30 Q Now, Mr. Grace, as a foreman of the company in this particular section, you know that gas has been escaping into the street from your mains. A Every time we get notified we send a man to repair any leak—

Q I am not asking you that. I am asking you about this particular street. You know you have had trouble about leaks in this street? A Yes.

40 Q And they were so profuse that they caught fire, didn't they, on the surface? A Along the curb line, yes.

William Grace, cross.

Q Right in front of this house? A No; not in front of the house.

Q Don't you know as a fact that this very night, that when you went there that a little water that was in the gutter contained bubbles where the gas was passing up through it? A No, sir. 10

Q Tell me where you did find the illuminating gas that you smelled? A Well, I have told you before, in that sewer.

Q In the sewer? A In the sewer; yes.

Q You found illuminating gas? A Gas. I would not say it was illuminating gas.

Q You would not say it was not, would you? A No.

Q You testified on your direct examination that you smelled a trace of illuminating gas, didn't you? A Yes. 20

Q Where did you smell that trace of illuminating gas? A Where I testified before, in that sewer.

Q In the sewer? A Yes.

Q Where else did you smell a trace of illuminating gas? A That is all I can recall.

Q Do you mean to say that you did not smell gas in the trench outside? A Why, I don't know. I could not say now. 30

Q You could not say? A No.

Q Don't you know as a fact that you did so find it there? A No; I do not know that as a fact. That is two years ago. I do not know that as a fact.

Q This gas connection that leads from the main in the street outside passes under the sidewalk? A No.

Q It ends where? A At the curb. 40

William Grace, cross.

Q From the curb to the sidewalk proper is a distance of about four feet, is it not? A Approximately that.

Q And that is earth, that four-foot strip? A Yes.

10 Q The walk itself is about four feet wide? A Yes.

Q And from the sidewalk to the building for a distance of fifteen or twenty feet is earth? A Yes.

Q This was in the winter time, was it not? A In February, yes.

Q Mr. Grace, have you ever in your experience observed the result of the ground being frozen and the sub-soil being soft to the gas passing through the soft soil rather than up through the frozen ground? A Well, it will pass naturally where there is the least resistance.

Q That would be where the subsoil is? A Yes.

Q It is nothing uncommon for escaping gas to follow the lines of water and sewer mains on through the mains leading into a house? A No.

Q It is uncommon or it is? A It is uncommon; yes; it is uncommon.

30 Q You have had leaks at Carteret quite often, have you not? A Yes.

Q Do you remember the Deak case? A Yes.

Q That was close by this property? A That had nothing to do with that street.

Q That was a gas leak where seven people were suffocated about that time? A That was an entirely different case.

Q And three people lost their lives there—an entire family? A I don't know. You know.

40 Q You know, too, don't you? A I know they died, but what they died from I don't know.

William Grace, cross.

Q Were you not the man who inspected the premises? A No.

Q This sewer connection that extended from the main into and beyond the curb, did you dig around that? A Yes.

Q You dug down to the plug that is in the end of it? A Inside or outside are you talking of now? 10

Q Outside. A Yes.

Q You dug all around it? A Yes.

Q Why did you dig around it? A When you go for a leak, you are going to find it if it is there and you keep on looking. You think maybe you will find it.

Q You shut the gas off finally, didn't you? A Finally; yes. 20

Q When was it that you shut the gas off? A I cannot recall now.

Q That was after your first inspection out there, was it not? A Yes.

Q How soon after? A About a week.

Q About a week after? A Yes.

Q You have never turned it on since, have you? A We never had consumers on that street from the time it was put in, and there is no demand for it. 30

Q I will ask you this: You never had any trouble with that street about leaks since you shut the gas off? A Yes.

Q With the gas shut off? A On that street. There are only two blocks on that street.

Q I mean the two blocks that are shut off. There is no more complaint about gas there now, is there? A No.

Q But before that you did have constant complaint, didn't you? A Not constant. We had 40

William Grace, cross.

several complaints but not constant, because we fix them any time we get a complaint.

Q You use high pressure gas, don't you, at Carteret? A No.

10 Q You say the gas is not high pressure? A No; the gas is not high pressure, not at 25 pounds when they run as high as 95 pounds and 100 pounds.

Q Where at? A Why, you can look it up if you want to find out what high pressure is; 25 pounds is medium pressure.

Q What do you call high pressure? You call this medium pressure? A Yes.

Q You call it medium pressure, do you? A Yes.

20 Q What is the lowest pressure that you carry; what is low pressure gas, what pressure? A Why, low pressure gas would be—

Mr. Newton: I object to this as not proper cross examination. I have not gone into it on my direct examination. This witness is not qualified as an expert on pressure.

30 Q There is what is known as low-pressure gas, is there? A Low-pressure gas would be measured in inches.

Q Low pressure gas is measured in inches? A Yes, two inches makes one pound.

Q For ordinary distribution you have pound pressure? A No.

Q Have you pounds? A Not pounds; inches in low pressure. You want to know, don't you?

Q Low pressure. A You can figure that. I told you two inches made a pound. Four inches pressure you can burn.

40 Q Four inches pressure? A Yes.

William Grace, cross.

Q That is four pounds? A If you want it that way.

Q The pressure that you carry is about 25 pounds? A It goes up to 25 pounds; yes.

10 Q Is not the reason why you have to have high pressure, because your mains are so small, they are not sufficient for capacity and you have to force the gas? A No.

Q When you went into this house that night you did not know Mrs. Kilek was dead? A I did not say that.

Q Did you know she was dead? A Yes.

Q You were asked if you saw her? A I did not see her.

Q How did you know she was dead? A I was informed she was.

20 The Court: For my information and perhaps for an admission on the record, what time did Mrs. Kilek die?

Mr. Brown: About nine o'clock.

Mr. Newton: I thought that was shown on the death certificate.

The Court: It does not give the hour.

Mr. Newton: No; it does not.

30 The Court: She died February 14th?

Mr. Newton: It was the 15th and this examination was on February 14th in the night; the death was on February 15th.

The Witness: It was before my visit.

Q You had how many men with you? A Four.

Q What did you do to destroy the trace of illuminating gas that you found in the place? A What did we do?

William Grace, cross.

Q Yes. A To destroy it?

Q Yes. A When we tapped the sewer there that would let out what gas there might be instead of going into the house, out under the porch.

10 Q You mean that by tapping the sewer you let out not only sewer gas but any illuminating gas there might be. A Any gas.

Q Can you explain how it let the illuminating gas out? A Why, by making a hole it lets it out.

Q You did not make a hole? A Yes.

Q Did you put a vent from that into the top soil? A I would not say whether we did or not.

By the Court.

20 Q Was it the water or the sewer pipe you tapped? A The sewer pipe.

By Mr. Brown.

Q After you tapped the sewer pipe could you notice any trace of illuminating gas after that, inside? A No.

30 Q Now, you have been questioned about two photographs that are shown here, one known as 1335 and the other as 1334. Questioning you about 1334, do you mean to have the Court and counsel understand that that photograph shows exactly the condition of the cellar as you found it that night?

Mr. Newton: That is not the fact.

A No; that is not the exact condition.

40 Q Is it not a fact that the cellar was not dug up as shown in this photograph? A No; it was not dug up. It was very much mused.

William Grace, cross.

By the Court.

Q What is the difference between this photograph of the cellar and what you found? A There was a toilet in it that time, which is not there now.

Q That is the only difference? A Yes. 10

By Mr. Brown.

Q Do you say that that toilet was connected with these sewer outlets that have the cap on?

A It was on one of these.

Q What was on the other? A Well, there was a toilet there—that condition is changed since that—but it was connected there. The toilet was inside.

Q Will you mark where you say the toilet was, as you know it? Make an X. A It is facing to me. I would say it is there. 20

Q What are these other things that you see in the cellar there with caps on? A Sewer connections.

Q Didn't you point out to Mr. Newton, when he asked you about the location of this toilet that you say was there, that it was fastened to the top sewer connection shown on the photograph on the right side? A I do not think I did. 30

Q Didn't you say that? A I do not think I did.

Q Didn't you put your finger and say: "On this top one?" A Did I?

Q Yes. A Well, if I did, I have changed my mind.

Q You have changed your mind? A Yes.

Q You say these two outlets shown on the right-hand side of the picture were not there? A No; I do not say they were not there. 40

William Grace, cross.

Q What were they used for? A I don't know what they were used for.

Q Do you know whether it is sewer or water or gas? A No.

10 Q You could not tell that night? A That night I could tell what was in that cellar. This wall—I don't know—you don't know whether that is connected on the other side or not, do you?

Q Well, I cannot say about that. I am asking you. A I say the condition that night was entirely different than that.

Q Entirely different? A Yes, sir; the toilet.

Q That is the only difference? A That is the only difference.

20 Q Now, then, about those outlets—were they there? A Here is one you can tell better on. That is the same picture. Right in there.

By the Court.

Q Mr. Brown is asking you about picture 1334? A This here?

Q Yes. A That one there.

30 Q What about that one? A That was not the same. I think that pipe came in further here.

By Mr. Brown.

Q You are pointing to what appears to be two plugs on pipes? A Yes.

Q On the right-hand side of the picture? A Yes.

Q You say they were not there? A It was not the same then. No; I do not think so. I did not see it that way.

William Grace, cross.

By the Court.

Q Senator Brown is trying to find out from you whether the picture 1334 depicts the condition of the cellar as you saw it when you were there in February, 1926. If not, what is different? A At that time there was a toilet.

10 Q There was a toilet? A Yes.

Q Somewhere in the cellar? A Somewhere in the cellar, and there was a partition across in here (indicating).

Q A wooden partition across the cellar? A Yes; along there. That is where the toilet was then.

Q About these two outlets, covering the openings that are shown in 1334, were they there, even if covered up, in February, 1926? A This (indicating) was there.

20 Q The upper one? A Yes.

Q How about this one? A That was there.

Q Therefore, the condition of the cellar was the same? A Yes.

Q The water pipe shown in the photograph—
A (Interrupting.) Yes.

Q Continuing.) —and the vent pipe marked with the circle, were there in February, 1926?
A Yes.

30 Q As shown by the photograph? A Yes.

By Mr. Brown.

Q Where was the toilet; what was it fastened to? A To the floor.

Q Where on the floor? Show on the photograph where it was fastened. A Right around here.

William Grace, cross.

By the Court.

Q Over the vent pipe? A Yes. There was no vent pipe.

By Mr. Brown.

10 Q There was no vent pipe there, you say?
A Not that I seen; no.

By the Court.

Q Was there a vent opening? A No; sat right down on top of that. There was no vent over here.

Q No sewer vent? A No sewer vent.

Q Nowhere any vent? A Not in the cellar.

20 Q Will you look at photograph 1335? Does that portray the condition of the cellar as it was in Ferbruary, 1926, and if not, what is there different? A The toilet. There is a difference right in here (indicating). This partition—

Q Photograph 1335 shows a partition, does it not? A No; not through—

Q This (indicating) is 1335. That shows a partition, does it not? A Yes; but this one does not.

30 Q 1334 does not? A No.

Q What is this on the end here? Isn't this the same? Isn't this the same on 1334—at the top of 1334?— A Yes.

Q Isn't this the end of the partition on 1334? A Possibly it is.

Q Then, the partition does show on photograph No. 1334, does it not? A Yes; according to that.

William Grace, cross.

By Mr. Brown.

Q That floor, as I understand it, was an earthen floor at the time you were there? A I think not. I think in there was cement.

Q All around the floor? A In that particular part of it; yes.

Q It was level? A No, it was not level. 10

Q I mean substantially level? A No; it was very poor. It was a very poor cellar right there.

Q But it was a hard surface? A Yes.

Q You are asked a question about changes in the photograph. Another change was that all of this cellar as shown in the photograph, that is, the floor of the cellar,—can you say whether it was dug up like that when you were there? A No; it had to be dug up to change this. 20

By the Court.

Q To change what? A They had taken the toilet out of here in the meantime.

Q They did not have to dig up the whole cellar floor to take the toilet out? A No; but here.

Q You mean to say the cellar floor has been dug up? A Yes.

Q (Showing witness.) Look at this one. A Yes; sure; it has been dug up. 30

Q It looks like a piece of concrete in the foreground? A Yes, sir.

By Mr. Brown.

Q So that the floor is not in the same condition as when you were there? A No.

Q The Court has questioned you about 1335. It looks as if the two caps there were on the old cement, does it not? A No; it looks like one 40

William Grace, cross.

was—this one here. This one (indicating) does not look like that.

Q Don't you remember seeing cement around the pipe? A Yes; but don't you see here where it is broke through?

10 Q However, you do not know what these two caps led to, whether sewer, gas, water or what, do you? A No; I do not know what they were leading to.

Q Not knowing what they led to, you did not examine them, did you? A I say not now I don't know.

Q Do you remember? A At that time I did know what they led to.

20 Q What did they lead to? A I told you that time I knew what they led to, but today I cannot tell you what they led to.

Q Did you examine around these pipes? A Sure.

Q You did not dig up to find out if there was any leak there? A No.

Q You mentioned something about a man coming down cellar smoking a pipe? A Yes.

30 Q What did you do to stop him, if anything? A I told him not to come down in that cellar while we were working around there, but he came down, but there was no occasion to drive him back.

Q Did he remain there smoking the pipe, or did you chase him out? A We put him out.

By the Court.

40 Q Right away? A As soon as we seen him coming down there, but he didn't go out right away, not for a few minutes.

William Grace, cross.

By Mr. Brown.

Q Did you know that three or four of the children of this family that afternoon, between five o'clock and nine o'clock that night, when their mother died, became so ill that their lives were despaired of? A No.

10 Q Don't you know that there was a complaint made about that? A No.

Q How many complaints had you had previous to February 14th, about gas escaping on that street?

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

The Court: I will allow the question if you will confine it to the two blocks where the gas has been shut off. I do not know how long this street may be. The witness says the gas has been shut off for two blocks.

20 Q These two blocks where the gas was shut off, how many complaints did you have about the gas escaping there for a year previous to shutting off? A The year previous?

30 Q Yes. A I would say that we had three or four.

Q There might have been more than that without your knowing it? A Hardly.

Q Eh? A No; I do not think there would be.

40 Q I am asking you in that particular locality, if that gas was not escaping so violently or so strongly or whatever you might call it, that it caught fire on the surface and the firemen came there and put it out and used bags and what-not to try and stop it from burning? A Along the

William Grace, cross.

curb it came up. It has come up along the curb there, but no further.

By the Court.

10 Q How near this house? A I would say 75 feet away from here.

By Mr. Brown.

Q And there was a fire there? A Yes.

Q And the fire would last how long? A About a minute or two minutes and go right out.

By the Court.

Q How long was that prior to February, 1926? A I could not give you the date.

20 Q Well, approximately? A Well, about, I would say two months before that.

Q Two months before February, 1926? A Yes.

Q That is, about December, 1925? A About.

By Mr. Brown.

30 Q This night that you were in the cellar, I understand it, there was dampness around the water pipe—no water; is that so? A No; it is not so. There was water.

Q I thought you said it was damp there? A No; no; I did not say that; I didn't say anything like that.

Q I know you used the word "damp." You said it was damp around the pipe. What did you mean by that? A No; I did not.

40 Q You said there was a hole around the water pipe? A Yes; there was a hollow around the pipe.

William Grace, cross.

Q Around the pipe where you say the toilet was, that has been described as a vent, was there any water around there, or couldn't you see it?

A The toilet.

Q You could not see it? A The toilet?

10 Q Can you explain how it was that you could smell illuminating gas and trace it around the outlet of this toilet, or in that section—what the effect of it was upon the water that there was there? A No.

Q You cannot explain that? A No.

Q Why? A There was no effect on it.

Q No effect? Where did the gas come from—out of the vent itself or out of the toilet? A There was no vent there in the toilet.

20 Q Did it come from the toilet? A Yes.

Q Was there water actually existing around the water pipe where it entered the earth or floor? A Yes.

Q And where did that water pipe lead to that was so close to the sewer—to the connection—can you tell the Court? A It supplied the house with water.

Q That was just the entrance point? A Yes.

30 Q You did not follow that water line, did you? A Which way do you mean?

Q Anyway. A Why, yes.

Q I mean on the interior? A The interior?

Q Yes. A No; but you would not find the gas following the outside of a water pipe.

Q I mean where it entered the earth? A Yes.

40 Q And under the floor, if it did go under. A It came right in that portion of the cellar, that is, where it came in through the wall, right there.

William Grace, cross.

By the Court.

Q I understood that the water pipe came in through the wall? A Yes.

Q And then along the wall and under the floor? A Yes.

10 *By Mr. Brown.*

Q Where did it go to from that point? A To the main.

Q Inside the cellar from that point where it went in, where did it go to from there? A It came through the cellar wall—

By the Court.

Q It ran a few feet through the cellar floor and along the cellar floor? A Yes.

Q Or did it run along the top? A It ran under the top.

By Mr. Brown.

Q Where did it go from there; where did it next come out to supply the house upstairs? A Right through the floor, the first floor and second floor.

Q You have referred to the inlet of the water main from the street and you have it going into the floor. Where did it come out, in what part of the cellar, the supply upstairs? A I was not interested in that because I never looked to find a gas leak on the outside of the water pipe in the cellar.

Q Where do you find them? A You will find them inside the pipe if you are looking to find them.

Q Did you follow along the water pipe? A No.

Benjamin A. Schwartz, direct.

Q You did not try the other outlet where it left the cellar floor? A No.

Q You cannot tell where that iron plug is at the end of some pipe on the right side of that photograph before you, what that pipe is used for? A No.

10

By Mr. Newton.

Q As a result of the investigation you made around there, you could not find any leak in the gas main? A No.

The Court: He has testified that there was no leak from the gas main into this house, as I understand, except so far as might be indicated by what he thinks was a trace of illuminating gas in the sewer connection.

20

Mr. Newton: I simply wanted to make sure of it.

I now offer the two photographs in evidence.

Mr. Brown: I still object.

The Court: They will be admitted.

(Photographs heretofore marked C. 5 and C. 6 for identification marked Exhibit C. 5 and Exhibit C. 6.)

30

BENJAMIN A. SCHWARTZ, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Newton.

Q What is your profession? A Physician.

40

Benjamin A. Schwartz, direct.

Q And surgeon? A Yes.

Q Where are you licensed to practice?

Mr. Brown: We will admit the qualifications of the witness as a physician and surgeon.

10

Q Suppose you give us a brief statement of your education and any special positions that you have held. A I graduated from Cornell Medical College in 1907; Coroner's physician in 1915.

Q Coroner's physician, New York County?

A New York County, 1915 to 1918, when the office of chief medical examiner was created. I was then appointed acting deputy chief medical examiner and remained there up until about six months ago when I resigned. I am visiting physician to St. Mark's Hospital. I taught in several medical schools and I performed over 1,000 autopsies.

20

Q Have you ever performed any autopsies on persons alleged to have died of illuminating gas poisoning? A Yes.

Q How many? A I believe about 100 approximately.

30

Q Have you examined bodies of persons alleged to have died of illuminating gas poisoning? A Yes.

Q About how many have you examined? A Approximately several hundred.

Q In your opinion, would an autopsy at this time made on the body of a person who died February, 15, 1926, disclose with reasonable certainty the cause of death? A It might.

40

Q In your opinion, would an autopsy at this time show the possibility of death having been caused by illuminating gas poisoning? A Yes.

Benjamin A. Schwartz, cross.

Q What examination would you make to disclose whether death had been caused by illuminating gas poisoning? A You mean in general or in this particular instance?

Q In this particular instance. A The lungs and liver would be removed and examination made for carbon monoxide, and also the entire body would be autopsied to determine if there was some other cause of death. 10

Q The presence of carbon monoxide would be the factor or one of the factors in determining whether death had been caused by illuminating gas poisoning? A Yes.

Cross examination by Mr. Brown.

Q You said, didn't you, that you might be able to determine that death was caused by illuminating gas? A I might be able to detect the presence of carbon monoxide. 20

Q Why did you use the word "might"? You are not sure of that, are you? A Let me ask this: Was the body embalmed? Can I have that information? That is very important.

Q I can tell you very frankly that the body was embalmed; all the blood was taken from the body and the usual embalming service was performed, under the usual undertaker's methods. A The only information I desired was whether the body was embalmed. It would not matter much whether the blood was removed or not. In cases where bodies have been embalmed we cannot detect the presence of carbon monoxide in 100 per cent of cases. We are merely able to get it in about 20 per cent. of cases. 30

Q That is why you used the word "might"? A Yes. 40

Benjamin A. Schwartz, cross.

Q This carbon monoxide gets into what—the blood? A The blood.

Q What traces does it leave? A Well, if there is carbon monoxide present you will find it in examining the blood or any organ that might contain the smallest quantity of blood; there isn't much necessary for determining that.

Q I say, doctor, how do you determine that; what is there in the blood or any other part of the body that shows carbon monoxide; does it get black, or does it get red or a different color, or what? A In a fresh case where the body has not been embalmed there is a pinkish discoloration of the skin.

Q Doctor, in this case, where a woman took sick about five o'clock and died at nine o'clock from alleged illuminating gas poisoning, February 14, 1926, and where after death her body underwent the usual administrations in preparation for burial, the blood was taken from her body and she was embalmed with formaldehyde solution, and she has been buried from that day to this, do you want the Court to understand that you can positively tell whether there are traces of illuminating gas poisoning at this late day? A For your information, I might state the length of time would be immaterial. If the body were not embalmed, we could assure you in 100 per cent. of the cases. Length of time is immaterial. It is the process of embalming, and in that case the length of time is immaterial, whether a year and a half or a day. As I said originally, in about 20 per cent. of the cases we can detect carbon monoxide.

By the Court.

Q Is there any other evidence of death by illuminating gas poisoning than the evidence

Benjamin A. Schwartz, cross.

shown by the presence of carbon monoxide? A No.

Q Any other condition of the organs of the body? A No.

Q I suppose the ability to detect carbon monoxide in cases of embalming—you say is about 20 per cent. of the cases—would depend somewhat upon the manner in which the body was embalmed, would it not? A Well, principally upon the amount of gas that the individual had inhaled.

Q The completeness of the embalming operation would have something to do with it, would it not? A That would have considerable to do with it.

By Mr. Brown.

Q Have you ever, in your experience, examined a body one and a half years after it was interred, after death from alleged gas poisoning and after embalming? A Not that length of time; no; I have not.

Q What is the longest length of time where you have made such an examination? A And performed an autopsy?

Q Yes. A In general?

Q No; for gas poisoning? A Well, that I don't remember.

Q Is it not a fact that all your cases of autopsy have been performed before embalming and shortly after the alleged occurrence? A No; we perform any number of autopsies after embalming.

Q I mean it has been within a short time after death? A Yes.

Q What would you say was the longest time that you can remember, in a case of death from

Michael Zylka, direct.

illuminating gas poisoning, that you performed an autopsy? A That I cannot remember. I perform so many autopsies it would be very hard to give you any definite information.

10 (At this point recess is taken until two o'clock in the afternoon.)

Mr. Newton: I offer in evidence C. 5 for identification and C. 6 for identification.

(C. 5 for identification is marked Exhibit C. 5. C. 6 for identification is marked Exhibit C. 6.)

Complainant rests.

20

DEFENDANT'S CASE.

MICHAEL ZYLKA, sworn as a witness on the part of the defendants, testifies as follows:

Direct examination by Mr. Brown.

Q You are an undertaker? A Yes, sir.

Q Licensed by the State of New Jersey? A Yes, sir.

30 Q And have been for many years? A Twenty-three years.

Q In that time how many bodies have you embalmed? A Averaging 160 or 170 a year.

Q You were the undertaker who performed the embalming operation on Mrs. Kilek? A Yes.

Q What did you do when you went to her place, and when was it? A Well, when she was dead I was away that day, but my assistant went there and embalmed the body.

40

Francis Born, direct.

By the Court.

Q What did you do? A My assistant embalmed the body.

Mr. Newton: I am willing to admit that the body was embalmed.

Mr. Brown: That is all I wanted to prove by this witness. 10

By Mr. Brown.

Q Was the body embalmed in the usual way? A Just what the law called for.

FRANCIS BORN, sworn as a witness on the part of the defendants, testifies as follows: 20

Direct examination by Mr. Brown.

Q You have lived in Carteret how many years? A Twenty-two years.

Q What is your official position there? A Inspector for the Board of Health.

Q You are that now, are you? A Yes.

Q How many years have you held that position? A Fourteen years. 30

Q In February, 1926, you were such health inspector? A Yes, sir.

Q In the course of your duties did you examine the apartment occupied by the Kilek's on Salem street? A Yes.

Q How well acquainted are you at that place? A I am well acquainted with the place.

Q Did you examine the place about the time of the death of this woman? A The day after. 40

Francis Born, direct.

Q What did you find there? A I was notified in the morning when I came in the office at half-past eight; I found a notice on my desk—

Q Because of the notice did you go? A To go and inspect for a gas leak.

10 *By the Court.*

Q Did you go there? A I did.

Q Tell us what you found there? A I came down to the premises and came in the cellar. The cellar door was open and also the windows were open. On entering the cellar there was a slight odor of illuminating gas and going in further to the cellar the odor got stronger. Going to the center of the cellar there is a toilet there and near the toilet it was the strongest.

20 In the cellar, near the toilet we found the floor was in a moist condition, and I found there was a leak under the bowl of the toilet and every time the toilet was flushed, this water will stay around the toilet there, that water condition, and the odor on this toilet was the strongest.

By Mr. Brown.

Q What kind of odor was it? A It was illuminating gas odor.

30 Q Where else did you trace it? A That is all I traced it there in the cellar, no other place in the cellar, but the odor was strong where the main drain pipe came in from the street.

Q The sewer pipe? A The sewer pipe from the main sewer into the house.

Q Did you look for any leak? A Yes.

Q What did you find? A Under the porch where the sewer enters into the wall it was dug up by the Gas Company; they dug a hole in the ground—

40

Francis Born, direct.

By the Court.

Q The hole was still there? A The hole was there the next day when I came there.

Q What did you smell there? A There it was as strong as it was inside the cellar.

Q What? A Illuminating gas on the wall. 10

By Mr. Brown.

Q What do you know about the escape of gas again in that locality? A Six months I gave an official notice to the Gas Company to have this gas leak—

Mr. Newton: I object.

By the Court.

Q Six months ago? A Six months previous to February, 1926. That was in August, 1925. I gave official notice to the Gas Company— 20

Mr. Newton: I object to that as too remote.

The Court: Maybe he is going to bring it down. I will admit it.

Q Go ahead with your answer. In August, 1925 what did you do? A I gave notice to the Gas Company to repair a leak on the corner of Mercer and Salem. 30

Mr. Newton: I object to that as immaterial and incompetent.

The Court: Objection sustained.

Q Why did you send the company that notice? A On complaint from the neighbors of the vicinity. 40

Francis Born, direct.

Mr. Newton: That is subject to the same objection.

The Court: That is also objectionable.

Q Did you investigate? A Yes.

10 Q What did you find? A I found a big leak there—a leak on the curb.

By the Court.

Q When was this? A In July and August, 1925.

By Mr. Brown.

Q Was it a pronounced leak, that is, was it plainly visible; could you smell it? A Yes, sir.

20 Q How long did that continue to your knowledge? A It continued up until February, 1927?

Q 1927? A Yes, sir.

By the Court.

Q How far away from Kilek's house? A I will say about seventy or seventy-five feet away from the house.

By Mr. Brown.

30 Q Was it on the same side of the street? A No; it was on Mercer street, running diagonally with Salem street.

Q Right at the corner? A Right at the corner.

Q Now, you know when Mrs. Kilek died, do you not? A I do; yes.

Q When was it? A Fourteenth or fifteenth of February, 1926.

40 Q I am asking you about the continuance of escaping gas. Did that continue down to the

Francis Born, direct.

time of her death? A No, sir; it did not. A man came down and fixed it.

By the Court.

Q How long before her death? A That was six months before. He put a new piece of pipe in. 10

By Mr. Brown.

Q From that time down was there any escaping gas? A There was escaping right along. It never stopped leaking.

Q That is what I am asking you. How long did it continue to escape? A It continued right along, almost up to March, 1927.

Q 1927 or 1926? A 1927. 20

Q When was the gas shut off on that street? A It was shut off in March—in March they shut it off.

Q March, 1926? A Yes.

Q Did the gas continue— A It continued leaking the same.

Q It still continued to leak? A Yes.

Q You have stated about the smell of gas about the apartment—what did you notice there—how strong was it? A It was strong enough for me that I would not stay there more than five minutes at a time, and go out in the yard again and come back again. 30

Q Is there any mistake in your mind that it was illuminating gas? A No mistake at all.

Q I show you photographs that have been introduced in evidence and ask you if that was the condition of the cellar at that time?

The Court: At what time? 40

Francis Born, direct.

Mr. Brown: The day after the fifteenth or sixteenth of February, 1926.

A Yes, sir.

Q Where was the toilet? A Right here.

10 Q Take this one—1334. There appears to be a partition here (indicating) and a door? A Yes.

Q Over here (pointing to a pipe)—what is that? A That is the pipe for your fixtures upstairs.

Q Pipe for the fixtures upstairs? A Yes.

Q What is this at the bottom? A That is the clean-out. That is the cellar drain. You can see these little holes there.

By the Court.

20 Q Perforations? A Perforations.

By Mr. Brown.

Q Are they— A This is the clean-out. The system in Carteret is a continuous vent system.

By the Court.

Q What are these two plugs? A Clean-out plugs.

30 Q Both of them? A You can take them out and—

Q Clean-out plugs to what? A To the main sewer.

By Mr. Brown.

Q Out to the street? A Running out to the street. (Indicating on photograph.) This is the partition here. According to the partition, this (indicating) is where the door was and—

40

Francis Born, direct.

By the Court.

Q The other side of the partition? A Inside.

Q On the side that does not show here. On the other side of this partition as shown in Picture 1335 with a door open? A Yes. 10

Q You go through that opening and find the toilet inside, in there? A Inside,—in back of this partition. It is partitioned off.

By Mr. Brown.

Q Will you explain to the Court what system prevails in Carteret as to venting? A That is known as the continuous vent system.

Q What does that mean? A Continuous vent system means that a pipe is connected from 20 the main sewer through the street into the house and continues right on into the roof without the interception of house traps of any kind.

Q Was that in this building? A Yes.

Q Was there a vent out to the roof? A Out to the roof.

Q What part of the cellar was that in? A That is going clean upstairs to take the fixtures upstairs and one pipe on this— 30

By the Court.

Q Is the vent pipe inside the house? A The vent pipe is going right—

Q Inside the house? A Inside, through the cellar and upstairs and out on the roof.

By Mr. Brown.

Q Where was the outside of the vent, the end of the vent? A Out on the roof. 40

Francis Born, direct.

By the Court.

Q It ran through the cellar to the rear of the cellar? A Yes.

Q And then it ran up inside the house? A Yes, sir.

10 Q And out through the roof of the house? A Yes, sir.

By Mr. Brown.

Q And all of the sewer connections, that is, the toilet connection was tapped on that? A Tapped on that, with a trap.

Q Each one? A Each one has a trap that seals the gas—whatever gas should be in the pipe; that seals it so that no gas can come through the water.

20 Q Did this toilet in the cellar have a trap? A Yes.

Q And all of the fixtures upstairs had traps? A All traps.

Q That is what you call the “through vent system”? A No; “continuous vent system.”

Q Is that in use in Carteret? A Yes.

Q Is that a standard system? A Standard system in Carteret.

30 Q What is this drain in the picture? A It is a drain set on a trap. If any water accumulates in the cellar, this takes it into the main sewer.

Q Is there a trap under that? A There is a trap under that; yes.

Q So that all outlets have traps? A Yes, sir.

Q Did you notice anything about the gas around this place at that time? A Do you mean in here?

40 Q Yes. A No.

Francis Born, cross.

Q Did you notice whether there was gas upstairs? A I was there the next day, and there was gas the next day upstairs.

Q But there was gas down in the cellar? A Yes.

Q Do you know when they stopped the gas from leaking? A In the street do you mean? 10

Q Yes, or in the building? A About a week after. The condition of the street didn't allow them to break it up, because it was full of water.

Q What did they do? A They dug up Warren street and Salem street.

Q What did they do then? A They shut off the gas right there and they put a new faucet into the valve.

Q Do you know what the condition of the gas pipes was in that street? A They were no 20 good.

Q What do you mean by that? A Well, they leaked; the cement of the pipe opened out.

Q Why was that? A That is the condition of the ground I suppose.

Q Were they old or new pipes? A They were old pipes.

Q How old were they, to your knowledge? A I couldn't tell you how old they were; I don't know how many years they were put in there. 30

Cross examination by Mr. Newton.

Q You say you were at this building on February 15, 1926? A I was there the day after it happened.

Q Were you there before that day? A When was it examined before?

Q Yes. A There was no examination before that.

Francis Born, cross.

Q What? A There was no examination before.

Q I thought you said you were there in December, 1925? A Not in December; no.

Q When were you there before February 15, 1926? A August, 1925.

10 Q Were you there between August, 1925, and February, 1926? A Yes, sir.

Q How many times? A Pretty near daily.

Q Pretty near daily? A Yes.

By the Court.

Q In this house? A Not in the house but in the street.

20 *By Mr. Newton.*

Q In the house? A In the house, no; no.

Q What occasion would you have to go there daily? A That is part of my business.

Q In other words, you would go— A Not in the house. Don't misunderstand me. I don't say I was daily in the house.

Q You were on the street daily? A On the street daily.

30 Q How did you come to notice the gas main in the street? A I am looking at them when the Gas Company repairs them.

Q What is that? A When the Gas Company was repairing them I usually was there.

Q How many times were they repaired? A Hundreds of times.

Q In this street, Salem avenue, they were repaired hundreds of times? A Not in Salem avenue.

Q Where were they repaired hundreds of times? A All over the Borough of Carteret.

40

Francis Born, cross.

Q How many times have you seen them repair these gas mains in Salem avenue? A About five or six times.

Q During what period? A During that period from August, 1925.

Q How much of the street would be torn up when they were making these repairs? A Just about three or four feet—big enough to let a man work in. 10

Q So that your examination of the gas main was limited to the three or four feet they would dig up? A Yes, sir.

Q Now, did you order the toilet removed from that cellar? A Yes; I did.

Q Why did you do that? A The unsanitary condition down there.

Q Then, you did not consider that the plumbing in the house was up to the sanitary standard, did you? A Yes, sir; it was. 20

Q Why did you order that toilet removed? A The surroundings of it—the uncleanness—

Q It was not because it hadn't a proper outlet? A No.

Q You are sure of that? A I am sure of that.

Q This vent that you speak of, that had the perforated top on, you still insist that there wasn't any odor— A No. That isn't a vent. 30

Q What is it? A That is the cellar drain.

Q Did you observe any odor of gas around that drain? A No, sir; I did not.

Q Where did you observe the odor of gas? A Right back here—the toilet—right around there.

Q Did this drain have any connection whatever with the toilet? A Yes, sir; through a trap. 40

40

Francis Born, cross.

Q Where was that trap? A Underneath the floor.

Q Did you look at that trap? A No. I knew when it was put in.

Q When was it put in? A The time the fixtures was put in there.

10 Q When was that? A I couldn't call off the date.

Q You never saw the trap there, did you? A I certainly did.

Q How do you know it was there if you don't know when it was put there? A I couldn't tell you the month and year when the fixture was put in without looking up my record.

Q Is this an old house? A This is an old house.

20 Q Did you inspect that house when the plumbing was installed there? A Yes, sir

Q How many years ago was that? A I couldn't tell you without looking over my records.

Q How long have you been an inspector? A Fourteen years.

Q When did you order them to take the toilet out of the cellar? A About a week after this happened.

30 Q Why didn't you order them to take it out before that? A He was pleading for time.

Q Who was pleading for time? A The owner of the house.

Q Did you smell any sewer gas in the cellar? A No, sir. We claim we have no sewer—

Q Never mind what you claim. I am asking you: Did you smell any sewer gas in the cellar? A No, sir.

40 Q Was there any water around the water service pipes in the cellar? A Not of any amount; no.

Francis Born, cross.

Q Were they covered? A What covered?

Q Were they covered? A Yes.

Q Were they covered with water—these service pipes? A No; not all over.

Q In the water that you observed, did you detect the bubbles of gas? A No, sir; I did not. 10

Q This gas odor that you detected, did it come from the toilet? A Evidently the toilet, near the ground.

Q Near the ground? A Yes.

Q How far away were you from it when you detected the odor of gas? A About a foot.

Q Did you have to get down near to it and smell it? A No; no; I didn't bend down. I stood right about a foot away from the toilet. 20

Q You could not observe it before you got to about a foot away from it? A Yes; in the middle of the cellar you got the odor of it.

Q Was there gas coming from any other place in the cellar? A No, sir; leading right to it.

Q What is that? A Odor leading right to the toilet.

Q You know, of course, that there are no gas pipes in that house? A I certainly do know.

Q What is that? A I certainly do. 30

Q What? A That there are no gas pipes in the house.

Q Where is the sewer in the street? A Right in the middle of the street.

Q Where is the gas main with relation to the sewer? A In Mercer street.

Q Mercer street? A Corner of Mercer street.

Q Isn't there any gas main in Salem street? A Not down in that section. 40

Francis Born, cross.

By the Court.

Q You mean there is no gas main in Salem street in front of this house? A No, sir.

Q There is no gas main there? A No.

10 Mr. Brown: We do not contend that there was.

Mr. Newton: I was under the impression that there was.

By Mr. Newton.

Q I show you this photograph (D. 2 for identification). Does that show Salem street? A Yes, sir.

20 Q And this (indicating) over here on the left, is what? A That is part of the house.

Q Do you see the opening in the street? A Yes.

Q Do you know what caused that? A They were digging up for a leak.

Q I thought you said there was no gas there? A Here (indicating) is where the gas main is,—right at the corner.

Q You are pointing to the second hole in the picture? A Yes.

30 Q What are these opening in front of the house? A They were probably looking for where the gas came from.

Q How near do you say is the nearest gas main? A Right at the corner.

By the Court.

Q What is the distance from this house? A There is about four lots there.

40 Q Twenty-five feet? A Twenty-five foot lots.

Albert Reitenmeyer, direct.

Q Then, the distance from the gas main to this house is a hundred feet? A I don't know. There is about four lots between.

Q I didn't care whether there are four lots. I am trying to get the distance in feet. How far would you say the gas main is from this house? A One hundred feet. 10

By Mr. Brown.

Q Is it not a fact that right in front of this house there was an odor of gas coming up through the street pavement.

Mr. Brown: Objected to as leading.

The Court: Objection sustained.

20

ALBERT REITENMEYER, sworn as a witness on the part of the defendant, testifies as follows:

Direct examination by Mr. Brown.

Q You are the secretary of this Gas Company? A Yes.

Q In active charge of its affairs in the vicinity of Perth Amboy and Carteret? A I am. 30

Q And in charge of its office? A Yes.

Q Have you a diagram or record of the location of the mains of this Gas Company in Carteret? A I have.

Q Now, will you please tell the Court the record that you have for Salem street? A Well, I have a map. This shows all our gas mains.

Mr. Newton: What is it you want to know? 40

Albert Reitenmeyer, direct.

Mr. Brown: The size of the main in this street; that it is a two inch main.

The Witness: Yes; it is.

Q You have a main in— A We have a couple of hundred feet I should judge in Wood-
10 bridge avenue.

Q Roosevelt avenue? A Or Roosevelt avenue.

Q It extends from there to what place? A Right on down beyond Warren street.

By the Court.

Q Is there a gas main in front of this property? A No; there is not.

Q How far away from the property in question is the nearest gas main? A Well, the nearest
20 gas main would be on Salem street.

Q This property is on Salem street, is it not? A The house is on the corner. There is no gas.

Q Is the Kilek house on the corner of Salem and some other street? A I think so.

Mr. Brown: There are vacant lots in between.

Q If you don't know where this house is located, then you cannot tell how close to it the
30 nearest gas main is; if you don't know, you better say so. That is the easiest way. A No; there is no gas in front of the house within a couple of hundred feet, I would say.

Q Do you know that? A No; I would say I don't know.

By Mr. Brown.

Q Your map shows that a red line on Salem
40 street extends from about a quarter of a block

Albert Reitenmeyer, direct.

south of Warren street to about half a block between Essex and Roosevelt avenue. Will you say that that red line indicates your main? A The red line indicates gas from the corner of Warren street to the centre of Essex street.

Q There is a projection from Warren street into Salem? A The gas line is on Salem street. 10

Q I mean this projection south of Warren street on Salem towards Mercer? A Yes.

The Court: That does not mean anything at all to me, because I do not know where Mercer street is with respect to Salem street. The thing that interests me is whether this witness can tell from his map, or any other knowledge that he has, how far away the
20 nearest gas main is from the Kilek house.

Q Have you any record of any kind? A No; not any more than the map, which will show how close it is to this house.

By the Court.

Q You don't know where the house is? A Here (indicating) is a school. I understood the house was on the corner, but I am not certain.

Q How far is the house from the corner—do
30 you know?

Mr. Brown: I understand there is a lot or two between that and the corner. I understand that is according to Mr. Grace's testimony.

By Mr. Brown.

Q Mr. Grace is the man that knows? A Yes.

Q Mr. Grace, the former witness? A Yes. 40

Albert Reitenmeyer, direct.

The Court: I understood his testimony to be that the main was there.

Mr. Newton: About a hundred feet away.

The Court: I got the impression from Mr. Grace's testimony that there was a main running down in front of this house, with a gas connection for this house extending from the main toward the house. Mr. Born says it is a hundred feet.

Q Is it at least a hundred feet? A A hundred feet.

Q Do you know whether Mr. Grace was wrong in his testimony? A No; I do not.

Q He would know if anybody would? A He would; yes.

Q Have you any record as to the connections along there? A No; we make no record of those things any more than the map shows.

Q Have you any record of the work that was done on Salem street in front of this property to detect the gas leaks? A The payroll book. We don't keep our time books. That is turned in weekly to the chief clerk. Our payroll book will show what work was done during that period for repairs to mains. That is all I would have.

Q Now, what is the pressure that you maintain out there? Have you a chart? A We have charts; yes.

Q Will you please refer to your chart and answer that question? A I can tell you offhand. Our pressure runs all the way from five pounds to fifteen pounds. Sometimes it runs up to eighteen pounds; but that is not considered a high pressure, for the reason that we have a governor installed on every home that reduces that pressure down to three pounds, but at no time would

40

Thomas Burke, direct.

we have much more than from about five pounds running up to fifteen pounds pressure.

Q That is considered high pressure, is it not?

A Well, they call it high pressure, but I would call it semi-high pressure, for the reason that high pressure is fifty, or sixty, or seventy-five or more.

10

No cross examination.

THOMAS BURKE, sworn as a witness on the part of the defendant, testifies as follows:

Direct examination by Mr. Brown.

Q Do you live in Carteret? A Yes.

Q Do you know where the Kilek home is on Salem street? A Yes.

20

Q What department are you connected with in Carteret? A Fire department.

Q What is your position? A Engineer and driver.

Q Did you ever have occasion to go to the Kilek premises? A Yes.

Q For a fire? A Yes.

Q In February, 1926? A Yes, sir.

Q When was it, about? A Around the tenth, I guess, of February.

30

Q What was the fire? A The gas along the curb.

Q In front of the Kilek home? A Yes; it ran all the way down from the corner.

Q Down to the Kilek house? A Yes; it ran a little past it.

Q When you say "the corner," what corner do you refer to? A The other street. What is the name of the other street on the corner?

40

Thomas Burke, direct.

Q Mercer street? A Mercer street.

Q How long did the fire continue? A Oh, for about, I guess, a half hour.

Q What was the fire? A Just gas.

Q Illuminating gas? A Yes.

Q What means did you have to take to put the
10 fire out? A We had to get bags and all kinds of old carpet, some sand and ashes and different things like that.

Q What did you do as a consequence of that fire, or what did the Gas Company do? A The Gas Company didn't do anything as I know of.

Q How many fires did you have there? A Well, there were several fires, but I was not at them.

Q But this particular one? A That particu-
20 lar one, I was called up by the police officer. There is a telephone box there right on the corner.

By the Court.

Q Was the apparatus called out? A Yes.

Q The fire engine? A Yes, sir.

Q Did you send word to the Gas Company to turn the gas off? A On that one, yes.

Q That was what put the fire out, was it not?
30 A No. They didn't turn the gas off for another day or so; I guess that gas was still going.

Q How far is the Kilek house from the corner of Mercer street? A About seventy-five or a hundred feet.

By Mr. Brown.

Q I show you here a photograph called D. 2 for identification, and I ask you if the Kilek house is on the left? A As you are going down,
40 it is on the right.

Thomas Burke, cross.

Q That is down toward Mercer street? A Yes.

Q It is on the left of the picture? A Yes; it is on my left now, the way I am now.

Q But if you are walking— A Walking down this way, it is on the right.

Q Looking at the front of the picture, that is
10 the right? A Yes.

Q Where is Mercer street—before you get to the Kilek house or after you pass it? A This is Mercer street. This is Salem.

Q These openings in the pavement that are shown in this photograph, do you know when they were put there? A No.

Q Were they there at the time of the fire? A They were not there at the time of the fire. The fire reached from this corner (indicating) right
20 down here.

Q Show the Court. Indicate it with your pencil.

By the Court.

Q Indicating the second telegraph pole. A That is the first telegraph pole from the corner.

Q This Kilek house is the one shown with the stoop? A Yes. It reached all the way
30 down there along the curb.

Mr. Brown: I offer the photograph in evidence.

Mr. Newton: No objection.

(Photograph heretofore marked D. 2 for identification marked Exhibit D. 2.)

Cross examination by Mr. Newton.

Q This fire that you speak of, ran along the curb? A Along the curb.
40

William E. Ramsey, direct.

Q Where is the gas main? Is that beyond the curb? A As far as I know. I don't know where the gas main is, but it is generally about two feet away from the curb. That is where I see them put them down.

Q What was ignited—any rubbish or wood?

10 A No, sir; no wood or nothing.

Q How high were the flames? A The flames were about a foot high—maybe two feet.

Q When was this? You say February 10th?

A Yes.

WILLIAM E. RAMSEY, sworn as a witness on the part of the defendant, testifies as follows:

20 *Direct examination by Mr. Brown.*

Q You are a physician and surgeon for how many years, doctor? A Since 1888.

Q Practicing in and about the City of Perth Amboy? A Part of the time in Baltimore and the rest of the time in Perth Amboy.

Q Will you state to the Court your medical qualifications? A I graduated from Columbia University in 1881; Philadelphia Post Graduate; 30 Johns Hopkins as associate for three years. I was in charge of the Baltimore City Hospital during that period, under the control of Johns Hopkins. Since that time I have been located in Perth Amboy and am doing industrial work as physician to the American Smelting and Refining Company, Barber Asphalt Paving Company, United Lead Works, which is a subsidiary of the National Lead Works, The Standard Underground Cable Company, Roessler Chemical Company, Perth Amboy Dry Dock, Raritan Copper 40

William E. Ramsey, direct.

Company through the Anaconda, Pennsylvania Railroad, Lehigh Valley.

Q What are your connections with medical societies? A I am a member of the Middlesex County Medical Society, the New Jersey State Medical Society, the American Medical Society, and some others. 10

Q What hospitals have you been and are connected with? A I have been connected, first, with the Manhattan Eye and Ear Hospital, New York Orthopedic Hospital; latterly I have been connected with the Perth Amboy City Hospital.

Q Have you had any experience in your industrial and other work with monoxide poisoning? A I have been with the American Smelting and Refining Company for twenty-six years; with the Raritan Copper Works, which is now part of the Anaconda, for thirty years; with the 20 Roessler & Hasslacher Chemical Company for twenty years; I am speaking of those in which carbon monoxide poisoning may occur,—and the Fordson Company, which is a porcelain works.

Q A woman living in a house in which it is claimed she was poisoned by illuminating gas became sick, nauseated, about five o'clock and died about twelve o'clock that evening, and the case was pronounced as one of gas poisoning by the coroner; subsequently there was embalming of the body carried on in the customary and usual manner; all of this occurring after the death February 14 or 15, 1926; what have you to say as to whether or not an exhumation and examination of the body at this day would disclose gas poisoning? 30

Mr. Newton: I object upon the ground that the evidence shows that she became sick at twelve o'clock noon, not at five o'clock. 40

William E. Ramsey, direct.

Otherwise, I think the question fairly states the fact.

Mr. Brown: Make it twelve o'clock instead of five.

10 A Would an autopsy— Repeat the question, please.

Q Would an autopsy performed on the cadaver or body at this time disclose gas poisoning? A May I be permitted to explain?

20 Q Yes. A The indication of monoxide poison is always evidenced in the blood; I am speaking of acute poisoning, such as covers the party you speak of, and after several hours or even several days an examination of the blood made within that period would show definite evidence.

Q Within what period? A It would be definite within eight days.

By the Court.

30 Q That is, after emblaming? A No; I am speaking of a plain case. After embalming it would not be a surety for any period. A whole lot depends, first, on the embalming fluid that is used; second, upon the fact that degeneration takes place in the blood cells very shortly after. If there is carbon monoxide poison present, it is very quickly assimilated by the tissue and blood cells. I have never known—I have never heard of an examination for carbon monoxide poisoning taking place at any such late period. In fact, pathologists do not do it.

40 Q Answering the question, would an examination, in your opinion, disclose any traces of monoxide poisoning now, even though it did

William E. Ramsey, cross.

occur about February 14 or 15, 1926? A In my opinion, it would not.

Cross examination by Mr. Newton.

Q How many autopsies have you performed?

A In my early days probably about 500 or 600. 10

Q When was the last that you performed?

A The last I performed within ten years, but in my early days I was doing a lot of autopsy work.

Q How many autopsies have you performed where it was alleged that death was caused by illuminating gas poisoning? A Not so many, but I have done quite a few in carbon monoxide poisoning, which is practically the same poisoning.

20 Q How many of that character? A I should say twenty-five. 20

Q When was the last? A The last one ten years ago.

Q Do you state that by no possibility will an exhumation and autopsy on this body show illuminating gas poisoning? A I can only state from the authorities and from my personal experience. My personal experience shows—I have never seen an autopsy done at that late period.

30 Q Then, you do not disagree in toto with Dr. Schwartz, do you? A I do not; no. 30

Q Are the tests that he stated the recognized one, that is, the color of the skin? A Dr. Schwartz I did not hear entirely. I did hear Dr. Schwartz say that he had never seen one done as late as this.

Q Of course, the autopsy would disclose if she died from a cause other than illuminating gas poisoning? A It might; yes.

40 Q In these cases of carbon monoxide gas poisoning and carbon monoxide poisoning, does 40

William E. Ramsey, cross.

not the unconscious state usually precede death?
A Not always. Sometimes death might be, like in cyanide of potassium, almost instant.

Q It might not have been instantaneous? A It may not be.

10 Q Well, in the average case of illuminating gas poisoning, does not the unconscious state precede death? A In a majority of cases; yes. It depends entirely on the concentration. If the air is rather concentrated with carbon monoxide, whether it is in the form of illuminating gas or carbon monoxide product from a furnace, there is the question of personal resistance, individual resistance.

20 Q But it has been your experience that in a case of death from illuminating gas poisoning, there must be a high concentration to cause it? A Yes.

Q So that if a period of nine hours elapsed wherein the person was on her feet and about, that would exclude the diagnosis of death by illuminating gas poisoning, would it not? A No; I have seen in carbon monoxide—

Q I am confining it to illuminating gas. A Illuminating gas is carbon monoxide.

30 Q Have you ever known of any case where death has resulted from illuminating gas poisoning, where the unconscious condition has not preceded death? A I cannot speak clearly on that from recollection; I can, though, on carbon monoxide direct.

Q Well, have you had any cases where death resulted from illuminating gas poisoning? A I have.

Q Have you inspected any persons suffering from illuminating gas poisoning? A I have.

40

William E. Ramsey, cross.

Q About how many? A Oh, in hospital work and outside work, I think I have had fifteen or twenty cases.

Q When was the last you had? A Death case?

Q Yes. A About a year ago.

10 Q When was the last prior to that? A That is a pretty severe test. I have had carbon monoxide poisoning.

Q I am confining my question to illuminating gas poisoning. A My experience with illuminating gas is now limited to cases that I see in the hospital, that are brought in in my hospital service.

20 Q This case that you speak of, did the unconscious condition precede death, about year ago? A You mean illuminating gas?

Q Yes. A It did; yes.

Q For what length of time? A I could not give you that. These cases will vary from a few minutes to seven or eight days.

Q Is it not a fact that before death can be caused by illuminating gas poisoning, there must be an intense inhalation in a confined area? A Yes.

By the Court.

30 Q Doctor, I suppose that in your mind there is a point or period of time after death by illuminating gas, embalming and burial, when an autopsy will not disclose any evidence of carbon monoxide. A The situation is this, bringing in the element of embalming. When a body is properly embalmed, the blood is removed, as much as they possibly can. The embalming is done in one arm. In doing that they remove practically all of the tissue or structure that controls the

40

William E. Ramsey, cross.

evidence of your carbon monoxide, and if the embalming was done fifteen minutes after death and they took out the blood, that would do away with the source of evidence.

Q Then, there would be no evidence whatever? A In acute cases there is not any evidence whatever left in the tissue. 10

Q If properly and thoroughly embalmed, it would be discovered by autopsy whether death was caused by some other cause, because there might be some other cause present? A Yes.

Q If the embalming is thoroughly and properly done, in a case of death by illuminating gas poison, one day after the embalming, there would be no evidence of death by illuminating gas? A If properly done, the source of supply, the evidence has been removed. 20

Q Can you say "Yes" or "No"? A If it is properly done, the source of supply of evidence has been removed, by the removal of the blood.

Q There would be no evidence discoverable by autopsy that the cause of death was illuminating gas? A No.

Q If the embalming was not properly done, then there would be a period of time after death, I imagine, when an autopsy would disclose that illuminating gas was the cause of death, if that was the cause? A According to all the authorities that you can find, there isn't any record of any case that I can find that has ever gone over a period of one year, and then it was indefinite. 30

Q Within a year it might be discoverable? A There might be enough blood under the proper embalming fluid—you must take into consideration the embalming fluid that is used. Lately they have used the formaldehyde solution. If 40

William E. Ramsey, cross.

your formaldehyde solution was too strong it would destroy the blood cells so that they could not be used. If the tissues were protected, there might be a possibility, but then it would be so remote that I cannot imagine it.

By Mr. Newton.

Q Would the blood have to be confined to any particular part of the body in order to disclose illuminating gas poisoning? A The blood throughout the whole body would disclose it. The blood from any part of the body, within a reasonable period, would show the presence of carbon monoxide, but after a period, in the latter stage, the best authorities agree that where it was definite that they had carbon monoxide poisoning, the autopsy didn't show a trace. 10 20

Q The blood in the nasal or oral activities, which are not usually affected by embalming, would they disclose the presence of carbon monoxide gas poisoning? A At what period?

Q Well, within, say, a year? A No; they would be so decomposed it would be disseminated through the tissue if there was any there, and it would not be detectable.

Q If the autopsy showed a cause of death other than illuminating gas poisoning, could you at this time exclude illuminating gas poisoning, due to the presence of the other causes? A That is a very difficult question to answer because a person might have a pathological condition—he might have another condition—that might be accelerated or intensified or might be produced by the carbon monoxide on account of the weakened condition; but to say that that thing was the cause of death, nobody could. There are many people going around to-day with a heart condi- 30 40

William E. Ramsey, cross.

tion, if they were exposed to illuminating gas poison, their lives might be ended, where they might have lived twenty-five or thirty years if the heart had not been injured by the carbon monoxide.

10 Q Would a small quantity of blood present in the cadaver be sufficient to determine whether death was due to illuminating gas poisoning? A Not after decomposition had been going on.

Q Within a year? A According to the best records, no. I want to state that it is very difficult to answer a question when no case has ever been recorded that I can find where an autopsy has been done at this late period.)

By the Court.

20 Q Within what time will an embalmed body, buried in an ordinary coffin, the usual depth in the ground, decompose? A A great many of them never decompose. They simply dry up, mummify.

Q Within what time will the organs disintegrate? A They will get hard where they have been buried many years, and they simply solidify without decomposing any.

Defendant rests.

30 Case closed.

The Court (Orally at close of argument.) Without going into lengthy conclusions at this time or stating reasons at length, I think there should be a decree entered on final hearing to the same effect as the order entered upon application for a stay pending final hearing. If an appeal is to be taken—and I assume an appeal will be taken—I shall state my conclusions at length.

40



EXHIBIT D. 2.

86 FEB. T. 1928

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

PERTH AMBOY GAS LIGHT COMPANY, a corporation,
Complainant-Respondent,

vs.

ALEXANDER KILEK, individually,
and as administrator *ad prosequendum* of Eva Kilek,
deceased, and EDWARD T. HANSON, one of the coroners of
Middlesex County,
Defendants-Appellants.

*On Appeal
from
Chancery.*

BRIEF FOR DEFENDANTS-APPELLANTS.

This is an appeal taken from a certain final decree made by the Court of Chancery in the above-entitled cause on the 9th day of December, 1927, whereby the defendants-appellants were ordered and directed to desist and refrain from prosecuting an action at law now pending in the New Jersey Supreme Court against the complainant-respondent arising out of an action for damages caused by the death of Eva Kilek, the wife of the said Alexander Kilek, unless and until the said Alexander Kilek individually and as administrator *ad prosequendum* of the estate of Eva Kilek deceased aforesaid, does consent to the exhumation of the body of the said Eva Kilek and the performance of an autopsy thereon at the expense of the complainant-respondent, such autopsy to be performed by a physician or a pathologist selected by the complainant-respondent.

Facts.

Eva Kilek was asphyxiated by illuminating gas on or about February 14, 1926 (p. 10, S. C.). The diagnosis and pronouncement of death was made by a reputable physician (p. 17, S. C.). Her body was embalmed and interred in the usual manner on February 17, 1926 (p. 12, l. 10, S. C.). The complainant-respondent was promptly informed of her death and was further informed that the next of kin held it liable therefor. No action was taken by the company other than an examination of the premises where the decedent died. A suit at law for the wrongful death of Eva Kilek was commenced August 16, 1926 (p. 13, l. 33). Issue was joined and the cause was noticed for trial.

No demand or intimation of the desire for an autopsy was made by the complainant-respondent. A demand was made for particulars of damage which particulars were furnished by the defendant-appellant but no autopsy was even suggested. The first expression of a desire for an autopsy was made on December 31, 1926 (p. 14, l. 20) and formal demand was made January 6, 1927 (p. 8). This request and demand was not made until it was evident that the trial of the cause at law would be reached in the course of a day or two. The case was already in the day call at the Middlesex Circuit for that term.

The body after having been embalmed and having suffered the natural changes incident to eleven months interment was claimed to be the best evidence. In support of this contention and as a basis for the order to show cause, the complainant-respondent produced two affidavits upon which affidavits the Court of Chancery made ab-

solute the order staying the defendant-appellant's action at law until an autopsy be had or until the further order of the Court. Defendant-appellant appealed to this Court and the case was submitted in the May term, 1927.

This court in an opinion filed October 17, 1927, and reported in 5 A. R. 1349, set aside the order of the Court of Chancery staying the action at law on the ground that the affidavits failed to establish the equity of the complainant-respondent by legal evidence verified by the oath or affirmation of some person or persons having knowledge of the fact set forth.

Thereafter and on October 24, 1927, a final hearing was caused to be had in Chancery (p. 45, l. 22) and testimony was taken and a final decree was granted to the complainant-respondent on December 9, 1927 (p. 29). The testimony before the Vice-Chancellor fails to show that the deceased's death was due to any other cause than asphyxiation by illuminating gas and the testimony by three employees of the complainant-respondent attempts only to show that there was no illuminating gas in the house where defendant-appellant's decedent died (pp. 45 to 93). (The complainant-respondent failed entirely to show that there was no illuminating gas on the premises because its employee George Szul admitted that *gas escaping from the gas mains of the company would follow the water or sewer mains into the building* (p. 63, l. 14) and William Grace who made the examination of the premises admitted that *he smelled illuminating gas on the premises and in the vicinity of the sewer* (p. 77, ll. 19 to 25). And that he dug such holes as are shown in the picture, Exhibit D. 2 (p. 76), where Thomas Burke extinguished a gas fire (p. 119, ll. 28 to 40), to find the leak.)

Benjamin A. Schwartz, a physician, produced by the complainant-respondent to show the possibility of determining the cause of death in the present case by an autopsy, could make no stronger statement than that in his opinion an autopsy on the body of Eva Kilek *might* disclose the cause of death (p. 94, ll. 34 to 37 and p. 95, ll. 22 and 23). *He furthermore admitted that he had never in his experience examined a body after it had been interred as long as this one after death from gas poisoning and after embalming* (p. 97, ll. 21 to 25).

(Francis Born, a disinterested witness called by the defendant-appellant who was inspector for the Board of Health of the municipality in which the decedent died, testified emphatically that *illuminating gas was strongly evident about the premises*, particularly in the vicinity of the toilet and sewer (p. 100, ll. 11 to 40) and that *the odor was so strong that he would not stay there more than five minutes at a time* (p. 103, ll. 30 to 33). He further testified that *there was no sewer gas* (p. 110, ll. 36 to 38).

Thomas Burke, a fireman in the municipality in which the decedent died testified as to the leakage of gas up through the ground along the curb and directly in front of the house where the death of the decedent occurred, to such an extent that *the gas being set on fire created a blaze all along the curb and in front of the Kilek house which necessitated the services of the fire department* (p. 117, ll. 24 to 36).

Dr. William E. Ramsay, a practicing physician since 1888 (p. 120) and who has had a wide experience in carbon monoxide poisonings (p. 121, ll. 11 to 25) stated positively that in his opinion *an autopsy would not now disclose any*

traces of monoxide poisoning (p. 122, l. 25 to p. 123, l. 2 and p. 126, ll. 25 and 27).

ARGUMENT.

The argument based upon the ground set forth in the petition of appeal logically divides itself into four points,

1. The facts and testimony before the court warranted a decree against the complainant-respondent and in favor of the defendant-appellant.

2. The relief sought is neither necessary or essential to the complainant-respondent's defense of the action at law.

3. The complainant-respondent was guilty of such laches as to warrant a decree against it.

4. In view of the citations in support of the foregoing points the decree is *contra* to the decisions of the courts of this state.

POINT I.

The facts and testimony before the Court warranted a decree against the complainant-respondent and in favor of the defendant-appellant.

The bill of complaint of the complainant-respondent sets forth *inter alia* that there was no gas leak in the premises where Eva Kilek met her death and that the toilet used by the occupants in said premises was not properly trapped (p. 4), that the cause of death might be determined by an autopsy upon the body of Eva Kilek and that the complainant-respondent was informed that Eva Kilek was suffering from diarrhoea or dysentery at the date of her death and that evidence as to the cause of her death can only be had by an exhumation and autopsy on her body and that complainant-respondent

cannot fairly defend said action at law begun against it unless such exhumation and autopsy be permitted (p. 4). The denial of these allegations by the defendant-appellant in his answer (p. 21) frames the issues which were before the court below at the final hearing held December 9, 1927.

It is respectfully submitted that an inspection of the testimony offered at the hearing shows conclusively that the complainant-respondent failed entirely to support any of the allegations made by it. Regarding the allegation that no gas leak was discovered on the premises at the time of the woman's death, William Grace, a witness for the complainant-respondent and one of its employees admitted that he smelled illuminating gas on the premises (p. 68, ll. 8 to 13).

"Q I don't understand whether you say you did smell gas? A Yes, sir; I did smell sewer gas at the time.

Q *And do you say that you smelled illuminating gas too?* A *Yes.*"

It is clear that this witness attempts to testify that the gas he smelled was sewer gas but in the foregoing excerpt from his testimony he admitted that there was illuminating gas. On page, 71, lines 16 to 24, he said:

"Q Where could you smell gas around there? A In the sewer.

Q In what sewer? A The sewer going into that house.

Q Where did you smell it at, at what point? A At the toilet.

Q At the toilet? A Yes.

Q What kind of gas could you smell? A *I think it was sewer gas.*"

while further on in cross examination he said (p. 77, ll. 11 to 31):

"Q Tell me where you did find the illuminating gas that you smelled? A Well, I have told you, before, in that sewer.

Q In the sewer? A In the sewer, yes.

Q You found illuminating gas? A Gas. I would not say it was illuminating gas.

Q *You would not say it was not, would you?* A *No.*"

It is clear then by the testimony of the complainant-respondent's own witness that illuminating gas was in the premises wherein Eva Kilek died. As to the quantity and strength of this gas the testimony of Francis Born, an inspector for the Board of Health of the Borough of Carterest, is very explicit and emphatic (p. 100, ll. 11 to 40).

"Q Did you go there? A I did.

Q Tell us what you found there? A I came down to the premises and came in the cellar. The cellar door was open and also the windows were open. *On entering the cellar there was a slight odor of illuminating gas and going in further to the cellar the odor got stronger. Going to the center of the cellar there is a toilet there and near the toilet it was the strongest.* In the cellar, near the toilet we found the floor was in a moist condition, and I found there was a leak under the bowl of the toilet and every time the toilet was flushed, this water will stay around the toilet there, that water condition, and the odor on this toilet was the strongest.

By Mr. Brown.

Q What kind of odor was it? A *It was illuminating gas odor.*

Q Where else did you trace it? A That is all I traced it there in the cellar, no other place in the cellar, but the odor was strong where the main drain pipe came in from the street.

Q The sewer pipe? A The sewer pipe from the main sewer into the house.

Q Did you look for any leak? A Yes.

Q What did you find? A *Under the porch where the sewer enters into the wall it was dug up by the Gas Company; they dug a hole in the ground.*

It will be noted that when this witness reached the premises the cellar door was open and the windows were open but that the illuminating gas was still in the building and was leaking in under the porch where the sewer entered into the wall and again in reply to a question by counsel he said (p. 103, ll. 28 to 35):

“Q You have stated about the smell of gas about the apartment—what did you notice there—how strong was it? A It was strong enough for me that *I would not stay there more than five minutes at a time* and go out in the yard again and come back again.

Q Is there any mistake in your mind that it was illuminating gas? A *No mistake at all.*”

and it must be borne in mind that the windows and door were open. Another witness for the complainant-respondent and one of their employees denies having smelled any gas on an inspection of the premises by him in the morning and before Eva Kilek died, but he *admits that escaping gas from the gas mains will follow the water or sewer mains into a building* (p. 63, ll. 14 to 16).

“Q Gas escaping from the gas mains of the company will follow the water mains or sewer mains into the building, won't it? A Yes.”

That gas was escaping in and about the Kilek house is not only shown by the testimony of Francis Born, an official of the Borough of Carteret, but also by Thomas Burke, a member of

the Carteret Fire Department, who was called upon to extinguish burning gas in front of the Kilek home (p. 117, ll. 23 to 37).

“Q What department are you connected with in Carteret? A Fire department.

Q What is your position? A Engineer and driver.

Q Did you ever have occasion to go to the Kilek premises? A Yes.

Q For a fire? A Yes.

Q In February, 1926? A Yes, sir.

Q When was it about? A Around the tenth, I guess, of February.

Q What was the fire? A *The gas along the curb.*

Q In front of the Kilek home? A Yes; it ran all the way down from the corner.

Q *Down to the Kilek house?* A *Yes, it ran a little past it.*”

The complainant-respondent attempted by the testimony of George M. Amouroux, who was employed by it, to make a plan of the cellar of the building (p. 48, ll. 10 and 11), and who inspected the premises for them seven months after the death of the defendant-appellant's decedent (p. 48, ll. 13 to 16).

“Q When did you get the data for making that plan? A *On September 21, 1926.*

Q You make it by actual inspection of the premises at that time? A I did.”

The testimony of Amouroux, however, is valueless. He stated that there was no vent pipe to the outer air and that there was no vent in the cellar (p. 48, ll. 23 to 37).

“Q And what did that inspection disclose?

Mr. Brown: I object to that as not being material in this case. It is quite sometime after this death took place.

The Court: Objection overruled.

A I found the plumbing to be in an unsanitary condition by reason of the house

sewer not being connected with a vent pipe to the outer air, which is called for in all plumbing rules and regulations and sanitary codes.

Q Did you find any vent in the cellar?
A No, sir."

Francis Born, the inspector for the Board of Health of the Borough of Carteret who held that position for fourteen years (p. 99, ll. 26 to 36).

"Q What is your official position there?
A Inspector for the Board of Health.

Q You are that now, are you? A Yes.

Q How many years have you held that position? A Fourteen years.

Q In February, 1926, you were such health inspector? A Yes, sir.

Q In the course of your duties did you examine the apartment occupied by the Kilek's on Salem Street? A Yes."

explains fully and from personal knowledge, the sewer system of Carteret and the system used in this house and shows that a vent was provided in the house (p. 105, ll. 16 to 40).

"Q Will you explain to the Court what system prevails in Carteret as to venting?
A That is known as the continuous vent system.

Q What does that mean? A Continuous vent system means that a pipe is connected from the main sewer through the street into the house and continues right on into the roof without the interception of house traps of any kind.

Q Was that in this building? A Yes.

Q Was there a vent out to the roof? A Out to the roof.

Q What part of the cellar was that in?
A That is going clean upstairs to take the fixtures upstairs and one pipe on this—

By the Court.

Q Is the vent pipe inside the house? A The vent pipe is going right—

Q Inside the house? A Inside, through the cellar and upstairs and out on the roof.

By Mr. Brown.

Q Where was the outside of the vent, the end of the vent? A Out on the roof."

The witness Born also shows that contrary to the testimony of the witness Amouroux, each one of the connections had a trap that sealed gas from coming up through the water itself as would sewer gas (p. 106, 17 to 24).

"Q Each one? A Each one has a trap that seals the gas—whatever gas should be in the pipe; that seals it so that no gas can come through the water.

Q Did this toilet in the cellar have a trap? A Yes.

Q And all of the fixtures upstairs had traps? A All traps."

This testimony of the witness Born is based upon his observation at the time the plumbing was installed (p. 110, ll. 1 to 13 and ll. 19 and 20).

"Q Where was that trap? A Underneath the floor.

Q Did you look at that trap? A No. I knew when it was put in.

Q When was it put in? A The time the fixtures was put in there.

Q When was that? A I couldn't call off the date.

Q You never saw the trap there, did you?
A I certainly did.

Q Did you inspect that house when the plumbing was installed there? A Yes, sir."

The witness Benjamin A. Schwartz, a physician, called by the complainant-respondent to prove that the cause of death might be determined by an autopsy on the body of Eva Kilek, was unable to say that an autopsy would with reasonable certainty disclose the cause of death in the present case. *He could only make the vague answer*

that it might. In his direct testimony he said (p. 94, ll. 34 to 37),

“Q In your opinion would an autopsy at this time made on the body of a person who died February 15, 1926, disclose with reasonable certainty the cause of death? A *It might.*”

and in cross examination he said (p. 95, ll. 20 to 23 and ll. 32 to 40):

“Q You said, didn't you, that you might be able to determine that death was caused by illuminating gas? A *I might be able to detect the presence of carbon monoxide * * ** The only information I desired was whether the body was embalmed. It would not matter whether the blood was removed or not. In cases where bodies have been embalmed we cannot detect the presence of carbon monoxide in 100 per cent of cases. We are merely able to get it in about 20 per cent of cases.

Q That is why you used the word 'might?' A Yes.”

But he admitted that he had no experience with a case such as the present one (p. 97, ll. 21 to 25).

“Q Have you ever, in your experience, examined a body one and a half years after it was interred, after death from alleged gas poisoning and after embalming? A *Not that length of time; no, I have not.*”

Dr. William E. Ramsay, a physician called by the defendant-appellant in response to a question by the Court said (p. 122, l. 36 to p. 123, l. 2):

“Q That is, after embalming? A No; I am speaking of a plain case. After embalming it would not be a surety for any period. *A whole lot depends, first, on the embalming fluid that is used; second, upon the fact that degeneration takes place in the blood cells very shortly after. If there is carbon monoxide poison present, it is very quickly assimilated by the tissue and blood*

cells. I have never known—I have never heard of an examination for carbon monoxide poisoning taking place at any such late period. In fact, pathologists do not do it.

Q Answering the question, would an examination, in your opinion, disclose any traces of monoxide poisoning now, even though it did occur about February 14 or 15, 1926? A *In my opinion, it would not.*”

The complainant-respondent's allegation that the decedent Eva Kilek was suffering from diarrhoea or dysentery at the time of her death while it is set forth in the affidavits attached to the bill of complaint which this Court declared to be incompetent (p. 14), *is not mentioned in the testimony and is evidently abandoned by the complainant-respondent. There is absolutely no evidence or testimony in the entire case that Eva Kilek suffered from any ailment or disease or that her death was due to anything but illuminating gas poisoning.* The certificate from the State Department of Health, Bureau of Vital Statistics (p. 10) gives as the cause of death “suffocated by illuminating gas” (p. 11, l. 34). This is the only evidence as to the cause of death and this certificate was offered in evidence by the complainant-respondent (p. 46, ll. 1 to 12).

“Mr. Newton: I offer in evidence certificate of the Department of Health, State of New Jersey, Bureau of Vital Statistics, under the seal of the Medical Superintendent, dated August 26, 1926, showing that Eva Kilek died February 15, 1926, the certificate of death being signed by J. F. Hay, Coroner, Perth Amboy, N. J., and the cause of death being stated “Suffocated by illuminating gas.”

This certificate was good evidence to prove the fact of the cause of death. Chapter 13, P. L. 1901, p. 36.

“1. The records of marriages, births and deaths, heretofore, and at any time prior

to the passage of the act to which this is a supplement, made, and kept by the secretary of state of this state, or any copy thereof or of any individual record thereof, certified to be a true copy under the hand of the medical superintendent of the state bureau of vital statistics, shall be received in evidence in any court of this state to prove the facts therein contained."

This certificate also refutes the allegation by the complainant-respondent that evidence as to the cause of her death can only be had by an exhumation and autopsy since the certificate itself by statute is good evidence of the facts therein contained. Moreover, the complainant-respondent disregards and makes no mention of the fact that *a practicing physician was in attendance upon Eva Kilek and after examination pronounced the woman dead of illuminating gas poison* (p. 17) and that after examination this physician feels that his diagnosis was correct and that an autopsy will elicit no further information (p. 18).

It will be seen that the complainant-respondent applied for an injunction upon the ground that the defendant-appellant refused to permit an autopsy and that the autopsy was necessary to its defense of the action at law. It does not attempt to explain its unprecedented delay in making this request. The testimony at no place shows any cause or reason for the request and is entirely barren of any proof or suggestion tending to show that an autopsy is necessary. The complainant-respondent presents no proof or testimony whatever supporting its claim for an autopsy. The medical witness produced by it could only say that an autopsy might reveal the cause of death but in the absence of testimony to the effect that either illuminating gas

did not cause the death or that the death was caused by some other agency, it is respectfully submitted that this vague statement has no evidential value, particularly in view of the fact that both doctors state that they have never known of an autopsy at such a late period and after embalming such as is the case here.

The complainant-respondent does not at any place make a positive statement that Eva Kilek died of any other disease or ailment than that which is set forth in the death certificate and which was proclaimed by the attending physician to be the cause of her death, that is, suffocation from illuminating gas poisoning. It engages simply in a speculative argument and investigation as to what result might be obtained by an exhumation and autopsy and the only testimony advanced to support the demand for an autopsy is that it might reveal the cause of death. Since the cause of death is set out in the death certificate and has already been stated by the attending physician without impeachment or refutation by the complainant-respondent and since both of the witnesses called as medical experts have testified that they have never known of an autopsy in a case similar to the present one it is respectfully submitted that the speculative proofs and arguments advanced by the complainant-respondent before the Court failed entirely to support its bill.

POINT II.

The relief sought is neither necessary nor essential to the complainant-respondent's defense of the action at law.

It appears conclusively from the testimony and pleadings before the trial court that the com-

plainant-respondent has made no effort to secure the best and first-hand evidence regarding the death of Eva Kilek, instead it making an appeal to the Court of Chancery to invoke the Court's injunctive power to compel the defendant-appellant to submit to the particular type of evidence that the complainant-respondent happens to deem necessary. The complainant-respondent simply stated that an autopsy had not been made. This is admitted. *There is no testimony or evidence, however, to show that an autopsy was necessary or even advisable.*

According to the testimony an examination of the premises was made by the complainant-respondent about the premises where the woman died *but there is no evidence of any investigation or even of an effort to obtain information concerning the woman's death.* Although William Grace, the employee of the complainant-respondent, who made the investigation of the premises knew that Mrs. Kilek was dead (p. 81, l. 16) he did not make any attempt to see her (p. 81, l. 16), he made no effort to see the woman or any of the family. The complainant-respondent at no time mentions the fact that *the woman was treated and examined by a reputable physician and that the same physician pronounced her dead and gave as the cause of her death "suffocation from illuminating gas," nor does it at any time attack the reputation and competency of the attending physician.*

The allegation as to another cause for the woman's death is not borne out by any proof or any testimony and there is nothing at all in the cause which would tend to show any other cause of death than that alleged by the defendant-appellant. The complainant-respondent itself caused to be produced at the hearing a certificate

from the State Department of Health, which has been shown in the preceding point herein to be good evidence in any court of this state of the facts therein contained and *this certificate sets forth the cause of death to be suffocation from illuminating gas.*

No attempt is made by the complainant-respondent to refute or controvert the truthfulness of this certificate which the complainant-respondent itself offered in evidence. The whole testimony on the part of the complainant-respondent is given over entirely to an effort to show that no illuminating gas was on the premises and in this effort they entirely failed as is shown by the preceding point.

The complainant-respondent in claiming that the body of the deceased woman is the best evidence as to the cause of her death does not take cognizance of the fact that *the woman's body had been embalmed* (p. 99, l. 10) *which makes the result of an autopsy a matter of conjecture and doubt* by the testimony of the complainant-respondent's own witness Dr. Benjamin A. Schwartz (p. 95, ll. 32 to 40) and furthermore it does not take cognizance of the fact that this woman's body had been interred since February 17, 1926 and the testimony of Dr. William E. Ramsey (p. 122, ll. 26 to p. 132, l. 2).

"Q That is, after embalming? A No; I am speaking of a plain case. After embalming it would not be a surety for any period. A whole lot depends, first, on the embalming fluid that is used; second, upon the fact that degeneration takes place in the blood cells very shortly after. If there is carbon monoxide poison present, it is very quickly assimilated by the tissue and blood cells. I have never known, *I have never heard of an examination for carbon monoxide poisoning*

taking place at any such late period. In fact, pathologists do not do it."

shows conclusively that *an autopsy at this time and under the conditions of the case sub judica would be valueless.*

The complainant-respondent fails to point out or stress the great length of time this body has been interred and subject to natural changes and decomposition.

It is respectfully submitted that under the very facts of the complainant-respondent's case and by reason of the obvious natural reasons which have been avoided by the complainant-respondent the autopsy demanded is shown to be unnecessary and even inadvisable.

POINT III.

The complainant-respondent was guilty of such laches as to warrant a decree against it.

The complainant-respondent was so tardy in making a demand for an autopsy that it is respectfully submitted their demand should not have been considered by the Court of Chancery. It must be borne in mind at the outset that this is a unique situation. The complainant-respondent demands that exhumation and autopsy of the body of a woman who died February 14, 1926. Although cognizant of the woman's death and that it was held liable therefor, *no demand was made until after eleven months.* It is hardly necessary to point out that a body consigned to the earth is subject to changes and alterations which are impossible of calculation and since the complainant-respondent knowingly delayed, it is guilty of laches.

In the case of *Stout v. Seabrook's Executors*, 30 N. J. Eq., p. 187, the court held on page 190:

"More than one hundred years ago Lord Camden said: 'A court of equity will always refuse its aid to a stale demand, when the party has slept upon its rights, or acquiesced for a great length of time. Nothing will call forth the activity of a court of equity but conscience, *good faith, and reasonable diligence.*'"

In the case of *Crawford v. Lees*, 84 N. J. Eq., p. 324, on pages 340 and 341, Vice Chancellor Leaming held:

"Laches may be equitably attributed to delay in the ascertainment of one's rights, when the duty and opportunity of ascertainment exist to the same extent as for delay in the assertion of such rights after their ascertainment."

In the case of *Soper v. Cisco*, 85 N. J. Eq., p. 165, at page 174, Justice Trenchard stating the opinion of the Court of Errors and Appeals said:

"The general rule is well settled that he who, without adequate excuse, delays asserting his rights until the proofs respecting the transaction, out of which he claims his rights arose, are so indeterminate and obscure that it is impossible for the court to see whether what is asserted to be justice to him is not injustice to his adversary, has no right to relief."

and in the case of *Bridgewater v. Ocean City Ass'n.*, 85 N. J. Eq., p. 379, Aff. 88 N. J. Eq., p. 351, Vice Chancellor Backes said:

"Equity demands diligence whenever its remedy is sought in cases of this kind, and where the right to enforce building restrictions is of a purely equitable nature, a court of equity will not enforce them by mandatory injunction, unless prompt application is made by the person entitled to enforce the restrictions."

If diligence is required in the asserting of such rights as restricted covenants and rights in land, it is respectfully submitted that even greater diligence was required under the peculiar circumstances of this case, where the subject matter is subject to deterioration and change and the facts of the case bring it squarely under the rule set forth by the Court of Errors and Appeals in the case of *Massie v. Asbestos Brake Co.*, 95 N. J. Eq., p. 298, where on page 311 the court said with regard to laches:

“There must be delay for a length of time which, unexplained and unexcused, is unreasonable under the circumstances and which has been prejudicial to the defendant.”

The complainant-respondent's delay is certainly unexplained and unexcused under the testimony and facts, it is entirely unreasonable and to grant the request of the complainant-respondent is prejudicial not only to the defendant-appellant as a party to this suit but as an individual and his rights as a citizen to have the dead bodies of his family rest in peace unless good cause be shown for their being disturbed. The complainant-respondent showed no cause for disturbing the body it dealt only in speculations as to what might be found.

POINT IV.

In view of the citations in support of the foregoing points the decree was contra to the decisions of the courts of this state.

The question as to the exhumation and performance of an autopsy on a corpse has not been dealt with fully by the courts of this state. However, there are numerous cases in which the question has been considered and the decisions are

sufficiently clear to establish the fact that an autopsy is not considered by our courts in the same light as ordinary evidence and that while the Court of Chancery has the power to order both exhumation and autopsy it exercises that power with the greatest care and circumspection. In dealing with the relative rights of the next of kin and of the public to the possession and care of dead bodies, the decisions in this state are all in accord and are to the effect that while there is no property right in the dead body itself, *a duty is imposed upon the surviving spouse or next of kin to bury the dead person and with that duty goes the right to protect it from desecration or needless removal or disturbance*, and further that in *cases of necessity* and for good cause shown the Court of Chancery may, in its discretion, order the removal or exhumation of a corpse. The Court of Chancery, while it has exercised this power in our state, has dealt with cases only between relatives of the decedent, and in all its decisions seems to view the removal of a corpse already buried with disfavor.

In the case of *Peters v. Peters*, 43 N. J. Eq., p. 140, which was an action by the wife of a decedent to recover the body of her husband after it had been buried by the husband's father, with her consent. The court assumed jurisdiction and refused to permit the removal of the corpse, stating that the wife having once consented to this interment, could not now demand its removal, and the attitude of the court is expressed in the following words:

“And the father, being one so near of kin, having thus committed his son to a last resting place, as was then clearly understood, every consideration demands that he should be protected in the peaceful enjoyment of the

right which he now asserts. I think all of the authorities go this far."

In the case of *Smith v. Shepherd*, 64 N. J. Eq., p. 401, where a widow who had buried her husband's body in a burial plot belonging to his sister, with the consent of all, attempted to remove the body because certain of his children could not also be buried there and the court followed *Peters v. Peters*, *supra*. The court here held that the remains should not be disturbed and that once a body was buried, there was no right to have it taken up and moved.

The case of *Toppin v. Moriarty*, 59 N. J. Eq. 115. The question of property right in a dead body is dealt with rather fully and the court is in accord with the great weight of authority that there is no property right in a dead body. In this case they permitted the removal of the body because the request of the decedent, with the consent of her husband, had been that she be buried with her parents and when the parents changed their burial plot, the court held that the husband could not permit them to go to great expense in providing a new place and then refuse to consent to the removal of the body when he had first acquiesced to the wishes of the decedent.

The case of *De Festetics v. De Festetics*, 79 N. J. E. 488.

The court followed the three cases *supra* in the following language:

"We get little light on the subject from the cases in our own state, which seem to settle three propositions—first, that there is no property right in a dead body; second, that after the body shall have been buried it is in the custody of the law; third, that the removal of a body once buried is subject to the

jurisdiction of this court. *Peters v. Peters*, 43 N. J. Eq. (16 Stew.) 140; *Smith v. Shepherd*, 64 N. J. Eq. (19 Dick.) 401; *Toppin v. Moriarty*, 59 N. J. Eq. (14 Dick.) 115."

In all these cases before mentioned, the question was one as to the relative rights of next of kin to the possession of the body after burial and as to the jurisdiction of the court over such body, and in the reading of the cases it will be seen that the court assumes jurisdiction, but is exceedingly careful and apparently loath to disturb the remains which have once been buried. Authorities, generally in other states and in the United States courts, are of the same tenor. In 17 C. J., page 1139, section 17-3, the law is stated as follows:

"3. RIGHTS AS TO DISTURBANCE OR DISINTERMENT—a. IN GENERAL. *Except in cases of necessity or for laudable purposes the policy of the law is that the sanctity of the grave should be maintained, and that a body once suitably buried should remain undisturbed.*"

and further on page 1140 in dealing with the question of disinterment by order of court, it is stated:

"The right to have a dead body remain unmolested is not an absolute one; it must yield where it conflicts with the public good or where demands of justice require such subordination. A court will not, however, order a body to be disinterred *unless there is a strong showing that it is necessary and the interests of justice require it.*"

The case of *Painter v. U. S. Fidelity and Guaranty Company*, 91 A. T. L. 158 (a Maryland case), the question of the rights of an insurance company to the inspection of a dead body, when the privilege of said inspection is one of the con-

ditions of the policy, is taken up and the Court of Appeals of Maryland held (p. 160):

"The right is not a property right in the general meaning of property right, but is extended for the purpose of determining who shall have the custody of the body in preparing it for burial. And courts of equity will protect those having this right from unreasonable disturbance. But courts have never hesitated to have a body exhumed where the application under the *particular circumstances appeared reasonable and was for the purpose of eliciting the truth in the promotion of justice.*"

Under a note in Volume 39, American and English Annotated Cases, page 156, on page 157, the authorities are cited as follows:

"Although the reported case appears to be one of first impression in holding that a demand for an autopsy should be made on a reasonable and proper occasion, its reasoning is upheld by those cases which have determined that the *right to make an examination of the body of the insured is not a continuing right, but one which must be exercised within a reasonable time.* Wehle v. U. S. Mutual Acc Asso'n., 153 N. Y. 116, 47 N. E. 35, 60 Am. St. Rep. 598, affirming 11 Misc. 36, 31 N. Y. S. 865; Ewing v. Commercial Travelers' Mut. Assoc., 55 App. Div. 241, 66 N. Y. S. 1056, affirmed 170 N. Y. 590, 63 N. E. 1116; Root v. London Guarantee, etc. Co., 92 App. Div. 578, 15 N. Y. Ann. Cas. 100, 86 N. Y. S. 1055, affirmed 180 N. Y. 527, 72 N. E. 1150. See also American Employers' Liability Ins. Co. v. Barr, 68 Fed. 873, 32 U. S. App. 444, 16 C. C. A. 51. For if the right to 'examine the person' of the insured with respect to 'any cause of death' is extended for a reasonable time after death and so long as the body is unburied or not finally disposed of, the utmost limit of the privilege stipulated for is reached. Ewing v. Commercial Travelers' Mut. Acc. Assoc., *supra*. Hence under a policy

giving the insurer a right to make an examination of the person of the insured with respect to any alleged injury or cause of death, an application for an examination is properly refused when it is made nearly a month after interment and it is shown that the organs of the deceased were removed at an autopsy immediately after death and were not replaced. Ewing v. Commercial Travelers' Mut. Acc. Assoc., *supra*. And a request for permission to exercise this right has been held to have been unreasonably delayed where it was made three days after death, on the day after the burial, and the insurer knew of the death on the day that it occurred. Root v. London Guarantee, etc., Co., *supra*."

The Federal cases deal almost entirely with the claims of insurance companies based upon agreements in their policies permitting examination. In the case of *American Employers' Liability Insurance Company v. Barr*, 68 Fed. 873, on page 877, it was held:

"Some three or four weeks after the deceased had been embalmed and buried, an application was made by the defendant company, to the widow of the deceased, for leave to exhume and examine the remains of her deceased husband, and such permission was by her denied. Under these circumstances the Circuit Court instructed the jury, in substance, that the demand for an autopsy was not made within reasonable time. We are of the opinion that, if the defendant company intended to rest its defense to this action on the ground that it was denied the right to examine the body of the deceased, it should at least have shown that it sought permission from the plaintiff to make such an examination when it was within his power to comply with the request. There is no evidence in the present record tending to show that the plaintiff refused to allow the body of his deceased uncle to be examined on any occasion, either prior to or subsequent to its

interment, or that it was within his power to allow the body of the deceased to be exhumed and examined when such a request was preferred. For this reason, if for no other, we think that the exception to the charge last above mentioned is without merit."

In the case of *Mutual Life Insurance Company, New York v. Griesa*, 156 Fed. 398, the Court permitted the exhumation of the body for an examination, but it in no way departed from the principles hitherto set down, *for the facts in this case were almost conclusive of fraud on the insurance company, and the insurance company applied promptly for an autopsy.* The court held that in the furtherance of justice, it would itself appoint a chemist to determine the cause of the death of the decedent.

CONCLUSION.

From the foregoing citations of the law, as viewed by the various courts, it will be seen that while the court of equity has jurisdiction over the bodies of deceased persons, it exercises that jurisdiction with great care and circumspection, and in fact even where the petitioning parties have some direct claim or agreement, they must show a very good and justifiable reason for the exhumation of the dead body and they must further show that they have acted within a reasonable time. In the present case, it certainly cannot be claimed by the complainant that it has acted within a reasonable time, nor that its demand is anything but the sheer speculation. Almost a year after the death of the defendant-appellant's wife and upon the very eve of the trial of the action at law, it suddenly demanded that an autopsy be made and claims it cannot adequately defend any action unless the same is

made. It ignores the fact that a licensed physician was in attendance upon the woman.

In its bill and the affidavits which were intended to support the bill, the complainant-respondent relied upon a rumor that the woman suffered from some other ailment of disease about the time of her death. This rumor and allegation is entirely unsupported and no testimony whatever was presented to the trial court disproving the cause of death set forth in the certificate from the Department of Health and the diagnosis of the attending physician. The testimony regarding the possible result of an autopsy shows conclusively that it is very doubtful that such an action would reveal the cause of death and from the experience of the physicians it seems clear that an autopsy at this late date and after the embalming of the body, would be entirely useless and inadvisable.

The fact before mentioned that a regular licensed physician was in attendance was ignored. The fact that the complainant-respondent knew for almost a year that this woman had died as a result of illuminating gas poisoning and made no request for an autopsy, was also disregarded. The fact that a most informal request was made just before the trial of the issue at law and that immediately a restraining order was obtained is also disregarded by the complainant-respondent. No reason is assigned for the unprecedented delay. No proof is given of any question as to the cause of death. No doubt is raised as to the capability of the attending physician who diagnosed the case.

The court is asked without any testimony or proof to sustain the allegations contained in the bill of complaint and after an unexplained and

inexcusable delay to grant an order directing the exhumation and autopsy despite the fact that all the authorities are to the effect that a very good cause must be shown and that the complainant-respondent must act with good speed.

It is respectfully urged that the decree or order in this case be set aside and the restraint dissolved.

Respectfully submitted,

THOMAS BROWN,
Solicitor for and of counsel with
Defendant-Appellant Alexander Kilek.

New Jersey Court of Errors and Appeals

PERTH AMBOY GAS LIGHT COM-
PANY,
Complainant-Respondent,

v.

ALEXANDER KILEK, individually
and as administrator *ad prosequendum* of Eva Kilek, de-
ceased, and EDWARD T. HANSON,
one of the coroners of Middle-
sex County,
Defendants-Appellants.

On Appeal
from Chancery.

BRIEF FOR COMPLAINANT- RESPONDENT.

1.

Statement of the Case.

This appeal is from a final decree of the Chancellor made on the advice of Vice-Chancellor FIELDER staying an action at law brought by appellant Alexander Kilek, individually and as administrator *ad prosequendum* of Eva Kilek deceased, his wife, against the respondent in the Middlesex Circuit of the Supreme Court to recover damages for the death of said Eva Kilek, unless the said Alexander Kilek does consent to the exhumation of the body of said Eva Kilek and the performance of an autopsy thereon at the expense of the respondent—the autopsy to be per-

formed in the presence of physicians or pathologists selected by both complainant and the defendant Kilek at the expense of complainant.

The case has already been before this Court on appeal by the present appellants from an order of the Court of Chancery staying the action at law pending final hearing. This Court, in an opinion filed October 17, 1927, and reported in 5 N. J. Adv. Rep. page 1349, set aside said order on the ground that the affidavits supporting said order were hearsay. The opinion is silent as to whether the Court of Chancery has the power to order an exhumation and autopsy on a bill for discovery in aid of the defense to an action at law. The *ratio decidendi* of the decision of this Court is, however, that the Court of Chancery has such power and will restrain an action at law pending such discovery providing the preliminary order of restraint is supported by legal evidence.

2.

Brief of the Argument.

Prefatory Statement.

In the action at law the complaint alleged that the death of said Eva Kilek was caused by the inhalation by her of illuminating gas which respondent negligently allowed to escape from its main or mains in or near the premises No. 1 Salem Street, Carteret, New Jersey, in which said Eva Kilek and her husband Alexander Kilek resided, and claimed \$40,000 damages.

The present respondent filed an answer to that suit denying negligence and denying that the death of said Eva Kilek was due to the cause alleged in the complaint.

It therefore became necessary for respondent to

ascertain the cause of death of said Eva Kilek, and the only method of determining such cause with accuracy was by an autopsy on her body, there having been no such autopsy at the time of her death.

Eva Kilek died some time during the night of February 14-15, 1926. The suit at law was not begun until August 16, 1926 (p. 3). On December 31, 1926, the attorneys for complainant requested the attorney for the plaintiff in the law action to permit an autopsy. On January 3rd, 1927, the attorney of the plaintiff in the law action wrote the attorneys of the defendant, refusing such request (p. 7). Thereupon, the defendant in the law action served a demand on one of the coroners of Middlesex County for an autopsy, which demand was refused by the coroner (p. 8). The present bill was then filed by respondent and came on for final hearing on October 24, 1927—one week after this Court had filed its opinion on the appeal from the order restraining the action at law.

I.

Complainant has no adequate remedy at law.

Section 19 of the Evidence Act (P. L. 1900, pp. 362, 367), provides that before the trial of an action brought to recover damages for injury to the person, the Court may direct an examination of the person injured, by a competent physician or surgeon; but that statute clearly applies to a living person and not to an autopsy on a corpse.

Section 142 of the Practice Act provides for the inspection of books, papers or documents in the possession or under the control of either party.

We have been unable, after careful research, to find any provision in the Practice Acts of 1903 or

1912 or elsewhere in the New Jersey statutes which would authorize a court of law to grant the relief sought by the bill.

II.

The decree appealed from is within the power of a Court of Equity under its general jurisdiction to compel discovery in aid of the prosecution or defense of an action at law.

Courts of Equity will always compel discovery in aid of prosecuting or defending suits at law; and in order to make such discovery of use on the trial at law, will restrain that suit from proceeding until the discovery is had. The jurisdiction is not taken away by the fact that courts of law have been clothed with powers to compel discovery in such cases by the oath of the complainant. Chancellor ZABRISKIE so held in *Shotwell v. Smith*, 20 N. J. Eq. 79, where he enjoined suits at law brought by the defendants upon notes and bonds which were alleged to have been obtained by fraud and without consideration, and ordered a discovery of the circumstances under which they were executed.

This case was followed by Vice-Chancellor EMERY in *Miller v. U. S. Casualty Co.*, 61 N. J. Eq. 110, where complainant sought discovery as to certain contracts necessary to enable him to prosecute a suit at law. The Vice-Chancellor said:

“In the *first* place, it is settled in this state that the statutes conferring jurisdiction for discovery upon the law courts have not had the effect of divesting the courts of equity of their ancient and original jurisdiction for discovery. *Howell v. Ashmore*, 1 Stock. 82 (Chancellor Williamson, 1852); *Shotwell v. Smith*, 5 C. E. Gr. 79, 81 (Chancellor Zabriskie, 1869), approved and followed in *Sweeney v. Williams*, 9 Stew. Eq. 627, 629 (Errors and Appeals, 1883).”

Shotwell v. Smith was approved by the Court of Errors and Appeals in *Sweeney v. Williams*, 36 N. J. Eq. 627, where MAGIE, J., said:

“When by statute, a right to administer relief previously administered only by courts of equity is extended to courts of law, the jurisdiction of the courts of equity is undisturbed unless prohibitory or restrictive words are used in the statute; thenceforth the jurisdictions are concurrent.”

The jurisdiction of a Court of Equity to compel discovery in aid of the prosecution or defense of an action at law is exhaustively and learnedly discussed in *Reynolds v. Burgess*, 71 N. H. 322, 51 Atl. 1075, where an inspection of machinery was ordered. We commend to the Court a careful reading of this instructive opinion. The Court quoted Story as follows:

“Story, after speaking of the defect of the administration of justice in courts of common law, arising from their want of power to ‘compel the production of deeds, books, writings and other things’ material to the issues on trial, says that the defect is remediable in courts of equity which will compel the production of such books, deeds, writings and other things. 2 Story, Equity Jur., Sections 1484, 1485.”

We have found one case directly in point. It is *Mutual Life Insurance Co. v. Griesa*, 156 Fed. 398. Bill in equity was filed to cancel a policy of life insurance for \$100,000, payable to the estate of one Perkins who had died. When he died there were other policies in force aggregating \$540,000. About the time he took out the policy in suit, insured was in correspondence with a chemist as to the uses and effect of poisons. The day of his death he purchased morphine poisons and that evening fell from the roof of his house and when reached was unconscious, and died a few hours

thereafter without regaining consciousness. The bill of complaint was filed after the death of the insured. The insurance company made application for an order to exhume the body of the insured. The executors of the insured protested on the ground that U. S. Comp. Stat. 190, at page 583, provided only for the production of papers and writings. The Court said:

"Whether he suicided is not now a question for decision; but on such a showing, if the body cannot be exhumed, it is because the court cannot and should not compel the disclosure of the real truth. If such disclosure cannot be made, it is because of the right of one party to disclose the truth if believed advantageous and to conceal it if believed harmful, and that ought not to be a rule for the guidance of courts. And the only objection aside from that as to the power of the court is one of sentiment, as if sentiment should control in the administration of justice."

The Court also said:

"The recent scholarly and timely work on Evidence by Wigmore (sections 2220 *et seq.*) is to the point that sentiment and modesty, real or affected, must not stand in the way of the court in compelling parties to disclose the exact truth, and to not allow one party to the litigation to make known the facts, or suppress them, as the interest of such party may suggest. And along the same lines is the Preliminary Treatise on Evidence by Prof. Thayer (1898) of Harvard, and Two Centuries of Growth of American Law (1701-1901) by the Faculty of the Yale Law School, under the title of 'Evidence.' And see the following authorities as to the power of a court of chancery as to evidence; *Reynolds v. Burgess*, 71 N. H. 322, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535, for the inspection of machinery; *Hensey v. Langdon* (C. C.) 80 Fed. 178, for the inspection of a mine; 1 Pomeroy, Equity,

Sections 191, 225. 2 Story Equity, Sections 689, 690. Can any one doubt but that all sentiment would dissipate, and all objection would vanish, if it were necessary for the estate to make the showing in order to recover the large sum of money involved? And why should it be optional with one party to say what part of the truth shall be made known, and what part kept from the court?

"The order will be that the marshal of this district will exhume the body. The court will appoint a pathologist to examine the body to the end that the evidence may be had as to whether the fall killed the insured. A chemist will be appointed to determine whether he died by morphine poison. The results of their efforts ought to materially aid the court in arriving at the truth. And such an order is made because this court is of the opinion that it cannot be made in the action at law, but holding that it is within the general powers of a court of equity, and that such an order is in the furtherance of justice."

Professor Wigmore in his work on evidence, Volume V, page 435, says with respect to this case:

"*Mutual Life Ins. Co. v. Griesa*, C. C. Kansas, 156 Fed. 398 (bill in equity to cancel a policy of life insurance) the deceased was killed by falling from the roof of his house; the issue was, whether he had taken morphine, just previously, with intent to suicide thereby, and had deliberately thrown himself from the roof to conceal the suicide; the insurer applied for an order to exhume the body of the deceased; granted, in a scholarly and sensible opinion by Smith McPherson, J.; the order directed the appointment of a pathologist to examine for the effect of the fall, and a chemist to examine for morphine; the opinion repudiates a privilege protecting from such disclosure."

III.

The evidence below warranted the decree made.

No. 1 Salem Street, Carteret, New Jersey, where Eva Kilek lived and died, is a frame tenement. The deplorable condition of the plumbing in the cellar will be observed from the photographs admitted in evidence (Exhibits C-5 and C-6). An engineer and architect who inspected the premises for the complainant on September 21, 1926, found the plumbing in an unsanitary condition by reason of the house sewer not being connected with a vent pipe to the outer air and because there was no vent into the outer air outside of the cellar. The photographs show that the vent was ventilated into the cellar itself. There were no illuminating gas pipes in the cellar or in any part of the house (p. 49). It is undisputed that the house contained no facilities or pipes for supplying gas to the occupants (pp. 49, 59, line 34; 61, line 30; 70, line 30).

The nearest gas main is located two hundred feet from the house (p. 114, line 33).

On February 14, 1926, the complainant sent one of its employees to inspect the house to ascertain whether there was a leak. This employee, George Szul (p. 58) first went into the cellar. He found no gas connection and smelled around the sewers and toilets and the water service, even sticking his head in the toilet. He could find no smell of gas (p. 59). He found that the water service was even with the cellar floor and that the water pipe was covered with water. He looked for bubbles in the water because, as he stated, he knew that if he saw bubbles that the gas had followed the water service (p. 60). He could detect no odor of gas. He even went upstairs and saw Eva Kilek and her four children in the kitchen. She was preparing

food. His visit was around noon time (p. 61, line 4). He then went down into the cellar again, closed all the windows, went outside and waited for fifteen minutes and then went back into the cellar again and could not smell any gas. There were no gas pipes upstairs (p. 61, line 35). In the house when he visited were Kilek and his wife and four children.

On the night of February 14, between ten and eleven P. M., the company sent its foreman, William Grace, to the house. He went into the cellar and all through the house and says: "The only thing we could get would be around the toilet where we would get sewer gas with a slight trace of illuminating gas, if you looked for it (p. 67, line 39 to p. 68, line 2)." He went upstairs in the house and found a whole lot of people up there, but could get no smell of gas and the people were walking back and forth through the house. He put the number of people at six or eight (p. 69, line 30). Not finding any odor of gas in the cellar or house, the foreman and his workmen went outside and drove bars about two feet under the level of the street near the gas main, but could find no smell of gas (p. 71, lines 10-20). They could, however, smell sewer gas in the sewer going into the house (p. 71, lines 19-25). They dug down until they found the sewer and tapped the sewer and could smell sewer gas (pp. 72 and 73). They even dug up between the sidewalk and the street for a space of about two feet and could find no smell of gas there (p. 73, lines 10-30). They dug straight out from the house along the water pipe. They found a gas connection leading in from the gas main in the street toward the house, which connection ended in a plug about twenty feet from the house. They dug down to this connection and could find no odor of gas (p. 74). Between this

plug and the house was earth (p. 74, line 38) and a concrete sidewalk (p. 74, lines 38-40).

Mrs. Kilek became nauseated about five o'clock on February 14th and died about twelve o'clock the same evening (p. 121, lines 20-30). There is some dispute as to whether she became sick around twelve o'clock noon or around five o'clock P. M. (p. 121 and 122). The appellant's physician admitted that before death can be caused by illuminating gas poisoning, there must be an intense inhalation in a confined area (p. 125). Now, bearing in mind that complainant's workmen inspected this house at twelve noon on February 14th and again around ten or eleven o'clock at night of the same day and that Mrs. Kilek died around midnight and that the foreman found only a trace of illuminating gas at the toilet in the cellar, it is, to say the least, possible that this woman died of a cause other than illuminating gas poisoning.

Confronted with this heavy suit for damages, the complainant sought expert advice. It produced as a witness, Dr. Benjamin A. Schwartz, who was coroner's physician of New York County from 1915 to 1918 and acting deputy chief medical examiner of New York County thereafter until about six months before he testified. He had performed over one thousand autopsies and about one hundred autopsies on persons alleged to have died of illuminating gas poisoning and had examined several interred bodies of persons alleged to have died of illuminating gas poisoning (p. 94). In his opinion, an autopsy would show the possibility of death having been caused by illuminating gas poisoning (p. 94). He outlined the examination necessary to disclose that fact and said that it involved the removal of the lungs and liver and examination for carbon monoxide and also an autopsy of the entire body to determine if there was

some other cause of death (p. 95). Where bodies have been embalmed, the presence of carbon monoxide could be detected in twenty per cent. of the cases (p. 95, line 35). Dr. Schwartz said that the length of time the body has been embalmed is immaterial (p. 96, line 30).

Dr. Ramsey, called for the defendant, had not performed any autopsies within ten years, but said that in his early days he did a lot of autopsy work. He admitted that the autopsy would disclose whether Mrs. Kilek died from a cause other than illuminating gas poisoning (p. 123). He admitted, moreover, that there might be enough blood left in the body, even though embalmed, to discover the presence of carbon monoxide (p. 126, line 35 to p. 127, line 10). He admitted that he did not disagree *in toto* with Dr. Schwartz (p. 123, line 30).

Dr. Schwartz further said that: "If there is carbon monoxide present, you will find it in examining the blood or any organ that might contain the smallest quantity of blood; there isn't much necessary for determining that (p. 96, lines 1-10)." The presence of carbon monoxide is shown by a pinkish discoloration of the skin (p. 96, lines 10-20).

Francis Born, a health inspector, says that he examined the cellar on February 15th, the day after Mrs. Kilek died, and detected a gas odor around the toilet (p. 111, lines 10-20). He said that he could detect the odor about a foot from the toilet and the in the middle of the cellar (p. 111, lines 15-30). He puts the nearest gas main at one hundred feet from the house (p. 112, lines 38-40). Strangely enough, with a vent in the cellar ventilating into the cellar itself, this witness could find no smell of sewer gas (p. 110, lines 30-40) although complainant's workmen smelled sewer gas outside and inside the house.

On a bill for discovery, the complainant does not have to demonstrate that the evidence sought will show what he seeks (18 *Corpus Juris* 1068). As the Vice-Chancellor put it in his conclusions (p. 34):

“Any application for discovery, examination or inspection before trial might be resisted on the plea that the party applying will find nothing if the order be made, but such a plea ought not to prevail if it appears that the evidence sought is in the possession or under the control of a party to a suit and that there is a possibility that an exhumation will disclose what the party applying therefor needs to complete his case.”

Here we have a case where there were no gas pipes in the house and the nearest main was at least one hundred feet away (some of the witnesses say two hundred feet); we have at least six or eight people in the house during the time it is claimed that Eva Kilek inhaled the gas; we have a situation where the inhalation even on defendant's own showing could not have been intense or within a confined area; and in addition, the doctors, both for complainant and defendant, are agreed that an autopsy at this time would disclose if death occurred through a cause other than gas poisoning, and moreover, we have the complainant's physician testifying that even though the body was embalmed the presence of carbon monoxide gas poisoning could be determined from even a small quantity of blood in the body and we have the defendant's physician admitting that carbon monoxide *might* be present in the blood even though the body had been embalmed.

We submit that to deny the present complainant the right to discovery by autopsy on the body in the face of this showing is to put it under an un-

fair handicap in the trial at law, in view of the fact that no autopsy was performed in this case of accidental death.

IV.

Laches.

Defendant contends that the relief sought by complainant is impossible of attainment because of the long delay and laches of the complainant. If that be so, then the laches are not prejudicial to the defendant, but to the complainant. Mere lapse of time is not sufficient to bar a suit by laches, but the person asserting it must show that he has been prejudiced. *Vliet v. Cowenhoven*, 83 N. J. Eq. 234, and cases cited at page 238. The delay has been due mainly to defendant in delaying his action at law and in the time taken for the appeal from the preliminary order. As the Vice-Chancellor said the complainant is not at fault for these delays (p. 34).

V.

Appellant asserts that the discovery sought is not necessary nor essential to complainant's defense of the action at law. Complainant, in its defense to the action at law, will have to overcome the testimony of the physician who attended Eva Kilek and also the coroner who made the certificate of death and who no doubt viewed the body and also the undertaker who embalmed it. No autopsy was performed on the body although the death was declared to be by accident. The body itself, or rather, the result of the examination of the body by autopsy, will furnish the vital and controlling evidence in the case. It may well be that the result of the autopsy may absolutely demolish the de-

fense, but inasmuch as the defendant is in a position to afford an autopsy, his refusal to consent to it, can fairly be said to be due to a fear that an autopsy may demolish his case at law. He is seeking to recover a large sum of money from this complainant. If it were essential to his case that the autopsy be performed, we have no doubt that one would have been made without regard to sentiment. If the present defendant be permitted to proceed with his action at law and suppress evidence which it is within his power to produce or at least permit inspection of by his adversary, then he has the present complainant at an advantage, which is neither equitable nor just and which deprives the present complainant of that equality before the law which is the right of all suitors.

VI.

The cases in this State, cited in Point IV of Appellants' Brief, concern disputes between next of kin as to the possession of bodies after burial, and are not very helpful in the present inquiry. They do settle, however, that after burial the body is in the custody of the law and its removal is subject to the jurisdiction of the Court of Chancery. *De Festetics v. de Festetics*, 79 N. J. Eq. 488, where the earlier cases are cited. Nor are the cases cited in Point IV involving the right of an insurance company to an inspection or autopsy of the body under a condition of the policy, pertinent. In the present case there was no contractual right in the respondent. The death occurred February 15, 1926, and the action at law was not begun until August 16, 1926 (p. 12). Appellant argues that because a licensed physician diagnosed the cause of death as suffocation by illuminating gas, the question of the cause of death is settled; but it is common knowl-

edge that *post mortem* autopsies controvert *ante mortem* diagnoses. Of course, we recognize that the sanctity of the grave should not be lightly violated to satisfy the whims of relatives. In this case, however, the respondent is not seeking to gratify a whim, but to protect itself from being mulcted in heavy damages on an allegation of negligence which may be proved or disproved by evidence in the control of its adversary.

The decree appealed from should be affirmed, with costs.

COLLINS & CORBIN,
Solicitors of Complainant-Respondent.

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