INDEX.

	PAGE
Notice of Appeal to Supreme Court	1
Grounds of Appeal	2
Complaint	5
Answer	9
Reply	11
Judgment	12
Rule to Show Cause	13
Reasons	14
Order Reducing Verdict	15
Remittitur	16
Final Judgment	16
Motion for Non-suit (Defendant McGuire)	17, 57
Motion for Non-suit (Defendant Standard Oil Company)	56
Charge to Jury	96
Exceptions to Charge	106
Requests to Charge for Defendants, Standard Oil Company and Fred Staub	108
Opinion of Supreme Court	111
Order on Reversal of Judgment	117
Notice and Grounds of Appeal	118

TESTIMONY.

For Plaintiff.

Leroy Powers,	direct examination	19
	cross "	23
	re-direct "	25
(recalled)	direct "	49
	cross "	49
Anna Scher,	direct examination	25
	cross "	28
Fred J. Staub,	direct examination	31
	cross "	35
Charles F. McGuire,	direct examination	44
	cross "	47
(recalled)	direct "	52
	cross "	54

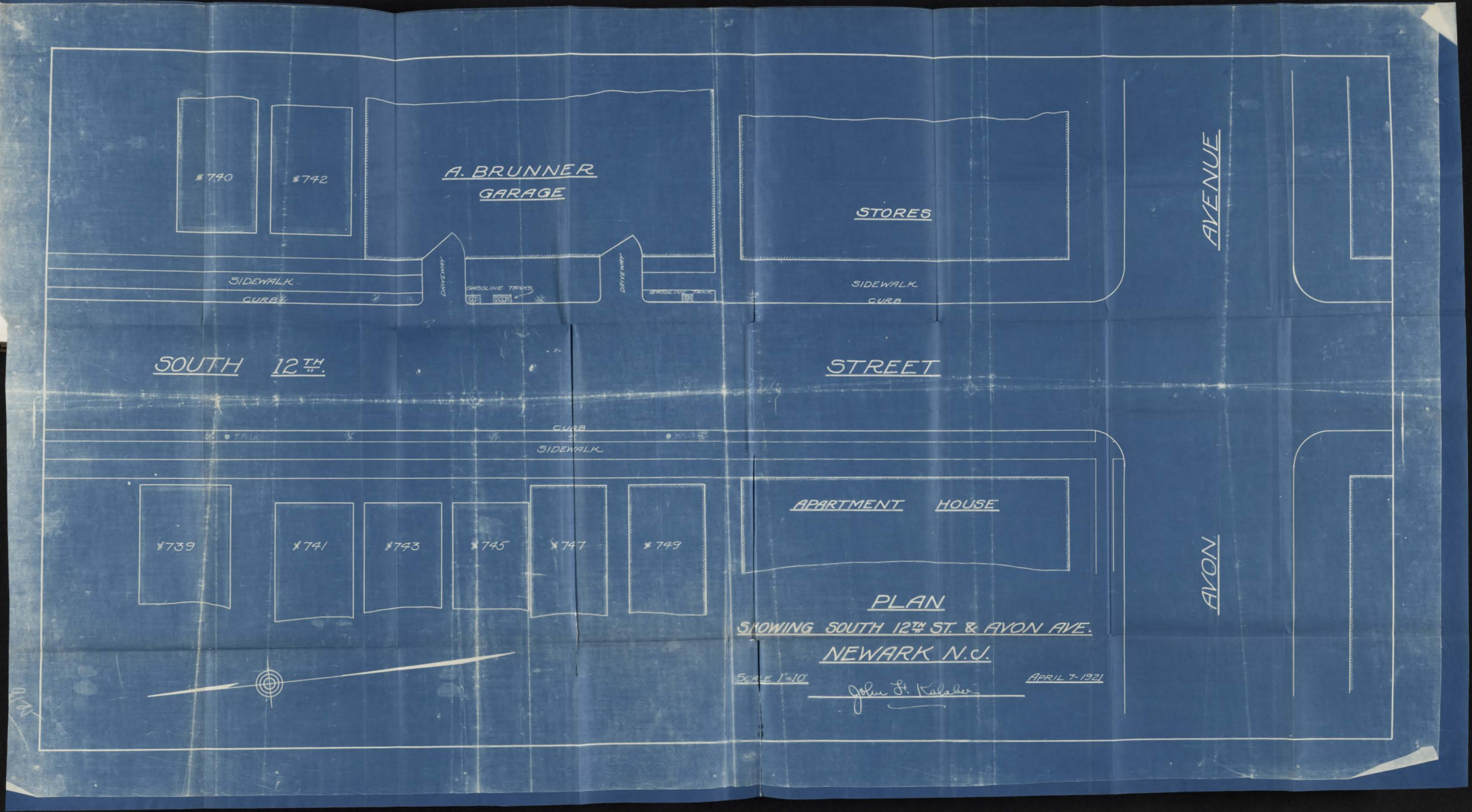
		PAGE
Emily Lutz,	direct examination.....	50
	cross "	50

For Defendant, Charles F. McGuire.

Charles A. Lindner,	direct examination.....	57
	cross "	58
Charles F. McGuire,	direct examination.....	59
	cross "	63
	re-direct "	65
(recalled)	direct "	95
John Bernhart,	direct examination.....	66
Bessie Scher,	direct examination.....	68

For Defendants, Standard Oil Company and Fred Staub.

Fred J. Staub,	direct examination.....	75
	cross "	78
(recalled)	direct "	84
John F. Kalaher,	direct examination.....	81
	cross "	83
William H. Lawrence,	direct examination.....	85
	cross "	86
Gertrude Brunner,	direct examination.....	88
	cross " 90,	94
	re-direct "	93
	re-cross "	94


#740
#742
A. BRUNNER
GARAGE
STORES
AVENUE
SIDEWALK
CURB
DRIVEWAY
GASOLINE TANKS
DRIVEWAY
GASOLINE TANKS
SIDEWALK
CURB
SOUTH 12TH.
STREET
CURB
SIDEWALK
#739
#741
#743
#745
#747
#749
APARTMENT HOUSE
AVON
PLAN
SHOWING SOUTH 12TH ST. & AVON AVE.
NEWARK N.J.
SCALE 1"=10'
APRIL 7-1921
John F. Kalisher

Arthur W. Cross, Law Printer, 213 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

LEROY POWERS, adminstrator *ad prosequendum* of the estate of MARY CATHERINE POWERS, deceased, *Plaintiff-Appellant,*	*Action at Law.*
vs.	*On Appeal from Supreme Court.*
STANDARD OIL COMPANY and FRED STAUB, *Defendants-Respondents.*	

BRIEF IN FAVOR OF DEFENDANTS-RESPONDENTS

(1)

Statement of the Case.

This action was brought by the plaintiff in the Essex Common Pleas to recover damages alleged to have been sustained because of the death of his minor child (Mary Catherine Powers), on June 12, 1920, which it was claimed resulted from the alleged negligence of these defendants and that of another defendant named Charles McGuire. The Standard Oil Co. and Staub were the owner and driver, respectively, of an automobile truck; the defendant McGuire was the owner and operator of an automobile which struck the plaintiff's intestate and thereby caused her death. The jury found a verdict in favor of McGuire and against these defendants, and judgment was entered accordingly; from the judgment thus entered, these defendants took an appeal to the Supreme Court. That Court reversed the judgment and ordered a new trial on the ground that even if these defendants were negligent in the manner alleged in the complaint, in that the driver parked the automobile truck on the wrong side of the street, contrary to the statute, nevertheless, such negligence was not

the proximate cause of the accident to the plaintiff's intestate (for report of opinion of Supreme Court see 119 Atl.; Case, p. 111). From this judgment of reversal, the plaintiff took an appeal to this Court.

(2)

Grounds of Appeal.

Plaintiff alleges as the ground of appeal that the Supreme Court erroneously reversed the judgment of the Court of Common Pleas (p. 118). In the Supreme Court, these defendants sought a reversal not only on the ground that the evidence failed to show any liability on their part, but also on the further grounds that the evidence showed contributory negligence on the part of the plaintiff's intestate and that there was error on the part of the trial judge in his charge, and in refusing to charge certain requests submitted on behalf of these defendants. As we shall urge in this Court that the judgment of the Essex Common Pleas Court should have been reversed, either on the ground that these defendants were entitled to a nonsuit, or on the ground that there was error in the charge and in the refusal to charge, we append the following statement of the grounds of appeal relied upon by these defendants in the Supreme Court.

1. The trial judge refused to non-suit the plaintiff when thereunto moved by the defendants, whereas said motion should have been granted on one or more of the following grounds urged in support of said motion:

(a) The evidence clearly showed contributory negligence on the part of plaintiff's intestate.

(b) No negligence has been shown on the part of the defendant, Standard Oil Company, or on the part of the defendant, Fred Staub, or any other employee of the Standard Oil Company.

(c) There was no evidence of any negligence on the part of the defendants, Standard Oil Company and Fred Staub, which was the proximate cause of the accident.

(d) The position of the defendant, Standard Oil Company's, truck or the position of the doors thereof and the alleged obstruction to view caused thereby which was the only allegation of negligence in the complaint against the defendants, Standard Oil Company and Fred Staub, was not the proximate cause of the accident.

2. The trial judge erroneously refused to charge the following requests to charge submitted by the defendants, Standard Oil Company and Fred Staub.

Although the motor vehicle law of this State provides that an automobile should not stop on its left side of the road, still the mere fact that there is such a violation of the motor vehicle law does not justify a recovery in a suit for damages. It must appear that that violation of the motor vehicle law was the proximate cause of the accident.

3. The trial judge erroneously refused to charge the following request to charge submitted by the defendants, Standard Oil Company and Fred Staub:

Even though the defendant's car was on its left or wrong side of the road, still that does not justify a recovery against the defendant, unless you find that the proximate cause of the accident was the fact that the car was on the left or wrong side of the road.

4. The trial judge erroneously refused to charge the following request to charge submitted by the defendants, Standard Oil Company and Fred Staub:

I have stated to you that a violation of the motor vehicle law does not justify a recovery for damages unless the violation in question is the proximate cause of the accident for which the suit is brought. By proximate cause I mean that the violation of the motor vehicle law was such a cause as to produce the death of which the

plaintiff complains and without which the said death would not have occurred. By proximate cause is meant the efficient act of causation. In short, even if the defendant, Standard Oil Company and Fred Staub, the chauffeur of the truck, were negligent in leaving the automobile gasoline truck on its left side of the road, yet the plaintiff cannot recover in this action as against them if the negligence of the defendant McGuire in operating his automobile intervened and caused the accident.

5. The trial judge erroneously refused to charge the following request to charge submitted by the defendants, Standard Oil Company and Fred Staub:

If the accident would not have happened were it not for the negligence of the defendant McGuire, then the plaintiff cannot recover as against the defendant, Standard Oil Company, and its chauffeur, Fred Staub.

6. The trial judge erroneously charged the following request to charge made by the defendant McGuire:

If you find that the negligence of the defendant, Standard Oil Company, was the proximate cause of the accident, there can be no recovery against the defendant, Charles McGuire, even though you find that he was chargeable with negligence, for the reason that there is no privity between the defendants, Standard Oil Company and Charles McGuire, as the Standard Oil Company is chargeable with all the consequences of its negligence.

Ground No. 7 was not pressed (see Case, pp. 2-4).

(3)

BRIEF OF THE ARGUMENT.

I.

The judgment of the Supreme Court reversing the judgment of the Common Pleas Court was correct on the ground stated by the Supreme Court, to wit, that it was error on the part of the trial judge to refuse to non-suit the plaintiff when thereunto moved by these defendants.

The four grounds urged by these defendants at the trial upon the motion for non-suit may be considered under two points:, namely, that the evidence failed to show any negligence on the part of these defendants which was the proximate cause of the accident and the evidence did show contributory negligence on the part of the decedent. We shall first consider the ground which was adopted by the Supreme Court as the basis of its decision, namely, that the evidence failed to show negligence on the part of these defendants which proximately caused the accident.

On June 12, 1920, the plaintiff's intestate, while in the act of passing from the easterly to the westerly side of South Twelfth street, in the City of Newark, was struck and killed by an automobile driven by the defendant, Charles McGuire. Suit was brought against McGuire on the ground that he was driving his automobile at a high rate of speed, that he gave no signal of his approach, that he did not have his automobile under control, and that he failed to take due care for the safety of persons legally crossing the street (p. 8, ll. 10-20). The jury found a verdict in his favor.

The charge against the defendants, Standard Oil Company and Fred Staub, was that the oil truck of the company whereof Staub was the driver, was standing on the wrong side of South Twelfth street, contrary to the Motor Vehicle Act, and by reason of certain parts of the truck extending outward from the body of the truck, it was

"impossible" for plaintiff's intestate to get a clear view of said street, and while she was crossing from a point in the rear of said truck she was struck by McGuire's automobile coming in the opposite direction to that in which the truck was facing (p. 6, ll. 5-15).

The circumstances of the accident were described by the witnesses produced by the plaintiff as follows:

Le Roy Powers, plaintiff: He saw the automobile truck after the accident, when he returned from the hospital. It was standing on the east side of the street facing south, between the two driveways of Brunner's garage. The back end of the truck was not up to the curb (p. 21, ll. 10-20). This garage was 135 feet from Avon avenue, the nearest intersecting street to the south (p. 22, ll. 20-40). The rear end of the truck was clear of the entrance to the garage and near a gas pump (p. 24, ll. 15-25). He did not know how close to the curb the rear wheel was, but thought it was about two or three feet from the curb. The front wheels were all but up to the curb (p. 24, l. 35, to p. 25, l. 20).

Anna Scher, a little girl 12 years of age, friend of the plaintiff's intestate, was on the street directly across from the garage (p. 26, ll. 25-36). She saw Mary (plaintiff's intestate) standing near the curb line while the men were taking out gasoline (p. 26, l. 40, to p. 27, l. 5). The tank into which the gasoline was pumped was at the rear of the truck (p. 27, ll. 10-15). Mary was on the sidewalk to the rear of the truck, but the witness does not know how far in the rear (p. 27, ll. 15-20). Mary looked both ways and then started to run over and got about three-fourths of the way across when she was struck (p. 27, ll. 20-30). The witness does not remember about horn and did not see automobile before it struck Mary. She did not call to Mary and did not hear anyone else do so (p. 27, ll. 30-40). Did not hear the man at the truck say anything to Mary (p. 29, ll. 5-10). Mary had been standing on the sidewalk about three minutes

before she started to cross the street (p. 29, ll. 20-25). Mary had asked witness if she had a ball (p. 29, ll. 35-40). Mary was moving all the time from the time she started to cross up to the time she was hit (p. 30, ll. 15-20). After leaving the sidewalk she ran directly toward the witness without again turning her head (p. 30, ll. 25-35).

Fred Staub, driver of the Standard Oil Company: The truck was about 15 feet long (p. 31, ll. 10-15). The rear wheels were about two inches wider than the front, otherwise the truck was the same width from front to back (p. 31, ll. 15-30). There is a box in the rear that covers the faucets when gasoline is not being unloaded (p. 32, ll. 1-10). The lowest part of the truck was about two feet four inches from the ground (p. 32, ll. 10-25). Each door of the box in the rear was about two feet wide (p. 32, ll. 25-30). The axle and gear casings under the truck are in the center and the view underneath the truck is the same, no matter which way the truck is facing (p. 33, ll. 10-25). He did not see decedent start across street or the automobile strike her (p. 33, ll. 25-30). McGuire's auto after the accident was stopped on the left-hand or opposite side of the street, pretty well up to the gutter, with the right rear wheel just about to go over decedent (p. 34, l. 20, to p. 35, l. 10). The left wheel of McGuire's car was about two feet from the west side of the street (p. 35, ll. 30-35). The impact attracted his attention and at that time he was at the garage helping to put in the gas (p. 36, ll. 1-15). Prior to the accident the little girl was playing around the funnel where he was pouring the gasoline into the underground tank (p. 37, ll. 1-15). The funnel was in the sidewalk back of the truck (p. 37, ll. 20-25). The street is 35 feet wide (p. 44, ll. 1-5).

Charles McGuire, sworn in behalf of the plaintiff, testified that he saw the Standard Oil truck in the center of the two driveways of Brunner's garage. The front was on the curb line, the rear was two to three feet from

the curb "at a slight angle" (p. 44, ll. 20-40). The truck was facing south and the doors on the back of the truck were open. The one on the west side was probably at right angles, but the other was at an acute angle to the body of the truck (p. 45, ll. 25-30). Witness "imagined" the rear of the truck from hub to hub was eight feet wide (p. 45, l. 35; p. 46, l. 5). He imagined the doors were 24 to 30 inches wide, 4 to 5 feet high, and 20 inches above the ground (p. 46, ll. 20-40). On cross examination the witness admitted that the door may not have been at a true right angle, but may have been a little off one way or the other (p. 48, ll. 15-35). He did not see the little girl at the rear of truck before accident. The truck and the doors interfered with his vision of things directly behind the truck (p. 52, ll. 15-25). The driver's cab and the tank would be the "first obstruction" (p. 52, ll. 30-35). "It was almost like a blank wall there. The cab is in the front of the tank, the doors and box in the rear (p. 52, l. 35, p. 53, l. 10). This box is where the measuring cans and funnels were placed (p. 53, ll. 10-15). And further:

> "Q Was there anything about the position of the truck on that day and its physical position in the street that interfered with your vision in a different manner than if the truck had been standing around facing in the same direction as the traffic on that side, on the same side of the curb line? A The position of the truck?
>
> Q Do you understand the question? A I think I do.
>
> Q Go ahead and tell us. A There wouldn't be any difference in the view unless you got the rear view first. The position of the truck would be the same because you couldn't see through the tank.
>
> Q Would the fact, then, that the rear of it was further out in the street than the front make any difference? A Another thing, the vision would be in front more than underneath because the box don't extend down underneath in front.
>
> Q The box on this occasion was nearer to where the child crossed than if the automobile truck was turned in the opposite way, of course? A Yes.

> Q Is that the only difference, as far as your ability to see was concerned, between that truck standing alongside the curb line in a normal position and the way it was standing on the day of this accident? A Not only in the doors.
>
> Q I wish you would state to us everything. What made the difference in your vision of the child, or what was behind the truck? A I don't think it is the doors. The housing on the differential and the box that covers the faucets and everything else which the front has not.
>
> Q Which, if it had been turned around, would not have interfered with your vision, if placed in the proper way along that curb line. Is that correct? A Yes, sir'' (p. 53, l. 10 to p. 54, l. 10).

He was traveling north on the street and the truck was facing south (p. 54, ll. 10-20). If the truck had been facing in the other direction, the tank, the hood and the differential would have been the same (p. 54, ll. 20-30). He was driving practically in the center of the street leaning a little towards the west curb so as to give plenty of room to clear the track. The moment he pulled out to the center he had a clear view straight ahead without regard to the truck (p. 54, ll. 35-40). "Q And it wouldn't make any difference when you were in that position whether the truck was facing you or in the other direction, would it? A Not a bit'' (p. 55, ll. 1-10). He pulled out to the center of the street when he was about 15 feet south of the truck. He was driving slowly and was three or four feet west of the truck (p. 55, ll. 15-35). His machine was a left-hand drive. The truck did not obstruct his view when he was broadside of it (p. 55, ll. 35-40).

The foregoing summary of the evidence shows that so far as relates to the negligence of the defendants, Standard Oil Company and Staub, the fundamental question is, whether the fact that the truck was on the wrong or left-hand side of the street in the direction it was headed (which admittedly was a violation of the Traffic Act) was the proximate cause of the accident. The statute in

question is the Traffic Act of 1915 (paragraphs (8) and (9) of section 2 of Part II), providing:

> "(8) No vehicle shall stop with its left side to the side of the road or to the curb, except as hereafter provided in subsection nine of this section.
>
> (9) No vehicle shall be stopped on any road or street except such vehicle be drawn to the side, and when such road or street has a curbing, then such vehicle shall be drawn close to such curb; provided, however, that nothing in this section shall prevent a vehicle from stopping in any emergency in order to avoid accident or to allow the right of way to vehicles or pedestrians, as provided in this act." (P. L. 1915, p. 287.)

Section (9) has no application, as it appears that at the point where the Standard Oil truck was standing there is no "curbing"; furthermore, it appears that the truck was in fact drawn "close to the curb line." Of course, the expression in section (9) "close to such curb" does not mean immediately adjacent to or actually adjoining the curb. While the evidence shows that the front wheels of the truck were about two feet nearer the curb line than the rear wheels,, it was not claimed that this slight difference in the position of the front and rear wheels could be considered to be a violation of section (9). We, therefore, need consider only section (8).

Admittedly, the Standard Oil truck had stopped with its left side to the road or curb. We do not question the general rule that a violation of a statutory regulation (and in some cases of an ordinance) might be some evidence of negligence; but, as above stated, the important question on this phase of the case is, whether such act, if it was negligent, was the proximate cause of the accident. This question was submitted to the jury by the trial judge wherein he charged the jury the requests of these defendants, that

> "One who places his automobile, in plain view, on the left side of the road, in broad daylight, at a point immediately next to the curb, cannot be

held liable for damages by a pedestrian or a pedestrian's estate because the pedestrian is run into by the operator of another automobile on the public highway, unless his negligence proximately contributed to the accident (p. 97, l. 40; p. 98, l. 10).

Again in the main charge, the trial judge said (p. 104, l. 20, p. 105, l. 20):

"Now, let us return to the Standard Oil Company, and Staub, for a moment. The Standard Oil Company and Staub, in placing the truck at that point, violated a duty, that is, they should not have put that truck in that position at that place. They could have stopped their truck at that point if they had turned it in another direction, the opposite direction, but they did not do that; it was turned in a wrong direction, and the contention is that by reason of these rear attachments, or doors, or whatever it was made of, on the rear of this truck, that they obstructed the view much more than it would have been obstructed had the truck been in a proper position. The claim on the part of the plaintiff is that this negligence consisted in having that truck turned the wrong way, and their claim is that it would have made a great difference if the truck had been turned around in the opposite direction.

As far as the parking of the truck at that point goes, the negligence of the Standard Oil Company, if any, was in putting the truck in that position. If you find the Standard Oil Company guilty of negligence you must find that that negligence, that that particular thing, was a proximate cause of this accident.

It is not every consequence of an act that a man is liable for. There are such things as unforeseen accidents, and you must ask yourselves the question, would a reasonably prudent man foresee such a consequence as that which occurred? Is such a consequence to be reasonably anticipated? If a reasonably prudent man would not foresee such a consequence from putting that truck in that position, the Standard Oil Company and the driver cannot be held responsible."

Under this charge, the jury were limited to the point as to whether the reversed position of the truck was the

proximate cause of the accident, and, as the jury were thus limited, this is the only point that we need now consider, the principle being well settled that a verdict, if sustained at all, can only be sustained on the theory on which the question of liability was submitted to the jury.

Hays v. *Penn. R. R.*, 42 N. J. L. 446;
Harte v. *Cumberland, &c., Ins. Co.*, 44 N. J. L. 478;
Halsey v. *L. V. R. R. Co.*, 45 N. J. L. 26;
Cook v. *American Gunpowder Co.*, 70 N. J. L. 65;
Oakley v. *Emmons*, 73 N. J. L. 206;
Doran v. *Thomsen*, 76 N. J. L. 754;
Fritz v. *Sayre & Fisher Co.*, 77 N. J. L. 236;
Barnes v. *Wellington & Co.*, 78 N. J. L. 490.

In considering this question it will be helpful to examine some of the numerous cases that deal with the question of proximate cause. The latest decision in the New Jersey reports in *Justeson* v. *Pennsylvania R. R. Co.*, 92 N. J. L. 257, wherein the rule is stated as follows (p. 259):

> "Damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency. The term 'natural' imports that they are such as might reasonably have been foreseen, such as occur in the ordinary state of things; the term 'proximate' indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss. Cuff, Admx., *v.* Newark & N. Y. R. R. Co., 35 N. J. L. 17; Wiley *v.* West Jersey R. R. Co., 44 *id.* 247."

In this case, it was held that misinformation given to the plaintiff by one of the defendant's employees in New York City as to the existence of a quarantine in the State of Virginia was not the proximate cause of the distress and illness resulting to the plaintiff by reason of her being obliged to leave the car in which she was riding after it had been turned over to another carrier for transportation for part of the through journey.

Another recent decision of interest is by the Circuit Court of Appeals for the Second Circuit in *Salsedo* v. *Palmer,* 278 Fed. 92. Here again the general rule was stated substantially as in this state, as follows:

> "In determining whether an act was the proximate cause of an injury, the question always is whether there was an unbroken connection between the wrongful act and the injury, and to warrant a finding that negligence or an act not amounting to wanton wrong, is the proximate cause of an injury; it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

The facts of the case are stated as follows in one of the headnotes:

> "If, as alleged, defendants held plaintiff in confinement, assaulted him and subjected him to mental torture, and thereby he was caused to lose control of his mind, and to become suicidally despondent and mentally irresponsible, with the result that he threw himself from a window causing his death, the wrongful acts were not the proximate cause of the death, as the suicide was an intervening act, if the killing was deliberate, while, if it was the result of suicidal mania, such mania was not a natural or reasonable result of the mental or physical torture."

Numerous authorities, both from text books and decisions, are cited in the elaborate opinion by Rogers, *C. J.*

The legal principles being well settled, the real difficulty, in any case, is the proper application of them to varying circumstances. As to violation of statutes, a common illustration is the class of cases arising under the federal statutes, such as the federal safety appliance act and the hours of service act. It has been held that proof of the violation of the safety appliance act was in itself sufficient to render the defendant responsible, even though the violation may have been without the carrier's

knowledge or consent and without any negligence on its part.

St. Louis, &c., R. Co. v. *Taylor,* 210 U. S. 281; 52 L. Ed. 1061.

Such decisions go further than the decisions of our own state which hold that violation of a statute is proof of negligence, but it is not necessarily conclusive on this point. But in this class of cases, the question still remains whether the alleged violation was the *cause* of the accident upon which the suit may be based. There is an important ruling by the United States Supreme Court on this question in *St. Louis, &c., R. Co.* v. *McWhirter,* 229 U. S. 265, 57 L. Ed. 1179. Suit was brought to recover damages for the death of the plaintiff's intestate on the ground that the carrier had violated the hours of service act by requiring from the intestate more than sixteen hours' consecutive service. After reviewing the history of the statute in question, the Court, speaking through White, *C. J.,* said (italics ours):

> "We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers, which the view taken of the act by the court below imposes. We say this because, although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employees to work beyond the statutory time to liability for all accidents happening during such period, *without reference to whether the accident was attributable to the act of working overtime.* And we think that where no such liability is expressed in the statute, it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that, where negligence is charged, to justify a recovery *it must be shown that the alleged negligence was the proximate cause of the damage.* The character of evidence necessary to prove such causation we need not point out, as it must depend upon the circumstances

> of each case. Conceding that a case could be presented where the mere proof of permitting work beyond the statutory time and the facts and circumstances connected with an accident might be of such a character as to justify not only the conclusion of negligence, *but also the inference of proximate cause,* such concession can be of no avail here, since the instruction of the Trial Court and the ruling affirming that instruction were based upon the theory that the mere act of negligence in permitting an employee to work beyond the statutory period *created liability irrespective of the connection between the alleged negligence and the injury complained of.*"

A recent decision by the Circuit Court of Appeals for the Sixth Circuit clearly indicates the distinction between a proximate cause of an accident and a condition accompanying the accident. *McCalmont* v. *Pennsylvania R. Co.,* 283 Fed. 736 (decided October 4, 1922; Petition for Certiorari denied by U. S. Supreme Court, January 22, 1923—see U. S. Supreme Court, Adv. Opns., March 1, 1923, p. 277). The action was brought under the Safety Appliance Act. A direction of verdict for the defendant was affirmed. We quote headnote 3 as follows:

> "A car with a defective coupler, standing with others on a dead track awaiting transfer to the shops for repair, had been attached to the next car by a chain, and plaintiff's intestate, foreman of car inspectors, passing with a helper, went between the cars to shorten the chain, when a collision was caused by the shunting of another car on the track, and he was killed. The rules required all employees, when working about standing cars, to set out a signal flag, but he did not. *Held,* that the proximate cause of the collision and of the injury was the failure to set out the flag, and that the defective coupler was not a cause, but only a condition of the injury, and did not create liability in the company under Safety Appliance Act April 14, 1910, Sec. 4 (Comp. St. Sec. 8621)."

The opinion has a full discussion of several recent cases in the U. S. Supreme Court as follows:

> "It is quite apparent that the defective coupling was not the direct cause of McCalmont's injury in the same way and to the same degree as in cases where a brakeman is actually trying to make a coupling with a car which is at the moment coming on for that purpose; yet there was a seeming cause and effect relationship from the fact that, except for the defective coupling, McCalmont would have had no occasion to go between the cars at this point and would not have been hurt. We think the properly logical view of such situations, and the authoritative precedents to be discussed, fairly indicate that such accidents fall into two classes—the one where the impact of the two cars which injures the workman is a part of the movement in which he is purposely participating; the other where this impact is rather a collision which is no part of the plan. In the former class nothing happens which was unintended or which should have been avoided. The presence of the injured person between the cars is the immediate cause of the injury, and that presence was induced by the defective coupling, which is therefore, in law, the proximate cause. In the other class of cases the unintended and unnecessary collision is the immediate cause of the injury, the presence of the injured person at the danger point is an incident or a condition, and we must therefore look to see whether the defective coupler is the cause of the collision. If so, then it is the proximate cause of the injury; otherwise, it is a remote cause.
>
> The decisions of the Supreme Court may well be compared, and are fully reconcilable, from this view point. In the Conarty Case, 238 U. S. 243, 35 Sup. Ct. 785, 59 L. Ed. 1290, the defective coupler was the immediate thing which permitted the two colliding cars to come so close together that Conarty was caught between. If the coupler had been in good order, Conarty would not have been hurt. The collision between the defective car and the engine was no part of an intended coupling movement, but was entirely distinct and quite unnecessary. The reasoning of the court is that the in-

jury was caused by the collision, that the collision was not caused by the defective coupling, and hence that the Safety Appliance Act did not create a liability. In the Layton Case, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931, there was a deliberate attempt to make a coupling by impact with a string of five cars standing on the track. Plaintiff was on one of these five cars for the purpose of cooperating in the coupling operation. Owing to the presence of a defective coupler, the attempt to make this coupling failed, and, as the necessary alternative of the failure, the five cars were pushed along the track into collision with others standing there, and this collision was the immediate cause of plaintiff's injury. Therefore in this case there is a direct chain of cause and effect—the intended coupling, the defective drawbar, the resulting unintended collision, and the finally resulting injury. In the Gottschal Case, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995, the train broke in two, and the imperfect coupler caused the parting, which set the brakes, which caused the unintended stop and shock, which injured plaintiff. In the Lang Case, 255 U. S. 455, 41 Sup. Ct. 381, 65 L. Ed. 729, we have again the case of an unintended collision not caused by a defective coupler. The collision would have occurred just the same if there had been no defective coupler; and thus the case is classified with the Conarty Case. Also, just as in the Conarty Case, the plaintiff would not have been hurt or might not have been hurt except for the defective coupler, but in the Lang Case also the defect was considered a condition, and not a cause of the injury.

The opinion of the majority of the Court, read in connection with the minority opinion, makes it clear that, where an unintended collision causes the injury, the defective coupler is not the proximate cause unless it was instrumental in bringing about the collision. The late Supreme Court cases have recently been carefully considered by the Court of Appeals in the Third Circuit (Philadelphia Co. *v.* Eisenhart (C. C. A.) 280 Fed. 271), and we read its analysis and conclusion as being in accord with ours. * * *

> "If, however, there were otherwise doubt about the conclusion that the defective coupler was not the proximate cause of McCalmont's death, it would be removed by observing and applying the ruling of the Supreme Court in the Wiles Case, 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732. This opinion points out that even in the presence of negligence by defendant which set in motion the train of events and without which the injury would not have happened, yet the plaintiff's own conduct and negligence may be such as to become the intervening and sole proximate cause, leaving the defendant's negligence as a remote cause only."

On the same principle, it has been held that the violation of a statute which regulates automobile or other traffic, does not justify a verdict unless the proof shows not merely violation of the statute but also that such violation was the cause of the accident. The standard work of Berry on Automobiles states the general rule as follows:

> "While the failure of a person to perform a duty imposed upon him by statute is sufficient evidence of negligence on his part, nevertheless, such neglect, however, illegal, in the absence of evidence showing it to have been a proximate cause of the injury complained of, furnishes no legal ground for complaint." (Sec. 198, p. 206, 3d Edition.)

Also see numerous cases there cited.

An illustration of this principle in the New Jersey reports is *Shaw* v. *Thielbahr,* 82 N. J. L. 23, wherein it was held that the failure of a plaintiff to have a license was not ground for a non-suit in an action brought for collision with defendant's wagon as "the duty created by the police regulation to have a license and to display its number was not owing to the defendant or created for his benefit at least as far as the avoidance of accidents is concerned." Similar cases can be found in Sections 260 and 261 of Berry on Automobiles, Third Edition. The point of such decisions, is that a failure to comply with a statutory provision neither bars recovery by a plaintiff who thus violates the law, nor permits recovery against a

defendant who does likewise, unless there is a causal connection between such violation of law and the accident. In the present case, we submit that the mere fact that the Standard Oil truck was standing on the wrong side of the street (thereby violating a statute) was not the *cause* of the accident to the plaintiff's intestate.

A case similar in facts and principle is *Mayor and City Council of Hagerstown* v. *Flotz* (Maryland), 104 Atlantic Reporter, 267, in which it was held that the city's alleged negligence in permitting a table to remain upon a sidewalk, in violation of an ordinance prohibiting obstructions thereupon, was not the proximate cause of injury to a small child, caught between the table and an automobile that backed upon the sidewalk. The court said:

> "For consequences of which his act or ommission was only a mere condition or remote cause, the defendant is not liable."

Even if we admit for the purpose of argument that the rear doors of the truck were opened (as claimed by McGuire) in such a manner that they protruded about a foot or fourteen inches beyond the other parts of the truck, it is difficult to see how that fact contributed in any way to the accident. McGuire's claim was that the truck and its doors interfered with his vision as he approached same, but his testimony shows clearly that whatever obstruction there was to his vision was caused equally by the cab at the front of the truck and the tank itself which form the body of the truck, together with the so-called "box" at the rear. If the truck had been turned around in exactly the opposite direction, the cab, the tank, the box and the doors would have obstructed his vision in exactly the same manner. McGuire very properly said, "You couldn't see through the tank." McGuire, according to the undisputed evidence, was driving in the center of the street, leaning a little to the west, so as to clear the truck. Under these circumstances, he stated (and indeed it is difficult to imagine how he could possibly have stated anything else) that when he was in that position it

would not make *a bit* of difference whether the truck was facing him or standing in the other direction. The map shows that according to scale the street where the accident happened, from curb to curb, was 36 feet wide. If McGuire was driving a little to the west of the center, it is fair to assume that his car must have been not less than 15 feet from the east curbline of the street. The width of the truck over all, including the hubs of the wheels, is estimated at eight feet (p. 36, ll. 1-10). Assuming that the rear wheels were two or three feet west of the curbline it follows that the extreme westerly edge of the hub of the truck would not be more than ten or eleven feet from the east curbline. In other words, in the location in which McGuire was driving along the street, there was a clear space of at least seven or eight feet between the truck and McGuire. McGuire's automobile was a left-hand drive, so that his position would be to the extreme west side of the car or away from the truck. It is very apparent that the fact that the truck was on the wrong side of the street did not in any way increase the obstruction to McGuire's view as compared with what the view would have been if the truck had been turned in the opposite direction. It may, therefore, be urged that the position of the truck to some extent obstructed the view of the plaintiff's intestate. There was no evidence, however, showing that she made any effort to see McGuire's car—either while she was behind the truck or after she had passed it. On the contrary, *the evidence shows without dispute that the plaintiff's intestate did not look at any time in the direction in which McGuire's car approached, except when she was on the sidewalk* (p. 30, ll. 25-35).

No one pretends that when she was on the sidewalk the truck interfered in any way with her view. We are not willing to admit that the position of the truck in any way increased the obstruction to her view, even if she had looked; but however that may be, it is certain that it had nothing to do *with obstructing her view after she had passed the line of the truck, from* which point, for a dis-

tance of at least seven or eight feet, before she came to that part of the street where McGuire's automobile was slowly approaching, at a rate of five or seven miles per hour, her view was clear. McGuire's car would be in plain sight to anyone who was coming from behind the truck, as the angle of vision of such a person would not be limited to a direct line from the east to the west side of the street. Under these circumstances, how can it possibly be urged that the position of the truck was the proximate cause of McGuire's failure to see the plaintiff's intestate or of her failure to see McGuire's car. An examination of the map which was offered in evidence by the plaintiff, a copy of which is attached to the back of the State of Case, will show that the tanks in front of Brunner's Garage are on the south side of the north driveway of the garage, so that if the Standard Oil truck had been facing north instead of south, it would have completely blocked the entrance to the garage, during the time it was unloading the gasoline. By facing the truck south, however, so as to bring the rear next to the pump on the sidewalk, this was avoided. If the truck had been facing north, and the plaintiff's intestate had run from in front of it and was injured, there would have been no liability on our part. Still in this very situation the doors, tank and cab of the truck would be just as much of an obstruction, for McGuire testified it didn't make any difference whether the truck was facing him or not. How can it be said, therefore, that the mere fact that the truck faced south was the natural and proximate cause of the accident, when according to the rationale of the cases "natural" imports that it might reasonably have been foreseen or such as occurs in the ordinary state of things, and "proximate" indicates that there must be no other efficient agency intervening between the defendant's dereliction and the damage.

Under the decisions above cited, we submit that the movement of McGuire's car was in a legal sense an independant intervening cause which broke the chain be-

tween the original wrongdoing of these defendants and the resulting accident.

Reply to Plaintiff's Brief.

Plaintiff argues that the proximate cause of the accident was the "careless parking" of the truck, and not merely the admitted fact that the Standard Oil truck was parked on the wrong side of the street. In paragraph 2 of the complaint there is a general allegation that the plaintiff's intestate received fatal injuries by reason of the "careless, negligent, and improper management and control" of the truck (p. 5, ll. 30-40). But these general allegations mean nothing without a specific charge of negligence, and that charge is found in paragraph 3 of the complaint which reads as follows:

> "The negligence of the said Standard Oil Company (N. J.), consisted in this: That the oil automobile truck of the said company was standing on the wrong side of South Twelfth street, contrary to the Motor Vehicle Act of the State of New Jersey and by reason of certain parts of the said automobile truck extending outward from the body of the truck while oil was being taken therefrom, it was impossible for the plaintiff's intestate to get a clear view of South Twelfth street, and while crossing from a point in the rear of said truck, was struck by an automobile being driven in the opposite direction to that in which the defendant's automobile was facing, receiving fatal injuries from which she died" (p. 6, ll. 5-18).

These are the only specific allegations as to the negligence of the defendant company. In the second count of the complaint which sets up negligence on the part of the defendant Staub, there is the same allegation (p. 7, ll. 15-25). These counts charge that the negligence of the company and Staub consisted of a violation of the Motor Vehicle Act by reason of the parking of the truck on the wrong side of the street; the statement that because certain parts of the truck extended out from the truck, it was impossible for the plaintiff's intestate to get a clear

view of the street, cannot be construed as a charge against the defendants that they were negligent because parts of the truck extended out into the street; such fact, if true, would not be negligence; it might have a bearing on the question of the contributory negligence of the plaintiff's intestate, but if that were the only allegation of negligence in the complaint, it would properly be struck out on the ground that it failed to disclose a cause of action.

Moreover, the trial judge told the jury that the plaintiff's claim was that the negligence of these defendants consists in having the truck "turned the wrong way" (p. 104, ll. 30-40). The rule is that a verdict can be sustained only on the theory upon which the question of liability was submitted to the jury. In an appellate court, the prevailing party cannot, for the first time, introduce a new theory of the case which was not pleaded in the complaint nor submitted to the jury.

Counsel for plaintiff further argues that the fact that the rear of the truck was two or three feet out from the curbline is also evidence of negligence. No such claim of negligence was made in the complaint and such theory was not submitted to the jury as the basis of possible liability on the part of these defendants. Counsel then asserts that the evidence shows that the truck was out to the "crown of the road," and was "at least half-way across the street" (p. 12, near top). Such a statement is not justified by the evidence. *It was shown without dispute that the street was thirty-seven (37) feet wide from curb to curb.* The width of the rear of the truck, according to the "imagination" of the witness McGuire, was eight or nine feet (p. 45, l. 35, to p. 36, l. 10). This same witness estimated that the rear wheels were so placed as to be two or three feet from the curb. In fact, an actual measurement of the truck shows that its width over all was *seven* feet (p. 83, ll. 10-12). This witness also said that he "thought" that after allowing for the extension of the doors at the rear of the truck, the "extreme part" of

the door would be "over ten feet from the curbline" (p. 46, l. 18). Even if we take McGuire's "imagination" and "thought" and estimate the distance of the extreme outer part of the rear door as ten feet from the curb—in the face of an actual measurement of seven feet—still the outer edge of the door would not be more than thirteen feet at the most from the curb; hence if we give the plaintiff the benefit of every possible doubt, there would still be a distance of at least five and one-half feet from the extreme outer edge of the rear door to the center of the street.

Counsel asserts that the defendant Staub (driver of the truck) in his testimony at the trial, did not accurately describe the position of the truck on the street, and that his testimony on this subject differs from a statement made by him to a police officer directly after the accident; and from this counsel then argues that the jury would be justified in disregarding any or all of his testimony (p. 13, of brief). The statement to which the brief refers is Exhibit D. 1 (see supplement at end of Case). It will be noted that this statement does not differ from the testimony given by Staub at the trial relative to the position of the truck, for the obvious reason that in the statement, nothing whatever was said about the position of the truck.

Counsel then quotes some of the testimony and argues therefrom that the rear of the truck was much wider than the front, and again asserts that the truck projected out in the street to the crown of the road (p. 16 of brief). We have already pointed out that if the rear of the truck was assumed to be ten feet wide (although actual measurement showed it to be seven feet) and that if we add to that the estimate of McGuire that the rear wheels extended two or three feet further from the curb than the front wheels (which were alongside of the curb), the outer edge of the truck would still be five or six feet from the center of the road.

Counsel then argues that McGuire's testimony shows that the tank of the truck and the cab in the front thereof interfered with his vision. This is correct as far as it goes, but there should be added the further statement that McGuire also testified that he was driving in the center of the street, "leaning a little towards the west curb," and that the moment he reached the center he had a clear view straight ahead without regard to the truck, and finally, he said it would not make "a bit" of difference in that position whether the truck was facing him or was in the other direction (p. 54, l. 30, to p. 55, l. 10). We have already summarized this testimony, but reiterate it for the purpose of refuting the argument now urged by counsel for the plaintiff that the mere fact that the truck was turned in the wrong direction and that the rear wheels extended two or three feet further from the curb than the front wheels, made any difference in McGuire's view. The fact is, that according to McGuire's own testimony, the position of the truck did not make a bit of difference in his straight ahead view.

Counsel then cites the case of *Pyers* v. *Tiers,* 89 N. J. L. 520, 99 Atl. 130, and urges that the situation in the present case is similar to that which existed in that case. In the cited case the plaintiff, while riding a motorcycle on a public street, attempted to turn out for the purpose of avoiding the defendant's car which at the moment of the collision was being backed from a position alongside of the curb; in the effort to avoid the defendant's car, the plaintiff collided with the car of a third party. The act of the defendant in backing his car under the circumstances was a violation of the Motor Vehicle Act (P. L. 1915, p. 294, Sec. 11 (4)). It was held to be a question for the jury whether the defendant's act was negligent in that it jeopardized other users of the highway who were in close proximity. Such a situation is very different from that presented by the instant case where the truck was standing still and where there was ample room

(at least twenty-four feet) for McGuire to pass between the truck and the opposite curb. There is no foundation for any claim in this case that the position of the truck jeopardized the use of the highway by other persons; there was plenty of room for McGuire to drive his car and likewise plenty of room for the plaintiff's intestate to cross the street. This is a very different situation from that found in the cited case, where the street was crowded with several vehicles. Counsel also cites the same case on the point of proximate cause, as authority for the statement that an intervening cause must be itself wrongful. It should be observed that this point was not involved at all in the case, as appears from the opinion, where the court says with reference to the argument of proximate cause, that this question was "suggested but not argued." While it is true in many cases that an intervening cause is in fact wrongful, we submit that that is not the only test as to whether the cause is to be considered as an intervening cause in the legal sense of that term (see 29 Cyc., p. 500). In the present case, the fact, stripped of all technicalities, is that the immediate cause of the accident was the collision between the plaintiff's intestate and McGuire's automobile.

In the opinion of the Supreme Court the case of *Pyers* v. *Tiers* was discussed, and that Court held that the decision therein supported its conclusion in the present case. Referring also to the case of *Marshall* v. *Suburban Dairy Company,* 96 N. J. L. 81, 114 Atl., 750, the Supreme Court said:

> "The differentiating characteristic in both cases as compared with the case at bar is that in the cited cases the culprit was the operating, moving, proximate and efficient cause, in the sense that without the culpability of the illegally moving factor, the accident would not have occurred" (Case, p. 116, ll. 1.10.)

Counsel for plaintiff says that the position of the truck was such that the child was on the "crown" of the road

before she could see the approaching automobile (p. 22 of brief) again overlooking the undisputed testimony that there was a space of at least five or six feet after the plaintiff's intestate passed the outer edge of the truck before coming to the middle of the street, and likewise overlooking the testimony of McGuire himself that he was driving in the center of the street and leaning a little towards the west curb (p. 54, l. 32).

Counsel also assert that the negligence of the defendants in parking the car made it impossible for the child to make a second observation until she reached a point where she "again" looked (p. 22 of brief). The trouble with this argument is that it assumes facts which are not in the case; it was not "impossible" for the plaintiff's intestate to make a second observation; the simple fact is that she did not make *any* observation at all after leaving the sidewalk (p. 30, ll. 20-30); and the further fact is that she was not struck until she was three-quarters across the street (p. 30, l. 32). In other words, she was hit at a point about twenty-eight feet west of the curb alongside of which the truck was standing (three-fourths of 37 feet). If, therefore, we assume (as stated above) that the extreme outer edge of the door at the rear of the truck was thirteen feet from the curb line, there would still be a space of fifteen feet which the child had to cross before she was struck by McGuire's automobile. In this connection, we should also point out the error found on page 23 of plaintiff's brief in the statement that the deceased made an observation when halfway across the road. The brief refers to the testimony of the witness, Gertrude Brunner (p. 90, ll. 20-40). But this witness did not say that the deceased made an observation when she was halfway across the street; on the contrary, the witness was asked the direct question as to whether the deceased at any time turned her head toward Avon avenue (the direction from which McGuire's car approached) and the witness answered: "I do not recall." The witness then went on to

say that she observed that the deceased paused, and at that time she was at least "half, if not over" (p. 90, ll. 20.38).

The Supreme Court held that the illegal parking of the truck was not the efficient proximate cause of the accident and that, therefore, the trial judge should have ordered a judgment of non-suit as against the defendant. We quote from the opinion on this point:

> "It appears from the testimony of McGuire, that, even if the position of the truck had been reversed, so as to entitle it legally to park on the side of the street where it was stationed, the same difficulty of an obstructed vision would have been presented. This fact indicates that the position of the truck in any event presented simply a perfectly obvious existing condition, rather than an operating unforeseen efficient cause. In such a situation the relative duties of exercising due care, in traversing the street were simply accentuated, and resulted in casting upon the driver of a vehicle using the street, the requirement of additional caution; and upon the wayfarer in attempting to cross the street a like precaution, and did not *per se* constitute negligence upon the part of the owner of the truck, so as to subject him to liability as an efficient proximate cause.
>
> *Winch* v. *Johnson,* 92 L. 219;
> *Paulsen* v. *Klinge, Id.* 95.

The fact that McGuire was found by the verdict not guilty of negligence in the operation of his car, does not *per se* impose liability upon the other defendant unless such defendant can be brought within the legal comprehension of the efficient proximate cause of the accident.

The case was submitted as against McGuire upon the theory that he may have occupied that status. The fact that the verdict was in his favor may be accounted for in the light of the charge of the Court, upon the theory that he was not such cause, or that if he were, the child was guilty of contributory negligence in running against the car, with ample opportunity of observing its approach. But whatever factual theory the jury adopted, as a basis for their verdict, cannot operate *per se* to impose

liability upon the remaining defendant, unless such liability can be predicated upon the recognized legal principle to which we have adverted. * * *

"The efficient proximate or intervening cause in such a situation, is tantamount in law to the force or operating factor, without which the accident could not have happened. Such a power must have been active, operative and carrying and containing within itself the possibility and potentiality for harm; as in the famous Squib case, 2 Wm. Blackstone, 892; or in the fire cases emenating from the sparks of a locomotive through the mediation of intervening combustible property, *D. L. & W. R. R.* v. *Salmon,* 39 L. 299; or the case of a runaway horse which was allowed to remain untied upon the highway and which ran away and collided with a truck which was engaged in an earnest effort to avoid the runaway, in which this court held the efficient and probable cause of the damage to be, the actual operating illegal force in the first instance of the untied horse, without which the accident would not have occurred, even conceding the ill-advised effort of the colliding truck in its attempt to evade the danger.

Marshall v. *Suburban Dairy Co.,* 114 Atl. 251. * * *

"In the case at bar it was unimportant whether the defendant's car rested legally or illegally upon the street, since its obstruction to the vision of the crossing pedestrain, or to the driver of a moving car upon the roadway, would under the testimony be equally effective. In either event its impotence for harm or damage, as an inocuos immobile instrumentality, must be manifest, since in both situations it simply presented a patent condition, and not an operating efficient or proximate cause, which can be said to contain by its activity, that potentiality for harm or damage, which furnishes the test upon which the rule of liability in this character of tort feasance is predicated."

Counsel for plaintiff on pages 3 to 11 of brief discusses the opinion of the Supreme Court. Near the end of the discussion, the statement is made that the opinion indicates that the Supreme Court passed upon the ques-

tions "as on a rule to show cause." It is somewhat difficult to understand the basis for such an assertion. The question of proximate cause was one of the fundamental points in the case. It was one of the grounds urged in the motion for non-suit and it was one of the legal points reserved in the rule to show cause. The facts upon which the question depends are without dispute; hence it was a question of law as to whether or not the admitted negligence of the defendants was the proximate cause of the accident.

The principal criticism made by counsel for plaintiff of the opinion of the Supreme Court seems to be that the opinion overlooked the claim of the plaintiff that the location of the Standard Oil truck created "a condition of peril," which required sudden action in an emergency. There are several answers to this argument; first the question whether the act of a defendant has created a condition of sudden peril or emergency has nothing to do with the question of defendant's negligence, but relates to the question of whether a plaintiff under such circumstances is excused from a charge of contributory negligence, which under other circumstances would bar recovery. In the second place, there is no claim in the complaint that these defendants were negligent because they created a perilous condition on the highway; in the third place, the question of the liability of these defendants was not submitted to the jury upon any such theory, and hence the plaintiff cannot now urge that the verdict might be sustained on such theory; and finally the evidence shows that the fact that the Standard Oil truck was parked on the wrong side of the street did *not* create a condition which was in any degree more perilous than if the truck had been parked on the same side of the street, but facing in the opposite direction. Counsel for plaintiff seems to think that there was negligence on the part of these defendants merely because the truck in question created what he calls "a big obstruction upon a public street, without due regard for the safety of the

traveling public'' (p. 9 of brief). If this argument is sound then such a truck is a nuisance and has no right at all on a public street; but this, of course, is not the law of the land, nor is it the law of this case.

If the judgment of the Supreme Court reversing the judgment of the Court of Common Pleas was correct on any of the grounds urged by these defendants (who were the appellants in the Supreme Court), then the judgment of the Supreme Court must be affirmed, even though this Court may not agree with the particular ground selected by the Supreme Court as the basis of its decision. We, therefore, proceed to discuss the other grounds of appeal urged by these defendants in the Supreme Court.

II.

Plaintiff's decedent was guilty of contributory negligence as a matter of law.

Decedent was a girl nine years and five months old (p. 19, ll. 20-30). She attended school and was in all respects normal for her age (p. 20, ll. 1-10). She had been attending school for two years and was a bright child (p. 23, ll. 1-10). She lived on the street where the accident happened, probably 100 feet north of the garage, and on the same side of the street (p. 23, ll. 20-30). She was accustomed to go on a great many errands for the lady with whom she and her father boarded (p. 50, ll. 20-30).

The evidence relative to the accident has been summarized under Point I, and we need not again cite it, except to indicate such parts thereof as bear directly upon the present question. It appears from the evidence of plaintiff's witness, Anna Scher, that the decedent was standing on the sidewalk at the rear of the truck; that while in that position she looked both ways, then started to run across the street, and got about three-fourths of the way across when the accident hap-

pened (p. 26, l. 27). This witness was in front of her own house, which was number 747 (p. 26, ll. 30-40). Reference to the copy of the map at the back of the Case will disclose that number 747 is about 20 to 30 feet south of the north driveway of Brunner's Garage. Decedent after leaving the sidewalk ran directly toward this witness and did not again turn her head, nor did she stop from the time she started to cross until she was struck (p. 30, ll. 20-30). According to this witness, decedent was running on a diagonal course across the street, directly toward the approaching automobile. Decedent was not running fast, "she was running about like marking in time" (p. 28, ll. 30-40), which indicates that during her journey across the street she had made no observation for vehicles and was totally unaware that one was bearing down upon her. McGuire's car was traveling slowly along, a little to the west of the center of the road, going north, and was in full view by decedent at any point ten feet or less from the curb up until she was struck, some 27 feet from the curb. According to the witness, Anna Scher, decedent was taking a course which would be almost directly toward the automobile. She was running during the entire distance very slowly, "like marking time," and could have stopped instantly and avoided the accident. The point where she was crossing the street was in the middle of the block, 135 feet from the nearest intersecting street (p. 22, ll. 30-40).

We submit that upon the above facts, which were undisputed, the trial judge erred in refusing to non-suit the plaintiff on the ground that as a matter of law his intestate was contributorily negligent.

North Hudson Co. Ry. Co. v. *Flanagan,* 57 N. J. L. 696;

Brady v. *The Consolidated Traction Co.,* 63 N. J. L. 25; 64 N. J. L. 373;

Anderson v. *Central R. R. Co.,* 68 N. J. L. 269;

David v. *West Jersey, &c., R. Co.,* 84 N. J. L. 685.

In *North Hudson Co. Ry. Co.* v. *Flanagan*, 57 N. J. L. 696, at p. 698, the court said (italics ours):

> "The testimony introduced by the plaintiff (who, at the time of the accident was *nine* years of age) showed that he and some companions were playing a game of ball in a street through which the defendant operated its railroad. This street ran north and south, and the plaintiff and his companions were playing upon the easterly side of it. As the car of the defendant was approaching from the south, the plaintiff started to run across the street in front of it, for the purpose of avoiding being hit by the ball which was about to be thrown at him by one of the players. *He ran diagonally across and in a northwesterly direction, at the same time looking over his right shoulder at the boy who was about to throw the ball at him. He was utterly unconscious of the approach of the car until he had reached the middle of the track, when, as he says, he heard the driver yell at him to 'get out of that.' Upon hearing the driver's call he stopped, and, turning around, saw the car horses within four feet of him. The next instant he was run down.* So far as the case shows there was no obstructions of any kind to prevent the plaintiff from seeing the defendant's car, had he looked as he was crossing the street. His only reason for not seeing it was that he was engrossed in his game, and had his head turned in exactly the opposite direction to that from which the car was approaching. The rule is perfectly well settled that a person, crossing a street on foot, is bound to look out for approaching vehicles, and, if neglecting to do so, he is hurt, he will be considered to have contributed to the injury by his negligence, and will be barred from a recovery against the person who inflicted. *Sheets* v. *Connolly Railway Co.*, 25 Vroom 518. It is urged, on behalf of the plaintiff, that this rule only applies when the person injured is *sui juris;* that the plaintiff, although nine years old, was backward, both mentally and physically, compared with other boys of his age, and that it was for the jury to say whether he was of sufficient intelligence to be chargeable with negligence in crossing the street as he did. *We do not think that there is*

anything in the evidence to warrant the idea that this plaintiff had not sufficient mental capacity to know the danger of attempting to cross a street directly in front of a moving horse car, and to avoid such danger. A boy of his age, even if mentally not up to the standard of other boys of the same age, is not in law altogether exempted from the exercise of care and prudence in approaching a known danger, and, when the evidence shows that he has been the heedless instrument of his own injury, he cannot recover. If it were necessary for us to decide this point in order to dispose of this case, we should be inclined to hold the plaintiff was guilty of contributory negligence in acting as he did."

The case of *Brady* v. *Consolidated Traction Co.,* was before this Court on two occasions, 63 N. J. L. 25, and 64 N. J. L. 373. Plaintiff was nine and a half years old and was struck by a trolley car while running across a street. On the first trial the evidence disclosed that he saw the approaching car while still in a place of safety, and the verdict was set aside on the ground that he was old enough to fully appreciate the danger and was contributorily negligent. On the second trial the evidence was that he neither heard the gong nor saw the car before he was struck. The Court, in setting aside the verdict, said (p. 374):

"The plaintiff was a foot passenger crossing a street containing a car track. A duty devolved upon him before crossing to use his powers of observation to observe approaching cars which are within a distance, if run at lawful speed, to put him in danger. *Newark Passenger Railway Co.* v. *Black,* 26 Vroom 605. Such a duty devolved upon an intelligent youth who was *sui juris,* as plaintiff is admitted to be. *Sheets* v. *Connolly Railroad Co.,* 25 *Id.* 518; *North Hudson Railway Co.* v. *Flanagan,* 28 *Id.* 696.

The duty of observation required from children may differ in extent and degree from that required from an adult. Judgment which a jury might find lacking in prudence if formed by a person of ma-

ture years might perhaps be found not to be lacking in prudence if formed by a child, but the child is not excused from some duty of observation.

Had plaintiff performed this duty in the very slightest degree he would have perceived the approaching car in time to avoid it, for there was admittedly no obstacle in the way to obstruct his view. That he did not see the car establishes the fact that he did not look, as required of a child. *Righter* v. *Pennsylvania Railroad Co.,* 13 Vroom 180."

In *Anderson* v. *Central R. R. Co.,* 68 N. J. L. 269, this Court sustained a direction of verdict for the defendant, where the plaintiff's intestate was not quite nine years of age. He was struck by a train at a highway crossing. The Court said (p. 272):

"The duty of taking care for one's personal safety, when in a place known to be dangerous, is imposed upon all minors who are *sui juris,* as well as upon all adults. The decree of care for personal safety exacted from adults may, and doubtless does, differ from that exacted from minors. The latter lack experience and are of immature judgment. Such deficiencies will be most observable in infants of tender years, and may well be considered in determining whether they have exercised due care for safety. As infants increase in years, and as they approach majority, such deficiencies will be of less weight. Where they tend to characterize the infant's acts, as being prudent or imprudent, the question presented is usually a jury question.

But when the act of an infant exposes him to a personal peril which he must recognize and appreciate, and when his personal safety may be secured by means indicated by most immature judgment, his exposure of himself to the peril, without any precaution, will leave no question for a jury.

The infant in this case was shown to have been in the constant and daily practice of crossing the tracks of the defendant company, and so acquired experience of the running of trains across the public highways at great speed, and in a mode which would peril the safety of anyone who stepped upon

> the track in front of them. No judgment more mature than his was required to show him that safety in the place of known peril was to be obtained by observing whether or not a train was approaching the highway on which he was moving, and to abstain from crossing in front of an approaching train. When, therefore, the evidence clearly establishes that, although there was nothing to distract him from observation, nor any physical obstacle to effective observation, deceased walked upon the track in front of the swiftly-moving train, which observation would have disclosed to him, I feel bound to conclude that deceased is thereby shown to have been guilty of negligence contributing to his death, and that no verdict to the contrary could be supported. It was not erroneous, therefore, to direct a verdict."

We respectfully submit that the plaintiff's intestate who was nine and a half years of age, bright and intelligent for her years, capable of running numerous errands, which of necessity required her to go across various city streets, was *sui juris* and chargeable with contributory negligence as a matter of law, in failing to make any observation for approaching vehicles as she crossed the street. Had she performed this duty in the slightest degree, she would have perceived the approaching automobile and avoided it, for there was admittedly no obstacle in the way from the moment she passed the westerly line of the truck ten feet from the curb up until she was struck 27 feet from the curb. That she did not see the car establishes the fact that she did not look, as is required even of a child under the authorities, *supra.*

Reply to Plaintiff's Brief.

Counsel for plaintiff asserts that according to the testimony of the witnesses, Brunner (p. 90 of Case) and Macguire (p. 65 of Case) the plaintiff's intestate looked when she reached the middle of the street and then continued her way across after seeing the approaching automobile;

he also argues that this was "the first chance" she had after leaving the sidewalk (p. 23 of brief). This statement of the facts on this point is correct as far as it goes, as it is undisputed, that the child looked after she had got somewhere near the middle of the street. But coupled with these facts is the additional undisputed fact that she did not look at all in the direction in which McGuire's automobile approached, from the time she left the sidewalk until she reached the middle of the street. As we have shown in the testimony above cited there was ample opportunity for her to see McGuire's automobile after she had passed the outer line of the Standard Oil truck, if she had merely turned her head for an instant in a southerly direction. But she did not do so until McGuire's automobile was so close that the accident could not be avoided.

Counsel for plaintiff insists that it was for the jury to say whether the decedent was chargeable with contributory negligence; to which we answer that whether that question was for the jury to decide as a question of fact, or for the court to decide as a question of law, depends upon whether the facts and the reasonable inferences therefrom were undisputed. In the present case, we claim that the facts and inferences were not disputed; and that, therefore, under the cases above cited, it was and is for the court to decide as a question of law, whether the decedent was chargeable with contributory negligence.

It is stated by counsel for plaintiff that the questions that are now argued were also argued before the trial court on rule to show cause (p. 24 of brief). We do not understand the point of this statement, but the fact is that the rule to show cause was granted with an express reservation of exceptions (p. 13, ll. 10-20), and the reasons that were urged before the trial court were therefore necessarily limited to such questions as could be reviewed by the trial court, namely, whether the verdict was against the clear weight of the evidence and whether the verdict was excessive (p. 14). The exceptions having been re-

served, the defendant can of course argue the legal questions raised by the exceptions, namely, whether it was error to refuse to non-suit and whether there was error in the charge.

The Supreme Court held that the question of contributory negligence was properly submitted to the jury. As against this conclusion we urge that the evidence is undisputed, that the plaintiff's intestate had no obstruction to her view from the moment she passed the westerly line of the truck, ten feet from the curb, up to the moment when she was struck, and that after she left the sidewalk she did not turn her head in either direction, nor did she stop running from the time she started up until the moment she was struck. Under these circumstances, we submit that she was chargeable with contributory negligence as a matter of law, and that it was, therefore, error for the trial judge to refuse to non-suit the plaintiff on this ground.

III.

The trial judge erred in his charge insofar as the same dealt with the subject of proximate cause.

So far as the defendants, Standard Oil Company and Staub, were concerned, the important question at the trial was whether the admitted violation of the motor vehicle law was the proximate cause of the accident. In order to bring this clearly to the attention of the jury, the defendant submitted certain requests to charge in which this point was specifically urged. These requests were numbers 1, 2, 3, 4, 8 and 9. Of the several requests dealing with this subject, the trial judge charged *only* numbers 1 and 4 and part of number 8. (For requests, see pp. 108-110; for part of charge where they are considered, see p. 97, l. 30 to p. 98, l. 30.)

Exception was duly taken and allowed to the requests that were not charged and also to the failure to charge

number 8 in the form in which it was submitted (p. 106, ll. 20-40).

The several requests on this subject which were denied read as follows (italics ours):

"2. Although the motor vehicle law of this state provides that an automobile should not stop on its left side of the road, *still the mere fact that there is such a violation of the motor vehicle law does not justify a recovery in a suit for damages.* It must appear that that violation of the motor vehicle law was the proximate cause of the accident."

"3. Even though the defendant's car was on its left or wrong side of the road, still that does not justify a recovery against the defendant unless you find that the proximate cause of the accident was the fact that the car was on the left or wrong side of the road."

"8. I have stated to you that *a violation of the motor vehicle law does not justify a recovery for damages unless the violation in question is the proximate cause of the accident for which the suit is brought.* By proximate cause I mean that the violation of the motor vehicle law was such a cause as to produce the death of which the plaintiff complains and without which the said death would not have occurred. By proximate cause is meant the efficient act of causation separated from its effect by no other act of causation. In short, even if the defendants, Standard Oil Company and Fred Staub, the chauffeur of the truck, were negligent in leaving the automobile gasoline truck on its left side of the road, yet the plaintiff cannot recover in this action as against them if the negligence of the defendant, McGuire, in oprating his automobile, intervened and caused the accident." (Modified by changing only the last sentence, p. 98, ll. 20-30.)

"9. If the accident would not have happened were it not for the negligence of the defendant, McGuire, then the plaintiff cannot recover as against the defendant, Standard Oil Company, and its chauffeur, Fred Staub."

On this same subject the Trial Judge also charged a request which was submitted on behalf of the defendant, McGuire. This reads as follows:

"If you find that the negligence of the defendant, Standard Oil Company, was the proximate cause of the accident, there can be no recovery against the defendant, Charles McGuire, even though you find that he was chargeable with negligence, for the reason that there is no privity between the defendants, Standard Oil Company and Charles McGuire, as the Standard Oil Company is chargeable with all the consequences of its negligence." Exception was duly taken to this part of the charge (p. 108, l. 33).

In order that the court may have before it the entire charge on this subject, we now quote from the main charge including certain requests submitted in behalf of the plaintiff.

> "I have been requested to charge you a number of requests, and I charge you the following requests at the request of the plaintiff. 'If the concurrent negligence of the Standard Oil Company, its employees, and that of the defendant, McGuire, was the proximate cause of the accident, then all defendants would be liable and the jury's verdict, if the deceased was not guilty of contributory negligence, would be against all defendants in such an amount as might be deemed reasonable and just, in view of the rules of law laid down by the Court. In this event the verdict would not be divided between the defendants, but would be joint.'"
>
> "'The mere fact that the actual killing of the child was caused by defendant McGuire's car would not excuse the defendant, Standard Oil Company, if the Standard Oil Company, by its agents or servants, were guilty of negligence which proximately caused the accident'" (p. 96, l. 35, to p. 97, l. 20).
>
> "'Even if the defendants, Standard Oil Company and Fred Staub, the chauffeur of the truck, were negligent in leaving the automobile gasoline truck on its left side of the road, yet the plaintiff cannot recover in this action as against them if the negligence of the defendant, McGuire, in oper-

ating his automobile intervened and caused the accident'" (p. 98, ll. 20-30).

"Now, let us return to the Standard Oil Company and Staub for a moment. The Standard Oil Company and Staub, in placing the truck at that point, violated a duty, that is, they should not have put that truck in that position, at that place. They could have stopped their truck at that point if they had turned it in another direction, the opposite direction, but they did not do that; it was turned in a wrong direction, and the contention is that by reason of these rear attachments, or doors, or whatever it was made of, on the rear of this truck, that they obstructed the view much more than it would have been obstructed had the truck been in a proper position. The claim on the part of the plaintiff is that this negligence consisted in having that truck turned the wrong way, and their claim is that it would have made a great difference if the truck had been turned around in the opposite direction.

As far as the parking of that truck at that point goes, the negligence of the Standard Oil Company, if any, was in putting the truck in that position. If you find the Standard Oil Company guilty of negligence you must find that that negligence, that that particualr thing, was a proximate cause of this accident.

It is not every consequence of an act that a man is liable for. There are such things as unforeseen accidents, and you must ask yourselves the question, would a reasonably prudent man foresee such a consequence as that which occurred? Is such a consequence to be reasonably anticipated? If a reasonably prudent man would not foresee such a consequence from putting that truck in that position, the Standard Oil Company and the driver cannot be held responsible" (p. 104, l. 20, to p. 105, l. 15).

The legal soundness of the requests above quoted, in the form submitted, is demonstrated by the authorities cited under Point I. The only negligence alleged in the complaint against these defendants *was the violation of the Motor Vehicle Act,* in having the truck on the left side of the road in the direction in

which it was facing (p. 6, ll. 10-20). It was undisputed throughout the trial that the truck was on the left-hand side of the road, and thus the jury had before it the fact that these defendants had violated the Motor Vehicle Act. These facts alone in their minds would tend to create liability, whereas legally it would not. It was incumbent, therefore, upon the trial judge to have charged these requests, or to have charged the substance thereof.

It must be borne in mind that the defendant McGuire whose automobile struck and killed plaintiff's intestate was charged with certain acts of negligence by the plaintiff. Even if the Standard Oil Company was negligent in having the truck on the wrong side of the road, the act of McGuire in operating his automobile so as to cause the accident would be an intervening, independent human agency which would break the chain of causation between the act of the Standard Oil Company and Staub, and the injury to the plaintiff's intestate.

Cuff, Admx., v. *Newark & N. Y. R. R. Co.*, 35 N. J. L. 17;

La Rue v. *Potts*, 103 Atl. 197;

Justesen v. *Pennsylvania R. R. Co.*, 92 N. J. L. 257.

The crux of the case was the question of the proximate cause of this accident. If the trial judge was correct in submitting that question to the jury at all, the jury required some definition or rule of proximate cause, in order to intelligently decide the question. The requests submitted by these defendants embodied sound legal principles applicable to the question of proximate cause and gave to the jury a correct definition or rule according to the facts in the case.

Cuff v. *Newark and N. Y. R. R. Co.*, 35 N. J. L., pp. 30, 32;

Salmon v. *D., L. & W. R. R. Co.*, 39 N. J. L., p. 299;

Batton v. *Public Service R'y Co.*, 75 N. J. L., p. 857;

Kelson v. *Public Service R'y Co.*, 94 N. J. L. 527.

If it be urged that the trial judge did in effect charge the rule of proximate cause in that part of his charge wherein he said that "if a reasonably prudent man would not foresee such a consequence from putting that truck in that position, the Standard Oil Company and the driver cannot be held responsible" (p. 105, ll. 10-15), the answer is that that is not a definition of proximate cause, but is merely an illustration. This part of the charge is correct as far as it goes, but it does not go far enough. As pointed out in the Justesen case, *supra,* the damages must be "the natural and proximate effect of the delinquency." In that case, the Court stated that the term "natural" imports such as "might reasonably have been foreseen." The part of the charge in question, therefore, correctly describes the term "natural," but the fundamental question in this case was whether the "delinquency" of the appellants was the proximate cause, and, in the Justesen case, the Court proceeded to point out the distinction between the term "natural," and the term "proximate" by adding that the latter term indicates that "there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss."

We therefore urge that the failure of the trial judge to charge the requests in the form in which they were submitted, and in charging the jury inadequately as to the meaning of the term "proximate cause," was prejudicial error.

Reply to plaintiff's brief.

In discussing the question as to whether there was error on the part of the trial judge insofar as his charge dealt with the subject of proximate cause, counsel for plaintiff insists that the defendants are in error in claiming that the case of the plaintiff rested solely on the violation of the Motor Vehicle Act. We have attempted to show that we are not in error on this point, but in any event we think it will be conceded that certainly *one* of the claims (if not the *only* one) urged by the plaintiff was the violation of the statute, hence if such violation was submitted to the jury as one of the grounds upon which the plaintiff would be entitled to recover as against the defendants, and if there was error in *such* submission, then the defendants would be entitled to a reversal. We have given the number and the language of each of the requests wherein this question was raised and pointed out in detail which requests were charged and which were denied, and we then quoted the entire main charge insofar as the same dealt with the subject of proximate cause.

Counsel for plaintiff asserts that the term "proximate cause" is not difficult to understand." In this respect, his view differs from that of many courts, for example, in *Anderson* v. *Miller,* 96 Tenn. 35; 33 S. W. 615; 31 L. R. A. 604, we find this statement:

> "The definitions of 'proximate cause' are easily given in general terms, but they are very difficult in practical application to the facts of each particular case."

Again, in *Cleveland* v. *Bangor,* 87 Maine 259, 32 Atl. 892, we find this statement:

> "It has been found impracticable to prescribe by abstract definition, applicable to all possible states of fact, what is a proximate and what a remote cause."

And again, in *Blythe* v. *Denver, etc., R. Co.*, 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, we find the following:

> "Great ability and research have been expended in attempting to arrive at and determine upon some general definition of the terms 'proximate' and 'remote' causes, and establish a rule and a line of demarkation between the two. Such efforts appear to have been but partially successful."

The Supreme Court did not find it necessary to discuss the question of whether there was error in the charge of the trial judge or in the refusal to charge, as that Court found that as a matter of law the illegal parking of the truck was the proximate cause of the accident. Of course, if this Court agrees with the Supreme Court on this point, or if this Court agrees with our contention that the plaintiff's intestate was chargeable with contributory negligence as a matter of law, either conclusion will require an affirmance of the judgment of the Supreme Court; but if this Court should disagree with both of these contentions, then it will, of course, become necessary to consider the further question of alleged error in the charge and in the refusal to charge. For the reasons above stated, we submit that the requests which were refused, correctly stated the law relative to the question of proximate cause, and that *if* it was a jury question, whether the negligence of these defendants was the proximate cause, the jury should at least have been fully advised as to the rules of law by which that question should be determined. It was therefore, prejudicial error to refuse to charge same, as they correctly set forth rules of law which were applicable to the circumstances and which were not elsewhere charged in substance.

Conclusion.

For these reasons we respectfully submit that the judgment of the Supreme Court reversing the judgment of the Essex Common Pleas should be affirmed.

COLLINS & CORBIN,
Attorneys of Defendants-Respondents.

GEORGE S. HOBART,
EDWARD A. MARKLEY, and
CHARLES W. BROADHURST,
Of Counsel.