

INDEX.

	PAGE
Complaint	1
Answer of Defendant-Appellant Terhune	5
Answer of Defendant Joseph Pico	7
Answer of Defendant Chisholm-Weisgerber, Inc.	8
Reply to Answer of Terhune	9
Reply to Answer of Chisholm-Weisgerber, Inc.	10
Reply to Answer of Pico	10
Case	11
Motion for Non-Suit	54
Motion for Directed Verdict	82
Charge to Jury	83
Rule for Judgment	90
Judgment	91
Notice of Appeal	102
Grounds of Appeal	103

TESTIMONY FOR PLAINTIFF:

Kenneth John Grant,	
Direct	12
Cross	15
Re-direct	17
Recalled, Direct	30
Recalled, Cross	30
Charles W. Winters,	
Direct	17
Cross	22
Re-direct	29
Jennie Di Carolis,	
Direct	31
Cross	35
Re-direct	40

	PAGE
William Messina,	
Direct	43
Cross	49

TESTIMONY FOR DEFENDANTS:

John W. Terhune,	
Direct	54
Cross	56
Re-direct	60
Re-cross	60
Joseph G. Pico,	
Direct	61
Cross	65
Re-direct	70
Recalled, Cross	72
Re-cross	75
William Henry Huff,	
Direct	77
Cross	78

EXHIBITS:

	OFFERED AT PAGE	PRINTED AT PAGE
P1 Photo of Premises	20	92
P2 Photo of Premises	20	92
P3 Photo of Premises	20	93
P4 Photo of Premises	20	93
P5 Photo of Premises	20	94
P6 Photo of Premises	20	94
P7 Contract for Erection of Building for Terhune by Pico	41	95
P8 Bogota Building Code	42	101

Bergen County Circuit Court

WILLIAM MESSINA and JENNIE
DI CAROLIS, by her next friend,
ANGELINA DI CAROLIS,

Plaintiffs,

vs.

JOHN W. TERHUNE, JOSEPH PICO
and CHISHOLM-WEISGERBER, INC.,

Defendants.

Action
at Law.

10

Complaint.

The plaintiff, William Messina, who resides in
the Borough of Bogota, Bergen County, New
Jersey, and the plaintiff, Jennie DiCarolis, who
resides in the City of Hackensack, Bergen County,
New Jersey, complain and allege that: 20

FIRST COUNT:

1. At the times hereinafter stated, the plaintiff,
William Messina, was the occupant and tenant of
a store located on the south side of Fort Lee Road,
about 100 feet east of Elm Avenue in said Borough
of Bogota, and therein conducted a fruit and
vegetable business and had conducted said business
in said store for a number of years prior to Decem-
ber 20th, 1927, and the plaintiff, Jennie DiCarolis,
was an employee of the plaintiff, William Messina. 30

2. The defendant, John W. Terhune, on said date
and for a long time prior thereto, was the owner
of the lands lying between the said store and Elm
Avenue and caused a deep excavation to be made 40

Complaint

on his lands immediately adjoining the store of the plaintiff, William Messina.

10 3. On or about said date, the defendant, Joseph Pico, was a general contractor and had been engaged by the defendant, John W. Terhune, to make said excavation and construct a foundation for a building therein.

4. The defendant, Chisholm-Weisgerber, Inc., a corporation of the State of New Jersey, was and is a general contractor and was employed by the defendant, Joseph Pico, to make said excavation by and through the means of a steam or gas power shovel.

20 5. Said excavation was actually made by the defendants, Joseph Pico and Chisholm-Weisberger, Inc., and their agents and servants, under the direction and supervision of the defendant, John W. Terhune.

30 6. The building in which the plaintiff, William Messina, conducted his said store was erected more than twenty years prior to December 20th, 1927, and the owner thereof and her tenants thereby acquired a right to lateral support of said building.

40 7. In making said excavation the defendants so improperly and negligently did and performed said work and without exercising proper care or precaution excavated the rock and dirt on said land and took away the same without leaving proper or sufficient support for said store, and as a result of said carelessness and negligence, the building

Complaint

occupied by the plaintiff, William Messina, collapsed and fell and destroyed the stock of merchandise then in his store as well as the fixtures of the plaintiff, William Messina, then in said store consisting of shelves, stands, ice-box, peanut machine, counters and other things of like nature.

10

8. The defendants, their servants, agents and employees were negligent in that they encroached upon and undermined the building occupied by the plaintiff, William Messina, without supporting the same; the defendants, their agents and servants were also negligent in that they caused the floor and walls of said building to crack and break by carelessly pounding the earth alongside of said building with the bucket of said steam or gas power shovel and by shaking and loosening the earth under said store by the negligent operation of said shovel; the defendants, their servants and agents, were also negligent in that they failed to guard and protect said excavation in the manner required by Section 1 of Article VII of an ordinance of the Borough of Bogota known as the Building Code, adopted on June 9, 1920; the defendants, their servants and agents, were also negligent in that they failed to give the owners of the store occupied by the plaintiff, William Messina, any notice of their intention to excavate the land adjoining said store; defendants and their agents and servants were also negligent in that they removed, simultaneously and at one time, the lateral support of the entire west wall of the building occupied by the plaintiff, William Messina.

20

30

9. The ordinance aforesaid, was enacted for the benefit of plaintiffs and others similarly situated

40

Complaint

and imposed upon the defendants the duty to protect plaintiffs from bodily injury and property damage.

- 10 By reason of the premises, the plaintiff, William Messina, was unable for a long space of time to carry on his said business and was put to great labor and expense in renting a new store and in attempting to re-establish his said business; plaintiff, William Messina, also lost a number of his former customers by reason of the change of the location of his store and the damage to his business is permanent.

SECOND COUNT:

- 20 1. Paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the first count are made a part of this count without here repeating the same.
2. The plaintiff, Jennie DiCarolis, at the time aforesaid, was an employee of the plaintiff, William Messina, and was in the said store at the time it collapsed and fell as described in paragraph 7 of the first count.
- 30 3. As the plaintiff, Jennie DiCarolis, was leaving said falling building, a portion thereof struck her and injured her foot and ankle and bruised her body, limbs and head, and as a result thereof, she underwent great pain and suffering; she suffered severe shock to her nervous system and was prevented from performing her customary duties for a long space of time and was also forced to pay and expend large sums of money for medical attendance and lost her customary earnings and
- 40 wages.

Complaint

The plaintiff, William Messina, therefore demands damages on the first count in the sum of \$10,000.00 and the plaintiff, Jennie DiCarolus, demands damages on the second count in the sum of \$500.00 and costs of this suit.

DETURCK & WEST, 10
Attorneys of Plaintiffs.

Answer of Defendant, John W. Terhune.

Defendant, John W. Terhune, answering the complaint of the plaintiffs, says:

FIRST COUNT: 20

1. Defendant has no knowledge or information sufficient to form a belief as to the matters and things contained in paragraph one.

2. Paragraph two is admitted.

3. Paragraph three is admitted.

4. Defendant has no knowledge or information sufficient to form a belief as to the matters and things contained in paragraph four. 30

5. Paragraph five is denied.

6. Paragraph six is denied.

7. Paragraph seven is denied.

8. Paragraph eight is denied.

9. Paragraph nine is denied.

10. Paragraph ten is denied. 40

Answer of Defendant, John W. Terhune.

SECOND COUNT:

1. Defendant hereby repeats his answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the first count and makes them a part of this count.

10 2. Defendant hereby repeats his answer to paragraph seven of the first count as his answer to this paragraph.

3. Defendant has no knowledge or information sufficient to form a belief as to the matters and things contained in paragraph three of the second count.

FIRST SEPARATE DEFENSE TO THE FIRST COUNT:

20 Defendant, John W. Terhune, by way of separate defense, avers that the plaintiff, William Messina, by his own negligence, caused or contributed to the said injuries, in that he failed to use proper care to protect his safety under the circumstances which existed at the time of the alleged accident.

FIRST SEPARATE DEFENSE TO THE SECOND COUNT:

30 Defendant, John W. Terhune, by way of separate defense, avers that the plaintiff, Jennie DiCarolis, by her own negligence, caused or contributed to her said injuries, in that she failed to use proper care to protect her safety under the circumstances which existed at the time of the alleged accident.

COULT & SATZ,
Attorneys for the Defendant,
John W. Terhune.

Answer of Defendant, Joseph Pico.

Defendant, Joseph Pico, answering the complaint of the plaintiffs, says:

FIRST COUNT:

1. Defendant has no knowledge or information sufficient to form a belief as to the matters and things contained in paragraph one.

10

2. Paragraph two is admitted.

3. Paragraph three is admitted.

4. Defendant has no knowledge or information sufficient to form a belief as to the matters and things contained in paragraph four.

5. Paragraph five is denied.

6. Paragraph six is denied.

20

7. Paragraph seven is denied.

8. Paragraph eight is denied.

9. Paragraph nine is denied.

10. Paragraph ten is denied.

SECOND COUNT:

1. Defendant hereby repeats his answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the first count and makes them a part of this count.

30

2. Defendant hereby repeats his answer to paragraph seven of the first count as his answer to the paragraph.

3. Defendant has no knowledge or information sufficient to form a belief as to the matters and things contained in paragraph three of the second count.

40

Answer of Defendant, Joseph Pico.

FIRST SEPARATE DEFENSE TO THE FIRST COUNT:

10 Defendant, Joseph Pico, by way of separate defense, avers that the plaintiff, William Messina, by his own negligence, caused or contributed to the said injuries, in that he failed to use proper care to protect his safety under the circumstances which existed at the time of the alleged accident.

FIRST SEPARATE DEFENSE TO THE SECOND COUNT:

20 Defendant, Joseph Pico, by way of separate defense, avers that the plaintiff, Jennie DiCarolis, by her own negligence, caused or contributed to her said injuries, in that she failed to use proper care to protect her safety under the circumstances which existed at the time of the alleged accident.

COULT & SATZ,
Attorneys for the Defendant,
Joseph Pico.

Answer.

30 The defendant, Chisholm-Weisgerber, Inc., a corporation of the State of New Jersey, by way of answer, says:

ANSWER TO FIRST COUNT:

1. This defendant has not sufficient knowledge of the allegations in paragraph 1 of the first count and leaves the plaintiffs to their proof.
2. Defendant admits paragraph 4 of the First
40 Count.

Answer.

3. Defendant denies paragraph 5, 6, 7, 8, 9 and 10 of the First Count.

ANSWER TO SECOND COUNT:

1. Paragraphs 1, 2 and 3 of the Answer to the First Count are realleged as an answer to paragraph 1 of the second count. 10

2. Defendant denies paragraphs 2 and 3 of the Second Count.

FIRST SEPARATE DEFENSE:

This defendant violated no duty that it owed to the plaintiffs.

SECOND SEPARATE DEFENSE:

The plaintiffs were guilty of contributory negligence. 20

JNO. W. MATTHEWS,
Attorney for Defendant,
Chisholm-Weisgerber, Inc.

Reply.

The plaintiffs, replying to the answer filed by the defendant, John Terhune, say that: 30

1. They deny the matters and things alleged in the first separate defense to the First Count.

2. They deny the matters and things alleged in the first separate defense to the Second Count.

DETURCK & WEST,
Attorneys for Plaintiffs. 40

Reply.

The plaintiffs replying to the answer filed by the defendant, Chisholm-Weisgerber, Inc., say that :

They deny the matters and things alleged in the first and second separate defenses of the defendant.

10

DETURCK & WEST,
Attorneys for Plaintiffs.

Reply.

The plaintiffs replying to the answer filed by the defendant, Joseph Pico, say that :

20 1. They deny the matters and things alleged in the first separate defense to the First Count.

2. They deny the matters and things alleged in the first separate defense to the Second Count.

DETURCK & WEST,
Attorneys of Plaintiffs.

30

40

Case.

BERGEN COUNTY CIRCUIT COURT.

WILLIAM MESSINA and JENNIE DI CAROLIS, by her next friend, ANGELINA DI CAROLIS, <i>Plaintiffs,</i> vs. JOHN W. TERHUNE, JOSEPH PICO and CHISHOLM-WEISGERBER, INC., <i>Defendants.</i>	}	Action at Law.	10
--	---	-------------------	----

Hackensack, New Jersey, February 4, 1929.

Before—Honorable EDWIN C. CAFFREY, 20
 Judge and a Jury.

APPEARANCES:

For the Plaintiffs, Messrs. DETURCK & WEST.

For the Defendants (Joseph Pico), Messrs. COULT
 & SATZ, by Gerald T. Foley, Esq.

Messrs. MORRISON, LLOYD & MORRISON (John W.
 Terhune), by Francis V. D. Lloyd, Esq.

Messrs. WARD & MCGINNIS (Chisholm-Weisgerber,
 Inc.), by John M. Ward, Esq. 30

JOHN A. MATTHEW, Esq., by Thomas M. Kane, Esq.

GEORGE C. FELTER, JR., Esq.

(A jury was empanelled, accepted and sworn.)

Mr. West opens the case to the jury on behalf of
 the plaintiffs. 40

Kenneth John Grant—Direct.

Mr. Lloyd opens the case to the jury on behalf of the defendant John W. Terhune.

Mr. Ward opens the case to the jury on behalf of Chisholm-Weisgerber, Inc.

Mr. Foley opens the case to the jury on behalf of the defendant Joseph Pico.

10

KENNETH JOHN GRANT, sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. West:

Q. Where do you live, Mr. Grant? A. Tenafly, New Jersey.

20

Q. What is your business? A. Foreman.

Q. For whom? A. Chisholm-Weisgerber.

Q. One of the defendants in this cause of action, A. Yes.

Q. How long have you been employed by Chisholm & Weisgerber? A. Two years.

Q. A foreman in connection with what kind of work? A. Excavation.

30

Q. Who was in charge of the excavating work for the cellar which was dug by Chisholm & Weisgerber on the southeast corner of Fort Lee Road and Elm Street in the Borough of Bogota? A. I was.

Q. And you were working for Chishold & Weisgerber at that time? A. Yes.

Q. That work was started when? A. It was started Saturday morning.

By the Court:

40

Q. What date?

Kenneth John Grant—Direct.

By Mr. West:

Q. That would be December 17? A. December 17.

Q. 1927? A. Yes.

Q. Was the steam shovel used in connection with that excavating work? A. Gasoline shovel.

10

Q. Gasoline shovel? A. Yes.

Q. Will you describe just what part of the excavating work was carried on by Chisholm & Weisgerber under your direction? A. All of it.

Q. I beg your pardon? A. All of the excavation.

Q. You began to excavate where? A. On the east side of the cellar.

Q. How close to the easterly line of the property? A. The start of the excavation?

20

Q. Yes. A. Well, possibly thirty feet, we started.

Q. From the easterly line of the property? A. (The witness nods head in the affirmative).

Q. Now, how much further easterly did you go? A. We went within four feet of the building.

Q. On the easterly side? A. On the easterly side.

Q. And you now refer to the building occupied by Mr. Messina, one of the plaintiffs? A. Yes.

30

Q. How deep was the excavation? A. The excavation was seven feet below the curb line.

Q. How long did it take you to do the work? A. To complete the job?

Q. Yes. A. We completed the cellar at three o'clock, Monday afternoon.

Q. I beg your pardon? A. Three o'clock, Monday afternoon, the cellar was completed.

Q. And when did you remove the shovel? A. We removed the shovel Tuesday morning.

40

Kenneth John Grant—Direct.

Q. Now, just how far from the easterly line of the propetry had you progressed with the work at the time you finished the excavating? A. I do not understand you.

10 Q. How far were you from the easterly line of the property when you finished the work that was being done by Chisholm-Weisgerber? A. From the easterly line, we were on the corner of Elm Avenue, on the west part of the cellar.

Q. How near to the easterly line did you excavate? A. We went within four feet of the building line, on top.

Q. And that was Monday afternoon, was it? A. That was Saturday afternoon.

20 Q. How far were you away at the bottom? A. Seven foot. It sloped out from four foot to seven, approximately.

Q. Did you do any work on Monday? A. Yes.

Q. What did you do on Monday? A. We excavated the west part of the cellar.

Q. At any time did you go nearer to four feet—
A. No.

Q. —more than four feet to the easterly line with the shovel? A. No.

30 Q. Do you know Mr. Pico?

Mr. West: Will you stand up, Mr. Pico, please? (A man stands).

A. I do.

Q. He was the general contractor? A. He was.

40 Q. Did you have any conversation with Mr. Pico relative to going further to the east than you carried on your work? A. Tuesday morning, after the job was completed.

Kenneth John Grant—Direct.

Q. Yes? A. He said that we had left too much dirt there.

Q. What did you say? A. Well, I told him my orders were to take out within four feet of that building line, and I also told him that I didn't—

Q. A little louder. A. I also told him I didn't want to take out any more because it would not be safe.

10

Mr. Foley: I object to what this gentleman told him in regard to danger of going further to the line.

The Court: Well, he is a party to the action.

Mr. Foley: But, certainly, this man's idea of what is dangerous is not binding.

20

The Court: It is just the conversation. It may not have been dangerous at all. It is just the conversation.

Q. What did he say to you, if anything, when you told him it was not safe, in your opinion, to go any closer than you had gone with your steam shovel? A. He did not say anything.

Mr. West: Cross examine.

Mr. Foley: No questions.

30

Cross examination by Mr. Ward:

Q. Mr. Grant, the space was four feet from the building that was left by your company making this excavation on the westerly side of the building; and the easterly side of the excavation, what was there on top of that? A. There was a flagstone walk.

Q. And how far did that extend, from where to where? A. That extended from the front of the building right around to the back.

40

Kenneth John Grant—Cross.

Q. At the time you completed your work there, what was the condition of that? A. It was still there in good condition.

10 Q. How was the embankment of dirt that was left there, did that appear to be solid and firm at that time or not? A. It appeared to be solid; in fact, it was just the same condition Monday morning when we got there, or Tuesday morning, as it was on Saturday.

Q. Monday, was there anything done by your company or by you, your men, along that side of the excavation? A. No, there wasn't; not in that particular point.

Q. And on Tuesday, was there anything done by you? A. No.

20 Q. Now, on Tuesday, or Monday, rather, at what time did you complete your work there, the work of excavation, of your company? A. Three o'clock.

Q. And was there any work done by anyone else after that? A. Why, Mr. Pico's men, I believe they were digging the footing trenches along the north side of the cellar on Fort Lee Road.

Q. Now, on Tuesday, what time did you arrive? A. Seven o'clock.

30 Q. At the place of work? A. Seven o'clock.

Q. And what was done by your men or by you on Tuesday? A. Why, we just put the timbers in place, and took the shovel out of the cellar.

Q. To where was it taken? A. It was taken to Bergenfield.

Q. No. I mean from the excavation, from the cellar. A. The shovel stood on Elm Avenue.

Q. How long was it there before the collapse took place? A. An hour.

40 Q. From the time you went to work there for

Kenneth John Grant—Cross.

the purpose of removing this shovel up to the time the building collapsed, did you see anything being done there?

Mr. Foley: Now, I object to this. The direct examination was concerned simply with what he did. The cross examination is now being directed to what someone else did there. I do not think that is proper cross examination. 10

The Court: Sustained. It is a matter of defense which you may utilize at that time.

Mr. Ward: I guess that is all, sir. That is all, Mr. Grant.

Re-direct Examination by Mr. West: 20

Q. When you speak of Elm Avenue, Mr. Grant, that is west of the property, isn't it? A. That is west of the property; yes, sir.

Q. And the four feet that you speak of that was left by you is on the easterly side of the property? A. On the easterly side.

Mr. West: That is all.

The Court: That is all.

Mr. West: Chief Winters. 30

CHARLES W. WINTERS, sworn as a witness on behalf of the Plaintiffs, testified as follows:

Direct Examination by Mr. West:

Q. You are Chief of Police of the Borough of Bogota? A. Yes, sir. 40

Charles W. Winters—Direct.

Q. And have been for how long? A. 21 years, January past.

Q. Were you serving as Chief of Police on December the 20th, 1927? A. Yes, sir.

10 Q. On that particular day, were you in the vicinity of Fort Lee Road and Elm Avenue? A. Yes, sir.

Q. What was the occasion for your being there? A. Why, I had left the office about five minutes after nine, and I went down to Fort Lee Road, which I always do, and hang around that section to see if the men are working, and I was there at the time this building fell in.

Q. Now, prior to the time the building fell, did you see Mr. Pico? A. Yes, sir.

20 Q. And what day of the week was it? A. On a Tuesday.

Q. Did you have a conversation with him? A. I certainly did.

Q. And how long before the conversation took place—how long before the building fell, did you have the conversation with him? A. Just in the neighborhood of about one hour.

Q. Did you speak to him officially? A. Yes, sir.

30 Q. What did you say to Mr. Pico, and what did he say to you? A. I asked Mr. Pico to shore up that building, as it would fall down, and he said, "No, that is all right," and he was laying cement blocks along there, and he had about fifteen blocks in lengths laid on his concrete footing, cement blocks, and he would bawl back there to me, "I come up, I will be laying them in a few minutes on the corner," and I kept hollering at him and asking him to block the building up.

40 Q. What did he say? A. He said, "Oh, it will

Charles W. Winters—Direct.

only take a few minutes," he says, "I will have that up, I will have it all fixed." I kept hollering, I done everything but swear at him, I guess.

Q. What did happen about fifteen minutes after that conversation, or how long did you say? A. This started about a quarter after nine when I got at him, and I got after Mrs. Messina and Mrs. Messina's child, and got them out a little after ten; and then there was a girl left in the office or in the store, I didn't know of, on the telephone, I know she was in the office, had been in, but I thought she was out, and that is when the building collapsed; that was just ten forty-five.

Q. Now, was anyone else working there at the time? A. About between four or five men.

Q. And what were these men doing? A. Digging the dirt out ahead. They had about, I should judge, about, that there was an embankment along there about four feet wide, three feet, six, to four feet, I didn't measure that; they had that about—well, half through, anyway, and he was following them up with the cement blocks.

Q. These men were? A. About five men, I would say about four or five men.

Q. Now, Chief, I show you a series of pictures, and ask you whether these pictures correctly describe the conditions which existed immediately after the building collapsed? Will you look at them? A. Yes, sir.

Q. Just look at them all, please. A. I know; but I was just going to say that was my picture, standing there, I am not sure.

Q. You weren't as quick as that, Chief. A. What? No. I know; but not that day; but I was there when some pictures were taken. Everything is correct.

Charles W. Winters—Direct.

Mr. West: I offer the pictures in evidence.

Mr. Foley: No objection on the part of the defendant Pico.

Mr. Lloyd: No objection.

Mr. Ward: No objection on our part, sir.

10

Mr. West: May we mark them P-1 to P-6? (Six photographs marked Exhibits P-1 to P-6, inclusive, in evidence.)

Q. Now, Chief, will you just step down for a moment, please? Referring to P-4, will you indicate which one of those streets is Fort Lee Road?

A. Right here (indicating).

20

Q. And will you indicate which one of the streets is Elm Avenue? A. It starts right along here on the west side (indicating).

Q. Showing the foreground of the street, the street in the foreground? A. Yes, sir.

Q. Now, will you indicate to the jury where you were standing at the time you had the conversation with Mr. Pico? A. Right there (indicating), where I was, standing right over the top of Mr. Pico's head.

Q. On what street? A. On Fort Lee Road.

30

Q. Was there anyone in the building, to your knowledge, at the time of the collapse? A. No, sir.

Q. Do you know whether there was or not? A. Yes, sir.

Q. Who was in the building? A. A girl named Jennie. I don't know her last name.

Mr. Lloyd: I object. He said he did not know whether there was anybody in the building, as I understood him.

40

Mr. West: Let us straighten the record, and withdraw the question.

Charles W. Winters—Direct.

Q. Was there anyone in the building? A. Yes, sir.

Q. And do you know who was in the building?
A. A girl named Jennie.

Mr. West: Will you stand up, Miss Di Carolis? (A young lady stands).

10

The Witness: Right.

Q. Is that the young lady to whom you refer?
A. Yes, sir.

Q. And how was she taken out of the building?
A. She was carried out by one of my officers, if I am not mistaken. She—as the cornice fell down in front of the building, she came running out the door and fell on top of the cornice; I think she hit on the side of the door there, the door jamb, and fell on top of the cornice. Just one second more, she would have been under the cornice. That would have settled her.

20

Q. Was she conscious or unconscious? A. I think she was unconscious, but I wouldn't say that.

Q. Now, after the building collapsed, did you station any men there? A. I had an officer, Carlson, there.

Q. Was the building in such condition that anyone might go in after it collapsed? A. No, sir; because I had forbid anybody—to allow anybody to go in it; it wasn't fit, not even for the owner to go in; I forbid him going in.

30

Q. What happened to the contents of the store?
A. What didn't go down the hole under this building when it collapsed laid there and froze up.

Q. Do you know whether or not there was much stock in that store, Chief? A. The stock was jammed, the pictures will even show, he had a—everything barreled up, he had it full of stuff.

40

Charles W. Winters—Direct.

Q. A store that had been established there for a number of years, I believe? A. Why, I wouldn't want to say; maybe a couple of years, or a year. I couldn't say that.

Mr. West: Cross examine.

10 Cross Examination by Mr. Lloyd:

Q. Chief, when you had this conversation with Pico, he was down in a trench? A. Yes, sir.

Q. Did he say anything to you? A. No. I was saying a whole lot to him.

Q. Yes. A. And I was saying a whole lot to him, and he was just saying that he would have it fixed in a minute.

20 Q. Yes. And did he do anything—A. Did I do anything?

Q. Just a minute, please. Did he do anything to indicate to you that the building alongside the excavation was safe? A. No, sir. Outside of laying these blocks what he was working on.

Q. Did he do anything to indicate that he was building on his own line? A. Building on what?

30 Q. On his own line, inside the excavation. A. As far as I know, he was right on his line. That I couldn't say. He was up against the other—

Q. And did he take a plumb rule—A. He didn't have a chance to use a plumb rule while I was there, boy.

Q. He didn't take a plumb rule and put it against the wall and plumb down to show you that he wasn't under the wall? A. Yes, I believe he did, right on his cement block.

Q. He took this plumb rule—A. He did.

40 Q. —and showed you that he wasn't under the wall, didn't he? A. At that corner.

Charles W. Winters—Cross.

Q. At that corner, he wasn't under the wall? A. Not at that corner.

Q. You said the plumb rule is just right? A. At that corner; but I told him it was falling out there about six feet away.

Mr. Foley: I object to what this witness told Pico. I do not think that is binding on Pico. 10

The Court: It is just a conversation. I do not know whether it is binding or not.

Mr. Foley: This witness could say anything to Pico that he wished.

The Court: Well then, Pico then can answer it or remain silent. It is evidential, the course of conduct on the part of Pico. 20

Q. Up on the corner, he took his plumb rule, and he was right? A. Right.

Q. He wasn't—A. Right.

Q. Now, you say that Jennie fell on top of the cornice, and the cornice not on top of Jennie; is that correct? A. What is that?

Q. Jennie fell on top of the cornice? A. Yes, Jennie fell on top of the cornice.

Q. Nothing fell on top of her? A. Well, there was so much stuff fallen there, I couldn't say she wasn't hit before she got out of the door; I don't know what threw her out of the door on the cornice. 30

Q. What time did you notify them, Chief? A. Notify who?

Q. The occupants of the store? A. A few minutes after ten.

Q. A few minutes after ten? A. Yes. Just 40

Charles W. Winters—Cross.

about five minutes or ten minutes before it went down, when I got up there.

Q. It fell at quarter of eleven exactly, you say?

A. Yes, sir; I took my watch out.

10 Q. And did they leave the building immediately when you told them to? A. They didn't right away, no.

Q. No. A. But Mrs. Messina and her child was the first one out.

20 Q. Yes. A. No, they wasn't. They had a woman customer. I called her out before, she didn't want to come first; because she wouldn't come, I got a little sore, and because I got sore, she went out, and Mrs. Messina and the baby followed out; and just at that I shouted out to save these men in the hole, I don't know who they was working for, but there was five or six men working there.

By the Court:

Q. Chief, did I understand you to say that at the time you took Mrs. Messina and the child out you did not know at that time whether or not Jennie was in the store? A. No. I know Jennie worked for him, but I didn't know Jennie.

30 Q. In other words, you did not notify her at that time? A. Not Jennie, only by hollering for everybody; that is all.

By Mr. Lloyd:

Q. The first time you noticed anything wrong then, was about a little after ten, Chief? A. No, sir; about quarter after nine.

Q. Quarter after nine? A. Yes, sir.

40 Q. And what did you do at quarter after nine,

Charles W. Winters—Cross.

Chief? A. I was cautioning this gentleman to block up his wall, shore up his wall, and that is the way I kept at him until things was over with.

Q. And you warned these people a little after ten? A. No, I couldn't say I—I was very busy trying to get them out of there; but I just got them out, as I know, when the building went down. 10

Q. They did not want to go out, did they? A. Mrs. Messina done as I told her.

Q. Who else did not? A. Nobody else I know, except the men in the hole, and they didn't go out until I hollered the building was coming.

Q. Chief,—A. Yes, sir.

Q. —you say a little dirt had sifted out, a little dirt had sifted out under the excavation, or under the—a little dirt had sifted out from the adjoining wall from the Messina building, is that correct? A. In under the foundation. That is what I thought you was getting at before. 20

Q. Just a little dirt sifted out? A. It didn't sift out; just like fallen out, like if frost gets in the ground and the sun gets at it.

Q. Well, there had been a frost that night or the night before, had there not? A. My God! I guess so. It was cold weather.

Q. And the sun came out and loosened it, is that correct? A. I couldn't say whether the sun was out or not; no, I couldn't say. 30

Q. How deep was the excavation? A. At that spot, I don't know; but it was seven feet four on the northwest corner.

Q. On the highest corner? A. I measured that myself.

Q. That is the highest corner, Chief? A. Seven foot, four. 40

Charles W. Winters—Cross.

Mr. Lloyd: That is all.

Mr. Foley: No questions.

Cross Examination by Mr. Ward:

10 Q. Chief, were you there when the steam shovel was removed? A. Yes, sir; it was just pulling it up the gang plank.

Q. And upon which side of the property? A. On the west side.

Q. That would be towards Elm Street? A. Elm Avenue.

Q. Elm Avenue. And that is the furthest side, from the furthest part of the property, from the building? A. The length of the building away, of the new building.

20 Q. How long after the steam shovel was removed did this building collapse? A. Well, I judge the steam shovel got out there about around ten o'clock, and ten forty-five, when this building went down, something like that. I wouldn't say that, because—exactly.

Q. Approximately? A. Yes.

Q. When you went there in the morning and saw this work being done, where was it being done? I don't mean by the steam shovel, I mean the work?

30 A. Right against this building, on the east side.

Q. And you saw Mr. Pico there? A. Yes, sir.

Q. And how much of the excavation along the building had been done at that time? A. Well, as I say, maybe one-half of it; something in that neighborhood.

Q. That would be from Fort Lee Road—A. Fort Lee Road, south.

40 Q. —in? Now, did you notice the embankment that was left there, if any? A. Before, do you mean?

Charles W. Winters—Cross.

Q. Yes. Before. A. Before it was touched, on the Sunday, I walked through there; there was a flagging, a flag sidewalk.

Q. On the top of the embankment? A. Yes, sir.

Q. How far did that flagging extend out from the building on the top of the embankment? A. Why, it didn't cover all the dirt that was left there. 10

Q. Some little space of dirt beyond that? A. Yes, sir.

Q. Is that correct? A. On one side of it, the flagging was up against the building.

Q. And that condition extended from Fort Lee Road how far in along the building? A. What do you mean, the digging?

Q. No. I mean the flagging. A. The flagging run from Fort Lee Road pretty close back to the building on the south, that used to be Mr. Lockwood's driveway. 20

Q. Along the entire easterly side or westerly side of the building; that is correct, is it not? A. Yes, the west side of the building, right.

Q. Yes. About how much space was there from the building towards the west? A. In the neighborhood of three feet, six, or four feet.

Q. Three or four feet? A. I did not measure it. 30

Q. And did you know whether or not there was an embankment there that extended down to the excavation on an—A. I do not know how wide that was, but it went down on a slant.

Q. On an angle or slant? A. Yes.

Q. Was there more space at the base of that or not? A. The base had—was wider than the top, yes.

Q. Wider than the top? A. Oh, sure. 40

Charles W. Winters—Cross.

Q. Now, in the morning, you saw about how many feet of this bank taken away, did you say?

A. In the neighborhood of pretty close to half.

Q. How close was Mr. Pico to the men who were working there? A. Why, Mr. Pico was laying blocks down in the corner.

10 Q. And how close was he to these men that were working there? A. Well, maybe as far as the gentleman between you—no, right here, alongside of you, or a little further.

Q. About ten or fifteen feet? A. They was cleaning up ahead of him, and he had part of the footing course in to lay these blocks.

Mr. Ward: That is all.

20 Cross Examination by Mr. Foley:

Q. Mr. Winters, Mr. Pico was at one end of this excavation, and the men at the other end? A. No, sir. They hadn't dug on the other end yet, they was just digging ahead of them.

Q. But as much of the excavation as was dug up to the wall, Mr. Pico—A. Yes.

Q. —was at one end, and the men at the other end? A. That is right.

30 Q. And they were about fifteen feet from him, you say? A. Yes.

Mr. Foley: That is all.

Re-direct Examination by Mr. West:

Q. Do you know whose men they were? A. No, sir; I do not.

By the Court:

40 Q. Now, looking at this picture, Chief, referring to P-4,— A. Yes.

Charles W. Winters—Re-direct.

Q. —what is this street here? A. This is Elm Avenue.

Q. This is— A. Fort Lee Road.

Q. —Fort Lee Road? A. Yes. And here (indicating) is where I stood.

Q. And which is the north and south? A. The north, that is the north, Fort Lee Road is on the north side, and Elm Avenue on the west side. 10

Q. You speak of some flaggings? A. Right along here, the east side of the street; no, the west side of the street, right along there (indicating); there used to be a house there, and the house had a walk in there.

Q. And when you refer to the flaggings, you refer to the walk? A. Yes, sir; on top.

Q. Not an ordinary flagging, but it was a walk? 20
A. It was an ordinary, blue flagging, laid on top of this ground.

Q. Which constituted the walk between the two houses? A. Yes, sir.

Q. And where was Mr. Pico with reference to—
A. Right down here, below me.

Q. Was the flagging still there, or had that been removed? A. No; about, as near as I know, one-half of it.

Q. One-half of the flagging had been removed? 30
A. Yes. Maybe all the flagging; I couldn't say; but he had it dug from Fort Lee Road up to about here (indicating).

Q. And had there been a change in condition from the time you observed it on Saturday? A. Yes, sir.

Q. What was the change? A. This here hole was dug out.

Q. Do you mean the excavation was closer to the building? A. Yes, where these men were digging. 40

Charles W. Winters—Re-direct.

By Mr. West:

Q. Chief, after you advised him in reference to the shoring, did he use any shoring? A. No, sir.

Q. And how many places did he use this plumb line? A. One, on the corner where he was laying
10 his concrete blocks.

Q. That was the only place? A. Sure, right on this corner.

Mr. West: That is all, Chief.

KENNETH JOHN GRANT, recalled as a witness on behalf of the Plaintiffs, testified as follows:

20 Direct Examination by Mr. West:

Q. Mr. Grant, these men who were working along the easterly side of that excavation, were they in the employ of Chisholm & Weisgerber or not? A. No, they were not.

Q. Yes. And under whose direction were they working? A. Under Mr. Pico's.

Mr. West: That is all.

Mr. Foley: No questions.

30 Cross Examination by Mr. Ward:

Q. I think I understood you to say that no work was done by Chisholm & Weisgerber along that side of the excavation from the Friday before, is that correct? A. From Monday.

Q. I beg your pardon. Was it Friday or Saturday? I keep saying Friday, and it was Saturday, wasn't it? A. Saturday. Three o'clock, Monday
40 afternoon, we finished.

Jennie Di Carolis—Direct.

Mr. Ward: That is all.

Mr. West: That is all.

JENNIE DI CAROLIS, sworn as a witness on behalf of the plaintiffs, testified as follows:

10

Direct Examination by Mr. West:

Q. Where do you live, Miss Di Carolis? A. At 91 Grove Street, Hackensack.

Q. And how old are you? A. 16.

Q. By whom were you employed on December the 20th, 1927? A. William Messina.

Q. And where were you employed? A. In the vegetable store.

Q. And where was his vegetable store? A. Fort Lee Road, Bogota. 20

Q. That store was located about 100 feet from Elm Avenue? A. Yes..

Q. On the south side of the street? A. Yes.

Q. What were they doing in connection with the property immediately to the west? A. They were building.

Q. Yes. And how far had they gotten along with the building? A. Well, about two or three feet.

Q. What were they doing? A. They were using a steam shovel. 30

Q. Yes. A. In the cellar.

Q. Now, how close did the steam shovel get to the building? A. About two or three feet.

Q. And after the steam shovel had gotten two or three feet from the building, it stopped its work, didn't it? A. Yes.

Q. Yes. Then what did they start to do? A. They just—shovels and picks, and they were— 40

Jennie Di Carolis—Direct.

Q. Who used shovels and picks? A. The men that were working there in the cellar.

Mr. West: Stand up, Mr. Pico. (A man stands.)

10 Q. Was that one of the men who was working there? A. Yes.

Q. And what were they using the shovels and picks for? A. Well, they were digging, they were still digging.

Q. And did they dig away the dirt that was left by the steam shovel? A. Yes.

Q. And how far did they dig? A. Well, about—about five inches.

20 Q. Five inches where? A. Underneath our building.

Mr. Foley: I object to that. I withdraw the objection.

Q. How did they dig about five inches under your building? A. With the picks.

Q. And when did they do that, the day it fell, or the—A. I think in the morning of the day it fell.

30 Q. In the morning of the day it fell. And were you in and out of the store? A. Yes, sir; I was going in and out.

Q. And where were you when the building collapsed? A. Well, I was in the back.

Q. Doing what? A. I think I was packing up stuff.

Q. Yes. Now, anything in relation to the telephone? A. Yes. The telephone rang, and I had to get an order from a customer.

40 Q. And where were you just at the time the building collapsed? A. I had the telephone in my hand.

Jennie Di Carolis—Direct.

Q. Yes. Now, just describe what happened? A. Well, as I had the telephone in my hand, I heard a big noise, and the whole wall fell down all at once, and the minute I saw the wall fall, I threw the telephone down and everything, and I ran. There was a bushel fell from a box, and I tripped over that bushel, and I fell on the floor and got hurt on my foot, and I got up; I wanted—I was in a hurry to get out before something else would fall. The minute I got near the door, the roof was coming down, and when I got near the door, the door was coming down, and I fell on my ankle. Then I saw Chief Winters outside and Officer Carlson. He ran in the store to get me. Of course, I was unconscious. 10

Q. Yes. Now, what happened to you? A. I got hurt on my head. 20

Q. Where on your head? A. Right up here (indicating), in the corner.

Q. And what kind of a hurt was it? A. Well, a brick fell on it.

Q. Yes. And what happened to your head when the brick fell on it? A. It cut a little hole in.

Q. I see. Now, what other part of you was hurt? A. Well, my back.

Q. And what part of your back? A. Right up here (indicating). 30

Q. Indicating the small of your back? A. Yes.

Q. And what other part? A. My ankle, and my—

Q. What ankle? A. My right ankle.

Q. Yes. What happened to your back? A. And foot. Well, I think the door fell on it.

Q. Yes. Was there any mark there? A. Yes.

Q. What kind of a mark? A. A black and blue bruised mark. 40

Jennie Di Carolis—Direct.

Q. Your right ankle, you spoke about? A. Yes.

Q. What happened to your right ankle? A. Well, that was cut on the bone.

Q. Cut where? A. On the bone.

10 Q. How big a cut was it? A. Well, it was about that big (indicating).

Q. Indicating about an inch and a quarter; yes? A. That big (indicating).

Q. Now, I think you said you were unconscious? A. Yes.

Q. Where were you when you regained consciousness? A. I was next door in the electric store.

20 Q. Yes. And were you taken anywhere? A. Well, the ambulance had come for me to take me to the hospital, and I didn't want to go, and they called up Doctor McFeeley, and he took me home. Then, I didn't know, of course.

Q. How were you taken home by Doctor McFeeley? A. In his automobile.

Q. What did you do when you got home? A. Well, I opened my eyes, and I saw myself home in bed.

Q. Yes. And how long were you in bed? A. Well, about two weeks or so.

30 Q. Did you have any pain? A. Yes.

Q. And at the end of two weeks, were you able to get up out of bed? A. Well, I wasn't able, but I had to go back to work.

Q. And did you go back to work? A. Well, not at William Messina; I went to another place.

Q. I see. And how much were you earning a week? A. With Messina.

Q. Yes. A. Twelve.

40 Q. \$12.00 a week. And you got up because you had to go to work? A. Yes.

Jennie Di Carolis—Direct.

Q. And did the doctor come to your house? A. Yes, he did.

Q. And he treated your wounds? A. Yes.

Q. Now, how long was it before you recovered?
A. Well, about three months.

Q. Yes. And after you got up out of bed, what was wrong with you during the balance of the time for those three months? A. Well, I couldn't walk so good. 10

Q. How would you walk? A. "Gimpy".

Q. Yes. How about the back? A. Well, I couldn't move my back so much because it was all hurt.

Q. And the head? A. The head, I could feel pains in it once in a while.

Q. And how are you now? Have all those injuries cleared up? A. Well,— 20

Mr. West: I withdraw the question.

Q. The head is all right now, isn't it? A. Yes.

Q. And the ankle is all right now, isn't it? A. Well, only when the weather is changing, I feel a little pain.

Q. What about the back now? A. Well, the back hurts me only once in a while.

Q. About how often does your back hurt you? A. About every month. 30

Q. About every month.

Mr. West: Cross examine.

Cross Examination by Mr. Foley:

Q. Miss Di Carolis, what did your employment consist of in Mr. Messina's store? A. Sales girl in the fruit store. 40

Jennie Di Carolis—Cross.

Q. Anyone else work there with you? A. No. Just me and Mrs. Messina, my boss.

Q. You and Mrs. Messina? A. Yes.

Q. You were both in the store that morning, were you? A. Yes, sir.

10 Q. And did your duties consist of anything else except merely selling the fruit? A. That is all, selling fruits.

Q. Did you make any deliveries? A. Yes, we had delivery when the boy come out of school.

Q. You did not deliver the things yourself? A. No.

Q. So your work was work that you did in the store? A. Yes.

20 Q. You had no occasion to go out of the store, did you, and do any of your work? A. No.

Q. Now, you were not out watching these men working that morning, were you? A. Every once in a while, I used to run out and see when I had nothing to do, I used to go watch them.

Q. You did not watch them every morning, did you? A. Well, if Chief Winters was warning them, I was always going out and watching them.

Q. Were you out there when Chief Winters was there? A. Yes.

30 Q. Were you there when Mr. Pico showed Chief Winters that he was on Mr. Terhune's side of the line? A. When he was showing Mr. Winters, no, I don't think I was out.

Q. You were not there then? A. No.

Q. Were you there when Mr. Winter's asked Mr. Pico whether he was on his own line or not? A. Yes.

40 Q. And did you see Mr. Pico show Mr. Winters that he was on his line? A. No, that I did not see.

Jennie Di Carolis—Cross.

Q. What did you see Mr. Pico doing? A. Oh, he was watching the men work.

Q. Wasn't Mr. Pico doing any work himself? A. Well, he used to help them every once in a while.

Q. Well, now, on this particular morning, was he doing any work? A. Well, I do not know.

Q. Well, as a matter of fact, you were not out watching him that morning, were you? A. Well, I was out, but I wasn't out every minute to see.

Q. Well, at any time that you were out there, did you notice Mr. Pico doing anything? A. Yes; putting up the wall; helping the men put up the wall.

Q. He was putting it up himself, wasn't he? A. Yes.

Q. What were the men doing? A. They were working, too.

Q. And they were all working within a comparatively small space, weren't they? A. Yes; where they were building the wall.

Q. And it was up against your building, wasn't it? A. Yes.

Q. You did not see any of the men digging, did you? A. Yes, I did.

Q. Where were they digging? A. They were digging right against our building.

Q. They were digging right up against the line that your building was on? A. Yes.

Q. Now, you did not see the men dig under the building, did you? A. Yes, I did.

Q. You actually saw them dig under the building? A. About five or six men; really, I don't know how many; but—

Q. What were they digging with when they dug under the building? A. Picks, picks.

10

20

30

40

Jennie Di Carolis—Cross.

Q. Where, in relation to the lower edge or the upper edge of their excavation, were they digging underneath your building? A. They were right even with our building. They were digging right underneath our building.

10 Q. Now, are you sure that the men were digging under, or didn't you see some of the dirt fall out from underneath your building? A. While they were digging, the dirt was coming out.

Q. While they were digging? A. Yes.

Q. But you did not see them actually dig under with the picks, underneath the building, did you? A. Yes, sir.

Q. When was this? A. That was on Tuesday morning.

20 Q. What time Tuesday morning? A. Oh, it was about eight o'clock.

Q. Did you call that to the Chief's attention? A. What is it?

Q. Did you call that to the Chief's attention when he came there? A. No.

Q. You did not say anything about that? A. No.

30 Q. You did not tell him you saw the men digging underneath your building? A. No. I was busy. I would go inside then.

Q. Didn't it alarm you when you saw them digging underenath the foundation of your building? A. No. I wasn't talking with him at all.

Q. Weren't you frightened when you saw them do that? A. No.

Q. And you did not tell the Chief anything about it? A. No.

40 Q. How long before the collapse came did you see them doing that? A. Well, when it collapsed

Jennie Di Carolis—Cross.

it was about half past ten or quarter to eleven, something like that, around that time.

Q. Well, now, you saw them at what time? A. When they were digging.

Q. Yes. A. About eight o'clock.

Q. Around eight o'clock. Did you see them after that at all? A. Yes. 10

Q. What time did you see them again? A. Oh, about ten or fifteen minutes after.

Q. After what? A. After they were digging.

Q. After eight o'clock? A. Yes.

Q. Did you see them again after that? A. Yes.

Q. What time did you see them again? A. Why, I really don't know what time it was, around eight or nine.

Q. Well, what was the last time before the building fell that you saw them digging? When was that? A. The last time? 20

Q. Yes. A. Why, I didn't look at the watch what time that was; I don't know what time it was.

Q. Do you know about what time it was? A. No, I do not.

Q. You do not have any idea? A. (The witness shakes head in the negative).

Q. How long were you standing there while the Chief was standing there? A. Oh, every time I hadn't anything to do, I went out and watched them. 30

Q. And the Chief was there at the same time? A. Yes. He was there; he was there from in the morning until it fell.

Q. But you did see Mr. Pico show the Chief that he was—A. No, I did not.

Q. Oh, you didn't see that? A. No.

Q. All right. 40

Jennie Di Carolis—Cross.

Mr. Foley: That is all.

Cross Examination by Mr. Lloyd:

10 Q. Miss Di Carolis, what time did you get to work that morning? A. I left the house at half past six and got there at seven.

Q. And did you have trouble getting the door open that morning? A. Well, it couldn't open so good.

Q. You couldn't open the door? A. No.

Q. And you tried to borrow a plane, didn't you? A. Yes, I did.

20 Q. And did you see the crack in the sidewalk that morning before you went to work? A. Yes. No. It wasn't there. It was about a half an hour before the store fell the sidewalk was cracking.

Q. Is that the first time you saw it? A. Yes; the first time I saw it.

Mr. Lloyd: That is all.

Re-direct Examination by Mr. West:

Q. There were Christmas trees out in front of your store, weren't there? A. Yes.

30 Q. And those were Christmas trees that were for sale? A. Yes, sure.

Mr. West: That is all.

Mr. Ward: No questions.

Mr. De Turck: We offer in evidence a contract between John W. Terhune, owner of the property, and Joseph G. Pico; and I understand there is no objection to the offer?

Mr. Foley: No.

Mr. De Turck: How about you, Mr. Ward?

40

Mr. Ward: No objection.

Jennie Di Carolis—Re-direct.

The Court: Mark it.

(Paper marked Exhibit P-7 in evidence.)

The Court: Do you want to read the contract?

Mr. De Turck: No, I do not think so. Just one portion. The contract provides that the work shall be done by Pico under the direction and supervision of John W. Terhune, and that is the purpose of the offer.

10

I now offer in evidence a certified copy of the building code of the Borough of Bogota, particularly Sections 1 and 2 of Article 7, or 7.

Mr. Foley: I object to that offer, if it please the Court, on the ground that the building code was not pleaded; under the complaint, there is a reference to it. As I understand it, in order to properly plead such a code, you must set it forth at length.

20

The Court: My recollection is it is pleaded.

Mr. Foley: It is referred to in the complaint, your Honor, but as I understand it, to properly plead it, you must set it forth at length and not merely make a reference to it.

30

The Court: Well, you are not surprised by it, and if it is going in in its entirety, I will permit an amendment.

Mr. Foley: Well, we do not know what that—

The Court: It certainly was in your power to find out what Section 1 of Article 7 in the building code adopted June 9th, 1920, was.

40

Jennie Di Carolis—Re-direct.

Mr. Foley: Yes. But I think we are entitled to have it set forth without going to the trouble to find out whether it has application to this situation, if for no other reason.

10

The Court: You did not raise the question, that you pleaded to this complaint.

Mr. Foley: I do not believe it is a proper method of proof.

Mr. De Turck: I think the statute provides a certificate signed by the Clerk makes it evidential.

Mr. Lloyd: There is no objection.

Mr. Foley: I object to it.

20

The Court: I will overrule your objection.

Mr. Foley: Exception.

(Building code marked Exhibit P-8 in evidence.)

Mr. De Turck: This is the building code of the Borough of Bogota, adopted June 8th, approved June 8th, 1920, and was in force at the time this building fell. Section 1 of Article 7 reads as follows:

30

“All excavations for buildings and other work shall be properly guarded and protected so as to prevent the same from becoming dangerous to life, limb or adjoining property.”

Section 2: “Forms are to be carried full depth inside and out except in rock excavation.”

40

William Messina—Direct.

WILLIAM MESSINA, sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. West:

Q. Where do you live, Mr. Messina? A. 117 Elm Avenue, Bogota. 10

Q. What is your business? A. Fruit dealer.

Q. How long have you been in the fruit and vegetable business? A. About 18 or 19 years.

Q. And on December the 20th, 1927, how many places of business did you have? A. On what?

Q. On December the 20th, 1927, where was your place of business? A. On West Shore Avenue.

Q. Did you have a place of business on Fort Lee Road? A. Yes, 1927.

Q. December 20th, 1927? A. Yes. 20

Q. On the south side of the street? A. Yes.

Q. You did not own the building? A. No.

Q. And your store was about 100 feet from Elm Avenue, was it? A. Yes.

Q. What kind of work was being carried on on the property directly west of yours? What were they doing there? A. Digging with a pick and shovel.

Q. Yes. And had they dug a cellar? A. What do you say? 30

Q. Had a cellar been dug? A. A cellar was dug.

Q. And what did they use to dig the cellar? A. A steam shovel.

Q. How far away from your wall did the steam shovel stop work? A. Two feet.

Q. And when it stopped work, everything was all right, was it? A. Yes.

Q. Now, after they dug within two feet of your 40

William Messina—Direct.

property, what was done? A. They took the steam shovel out of there.

Q. They took the steam shovel out? A. Over the avenue.

10 Q. Moved it out. And then did they do anything to the dirt that was left between your building and the—A. Mr. Pico digging with pick and shovel.

Q. Now, did somebody take the dirt away that was left by the steam shovel? A. No.

Q. Well, when the steam shovel went out, Mr. Messina, I think you said there was about two or three feet of dirt left? A. Yes.

Q. Yes. A. From the wall.

20 Q. Now, what becomes of that dirt? A. Mr. Pico digging with the pick and shovel, and put it on the center of the cellar.

Q. What did he use? What did you see them use to take that two or three feet of dirt away? A. Pick and shovel, on the center of the cellar.

Q. How close to your building did they come? A. They went six inches under my building.

Q. Yes. And what did they use to go six inches under your building? A. Digging with the pick and taking it away with the shovel.

30 Q. Did they use any shoring or anything to protect your building? A. No.

Mr. Lloyd: I object to that.

Mr. West: I withdraw the question. The question is withdrawn.

Q. Were you there when the building fell? A. No.

40 Q. What time did you leave that Tuesday morning? A. I left there about half past eight, and I went to the market.

William Messina—Direct.

Q. And was Mr. Pico there then? A. Mr. Pico was there.

Q. And his men? A. And four or five men, digging on the side there.

Q. And what part of the work was Mr. Pico doing himself? A. Well, once in a while he helped the men. 10

Q. I beg your pardon? A. Once in a while he would give a hand for the men.

Q. Now, how long had you occupied this store? How long had you had the store there? A. I was have it three years lease.

Q. I beg your pardon? A. Three years lease.

Q. You had three years lease? A. Yes.

Q. How long had you been there before the building fell? A. Well, I will say about two years, about two years. 20

Q. Yes. And you had a general fruit and vegetable business? A. And grocery.

Q. And this collapse took place five days before Christmas, didn't it? A. Christmas.

Q. Did you have much stock in your store at that time? A. Plenty. I have enough.

Q. And what kind of stock did you have in your store? A. I have apples, potatoes, all the stuff.

Q. Do you mean all the stuff for your trade? A. For my trade. 30

Q. Well, would you have more or would you have less just before Christmas? A. No. I have more at that time, because, you know, a little business, you have trees—

Q. Yes. A.—For the time, you know, for Christmas, you have wreaths,—

Q. Yes. A.—you have a lot of stuff for this time of the year. 40

William Messina—Direct.

Q. What was the value of the stock that you had in your store at the time of the—

Mr. Lloyd: I object, if the Court please.

The Court: Why?

10

Mr. Lloyd: I do not think he is competent to testify what the value of the stock in the store was in a lump item.

The Court: Well, you can ask him to develop it. The question is competent. This is a tort action. It is not a contract action.

Q. What was the value of the stock that you had in your store? A. About \$4,000.

Q. Did that include fixtures, too? A. Everything.

20

Q. What happened to the stock? A. Well, it freeze. I cannot touch it. Chief Winters no allow me to take anything, because nobody risk going in there.

Q. Did you get any stock out of there at all? A. I got a few things, yes.

Q. What did you get out? A. I got a few canned groceries. I can take nothing of the green stuff, because it was all froze.

Q. I see. A. It has been there about three days.

30

Q. Did any of the fruits and vegetables go down into the hole? A. Yes.

Q. Did anybody give you any notice that they were going to dig there? Did they ever tell you?

Mr. Lloyd: I object to that. I do not think it is material or relevant. It is not necessary. It has been shown here conclusively that the excavation was not deeper than seven feet.

40

The Court: There is testimony that it was under the building five or six inches.

William Messina—Direct.

Mr. De Turck: Well, furthermore, there is a case which holds that failure to give notice in an excavation is evidence of negligence. There is a New Jersey case on that.

Mr. Lloyd: That applies to the owner.

Mr. De Turck: He is the owner, he is a leaseholder. 10

The Court: It is a possessory action, and whether he is the owner or not—

Mr. Lloyd: If you are going on the theory of a trespass, that is a question for the Court.

The Court: A question of trespass and negligence in the doing of the work.

Mr. Lloyd: The plaintiff has pleaded the case on the theory of lateral support. 20

Mr. West: Oh, no.

The Court: No.

Mr. West: Not in paragraph eight; it says they encroached.

The Court: No. And even if the ordinance relating to the notice did not apply, then we would have to rely on the compiled statutes which also charges them with some duty, and there is some evidence in the case that there was work done after the steam shovel, just how much I cannot say; it is for the jury to decide. 30

Mr. Lloyd: I will withdraw the objection. (Question read.)

A. No. But—

Mr. Foley: I ask that this be limited purely to the defendant Terhune. I do not 40

William Messina—Direct.

think there is any obligation upon the contractor to give notice to the owner next door.

Mr. West: We have no objection to that.

The Court: The question is anybody, and the answer is not; but Terhune is the man to whom it would apply.

10

Q. Did you open another store, Mr. Messina

A. The landlord give me another store below, two stores below.

Q. And how many days was it before you opened the other store? A. It was two days before I opened that store.

20

Q. Yes. A. Because the night when the store fell, I was come to the market for a load of stuff, and I put it on the front of a house on Elm Avenue.

Q. Now, during the Christmas season, how much fruit and vegetables would you sell each week? A. Well, a couple of weeks before Christmas, you sell from \$9,000.00 a week.

Q. Yes. And how much profit would there be? A. About \$100.

Q. Yes. And at other times during the year, how much fruit and vegetables would you sell each week? A. From five and six.

30

Q. Five and six hundred? A. A hundred a week.

Q. And how much profit would you get from selling five or six hundred? A. From sixty-five to seventy.

Q. \$65 or \$70 a week? A. Yes.

Q. I think your wife worked in this store? A. Yes.

Q. And your daughter worked there? A. Yes.

40

Q. And you worked there? A. And I worked there.

William Messina—Cross.

Mr. West: Cross examine.

Cross Examination by Mr. Lloyd:

Q. Is Jennie Di Carolis your daughter? A. No.
She working there.

Q. Just working there? A. Yes.

10

Q. You opened this new store two days after the building collapsed, did I understand you to say?
A. Yes.

Q. Two days? A. Because there was still a sign on the door there, and I get another month's lease, and I give no key for the landlord, see? And the landlord come over the night that the store fell and says, "I try to get the key on Ikie Davis, and I give it to you," and I opened the store there.

20

Q. How do you arrive at this \$4,000 as the value of your stock? Will you give us the items, please?
A. Well, my lawyer got that.

Q. What is that? A. My lawyer got the list.

Mr. West: We have a list here, if you would like to have it, Mr. Lloyd.

Mr. Lloyd: Who made it up?

Mr. De Turck: He dictated it and his daughter took it down.

Mr. West: Are you willing to have it go in evidence? 30

Mr. Ward: We are willing.

Q. When did you make this list, Mr. Messina?
A. After the store fell.

Q. How long after? A. What?

Q. How long after? A. The day after.

Q. Who did you dictate this list to? A. My daughter.

40

William Messina—Cross.

Q. Where did you get this information from? A. From nobody.

Q. Just what you remembered? A. Just what I remembered, the stuff I got in the store there.

By the Court:

10 Q. How much of your stock did you recover from the cellar and sell later? A. Well, about seven or eight hundred dollars, I get back.

Q. Seven or eight hundred dollars.

The Court: Did you hear that?

Mr. Lloyd: I did not hear that.

The Court: Read it, Mr. Stenographer.
(Question and answer read.)

20 Mr. De Turck: There was no cellar in the building.

The Court: Well, whatever was referred to that the goods had fallen to.

Q. This includes everything, does it? A. (The witness nods head in the affirmative).

Mr. Lloyd: That is all right.

Mr. West: Have you any objection, Mr. Ward?

30 Mr. Ward: No.

The Court: What is the amount?

Mr. West: \$3,049.16.

By Mr. West:

Q. Now, does this list include everything, Mr.—
A. Everything what I lose in there.

40 Q. Everything that you lost? A. What I lost, yes. (Paper marked Exhibit P-9 in evidence.)

William Messina—Cross.

By Mr. Lloyd:

Q. But you got seven or eight hundred dollars out of salvage? A. I got about \$4,000 stock in there. I get about seven or eight back.

Q. This list is after taking in consideration the stuff that you saved? A. Yes. 10

Q. How did you save that stuff? A. What I save? Well, the canned goods.

Q. You went in the store? A. After they take the roof off. Some stuff was smashed, and everything, and I get it.

Q. How long after? A. I think they take the roof after three days.

Cross Examination by Mr. Foley:

Q. Mr. Messina, did you work at the store, too? A. Why, I work some part of the day, yes. 20

Q. What else did you do? Did you have any other occupation? A. Why, I go to the market.

Q. You were not around the building at all the day it fell, were you? A. What?

Q. You were not around the building the day it fell? A. I was there about half past eight in the morning, and I went to the market.

Q. You were there about half past eight? A. I was there in the morning. 30

Q. The men were not working at that time, were they? A. The men were working at that time, yes.

Q. Are you sure of that? A. Yes. The men come from ten minutes after seven; lots of time, I open the store, the men used to come in.

Q. You did not stand and watch the men working, did you? A. Well, some time, yes.

Q. Well, that day, you did not watch them, did 40

William Messina—Cross.

you? A. I watch them on Monday. I watch them that morning when I went to the market, before I went to the market, because I—

Q. You stopped and watched them before you went to the market? A. I put trees on the side, and I watch them.

10 Q. You did not say anything to Mr. Pico about what you observed, did you? A. No. I say nothing to Mr. Pico.

Q. You say that at that time that they were undermining your building? A. Yes.

Q. And you never said one single word about it to Mr. Pico, did you? A. No.

Mr. Foley: That is all.

20

By Mr. Lloyd:

Q. Just one more question, Mr. Messina. This list was made up two days after the accident, you say, after the building fell in? A. Yes.

Q. And it wasn't until three days after that you were allowed to go in and get the canned goods out? A. What?

30 Q. And three days after, you went in and got the canned goods out? A. Yes.

Q. And this was made up three days after? A. Two or three days.

Q. I see. And are there any canned goods shown on this list? A. What?

Q. Any canned goods shown on this list? A. Yes.

Q. The canned goods are on this list.

40

Mr. Lloyd: That is all.

William Messina—Cross.

By Mr. Foley:

Q. Mr. Messina, these prices represent what money you would have received from the—A. Those are the wholesale prices.

Q. —sale, the wholesale prices? A. The wholesale prices.

10

Mr. Foley: That is all.

The Witness: That is what I pay myself.

Mr. West: We submit to a voluntary nonsuit as to Chisholm & Weisgerber, and rest our case as to the other two defendants.

Mr. Lloyd: May it please the Court, I move for a nonsuit as to the owner, John W. Terhune, on the theory first, of an independent contractor. There has been no proof to show that Pico was the servant of John W. Terhune, or that Terhune exercised any supervision over him or any direction insofar as this particular work was concerned.

20

(Citing *McGuire v. Grant*, 25 N. J. L., 356.)

There is no proof that John W. Terhune was anything other than the owner, and that Pico was an independent contractor in this case; in fact, the case, it is pleaded a general contractor, paragraph three. There is no proof that Terhune had anything to do with this building, and his name has not been mentioned except in the opening by myself. There is no proof that the work was done in an unskillful manner. I submit, as far as the defendant John W. Terhune is concerned, there is no evidence whereby he

30

40

John W. Terhune—Direct.

can be held liable for the falling of this building.

The Court: Are you familiar with the case of Wegener v. Sugarman, 138 Atlantic, decided in October, 1927? (Reading from case.)

10

Now, this contract offered in evidence provides specifically for this work to be done. Now, whether it was done actively or not, that is, whether the supervision was active or not, or whether or not the negligence came about through the want of supervision, I think that is a question for the jury, and I will have to deny the motion.

20

Mr. Lloyd: Your Honor will allow me an exception.

Mr. Foley: I make a formal motion for a nonsuit at this time, your Honor.

The Court: I will deny your motion.

Mr. Foley: Exception.

THE DEFENDANTS' CASE.

30

JOHN W. TERHUNE, one of the defendants, sworn as a witness on his own behalf, testified as follows:

Direct Examination by Mr. Lloyd:

Q. Mr. Terhune, you are the owner of the premises on which this building was being erected? A. I am.

Q. And this is the contract that you made with Pico? A. Yes.

Q. And did you, at any time during the construction of this building, supervise any part of the construction?

40

John W. Terhune—Direct.

Mr. West: If your Honor please, we object on the ground it calls for a conclusion.

The Court: No. I will allow it as a fact. In other words, it is not attempting to change it. He just tells what he did.

Q. Did you go on while this excavation was taking place? Were you on the site? A. I was not. 10

Q. Did you see what Pico was doing? A. I did not.

Q. When construction was commenced on this building, or before it was commenced, did you give Pico the proper lines of the building? A. The surveyor did.

Q. Your surveyor? A. Yes. I believe—yes, that is right. 20

Q. You employed a surveyor to show him what the lines of the building were to be? A. That is right.

Q. And the lines of your lot? A. The lines of my lot.

Q. And did he have any authority from you at any time to excavate on any place other than your lot? A. No, he did not.

Q. And did you, at any time during this excavation, have any conversations with Pico relative to how he should do the excavating? A. I did not. 30

Q. And did you leave the construction of this building and the control of the work entirely up to Pico?

Mr. West: I object to that on the ground it is leading.

The Court: Sustained.

Mr. Lloyd: That is all. 40

John W. Terhune—Cross.

Cross Examination by Mr. West:

Q. You are the John W. Terhune who signed this contract? A. That is right.

Q. Yes. And you are the owner of the building? A. That is right.

10 Q. And familiar, more or less, with the construction of buildings? A. Somewhat.

Q. It is your business, partly? A. Not necessarily so.

Q. No. But in part? A. Well, I won't say that.

Q. You examined the specifications, I suppose, to see that they met with your approval? A. Well, Mr. Meisler made up the specifications.

20 Q. You did not look it over at all? You did not pay any attention to it? A. I believe I read it over.

Q. And you read the contract over, too, didn't you? A. Yes.

Q. And who was to supervise the work that was done by Pico? A. Why, I was, insofar as the specifications were concerned.

Q. Yes. Well, insofar as the contract was concerned, too, isn't that so, Mr. Terhune? A. If you feel that way about it.

30 Q. Well, it says so, doesn't it? "In a good workmanlike and substantial manner, under the direction of the said John W. Terhune." It says that, doesn't it? A. Where.

40 Q. The work was to be done agreeable to contracts and specifications made by Frederick Meisler, and signed by these parties hereto, in the form aforesaid, in a good workmanlike manner, and in a good workmanlike and substantial manner, under the direction of the said John W. Terhune. It says that, doesn't it? A. It says that in the contract.

John W. Terhune—Cross.

Q. And you were the John W. Terhune? A. That is right.

Q. And the building is now on the property, isn't it? A. Yes, it is.

Q. And your office is on Main Street, Hackensack? A. That is right.

Q. Probably a mile or a mile and a quarter from the building? A. About that.

Q. Yes. And I suppose you were more or less interested in seeing that the work progressed on that building? A. From time to time.

Q. Sure. And you went there from time to time, didn't you? A. Not very frequently. I went there occasionally.

Q. But you did go there from time to time, didn't you? A. Yes.

Q. And you went there to see how your building was progressing? A. Yes.

Q. Now, Mr. Pico was to do work, to supply all the labor and material, and to complete the building, except the plumbing and heating, wasn't he? A. That is right.

Q. The architect did not do any supervision? A. No.

Q. It was not part of the arrangement you had with him? A. No.

Q. And this is quite a considerable structure, isn't it? A. No, it is a simple building.

Q. A one-family, or a two-family? A. Two-family one story.

Q. Well, it is a building that cost \$11,100.00, isn't that right? A. That is right.

Q. And the architect did not supervise, did he? A. No.

Q. And who did supervise? A. Mr. Pico.

John W. Terhune—Cross.

- Q. I mean who, besides Pico? A. Nobody.
- Q. Do you mean to say that, in this contract that provides that the work was to be done under your supervision, and that you were to pay \$11,100.00 for, that you, a man in the building business, did not supervise the construction of that building? A. I am not in the building business.
- 10 Q. What? A. I am not in the building business.
- Q. Well, you built that building, didn't you? A. Yes, that is correct.
- Q. Then, as far as you are concerned, there wasn't any supervision, was there? A. Why, just as Mr. Pico put it up, I went over there from time to time.
- Q. I say, then there was a total lack of supervision on your part, wasn't there? A. Why, yes, there was.
- 20 Q. Yes. A. I didn't supervise it and tell him how to do the work.
- Q. Were you there the day it fell? A. After it fell, yes.
- Q. Yes. And were you there the day before? A. No.
- Q. How long before that had you been there? A. Why, I think I was going by there the morning that I saw the steam shovel there.
- 30 Q. Yes. Did you stop? A. They were just moving it in on the property.
- Q. Did you stop? A. Yes.
- Q. You stopped that day? A. Yes. I was going by there.
- Q. That was on Friday, wasn't it? A. It might have been Thursday or Friday.
- Q. Did you talk to anybody? A. Why, Mr. Pico
- 40 stood there. Yes, I did.

John W. Terhune—Cross.

Q. You did talk to Pico, didn't you? A. That morning, I bid him good morning.

Q. You said you were going by there. I guess, as a matter of fact, you went there to the building, isn't it, Mr. Terhune? A. No, it isn't.

Q. Where were you going? A. I was going to Leonia. 10

Q. How long did you stay there? A. Why, I don't believe I was there over five minutes.

Q. But you did talk to Pico? A. Yes; I did talk to Pico.

Q. And I suppose the thing you talked to Pico about was in connection with the work that he was doing for you, wasn't it? A. I said, "I see you are on the job." He said, "Yes".

Q. Well, as a matter of fact, this contract was only made five days before the collapse of the building, wasn't it? A. About the 15th of December, I think. 20

Q. The contract was made. And where was the contract made? A. Mr. Greenstone made it.

Q. And as early as the 16th or 17th of December, that is one or two days after it was made, you were going by there, and you stopped and had some talk with Pico? A. That is right.

Q. You were also there the day the building fell? A. Only after I received notice that it fell. 30

Q. After you received notice. And I suppose, from time to time, until the building was completed, you also went over there, didn't you? A. Well, I wouldn't say frequently. Occasionally, yes.

Q. Well, how often? A. I do not know. I would go there once in a couple of weeks, two or three weeks.

Q. Yes. 40

John W. Terhune—Re-direct.

Mr. West: That is all.

Re-direct Examination by Mr. Lloyd:

Q. Did you tell Pico how to do the work at all?
A. I did not. He was recommended as a competent contractor to me.

10

Q. Do I understand you to say that you first went to the site the day they were bringing the steam shovel onto the property? A. I was going by and I saw them putting the steam shovel on, and so I just stopped.

Q. No work had been done at that time? A. No. They were just moving it in.

20

Q. And the next time you were at the building was after the building had fallen? A. When the man told me that the building fell down over there.

Mr. Lloyd: That is all.

Re-cross Examination by Mr. West:

Q. Then, as I understand the situation, even though the contract provided that the work was to be done under your supervision and direction, there was a total lack of supervision and direction on your part; is that correct? A. I did not understand the contract that way.

30

Q. Now, as a matter of fact, there was a total lack of supervision on your part; is that correct? A. Yes, I did not supervise.

Mr. West: That is all.

Mr. Lloyd: That is all, Mr. Terhune.

Joseph G. Pico—Direct.

JOSEPH G. PICO, one of the defendants, sworn as a witness on his own behalf, testified as follows:

Direct Examination by Mr. Foley:

Q. What is your occupation, Mr. Pico? A. Builder; builder.

10

Q. Speak up loudly so that the jury can hear you. For how long have you been a building contractor? A. Approximately 18 years.

Q. How many years? A. 18.

Q. 18. You are the Joseph Pico who is being sued in this action, are you not? A. I am.

Q. Did you contract to put up a building for Mr. Terhune? A. I did.

Q. That building which is referred to in this— which has been referred to in this suit? A. I did.

20

Q. And do you recall when this accident occurred, when a store on the adjoining premises collapsed? A. Yes.

Q. What work were you doing at the time, Mr. Pico? A. At the time of the collapse, on the morning of the collapse, the thing that collapsed,—we started on a Monday morning; Monday morning I had five men do work there to dig a trench to put in the sub-foundation; that is on the Fort Lee side and the Elm Street side, on those two sides; we completed that on a Monday. On the Tuesday morning I got there with my men at approximately quarter to eight.

30

Q. What time? A. Quarter to eight. We start work at eight o'clock sharp. And as we started, we proceeded to dig the dirt, which I ordered left by the steam shovel, three feet of dirt, by the steam shovel, in sixteen-foot sections, making the building—

40

Joseph G. Pico—Direct.

Q. Just a minute. The steam shovel had been there at some previous time, had it not? A. Yes, sir.

Q. And that work was completed? A. Yes, sir.

10 Q. And then there was this ledge of three or four feet? A. Yes. There was three feet of dirt was left there by my orders to the steam shovel men; at no suggestion of any individual, I ordered that left there.

Q. Why did you order that? A. As a precaution.

20 Q. A precaution for what? A. Principally, on that time of the year, any builder that is building anything must protect other people's property, and if I had had the steam shovel take out all the dirt from that property, it would mean the frost would have got under that building and completely wrecked that building, without no frost whatsoever, so I had the dirt left there as a precaution against frost.

Q. And you planned to continue your work by hand, manual labor? A. Continue it by manual labor, spending additional money for my own protection.

30 Q. Now, where, in reference to the easterly line of Mr. Terhune's property was this other building? A. It was directly on the line.

Q. On the line? A. Within a half an inch.

Q. And you observed the foundation of that building, did you not? A. I did, after I commenced with the excavation.

40 Q. What kind of a foundation did it have? How deep was it, I should say? A. The foundation on the Fort Lee side, it was approximately eight inches below the ground.

Joseph G. Pico—Direct.

Q. Is that the side on which you were working?

A. On the Fort Lee end of the building was approximately eight inches; on the other end, in the back part of the building, it extended to about six inches below the ground.

Q. How high was this building next door? A. It was a one-story building, approximately fourteen feet high. 10

Q. And of what was this foundation made? A. The sub-foundation was made out of cinders.

Q. Out of cinders? A. Cinders and cement.

Q. And cement, did you say, sir? A. Yes.

Q. And then the building was erected right upon that? A. A brick wall was built right on top of that.

Q. Now Mr. Pico, did you, at any time in the course of your excavating, dig underneath that other building—A. Never. 20

Q. —at all? A. Never.

Q. Are you sure of that? A. Positive.

Q. Will you just describe to the Court and Jury how you did your work, that is to say, how close you got to the building, and what your side wall consisted of as you laid the bricks of it? A. In starting a building of any description where there is any doubts of any building not having a proper foundation, you take precautions of leaving two or three feet of dirt alongside of the building; and after that, we divide up into four sections, five sections, or six sections; it all depends on the line of the building, how long the building is; and, therefore, we take it down with pick and shovel so we don't jar the building. 30

Q. You take each section out with pick and shovel? A. Yes, sir; take each section out with 40

Joseph G. Pico—Direct.

pick and shovel; so that this section, we had planned to work in 16-foot sections all the way through; a 16-foot section, that is all that the men dug out; lay my trench wall underneath, and start building the blocks, build up that section before I take out any more dirt from the other section; that is the way the work was carried on all the way through.

10

Another point: as I explained to Mr. Terhune, as soon as the shovel got under the place that was going two inches away from the other property on the lower end, so I would not encroach on any individual's property, I put my wall slightly on a slope and bring it out directly on the top; that was perfectly agreeable, and I used my own judgment in that particular line.

20

Q. Now then, I understand you started your wall even on the line at the top? A. Even on the line at the top, but two inches underneath.

Q. And then slanting away from Messina's line as you went down? A. Yes. In towards—built two inches on our line.

Q. You slanted it away from Messina's house and towards Terhune's property, didn't you? A. Yes.

30

Q. Did you do that in this particular case? A. I did.

Q. And how much of this first section had you completed when this accident occurred? A. The first section was all excavated and it was—I had up about forty-two or forty-four blocks, which I was building up with it.

40

Q. Now Mr. Pico, is there any way in which you could have shored this property? A. It wasn't possible, whatever, that any builder can go to work

Joseph G. Pico—Direct.

and shore up that building in the condition that it was in.

Q. You are certain of that? A. I am positive.

Q. And I ask you now, having in mind your qualifications as a builder, whether or not in your opinion this building next door was built upon a sufficiently secure foundation? A. It was not. 10

Q. And you are certain that at no time you encroached upon the other—

Mr. West: I object to that as leading.

Q. I will ask you once again, did you at any time encroach upon the other man's property? A. I did not.

Q. In any degree whatsoever? A. None whatever. 20

Mr. Foley: Take the witness.

Cross Examination by Mr. West:

Q. Mr. Pico, it was your intention to build your wall right up to the line, wasn't it? A. At the top, above the grade level.

Q. At the top? A. Yes.

Q. Right up to Mr. Terhune's line? A. Right up to Mr. Terhune's line. 30

Q. So that, insofar as the easterly wall of Mr. Terhune's building is concerned, there would be no distance which would separate it from the line, would there? A. Yes, there would be a half inch distance we was going to leave between the walls.

Q. A minute ago you said you were going to build right up to the line, and now you say a half an inch. Now, which do you mean? A. Meaning that we was going to build directly up to the line, 40

Joseph G. Pico—Cross.

but going a half an inch away from the other wall.

Q. A half inch away from the other wall? A. Yes.

Q. Now, as I understand, the other wall was a half inch off the line? A. I beg your pardon?

10 Q. The other wall of the building which collapsed was a half inch off the line? A. I just directly went with the surveyor's blocks, just as the surveyor placed the blocks, I draw my line across.

Q. I did not ask you that. I asked you whether you testified on direct examination that the building occupied by Mr. Messina,—did you not say that it was a half inch off the line? A. Possibly, it might have been.

20 Q. Yes. And it was your intention to build your wall right up to the line, is that correct? A. Right up to our line, certainly.

Q. Did you use a footing course? A. Yes, I did.

Q. How much beyond the bottom of your wall did the footing course extend? A. Behind our line?

Q. Yes. A. Two inches inside of our line.

Q. Do you mean to say that the footing course did not extend as far as your brick work? A. Two inches inside of our line.

30 Q. Then do I understand that the footing course did not go as far as the wall? A. The footing course, there is evidence that it is two inches inside of our line.

Q. Now, I will ask you, do you mean by that that your footing course did not go as far to the east as the line of your wall? A. It did not.

Q. That was rather unusual, wasn't it? A. No, it is not.

40 Q. You build your footing course inside the wall,

Joseph G. Pico—Cross.

do you? A. You build your footing course according to the way you are putting up your wall.

Q. Yes. Now, what was the wall of this building to be built of? A. Blocks.

Q. Cement blocks? A. Correct.

Q. Now, to build a building directly to the line, right to the line, wouldn't it be absolutely necessary for you to do your excavating at least a little bit beyond that line? A. Not a bit. 10

Q. Are you sure of that? A. I am positive of that.

Q. You wouldn't have to go at least a half an inch beyond so as to get your bricks right up to the line? A. But I didn't build up to the line on the bottom.

Q. But you did on the top; you intended to; and your excavation was, at least in part, complete, wasn't it? A. The excavation was 16 foot. 20

Q. Yes. That was all excavated? A. That 16 foot was all excavated.

Q. At the time of the collapse? A. Correct.

Q. They did use picks and shovels, didn't they? A. They did.

Q. Sure. And your men used picks and shovels? A. They did.

Q. And that was all done after the steam shovel left, wasn't it? A. Yes. 30

Q. And you were more or less in a hurry, weren't you? A. Nothing in a hurry about it. Just to build up one section, that was for that one day, just to build up that one section.

Q. Well, Chief Winters was there, wasn't he? A. Chief Winters came there around nine-thirty.

Q. He had a talk with you, didn't he? A. He did. 40

Joseph G. Pico—Cross.

Q. And he talked to you about putting shoring up, didn't he? A. He did not.

Q. He did not? A. He did not.

Q. Are you sure about that? A. Positive.

Q. What did he say to you? A. I don't care—
what did he say to me?

10 Q. Yes. A. He just mentioned to me that there was a crack in the sidewalk.

Q. And didn't he say to you that you better put shoring up there, and didn't you get down and get your bricks, and say, "I will have it up in a minute"? A. That was the only salvation for that one building over there, to put it up.

Q. That was the salvation, wasn't it? A. That is true.

20 Q. And didn't you tell him that was the salvation? A. I told him.

Q. Before you told him that was the salvation, what did he say to you? A. I don't remember him saying anything to me.

Q. You do not remember? A. I don't remember him saying anything.

Q. You wouldn't deny that he spoke to you about shoring, would you? A. Well, I won't deny that he spoke to me about shoring that building up.

30 Q. Yes. It is a fact that you did not use any shoring, isn't it? A. Yes; it is a fact I did not use any shoring.

Q. Yes. It is a fact that you had a plumb line? A. That I had what? Yes, I had a plumb line, and I had a level.

Q. And it is a fact that you used the plumb line in the corner when the Chief was there? A. I used it in two places in the presence of the Chief.

40 Q. Not only in one place? A. In two places.

Joseph G. Pico—Cross.

Q. And was it exactly plumb? A. Two inches on our line.

Q. Two inches on your line. And your excavating was all complete? A. The 16 foot was complete.

Q. Well, did you use the plumb line in those 16 feet? A. In those 16 feet. 10

Q. And you were two inches off the line? A. Two inches on our side of the line.

Q. I thought you were building this wall directly to the line? A. The upper part.

Q. Now, I show you Exhibit P-1. You say you excavated how much? A. 16 foot.

Q. Will you explain to the jury how all this entire line along the building fell down? A. Yes. I will explain to the jury how the whole thing fell down. 20

Q. If you will, please. A. If I possibly go into the details from the start to the finish.

Q. Can you explain why all that dirt was out alongside of the wall there? A. Yes.

Q. You can explain that? A. Yes.

Q. How high had you gotten with your cement blocks at the time the wall collapsed? A. I was six courses high on the corner.

Q. How many courses would you have had to lay before you got up to the top of the ground? A. To get up to the top of the ground, approximately nine courses. 30

Q. And when had you started to lay those cement blocks? A. All that morning, the excavation was carried on that morning, and the blocks laid that morning.

Q. And the accident happened at what time? A. That I did not stop to look at the time; I could not tell you. 40

Joseph G. Pico—Cross.

Q. It was in the forenoon, wasn't it? A. It was in the forenoon.

Q. Where was this crack that you speak about?

A. The Chief drew my attention that there was a crack in the sidewalk.

10 Q. Yes. What did you do about that crack being there? A. Nothing I could do for it.

Q. I beg your pardon? A. There was nothing I could do for it.

Q. Nothing you could do for it? A. Nothing; absolutely nothing.

Mr. West: That is all.

Re-direct Examination by Mr. Foley:

20 Q. Mr. Pico, Mr. West asked you whether or not you can explain why this side wall had fallen away. Now, I will ask you to explain why that fell away. Just tell the jury. A. All right. Your Honor, and Gentlemen of the Jury, in order to explain why that wall fell down, I must go into details from the construction.

The Court: Now, just a minute; without making a speech about it, point out specifically why?

30 The Witness: Specifically why, the faulty construction of the sub-foundation of the building adjoining the property of John W. Terhune, not having enough support and not enough—having any binding of any kind, and being only six inches to eight inches below the ground, it was not below the frost line, and it was made out of cinders, that is, the sub-foundation, a sub-foundation
40 made out of cinders will not hold up to any

Joseph G. Pico—Re-direct.

extent or any degree, any brick wall, and as soon as the wall came down—that is, prior to the Chief telling me there was a crack into the thing, I thought there was something going wrong, and the building must start to cave in before that; otherwise, there would be no crack in front. In the morning at seven o'clock, when I went up there, the girl asked me for a plane to plane down the door. That showed that the building had already settled, and as a train went by, I heard the rumble of a train, the building went down. Naturally, if this corner lets down, the whole building will come down. That is all there is to explain about it.

10

20

Q. Now Mr. Pico, does this picture represent the condition of that wall, of course, extrinsic of this material that has fallen out of the house, as it was before the accident or not? A. Yes. It shows exactly as it was before the accident. If you look on the back here, you will notice there is four inches of concrete, you will note there is approximately eight inches of sub-foundation that was under there, underneath the sub-foundation; you will notice there was approximately eight inches of loose cinders under the sub-foundation.

30

Q. Before the accident, can you point out to us how much of that corner was exposed, as it is now? A. Just about to here (indicating); just about sixteen feet. Right up to here (indicating).

Q. Just show that to the jury, please. A. (Handing photograph to the jury).

Q. One other question, Mr. Pico. Was Mr. Mes-

40

Joseph G. Pico—Re-direct.

sina at the scene of the accident that morning? Before the accident occurred, did you see him there? A. I seen him there very early in the morning.

10 Q. What time? A. Well, I should judge he was there about quarter to eight, when I got there.

Mr. West: Just one or two questions I overlooked.

Mr. Lloyd: May I finish my cross?

Mr. West: I beg your pardon.

Cross Examination by Mr. Lloyd:

20 Q. Mr. Pico, what experience have you had in the handling or the building of buildings and the handling of concrete, and where did you get your experience which gives you the right to talk about cinders as you do? Will you tell us, please? A. My experience in that has been gotten from the United States Army, with the engineering department, for seven solid years, in the event of reinforced concrete and bridges.

Q. During what period of time? A. Three years prior to the war, and then four years during the war.

30 Q. And what was your—with what department were you connected? A. Engineering Department.

Q. With the Engineering Department? A. Yes, sir.

Q. And did you, in the Engineering Department, have direct charge and supervision of particular pieces of work involving the use of concrete and cinders? A. Yes. I was a master engineer.

40 Q. A master engineer in the United States Army? A. Yes, sir.

Joseph G. Pico—Cross.

Q. After that, where did you get your experience? A. After that, I got my experience from other jobs which I have conducted all throughout, including one apartment house, two or three apartment houses, and possibly eighteen to twenty, one or two-family houses.

Q. Yes. Now Mr. Pico, did Mr. Terhune supervise you in any way? A. Not what I would call direct supervision. 10

Q. Did he tell you how to do the work? A. No.

Q. Did he tell you how not to do the work? A. No.

Q. The engineer and the surveyor laid out the lines—A. He did.

Q. —whereon this building was to be erected? A. He did. 20

Q. And you stayed within those lines? A. Stayed within those lines.

Q. And those lines, you say, where you laid your footing course were two inches inside of the—

Mr. West: I object to that as leading.

The Court: It is cross examination.

Mr. West: I beg your pardon. I thought it was your witness.

Q. Two inches difference? A. Two inches difference. 30

Q. And this footing course was how wide? A. The footing course, it was eighteen inches wide on the top, that is, against the building, and twenty-four inches wide around the building.

Q. And the idea was, the footing course was two inches inside the line and was to bring your building up so that when it reached the top it would be on the line, is that correct? A. On the line. 40

Joseph G. Pico—Cross.

Q. So it would be on a slight angle? A. We fill in there, in case there is any apertures over there, we fill in with concrete.

Q. Is that generally accepted as good building practice? A. Yes.

10 Q. And is there any way in which that adjoining building could have been shored, Mr. Pico? A. None whatever.

Q. You say the foundation consisted of cinders and cement. Where was the cement; on top of the cinders? A. On top of the cinders.

Q. How much cement was on top of those cinders? A. Of the sub-foundation, or the cement floor of the building?

20 Q. Oh, I see. There was a cement floor there, and a sub-foundation? A. Under the sub-foundation was approximately eight inches of loose cinders.

Q. How thick was the cement floor? A. The cement floor was only three inches and a half thick.

Q. How was this adjoining building fastened on its extreme westerly—at its extreme easterly side? Was there a brick wall on that side? A. Yes, there was a brick wall on that side.

30 Q. Was that brick wall part of this building which collapsed? A. No, it was not.

Q. How was this building which collapsed fastened on its extreme easterly side? A. This building, according to my observation, was an addition that was put on the building after the other building was put on. They just dug holes and the beams were laid in there loose.

40 Q. In other words, it was just hooked on to the adjoining wall of the other building? A. The beams just laid in there without no anchor on; that is the trouble.

Joseph G. Pico—Cross.

Q. Was this a flat roof? A. A flat roof.

Q. You showed Mr. Winters, or Chief Winters, in more than one place by your plumb that day that you were not on the Messina property? A. I showed him on two different places, not one.

Mr. Lloyd: That is all.

10

Re-cross Examination by Mr. West:

Q. I think you have told us that you have erected several apartment houses and then connected with the government? A. Yes.

Q. During the period of the war? A. Right. And before the war.

Q. And that was part of your qualifications? A. That was part of my qualifications.

Q. To testify? A. Correct.

20

Q. And I suppose you took war construction into consideration, didn't you? A. Not necessarily.

Q. But you spoke about having four years in the army, didn't you? A. During the war, and three years prior to the war.

Q. Doing construction work? A. And three years prior to the war doing construction work.

Q. So it was part of the construction that was done during the war that you took into consideration in giving us your experience, wasn't it? A. Part of it, yes.

30

Q. And, aside from that, you have been more or less a successful contractor, haven't you? A. Not what I would call a successful contractor.

Q. But you have built apartment houses, haven't you? A. Yes.

Q. And you also said that Chief Winters said nothing about the shoring, is that correct? A. Not shoring, no shoring; shoring wasn't mentioned.

40

Joseph G. Pico—Re-cross.

Q. How about the conversation that Mr. Grant said he had with you, when he testified on the stand under oath this morning? A. I deny that.

Q. You deny that, too? A. I deny that, too.

10 Q. That is, you deny what Winters said, and you deny what Grant said? A. I instructed Mr. Grant to leave three feet of dirt there, not at his suggestion, but at my suggestion of leaving three feet of dirt there. He said "That is a good idea; we will leave that three feet of dirt."

Q. Did Mr. Grant say anything to you about leaving dirt there for safety's sake? A. I told Mr. Grant to leave three feet of dirt there for safety's sake.

20 Q. Did Mr. Grant advise you to do it? A. Mr. Grant did not advise me to do it.

Q. Now, you also have testified in relation to Mr. Terhune, "I would not call it direct supervision." What kind of supervision would you call it? A. Principally, Mr. Terhune left the job entirely into my hands.

Q. Well, principally, he did? A. Yes.

30 Q. What did he do outside of principally leaving it in your hands? A. Well, if he come around there once in a while, perhaps he would see something that wasn't done right, he might say something, and so forth; but he wasn't there very often.

Mr. West: That is all.

By Mr. Lloyd:

Q. Was this before or after the wall fell in? A. After the wall fell in.

40 Mr. Lloyd: I ask that the answer be stricken out.

William Henry Huff—Direct.

The Court: Why?

Mr. Lloyd: We are not interested in anything that happened after the wall fell.

The Court: The answer will remain; it is responsive.

We will adjourn until two o'clock.

10

(Recess.)

After Recess. 2:00 o'clock, P. M.

Mr. Foley: May it please the Court, I had Mr. Pico on the stand at one o'clock. I have no further questions.

20

Mr. West: Nothing further.

WILLIAM HENRY HUFF, sworn as a witness on behalf of the defendant Pico, testified as follows:

Direct Examination by Mr. Foley:

Q. What is your occupation, Mr. Huff? A. Civil engineer.

30

Q. And for how long have you been a civil engineer? A. 26 years.

Q. Did you make an examination and survey of a premises in which Mr. Messina formerly carried on a business, which premises were located on Elm Avenue near Fort Lee Road, or on Fort Lee Road near Elm Avenue, in Bogota? A. Yes, sir.

Q. And at whose request did you make that? A. Mr. Pico.

40

William Henry Huff—Direct.

Q. When you made that survey, did you ascertain whether or not Mr. Pico's excavation work there, or whatever excavation work was done, was made on Mr. Terhune's side of the line, or on Mr. Messina's side of the line? A. I did.

10 Q. And what did you find? A. I found that he was in his metes and bounds on his proper location within his lines.

Q. That is, it was within Mr. Terhune's side? A. Yes, sir.

Q. Did you find anything to indicate that during the course of that work, the man who made the excavation, whoever he was, dug over on the other side of the line and undermined the building? A. No, sir.

20 Q. Did you examine the premises carefully? A. I did.

Q. And you came to that conclusion? A. Yes, sir.

Mr. Foley: Take the witness.

Cross Examination by Mr. West:

Q. When did you make your examination? A. January the 7th, 1928.

30 Q. And that was some eighteen days after the collapse of the building, wasn't it? A. I know nothing about the building collapsing.

Q. Well, you did find an excavation there, didn't you? A. I did.

Q. Yes. Did you find a lot of debris down in the excavation? A. Any what?

Q. Any debris down in the excavation? A. I found an excavation there, certainly.

40 Q. All cleaned out, was it? A. Yes, sir.

William Henry Huff—Cross.

Q. The excavation, when you made your observation, did it look anything like the excavation that is shown on Exhibit P-6? A. No, sir.

Q. It did not look anything like that? A. It did not.

Q. And what happened between December the 20th and January 8th, did you say? A. 7th. 10

Mr. Foley: I object.

Q. You do not know, do you? A. No.

Q. You have no knowledge of that at all? A. No.

Q. But you do know that the premises that you made your examination of on January the 7th were not in the condition as shown by this exhibit? A. No, sir. 20

Q. And I suppose it differed in the respects that it was all clear in here, wasn't it? A. Yes. It was all cleared out, and the retaining walls were constructed.

Q. The retaining walls were then constructed, were they? A. Yes, sir.

Q. You do not know what the condition was on December the 20th, do you? A. No, I do not.

Q. And you cannot give us any information about that, can you? A. No, I do not. 30

Mr. West: That is all.

Cross Examination by Mr. Lloyd:

Q. Mr. Huff, were the footings in place when you made your examination of the premises? A. Yes. The footings were in.

Q. And of what material were those composed? A. Of good, rich concrete. 40

William Henry Huff—Cross.

Q. Concrete footings? A. Yes, sir.

Q. Set into the ground? A. Yes, sir.

Q. And what distance was there—what was the distance of the footings from the Messina line, the adjoining line on the east? A. Two and a half inches.

10

Q. Two and a half? A. Yes, sir.

Q. They were two and a half inches west of the Messina line? A. The Messina property is the property in question?

Q. That fell in, yes. A. Yes. Clear of that property line.

Q. On Terhune's own land? A. Yes, sir.

Mr. Lloyd: That is all.

20 By Mr. West:

Q. Were the footings a little wider than the wall, or were they narrower? A. No, they were the same, flush to the—

Q. Flush to the wall? A. Flush to the line; yes, sir.

Q. You went down, did you, on the—A. I did not take any soundings.

Q. On the east side of the wall? A. Yes, sir.

30

Q. How did you get down into there? A. Why, it was open. You can see right down.

Q. It was open, was it? A. Yes, sir.

Q. How much of an opening was there that you could see down? A. Well, the width of the opening, of the excavation, the clearance from the line, two and a half inches.

Q. And how deep did you look down to see that those footings were flush? A. Oh, about three and a half feet.

40

Q. What? A. Three and a half feet.

William Henry Huff—Cross.

Q. How deep was this excavation? A. How deep.

Q. Yes. A. About three and a half to four feet from the level of the sidewalk.

Q. It wasn't about seven feet? A. The cellar, I am speaking of the top of the concrete finish of the wall, the cellar line down to the bottom of your footing. 10

Q. Yes. A. About three and a half feet.

Q. How wide was the opening that you looked down through? A. About two and a half inches.

Q. You looked down three and a half feet? A. Yes, sir.

Q. And you were then able to determine that that footing was flush with the wall? A. Yes, sir.

Q. Any ground been filled in? A. No, sir.

Q. The ground was perfectly solid, was it? A. 20
Yes, sir; it was.

Q. You did not dig down at all? A. I did not take—no, I did not dig.

Q. How many places did you make examinations along that line? A. Along the line, on the forty-six foot line.

Q. All along the line? A. Well, on the corners.

Q. Oh, just on the corners? A. Yes, sir. At about some ten or twelve or fifteen feet back from the corners. I did not examine that. 30

Q. You did that, of course, in day time, I suppose? A. Yes, sir.

Q. Did you use any light, or anything at all, to—A. No, sir; ordinary day light.

Q. And you could see down this—A. Yes, sir.

Q. —three and a half feet, through an opening of two or three inches? A. Yes, sir.

Q. So as to be able to testify that those footings were flush with the wall? A. Positively. 40

William Henry Huff—Cross.

Q. At the points where you examined them? A. Where we examined them.

Q. Yes.

Mr. West: That is all.

10 Mr. Lloyd: That is all, Mr. Huff. The defendant rests.

Mr. Foley: The defendant rests.

Mr. West: No rebuttal.

20 Mr. Lloyd: If the Court please, I should like at this time to renew my motion for the direction of a verdict in favor of the defendant Terhune on the ground that it is conclusively shown here that Pico was an independent contractor, and that there has been no competent testimony showing an encroachment in any way on the adjoining property.

The Court: The motion will be denied.

Mr. Lloyd: Your Honor will allow me an exception?

Mr. Foley sums up the case to the Jury on behalf of the defendant Pico.

Mr. Lloyd sums up the case to the Jury on behalf of the defendant Terhune.

30 Mr. West sums up the case to the Jury on behalf of the plaintiffs.

The Court then charged the Jury as follows:

Charge.

CAFFREY, J. Ladies and Gentlemen of the Jury: There are two plaintiffs in this action, William Messina and Jennie Di Carolis. At the outset of the trial there were three defendants; now we have two by virtue of a voluntary nonsuit on the part of the plaintiffs with respect to the Chisholm Weisgerber Company. So you have before you as defendants John W. Terhune and Joseph Pico. 10

The plaintiff Messina is suing on the theory of property damage, and Miss Di Carolis is suing for personal injuries, both causes arising out of the same happening. The plaintiffs have charged the defendants with carelessness and negligence in the construction of a wall adjoining the premises of Mr. Messina's store on the south side of Fort Lee Road. In addition to that, they have claimed a violation of our State law in that due notice was not given nor were proper supports provided to protect the building of Mr. Messina, and, thirdly, they predicate their action upon a violation of a municipal ordinance of the Borough of Bogota. 20

There is no question that this building fell, but there is a conflict of evidence as to how it fell, and the causes that brought it about. Mr. Pico said that he built or, at least, he excavated within two feet or some inches away from the property line of the building occupied by Mr. Messina. Mr. Messina, on the other hand, corroborated by another witness, at least, said that Pico dug at least five or six inches beyond the line and under the Messina building; and we have in this case, too, evidence of Chief of Police Winters who testified that on the morning of the collapse he talked to Pico and asked him to shore up the building, and that Pico said it was all right; and he said at that time 30 40

Charge.

he was digging dirt, and also placing in some blocks, the exact language I am not attempting to recall. I think Miss Di Carolis said that she, too, saw them digging with a pick and shovel.

10 Now, Pico was the general contractor and, in the absence of any other proof in the case, of course, Mr. Terhune would be excused. However, the Supreme Court has said that an owner of a lot who employs a contractor to excavate on his land is liable for trespass committed by the contractor on adjoining lands when committed under his direction and supervision.

20 Now, as to the measure of Mr. Terhune's liability under his contract with Mr. Pico, of course, that is for you to decide from all of the evidence in the case. I spoke to you with reference to a State law. The application of this law which I am about to read to you will depend upon your findings of fact. Now, there is evidence in the case from some of the witnesses that the excavation was to a depth of seven feet, four inches, and there is some evidence that there was some digging. Now, whether or not eight feet was dug or not, I cannot say, and in view of the affirmative testimony on one side and testimony as to other diggings, of course, before

30 you will apply the rule concerning notice you must first decide that the depth as provided for by the statute has been done.

Referring to this Act as stated, it provides that whenever any excavation hereafter commenced, for building or other purposes, on any lot or piece of land, shall be intended to be carried to the depth of more than eight feet below the curb or grade of the street, and there shall be any party or other

40 wall, wholly or partly on adjoining land, and stand-

Charge.

ing upon or near the boundary lines of such lot, the person causing such excavation to be made, if afforded the necessary license to enter on the adjoining land, and not otherwise, shall at all times, from the commencement until the completion of such excavation, at his own expense, preserve such wall from injury, and so support the same by a proper foundation that it shall remain as stable as before such excavation was commenced." 10

Now, with reference to that, if you find that the facts warrant the application of this statute, that rule is absolute; we are not at all concerned with whether or not Mr. Pico acted reasonably or not. The statute is absolute on that and calls for a strict following of this language.

The plaintiffs, in addition to that claim, offer in evidence a certified copy of the municipal ordinances of the Borough of Bogota. Section 1 of Article 7 provides: 20

"All excavations for buildings and other work shall be properly guarded and protected so as to prevent same from becoming dangerous to life, limb or adjoining property."

While this is not the mandate of our State Legislature, still the Borough of Bogota is an arm of the State, and in the power given to that municipality that ordinance has the same effect as any other law. Now, it was evidently contemplated that this section as passed was to protect not only the public but to protect and preserve adjoining properties. So, therefore, you may consider whether or not in the light of all of the evidence the statute was violated. If the statute was violated, and it was made to meet a condition such as this, 30 40

Charge.

and the violation was the proximate cause of the injuries sustained, then, of course, Mr. Messina would be entitled to be compensated on the basis of his loss. And the same thing, too, applies to the injuries sustained by the young lady.

10

The defendant, as I said before, denies the accident as resulting from his course of conduct, and in response to a question offered or asked of him he said that the building caved in not as a result of any act of his, that the building fell down as a result of improper foundations. I think he said, too, that it was made up of cinders and some other composition, and that a train went by and about that time there was a collapse. So, you see, you must decide from all of the evidence as to the liability in this case.

20

Now, if you conclude that the plaintiffs have failed in making out a cause of action against the defendants, your verdict will be no cause of action; but, on the other hand, if you are satisfied from the evidence of the liability of the defendants or either of them, then you are concerned with the question of damages.

30

Miss Di Carolis claims personal injury. I think she said she suffered an injury to her head; that when the building collapsed, she ran out and fell over something, and then she was struck by a door, and she sustained an injury to her head; she suffered an injury to her back, and there were some other injuries; she lost two weeks' work, and she was getting then \$12.00 a week. I think, too, she said that she was laid up for some three months. However, as to the injuries of the young lady, there is no medical testimony and we have not had the benefit of a professional diagnosis.

40

Charge.

Messina himself claims loss of profit. He said that his store was stocked to the extent of \$4,000.00 that he salvaged canned goods amounting to some seven or eight hundred dollars; and, by consent of counsel, there has been offered in evidence a memorandum, or several memoranda, I believe, indicating the goods that were lost; so you have the benefit of that to examine. 10

Now, you are the sole judges of the credibility of witnesses. That not only applies to the evidence with respect to the liability itself, but you, too, have a right to consider the value of the testimony of Mr. Messina with relation to his loss. This case, as I see it, in view of the conflicting testimony, is essentially one of fact, and in my reference to the testimony I want it understood that I have made no effort to cover all of the testimony, and if I have misstated any of the evidence, I do not want you to follow the Court's mention of it, but you must rely entirely on your own recollections; nor do I wish it understood that any particular reference to the testimony warrants you putting more emphasis on that. As I said before, you must decide this case entirely upon the evidence, and by that I mean all of the evidence. In addition to the oral testimony, you have the benefit of some photographs, and you may take the entire case and give it your best judgment. 20 30

(Officer sworn and jury retired at 3:20 P. M.)

Mr. Foley: The Court failed to charge the burden of proof, that it was the duty of the plaintiffs to establish the negligence of the defendant by a fair preponderance of evidence. In fact, I should like to request the Court to charge, at this time, the duty is upon the plaintiff to establish the negli- 40

Charge.

gence of the defendant by the fair preponderance of the evidence.

The Court: All right. Bring the Jury back.
(The Jury returned to the Court room.)

10 The Court: Counsel has requested that I call you back to charge you that the burden of proof to establish the plaintiffs' claim rests upon the plaintiffs. I so charge you.

Anything further?

Mr. Foley: I have several other exceptions.

The Court: Oh, well, you may take exceptions; but I mean do you want me to charge the jury any further while they are here?

20 Mr. Foley: I still feel that your Honor does not state that they have to establish it by a fair preponderance of the evidence.

The Court: Well, they are to establish it by a fair preponderance of evidence. If you want that, you may have that also; that may be included in my other statement.

You may retire.

(The Jury again retired.)

30 Mr. Foley: I take an exception to that portion of the Court's charge wherein the Court submits the question to the jury of whether or not the defendant dug below eight feet, on the ground that there is no evidence that he did dig below eight feet.

The Court: You may have an exception.

Mr. Foley: Also, I further take exception to that particular part of the charge I have just referred to on the ground that there is no claim in the complaint that we violated the statute in that regard, or that particular statute.

40 I take exception to that portion of the Court's

Charge.

charge wherein the Court stated, in effect, that the violation of the ordinance of the town or Borough of Bogota would create the same liability upon the defendant as would—

The Court: I do not believe I said that. I said if they found that the violation was the proximate cause. You may have an exception if you want it.

10

Mr. Foley: That the effect of that violation would be the same as if the statute had been violated.

The Court: All right.

Mr. Lloyd: Now representing the defendant Terhune, I take the same exceptions requested by Mr. Foley, which are as follows:

1. I take an exception to that portion of the Court's charge wherein the Court submits the question to the jury of whether or not the defendant dug below eight feet, on the ground that there is no evidence that he did dig below eight feet.

20

2. Also, I further take exception to that particular part of the charge I have just referred to on the ground that there is no claim in the complaint that we violated the statute in that regard, or that particular statute.

30

3. I take exception to that portion of the Court's charge wherein the Court stated, in effect, that the violation of the ordinance of the town or borough of Bogota would create the same liability upon the defendant, or that the effect of that violation would be the same as if the statute had been violated.

The Court: All right. You may have your exceptions.

40

Rule for Judgment.

10 This action having been tried before Judge Edwin C. Caffrey with a jury in the presence of counsel of the respective parties on February 4th, 1929 and the jury having returned a verdict in favor of the plaintiff, William Messina for the sum of \$2,000.00 and in favor of the plaintiff, Jennie Di Carolis for the sum of \$250.00 damages.

It is ordered that judgment final be entered in favor of the plaintiff, William Messina and against the defendants, John W. Terhune and Joseph Pico for the sum of \$2,000.00 and in favor of the plaintiff, Jennie Di Carolis and against the defendants, John W. Terhune and Joseph Pico for the sum of \$250.00 and the plaintiffs' costs to be taxed.

20 On motion of

DE TURCK & WEST,
Attorneys of Plaintiffs.

30

40

Judgment.

BERGEN COUNTY CIRCUIT COURT.

WILLIAM MESSINA, JENNIE DI
CAROLIS, by her next friend
ANGELINA DI CAROLIS,

vs.

JOHN W. TERHUNE and
JOSEPH PICO.

Action
at Law.

10

DE TURCK & WEST,
Attorney for Plaintiff.

Amount of damages in favor of William Messina
\$2,000. And in favor of Jennie Di Carolis \$250. 20
And costs \$76.83.

Judgment signed and entered Feb. 8, 1929, at
11 A. M.

30

40

BERKELEY COUNTY, WEST VIRGINIA

10

20

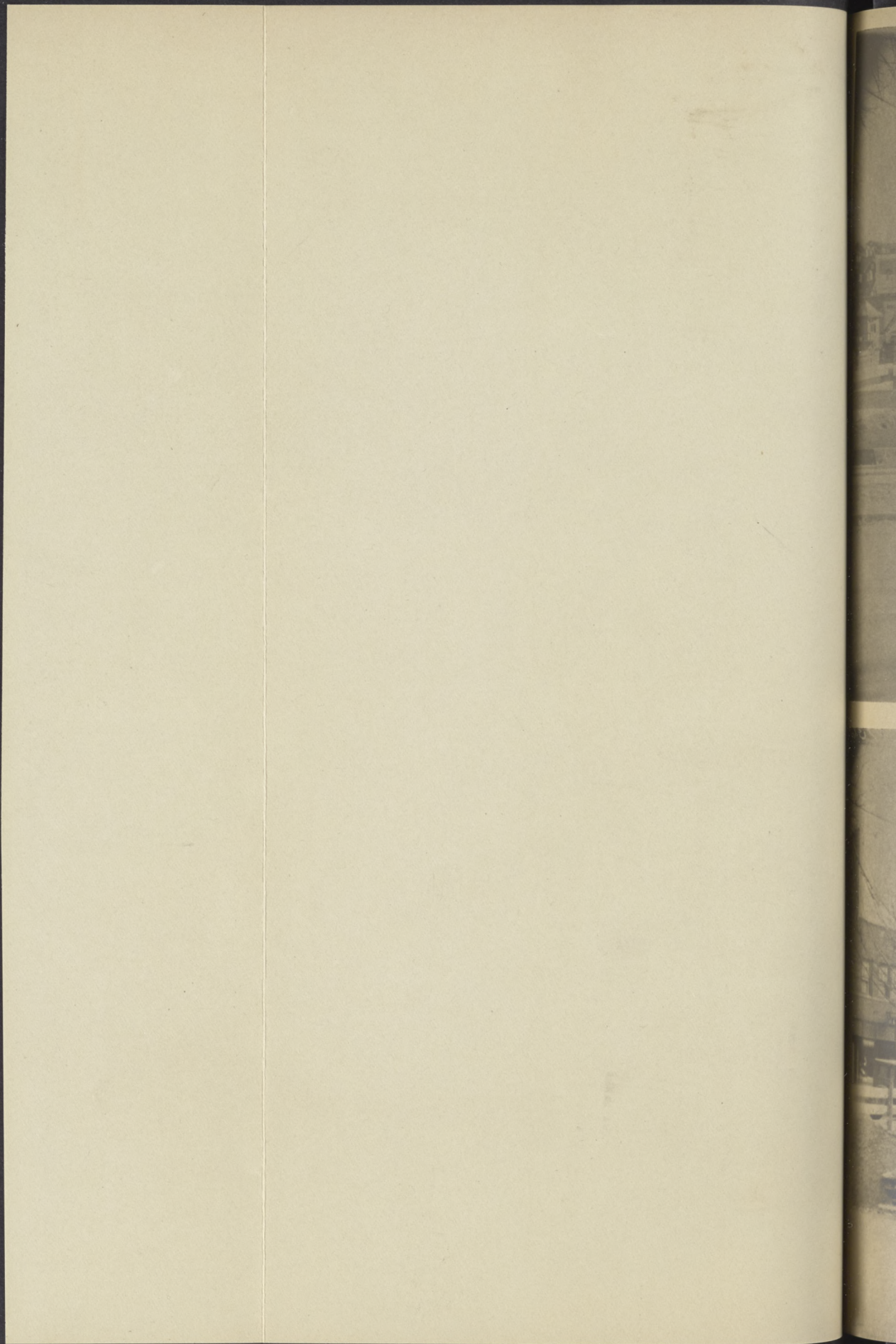
30

40



Plaintiff's Exhibit 2.



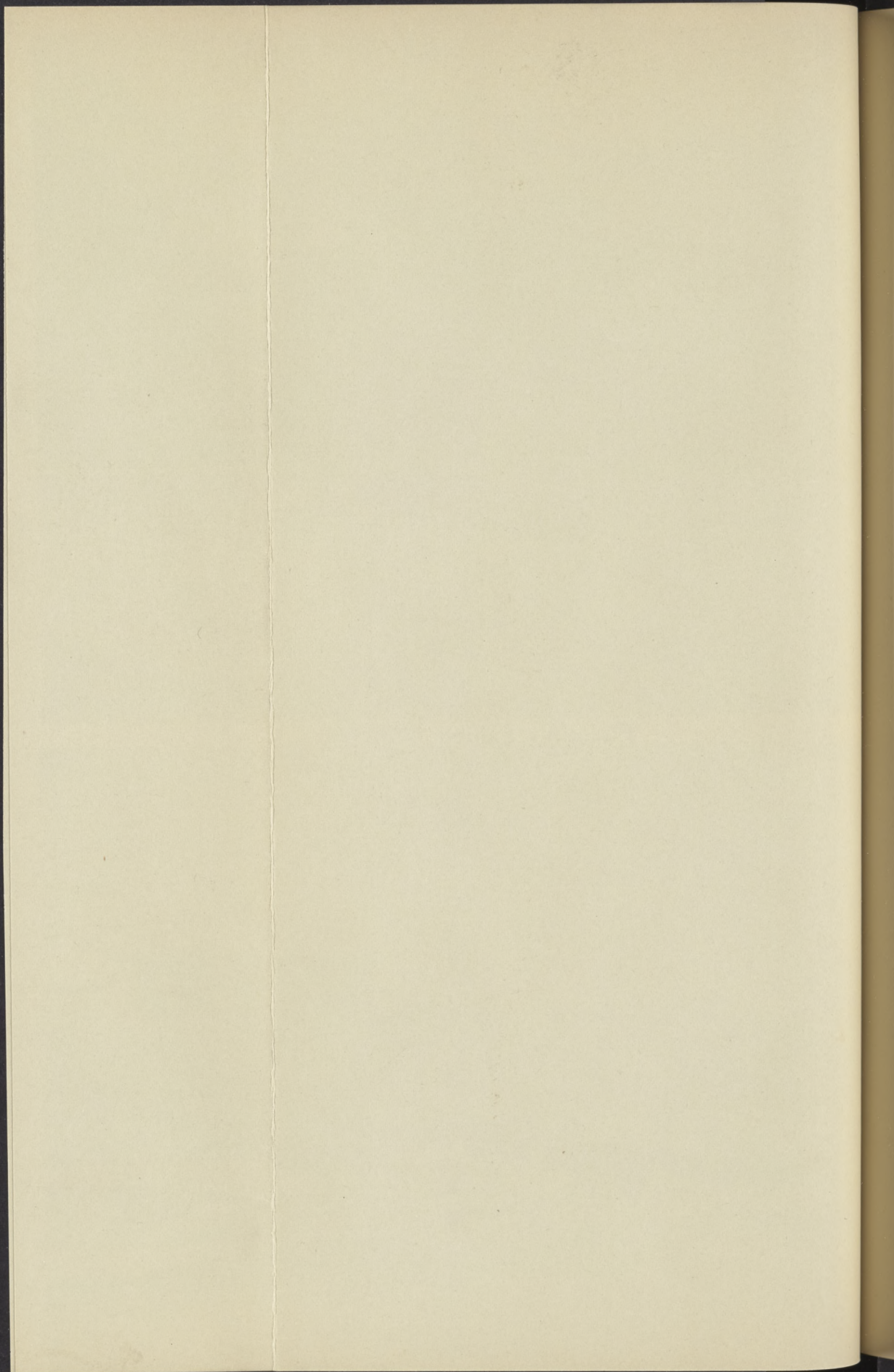


Plaintiff's Exhibit 3



Plaintiff's Exhibit 4





10

20

30

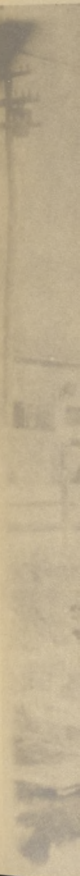
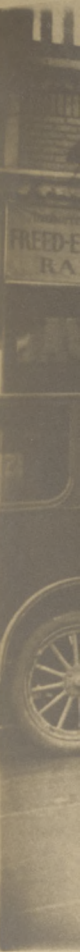
40

10

20

30

40





Plaintiff's Exhibit 6.



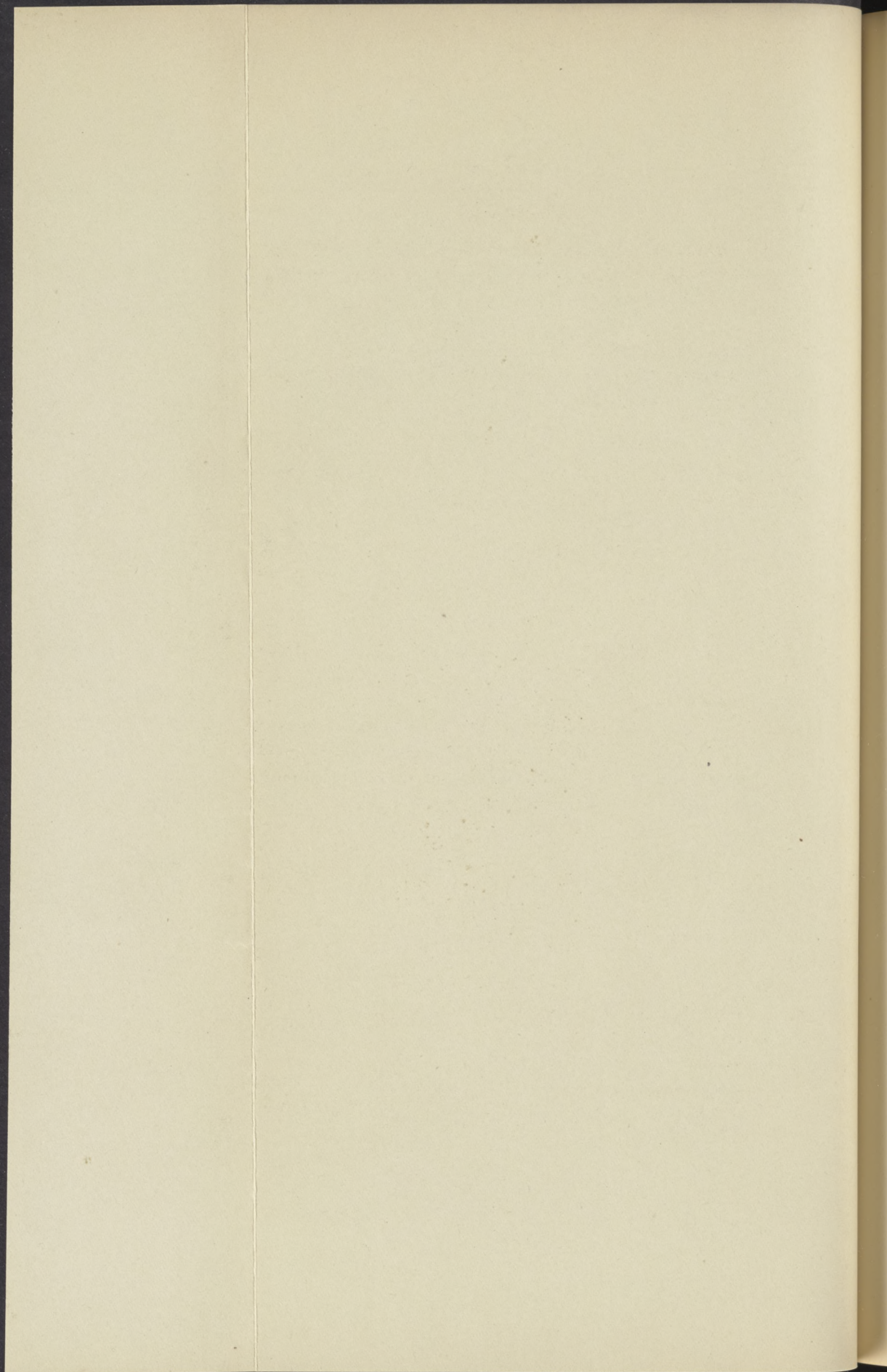


Exhibit P7.

ARTICLES OF AGREEMENT, Made the fifteenth day of December, One Thousand Nine Hundred twenty-seven.

BETWEEN John W. Terhune of the City of Hackensack, County of Bergen and State of New Jersey party of the first part;

10

AND Joseph G. Pico of the Borough of North Arlington, County of Hudson and State of New Jersey, party of the second part;

WITNESSETH, FIRST, The said party of the second part does hereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said party of the first part; his executors, administrators or assigns, that he, Joseph G. Pico said party of the second part, his heirs, executors or administrators shall and will, for the consideration hereinafter mentioned, on or before the April 1st, 1928 well and sufficiently erect and finish the new Building to be located on the southeast corner of Fort Lee Road and Elm Avenue in the Borough of Bogota, Bergen County, New Jersey, consisting of a one (1) story brick building of which there shall be therein five (5) separate stores, agreeably to the Drawings and Specifications made by Frederick Meisler, Architect, and signed by the said parties hereto within the time aforesaid, in a good workmanlike and substantial manner, under the direction of the said John W. Terhune to be testified by a writing, or certificate, under the hand of the said John W. Terhune and also, shall and will find and provide such good, proper and sufficient materials of all kinds what-

20

30

40

Exhibit P7.

soever, as shall be proper and sufficient for the completing and finishing all the work and supply all the material and labor necessary for the completion of the said building excepting the plumbing and heating, and other works of the said Building mentioned in the plans and specification for the sum of Eleven thousand one hundred (\$11,100.00) Dollars,

10

AND the said party of the first part, does hereby for himself, his heirs, executors and administrators, covenant, promise and agree, to and with the said party of the second part, his executors and administrators, that he the said party of the first part, his executors or administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified, well and truly pay, or cause to be paid unto the said party of the second part, his executors, administrators or assigns, the sum of Eleven thousand one hundred (\$11,100.00) Dollars, lawful money of the United States of America, in manner following:

20

	When first floor beams are on	\$1,500.00
	When second floor beams are on	2,500.00
30	When roof is on, roughing and all plaster for the walls and metal ceilings are on	3,000.00
	When building is finished and completed	4,100.00

30

It is agreed between the parties hereto that in the event the said builder is restrained by the court from going ahead with the erection and construction of the aforementioned building; the time that the said builder is restrained shall be added to and

40

Exhibit P7.

extend the time of the completion of the said building; but in the event the restraint goes over a period of thirty (30) days then either party can cancel this agreement by written notice to the other party and that the builder shall be entitled to the following paymens:

If foundation is excavated only	\$	600.00	10
If foundation footings additional		112.00	
If foundation is up to grade additional..		488.00	
		\$1,200.00	

PROVIDED, That in each of the said cases a certificate shall be produced, signed by the said
to the effect that the work is done in accordance with said Drawings and Specifications, said certificate, however, in no way lessening the total and final responsibility of the Contractor; neither shall it exempt the Contractor from liability to replace work if it be afterwards discovered to have been done ill or not according to the Drawings and Specifications either in execution or materials.

AND IT IS HEREBY FURTHER AGREED BY AND BETWEEN THE SAID PARTIES:

FIRST.—The Architect shall furnish to the Contractor all drawings or explanations of drawings as may be necessary to illustrate the work to be done, and the Contractor shall conform to the same as part of this contract, so far as they may be consistent with the original Drawings and Specifications, and all plans must be furnished to the Contractor at the time of signing contract.

Exhibit P7.

SECOND.—The Contractor, at his own proper costs and charges, to provide all manner of materials and labor, of every description, for the due performance of the work as per Specifications herewith submitted.

10 THIRD.—Should the Owner at any time during the progress of the said BUILDING request any alterations, deviations, additions or omissions from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation.

20 FOURTH.—Should the Contractor, at any time during the progress of said work, refuse or neglect to supply a sufficiency of materials or workmen, the Owner shall have power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract.

30 FIFTH.—Should any dispute arise respecting the true construction or meaning of the Drawings or Specifications, the same shall be decided by Frederick Meisler and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or of the work omitted, the same shall be valued by two competent persons—one employed by the Owner, and the other by the Contractor, and those two shall have power to name an umpire, whose decision shall be

40 binding on all parties.

Exhibit P7.

SIXTH.—The Owner shall not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the same.

10

EIGHTH.—The Owner will insure the building in the joint names and interest of and the Contractor against loss or damage by fire, in such sums as may from time to time be agreed upon with the Contractor to cover work and materials used in the building and around the premises, and the policies to be made payable to Owner and Contractor, as their interests may appear. The Contractor shall see to it that this insurance is satisfactorily effected.

20

NINTH.—All work and materials delivered on the premises to form part of the work, whether actually incorporated therein or not, are to be considered the property of the Contractor until the same shall have been paid for, in accordance with the terms hereof; unless said Contractor shall, after receiving a payment thereon, have refused to proceed with the work in accordance with the terms of this contract. And the Contractor shall have free access at all reasonable times to the said material and to the said work until the same shall have been fully paid for as provided for by this contract. The Contractor shall remove all surplus material after the completion of the work.

30

TENTH.—Neither the Contractor shall, without the written consent of the Owner,

40

Exhibit P7.

have authority to vary, alter, amend or change this contract, or any of the Plans or Specifications herein referred to.

10 ELEVENTH.—Whenever building permits shall be required by any municipality, or be necessary under any law, ordinance or other regulation, to the erection, alteration or repair of any building, the same shall be procured by the owner.

20 TWELFTH.—That the said Contractor shall produce and deliver to the Owner the release of all persons who may then have furnished materials or done work on said building, who may have a lien on such building and the land whereon the same is erected, releasing their lien on said building and the land whereon the same is erected, with an affidavit by said Contractor thereto annexed, that no person or persons other than those named in said release have any lien upon such building or land for work done or materials furnished for the erection thereof according to the statute in such case made and provided.

30 The contractor agrees to save the owner free and harmless from any claim or claims that may arise due to any injury or damages to any person or persons or to the said building or any buildings during the time that the said building is under the erection, construction and control of the said contractor and it is understood and agreed that no responsibility of any sort, relative to any accidents or damage that may be sustained or incurred during the construction and erection of this building shall fall on the owner but that the responsibility for same shall be taken care of by the said contractor.

40

Exhibit P7.

Words erased before signing

IN WITNESS WHEREOF, the said parties to these presents have set their hands and seals the day and year above written.

Signed, Sealed and Delivered } 10
in the presence of }

JOHN W. TERHUNE (Seal)

JOSEPH G. PICO (Seal)

Exhibit P8.

BUILDING CODE OF THE BOROUGH OF BOGOTA. 20

ARTICLE VII

EXCAVATIONS.

1. All excavations for buildings and other work shall be properly guarded and protected so as to prevent same from becoming dangerous to life, limb or adjoining property.

30

40

Notice of Appeal.

To DeTurck and West, Attorneys for Plaintiffs:

TAKE NOTICE that the defendant John W. Terhune appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

10

MORRISON, LLOYD & MORRISON,
Attorneys for Defendant,
John W. Terhune.

Service of the foregoing notice of appeal is hereby acknowledged this 6th day of March, 1929.

DETURCK & WEST,
Attorneys of Plaintiffs.

20

30

40

Grounds of Appeal

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM MESSINA and JENNIE
DI CAROLIS, by her next friend,
ANGELINA DI CAROLIS,

Plaintiffs-Respondents,

vs.

JOHN W. TERHUNE,

Defendant-Appellant.

On Appeal
from Cir-
cuit Court.

10

The appellant states the following grounds of appeal:

1. Because the trial court erred in denying a motion for a non-suit made at the close of the plaintiffs' case in behalf of the defendant John W. Terhune, on the ground that there had been no proofs adduced that the collapse of the building by which plaintiffs were injured or damaged resulted from any act of said defendant, John W. Terhune, or of any other person for whose acts he was answerable, to which ruling an exception was taken.

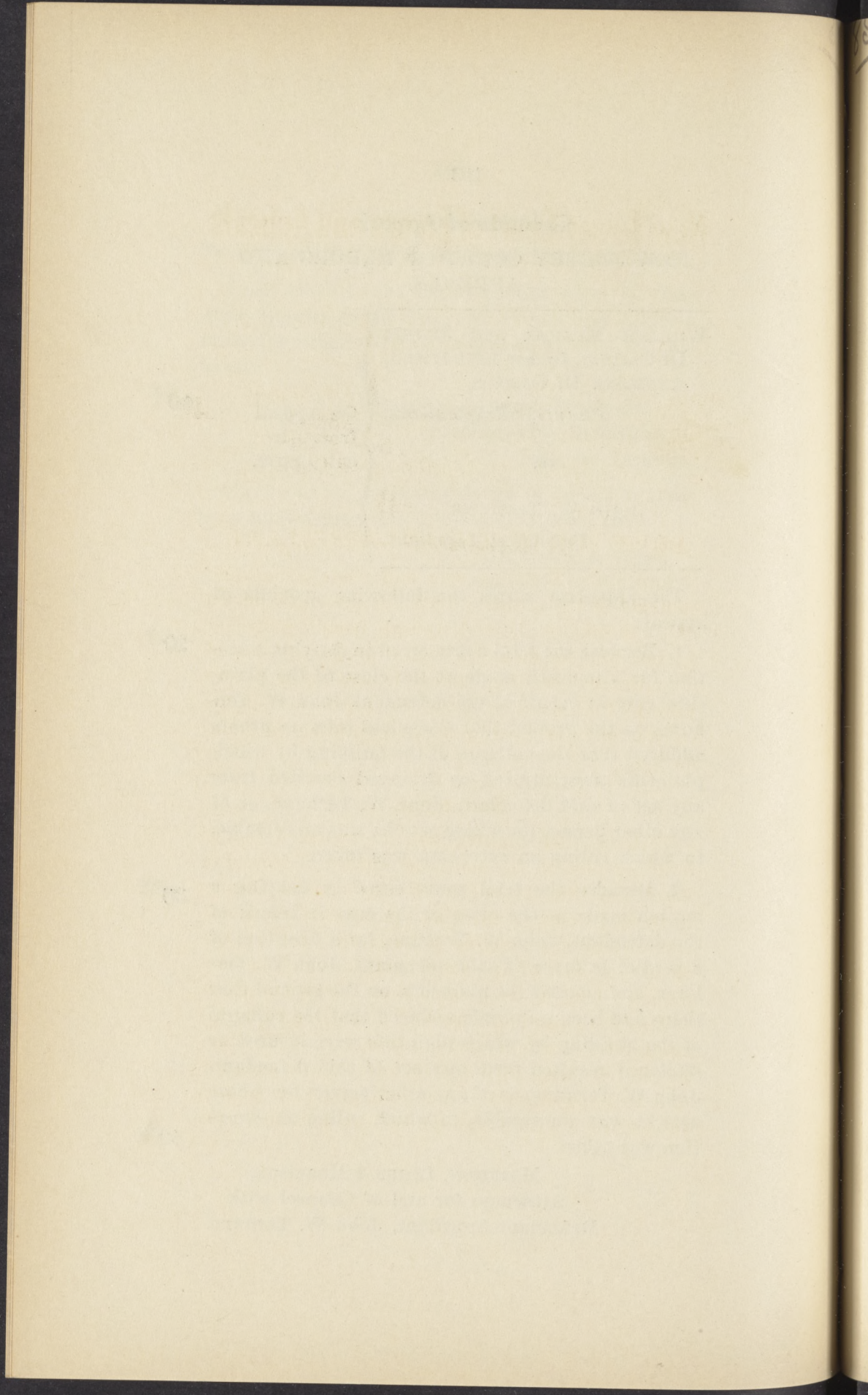
20

2. Because the trial court erred in denying a motion made at the close of the case in behalf of the defendant, John W. Terhune, for a direction of a verdict in favor of said defendant, John W. Terhune, and against the plaintiffs, on the ground that there had been no proofs adduced that the collapse of the building by which plaintiffs were injured or damaged resulted from any act of said defendant, John W. Terhune, or of any other person for whose acts he was answerable, to which ruling an exception was taken.

30

40

MORRISON, LLOYD & MORRISON,
Attorneys for and of Counsel with
Defendant-Appellant, John W. Terhune.



New Jersey Court of Errors and Appeals

WILLIAM MESSINA, et als.,
Plaintiffs-Respondents,

vs.

JOHN W. TERHUNE,
Defendant-Appellant.

On Appeal.

BRIEF FOR DEFENDANT-APPELLANT.

Appellant, Terhune, who had made a building contract in the ordinary form for the construction of a building on his land, appeals from a judgment against him for damages caused by the collapse of an adjacent building, which it was open to the jury to find resulted from the negligence of his contractor in excavating for and building the foundation.

Statement.

Terhune (defendant-appellant) owned a vacant building plot on the southeast corner of Fort Lee Road and Elm Avenue in the Borough of Bogota in Bergen County. Messina (plaintiff-respondent) was a tenant occupying a building on Fort Lee Road next east of appellant's lot, in which he conducted a fruit and vegetable store. Miss DiCarolus (plaintiff-respondent) worked in this store as his employee. Terhune made a contract (P7, Case, pp. 95-100) with Pico (defendant) for the erection of a building on said vacant plot, and Pico made a sub-contract with Chisholm-Weisgerber, Inc. (de-

fendant) to excavate the cellar for the new building.

The west wall of the building occupied by Messina was on or near the line between the two properties, and the east wall of the new building was to be built on or near this line. Chisholm-Weisgerber, Inc., made the cellar excavation with a steam shovel, but did not excavate within about four feet of this boundary line. Pico and his men with picks and shovels, took out part of this soil and began to build the easterly foundation wall of the new building at the northerly end thereof. While they were doing this, the building occupied by Messina collapsed into the excavation as a result of which Messina was damaged by the loss of part of his stock of goods and Miss Di Carolis was hurt.

They sued the owner, contract and sub-contractor. There was a voluntary non-suit as to Chisholm-Weisgerber, Inc., and a verdict against the owner and contractor. The owner appeals.

Extracts of Pertinent Testimony.

The testimony so far as it relates to the appellant, is as follows:

He made the building contract, Exhibit P 7 (Case, pp. 95-100).

He did not supervise or direct the work. The testimony on this point is as follows:

Mr. Grant, witness for the plaintiffs:

“Q. Mr. Grant, these men who were working along the easterly side of that excavation, were they in the employ of Chisholm & Weisgerber or not? A. No, they were not.

Q. Yes. And under whose direction were they working? A. Under Mr. Pico's” (Case, p. 30, L. 20-26).

Mr. Terhune (defendant-appellant) :

“Direct Examination by Mr. Lloyd :

Q. Mr. Terhune, you are the owner of the premises on which this building was being erected? A. I am.

Q. And this is the contract that you made with Pico? A. Yes.

Q. And did you, at any time during the construction of this building, supervise any part of the construction?

Mr. West: If your Honor please, we object on the ground it calls for a conclusion.

The Court: No. I will allow it as a fact. In other words, it is not attempting to change it. He just tells what he did.

Q. Did you go on while this excavation was taking place? Were you on the site? A. I was not.

Q. Did you see what Pico was doing? A. I did not.

Q. When construction was commenced on this building, or before it was commenced, did you give Pico the proper lines of the building? A. The surveyor did.

Q. Your surveyor? A. Yes. I believe—yes, that is right.

Q. You employed a surveyor to show him what the lines of the building were to be? A. That is right.

Q. And the lines of your lot? A. The lines of my lot.

Q. And did he have any authority from you at any time to excavate on any place other than your lot? A. No, he did not.

Q. And did you, at any time during this excavation, have any conversations with Pico relative to how he should do the excavating? A. I did not" (Case, p. 54, lines 30-40; p. 55, lines 1-32).

"Cross Examination by Mr. West:

Q. You are the John W. Terhune who signed this contract? A. That is right.

Q. Yes. And you are the owner of the building? A. That is right.

Q. And familiar, more or less, with the construction of buildings? A. Somewhat.

Q. It is your business, partly? A. Not necessarily so.

Q. No. But in part? A. Well, I won't say that.

Q. You examined the specifications, I suppose, to see that they met with your approval? A. Well, Mr. Meisler made up the specifications.

Q. You did not look it over at all? You did not pay any attention to it? A. I believe I read it over.

Q. And you read the contract over, too, didn't you? A. Yes.

Q. And who was to supervise the work that was done by Pico? A. Why, I was, insofar as the specifications were concerned.

Q. Yes. Well, insofar as the contract was concerned, too, isn't that so, Mr. Terhune? A. If you feel that way about it.

Q. Well, it says so, doesn't it? 'In a good workmanlike and substantial manner, under the direction of the said John W. Terhune.' It says that doesn't it? A. Where?

Q. The work was to be done agreeable to contracts and specifications made by Frederick Meisler, and signed by these parties hereto, in the form aforesaid, in a good workmanlike manner, and in a good workmanlike and substantial manner, under the direction of the said John W. Terhune. It says that, doesn't it? A. It says that in the contract.

Q. And you were the John W. Terhune? A. That is right.

Q. And the building is now on the property, isn't it? A. Yes, it is.

Q. And your office is on Main St., Hackensack? A. That is right.

Q. Probably a mile or a mile and a quarter from the building? A. About that.

Q. Yes. And I suppose you were more or less interested in seeing that the work progressed on that building? A. From time to time.

Q. Sure. And you went there from time to time, didn't you? A. Not very frequently. I went there occasionally.

Q. But you did go there from time to time, didn't you? A. Yes.

Q. And you went there to see how your building was progressing? A. Yes.

Q. Now, Mr. Pico was to do work, to supply all the labor and material, and to complete the building, except the plumbing and heating, wasn't he? A. That is right.

Q. The architect did not do any supervision? A. No.

Q. It was not part of the arrangement you had with him? A. No.

Q. And this is quite a considerable structure, isn't it? A. No, it is a simply building.

Q. A one-family, or a two-family? A. Two-family, one story.

Q. Well, it is a building that cost \$11,100.00 isn't that right? A. That is right.

Q. And the architect did not supervise, did he? A. No.

Q. And who did supervise? A. Mr. Pico.

Q. I mean who, besides Pico? A. Nobody.

Q. Do you mean to say that, in this contract that provides that the work was to be done under your supervision, and that you were to pay \$11,100.00 for, that you, a man in the building business, did not supervise the construction of that building? A. I am not in the building business.

Q. What? A. I am not in the building business.

Q. Well, you built that building, didn't you? A. Yes, that is correct.

Q. Then, as far as you are concerned, there wasn't any supervision, was there? A. Why just as Mr. Pico put it up, I went over there from time to time.

Q. I say, then there was a total lack of supervision on your part, wasn't there? A. Why, yes there was.

Q. Yes. A. I didn't supervise it and tell him how to do the work.

Q. Were you there the day it fell? A. After it fell, yes.

Q. Yes. And were you there the day before? A. No.

Q. How long before that had you been there? A. Why, I think I was going by there the morning that I saw the steam shovel there.

Q. Yes. Did you stop? A. They were just moving it in on the property.

Q. Did you stop? A. Yes.

Q. You stopped that day? A. Yes. I was going by there.

Q. That was on Friday, wasn't it? A. It might have been Thursday or Friday.

Q. Did you talk to anybody? A. Why, Mr. Pico stood there. Yes, I did.

Q. You did talk to Pico, didn't you? A. That morning, I bid him good morning.

Q. You said you were going by there. I guess, as a matter of fact, you went there to the building, isn't it, Mr. Terhune? A. No, it isn't.

Q. Where were you going? A. I was going to Leonia.

Q. How long did you stay there? A. Why, I don't believe I was there over five minutes.

Q. But you did talk to Pico? A. Yes; I did talk to Pico.

Q. And I suppose the thing you talked to Pico about was in connection with the work that he was doing for you, wasn't it? A. I said, 'I see you are on the job.' He said, 'Yes.'

Q. Well, as a matter of fact, this contract was only made five days before the collapse of the building, wasn't it? A. About the 15th of December, I think.

Q. The contract was made. And where was the contract made? A. Mr. Greenstone made it.

Q. And as early as the 16th or 17th of December, that is one or two days after it was made, you were going by there, and you stopped and had a talk with Pico? A. That is right.

Q. You were also there the day the building

fell? A. Only after I received notice that it fell.

Q. After you received notice. And I suppose, from time to time, until the building was completed, you also went over there, didn't you? A. Well, I wouldn't say frequently. Occasionally, yes.

Q. Well, how often? A. I do not know. I would go there once in a couple of weeks, two or three weeks.

Q. Yes.

Mr. West: That is all.

Re-direct Examination by Mr. Lloyd:

Q. Did you tell Pico how to do the work at all? A. I did not. He was recommended as a competent contractor to me.

Q. Do I understand you to say that you first went to the site the day they were bringing the steam shovel onto the property? A. I was going by and I saw them putting the steam shovel on, and so I just stopped.

Q. No work had been done at that time? A. No. They were just moving it in.

Q. And the next time you were at the building was after the building had fallen? A. When the man told me that the building fell down over there.

Mr. Lloyd: That is all.

Re-cross Examination by Mr. West:

Q. Then, as I understand the situation, even though the contract provided that the work was to be done under your supervision and direction, there was a total lack of supervision

and direction on your part; is that correct?
A. I did not understand the contract that way.

Q. Now, as a matter of fact, there was a total lack of supervision on your part; is that correct? A. Yes, I did not supervise.

Mr. West: That is all.

Mr. Lloyd: That is all, Mr. Terhune"
(Case, pp. 57-60, inclusive).

Mr. Pico (contractor and co-defendant) :

"Cross Examination by Mr. Lloyd:

Q. Yes. Now Mr. Pico, did Mr. Terhune supervise you in any way? A. Not what I would call direct supervision.

Q. Did he tell you how to do the work? A. No.

Q. Did he tell you how not to do the work? A. No.

Q. The engineer and the surveyor laid out the lines— A. He did.

Q. —whereon this building was to be erected? A. He did.

Q. And you stayed within those lines? A. Stayed within those lines" (Case, p. 73, L. 10-22).

Mr. Pico:

"Cross Examination by Mr. West:

Q. Now, you also have testified in relation to Mr. Terhune, 'I would not call it direct supervision.' What kind of supervision would you call it? A. Principally, Mr. Terhune left the job entirely into my hands.

Q. Well, principally, he did? A. Yes.

Q. What did he do outside of principally leaving it in your hands? A. Well, if he come around there once in a while, perhaps he would see something that wasn't done right, he might say something, and so forth; but he wasn't there very often" (Case, p. 76, L. 21-32).

Motions for Non-suit and Direction of Verdict.

At the close of plaintiff's case, counsel for appellant moved for a non-suit on the ground that Pico was an independent contractor and that Terhune was not liable for his acts, omissions or negligence. The motion was denied and an exception taken (Case, pp. 53-5).

At the close of the entire case, counsel for appellant moved for a directed verdict in his favor on the same grounds. This motion was denied and an exception taken (Case, p. 83, L. 14-25).

The denial of these motions is the basis of this appeal (Grounds of Appeal, Case, p. 103).

I.

Pico was an independent contractor.

The building contract, Exhibit P 7 (Case, pp. 95-100) is in the ordinary form. It provides that Pico shall erect the building according to plans and specifications by Frederick Meisler, Architect, "under the direction of the said John W. Terhune to be testified by a writing, or certificate under the hand of the said John W. Terhune," etc. (Ex. P 7, Case, p. 95, L. 35-37).

The testimony, quoted above, demonstrates that Terhune did not direct the manner of doing the work, and particularly that he was not present and

had nothing to do with the manner in which Pico and his men were working when the accident happened. The question squarely presented is, therefore, whether under such a contract the owner owed a duty to plaintiffs to direct how this work should be done and to see that this work was done in such a way as to avoid the collapse of the adjoining building.

The contract is in the common form and it is the custom to fill in, in the clause quoted above, the name of the owner, or of the architect or some other agent of the owner. If the name of an agent be used, the result is the same as if the owner's name be used, upon familiar principles of principal and agent.

This being so, it follows that, to affirm the judgment against the owner in the present suit, it is necessary to hold that all such ordinary building contracts result in a relationship between the owner and his contractor of master and servant and the application of the doctrine of respondeat superior;—and not, as has heretofore been thought and held, in a relationship of owner and independent contractor, to which that doctrine does not apply. The distinction between the relationship of master and servant and of owner and independent contractor, has been made clear by the unanimous decision of this Court in *Spelde v. Galturi*, 102 N. J. L., 203. Judge White, delivering the opinion says (at p. 204):

“‘Control’ is the essence of the relationship”
(of master and servant) “and the underlying principle upon which rests the liability of the owner for the driver’s negligence”

and, the relationship exists

“Wherever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.”

The duty of the owner, or of his architect or other agent, under a contract in this form, has been determined by the unanimous decision of this court in *Jansen v. Jersey City*, 61 N. J. L., 243, in which a contract for mason work for the City Hall provided that the work should be done (Opinion, p. 244) “under the supervision of an architect named in the contract” and it was held that:

“The entire duty of the architect and the inspector for the city, was to see that the work was done according to the contract,”

and a non-suit as to the City was affirmed.

In *Styles v. Long Co.*, 70 N. J. L., 301, at 304, this court in its unanimous opinion cited *Jansen v. Jersey City* as “a case where no duty rested on the city.”

So in the present case the only duty or privilege of appellant, under the clause quoted, was to see that the work was done according to the contract and he should have been granted a non-suit.

There is nothing else in the contract which imposes other duties in this respect upon the appellant, and as the plans and specifications were not put in evidence no duty upon appellant can be inferred from anything therein.

At the trial, the plaintiff's attorneys and the trial judge seemed to rely upon *Wegener v. Sugarman*

(Supreme Court), 5 N. J. Adv. Rep., 1539; 138 Atl., 699. (Not yet officially reported.) (Case, p. 54, L. 6.)

But in that case, which was an action *quare clausem fregit*:

“The evidence was that defendant employed a contractor with a steam shovel to do his excavating and personally supervised the work, even to the extent of laying down the line to which the contractor should work, and which included the plaintiff’s hedge, which was consequently dug up and destroyed” (see opinion at p. 1540, 4th Par., L. 3, et seq.).

Or, in Judge White’s words (in *Spelde v. Galturi*, supra), he was in “control”; he directed not only what should be done but how it should be done. The distinction between a case in which the owner is actively in control of the work, is present and directs it to be done in a way that causes damage; and a case in which the owner, having made an ordinary building contract, leaves the methods of construction to the contractor, is not present and gives no directions as to how the work shall be done, is clear, and, we respectfully submit, the trial judge erroneously recognized *Wegner v. Sugarman* as a precedent in the present case.

IT IS RESPECTFULLY SUBMITTED THAT THE DEFENDANT PICO WAS AN INDEPENDENT CONTRACTOR, FOR WHOSE ACTS OR NEGLIGENCE APPELLANT WAS NOT LIABLE.

II.

The appellant is not liable under the party wall statute.

This statute (3 C. S., 3926), reads as follows:

“PARTY MAKING EXCAVATION TO PRESERVE WALL ON ADJOINING LAND FROM INJURY—That whenever excavations hereafter commenced, for building or other purposes, on any lot or piece of land, shall be intended to be carried to the depth of more than eight feet below the curb or grade of the street, and there shall be any party or other wall, wholly or partly on adjoining land, and standing upon or near the boundary lines of such lot, the person causing such excavations to be made, if afforded the necessary license to enter on the adjoining land, and not otherwise, shall at all times, from the commencement until the completion of such excavations, at his own expense, preserve such wall from injury, and so support the same by a proper foundation that it shall remain as stable as before such excavations were commenced (Rev. 1877, p. 809).”

It is to be noted that by its terms it is applicable only when the excavation “shall be intended to be carried to a depth of more than 8 ft. below the curb or grade of the street”.

In the present case the excavation was intended to be carried to a depth of 7 feet only. The testimony on this point is as follows:

Mr. Grant (plaintiffs' witness):

“Q. How deep was the excavation? A. The excavation was seven foot below the curb line” (Case, p. 13, L. 30-32).

Charles W. Winters (plaintiffs' witness) :

“How deep was the excavation? A. At that spot, I don't know; but it was seven feet four on the northwest corner.

Q. On the highest corner? A. I measured that myself.

Q. That is the highest corner, Chief? A. Seven foot, four” (Case, p. 25, L. 33-40).

William Henry Huff (defendant's witness) :

“Cross examination by plaintiffs' attorney:

Q. How deep was this excavation? A. How deep?

Q. Yes. A. About three and a half to four feet from the level of the sidewalk.

Q. It wasn't about seven feet? A. The cellar I am speaking of the top of the concrete finish of the wall, the cellar line down to the bottom of your footing” (Case, p. 81, L. 1-10).

This testimony shows that it was intended that the excavation should be 7 feet deep. If plaintiffs relied upon the statute, the burden of proof, on familiar principles, was on them to show that the excavation “was intended to be carried to a depth of more than 8 feet”. No proof of this was adduced.

IT IS RESPECTFULLY SUBMITTED THAT
THE APPELLANT IS NOT LIABLE UNDER
THIS STATUTE.

III.

The appellant is not liable under the local Municipal Ordinance.

This ordinance (Exhibit, P8, Case, p. 101) provides "All excavations for buildings and other work shall be properly guarded and protected so as to prevent same from becoming dangerous to life, limb or adjoining property."

As the appellant was not in control of the method of doing this work (see Point I) the guarding of this excavation was the duty of Pico, the contractor, and not of the owner.

In *Mann v. Max*, 93 N. J. L., 191, this Court unanimously held that the owner, for whom a building was being erected under an ordinary building contract, was not liable for the safety of a pedestrian who, in passing the building, struck his head on a projecting scaffold timber.

While in the cited case there was no proof of a municipal ordinance (see Opinion, p. 193, L. 6-8), the general principle applied is that when an owner entrusts his work to an independent contractor, directing only what shall be done and not how it shall be done, all matters pertaining to the methods used, and all liability arising therefrom, are for the contractor and not the owner. As the ordinance does not say who shall protect such an excavation the general rule applies, that the duty of so doing is on the one who has control of the manner in which the work is to be done.

In ^{BUSH} ~~Huber~~ ^{MARGOLIS} v. Cloud, 102 N. J. L., 179, at p. 181, Mr. Justice Campbell, delivering the unanimous opinion of this Court, said (in an independent contractor case) :

“The protection of the work was as much a part of the work of the contractor as the laying of the concrete itself. * * * The work of repair and the protection of the work not being a nuisance the contractor alone was liable for the injury resulting from the negligence of himself or his servants unless the employer was in default in selecting an unskilled or improper person as a contractor, and there is no contention here that the respondent was in default in that direction.”

and a verdict directed in favor of the owner was affirmed.

IV.

The appellant is not liable upon the nuisance theory.

The construction of a building is not a nuisance per se. *Mann v. Max*, 93 N. J. L., 191, at page 193. Mr. Justice Parker, delivering the unanimous opinion of this Court, said:

“And the rule is thoroughly settled that where one employs a contractor exercising an independent employment and hiring his own servants to do a work not in itself a nuisance, the contractor alone is liable for an injury resulting from the negligence of himself or his servants, unless the employer is in default in selecting an unskillful or an improper person as contractor.”

See also:

BUSH **MARGOLIS**
Huber v. Cloud, supra.

And there is no proof, nor is it suggested in this case that Pico was an unskillful or improper person to be entrusted with this work. The contrary appears by the following testimony as to his experience and qualifications:

“Q. What is your occupation, Mr. Pico? A. Builder; builder.

Q. Speak up loudly so that the jury can hear you. For how long have you been a building contractor? A. Approximately 18 years.

Q. How many years? A. 18” (Case, p. 61, L. 8-14).

“Mr. Pico, what experience have you had in the handling or the building of buildings and the handling of concrete, and where did you get your experience which gives you the right to talk about cinders as you do? Will you tell us please? A. My experience in that has been gotten from the United States Army with the engineering department, for seven solid years, in the event of reenforced concrete and bridges.

Q. During what period of time? A. Three years prior to the war and then four years during the war.

Q. And what was your—with what department were you connected? A. Engineering Department.

Q. With the Engineering Department? A. Yes, sir.

Q. And did you, in the Engineering Department have direct charge and supervision of particular pieces of work involving the use of concrete and cinders? A. Yes. I was a master engineer.

Q. A master engineer in the United States Army? A. Yes, sir.

Q. After that, where did you get your experience? A. After that, I got my experience from other jobs which I have conducted all throughout, including one apartment house, two or three apartment houses, and possibly eighteen to twenty, one or two-family houses" (Case, p. 72, L. 18-40; p. 73, L. 1-10).

V.

It is respectfully submitted that the Trial Judge erred in denying appellant's motions for a non-suit and for a direction of a verdict in his favor and that the judgment, as to appellant, should be reversed.

MORRISON, LLOYD AND MORRISON,
Attorneys for and of Counsel
with Defendant-Appellant,
John W. Terhune.

By WILLIAM J. MORRISON, JR.

The first part of the book is devoted to a general
 introduction of the subject, and to a description of the
 various methods which have been employed for the
 purpose of determining the true nature of the
 phenomena which are observed. The second part
 is devoted to a detailed description of the
 various experiments which have been performed,
 and to a discussion of the results which have
 been obtained. The third part is devoted to a
 discussion of the various theories which have
 been proposed to explain the phenomena which
 are observed, and to a comparison of the
 results which have been obtained with the
 predictions of these theories. The fourth part
 is devoted to a discussion of the various
 applications of the theory, and to a
 comparison of the results which have been
 obtained with the predictions of the theory.

New Jersey Court of Errors and Appeals

WILLIAM MESSINA, et al.,
Plaintiffs-Respondent,

vs.

JOHN W. TERHUNE,
Defendant-Appellant.

On Appeal
From Bergen
Circuit Court.

Brief of
Plaintiffs-
Respondent.

STATEMENT OF FACTS

The complaint in this matter alleges and the evidence shows that the plaintiff, William Messina, on December 20th, 1927 was the tenant and occupant of a store located on the south side of Fort Lee Road in the Borough of Bogota, New Jersey, and conducted therein a fruit and vegetable business; that the plaintiff, Jennie DiCarolis, was an employee of Messina. The answer of the defendant, John W. Terhune, admits that he was, on December 20th, 1927, and for a long time prior thereto, the owner of the lands lying between Messina's store and Elm Avenue and that he caused a *deep excavation* to be made on his lands immediately adjoining said store (case p.1, l. 37 to l. 2, p.2; case p.5, l. 24); Terhune's answer further admits that he had engaged the defendant, Joseph Pico, to make said excavation and construct a foundation for a building therein (par. 3 of complaint and par. 3 of answer of Terhune); the contract for this work between Pico and Terhune was offered in evidence as Exhibit P-7 (case p.95) and provides that the building in question shall be constructed "in a good workmanlike and substantial manner under the *direction* of the said John W. Terhune" (case p.95, ll. 34-37); the

Building Code of the Borough of Bogota was offered in evidence as Exhibit P-8 and the part thereof pertinent to the matter in question is printed on page 101 of the State of Case and reads as follows: "all excavations for buildings and other work shall be properly guarded and protected so as to prevent same from becoming dangerous to life, limb or adjoining property."

The west wall of the building occupied by Messina was built up to Terhune's boundary line and while the defendant, Pico, and his men were excavating along the Messina building and under the Messina walls under the direction of the defendant, John W. Terhune, for the purpose of constructing footings for the foundation of Terhune's new building, Messina's wall fell into the excavation with the result that Messina's stock and fixtures were damaged and destroyed and the plaintiff, Jennie DiCarolis, was physically injured.

Originally Chisholm-Weisgerber Inc., the owners of the steam shovel which did part of the excavation work, were parties defendant, but at the end of plaintiffs' case a voluntary non-suit was taken as to the last mentioned defendant and the jury brought in a verdict against the owner, Terhune, and the builder, Pico, in favor of Messina for the sum of two thousand dollars and in favor of the plaintiff, Jennie DiCarolis, for the sum of two hundred and fifty dollars; from this verdict the owner, John W. Terhune, appeals and alleges the following as his grounds for appeal:

1. Because the trial court erred in denying the motion for a non-suit made at the close of plaintiffs' case on behalf of the defendant, John W. Terhune.

2. Because the trial court erred in denying the motion at the close of the case on behalf of the defendant, John W. Terhune, for a verdict in favor of said defendant.

POINT I.

The trial court properly denied the motion for a non-suit made by the attorney of the defendant, Terhune.

When the plaintiffs rested, the following facts had been proven or had been admitted by the defendant, Terhune.

1. That the defendant, John W. Terhune, was on December 20th, 1927, the owner of the lands lying to the west of the Messina building and had caused a *deep excavation* to be made therein (par. 2 of complaint admitted by par. 2 of Terhune's answer).

2. That Terhune had engaged Pico to make said excavation and construct a foundation for a building therein (par. 3 of complaint and par. 3 of Terhune's answer).

3. That said work was done pursuant to Exhibit P-7 (case p.95) which provides that it should be done under the *direction* of the defendant, John W. Terhune.

4. That the Building Code of the Borough of Bogota provides that all excavations for buildings and other work shall be properly guarded and protected so as to prevent the same from becoming dangerous to life, limb or adjoining property.

5. That neither Pico nor Terhune had done anything to protect the Messina property in accordance with the Building Code of the Borough of Bogota and that as a result of said neglect, the building occupied by Messina collapsed and fell into the excavation.

The substance of Mr. Lloyd's motion for a non-suit on behalf of Terhune was as follows: That Pico was an independent contractor and that there

was no proof to show that Pico was the servant of John W. Terhune or that Terhune exercised any supervision over him.

The court thereupon referred to the case of Wegener vs. Sugarman, 138 Atl. 699, and after reading from the case said "now this contract offered in evidence provided specifically for this work to be done. Now, whether it was done actively or not, that is, whether the supervision was active or not, or whether or not the negligence came about through the want of supervision, I think that is a question for the jury and I will have to deny the motion."

We think that the court properly denied the motion as the proofs showed that Pico was not an independent contractor.

The attorneys of the defendant-appellant have failed to distinguish the difference in the meanings of the words "direction" and "supervision"; according to the decisions the words "direction" and "control" are synonymous; the word "supervision" has a narrower meaning than either "control" or "direction". The authorities on the question of when a contractor is an independent contractor and when he is not have been gathered and digested in 39 Corpus Juris and the general rule is there stated as follows:

"It has been very generally held that the right of control as to the mode of doing the work contracted for is the principal consideration in determining whether one employed is an independent contractor or a servant. It is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant or agent. If the employer has the right to control it is immaterial whether he exercises it or not."

39 Corpus Juris p. 1316.

"Direct", as a verb, is defined in *Bowden vs. Cumberland County*, 123 Atl. p. 166 as follows:

"To guide, to show, to regulate; to point out with authority or direct as a superior; to instruct, to order; to point out a course of proceeding with authority; to command."

"Control", is defined in 9 Cyc. p. 811 as follows:

"As a verb, to restrain; to check; to regulate; to direct; to govern; to keep under check; to dominate; to rule and direct; to counteract; to govern with reference thereto; to subject to authority; to have under command, and authority over; to have authority over the particular matter."

"Supervision", is defined in *re James*, 123 Atl. 385, as follows:

"Act of overseeing; inspection; superintendence; oversight."

"Supervision" is also defined in 37 Cyc. p. 604 as follows:

"Having general oversight of; oversight; the act of supervising; the act of overseeing; inspection; superintendence."

If we apply the foregoing definitions to the authorities cited by our opponent, we find that the decision in the case of *Jansen vs. Jersey City*, 61 N. J. L. 243 is not applicable because there the contract under consideration authorized the architect to merely "supervise" and not either "control" or "direct." The decision of this court in *Spelde vs. Galtieri*, 102 N. J. L. 203, if of any assistance, is a precedent in favor of our contention that Pico was not an independent contractor.

The attorney of the defendant-appellant tries to differentiate the case of *Wegener vs. Sugarman*,

138 Atl. 699 by pointing out that in the Wegener case the evidence showed that Sugarman supervised the work to the extent of laying down the line to which the contractor should work. In the case at bar it is conceded that Terhune furnished to the contractor plans and specifications for a building of a certain size, which could not be built on his property without causing damage to Messina; he retained the right to direct the work and his engineer furnished the lines (case p.73); this feature is equivalent to Sugarman's laying down the line of the excavation, especially so in view of the fact that Terhune failed to comply with his duty to protect adjoining property, imposed upon him by the Building Code of the Borough of Bogota.

Assuming, but not admitting, for the purpose of this argument that Pico was an independent contractor in so far as the construction of the building in question was concerned, he was under no duty to comply with the provisions of the Building Code of Bogota in making his excavation but was merely obliged to be reasonably careful in doing his work. The portion of the Building Code of the Borough involved in this matter prescribes the duties of an owner and not of a contractor, whether independent or otherwise.

The Building Code of the Borough of Bogota was adopted on June 9th, 1920 (case p. 41, ll. 39-40) and was predicated upon Section 1 of Article XIV of Chapter 152 of the Laws of 1917, commonly known as the Home Rule Act; the pertinent portions of that section read as follows:

1. "The governing body of every municipality shall have power to make, publish, enforce, amend and repeal ordinances for the following purposes:"

(x) To regulate excavations below the established grade or curb line of any street which *the owner of any land may make, in the erection of any building upon his own property, etc.*

In other words the Building Code of Bogota imposed a duty upon Terhune which he failed to perform and as the section of the code in question was clearly enacted for a certain class of individuals, the plaintiffs became invested with the right to call upon Terhune to respond in damages when they were injured as the result of his negligence.

The authority for this proposition, relied upon at the trial, though it does not appear in the State of Case, is *Fielder vs. North Jersey Street Railway Company*, 68 N. J. L. 343, decided by the Court of Errors and Appeals of this State in 1902; Justice Pitney, writing the opinion of the court, says as follows:

“It is certainly well settled that a specific duty, the violation of which is actionable, may arise from a valid statute or municipal ordinance, as well as from the general principles of the common law. Familiar examples among our statutes are the so-called “law of the road” (Gen. Stat., p. 2823, Sec. 91), and the requirement that a railroad locomotive shall sound a bell or whistle on approaching a highway crossing. Gen. Stat., p. 2645, Sec. 29. The books contain many cases arising out of breaches of the latter duty. The duty imposed upon railroad companies “to use all practicable means to prevent the communication of fire from any locomotive engine”, and making them liable in damages to the person injured, is an instance. Gen. Stat., p. 2670, Secs. 13, 14; *Delaware, Lackawanna and Western Railroad Co. v. Salmon*, 10 Vroom 299, 303. So is the duty to provide spark arresters. Gen. Stat., p. 2671, Secs. 15, 16; *Wiley v. West Jersey Railroad Co.*, 15 Vroom 247; *Hoff v. West Jersey Railroad Co.*, 16 Id. 201; *West Jersey Railroad Co. vs. Abbott*, 31 Id. 150. So doubtless, are such of the provisions of the

act relating to factories, &c. (Pamph. L. 1885, p. 212; Gen. Stat. p. 2345), as are expressly designed for the personal safety of the operatives. Other instances might be cited.

Nor does there seem to be any distinction between a valid statute and a valid ordinance, in respect to the binding force of a duty created thereby. A lawful municipal ordinance is an exercise of the delegated power of legislation, and is the law of the place. When adopted in the exercise of that power which is commonly called the "police power", ordinances frequently prescribe for persons subject thereto a rule of conduct, for the purpose of insuring the safety of others. Familiar instances of municipal ordinances imposing duties, for a breach of which an action may be maintained by any person specially injured, are those regulating the speed of vehicles in streets, those requiring railroad companies to place gates or flagmen at street crossings, those regulating excavations in the streets, the use of explosives, and the like. In *New Jersey Express Co. v. Nichols*, 3 Vroom 166, 169; S. C., 4 Id. 434, 441, the plaintiff was attempting to pass along a sidewalk in the city of Newark when he was caught and injured by the wagon of the defendant being backed up to the side of the building adjoining the walk for the purpose of taking in packages from the building. The fact that the wagon was thus backed, in violation of a city ordinance, was a circumstance considered as material by the Supreme Court and by this court upon the question of defendant's negligence. In *New Jersey Railroad Co. v. West*, 3 Id. 91; S. C., 4 Id. 430, the plaintiff was watching a railroad train approaching a street crossing from one direction, at a rate exceeding that limited by the city ordinance, and was struck by a train coming from the opposite direction at a less speed. The ordinance required no flagman at this crossing, and the defendant company relied upon the ordinance, and claimed to have complied with it. This court treated the fact that the fast train was exceeding the limit fixed by the city ordinance as a circumstance tending to show negligence on the part

of the defendant, and to rebut the allegation that there was contributory negligence on the part of the plaintiff.

In some jurisdictions contention has arisen as to whether the violation of a statute or ordinance intended to regulate the conduct of the individual constitutes negligence per se, or conclusive evidence of negligence; or whether, on the other hand, such violation is only prima facie evidence of negligence. Abundant citation of authorities will be found in 21 Am. & Eng. Encycl. L. (2d ed.), tit. "Negligence", 460, 478, 483; Thomp. Negl. (2d ed.), Secs. 10, 773, 1094, 1196, 1226, 1394, 1396, 1528, 1538, 1554, 1900, 1905, 2103.

Perhaps the doubts have arisen from confusing the action for violation of a specially imposed duty with the action for violation of the common law duty of exercising care under given circumstances. It would seem that a correct definition of actionable negligence must include the notion that a legal duty has been violated; whether the duty arose from the common law or from a valid statute or municipal ordinance would seem immaterial. See Thomp. Negl. (2d ed.), Secs. 1, 12. Assuming the party injured in a given case to be one of a class for whose benefit a duty has been by statute or ordinance imposed upon the opposite party, and assuming that the evidence shows an actual breach of that duty, it would seem the sole remaining inquiries should be whether the violation of the imposed duty was the proximate cause of the injury, and if so, whether any faulty conduct of the injured party was a contributing cause. This view of the matter would give to the party aggrieved by a violation of a duty that had been imposed for his benefit the right to maintain an action for an injury thereby sustained, irrespective of the question whether the conduct complained of could be properly termed negligent in the general sense. This is the case with those statutory actions that stand quite apart from negligent conduct; such, for instance, as the action for damages for excessive distress under the statute of Marlbridge (52 Henry III.), embodied in our act concerning distresses as

section 1 (Gen. Stat., p. 1207), and the special action for a mere irregularity in the proceedings consequent upon a lawful distress for rent, which action was conferred by the statute 2 Geo. II., c. 19, Sec. 19, whose provisions are found in section 12 of our act concerning distresses.

Without pursuing the subject further, we assume, for the purposes of the following discussion, that there is no distinction between a common law duty and one imposed by statute or ordinance, with respect to entitling a party injured to his damages; and no distinction between a valid statute and a valid ordinance with respect to its effect in imposing a duty for violation of which an action will lie."

Fielders v. North Jersey Street Railway Co., 68 N. J. L. 343.

For the foregoing reasons we contend that the defendant-appellants motion for a non-suit was properly denied.

POINT II.

The court did not err in denying defendant-appellant's motion for a direction of a verdict in his favor.

When the defendants rested the situation had not changed in so far as the questions of law were concerned. Terhune denied that he had directed the construction of the building and Pico denied some of the plaintiffs' testimony. The motion of the attorney of Terhune for a direction of a verdict in his favor was a repetition of his motion for a non-suit. Our arguments above therefore need not be repeated here.

POINT III.

The court properly submitted to the jury the question of the liability of the defendant, Terhune, under our state law as to lateral support.

We first will call the court's attention to the fact that this point is not covered by any ground of appeal served pursuant to the rules of this court. The only two reasons for reversal stated in defendant-appellant's grounds of appeal are:

1. Failure to grant a non-suit.
2. Failure to direct a verdict for the defendant Terhune (case p. 103).

We contend however that this question was properly submitted to the jury. The court in its charge explained the purport of our Party Wall Statute (C. S. p. 3926), as it is called, and stated that there was evidence in the case that the defendants had excavated to a depth of seven feet and four inches and that thereafter there was more digging (case p. 84, l. 20 to l. 19, p.85). He evidently had in mind the evidence of Jennie DiCarolis (case p. 32 and pp. 37-38) and the testimony of William Messina (case pp. 43-44); the testimony referred to seems to us to make the question of the application of our statute a jury question especially so in view of the testimony of Chief Winters that the main excavation was seven feet and four inches in depth (case p. 25, ll. 33-40) and the testimony of the defendant Pico to the effect that his men dug trenches for the sub-foundation after the completion of the main excavation (case p. 61, ll. 24-34).

POINT IV.

It was the duty of Terhune, the owner, to comply with the local ordinance as to guarding excavations and for his failure to perform he is obligated to respond in damages to persons for whose benefit it was passed.

The ordinance in question is directed at the owner and being the type of ordinance fully discussed in *Fielders v. North Jersey Street Railway Co.*, 68 N. J. L. 343 makes the owner liable to the plaintiffs. In briefing the law and the facts in reply to the contention of the defendant-appellant that a non-suit should have been granted, we were obliged to cover this subject at length and instead of repeating our argument, we will refer your Honors to our argument under Point I. The same rule which was applied in the case of *Pinto v. Foo Jang Realty Co.*, 2 Misc. Rep. p. 887 is applicable here if we substitute the ordinance for our Party Wall Act. It was there held that it is the duty of the owner of lands and not the duty of the contractor to protect adjoining property.

In *Bush vs. Margolies*, 102 N. J. L. 179 (incorrectly entitled in defendant-appellant's brief as *Huber v. Cloud*) no local ordinance was involved and is therefore not applicable.

Secondly defendant-appellant's Point III is not covered by any of his grounds of appeal (case p. 103).

POINT V.

The trial judge did not err in denying the motions of the attorney of the defendant below for a non-suit and a direction of a verdict in his favor for the reason that there were three different theories, justifying a recovery, pleaded and the facts supporting the same were proven and the case was therefore properly submitted to the jury.

1. There was a jury question as to whether Pico was an independent contractor or a servant or agent of the owner, thus making the owner responsible for Pico's negligence.

2. There was a jury question as to whether or not the failure of the owner to comply with the Building Code of the Borough of Bogota was the proximate cause of the damages sustained by the plaintiffs.

3. There was a jury question as to whether or not the facts proven brought the case within the provisions of our Party Wall Statute (supra).

This matter does not come before the court upon exceptions to the judge's charge and therefore we may assume that the defendant-appellant admits its correctness and the verdict of the jury should stand regardless of whether it was based on one or more of said theories.

We therefore respectfully submit that the judgment of the Bergen County Circuit Court should be affirmed.

DETURCK & WEST,
Attorneys for and of Counsel
with Plaintiffs-Respondent.

The first part of the book is devoted to a general survey of the history of the world, from the beginning of time to the present day. The author discusses the various civilizations that have flourished on the earth, and the progress of human knowledge and art. He also touches upon the political and social changes that have shaped the course of history.

In the second part of the book, the author turns to a more detailed examination of the political and social conditions of the world in the present day. He discusses the various forms of government that exist, and the different theories of political philosophy. He also touches upon the social problems that are facing the world today, and the various efforts that are being made to solve them.

The third part of the book is devoted to a discussion of the various theories of political philosophy that have been advanced by different schools of thought. The author examines the ideas of the ancient Greeks, the medieval scholastics, and the modern philosophers. He also touches upon the various theories of justice, liberty, and equality that have been advanced by different schools of thought.

In the fourth part of the book, the author discusses the various theories of justice, liberty, and equality that have been advanced by different schools of thought. He examines the ideas of the ancient Greeks, the medieval scholastics, and the modern philosophers. He also touches upon the various theories of justice, liberty, and equality that have been advanced by different schools of thought.

The fifth part of the book is devoted to a discussion of the various theories of justice, liberty, and equality that have been advanced by different schools of thought. The author examines the ideas of the ancient Greeks, the medieval scholastics, and the modern philosophers. He also touches upon the various theories of justice, liberty, and equality that have been advanced by different schools of thought.

