New Jersey Court of Errors and Appeals

WILLIAM A. DAVENPORT, an infant, suing, etc.,
Plaintiff-Appellant,
vs.
DOUGLASS Y. MCCLELLAN,
Defendant-Respondent.

Appellant's Brief.

STATEMENT.

This action was brought by the plaintiff, an infant, against the defendant to recover damages for *personal injuries.*

The defendant *built a fire in the street of leaves and rubbish,* which he had been raking up in his front yard for some time, and before it was extinguished *left it unguarded.*

The *plaintiff, an infant then five years old,* having seen the defendant make the fire and throwing leaves upon it, in imitation of him *gathered up a handful of leaves and threw them on the fire.* While so doing the flames caught his trousers and he was *terribly burned.*

The plaintiff's case was dismissed at the trial, the presiding judge holding that, although the *plaintiff was too young to* be guilty of *contributory negligence, yet,* the act of the plaintiff in throwing leaves upon the fire was an *"intervening cause,"* which relieved the defendant.

THE FACTS.

1. It must be assumed for the purpose of the argument of this appeal that the plaintiff has established the negligence of the defendant in making and leaving the fire, which caused the injury, in the street; (b) that the plaintiff was too young to be guilty of contributory negligence.

2. *The main point for argument on this appeal is, whether the act* of the plaintiff, a *child of five years of age,* in *throwing leaves on a burning fire in the street,* left unguarded by the defendant, *in a neighborhood* known to him to be a place *where children were accustomed to play* (and which, indeed, was expressly designed as a park for members of neighborhood families and as a playground for children), *can be held to be such an "intervening cause" of* the plaintiff's *injuries* as to *relieve* the *defendant* of the consequences of *his acknowledged negligence.*

3. To reach this conclusion this Court must find first the plaintiff's act which *could not be contributory negligence* on his part will nevertheless be an *"intervening cause"* on his part, so as to relieve the defendant in exactly the same way as though the plaintiff had been guilty of contributory negligence.

4. Furthermore, in this case the court must find that the act of this little *child in imitating the defendant,* as he had seen him before he left the fire, in throwing leaves upon the fire, was such an act that the defendant could not reasonably have anticipated it as a result of leaving a fire burning negligently in the street under the circumstances of this case. For an "intervening cause" to be an effective defense, must be not only an "intervening"

but (where it consists of the act of an infant *non sui juris*), it must be such an act of a child or such circumstance as could not have been reasonably anticipated under the circumstances.

(General rule stated.)

1. *Kuhn* vs. *Jewett*, 32 N. J. L. 647.

2. *Cox* vs. *Penn. R'y Co.*, 47 Vroom (76 L.) 788.

5. Concisely stated, the act of a plaintiff, who, had he been old enough to be guilty of contributory negligence (by reason of his knowledge and experience with fires), in throwing the leaves on the fire, will be prevented from recovering, in exactly the same way, and to exactly the same extent, as if it were actually guilty of "contributory negligence," although he cannot, as a matter of law, be guilty of "contributory negligence."

THE LAW.

POINT I.

A CHILD UNDER SEVEN YEARS OLD IS PRESUMED NOT TO BE OLD ENOUGH TO BE GUILTY OF CONTRIBUTORY NEGLIGENCE.

The plaintiff was five years old (Rec. pp. 10, 11 and 12).

3. *Baker* v. *Public Service R'y*, 79 N. J. L. 249.

Plaintiff was *under* 6 *years of age*, and could not be guilty of contributory negligence.

4. *Traction Company* v. *Scott*, 58 N. J. L. 682, at p. 69x.

A boy 7 *years and* 8 *months old, walking* across

the street behind a standing car, was struck and killed by another car passing in the opposite direction.

5. *Schneider* v. *Winkler,* 45 Vroom (74 L.) 71, at p. 73.

A child of 6 *years of age* fell into an opening in the sidewalk. She was attracted by the show window in front of the opening. Was not guilty of contributory negligence. Opening was provided with an iron door over sidewalk. When opened outwardly from building an iron bar extended from east end of door to building. Whether opening properly guarded, was a question for jury. Garretson, J.

Citing Newman 1. R. R., 23 Vroom 446.

6. Kennedy v. Sullivan, 66 N. J. L. 185.

Plaintiff was only 3 *years,* 7 *months old.* Question of contributory negligence out of case. Plaintiff starting from behind one wagon was struck by defendant's coming in other direction.

POINT II.

NO ACT OF THE CHILD, NON SUI JURIS (WHETHER THE ACT OF THE CHILD INJURED OR THE ACT OF ANOTHER CHILD), CAN BE CONSIDERED AN "INTERVENING CAUSE," WHICH WAS IN ITSELF A PERFECTLY NATURAL THING FOR THE CHILD TO DO, AND WHICH OUGHT REASONABLY TO HAVE BEEN ANTICIPATED BY THE DEFENDANT.

7. *Lamurri* v. *Saginaw City Gas Co.,* 148 Mich. 27; 111 N. W. 884.

Defendant had a drip wagon in the street con-

taining explosives. The plaintiff was at play on the drip wagon, which had been left unattended. *Plaintiff was* 5½ years old, and *companion* 6½. The companion threw a match into the drip wagon and it exploded causing injuries to the plaintiff, who was allowed to recover. Some emphasis was given by majority opinion to fact that wagon was in street.

8. *Palermo* v. *Orleans Lee Mfg. Co.,* 130 La. 833 (1912).

A *child* 4 *years old* fell into a street gutter containing hot water which flowed from the defendant's plant. Shows that water attracted the curiosity of children. The parent is not negligent in allowing child to play in the street.

9. *Cahill* v. *E. B. & A. L. Stone Co.,* 153 Cala. 571; 96 Pac. 84.

A path ran over the defendant's vacant lot. Children 5 to 14 years played there. *Plaintiff* 12 *years.* Defendant constructing railroad tracks in the street left a push car on the rails loaded with steel rails unguarded and unlocked, on a grade. The children started the car. Question for the jury. Plaintiff tried to stop it. There is no conclusive presumption that a boy 12 years old is able to foresee the danger in trying to stop a loaded push car.

10. *U. S. Natural Gas Co.* v. *Hicks,* 134 Ky. 12; 119 S. W. 166 (1909).

The Gas. Co. maintained in a public highway a leaky gate valve in its main enclosed by decayed wooden box. The act of *a* 4 *year old boy* in throwing a match into the cracked box, will not relieve the defendant of liability for injuries to the plaintiff

caused by the explosion. (Also reported in 23 L. R. A. N. S. 249.)

Plaintiff was 8 years old and was playing marbles in street with his four year old brother and a neighbor's son, 7 years old. One of the marbles went through the cracked and rotten box. The 7 year old boy went home and got some tar paper and a box of matches. He put the tar paper on top of box, where plaintiff was, and lit it. Plaintiff then looking for the marble, when the 4 year old boy lit a match and threw it into the crack in the box, causing the explosion which injured plaintiff.

11. *Aiken* v. *Bradley Engineering and Machine Co.*, 48 Wash. 97; 92 Pac. 903; 14 L. R. A. N. S. 580.

Demurrer to evidence. Boy found dynamite cap and exploded it with a dry battery. *Plaintiff was 11 years old.* Defendant was engaged in manufacturing mining machinery and supplied dynamite caps. Defendant had thrown large number of these on vacant land near path used by large numbers of children in going to school. They were in habit of exploding caps on rocks, etc. Plaintiff tried to explode some by throwing them against rocks; then tried dry battery, which caused explosion doing plaintiff injury. Seems to be *in point*—see 111. At least the point that plaintiff did not appreciate danger and therefore was not an intervening cause, seemed to be controlling.

12. *Fishburn* v. *Burlington & N. W. R. Co.*, 127 Iowa 483; 103 N. W. 481.

Where a *child six years old* put back panel in fence negligently erected, and panel blew down again injuring him.

Defendant had permission to build the snow fence on land of plaintiff's father, held question of negligence of the defendant in constructing fence for jury.

13. *Nagel* v. *Mo. Pac. R'y Co.*, 75 Mo. 653, at p. 661.

Plaintiff, 6 *years old,* in charge of *sister* 11 years old, went to see lady walk tight rope before circus tent. Sister went home and left him. Turntable case where other children turned table and plaintiff was hurt.

"The mere fact that (the turntable) was revolved by other children who were playing on it at the time the child was injured, will not excuse defendant, if such act ought have been foreseen or anticipated by it."

14. *Edgington* v. *Burlington C. R. & N. R. Co.*, 116 Iowa 410; 90 N. W. 95.

Child 7 *years old* playing with turntable on unfenced land near alley. Turntable on unfenced lot and not otherwise guarded. Child of 8 years cannot be considered, as matter of law, of sufficient age and intelligence to appreciate danger of playing on turntable. Fact that other children unfastened turntable and were immediate cause of injuries will not relieve defendant. (Long discussion.)

15. *Harriman* v. *Pittsburgh C. & St. L. R. Co.*, 45 Ohio St. 11; 12 N. E. 451.

Plaintiff was *ten years old.* Signal torpedo left at a notoriously public crossing, apparently harmless, but in reality highly explosive, but attractive to children. Demurrer overruled.

16. *Sprecht* v. *Waterbury Co.,* 70 Misc. 404. (*Child 6 years old.*)

The deceased child approached witness for the plaintiff who was about 7 feet from the fire in the open lot of the defendant and asked her if the metal which she had taken from the fire was copper. The witness noticed her dress was on fire behind and tried to put it out. The child ran and a man, seeing her, tried also to put out the fire but she was burned to death. Held, question for Jury.

17. In *Bindford* v. *Johnson,* 82 Ind. 426, the defendant sold cartridges to a child and was informed of what use the child expected to make of them. Held he could not escape liability on the ground that a pistol loaded with one of the cartridges was left lying where another child could reach it, because the result should have been anticipated. "One who deals with children must expect the ordinary behavior of children. The appellant was bound to take notice of the natural conduct of lads like those to whom he sold cartridges and it cannot be justly said that the act of lads in carrying the pistol with them to their home, and leaving it upon the floor within reach of their brother and playmate, was an unnatural or improbable one."

18. In the case of *Vandenburgh* v. *Truax,* 4 Denio 464, it was held that a man chasing a boy with a pick axe was not relieved by the fact that the boy ran into a spigot of a wine cask in the plaintiff's store, knocking it out and wasting the wine, for value of which defendant was sued.

19. *Lynch* v. *Nurdin,* 1 Q. B. 29, cited in *Friedman* v. *Snare Triest Co.,* 42 Vroom.

Defendant left his horse and wagon untied in street. While he was gone plaintiff and a companion climbed on wagon, and the other boy by moving horse slightly forward and shook plaintiff from wagon shaff and he was run over and his leg broken.

Defendant "has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant, which produced it."

POINT III.

THIS CASE MUST BE DISTINGUISHED FROM THOSE CASES WHERE THE ACTS OF CHILDREN RESULTING IN INJURIES ARE SAID TO HAVE BEEN SUCH AS NOT TO CHARGE THE DEFENDANT WITH LIABILITY, WHERE THE FACTS OF THE PLANTIFF'S CASE DO NOT PROVE NEGLIGENCE OF THE DEFENDANT IN THE FIRST INSTANCE.

20. *Stephenson* v. *Corder,* 71 Kans. 475. Boy 10 years old.

A farmer tied a team of 11 year old horses to a hitching rail of cast iron pipe, according to custom. Halter with which he tied the horses was in good condition. He had hauled a ton 17 miles. While the team was standing quietly a boy turning about the iron rail, struck the horse with his foot. The team broke the halter and ran away causing damage to the plaintiff. Held "intervening cause." Boy's act could not have been foreseen.

21. *Berman* v. *Schultz,* 81 N. Y. Supp. 647; 40 Misc. 212.

Defendant's power truck was standing in the street, with power turned off and brakes on, while the driver was delivering goods. It was of the best make and in perfect order. Two boys, 10 *years of age,* stopped to look at the machine, and one of them pulled the starting lever. The truck struck the plaintiff's carriage and horses at a street crossing below. Plaintiff nonsuited.

22. *Fitzgerald* v. *Rogers,* 58 App. Div. 298; 68 Supp. 946. Plaintiff was 10 *years old.*

Defendants were constructing sewer in street. He used a winch in raising fragments of stone from trench. Not attractive to playing children so as to charge defendant because left unprotected. "Since the machine is not in itself dangerous, and does not in itself, cause an unlawful obstruction to the highway, and is not of such a character that a jury may find that, merely because it is so left in the highway it is dangerous and a temptation or enticement to children of tender years, and that the natural and probable result of their playing with it will be an injury to them."

23. *Holmes* v. *D. & H. Delaware and Hudson R. R. Co.,* 128 A. D. 24.

Plaintiff was 16 *years old.* Torpedo of the defendant was taken from the track by the plaintiff's brother and handed to him. Plaintiff tried to open the torpedo with a stone to discover what was inside, and was hurt by the explosion. Held the defendant not liable as it was not shown by the facts of this case that there was any implied invitation, and that the torpedo was placed where it was by

the defendant in a proper place and in the proper performance of its business.

24. *Finkbeimer* v. *Solomon,* 225 Pa. 333; 24 Atl. 24; 24 L. R. A. N. S. 1257.

Plaintiff 9 *years old.* His father had purchased an old barn and the lot on which it stood from the defendant. A considerable time thereafter he removed the barn. Defendant meanwhile moved out most of his goods. The plaintiff's son and other children were playing in the barn. The younger child and the boy injured found *on a dark shelf* a tin box containing dynamite caps. The older boy took the caps and exploded one of them by driving a nail through it. Held the explosion was not caused by leaving the caps in the barn but by the *unrelated act of the child.* Defendant not negligent in the first instance.

"The finding that the act of an irresponsible child can be an intervening cause is clearly in conflict with the Lamurri case, and it is also in conflict with the weight of authority." Case note to *Finkbeimer* v. *Solomon,* 24 L. R. A. N. S. 1259.

25. *Keegan* v. *Luzerne County,* 8 Kulp. 160.

No liability for injury to 8 *year old boy* caused by falling of ornamental urn on top of iron street post, which he climbs to get better view of parade.

26. *Clark* v. *Richmond,* 83 Va. 355.

Plaintiff is 6 *years old but small.* He was going on an errand along the highway, got on top of a high wall and fell over in an excavation made by the defendant, city, on the opposite side. "Where, in order to reach the place of danger the party must quit the highway and become a trespasser upon another's premises," he could not recover.

27. *Cooper* v. *Overton,* 102 Tenn. 222; 52 S. W. 183.

Water had accumulated in the defendant's land in a pond from recent rains. It was 50 feet from the road and its existence unknown to the defendant, being caused by a dam made by the city that prevented the outlet of the water. He also was ignorant of the plank on which the plaintiff was playing and fell off and was drowned. *Plaintiff was* 10 *years old.* Plaintiff nonsuited. Plaintiff's companion refused to go on the plank and warned plaintiff.

28. *Madden* v. *R'y Co.,* 76 N. H. 379; 83 Atl. 129.

Where defendant railroad company does not know of the habits of children to play on its tracks it is not charged with knowledge of their presence while burning grass off its right-of-way. The *plaintiff, a child of* 6 *years of age.* It did not even appear that the fire was what attracted her to the place.

29. *Walsh* v. *Fitchburg R'y Co.,* 145 N. Y. 301.

Defendant owned the ground on which its turntable was built on the usual manner and was in good repair. A portion of the premises was unfenced, and the public was long customed to cross the lot. The path ran within 20 feet of the turntable. The *plaintiff* (*a child of* 5 *years and* 9 *months*) went to the turntable with other boys and was injured while they were turning it. Nonsuited. Court held there was nothing in the facts to constitute invitation. Court says table might have been locked and defendant might have built a high wall around it, "but was defendant bound

to do so?" Approves—*Daniels* v. *R. R.*, 154 *Mass.* 349. *Frost* v. *Eastern R. R.*, 64 N. H. 220. Disapproves—*Coones* v. *R. R.*, 60 Mo. 592. *R. R.* v. *Fitzsimmons*, 22 Kans. 686. *Barrett* v. *Southern Pacific Co.*, 91 Cal 396.

"We do not assert that the defendant owed no duty to the plaintiff, but we think it did not owe the duty of such active vigilance as would be necessary to expect in order to send the case to the jury."

30. *Coleman* v. *Robert Graves Co.*, 39 Misc. 85; 78 N. Y. Supp. 893. (Child 9 years old.)

The plaintiff was poking in some hot ashes, trying to find pieces of brass. The fire had been lighted by the defendant's employee in the defendant's vacant lot in proper conduct of business. "*A child of nine years knows that fire will burn.*" "She did not think her dress would take fire; neither would defendant's employee." "The accident which overtook this child is extraordinary." Court cites *Walsh* v. *R. R.*, 145 N. Y. 301.

31. *Paolino* v. *McKendall*, 24 R. I. 432; 53 Atl. 268.

Child 10 *years* of age cannot recover where fire was on defendant's premises. Same as N. J. rule. Do not accept turntable cases. Only duty is not to take any active measures to injure plaintiff.

Plaintiff's intestate 5 years old. Caught dress on fire. There can be no recovery against the proprietor of land in favor of infant of tender years who has been allured to premises by means of fire kindled thereon, from the knowledge that the owner had that children were accustomed to use the lot as a playground without objection or of a duty on

the part of the occupier to exercise of care to prevent injury therefrom to such children. His only duty is not to willfully injure children. Turntable cases disapproved. Cites with approval *D., L. & W. R'y* v. *Reich,* 61 N. J. L. 635, at p. 637. (Where plaintiff was 13 years old.)

32. *Erickson* v. *R'y Co.,* 82 Minn. 60; 84 N. W. 462.

A child 4 *years old went to the fire* on the defendant's right-of-way. It was not fenced, fire was left unguarded. It did not appear that the child went on to the land at any point *where the same could have been fenced.* Dismissed.

33. *U. S. Gas Co.* v. *Hicks,* 134 Ky. 12; 23 L. R. A. N. S., p. 250.

34. *Travell* v. *Bannerman,* 174 N. Y. 47.

The defendant manufactured ammunition, works enclosed in high walled fence next to vacant lot, on which is dumping ground. Children played here. Plaintiff was standing in street, watching some work there. Two boys were in the lot and picked up a piece of black material embedded in which were pieces of brass. They brought it where the plaintiff was standing, exploded the brass caps in extricating them.

Held that contributory negligence is a question for the jury, but defendant's primary negligence was not established because not connected with the explosion.

35. *Seymour* v. *Union Stock Yards,* 224 Ill. 579; 79 N. E. 950.

(Plaintiff was attracted by a clay pile but left this to touch and follow a moving train.)

Refer to and approves *R'y* v. *Matson,* 68 Ks. 815, where boy 5 years old was attracted to pile of lumber, placed by defendant on spongy ground near its tracks, and was shaken down by vibrations of passing train. "Here an element intervened between acts induced by allurements of the clay pile and the injury, viz., the movements of the boy in placing himself in contact with the train."

In this case there was no proof that defendant piled clay negligently.

36. *Friedman* v. *Snare Triest Co.,* 42 Vroom 605. (See also 19 supra.)

In regard to the position taken by Mr. Justice Pitney in *Friedman* v. *Snare-Triest Co.* as to *Lynch* v. *Nurdin.*

See, contra, remarks of Mr. Justice Harlan in *Union Pac. R'y Co.* v. *McDonald,* 152 U. S. 262, Justice Summers in *Wheeling & L. E. R. Co.* v. *Harvey,* and *Ackron* v. *Waterworks Co.,* 77 Ohio St. 235, at p. , and the remarks of Manisty, J., in *Clark* v. *Chambers,* L. R. 3 Q. B. Div. 327. "If the decision as to negligence in *Mangan* v. *Atterton,* L. R. Exch. 239 (where a 4 year old boy put his hand into a machine in highway at suggestion of companion who turned a wheel starting machine and cut off plaintiff's fingers and non-suit was allowed), is in conflict with our judgment in this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place, along which persons, and among them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precautions against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character; and not the less so because the im-

prudent and unauthorized act of another may be necessary to realize the mischief which the unlawful act or negligence of the defendant has given occasion." (See also *Smith* v. *Hayes,* 29 Ont. Rep. 283, and *Edgington* v. *Burlington,* 116 Iowa 410, *Harold* v. *Watney,* 2 Q. B. 322, and *McDowell* v. *Great Western R. Co.,* 1 K. B. 618, where *Lynch* v. *Nurdin* was sustained.)

It does not necessarily follow that *Lynch* v. *Nurdin* is authority to support *Sioux City & P. R. Co.* v. *Stout,* 17 Wall. 657, the leading "Turntable" case.

In *Wheeling & L. E. R. Co.* (supra) the plaintiff, a boy 5 *or* 6 *years* old, met two boys, 10 and 13, who were on their way to the repair shanty to "get something" to use for Fourth of July. They did not want the plaintiff, but he followed along. They found something they thought would do, though no one was at the shanty, and stopped at the turntable on their way back. One of the older boys removed the block from the turntable and started it while plaintiff sat upon one end with his leg over the edge, which was crushed between the end of table and the head block. No recovery. Turntable cases reviewed and doctrine not followed. (Refers to article of Judge Jeremiah Smith in 11 Harvard Law Review 344, at p. 434.)

See, contra, (semble) *Busso* v. *Rogers,* 120 Wisc. 443 (Infra 141), and *Kunz.* v. *City of Troy,* 104 N. Y. 345 (Infra 164).

Snare-Triest Co. v. *Friedman,* 169 Fed. 1 and distinguish *Meyer* v. *Benton,* 74 N. J. L. 533 and *Guinn* v. *Delaware & Alt. Tel. Co.,* 72 N. J. L. 274.

37. *Ball* v. *Middlesborough T. & L. Co.,* 24 Ky. Law Rep. 114; 68 S. W. 6.

Defendant did not place dynamite caps in old house, which it kept locked.

POINT IV.

IN DETERMINING THE QUESTION WHETHER THE DEFENDANT WAS NEGLIGENT IN THE FIRST PLACE, THE FACT THAT THE CHILD, OR CHILDREN, WERE OR WERE NOT TRESPASSERS HAS HAD GREAT WEIGHT WITH THE COURTS; AND IN MANY CASES WHICH WOULD HAVE BEEN OTHERWISE DECIDED, THE COURT HAS EXONERATED THE DEFENDANT BECAUSE THE FIRE, EXPLOSIVE OR ATTRACTIVE NUISANCE, WAS USED ON THE DEFENDANT'S OWN PREMISES FOR PROPER PURPOSES. THE CHILD, INDEED, MAY BE TECHNICALLY A TRESPASSER ON THE DEFENDANT'S ATTRACTIVE MACHINERY OR DANGEROUS OBJECT IN THE STREET, BUT, OBVIOUSLY, THE TEMPTATION IS MORE OPEN AND INVITING; THE DEFENDANT'S EXCUSES LESS CONVINCING.

38. *Lynch* v. *Nurdin,* 1 Q. B. 29.

Plaintiff 7 years old. Defendant left his horse and wagon untied in street. While he was gone plaintiff and a companion climbed on wagon, and the other boy by starting horses, moved wagon slightly forward, shook plaintiff from shaft of wagon and he was run over and his leg broken.

39. *Walsh* v. *Fitchburg R'y Co.,* 145 N. Y. 301. (Supra, 27.) *Plaintiff was 6 years old.*

Defendant was not negligent because the machine (turntable) was only such as was required for proper conduct of its business on its own premises.

40. *Finkbeimer* v. *Solomon*, 225 Pa. 333. (Supra, 24.)

Purchase of old barn in which dynamite caps were.

41. *Erickson* v. *Great Northern R'y Co.*, 82 Minn. 60, at p. 64-5; 84 N. W. 462. (Supra, 30.)

Child 4 years old on demurrer to petition. It appeared here that defendant had no reason to anticipate that children would or were accustomed to play on its tracks.

"The child was an intruder. It is true she knew no better and was an innocent trespasser, but the innocence of the intruder in cases of this kind does not necessarily establish the legal duty of the land owner to protect him from injury."

42. *Paolino* v. *McKendall*, 24 R. I. 60; 53 Atl. 268. (Supra, 31.)

43. *Coleman* v. *Robert Graves Co.* (supra, 30), 39 N. Y. Misc. 85; 78 N. Y. Supp. 893. But see *Sprecht* v. *Waterbury*, 70 Misc. 404; 127 N. Y. Supp. 138.

44. *Conrad* v. *Baltimore & O. R. Co.*, (W. Va.) 61 S. E. 44; 16 L. R. A. N. S. 44. Turntable cases not accepted.

45. *Cahill* v. *Stone*, 153 Cala. 571; 96 Pa. 64. (Supra, 9.)

46. *Barney* v. *Hanover, etc., Co.*, 126 Mo. 387; 28 S. W. 169.

No duty to trespassers. Incapacity of child cannot create negligence on part of defendant. Plaintiff hurt by jumping on moving train.

47. *Fritzmanice* v. *R'y Co.*, 78 Conn. 406; 62 Atl. 620.

Child 3 years old fell into hot soot dumped on defendant's premises. Plaintiff a mere tresspasser, and his presence could not have reasonably been anticipated—ash heap not being near highway.

48. *Kalz* v. *Winova & St. Paul R'y Co.*, 76 Minn. 351; 79 N. W. 310.

Defendant set fire on its right-of-way. Plaintiff, *a child 3½ years,* went inside fence of defendant's right-of-way when fire was almost out. No witnesses but children.

49. *Lamurri* v. *Saginow City Gas Co.* (Supra, 7.).

50. *Delaware L. & W. R'y Co.* v. *Reich,* 61 N. J. L. 635.

Gummere, J. Mere attraction to children does not make the defendant liable unless he is, in the first instance negligent. The defendant has a superior right to use necessary implements in his business even though the plaintiff be a child and be attracted thereby.

See *Friedman* v. *Snare-Triest Co.*, 71 N. J. L. 605.

51. *Coleman* v. *Robert Graves Co.* (supra, 30).

Where the fire was built on defendant's land. 39 Misc. at p. 86.

52. *Sullivan* v. *Hidekoper,* 27 App. D. C. 154.

Boy ten years old drowned in pond an eighth of mile outside of city and a mile and a half from his home.

53. *Brickley Car Works* v. *Cooper,* 60 Ark. 545; 31 S. W. 154. Reversed in 70 Ark. 331; 67 S. W. 75.

Plaintiff was six years old, and walked into a pool of hot water and was injured. Held that it was a question for the jury, whether the defendant should have anticipated that the pool would be attractive to children of the age of the appellee.

That plaintiff must establish (1) notice to defendant of the concealed nature of pool, and (2) want of notice of water's injury to plaintiff which ought reasonably to have been foreseen.

54. *Sprecht* v. *Waterbury Co.,* 70 Misc. 404. (Supra, 18.)

In the case at bar the plaintiff had a perfect right to be where he was and to be playing there.

Of course, to make a fire in a street as here, made by the defendant contrary to his own rights, where he himself is the wrong-doer, charges him with yet heavier responsibilities. The fire at that place was not only not necessary, but was a wrongful use of the street.

55. *Indianapolis* v. *Emmelman,* 108 Ind. 530; 9 N. E. 155.

Child 5 years old falls into pond made by levee constructed by city in making excavation across a small stream, where the street crosses it, and leaves it unguarded, knowing that children play in street in that vicinity, it is liable for child's death by drowning.

56. *Rachmal* v. *Clark,* 205 Pa. St. 314; 54 Atl. 1027.

Where the owner of a slate factory allowed slabs of slate to remain on the sidewalk, leaning against the factory, and a boy, 7 years old, leaned against the slabs, which fell over upon him, the owner of the factory is liable for the injuries received, although the slabs stood within the building line.

Mestrezat, J. "The defendants had no right to use the pavement of the street as a storage ground for the material used in their factory. They could use it temporarily in conveying the matter to the factory and in taking manufactured articles from it. But, even under those circumstances they were required to observe proper care and precaution so as not to endanger those who were using the pavement for transit.

The slab that fell upon the boy had stood in its place for at least a month. The act of the defendants in obstructing the pavement was a nuisance and hence unlawful. They were, therefore, responsible for injuries occasioned by their conduct to any person lawfully using the street and who was himself without fault.

The evidence tendered to show that the space between the building line and the factory had been paved, and was used as a part of the sidewalk of the street. The defendants were required to exercise due care to keep it in reasonable condition, and, if they placed upon it a dangerous obstruction resulting in injury, an action would lie to the injured person. *Tomale* v. *Hampton,* 129 Ill. 379; 21 N. E. 800; *Holmes* v. *Drew,* 159 Mass. 578; 25 N. E. 22."

57. *O'Leary* v. *Mich. State Telegraph Co.,* 146 Mich. 243; 109 N. W. 434.

Plaintiff, a *child of 7 years, is not a trespasser* by having his hand caught in a pulley operated intermittingly in street by men and team more than a black away. Pully was left unattended. Children had been noticed by defendant. Question of contributory negligence is for jury.

58. *Westfield* v. *Levis Bros.,* 43 La. Ann. 63; 9 So. 52.

Child 5 *years* is *prima facie* incapable of contributory negligence. Parents are not obliged to restrain young children from the streets. Plaintiff kept climbing upon iron roller used in paving street, though warned away. Allowed to recover. *"Lynch* v. *Nurdin has been affirmed in every court of last resort where it has been presented in this county except in the Courts of Massachusetts."*

59. *Kelly* v. *Parker-Washington Co.,* 107 Mo. App. 490; 81 S. W. 631.

Contractor grading street left scraper in street unguarded 25 or 30 feet from plaintiff's residence, is liable *to child* 5 *years old,* whose *brother, about* 4, running to get out of way of approaching team, started to jump into pan of scraper, stepped on the lever, thereby dropping the pan, causing the plaintiff to fall into the pan, catching her hand and severing her finger.

60. *Madden* v. *R'y Co.* (supra, 26) 76 N. H. 379.

Railroad company not liable for negligence where its employees burned grass on its right-of-way, but did not take precautions for protection of infant trespassers whose presence was not reasonable to be anticipated. "No one saw her when her clothing caught fire, she was discovered on defendant's

right-of-way when on fire." She might be considered a trespasser.

61. Remarks of court in *Indianapolis* v. *Emmelman* (supra, 55) are said to be obiter in *Pekin* v. *McMahon,* 154 Ill. 141; 39 N. E. 848.

62. *Turess* v. *N. Y., Susquehanna & W. R'y Co.* (cited in 71 N. J. L. 618) 32 Vroom 314.

Trespassers cannot recover against railroad even if infants and if turntable is attractive. See also D., L. & W. R'y v. Reich, 32 Vroom 635.

63. *Keffer* v. *Milwaukee & St. Paul R'y Co.,* 21 Minn. 211.

Turntable case, taking diametrically opposite view from 62.

POINT V.

THIS CASE MUST BE DISTINGUISHED FROM THOSE CASES WHERE, ALTHOUGH THE DEFENDANT WAS NEGLIGENT IN THE FIRST INSTANCE, YET IT COULD NOT HAVE BEEN REASONABLY ANTICIPATED THAT THE CHILD INJURED, OR ANY "INTERVENING" CHILD WOULD BY HIS PARTICULAR CAPRICIOUS ACTION CONTRIBUTE, IN THE WAY IN WHICH HE ACTUALLY DID CONTRIBUTE, TO THAT INJURY.

64. *Berman* v. *Schultz* (supra, 21).

65. *Seymour* v. *Union Stock Yards, etc., Co.* (supra, 35).

66. *Madden* v. *R'y Co.,* 76 N. H. 379 (supra, 60).

67. *Leuhrmann* v. *Laclede Gas Light Co.,* 127 Mo. App. 213.

Boy threw baled hay wire over light wire, pushed it along to uninsulated part, connected it with another bundle of wire, which electrified a pool of water into which plaintiff drove his horse.

68. *Loftus* v. *Dehail,* 133 Cala. 214; 65 Pac. 379.

Child pushed plaintiff into an excavation of which plaintiff was old enough to be, and was, afraid.

Defendants had removed a house which was located near the street, leading to an open cellar. There was no danger, however, to travellers upon the highway. Held that defendant was not liable in failing to guard the open cellar against children, who were not there by permission. *Plaintiff was* 7 *years* old, and was pushed into the cellar by her younger brother, 4 *years old.*

Henshaw, J., at p. 218. "But it by no means follows as has been said, that anything or everything, which a jury might find, or a court may determine to be attractive as playground or plaything for children casts a responsibility of guard and care upon the owner of that thing. Moving street cars and vehicles upon the street are irresistibly attractive to many children. * * *

If an owner became responsible, merely because children were attracted, it would burden the ownership of property with a most preposterous and unbearable weight. The case at bar, therefore, is not referable to that class of cases like the turntable cases. * * *

Nor to the other class that permits a recovery

where a dangerous excavation has been maintained so near a public highway that one lawfully using the highway has been injured. Here the excavation was 30 feet from one street, and 50 feet from the other. * * *

"The children were neither there by license or permission." * * *

"But there is still another reason why, in this particular case, the findings, and consequently the judgment cannot be upheld. Where such an action as this lies at all, *it can be successful only upon a showing that the infant was of such tender years as not to appreciate the danger to which it was exposed.* Such was the finding of the court in this case, but the evidence utterly failed to support it. The child herself shows by her testimony and appreciation of the danger, and says that she knew that it would hurt her to jump from a high point into the cellar."

In the case at bar the plaintiff clearly did not know, and had no warning of his danger. (See Rec. p. 39.)

69. *O'Connor* v. *Brucker,* 117 Ga. 451; 43 S. E. 731.

Door of vacant house left open. Plaintiff's playmate lifted a window which fell, injuring plaintiff. No recovery.

70. *Tutein* v. *Hurley,* 98 Mass. 211.

Shears would not have fallen, had not some boys swung in play upon another rope, although shears would not have fallen had rope been fastened. No recovery.

71. *Beetz* v. *Brooklyn,* 10 A. D. 382; 41 Supp. 1009.

Plaintiff was 7 years old. Other boys about the same age. Another boy picked up piece of lime allowed to run from barrels into street, put it into can of water causing explosion which hurt plaintiff, who was holding can. Plaintiff *about 7 years* old.

72. *Malmberg* v. *Bartos,* 83 Ill. 481.

Child chopped off finger of another with axe left on sidewalk. (See 78, infra.)

In the case at bar the defendant knew plaintiff personally, knew that the children played there habitually and would imitate their elders in their plays. Rec. pp. 3, 7, 8, 11 and 46.

POINT VI.

AND FROM THAT OTHER LARGE CLASS OF CASES WHERE THE CHILD'S ACT WAS CONSIDERED TO BE AN "INTERVENING CAUSE" BECAUSE NO ONE COULD HAVE ANTICIPATED THAT A CHILD, CONSIDERABLY OVER THE AGE OF SEVEN YEARS, WOULD HAVE DONE THE PARTICULAR THING WHICH CONTRIBUTED TO, OR WAS THE PROXIMATE CAUSE OF, THE INJURY RECEIVED.

73. *Belt R'y Co.* v. *Charters,* 123 Ill. App. 322.

"Attractive nuisance" doctrine applied almost exclusively to children under *ten* years of age.

Plaintiff 14 years old, nonsuited—turntable case—even if he was aiding defendant's servant.

"An examination of the cases will show that, in nearly every instance, the child was less than *ten*

years of age, and incapable of exercising ordinary care, and that the machinery or other dangerous agency, was situated near a public street or alley in a populous neighborhood, and unfenced."

74. *Berman v. Schultz* (supra, 21).

75. *Holmes* v. *Delaware & Hudson R'y Co.,* 128 A. D. 24. (Supra, 23.)

76. *Finkbeimer* v. *Solomon* (supra, 24).

77. *Lamurri* v. *Saginow City Gas Co.* (supra, 7.)

78. *Malmberg* v. *Bartos,* 83 Ill. 481.

The defendant, a grocery man, was unloading ice, and breaking it up with an axe for use in his store. He left the axe while carrying the ice into the store, on the sidewalk outside. Children were playing there in the street. The plaintiff (a girl 7 years old), another girl a little older, the defendant's son (4 years old), and a boy (5 years old) were playing there. Plaintiff was trying to get some pieces of ice and started to pick up the axe. Defendant's little son warned her away and when she refused he and the other boy said "They would fix her," and the older boy holding her hand, defendant's son chopped off one of her fingers with the axe. The plaintiff was non-suited. The axe was the means and not the cause of the injury.

79. *Clark* v. *Richmond,* 83 Va. 355; 5 S. E. 369. (Supra, 26.)

80. *Hanna* v. *Iowa City R'y Co.,* 129 Ill. App. 124.

The *child here was* 12 *years old.* The premises outside city limits, the nearest point of the pond being an eighth of a mile west, and where the de-

cedent fell fourteen hundred feet further. It was reasonably protected from intrusion by fences. The children nevertheless were accustomed to go there in numbers, and decedent knew depth of the water and the surroundings of this pond did not obtrude itself upon the children as an attraction.

Remote from any highway on which he had a right to travel. The court quotes with approval A. & E., Cyc. of Law, vol. 7, second ed., page 409. No recovery if the infant *appreciated the danger.*

81. *Rogers* v. *Lees,* 140 Pa. 475; 21 Atl. 399.

Riding on ball attached to hoisting apparatus while trespassing. *Lad two years old.* Warned by his companion not to attempt to ride on the ball at end of hoisting rope. No recovery.

82. *Houck* v. *Chicago & A. R. Co.,* 116 Mo. App. 559; 92 S. W. 738. *Plaintiff* 10 *years old.*

Machinery enclosed in building. Plaintiff with daughter of defendant's engineer brought his dinner pail. Plaintiff did not approach the machinery from curiosity. But engineer who invited plaintiff into building binds defendant by his act. Question for jury.

83. *Ryan* v. *Towner,* 128 Mich. 463; 87 N. W. 644.

The plaintiff was a *girl of about* 13 *years* of age. Defendant, a number of years before the accident, had been in the manufacturing business, but its plant had been shut down. Among other structures it owned a small pump house located on the ground of the railroad company, by permission. In the house was a small over-shot water wheel.

The plaintiff, with her brothers and sisters, was in the habit of passing this pump house on the way to school. A hole existed in the pump house, through which the children went to play with the wheel. Apparently this hole was made by children, and from time to time enlargened, as they would take one stone out after another. The brothers of the plaintiff on their way from school crossed through this hole and by mounting the wheel were able to turn it apparently backward and forward. The younger sister, about 8 years old, got caught between the wheel and the wheel-pit. The plaintiff heard her screams and went through the hole to help her and was herself injured.

Held verdict should be directed for the defendant.

Invitation to cross premises can not be predicated on fact that no active steps to prevent it are taken by defendant. No distinction between children and adults as to circumstances which will warrant inference of invitation. Turntable cases disapproved. Concurs with No. 58. No recovery.

84. *Holbrook* v. *Aldrich,* 168 Mass. 15; 46 N. E. 115.

Child under 7 years entered shop with father, who went to make a purchase. While he was making change she put her hand into coffee grinder and was hurt. "Temptation is not always invitation." No recovery.

85. *Porter* v. *Anhauser Busch Brewing Co.,* 24 Mo. App. 1.

Plaintiff 4½ *years old.* Facts were defendant's furnace used on street was standing on side-walk on level ground, weighed 180 pounds to 270, filled

with coal. Could not be upset except by use of great force. No one could anticipate that a child could upset it. No recovery.

86. *Slayton* v. *Freemont, E. & M. Valley R. Co.,* 40 Neb. 840.

Defendant Railway had torpedoes and other implements in untenanted section house, all the doors and windows of which were securely fastened. Access was obtained by children, who unfastened and opened one of the windows and removed torpedoes. Defendant not liable for injury to plaintiff —boy 12 *years*—had not been with these children, but on his return home was told by his sister that they could not open the torpedo. He struck it with a hammer and it exploded—no recovery.

87. *Sauerio-Cella* v. *Brooklyn Union Elevated R'y Co.,* 55 App. Div. 98.

Defendant in construction work used a windlass working with a drum and cogweels, left it on sidewalk over Sunday, where children were numerous, after removing the rope, unshipping the handles and tying the machine. Boys cut cord tiers, wound a child's jumping rope around the drum and pulled and relaxed the rope. Defendant *not liable* for injuries of plaintiff, *a boy* 6 *years old,* who caught his foot in revolving wheels.

88. *O'Connor* v. *Brucker* (supra, 68.)

89. *Franks* v. *So. Cotton Oil Co.,* 78 S. C. 10; 58 S. E. 960.

Plaintiff's intestate, *boy under* 10 *years,* was drowned in reservoir on vacant land, which was near street in crowded neighborhood, where children were accustomed to play. Court held defen-

dant liable, quoting Thompson on negligence, section 1026, with approval.

90. *Doonk Bros. Coal & Coke Co.* v. *Leavitt,* 109 Ill. App. 385.

Courts of this state go beyond New Jersey. Plaintiff, 2½ *years old, lifted cover off a cistern,* and fell in. Premises were rented by defendant on monthly tenancy. Even if mother guilty of contributory negligence, this would not bar father who brought action. The child could not be guilty of contributory negligence.

91. *Stefanowiske* v. *Chain Belt Co.,* 129 Wisc. 484; 109 N. W. 532.

Where *a boy* 13 years invented a device to protect his fingers in handling chains at his work.

92. *Luehrman* v. *Laclede Gas Co.* (supra, 67.)

Boys threw wire over electric cable, above porch, and milkman's horse was killed, etc. (Distinguish from *Harrison* v. *K. C. Electric Light Co.,* 195 Mo. 606.)

93. *Coleman* v. *Graves Co.,* 39 Misc. 85; (aff'd 97 A. D. 411.) (*Child was* 10 *years old.*) (Supra, 30.)

94. *Loftus* v. *Dehail* (supra, 68.)

Boy 4 years pushed plaintiff into cellar.

95. *O'Connor* v. *Brucker* (supra, 69.)

96. *Tutein* v. *Hurley* (supra, 70.)

97. *Beetz* v. *Brooklyn* (supra, 71.)

98. *March* v. *Giles,* 211 Pa. 17; 60 Atl. 315.

Plaintiff was a boy 7 years old and in order to start electric light pushed back a large flat stone left leaning against an electric light pole and let it fall back against pole and injured plaintiff's hand. The boys had seen policeman strike pole and start light.

99. *Friedman* v. *Snare & Triest Co.*, 42 Vroom 619. (Mr. Justice Garrison, last paragraph.)

POINT VII.

THERE IS SCARCELY A CASE WHERE THE PLAINTIFF HAS BEEN PREVENTED FROM RECOVERY OWING TO THE "INTERVENING CAUSE," BEING AN UNEXPECTED ACT OF A CHILD, UNLESS, AND EXCEPT, IN THOSE CASES WHERE THE PLAINTIFF RECEIVED HIS INJURY FROM THE ACT OF SOME CHILD OTHER THAN HIMSELF; AND, IN ALMOST EVERY CASE, WHERE THE ACT, WHICH CONSTITUTED "INTERVENING CAUSE" WAS THE ACT OF THE PLAINTIFF HE WAS OVER THE AGE OF SEVEN YEARS AND THE ACT WAS AN ACT WHICH THE CHILD KNEW, FROM HIS ABILITY TO APPRECIATE THE PARTICULAR DANGER, WAS A DANGEROUS AND FORBIDDEN THING TO DO —IN OTHER WORDS, IT WAS "CONTRIBUTORY NEGLICENCE."

100. *Finkbeimer* v. *Solomon,* 225 Pa. 333; 74 Atl. 170 (supra, 24.)

101. *Verdon* v. *Crescent Auto Co.,* 80 N. J. L. 199.

A boy 7 years old, allowed to testify is not altogether exempted from exercise of care in approaching danger—and if it appear that he is *sui juris*

and his heedlessness amounts to contributory negligence, he cannot recover.

102. *Holmes* v. *Delaware & H. R'y Co.,* 128 A. D. 24 (supra, 23.)

103. *Lamurri* v. *Saginow City Gas Co.* (supra, 7.)

What is there in this case intervening between the defendant's wrong and the plaintiff's injury which may be called a cause? Nothing, unless it be the action of the plaintiff's companion, a child of tender years. It is true that the intervention of a responsible human agency has frequently been held to destroy the causal connection between a wrong and its consequences; but the intervening human agency in this case was irresponsible." Majority opinion in *Lamurri* v. *Saginow City Gas Co.,* 148 Mich. 27; 11 N. W. 884.

104. *Belt R'y Co.* v. *Charters* (supra, 73.)

105. *Smith* v. *Hopkins,* 120 Fed. Rep. 921.

106. *Hanna* v. *Iowa C. R. Co.* (supra, 80.)

107. *Biggs* v. *Consolidated Barbed Wire Co.,* 60 Kans. 223; 56 Pac. 4.

Boy 14 years old. On demurrer. A water wheel on premises of defendant attractive to children, at a place where men and boys congregate for amusement and boys were accustomed to climb about shafts holding wheel to fish, ran by set screw in which decedent was caught, and which revolved so fast that the motion could not be seen by the naked eye. Decedent was caught in machinery and killed. Defendant held liable.

108. *Otten* v. *Cohen,* 1 N. Y. Supp. 430. (City Court.)

Plaintiff's child injured and she sues therefor.

"Did you see any boys playing in the yard of these premises, around that sign previous to the 23rd day of May, 1885?" Objection sustained. For this a reversal was ordered. "The fact that the boy charged with interference was under age is not ground for excluding the testimony." What the child's age was does not appear.

109. *Loftus* v. *Dehail* (supra, 68.) Girl 7 pushed into cellar by her 4-year-old brother.

110. *O'Connor* v. *Brucker* (supra, 69.)

111. *Tutein* v. *Hurley* (supra, 70.) (Guy ropes on tackle.)

112. *Berman* v. *Schultz* (supra, 21.)

Starting electric truck by pulling lever. But no negligence was proved here in first instance.

113. *Pittsburg* v. *Reducing Co.* v *Horton,* 87 Ark. 576; 113 S. W. 647.

Defendant left dynamite caps where they were liable to be picked up by children passing by to school. Cap was picked up by *boy, 10 years old,* taken home, kept there a week, and shown to his mother, who did not know what they were and who allowed him to take it to school the next day. Plaintiff, a companion of the other boy, 13 years old, traded for caps some writing paper. Plaintiff exploded cap at school trying to pick dirt out of it with match. Held that there was an "intervening cause." Court approves Harriman v. Pittsburg, &c, R'y, 45 Ohio St. 11 (supra, 17), holding that it turned on "contributory negligence of Plaintiff."

114. *March* v. *Giles,* 211 Pa. 17; 60 Atl. 315.

Plaintiff 7 years old. Defendant had placed on unpaved footway of a back street, certain stones, one of which was about 3 feet long, leaning against electric light pole. Plaintiff had seen policeman knock the pole with his stick and start light which had gone out. Plaintiff suggested to his companion, 9 years of age, that they jar this pole and start the light as the policeman had done. In doing this plaintiff had his finger smashed. Held "intervening cause," not reasonably to be anticipated by defendant.

115. *Stephenson* v. *Corder* (supra, 20.)

Boy over 10 *years,* no negligence in first instance.

116. *Brady* v. *Consolidated Traction Co.,* 63 N. J. L. 25.

Boy 9½ *years old,* while playing in street ran in front of a trolley car which he saw approaching. Held no element of danger which he did not perceive and which a boy of his age was not fully capable of appreciating. Question for Jury.

117. *Coleman* v. *Graves Co.,* 39 Misc. 85; aff'd 97 A. D. 411 (supra, 28.)

118. *Aiken* v. *Bradley Engineering Co.,* 48 Wash. 97; 92 Pac. 903.

Where a court held that defendant was not relieved from its negligence in leaving an unexploded dynamite cap where it could be picked up by a child, because plaintiff exploded it with a dry battery. HE DID NOT APPRECIATE THE DANGER.

This case is strictly in point and holds that the intervening act of a child *non sui juris* cannot be an "intervening cause" where the child is himself the plaintiff, and the alleged "intervening act" is

simply another expression meaning "contributory negligence."

119. In *Gulf C. &c R. R.* v. *McWhirter,* 77 Tex. 356; 14 S. W. 26 (turntable case), it is suggested that act of child cannot operate as "intervening cause," but Court said that even if the person turning the table was *sui juris,* it would not prevent recovery because the result was to be anticipated.

120. *Beetz* v. *Brooklyn,* 10 A. D. (supra, 71.)

121. *Fishburn* v. *Burlington & N. W. R. R.,* 127 Iowa 483; 103 N. W. 481. *Plaintiff, 6 years old,* put back panel of fence negligently erected by defendant, and it blew down again, injuring him. He recovered, just the same.

122. *Mattson* v. *Minnesota &c Ry.,* 95 Minn. 477; 104 N. W. 443. Defendant left a large quantity of dynamite exposed on its premises which was found by plaintiff's children. Held liable.

123. *Brady* v. *Consolidated Traction Co.,* 63 N. J. L. 25.

Boy 9½ *years old,* while playing in street, ran in front of a trolley car which he saw approaching. Held no element of danger which he did not perceive and which a boy of his age was not fully capable of appreciating. Question for Jury.

124. *Coleman* v. *Graves Co.,* 39 Misc. 85; aff'd 97 A. D. 422. (Supra, 30.)

125. *Fiskburn* v. *Burlington & N. W. R. R.,* 127 Iowa 483; 103 N. W. 481.

Plaintiff, 6 years old, put back panel of fence negligently erected by defendant, and it blew down again injuring him.

POINT VIII.

WHERE THE NEGLIGENCE OF THE DEFENDANT IS ADMITTED, AND THE ACT, CONSTITUTING THE "INTERVENING CAUSE," IS THAT OF A VERY YOUNG CHILD ATTRACTED TO THE DANGER BY THE DEFENDANT'S NEGLIGENCE, AND IS AN ACT PERFECTLY NATURAL TO A CHILD, AS UNDER THE CIRCUMSTANCES OF THIS CASE, THE DECISIONS HAVE BEEN ALMOST UNIVERSALLY UNIFORM TO THE EFFECT THAT, IF THE ACT WAS AN ORDINARY OR NATURAL THING FOR A CHILD TO DO, HIS ACT WILL NOT CONSTITUTE AN "INTERVENING CAUSE," OR CONTRIBUTORY NEGLIGENCE.

126. *Kreiner* v. *Straubmuller,* 30 Pa. Supr. Ct. 609.

127. *O'Leary* v. *Michigan State Tel. Co.* (supra 57.)

128. *Westfield* v. *Levis Bros.,* 43 La. Ann. 63; 9 So. 52 (supra, 58.)

129. *Kelly* v. *Parker-Washington Co.,* 107 Mo. App. 490; 81 S. W. 631. (Supra, 57.)

130. *Earl* v. *Crounch,* 40 N. Y. St. 847; 16 N. Y. Supp. 770; aff'd in 131 N. Y. 613.

Piling lumber adjacent to the sidewalk of a city street in such a manner that the slight force that can be applied to it by a *child* (*4½ years old*) residing in the street, will be suffice to topple it over, is reckless, culpable negligence. But see

131. *Friedman* v. *Snare & T. Co.,* 71 N. J. L. 605.

132. *Hobbs* v. *Blanchard & Sons,* 75 N. H. 73; 70 Atl. 1082.

Question for Jury. New Hampshire Rule.

133. *Lamurri* v. *Saginow City Gas Co.,* 148 Mich. 27; 111 N. W. 884. (Supra, 7.)

134. *Palermo* v. *Orleans Lee Mfg. Co.,* 13 La. 833; 58 So. 589. (Supra, 8.)

135. *Cahill* v. *E. B. & A. L. Stone Co.,* 153 Cala. 571; (supra, 9.)

136. *Edgington* v. *Burlington C. R. R. & N. R. Co.,* 116 Iowa 410; 90 N. W. 95; (supra, 14.)

137. *Indianapolis* v. *Emmelman,* 108 *Ind.* 530; 9 N. E. 155; (supra, 55.)

138. *Kelly* v. *Parker-Washington Co.* (supra, 59.)

139. *Kunz* v. *City of Troy,* 104 N. Y. 345.

To charge defendant with negligence in not removing obstruction placed in street by third person, it is not necessary to show express notice.

Child 5½ years old playing with companions, knocked over a large counter left negligently unbalanced in street. *Plaintiff cannot be guilty of "contributory negligence."*

140. *Harper* v. *Kopp,* 24 Ky. L. Rep. 234; 73 S. W. 1127.

Contributory negligence on part of child can only be predicated on its actual appreciation of the danger. It is not a defense that lumber piled in the street where children play was not negligently stacked. It was negligence to stack it there at all. unless the *necessity* was shown.

Plaintiff was *six years old.*

141. *Busse* v. *Rogers,* 120 Wisc. 443; 98 N. W. 219.

Plaintiff, 5 years old, was playing on pile of lumber in street insecurely arranged, and it fell on her. The fact that there was plenty of room to pass did not prevent recovery.

142. *Westfield* v. *Levis* (supra, 58.)

Lumber pile cases, 19 L. R. A. N. S. 1158.

Child 5½ years old is incapable of contributory negligence.

143. *Nagel* v. *Mo. Pac. R'y Co.,* 75 Mo. 653. (Supra, 13.)

Turntable case. "Test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise..'

144. *Fishburn* v. *Burlington & N. W. R. R. Co.* (supra, 12.)

145. *Aiken* v. *Bradley Engineering Co.* (supra, 11 and 111.)

146. *Powers* v. *Harlow,* 53 Mich. 507; 19 N. W. 257.

Where the old house in which explosives were stored was open and attractive to children——

POINT IX.

IN ANY EVENT THE QUESTION OF WHETHER THE YOUNG PLAINTIFF'S ACT IN THROWING LEAVES ON THE FIRE UNDER THE CIRCUMSTANCES OF THIS CASE WAS A CONTRIBUTORY OR INTERVENING CAUSE, OR NOT, IS A QUES-

TION WHICH OUGHT TO HAVE BEEN SUBMITTED TO THE JURY.

147. The general rule is well stated by Mr. Justice Vredenburgh, in Brewster v. N. Y. Central R. R. Co., 80 N. J. L. 447, at page 450.

"Under the circumstances recited above, it seems to us the question of his contributory negligence was for the jury. The long-accepted, as well as recently-affirmed, rules of law governing cases analogous in principle to the present, are that such question is regularly a matter of defence, and that the plaintiff is not required to prove its absence as a part of his case; that there is no presumption of negligence upon the part of the highway traveler arising from the mere occurrence of his collision with the railroad train at its crossing over a highway, and that to justify a nonsuit his contributory negligence must clearly appear, conclusively as a fact, or by necessary exclusive inference from the plaintiff's evidence, and where the evidence, when the plaintiff rests, leaves the contributory negligence of the plaintiff in doubt, the determination of the question must be submitted to the jury. Pennsylvania Railroad Co. v. Middleton, 28 Vroom 154; Danskin v. Pennsylvania Railroad Co., 50 Id. 526."

148. *Richter* v. *Orange & Passaic Valley R. R.*, 79 N. J. L. 462

Where a boy 7 *years old,* running away from a boy who was going to throw a stone at him. Was he reasonably cautious in running into a trolley car? It was a question for the Jury whether he was guilty of contributory negligence.

149. *Verdon* v. *Crescent Automobile Co.,* 80 N. J. L. 199.

150. *Sprecht* v. *Waterbury Co.,* 70 Misc. 404; (supra, 16.)

151. Thompson on Neg., sec. 1030 et. seq.

152. *Bjork* v. *Tacoma Wash.,* 135 Pac. 1005 (1913).

Plaintiff was 3 years old. Adjoining the street of populous city, defendant had a square flume practically level with the ground, in which was an opening 24 inches wide. Water in flume was 18 inches deep. No fence. Street known to be used by children as a playground. *Question for Jury.* The fact that child is technically a trespasser does not defeat recovery. See Friedman v. Snare T. Co., 71 L. 605 contra (semble).

153. *O'Leary* v. *Mich State Tel. Co.* (supra, 57.)

154. *U. S. Natural Gas Co.* v. *Hicks,* Ky. 119 S. W. 166. (Supra, 10.)

155. *Schneider* v. *Winkler,* 74 N. J. L. 71. (Supra, 5.)

156. *Brady* v. *Consolidated Traction Co.,* 63 N. J. L. 25. (Supra, 116.)

157. *Ross* v. *Chester Traction Co.,* 224 Pa. St. 86.

Plaintiff a child 7 years old. Defendant made bonfire on vacant lot and waited till it subsided to hot ashes and left it. While standing near fire with a companion, wind fanned flames and spark caught fire to plaintiff's clothing. "The cause of child's injury was the fact that child rebuilt the fire into a dangerous condition," defendant's brief. But held that this was not established and among other things, a question for Jury whether.

158. *Keffer* v. *Milwaukee & St. Paul R'y Co.* (supra, 63.)

159. *Schneider* v. *Winkler* (supra, 5.) (Child 8½.)

160. *Verdon* v. *Cresent Automobile Co.,* 80 N. J. L. 199. (7 yrs. old.) (Supra, 101.)

A boy 7 years old allowed to testify is not altogether exempted from exercise of care in approaching danger—and if it appear that he is *sui juris* and his heedlessness amounts to contributory negligence he cannot recover. Whether he could have reasonably avoided collision with automobile in street is a question for Jury.

161. *Richter* v. *The Orange & Passaic Valley R. R. Co.,* 79 N. J. L. 462.

Plaintiff, a boy 6 years and ten months old, running to escape stone of a playmate, ran across defendant's tracks and was injured by approaching car. Held question of contributory negligence was for jury.

162. *Cahill* v. *Stone & Construction Co.,* 153 Cala. 571; (supra, 11.)

163. *Hobbs* v. *Blanchard & Sons,* 75 N. H. 73. (Supra, 132.)

164. *Kunz* v. *City of Troy,* 104 N. Y. 345. (Supra, 139.)

"In this case the child, in playing about the counter, was indulging a natural instinct in amusing himself and was not guilty of legal negligence, 'although he contributed to the mischief by his own act.' (Lord Denman in Lynch v. Nurdin, 1 Adolph & E. L.) (N. S. 29.) The law does not define when

a child becomes *sui juris*. If there was any question whether the plaintiff's intestate had sufficient discretion to understand the danger of the situation, it should have been left to the jury, with proper instructions as to the degree of care exacted of a child of tender years, under the circumstances. (Mangam v. Brooklyn R. R. Co., 38 N. Y. 455; McGovern v. N. Y. C. & H. R. R. R. Co., 67 id. 418; Byrne v. Same, 83 id. 620; Dowling v. Same, 90 id. 670; R. R. Co. v. Stout, 17 Wall. 657.) It is insisted, however, that the father of the intestate was chargeable with negligence in permitting the child to be on the sidewalk unattended. It has been held that it is not *per se* wrongful or negligent to permit children to play in the street. (McGarry v. Loomis, supra; McGuire v. Spence, 91 N. Y. 303.) It may, or may not, be negligence, depending upon circumstances. It was, we think, for the jury to determine whether the father of the intestate was guilty of negligence."

165. *Matson* v. *Minnesota &c R. R. Co,* 65 Minn. 477; 104 N. W. 477.

Where court held children would not be guilty of contributory negligence under the circumstances of explosion.

POINT X.

The tendency of the recent decisions is to receive in evidence, Ordinances and Statutes, which prohibit certain acts on which plaintiff is attempting to predicate negligence; even where the Statutes themselves may not, in and of themselves, properly be considered the basis for recovery.

166. *Lamurri* v. *Saginow City Gas Co.,* 148 Mich. 27; 11 N. W. 884. (Supra, 7.)

In this case the ordinances of the City of East Orange prohibited building offices within 40 feet of a dwelling; or throwing rubbish into the street. (pp. 44 and 58 case.)

167. *Union Pac. R'y Co.* v. *McDonald,* 152 U. S. 262.

Railroad Company was mining at a point not far from highway. Deposited large amount of stock, which took fire and was in a continuous state of combustion. This fact was well known. Plaintiff, a *lad* 12 *years old,* alighted from train at nearby station and had no knowledge of the condition of stock which on its surface presented no sign of danger. Boy became alarmed at something, ran into stock and was badly burned. Verdict directed for the plaintiff.

168. *Kunz* v. *City of Troy,* 104 N. Y. 345. (Supra, 139.)

169. *Knupple* v. *Knickerbocker Ice Co.,* 84 N. Y. 488.

In an action to recover damages for alleged negligence, proof of the violation of a city ordinance does not establish negligence *per se;* it is competent evidence upon the question to be submitted to the jury, but not conclusive.

POINT XI.

Can the question of "intervening cause" hereunder discussion arise independent of and unconnected with the peculiar duty chargeable to the

alleged negligent person? "In all negligent cases the duty, the breach of which is complained of, is always more or less a relative duty—greater in some cases than in others. It is always "reasonable," but what is reasonable in one case may well be insufficient in another—and in respect to turntables, fires and explosives, the duty is of such a character that, if there is a breach, it may be that the liability of the defendant is determined by the very breach itself, and is not relieved by any intervening act, especially to one of a class to which the peculiar duty is owed.

Respectfully submitted,

TERRY PARKER.

East Orange, N. J.,
June 15, 1915.

CASES CITED.

A

Aiken v. Bradley Engineering & Machine Co., 48 Wash. 97; 92 Pac. 903.

B

Baker v. Public Service R'y, 79 L. 249.
Ball v. Middlesborough T. & L. Co., 24 Ky. L. Rep. 114; 68 S. W. 6.
Barney v. Hanover, etc., Co., 126 Mo. 387; 28 S. W. 169.
Beetz v. Brooklyn, 10 A. D. 382.
Belt R'y Co. v. Charters, 123 Ill. App 322.
Berman v. Schultz, 81 N. Y. Supp. 647; 40 Misc. 212.
Bindford v. Johnson, 82 Ind. 426.
Biggs v. Consolidated Barbed Wire Co., 60 Kans. 223; 56 Pac. 4.

Bjork v. Tacoma Wash., 135 Pac. 1005 (1913).
Brady v. Consolidated Traction Co., 63 N. J. L. 25.
Brewster v. N. Y. Cent. R'y, 80 N. J. L. 448.
Brickley Car Works v. Cooper, 60 Ark. 545; 31 S. W. 154.
Busse v. Rogers, 120 Wisc. 443; 98 N. W. 219.

C

Cahill v. E. B. & A. L. Stone Co., 153 Cala. 571; 96 Pac. 84.
Clark v. Richmond, 83 Va. 355; 5 S. E. 369.
Coleman v. Robert Graves Co., 39 Misc. 85; 78 N. Y. Supp. 893.
Conrad v. Baltimore & O. R. Co. (W. Va.), 61 S. E. 44; 16 L. R. A. N. S. 44.
Cooper v. Overton, 102 Tenn. 222; 52 S. W. 183.
Cox v. Penn. R'y Co., 47 Vroom 76 L. 788.

D

Delaware L. & W. R'y Co. v. Reich, 61 N. J. L. 635.
Doonk Bros. Coal & Coke Co. v. Leavitt, 109 Ill. App. 385.

E

Earl v. Crounch, 40 N. Y. St. 847; 16 N. Y. Supp. 770.
Edgington v. Burlington C. R. & N. R. Co., 116 Iowa 410; 90 N. W. 95.
Erickson v. R'y Co., 82 Minn. 60; 84 N. W. 462.

F

Finkbeimer v. Solomon, 225 Pa. 333; 24 Atl. 24; 24 L. R. A. N. S. 1257.
Fishburn v. Burlington & N. W. R. Co., 127 Iowa 483; 103 N. W. 481.

Fitzgerald v. Rogers, 58 App. Div. 298; 68 Supp. 946.

Franks v. So. Cotton Oil Co., 78 S. C. 10; 58 S. E. 960.

Friedman v. Snare Triest Co., 42 Vroom 605; also 169 Fed. 1.

Fritzmanice v. R'y Co., 78 Conn. 406; 62 Atl. 620.

G

Gulf C. &c. R. R. v. McWhirter, 77 Tex. 356; 14 S. W. 26.

Guinn v. Delaware & Atl. Tel. Co., 72 N. J. L. 276.

H

Hanna v. Iowa City R'y Co., 129 Ill. App. 124.

Harper v. Kopp, 24 Ky. L. Rep. 234; 73 S. W. 1127.

Harriman v. Pittsburgh C. & St. L. R. Co., 45 Ohio St. 11; 12 N. E. 451.

Hobbs v. Blanchard & Sons, 75 N. H. 73; 70 Atl. 1082.

Holbrook v. Aldrich, 166 Mass. 15; 46 N. E. 115.

Houck v. Chicago & A. R. Co., 116 Mo. App. 559; 92 S. W. 738.

Holmes v. D. & H. Delaware & Hudson R. R. Co., 128 A. D. 24.

I

Indianapolis v. Emmelman, 108 Ind. 530; 9 N. E. 155.

K

Kalz v. Winova & St. Paul R'y Co., 76 Minn. 351; 79 N. W. 310.

Keegan v. Luzerne County, 8 Kulp. 160.

Keffer v. Milwaukee & St. Paul R'y Co., 21 Minn. 211.

Kelly v. Parker-Washington Co., 107 Mo. App. 490; 81 S. W. 631.
Kennedy v. Sullivan, 66 N. J. L. 185.
Kuhn v. Jewett, 32 Eg. 647.
Kunz v. City of Troy, 104 N. Y. 345.
Knupple v. Knickerbocker Ice Co., 84 N. Y. 488.
Kreiner v. Straubmuller, 30 Pa. Supr. Ct. 609.

L

Lamurri v. Saginow City Gas Co., 148 Mich. 27; 111 N. W. 885.
Leuhrmann v. Laclede Gas Light Co., 127 Mo. App. 213.
Loftus v. Dehail, 133 Cala. 214; 65 Pac. 379.
Lynch v. Nurdin, 1 Q. B. 29.

M

Madden v. R'y Co., 76 N. H. 379; 83 Atl. 129.
Malmberg v. Bartos, 83 Ill. 481.
March v. Giles, 211 Pa. 17; 60 Atl. 315.
Matson v. Minnesota &c. R. R., 95 Minn. 477; 104 N. W. 443.
Meyers v. Benton, 74 N. J. L. 533.

N

Nagel v. Mo. Pac. R'y Co., 75 Mo. 653, at p. 661.

O

O'Connor v. Brucker, 117 Ga. 451; 43 S. E. 731.
O'Leary v. Mich State Telegraph Co., 146 Mich 243; 109 N. W. 434.
Otten v. Cohen, 1 N. Y. Supp. 430.

P

Palermo v. Orleans Lee Mfg. Co., 130 La. 833 (1912).

Paolino v. McKendall, 24 R. I. 432; 53 Atl. 268.
Parter v. Anhauser Busch Brewing Co., 24 Mo. App. 1.
Pittsburg v. Reducing Co. v. Horton, 87 Ark. 576; 113 S. W. 647.
Powers v. Harlow, 53 Mich. 507; 19 N. W. 257.

R

Rachmel v. Clark, 205 Pa. 314.
Richter v. The Orange & Passaic Valley R. R. Co., 79 N. J. L. 462.
Rogers v. Lees, 140 Pa. 475; 21 Atl. 399.
Ross v. Chester Traction Co., 224 Pa. St. 86.
Ryan v. Tower, 128 Mich. 463; 87 N. W. 644.

S

Sauerio-Cella v. Brooklyn Union Elevated R'y Co., 55 App. Div. 98.
Schneider v. Winkler, 45 Vroom 74 N. J. L. 71, at p. 73.
Seymour v. Union Stock Yards, 224 Ill. 579; 79 N. E. 950.
Slayton v. Freemont, E. & M. Valley R. Co., 40 Neb. 840.
Smith v. Hopkins, 120 Fed. Rep. 921.
Sprecht v. Waterbury Co., 70 Misc. 404.
Stefanowiske v. Chain Belt Co., 129 Wisc. 484; 109 N. W. 532.
Stephenson v. Corder, 71 Kans. 475.
Sullivan v. Hidekoper, 27 App. D. C. 154.

T

Thompson on Neg., sec. 1030 et. seq.
Traction Company v. Scott, 58 N. J. L. 682, at p. 694.
Travell v. Bannerman, 174 N. Y. 47.

Turess v. N. Y. Susquehanna & W. R'y Co., 71 N. J. L. 618; 32 Vroom 314.
Tutein v. Hurley, 98 Mass. 211.

U

Union Pac. R'y Co., v. McDonald, 152 U. S. 262.
U. S. Natural Gas Co. v. Hicks, 134 Ky. 12; 119 S. W. 166 (1909).

V

Verdon v. Crescent Auto Co., 80 N. J. L. 199.

W

Walsh v. Fitchburg R'y Co., 145 N. Y. 301.
Westfield v. Levis Bros., 43 La. Ann. 63; 9 So. 52.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

WILLIAM A. DAVENPORT, *Plaintiff-Appellant,*	*Action at Law.*
vs.	*On Appeal from Supreme Court.*
DOUGLAS Y. MCCLELLAN, *Defendant-Respondent.*	

Brief for Respondent.

STATEMENT OF FACTS.

This action is brought to recover damages for injuries sustained by the plaintiff by reason of being seriously burned on November 4th, 1911. The defendant resided at No. 196 South Clinton Street in the City of East Orange, New Jersey, which dwelling was diagonally opposite and across the street from the residence of the plaintiff. At about 8:30 A. M. on the day in question the defendant started a fire in the front of his premises within one or two feet of the curb for the purpose of burning leaves which had fallen upon his property (page 8, lines 31-38). The fire which the defendant started burned between 8:30 and 9 A. M., during which time the defendant remained and guarded the same (p. 9, lines 12-21). The plaintiff, an infant five years of age, at the time of the happening of the accident, gathered leaves from neighboring premises and placed them upon a fire, which, the infant plaintiff alleges, was in front of the defendant's premises (p. 36, lines 36-40). The fire at that time was practically out and just smoldering (p. 37, lines 22-28). As a result of the plaintiff's

tampering and playing with the smoldering ashes of the fire started by the defendant and adding fuel thereto, the leaves which the plaintiff himself had placed thereon caught fire from which fire the plaintiff was burned. For the injuries so suffered by the plaintiff, he now seeks to recover from the defendant.

The Trial Court non-suited the plaintiff upon the ground that the injuries complained of were the proximate consequence of the intervening act of the plaintiff, and not the alleged negligence of the defendant. From this ruling the plaintiff appeals.

Point 1.

THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF THE DEFENDANT.

The testimony shows that the defendant at about 8:30 A. M. on the day in question built a fire in the front of his residence, within one or two feet of the curb for the purpose of burning leaves which had fallen upon his property (p. 8, lines 31-38). The fire which the defendant started burned between 8:30 and 9:30 A. M. (p. 9, lines 12-13), and the defendant during that time stayed by and guarded it (p. 9, lines 20-21). There were other fires burning that morning near the plaintiff's residence, which had been started by other neighbors for the same purpose, as that for which the defendant had started his (p. 16, lines 26-30). The plaintiff met with the accident complained of and was burned at about 11:45 A. M. (p. 28, lines 19-24). There is absolutely no evidence which proves that the fire started by the defendant was the one from which the plaintiff received his burns, excepting the infant plaintiff's own statement (page 37, line 27), in which he locates the fire from which he was burned

as being "right in front of Mr. McClellan's door." The evidence shows that the fire started by Mr. McClellan was within one or two feet of the curb (p. 8, line 38) and that the residence of Mr. McClellan was at least forty feet from the curb line (p. 11, lines 10-18).

This is all the evidence contained in the plaintiff's case, upon which it is in any wise attempted to prove negligence upon the part of the defendant. The fire started by the defendant consisted merely of leaves (p. 9, line 8) and was approximately two feet wide by three feet in length (p. 9, line 26.) This fire was started at about 8:30 A. M. while the plaintiff received his injuries at approximately 11:45 A. M., which is more than three hours after the starting of the fire by the defendant. Appreciating the dimension of the heap of leaves, which the defendant was burning, it is difficult indeed to imagine that such a fire would last or continue for more than three hours. In addition to this the defendant's testimony, as part of the plaintiff's case, shows that the fire burned only between the hours of 8:30 and 9 A. M. and that during all that time he stayed by and guarded it.

The mere building of the fire was not of itself negligence, and assuming for the purpose of argument, although there is no proof to that effect, that the defendant did receive his injuries from the fire started by the defendant, it is nevertheless no easy matter to ascertain in what respect the defendant was negligent. The defendant did, according to the testimony of the plaintiff's case, as a reasonably prudent man would do, to wit, stayed and guarded the fire while it was burning until it was out. The condition of the fire when the defendant left it was of such a character that no possible harm could have been done by it alone. The fire from which

the infant was injured, according to his own testimony, was at that time merely a smoldering smudge of ashes, which in itself could do absolutely no harm. The child could, undoubtedly, have walked through the ashes without having been harmed or burned, as is indicated by the fact that the plaintiff was injured not by the defendant's fire or ashes, but by the fresh or new fire which he himself had started. In the condition which the defendant had left the fire, it could scarcely have been communicated to other property, even if it had been scattered by the wind, and the possibility that it would injure passers-by in the street or on the sidewalk was extremely remote.

A definition of negligence is laid down by Dickson, *J.*, in *Kowalski* vs. *The Newark Passenger Railroad Company,* 15 N. J. L. J. 50, which reads as follows:

> "Whenever it is undertaken to charge a person with negligence, it is meant that such person has failed to exercise reasonable care. It is not negligence in the eye of the law to fail to exercise extraordinary care. * * * Reasonable care means not extraordinary care, but such care as a reasonable man would exercise in view of all the circumstances presented to him, such care as an ordinary prudent man would exercise under the conditions existing at the time he is called upon to act."

In the case at bar the defendant is even less guilty of actionable negligence than was the defendant in the case of *Myer* vs. *Benton,* 74 N. J. L. 533, 65 Atl. 1023, where the Court of Errors and Appeals held that the dumping of hot ashes on vacant land without right or license was not absolute negligence in the absence of evidence that the injury to the minor plaintiff, or to a class of which

the plaintiff was one, ought reasonably to have been anticipated by the defendant.

In *Bennett* vs. *Odell Manufacturing Company,* 76 N. H. 180, 80 Atl. 642, the Court held in an analogous case that the maintenance of a nuisance upon land by unlawfully storing explosives thereon, was not the proximate cause of the injury to a boy, nine years of age, who had entered the premises and carried the explosives away and set them off, injuring himself.

The well settled line of authorities of *Friedman* vs. *Snare & Triest Company,* 71 N. J. L. 637; *Turress* vs. *N. Y. Susquehanna & Western Railway,* 61 N. J. L. 314, &c., has established the principle in this State that "Attraction is not invitation." The defendant's act in this case is, therefore, not made negligent by the mere fact that the fire which he had kindled and started did in fact attract the infant and subsequently cause him to place fresh leaves on the smoldering ashes. The plaintiff was not harmed, burned or injured by the smoldering ashes of the defendant's fire which he himself started.

It is respectfully contended that the facts proven in the case at bar show that the defendant, in view of all the circumstances, took such care as an ordinarily prudent person would have exercised, and did not fail to exercise reasonable care thereby fastening upon himself any liability.

Point II.

ASSUMING THAT THE DEFENDANT WAS NEGLIGENT IN BUILDING AND GUARDING THE FIRE, THE DEFENDANT IS STILL NOT LIABLE, FOR THE INJURY SUSTAINED WAS NOT THE NATURAL AND PROBABLE CONSEQUENCE OF THAT NEGLIGENT ACT AND WAS NOT REASONABLY FORESEEABLE.

> A wrong-doer is responsible only for such injurious results as could have been foreseen by the exercise of reasonable diligence and prudence as a reasonable and natural and probable consequence of his wrongful act. 11 L. R. A. (N. S.) 684.

This principle is so well established by the weight of authority that it seems necessary to cite only a few statements of it.

In *Cooley on Torts* (from Edition 3, page 73), the rule is stated as follows:

> "If the wrong and the resulting damage are not known by common experience to be natural and usually in sequence and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support the action."

In *Ward* vs. *Hutchinson,* 45 N. J. L. 61, Depue, *J.,* states the rule as follows:

> "The wrong done and the injuries sustained must bear to each other the relations of cause and effect, and the damages, whether they arise from withholding a legal right or the breach of a legal duty, to be recoverable, must be the natural and proximate consequence of the act complained of."

In *Comer* vs. *Myer,* 78 N. J. L., 664, the Court lays down the following test:

> "The proximate cause of an injury is the *efficient cause,* the one that *necessarily* sets the other cause in operation."

Justice Strong in his opinion in *Milwaukee & St. Paul Railroad Company* vs. *Kellogg,* 94 U. S. 469, says:

> "It is generally held that in order to warrant a finding that negligence, or an act not amounting to a wanton wrong, is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

The same principle is stated and explained at greater length by Sanborn, *J.,* in *Cole* vs. *German Savings Bank & Loan Society,* 59 C. C. A., 593, 124 Fed. 113.

> "An injury which could not have been foreseen nor reasonably anticipated, as the probable result of an act of negligence, is not actionable and such an act is either the remote cause or no cause whatever of the injury. An injury that results from an act of negligence, but that could not have been foreseen or anticipated as its probable consequence, and that would not have resulted from it, had not an interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course and produced it, is not actionable. The *natural* consequence of an act is the consequence which *ordinarily* follows it, the result which may reasonably be anticipated from it. A *probable* consequence is one that is *more like-*

ly to follow its supposed cause than it is to fail to follow it.''

It is respectfully submitted that the injuries which the child received in the case at bar were not the natural and probable consequence of the defendant's act in leaving smoldering ashes in the street. To a reasonable man the idea that a small child would heap more leaves on these ashes, and so burn himself would would seem quite fanciful and far beyond the limits of reasonable probabilities. The very fact that many such fires are built every fall without any such unfortunate accident occurring, is an indication that such an accident is not the natural consequence, that is, not the one that ordinarily follows the act of leaving the fire unguarded. Certainly adopting Judge Sanborn's test, quoted above, it cannot be called the *probable* consequence, that is, ''the one that is more likely to follow its supposed cause than it is to fail to follow it.''

As said by Brown, *J.*, in *Carpenter* vs. *Miller,* 232 Pa. 362, 81 Atl. 439, 36 L. R. A. (N.S.) 932:

> ''In all the rubbish heaps on dumping grounds there are to be found rusty iron, broken knives, bottles, glass, and innumerable other useless articles, all of which are likely to cause injuries to boys, who are likely to dig them out and handle them; but it has never yet been held that one who thus does what is usual and customary is guilty of any negligence. Though there were unexploded fireworks in the refuse deposited by the appellee, they could have caused no injuries unless fire was applied to them, while all the other articles enumerated might have caused injury without any intervening agency.''

So, in the case at bar, it is a very usual custom for property owners to burn the fallen leaves, and as in the case above cited, no injury could have resulted from the smoldering leaves, themselves—there had to be an intervening agency, adding fresh fuel, and the possibility of such an act was still more remote than the possibility of any injury from the fire itself.

As said by the Indiana Court in *Roots Company* vs. *Meeker,* 165 Ind. 132, 73 N. E. 253-254:

> "What are regarded as natural and probable consequences are sometimes defined to be such results and effects as, according to the usual experience of mankind ought to have been apprehended. The question is never whether the result is *possible,* but was it *probable;* that is, would it appear probable according to common experience of observation?"

Moreover it is to be remembered that at the time the defendant left the fire smoldering, the children were not in the street (State of case p. 37, lines 32-40 and p. 40, lines 7-11) and other neighbors were burning leaves in the same way (State of case p. 16, lines 22-28; p. 19, line 35 and p. 20, line 17). The possibility that a small child should add more fuel to the fire to his own injury was about as remote as a possibility that such a child should take a sickle or knife, which a man might carelessly leave in his grass, and cut off his hand with it. Children are as prone to play with sharp instruments as they are with fire. Still it would seem preposterous to hold that the negligence of a man in forgetting a sickle was the proximate cause of the injury resulting from a child's finding and using the same.

Thus in the case of *Malmberg* vs. *Bartos,* 83 Ill. 481, where an iceman carelessly left an axe on the ground and his young son used it and cut off the

finger of another child, the injury was held to be the proximate consequence of the child's act and not the results of the defendant's negligence.

In many analogous cases to the one at bar the defendant was held not liable, although negligent, because the injury sustained by the plaintiff was not the natural and probable consequence of that original negligent act of the defendant and not reasonably foreseeable.

In *Swanson* vs. *Crandall,* 2 Pa. Super. Ct. 85, the defendant's five year old child found his father's revolver which was kept loaded in a drawer. In the course of play the child discharged the revolver and injured the plaintiff. Held, placing the revolver in the drawer was not the proximate cause of the injury. Ordlay, *J.,* said:

> "As placed by Mr. Crandall, the revolver was perfectly harmless and save for the intervention of the baby fingers would not have caused the injury. Its discovery by the child could not have been reasonably anticipated."

In *Coleman* vs. *Robert Graves Company,* 39 Misc. 85, 78 N. Y. S. 893, the plaintiff, a child of eight years, was poking some hot ashes trying to find pieces of brass. The fire had been lighted by the defendant's employee on a vacant lot. The Court held that the defendant was not liable for the resulting injuries; the accident which overtook the child not being foreseeable.

In *Paolino* vs. *McKendall,* 24 R. I. 432, 53 Atl. 268, the Court held that the defendant was not liable for injuries to an infant which resulted from catching fire from a fire built on the defendant's premises, even though children were accustomed to use the lot for a playground without the objection of the defendant.

In *Berman* vs. *Schultz,* 81 N. Y. S. 647, Misc. 212, a child, ten years of age, pulled the starting lever of the defendant's power truck, which was standing in the street. The truck, which was thereby set in motion, struck the plaintiff's carriage and horses at the street crossing below. The plaintiff was non-suited since the act of the child was unforeseeable.

In *O'Conner* vs. *Brucker,* 117 Ga. 451, 43 S. E. 731, a door of a vacant house was left open and a young child playing therein was injured by the fall of a window which was being raised by an infant companion. It was held that the owner was not liable, even if it were admitted that he was negligent in leaving the door open, as the injury was caused by the unforeseeable, independent, intervening act of the infant's playmate.

In *Afflick* vs. *Bates,* 21 R. I. 281, 43 Atl. 539, the plaintiff, a lad of nine, sued the city for injuries resulting from negligence in keeping dynamite caps in a vacant lot, where they were easily accessible to children playing therein. The tool chest had been broken open and some of the caps removed, and one of them found by the plaintiff. He gave it to another boy and the latter exploded it by striking it with a stone, and the plaintiff was injured thereby. Held—the city is not liable. The Court said:

> "Assuming that the cap by which the plaintiff was injured was one belonging to the city, we do not think that the city was bound to guard against mischievousness and unlawful acts in others in removing the caps, and we, therefore, do not think it was guilty of the negligence alleged. But *assuming that it was,* the act of the boy, Nolan, in exploding the cap was, in our opinion, the proximate cause of the

> injury intervening between the negligence of the city and the injury to the plaintiff and breaking the causal connection between them."

Assuming that the defendants were negligent both in the case above cited and in the case at bar, the intervening act of the plaintiff in the case at bar was clearly not as foreseeable, not as much of natural and probable consequence of the defendant's negligence as was the act of the infant in *Afflick* vs. *Bates*. The very fact that so many cases have arisen where children have been injured by explosions, caused by their own or other children's inquisitiveness in setting off explosives left accessible to them by the negligence of others, shows that such intervening acts of children are more natural and probable consequences of negligence than the intervening act of a child in adding fuel to smoldering leaves, the latter being a comparatively rare accident as shown by the reported cases.

In *Cole* vs. *German Savings and Loan Society*, 57 C. C. A. 593, 124 Fed. 113 (1903), the defendant negligently left an elevator door ajar. It was pushed open by a stranger, a boy, and the plaintiff thinking the elevator was there stepped in and was injured by a fall down the elevator shaft. Held—the defendant was not liable, as his negligence was not the cause of the injury, the intervening act of the boy breaking the causal chain. The injury was not the natural consequence of the defendant's negligence.

As stated by Judge Sanborn (quoted *supra*):

> "A natural consequence of an act is a consequence which *ordinarily* follows it, the result most reasonably to be anticipated from it. A *probable* consequence is one that is *more likely to follow its supposed cause than it is to fail to follow it.*"

In *Carpenter* vs. *Miller,* 232 Pa. 362, 81 Atl. 439, 36 L. R. A. (N. S.) 932, a deposit by the owner of unexploded fireworks on a public dumping ground was held not to be the proximate cause of the injury of a twelve year boy, who picked up some fireworks from the dumping and was injured by the explosion following the lighting of the same.

Per Brown, *J.:*

> "The injury to young Carpenter was not the immediate consequence of the deposit of the refuse on the dumping ground, but resulted from his independent, intervening act in taking the 'flower pot' from his home to which place he had safely carried it, and setting fire to it sometime afterwards. His injury could not reasonably have been contemplated as the result of the appellee's act in placing the rubbish on the lot. The boy's own act was the direct and proximate cause of his injury."

Batton vs. *Public Service Corporation of N. J.,* 75 N. J. L., 857. On page 859 Trenchard, *J.* says:

> "The proximate cause is the efficient cause—the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not proximate causes and the responsible ones, though they may be nearer in time to the result. *Aetna Fire Insurance Co.* vs. *Boon,* 95 U. S. 117; *Wiley* vs. *West Jersey Railroad Co.,* 15 Vroom 247; *Collins* vs. *West Jersey Express Co.,* 43 Id. 231."

Smith vs. *Public Service Corporation,* 78 N. J. L. 478, Trenchard, *J.* on page 480 says:

> "The rule of law requires that the damages chargeable to a wrong-doer must be shown to be the natural and proximate effects of his delinquency. The term 'natural' imports that they

> are such as might reasonably have been foreseen—such as occur in an ordinary state of things; the term 'proximate' indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss. *Wiley* vs. *West Jersey Railroad Co.,* 15 Vroom 247; *Delaware, Lackawanna and Western Railroad Co.* vs. *Salmon,* 10 Id. 299."

The intelligence of the most intellectual individual would hardly be sufficient to warrant his assuming the responsibility of prophesying what the action of an unknown infant would be under various circumstances, and the law places no such burden upon this defendant.

The plaintiff in order to recover must show, as to the Trial Court charge, state of case page 56, "Not only must the injury have been the natural and probable consequence of the negligent act, but, in addition to that requirement, the consequence should be one which, in the light of attending circumstances, an ordinarily prudent man ought reasonably to have foreseen might probably occur as the result of his negligence."

It is respectfully contended that a reasonably prudent man could not reasonably have foreseen that the infant would do as he did in this case and that the injury was not the natural and probable consequence of the defendant's act.

Point III.

THE INJURY WAS THE RESULT OF AN INTERVENING CAUSE.

Any efficient intervening act which breaks the causal connection relieves the defendant of liability.

This well settled rule of liability has been ex-

pressed by the Courts in many cases, but very few of which will be cited.

> "Any alleged act of negligence which could not have produced injury but for the interposition of an independent cause, which could not have been reasonably anticipated, but which turned aside the natural sequence of events and produced the result, is not the proximate cause of the injury and is not actionable. The intervening cause is the only proximate cause."—*American Bridge Company* vs. *Seeds,* 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041.
>
> "An act of negligence is not the proximate cause of an injury in a legal sense, where there was an independent, intervening cause, unless the injury was not only the natural but the probable result of such negligence, and the intervening cause should reasonably have been foreseen."*Santa Rita,* 173 Fed. 413, 417.
>
> *Cuff vs. Newark Railroad Company,* 35 N. J. L. 17; 10 Am. R. 205.

The Courts make no distinction so far as intervening cause is concerned between the act of an adult and those of an irresponsible infant if that act was not the reasonable, natural and probable consequence of the wrongdoer's negligence. The cases which appear to say that the act of an irresponsible child cannot be an intervening cause, all do so on the ground that the particular act of the child was the natural and probable consequence of the original negligence of the defendant. Where such an act was not reasonably to have been expected, the Courts have uniformly held that the act of the irresponsible child was an intervening cause. The cases on this subject have been collected in the *Case Note* to 23 L. R. A. (N. S.) 249, entitled "May the intervening act of a child break the

causal connection between the defendant's negligence and the injury?'' After an examination of the cases, the annotator comes to the following conclusion:

> ''The general rule seems to be that the fact that the person responsible for the intervening act is a child does not affect the case, but if the act itself is an intervening efficient cause, it will break the causal connection between the defendant's negligence and the plaintiff's injury, even though the act of an irresponsible child.''

An examination of the cases seems to bear out this conclusion and show that in cases analogous to the one at bar, the act of the intervening agent has been held to be *not* the natural and probable consequence of this defendant's negligence.

Thus in *Stark* vs. *Muskegon Traction & Lighting* Company, 141 Mich. 575, 104 N. W. 110, 1 L. R. A. (N. S.) 823, a boy of ten, seized a broken telephone wire to receive a shock and was badly injured. Held—the *boy's act* was the proximate cause and not the violation of a municipal ordinance as to the manner of stringing the electric wire which charged the broken wire, nor the fact that the wire was imperfectly insulated; and the fact that the boy was not aware of the risk was immaterial.

In *Beetz* vs. *Brooklyn,* 10 App. Div. 382, 41 N. Y. S. 1009, lime was allowed to escape from barrels in the street where it was being used for building purposes for the defendant, and some small boys carried some of it into a vacant lot and put it into a can of water, where it exploded, blowing out the plaintiff's eyes. In the Upper Court the non-suit of the plaintiff was affirmed. The act of the boys and not the negligence of the defendant being held to be the proximate cause of the injury.

In *O'Conner* vs. *Brucker,* 117 Ga. 451, 43 S. E. 731 (quoted *supra*), the intervening act of a young child in raising a window was held to be the cause of the injury to its companion, and not the negligence of the defendant.

Lamar, *J.,* said:

> "Even if leaving the door open was an act of negligence and an enticement to children, the owner would only be liable for damages that naturally flowed from that act—as, for example, injuries caused by a child falling through a hole in the floor, or from defects in the building. But where there was no defect in the building * * * where a companion attempting to lift the window sash and in so doing the window fell and injured the hand of the infant, the owner of the building is not responsible. The fall of the window was not the proximate result of leaving open the door. The injury was caused by the independent and intervening act of the infant's playmate."

In *Swanson* vs. *Crandall,* 2 Pa. Super. Ct. 85 (quoted *supra*), the act of the defendant's five-year-old child in discharging his father's revolver was held to be an independent, intervening force, breaking the causal chain.

In *Otten* vs. *Cohen,* 1 N. Y. S. 430, in an action based on the negligence of the defendant in maintenance of a sign which fell and injured the plaintiff's children, the upper court held that it was error to exclude evidence that the sign would not have fallen but for the interference of other children, and the fact that the boy charged with such interference was under age was no ground for excluding the testimony.

This is a clear indication of the feeling of the New York Court that the act of an irresponsible child may be an intervening cause.

In *Stenson* vs. *Corder,* 71 Kansas 475, 69 L. R. A. 246, a boy struck his foot on the nose of the defendant's horse, causing the said horse to break the tie strap, which was insecure, and run away and injure the plaintiff. The Court held that the defendant was not liable, as the boy's intervening act was the proximate cause. This case again shows that the age of the intervening agent was absolutely immaterial.

In *Bennett* vs. *Odell Manufacturing Company,* 76 N. H. 180, 80 Atl. 642 (quoted *supra*), it was held that the fact that one maintains a nuisance on his own lands by making unlawful use thereof by storing explosives thereon has no connection with an injury to a boy of nine, who, finding the door of the building in which the explosives were stored open, entered and carried away some of the explosives and was injured by exploding them.

This is another indication that the act of an irresponsible child can be an intervening cause. The fact that the child was a trespasser did not affect the question of causation, though it might have had a bearing upon the question of the original negligence of the defendant.

So in *Carpenter* vs. *Miller,* 232 Pa. 362, 81 Atl. 439 (quoted *supra*), the act of the twelve year old boy in lighting fireworks, which he had found upon the dumping ground, was distinctly held by the Court to be an independent, intervening act which broke the causal connection between the defendant's original negligence and the resulting injury.

Likewise in *Afflick* vs. *Bates,* 21 R. I. 281, 43 Atl. 539 (quoted *supra*), the Court held the act of an irresponsible boy was the intervening and efficient cause of the injury to his playmate, and not the negligence of the city.

In *Finkbeimer* vs. *Solomon,* 225 Pa. 333, Atl. 24, 24 L. R. A. (N. S.) 1257, the defendant had left certain dynamite caps in an old barn, which was purchased by the father of the plaintiff. While the plaintiff, a child of nine years, was playing in the barn with another child they found the caps and, in attempting to explode one of them by driving a nail through it, seriously injured the plaintiff. It was held that the injury was not caused by the negligence of the defendant in leaving the caps in the barn, but by the intervening independent act of the child.

In *Cole* vs. *German Savings & Loan Society,* 59 C. C. A. 593, 124 Fed. 113 (quoted *supra*), the Court held that the intervening act of a young boy in opening the elevator door was the direct cause of the injury of the plaintiff, and broke the causal chain between the defendant's negligence and the plaintiff's injury.

In *Loftus* vs. *Dehail,* 133 Cal. 214, 65 Pac. 379, a child of four pushed the plaintiff, a child of seven, into a cellar which the defendant had negligently left unguarded. The Court held that the defendant was not liable, as the injury was the result of the intervening act of the child. Another ground upon which the Court based the decision was that the infant plaintiff appreciated the danger, but in the case at bar the plaintiff likewise realized that fire would burn and had been frequently warned against it. (p. 43, lines 22-28).

In *Seymour* vs. *The Union Stock Yards Company,* 224 Ill. 579, 79 N. E. 950, the Court held that the act of the infant plaintiff in running along side of and touching the defendant's moving train was the intervening and efficient cause of his own injury, although in that case there could be no contributory negligence on the part of the infant plaintiff.

As stated in the Note, 23 L. R. A. (N. S.) 249,

> "The distinction between the intervening acts of persons who are *sui juris* and the acts of persons who are not is suggested in *Gulf & F. S. Railroad* vs. *McWhirter,* 77 Tex. 356, 14 S. W. 26, which is a turn table case, but the Court held that, conceding that the person who put the turn table in motion was *sui juris,* that would not relieve the defendant from liability under the facts of the case, as it was practically admitted that the turn table was not kept in a proper condition. The Court said: 'If a railway should leave its turn table unfastened or so slightly fastened that children, not *sui juris,* could unfasten it and use it, then it should be held liable for injury resulting from its use by such persons, for, on account of their want of intelligence, the negligence of the company must be deemed the proximate cause of the injury. If a turn table or like dangerous machine such as is likely to attract a child to it for purposes of amusement be left unsecured, this is negligence on the part of its owner; and if, while in this condition, it be put in motion by one of sufficient intelligence to make his act negligence, then both parties ought to be liable for their concurrent negligence, through which one not guilty of contributory negligence is barred.'"

The same distinction is made in *Fishburn* vs. *The Burlington & N. W. Railway,* 127 Iowa 483, 103 N. W. 481, where a child was allowed to recover from injuries caused by the fall of a panel in the fence which he had himself put back. The Court said that if the panel had been set up by an adult instead of a child, and if the adult had been hurt, the adult would be barred by contributory negligence, but there would not be such intervening cause as to bar the child's right to recover, since the act of placing back the panel was entirely natural, probable and foreseeable.

The cases which seem to hold that the independent act of an irresponsible person cannot be such an intervening cause as to break the causal sequence, all do so as stated above on the ground that the act of the child was reasonably probable and foreseenable. These cases fall almost entirely into two main classes, those generally grouped under the *"Attractive Nuisance"* doctrine represented by the "Turn Table" case, and those grouped under the *"Dangerous Instrumentality"* doctrine, where explosives were left accessible to children.

The cases coming under the *former* class, such as *Palermo* vs. *Orleans Manufacturing Company,* 130 La. 833; *Cahill* vs. *E. B. & A. L. Stone Company,* 153 Cal. 571, 96 Pac. 84; *Nagel* vs. *Missouri Pacific Railway Company,* 75 Mo. 653; *Edington* vs. *Burlington C. R. & N. R. Company,* 116 Iowa 410, 90 N. W. 95 (all cited on plaintiff's brief), are hardly in point, as that doctrine has been effectively disposed of in New Jersey by the decisions in *Turess* vs. *N. Y. S. & W. Railway,* 61 N. J. L. 314, and *Friedman* vs. *Snare & Triest Company,* 71 N. J. L. 705.

Most of the other cases are ones in which the defendant *negligently exposed explosives* which might be set off by contact or fire, either accidentally or by prying children. The following cases come in this class: *Iamurri* vs. *Saginaw City Gas Company,* 148 Mich. 27, 111 N. W. 884; *U. S. Natural Gas Company* vs. *Hicks,* 134 Ky. 12, 119 S. W. 166;*Aiken* vs. *Bradley Engineering and Machine Company,* 48 Wash. 97, 92 Pac. 903; *Harriman* vs. *Pittsburgh C. & St. L. R. Company,* 45 Ohio St. 11, 12 N. E. 451; *Bindford* vs. *Johnson,* 82 Ind. 426.

Now it is respectfully submitted that leaving smoldering ashes of leaves in a gutter is an act of an essentially different character from leaving exposed the dangerous fires of hidden explosives. In the latter case it is the natural tendency of children to play with and try to light and open such dangerous instrumentalities. Therefore the necessity for watching against the occurrence of any such accidents is so much greater, and the probability of such accidents, especially in view of the childish ignorance of the danger of such accidents, is proportionately greater. Consequently such independent acts of children have been frequently held to be reasonable and probable consequences of the defendant's negligence, against which the defendant should have guarded. But leaving an innocent fire in the street seldom causes injury unless fresh fuel has been added by an independent force. The smouldering leaves could not have caused injury by the mere interposition of an independent force, such as a child's kicking them about. There had to be a combination with the fresh fuel added by the independent force in order to cause the injury, and such a combination is not reasonably forseeable as the natural and probable consequence of the defendant's act

in leaving the fire. Any child knows that fire will burn, as did the plaintiff in the case at bar (p. 43, lines 22-29), and there is therefore no such likelihood of such acts as in the case of a hidden explosive, of the dangers of which the child has little comprehension. As argued above, the very frequency of the occurrence of accidents caused by children playing with explosives shows the greater probability of such independent acts of children in the case of explosives, while accidents by fire, such as in the case at bar, are very rare, and consequently not such as a reasonable man should naturally foresee.

If the Court is to hold that the injury to the plaintiff in the case at bar was the natural, probable and foreseeable consequence of the defendant's negligence, it is but a short and logical step to the further conclusion that the defendant would be liable for the plaintiff's injury, if he had left the heap of leaves in the street, knowing that children were accustomed to play in the street and that his neighbors built fires in the street, and the plaintiff had brought fire from a neighbor's fire and lighted the defendant's pile of leaves and been burned thereby. Yet to hold that the defendant would be liable in such a case would go far beyond any reported decision.

In the case of *Wiley* vs. *West Jersey Railroad Co.*, 44 N. J. L. 247, the Court lays down the law that in a tort action the damages in order to be recoverable must be the natural and proximate result of the negligent act, and the proximate effects are those between which and the tort there intervenes no culpable and efficient agency.

Dixon, *J.*, on page 251, says:

> "The rule of law requires that the damages chargeable to a wrong-doer must be shown to

> be the natural and proximate effects of his delinquency. The term 'natural' imports that they are such as might reasonably have been foreseen, such as occur in an ordinary state of things; the term 'proximate' indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss. *Cuff* vs. *Newark & N. Y. R. R. Co.,* 6 Vroom 17; *D., L. & W. R. R. Co.* vs. *Salmon,* 10 Vroom 299. Now, the spread of the fire was a natural result of its kindling, and the failure to extinguish it was not, in any just sense, an efficient cause of its spreading; it was merely the absence of prevention. Although that failure might be culpable, yet it neither added to the original force nor gave it new direction, and hence in tracing back the line of causation, it would not be noticed as a potent agency."

The Court here held that the mere failure to act was not an efficient intervening cause, because "it neither added to the original force nor gave it a new direction," but in the case at bar the plaintiff not only added to the original force, but by his own act, knowing that fire burns and its dangers, created an absolutely new force which caused the injuries complained of.

The above case was cited and followed in *Batton* vs. *Public Service Corporation of N. J.,* 75 N. J. L. 857; *Smith* vs. *Public Service Corporation,* 78 N. J. L. 478; *Rivers* vs. *Pennsylvania R. R. Co.,* 80 N. J. L. 217.

It is respectfully contended that the act of the plaintiff was an efficient intervening cause which created a greater and new force which caused the injury complained of, and that the injury was not the proximate and natural effect of the alleged negligence of the defendant.

Point IV.

THE QUESTION WHETHER THE ACT OF THE PLAINTIFF WAS AN INTERVENING CAUSE IS ONE FOR THE COURT.

The question whether the act of the plaintiff was an intervening cause is one for the Court, for there was no substantial evidence connecting the alleged negligence of the defendant with the injury complained of.

This rule is stated by Trenchard, *J.*, in *Smith* vs. *The Public Service Corporation,* 78 N. J. L. 478.

> "Whether an act or omission alleged to be negligence naturally and proximately caused an injury is, as a rule, a question for the jury. But if there is no evidence connecting the alleged negligence with the injury, or if it is obvious that the act or omisison was not the natural and proximate cause thereof, the question is for the Court."

The same rule is laid down in *Cole* vs. *The German Savings & Loan Society,* 59 C. C. A. 593, 124 Fed. 113 (quoted *supra*).

> "The burden of proof is on the plaintiff in an action for personal injury to establish the fact that the acts of negligence, of which he complained, were the proximate cause of the injuries suffered and, if at the close of the testimony in a trial for personal injury there is no substantial evidence upon which the jury can find that the negligence charged was the proximate cause of the hurt sustained, it is the duty of the Court, as it is in a like condition of evidence in a trial of every

issue of fact, to instruct the jury to return a verdict for the defendant."

The facts in the last mentioned case indicate that in the case at bar the question was properly one for the Court. There the defendant negligently left the door of an elevator ajar, the child accompanying the plaintiff pulled it open and invited the plaintiff to step in. The plaintiff did so without contributory negligence, fell down the open elevator shaft and was injured. The Upper Court sustained the non-suit on the ground that the defendant's negligence had not been sufficiently connected with the injury sustained by the plaintiff.

Point V.

THE ORDINANCES OF THE CITY OF EAST ORANGE WERE PROPERLY EXCLUDED.

They were irrelevant to the issues of the defendant's negligence, for they were not passed for the benefit of the plaintiff or a class of which he was a member, but as a police measure for the care of the streets and for the prevention of fires to property. Consequently they imposed no new duty on the defendant in behalf of the plaintiff, and therefore could have no bearing upon the defendant's negligence in the particular instance.

There is no evidence in the plaintiff's case to show that the fire started by the defendant was situated so as to be covered by the ordinances of the City of East Orange, which were attempted to be introduced. Exhibit 1 for Identification

says "That no fire shall be kindled within forty feet of any building located wholly or partly within the fire limits of the City of East Orange." There is no testimony in the plaintiff's case which shows that the fire was located within forty feet of any building, the only evidence on this point being that given on page 11, line 16, in which the mother of the plaintiff estimates that the defendant's house was located thirty-five to forty feet from the curb.

The mere fact that the fire was built in the street in violation of the city ordinance does not make such conduct actionable, if it would not have been negligent in the absence of the ordinance.

In *Kelly* vs. *Henry Muhs Company,* 71 N. J. L. 358, the Court held that the failure of the defendant to comply with the statute requiring open shafts and hoists ways to be guarded gave no right of action to a fireman injured thereby.

Gummere, *C. J.,* said that—

> "In an action based upon neglect of duty it is not enough for the plaintiff to show that the defendant neglected to perform a duty imposed by statute for the benefit of a third party, and that he would not have been injured if the duty had been performed; he must show the duty was imposed for his benefit or was one which the defendant owed him for his protection."

In *DeGunther* vs. *New Jersey Home,* 58 N. J. L. 354, it was held that failure to provide fire escapes as required by law gave no action for death.

The same principle was stated by Depue, *J.*, in *Snowden* vs. *Dodd,* 8 N. J. L. 296, where the failure to remove ice from the sidewalk in violation of a city ordinance was held to give no right of action to a person who was injured by slipping on such ice.

In *Fielders* vs. *North Jersey St. Ry. Co.,* 68 N. J. L., 343, a city ordinance in terms requires all street railway companies to pave, re-pave and keep in repair, under the direction and to the satisfaction of the proper municipal authorities, the space between the rails of their tracks and between the tracks, and the space for one foot outside of each outer track, at the same time providing that if any company fail so to pave or re-pave, or to keep the pavement in repair, the city authorities may cause the work to be done, and the company shall, on demand, pay the cost thereof.

The Court upon this state of facts *Held* as a matter of construction, that the ordinance does not confer a right of action upon any member of the traveling public who may sustain damage through the non-repair of the street.

The opinion in the above case of *Fielders* vs. *North Jersey St. Ry. Co.* is cited and followed in the case of *Rupp* vs. *Burgess,* 70 N. J. L., page 7. Chief Justice Gummere, on page 9, says:

> "And even when the duty of repairing sidewalks is imposed upon the abutting owner by statute or ordinance, the failure to perform that duty does not render the owner responsible to the individuals for injuries received by them, resulting from defects in the sidewalk due to want of repair. The only liability which rests upon the property

owner for the non-performance of such a duty is the penalty provided by the statute or ordinance."

Similarly, in *Bennett* vs. *Odell Manufacturing Company,* 76 N. H. 180, 80 Atl. 642 (quoted *supra*), the fact that the defendant was unlawfully storing explosives on his premises did not make him liable to the private person injured thereby.

Likewise, in *Stark* vs. *Muskegon Traction & Lighting Company,* 141 Mich. 575, 1 L. R. A. (N. S.) 823, 104 N. W., 1100, the Court held that the violation of the municipal ordinance as to the manner of stringing electric wires was not such negligence as to render the defendant company liable to a boy who was injured while grasping a telephone wire charged thereby.

In the case at bar it is clear that the purpose of the ordinance was to keep the streets clean and prevent fires in proximity to houses, so that there was no intent to impose any new duty upon the defendant towards third parties, and the failure to obey the ordinance has no bearing on the question of the defendant's negligence.

It is respectfully contended that there is absolutely no evidence of any negligence on the part of the defendant and even assuming negligence in the building and guarding of the fire the defendant was nevertheless not liable for the injuries sustained because they were not the natural and probable consequence of the negligence of the defendant, but were the direct result of the intervening act of the plaintiff himself; that there was no evidence connecting the alleged negligence with the injury, and it is obvious that the act or omission was not the natural and proximate cause of said injuries and therefore the question was

one for the Court; that the ordinances of the City of East Orange were properly excluded and that the judgment of the Trial Court should be affirmed.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

WILLIAM A. DAVENPORT, Plaintiff-Appellant, vs. DOUGLAS Y. MCCLELLAN, Defendant-Respondent.	At Law Appeal From Supreme Court.

REPLY BRIEF.

The facts.

The fire took place in the morning after 10:30 o'clock and not 8:30 o'clock (line 30, page 24; lines 20-30, page 25; lines 10-30, page 28; line 20, pages 32 and 33) on Saturday morning when the children were particularly expected there (Case, pages 6, 7, and lines 6-14).

Respondent's Point I.

The case of Myer vs. Benton, cited on page 4 of the Respondent's Brief, is good point of departure.

How different the neighborhood from ours! There was here a dumping ground so low as to be filled with water. There were only factory build-

ings in the neighborhood. With us, the defendant was bringing a fire into the safety and security of the home (Case, lines 22-40, page 39; lines 1-15, page 40; pages 45, 46 and 48).

Plaintiff in Myer vs. Benton was *nine years old.* No case could better illustrate the difference.

These considerations are important in considering the *defendant's* point of view—*his negligence.*

Court in this case cites with approval case of Daltry vs. Media Electric Light Co., 208 Pa. St., 403; where Company was held liable for injuries to boy, while playing on private lawn coming into contact with neglected live wire.

In case of Myers vs. Benton, "Plaintiff himself testified that he had never played there before" and another witness accustomed to pass there had never seen children "go through there," etc. In our case this was their regular playground and designed as such. The Court holds defendant had no reason to anticipate the result, and was not negligent in the first instance. "Whether the defendant would be held to a duty to render their ashes harmless to one using them as a place for play (Friedman vs. Snare & Triest Co.), are questions we need not discuss" (page 526, last par.).

Page 5, Respondent's Brief.

In Bennett vs. Odell Manufacturing Company, 76 N. H., 180, 80 Atl., 642, the plaintiff was old enough to understand, but in our case the *plaintiff was only five years old* and this must be borne in mind in all of the discussions of this Appeal.

Our plaintiff was playing street where he had a right to be;—a place particularly designed for that purpose (Case, page 45).

A boy 9 years old, as in the Bennett case, knows when he is taking things without permission, but

we had plenty of "invitation" in our case. The boy had seen these fires made, even if he had not seen the defendant make this particular fire, but he had never been permitted to play with fire (page 39, lines 22-40; page 40, lines 1-10). His mother had required a neighbor to extinguish one that very morning (Case, page 12, lines 1-20; page 16, lines 20-30; page 17, lines 6-16).

The case of Friedman vs. Snare & Triest Company, has given rise to a great deal of discussion in the State of New Jersey as to what would be the liability in the Turntable cases and as to the whole question now under discussion. It seems to be conceded that the case needs a great deal of explanation, and the decision does not seem final, for the reason, apparently, that Mr. Justice Pitney, who wrote the prevailing opinion in that case was evidently trying to emphasize a particular feature of the legal definition of negligence. Some decisions, since that decision (which was by a divided Court) make the application of the law to the particular facts of that case seem somewhat unfortunate.

See especially the decision in the U. S. District Court for the State of New Jersey and on appeal in the Circuit Court of Appeals on the same identical facts, in 169 Fed Rep., 1; also, especially, the subsequent consideration and application of the principle of the case of Lynch vs. Murdin, by the English Courts in contradiction of Mr. Justice Pitney's contentions, cited on page 16 of the Appellant's Brief.

In the case of Friedman vs. Snare & Triest Company, 169 Fed. Rep., 1, application was made to the U. S. Supreme Court for permission to argue an appeal from the Circuit Court of Appeals, but this application was denied after careful review of the decision of Judge Gray in the Circuit Court of Appeals (214 U. S., 518).

This Court was impressed in that case with the fact that a trespasser is not entitled to as great consideration as other people.

Page 607 "*We assume that the jury might reasonably find that if any legal duty was owing to the injured child, or* to the plaintiff as her parent, with respect to the condition of the pile of girders, it was owing by this defendant, and that if this duty included the exercise of care that the girders should be so placed and maintained as not to cause injury to children playing upon them, or resting upon them during play, it might be found that that duty had been neglected. At the same time the question of defendant's responsibility must be viewed in the light of the incontroverted fact that whatever it had done about placing and leaving the girders there had been done under employment of Colgate and Company, for the purpose of repairs on their buildings, and one in their right as owners and occupants of the land."

Was the necessity greater in their case than in ours? It seems so.

But the Court in Grimm vs. Del. & Atlantic Telephone Co., 72 N. J. L., at page 278, citing the Freidman case, nevertheless holds that defendant was liable for injuries received on its own property. "The care required changes with the changed circumstances" (page 279, last par.).

As to what constitutes "invitation" as distinguished from "attraction," see the discussion by Depue, J., in Philips vs. Library Co., 55 L., 307, at page 314, etc.

In the case at Bar, the fire was, in any event, not on defendant's premises (Case, lines 16-18, page 25).

In Turress vs. Ry., the "Turntable" cases are defined, and the Court says, "A railroad company which maintains on its own land a turntable, which

from its attractiveness to the eyes of children or from its being adapted by its construction to provide for children an attractive thing to play upon, is bound to take reasonable care that they be not injured thereby," and takes issue with this statement. "Invitation" is also defined, and the Court proceeds: "The turntable, however attractive, could not be deemed to have been erected for the use which the child makes of it. This objection is not obviated by an appeal to the doctrine that children of tender years are not held in the same degree of prudence and care as adults, but only to such as *their years indicate them to possess,* for it is not a question of the child's negligence, but a question of the duty of the railroad company towards the child."

In Friedman vs. Snare & Triest Company, Mr. Justice Pitney remarks, "Attraction is not invitation," but in our case we had invitation as well as attraction. The plaintiff was an old acquaintance of the defendant, and building fire in the particular neighborhood where little children were known to be playing all the time, and where the neighborhood was laid out for that very purpose, and where fires were not generally built, and were, in fact, prohibited by ordinances; it was practically inevitable to result in burning or injuring some of them. It was known to be dangerous, and fire has always been inviting to children. (Case, pages 10 and 11; page 12, lines 1-17; page 16, lines 20-30, page 17, lines 6-16; page 45; page 44; page 58; page 46.)

Again we would call the attention of the Court to our main contention, i. e., that the simple definition of negligence makes the party who is guilty of negligence in the first instance responsible for all the natural consequences of his act.

It seems to us that the main differences in the decisions arises from trying to emphasize one idea

in the definition too much so that it becomes exaggerated, and the facts have not been properly weighed. For example: we find the Court giving its entire attention to the question whether the defendant's act is the "proximate cause" where it was not any cause whatever; whether there was an intervening cause; when the "intervening act" was an inevitable result of the original negligence whether the injury was the natural and probable result of defendant's negligence, when defendant was not negligent at all, etc.

Almost every case requires a consideration of that case individually, and when a defendant has been guilty of negligence in the first instance, it usually follows that he should be held liable for the results which actually happen.

Certainly a man building a fire, as this respondent did, in a neighborhood laid out for the purpose of a playground for neighbors and children, and where he was acquainted with and knew the children who played there, and the plaintiff intimately, and where the neighbors understood that fires were not to be made and where they were, in fact, everyone warned against them, such person is negligent and ought to be held responsible for the burning of a child who played there, or toyed with the unguarded fire itself.

Respondent's Point II.

Page 6.

On respondent's own contention as to law, the defendant under the facts of this case was guilty of negligence, and liable for the results of it. That in a neighborhood a young child should be burned by a fire left unguarded in his natural playground was almost inevitable.

Page 8.

Carpenter vs. Miller.

This is not a "rubbish heap" case, but even in such cases reasonable care must be taken when they are set on fire where children are known to work or play.

Sprecht vs. Waterbury Co., 70 Misc., 404, distinguishing Coleman vs. Robert Graves Co., 39 Misc., 85.

While in some country places it is customary to burn leaves in the road, that does not apply to a neighborhood such as is described in this case. (Case, page 46.)

Page 12.

Cole vs. German, etc., Society, 124 Fed., 113.

In any event, how could the perfectly natural act of a child only five years old attracted to a fire, either in poking it, or throwing leaves on it, or running through it be considered an "intervening cause" of injuries to himself? How else do fires usually burn children attracted to them?

Page 13.

In Carpenter vs. Miller, 232 Pa., 362.

The facts of this case are not even remotely similar to the case under discussion. In that case the plaintiff entered upon an entirely independent operation.

Page 14.

The intelligence of any person of ordinary experience would be sufficient to warn them against leaving an unguarded fire in a street, parked and laid out for the convenience of families of children at play, and where children were accustomed at all times to play, especially on Saturday mornings. (Case, pages 6 and 7, and page 8, lines 6-14.)

Point III, Respondent's Brief.

Page 15.

Where the alleged "intervening cause" is the natural act of the very young plaintiff himself, the courts do not charge him with "contributory negligence" by calling his act an "intervening cause." The plaintiff in the case at bar could not be guilty of contributory negligence (only five years old). Shall we stultify ourselves by saying that he is liable for precisely the same act, in precisely the same way by calling his act an "intervening cause"?

We must remember the defendant was negligent in the first instance.

Page 16.

In Stark vs. Muskegon Traction Co., 141 Mich., 575, plaintiff, ten years old, *was guilty of contributory negligence.* He knew the danger, was warned against it and caught hold of the wire out of mere bravado. He was old enough to know better.

Beetz vs. Brooklyn, 10 A. D., 382.

The boys undertook an entirely independent operation, and were old enough to, and did, as-

sume entire responsibility for their acts. They knew they had no business taking the contractor's lime.

Page 17.

In the cases of O'Connor vs. Brucker, Swanson vs. Crandall (page 98), Stenson vs. Corder, there was no negligence of defendant in the first instance. So in Bennett vs. Odell, etc., Company. The children were from 9 to 15 years old in these cases. Their acts were those of an intelligent agency, not of a child so young as to be incapable of contributory negligence.

If the child is not old enough to be an intelligent agent, his act cannot relieve a defendant, *if the defendant was in the first instance negligent, so far as the plaintiff* is concerned.

Page 18.

What is the advantage of comparing the acts of a boy twelve years old handling fireworks which he knows are going to explode, as in Carpenter vs. Miller, with the facts in this case?

Page 19.

In Afflick vs. Bates the defendant was not negligent. So in Finkheimer vs. Soloman, 225 Pa., 333, and Cole vs. German, etc., Society. In Loftus vs. Dehail, 133 Cala., 214, it was not the plaintiff's act that caused her fall. Moreover, she was *nine* years old and knew the danger of standing near the excavation. In our case the plaintiff himself was too young to know of the danger of his act. No other child but the plaintiff himself threw the leaves on the fire, just as he might have walked through it or poked it without knowing of his danger (Case, page 39, lines 22-40; page 40, lines 1-10).

(Page 20, Resp. Brief.)

As to the note from 23 L. R. A. (N. S.), 249. This fits in with the suggestion in Point IX of Appellant's Brief.

(Page 21, Resp. Brief.)

Nothing could illustrate the contention of appellant better than the contention in Fishburn vs. Burlington, etc., Railway.

The cases cited by appellant are in point, as the doctrine of "attractive nuisance" has not been repudiated in New Jersey, except to hold that a defendant has much more immunity in pursuing his own business on his own land than in doing acts dangerous to the public elsewhere. But the court does not permit a real act of negligence even on his own property. (Grimm vs. Telephone Company, 72 N. J. L., 272.)

Page 22.

If the respondent is serious in the contention set forth here, it ought not to require further argument to convince the Court that there should be a new trial. When it comes to contending that the defendant is not liable because he brought into the street only a nice, gentle, little pet of a fire that any child might play with, there seems to be little left to argue about.

Page 23.

"Any child FIVE YEARS OLD does NOT know that he will catch fire from trying to do what his elders have been doing with fires. In our case the plaintiff had no experience with fires" (Case, page 39, lines 22-40; page 40, lines 1-10).

In reference to "culpable" intervening agency (Wiley vs. West Jersey Railroad Co.), does the respondent now contend that the appellant was

guilty of "contributory negligence"? Was this child five years old "culpable"?

Page 24.

In Cuff vs. Newark & N. Y. R. R. Co. there was an attempt to hold a defendant liable for not stopping the spread of a fire which he did not start and could not stop. It has no bearing on the case at bar.

Point IV, Respondent's Brief.

Page 25.

The rule laid down in Smith vs. The Public Service Corporation would require this case to go to the jury. The very question was whether under the circumstances of this case the defendant should have anticipated that children would play with the fire if he left it before it was out.

Point VI, Respondent's Brief.

Page 26.

The ordinances were relevant, as explained to the Court when they were offered, to show negligence, not to predicate a cause of action on. They showed the character of the neighborhood, the danger of fires to houses and people, and were a caution against danger, which ought to have been heeded (Case, page 44; page 58, lines 16-40; page 45; page 46).

November 16, 1915.

Respectfully submitted,

TERRY PARKER,
Attorney for Appellant,
25 North Walnut Street,
East Amboy, N. J.

19082

Index

NOTICE OF APPEAL, FILED JANUARY 30, 1915

New Jersey Supreme Court

ESSEX COUNTY

Between WILLIAM A. DAVENPORT, An infant suing, etc., Plaintiff, vs. DOUGLAS Y. MCCLELLAN, Defendant.	*Action at Law* *Notice of Appeal*

GENTLEMEN:

You will please to take notice that the plaintiff herein appeals from the judgment entered herein on the 10th day of January, 1915, and from each and every part thereof, to the Court of Errors and Appeals, at a term thereof to be held in the City of Trenton, on the first Tuesday of March, 1915.

Dated January 21st, 1915.

Yours, etc.,

TERRY PARKER

Attorney for Plaintiff.

No. 25 No. Walnut Street,

East Orange, New Jersey.

To

MESSRS. LUM, TAMBLYN & COLYER,

Attorneys for the Defendant,

Firemen's Building, and

WILLIAM C. GEBHART,

Clerk of the Supreme Court,

Trenton, New Jersey.

COMPLAINT, FILED JANUARY 20th, 1914.

New Jersey Supreme Court

ESSEX COUNTY

WILLIAM A. DAVENPORT, an infant, by WILLIAM E. DAVENPORT, his next friend, Plaintiff.	*Complaint*
vs.	*Action at Law*
DOUGLAS Y. MCCLELLAN, Defendant.	

The plaintiff, residing at number 297 South Clinton Street, in the City of East Orange, in the County of Essex, and State of New Jersey, complains of the defendant and alleges:

That heretofore, namely, on or about the fourth day of November, nineteen hundred and eleven, this defendant, (who is also a resident of the said County of Essex, State of New Jersey) having gathered together a large quantity of leaves, garbage and inflammable material in one of the streets of the said City of East Orange, namely, at or near premises numbered 196 South Clinton Street and 197 South Clinton Street, in the City of East Orange, ignited the same, or caused the same to be ignited, in so negligent and headless a manner, although he had heretofore been duly warned against the danger from such fires and against such carelessness and negligence and headlessness on defendant's part, so that a great

and dangerous fire arose from such heap of leaves and rubbish, and after causing said fire and blaze, defendant neglected and failed to guard the same, or to prevent the flames from spreading, that this plaintiff, without any carelessness or negligence on his part, and solely by reason of the said negligence and carelessness and headlessness of the said defendant, was so badly burned and suffocated by the said fire and flames, that by reason thereof the plaintiff became sick, sore, lame and disabled, and continued so to be for a long time, and still so continues, and has suffered and suffers great and permanent injuries from the wounds and burns and contusions inflicted upon him by the said fire and flames so negligently caused and left unguarded by the defendant, to plaintiff's damages in the sum of Ten Thousand ($10,000) Dollars.

II. That solely by reason of the defendant's said negligence, plaintiff was injured, bruised and wounded, so that he became sick, sore and disabled and so remains and has ever since been, and will for a long time to come be, prevented from attending to his education, duties and business, and be unable to work, or labor, and has necessarily expended large sums of money, namely: the sum of Seven Hundred and Fifty ($750.00) Dollars endeavoring to be cured of his said injuries, all to the plaintiff's damages in the sum of Ten Thousand Seven Hundred and Fifty ($10,750) Dollars.

WHEREFORE, deponent demands judgment against the defendant for the sum of Ten Thousand Seven Hundred and Fifty ($10,750) Dollars, with interest thereon from the first day of December, nineteen hundred and eleven, together with the costs and disbursements of this action.

TERRY PARKER,
Attorney for Plaintiff,
25 North Walnut Street,
East Orange, N. J.

ANSWER, FILED JANUARY 20, 1914

New Jersey Supreme Court

ESSEX COUNTY

WILLIAM A. DAVENPORT, an infant, by WILLIAM E. DAVENPORT, his guardian ad litem, Plaintiff,

vs.

DOUGLAS Y. MCCLELLAN, Defendant.

Action at Law
ANSWER

The defendant, Douglas Y. McClellan, residing at No. 196 South Clinton Street, East Orange, New Jersey, says that:

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

LUM, TAMBLYN & COLYER,

Attorneys for defendant.

JUDGMENT ENTERED JANUARY 16th, 1915

New Jersey Supreme Court

ESSEX COUNTY

WILLIAM A. DAVENPORT,
an infant, suing, etc.
Plaintiff,

vs.

DOUGLAS Y. MCCLELLAN,
Defendant.

This case was tried before Judge Nelson Y. Dungan to whom it was duly referred for trial with a jury at the Essex Circuit on January eleventh, Nineteen hundred and fifteen.

The plaintiff having submitted his evidence and the Court being of the opinion that it was not sufficient to entitle him to recover, ordered judgment of non-suit to be entered against him.

Nelson Y. Dungan
Judge

New Jersey Supreme Court

ESSEX COUNTY

WILLIAM A. DAVENPORT, an infant, etc.,
Plaintiff,

vs.

DOUGLAS Y. McCLELLAN,
Defendant.

At Law

Transcript of testimony, and so forth, taken in the above stated cause, at the trial thereof, Court House, Newark, N. J., Monday, January 11, 1915.

Before Hon. Nelson Y. Dungan, Judge, and a Jury.

Terry Parker for plaintiff.

Lum, Tamblyn & Colyer for defendant.

Mr. Parker opens for the plaintiff.

Mr. Lum opens for defendant.

DOUGLAS Y. McCLELLAN, defendant, sworn in behalf of plaintiff.

DIRECT EXAMINATION by Mr. Parker.

Q. Mr. McClellan, you are the defendant in this action, are you? A. Yes, sir.

Q. You know the plaintiff, the little boy that was burned, do you not? A. Yes, sir.

Q. Mr. McClellan, how long have you known this plaintiff? A. About five years.

Q. You know the family of the plaintiff, do you not? A. Yes, sir.

Q. You are acquainted with the father of the plaintiff, the next friend who appears in this action, are you not? A. Yes, sir.

Q. You have also met the mother of the plaintiff? A. Yes, sir.

Q. Now, Mr. McClellan, you at one time lived with the plaintiff's mother and father, did you not? A. Yes, sir.

Q. It was a two-family house? A. Yes, sir.

Q. Where was it located? A. 197 South Clinton street, East Orange.

Q. Is that the one where you now live? A. It is slightly diagonally opposite our house.

Q. Slightly further than the width of the street, is it not? A. Well, it is diagonally opposite, within a few feet of being opposite us.

Q. It is a two-family house, is it? A. Yes, sir.

Q. Where do you live, Mr. McClellan? A. 196 South Clinton street.

Q. The plaintiff's father and mother live at 197? A. Yes, sir.

Q. Is your house also a two-family house? A. No, sir.

Q. His father and mother live at 197? A. Yes, sir.

Q. Is your house also a two-family house? A. No, sir.

Q. Now, Mr. McClellan, how long have you resided at your present address? A. A little over four years; four or four and a half years.

Q. Is that your residence? Do you consider that your residence? Do you vote there? A. No, sir, I am not a voter.

Q. Do you vote from that place, I should say? A. I am not a voter.

Mr. Lum: I object to that as immaterial.

The Court: Objection sustained.

Q. Mr. McClellan, at the time the plaintiff was injured you were not living in the same house with the plaintiff's father and mother, were you? A. No, sir; I was living at 196 South Clinton Street.

Q. Where you now reside? A. Yes, sir.

Q. Do you remember the 4th day of November, 1911? A. I do.

Q. What day of the week was that, Mr. McClellan? A. To the best of my knowledge it was Saturday.

Q. Were you home on the morning of that day? A. I was.

Q. Did you build a fire? A. I did.

CROSS-EXAMINATION by Mr. Lum.

Q. What time, Mr. McClellan? A. Half-past eight to half-past nine.

Mr. Parker: I object to that as not proper cross examination.

The Court: Objection overrruled.

Mr. Parker: I did not ask him anything about the fire; simply asked him if he built a fire.

The Court: You have made him your witness.

An objection to this ruling is made by the plaintiff as ground of appeal.

Q. Have you answered the question? A. About half-past eight or nine o'clock.

Q. Where was this fire built? A. In front of my residence, 196 South Clinton street.

Q. Describe to the jury what you mean by in front of your residence? A. Well, then, our frontage is 43 feet. It is somewhere in the center of that frontage.

Q. How close to the curb? A. Within 1 to 2 feet.

Q. What was the size of this fire? A. Why, several feet long and 2 feet wide to the best of my recollection.

By the Court.

Q. 2 feet wide? A. About 2 feet wide.

By Mr. Lum.

Q. 2 feet long? A. Several feet—3 feet.

Q. Of what was the fire composed? A. Leaves.

Q. Nothing else? A. Nothing else to the best of my recollection.

Q. Did you put any rubbish on there? A. No, sir; not to my knowledge.

Q. How long did the fire burn? A. Between half past eight and half past nine.

Mr. Parker: I wanted it to be perfectly clear that I object to the line of examination.

The Court: That will not appear on the record. If there is any question to which you object an objection should be made to it.

Q. Did you state whether or not you stayed by the fire? A. I stayed by the fire.

Mr. Parker: I object to that as not proper cross examination.

The Court: I am inclined to think that is not proper cross examination.

By Mr. Parker.

Q. Are you a citizen of the United States?

Mr. Lum: I object.

The Court: Objection sustained. Everybody is entitled to the even protection of our laws whether a citizen of the United States or not.

MARGARET DAVENPORT, sworn in behalf of plaintiff.

DIRECT EXAMINATION by Mr. Parker.

Q. Mrs. Davenport, you are the mother of the plaintiff in this case, are you not? A. I am.

Q. Do you know the defendant, Mr. McClellan? A. Yes.

By the Court.

Q. How old is your boy now? A. He is eight now.

Q. When was his birthday? A. On the 18th of March.

Q. That is, he will be eight next March? A. He will be nine next March.

By Mr. Parker.

Q. Mrs. Davenport, I want to ask you—it being the first opportunity I have had except one—to describe the neighborhood in which you reside. As I understand it, I think you reside at 197 South Clinton street, East Orange? A. Yes.

Q. Now, will you describe the neighborhood between Central avenue, which is on the north of your house, and the portion of Clinton street, in your neighborhood, to the south of your house? A. Well, there is an apartment on the corner and a real estate office on the other corner.

Q. That is on the Central avenue corner? A. On the Central avenue corner. Then there is a stone wall between Mr. McClelland's residence and the avenue, and this real estate office. Then there are private residences above the other side.

By the Court.

Q. When you say above do you mean north? A. South. Mr. McClellan's is the first residence, that is, coming south.

Q. On the east or west, is it? A. On the east.

Q. Your house is on the west? A. Our house is on the west, almost directly opposite 197. His is 196.

By Mr. Parker.

Q. The house you live in is the two-family house, is it? A. Yes, sir.

Q. And the one next to that? A. A two-family house.

Q. Do you remember what the one next to that is? A. A two-family house.

Q. And on the other side of the street how is it? A. All one-family houses with the exception of one near our home. Beyond that I couldn't tell.

Q. These houses are built back, are they not, from the street line, from the curb? A. Yes, sir.

Q. How far? A. We are 25 feet.

Q. From the sidewalk? A. From the stoop.

Q. Further up from the curb? A. 25 feet is the space it is.

Q. At least 25 feet? A. Yes.

Q. Is that true also on the other side of the street where Mr. McClellan lives? A. No; I should judge it was 35 to 40 feet.

Q. Are there any fences along the street? A. No.

Q. It is all— A. It is all open for the children to play.

Mr. Lum: I object to that last part.

The Court: The last part of it will be stricken out.

Q. Those houses are occupied by families of children? A. Yes, they are.

Q. Children do, as a matter of fact, play in the street, do they not, there? A. At all times.

Q. And on the lawns back of the street line? A. At all times. There is no other place for them to play.

Mr. Lum: I object to that last remark.

The Court: The latter part will be stricken out.

Q. Now, Mrs. Davenport, I want you to go back to November 4, 1911. A. Yes, sir.

Q. And I want you to tell the Court and jury just what occurred that morning that made an impression on your mind. A. As near as I can remember——

Q. As nearly as you can remember. A. Willie went out to play that morning as all the children do.

Q. About what time, Mrs. Davenport? A. He went out early in the morning. I should say about eight o'clock.

Q. And then? A. He played about with the children, and there were two little girls——

Q. Do you remember what children he was playing with? A. Two little girls, Mrs. Bonafield's little girls, the little girls on the upper floor. They went in and left William alone. Later he went out in the street and saw this fire burning.

Q. Just a moment. You don't know what William was doing? A. Well, he told me at the time—Pardon me!

Q. I don't want you to tell that. A. No, I didn't see that.

Q. Tell what occurred that you were a witness to yourself. A. Well, I heard a scream and Mildred was in the kitchen——

Q. Who do you mean by "Mildred?" A. Miss Tasto. I said, "Mildred, that sounds"——

Mr. Lum: I object.

By the Court.

Q. Just tell what you did. A. Mildred heard the scream also.

Mr. Lum: I object to that "Mildred heard the scream also."

Q. You see you don't know what she heard. A. I heard the scream and I told her to go and see——

Mr. Lum: I object to what she told her.

The Court (Addressing witness): I will say to you it is quite improper to say what anybody else said to you and what you said to anybody else or to state any information you received from anybody else.

By Mr. Parker.

Q. What happened? A. I ran downstairs and saw William in flames going toward the street.

Q. Away from you? A. Away from me. The door was locked so he could not get in and he screamed. I ran and called to him to come to me, as I saw him in flames. I wanted to save him. He came to me and I took him in my arms and tore the clothing from him —well, don't you know, tried to get the fire out.

Q. Then his clothing was all on fire? A. All in flames up his back. I shall never forget it as long as I live. There was no one in the street that I could see until Mr. Fenner came running to me, as he was the janitor at the time. He said, "My God!"

Mr. Lum: I object.

Q. You say he was in flames. Will you describe as well as you remember to what extent he was on fire and all the rest of it? A. Well, I had him dressed very warm that morning. There was two sweaters, and the flames had gotten up on the lower part of his limbs and had already caught on the two woolen sweaters. They were all wool and of course it didn't burn so rapidly as the cotton; but I tore them. I could feel my hands stiffen up but I thought I must get the flames out and save him, as I think that I did.

Q. Were your hands burned? A. Terribly; my right hand especially; there were only three fingers in use. There was a neighbor—they heard me scream; they had a vacuum cleaner company, and they have a colored woman—Mr. Fenner came to me first; he was the first to me, and I wouldn't let William out of my eyes. I simply tore his little clothes from his back as any natural mother would do. Mr. Fenner of course was there and this other neighbor came running with the colored woman and a rug, and Mr. Driscoll in the meantime came running with a comfortable and they took the child from me. As they did

I asked him to open the comfortable again. He was then burning in his shoes.

Q. Even then? A. Even then. I patted him on his shoes, and then they took the child to the kitchen and I was unable to touch him. After that I was in agony and my sister held the child in her arms. He was unable to talk. Afterwards Mr. Fenner came in and asked me if there was anything he could do—

Mr. Lum: I object.

Witness: That is all I can remember.

Q. One thing more. What followed. A. What followed? Dressing.

Q. I mean what followed the time you speak of. Now, we have him in the kitchen. A. I was frantic with my hands, and the doctor—a neighbor ran for the doctor. The first who got there was Dr. Warner. He dressed William. I waited until his dressing was over with to have him dress myself. Mrs. Nash assisted him in dressing William and then he came to me and dressed my hand. That is all I can tell you.

Q. You can tell how long William was ill. How long was he in bed? A. How long was he in bed?

Q. Yes. A. He was in bed from November until May. We took him out, in the meantime, several times, in the baby cart stretched out and wheeled him from one room to another for the change. We couldn't lay him along the bed at the time. The child had to be carried on pillows in order to do that.

Q. The doctor came? A. Dr. Warner. He was there five times that day.

Q. Did he continue to call there during all this interval between November and May? A. Until May Dr. Warner was with me, then he thought I was able to take the case; but he said that I was not able to take it in case of infection. I had been dressing him every day until the present morning for

the wounds. There is but a slight wound there now. We have had the doctor there on and off, during these three years.

Q. You mean there is a slight open wound? A. Yes. It would have been infected if I had let it, but I dressed it every morning and night so that it has not been.

Q. Do you remember, in the care of this matter, when it became necessary to resort to skin grafting? A. Yes, sir.

Q. Describe it to the jury. A. Grafting took place on the 5th day of January, 1912.

Q. Who was the person who furnished the skin for the skin grafting? A. My husband. They took sixty square inches from his limbs. I had three nurses and three doctors—two nurses and myself. I held my boy for one hour and three-quarters while they transferred the skin from my husband, and they placed it there. Of course, the boy had third degree burns in some parts of the limbs and that sluffed off; sluffed off; that is what the doctor termed it. That is what made this wound so hard to heal. It was into the bone on the lower part of the muscle. In his knee of the left leg, the casings are all burned and never will be any different; he is webbed between the limbs. It will need a further operation, as the doctor thinks, later on. The right limb healed up better than the left, simply because——

Mr. Lum: I object. The witness cannot tell what it is. She is not a doctor.

Q. But it did need an operation there? A. Yes. My husband took his own tissue. So much so that it was a great deal harder to heal.

Q. How much did Mr. Davenport have to supply in the matter? How much was taken? A. How it was taken from him?

The Court: She said sixty square inches.

Q. About what time in the morning was it that you saw William running in the street from the fire? A. It was between ten and eleven. Say an hour. There was one fire earlier than that one, and that was out.

Q. You were in the street in the morning, were you, Mrs. Davenport? A. I was on the front porch.

Q. Were you there between eight and nine o'clock? A. Yes, sir; I was.

Q. Did you see any fire? A. No, sir. There was slight fire and I called the lady's attention to it.

Q. But that was not Mr. McClellan's fire?

Mr. Lum: I object unless you are going to be sworn. I ask to have that stricken out.

The Court: Strike it out.

Q. State what you did see that morning at eight or nine o' clock in the morning? A. About nine o'clock in the morning I went to clean the front porch and Mrs. Bonafield was sweeping up the lawn, as we all do on Saturday morning. She had just a little bunch of leaves like that (indicating) burning, and I called her to me and I said, "Mrs. Bonafield"——

The Court: No, you cannot state that.

Q. Did Mrs. Bonafield put out that fire while you were there?

Mr. Lum: I object to that as leading.

The Court: Objection sustained.

Q. What did Mrs. Bonafield do while you were there?

Mr. Lum: I object. I think the witness should not be permitted to answer that question. I think counsel should be compelled to go to some other subject and come back later. The repeated

question, immediately after, gives me no benefit from my objection.

The Court: The witness has not said that she did anything. It should be preceded by the question as to whether anything was done to the fire, and if so, what?

Q. Was anything done by Mrs. Bonafield?

Mr. Lum: In your presence, and if you know? A. Yes, sir; she put the fire out immediately.

Q. And when you retired from the porch was the Bonafield fire out? A. Yes, sir.

Q. That was about what time? A. Well, it was about nine o'clock, perhaps a little after; something of that kind.

Q. You were where you could plainly see the spot described by Mr. McClellan? A. Yes, sir.

Mr. Lum: I object. I ask that the entire answer be stricken out.

The Court: It will be stricken out.

Q. From your porch can you see clearly the street in front of Mr. McClellan's yard? A. Yes, sir.

Q. There was nothing to prevent you seeing it that morning? A. No, sir.

Q. Did you see any other fire that morning? A. No, sir.

Q. That is, before you went into the house, I speak of? A. No, sir.

CROSS-EXAMINATION by Mr. Lum.

Q. You saw no other fire that morning except the fire that Mrs. Bonafield had built? A. That is all.

Q. At any time?. A. Not at any time.

Q. How do you fix the time at which you heard Willie scream? A. Between ten and twelve some time. I couldn't quite remember the time.

Q. You don't know whether it was nearer ten or

twelve? A. Well, no, I couldn't say that I am positive. I couldn't say that.

Q. You had no way of fixing the time, then? A. No, I had not.

Q. Where were you when you heard the scream? A. In the kitchen.

Q. On the ground floor or the basement? A. On the second floor.

Q. You reside upstairs? A. Yes, sir.

Q. Were both doors of your house locked? A. The lower door was locked, as we always keep it locked, to be opened by a push button. Anybody rings the buzzer downstairs and we open it, generally.

Q. You didn't hear the buzzer ring? A. The buzzer didn't ring. The child didn't ring the buzzer; he screamed.

Q. There was in your employ a girl? A. Miss Mildred Tosta.

Q. Was she with you at the time? A. In the kitchen.

Q. She was not out with the boy? A. No.

Q. She was the boy's nurse? A. Well, no; she assisted me always when I wanted her to. All that morning he wanted to go out and play with the children as all children do.

Q. He went out alone that morning? A. Yes.

Q. He was five years old at the time? A. Five years old and eight months.

Q. A rather small child for his age, was he not? A. Yes.

Q. He went out at eight o'clock, didn't he? A. Around eight o'clock. I couldn't state positively.

Q. Nothing to fix the time? A. No.

Q. Had he been out at all before that? A. No.

Q. He had on, that morning, a little Indian suit? A. Yes.

Q. Of cotton goods? A. Yes.

Q. With fringe along the ouside of the leg? A. On the inside.

Q. Of the leg? A. Yes. He had other clothes besides under the sweaters. Of course, he had sweaters on the outside of the Indian suit.

Q. When you ran out you saw the fire? A. He was going toward the street with his hands up.

Q. You saw no fire except on the boy? A. Only on the boy. Of course, I was anxious to get to him. I saw him and I was frightened.

Q. He was running away from you? A. He was running toward the middle of the street.

Q. Toward Mr. Fenner, was he not? A. He was going toward the stone wall there; I couldn't say anything more. He was in the middle of the street when I got him.

Q. When did you first see Mr. Fenner? A. I believe—I could only tell what the child told me.

Q. When did you first see Mr. Fenner? A. He came running to me. I took the child and tore the clothes from him.

Q. He was running towards you? A. Mr. Fenner.

Q. Yes. A. I didn't see Mr. Fenner until he reached me. I was frantically tearing off the clothes from William.

Q. How long had you had William before Mr. Fenner came up? A. Perhaps a minute or two; perhaps three minutes. I couldn't really tell you; I was so frightened at the time, and upset.

Q. Where did Mrs. Bonafield live with reference to your house? A. Next door, 199.

Q. Where was this fire that she built this morning, out in the street or in the yard? A. Right in front of the walk there, on the curb there, rather. She was sweeping out there and burned just a handful of leaves, that is all there was there to burn up.

Q. You mean she swept up the leaves in the street? A. No.

Q. Where did she sweep them from? A. From the lawn and the walk.

Q. There was only a little handful? A. It just seemed like a small pile of leaves there; I don't know just the size; couldn't tell you the size. It burned up quickly and was out.

Q. Did you see her light the fire? A. No, sir; I didn't see her light the fire. It was burning when I came downstairs. She was sweeping it with a broom in her hand.

Q. What did you do? A. Called Mrs. Bonafield to me and asked her if she knew it was against the law of East Orange to have a fire in the street.

Q. I didn't ask what you said. I asked what you did.

Mr. Parker: I object. I think the answer should be full and fair.

The Court: There is no request to have the answer stricken out and the answer may stand as it is. Mr. Lum has a perfect right to interrupt the witness.

Q. Will you please listen to my questions and answer them. A. Yes, sir.

Q. I asked you what you did when you met Mrs. Bonafield by the fire—what you did? A. What I did?

Q. Yes. A. Why, I was on the porch. I just stayed there and looked at her.

Q. How long did you stand there? A. Just a few minutes.

Q. One or five? A. I couldn't tell you.

Q. You have no recollection of the time at all? A. No.

Q. And where was Mrs. Bonafield in the house? A. That I don't remember whether I left her there on the street or whether she had gone in before I went in, that I couldn't remember.

Q. You don't remember that? A. No.

Q. This was about what time? A. What time? About nine or something after nine. I should judge it was after that time.

Q. Might have been half-past eight or half-past nine? A. It would be more like half-past nine than half-past eight.

Q. You have no recollection of the time? A. No; around that time.

Q. Did you go outdoors again after going in on this occasion until you went out for William? A. No, sir; until I went out for William.

Q. You didn't look out? A. Didn't look out again.

Q. What time did you say this accident happened —what day? A. The 4th day of November, 1911.

Q. Do you know Miss Edith Lauder? A. Yes, sir.

Q. Do you recall speaking to her some time after the fire? A. Yes, sir.

Q. And saying that you didn't know where Willie got afire? A. I don't know.

Q. And saying that you didn't know where Willie got afire? A. Why, when Miss Lauder called——

Q. No. Did you say that? A. No, sir.

Q. You never did say to Miss Edith Lauder that you didn't know where Willie got afire? A. At first I didn't know until William told us.

Q. No, the question is, whether a month or two after the fire, that you didn't say, to Miss Edith Lauder that you did not know? A. No, sir; not a month or two after.

Q. At any time? A. No, sir.

Q. You never at any time said to Miss Edith Lauder that you didn't know where Willie got afire? A. No, sir; I did not.

Q. Did you say to her that it was very queer that nobody saw William get afire? A. No, sir; I don't remember that.

Q. You didn't say it was queer that nobody saw William get afire? A. Well, I did say that it was strange that nobody did see the child running around the street in flames; that nobody went to him; that I should have to be the first one to him. I did say that.

MILDRED TOSTA, sworn in behalf of plaintiff.

DIRECT EXAMINATION by Mr. Parker

Q. Miss Tosta, you know the plaintiff in this action do you not? A. Yes, sir.

Q. How long have you known the little boy, the plaintiff, who is suing here? A. About four and a half years.

Q. You are acquainted with Mrs. Davenport who has just been on the witness-stand, are you not? A. Yes, sir.

Q. You have at times helped Mrs. Davenport in the family? A. Yes, sir.

Q. Do you happen to remember the 4th day of November, 1911? A. I do.

Q. What day of the week was it, do you remember? A. Saturday morning.

Q. Now, Miss Tosta, I wish you would, just in your own way, begin as well as you can, and tell us what occurred on that day, that was interesting. You were then living with Mrs. Davenport, were you? A. Well, the other time I was.

Q. Well, now, after you arrived at the house that day tell what happened as near as you can remember? A. Why, after I got there William went out to play with the children with his little Indian suit. I was cleaning up, and I went to the window in the middle of the morning to see where he was. When I looked out I saw Mr. McClellan carrying leaves from the back and putting them in the curb. It was then about a quarter of eleven. We heard screams, and I went to the window, and William ran through the alley in

flames and then ran to the street. I yelled to Mrs. Davenport and she ran to the street and caught William.

Q. Do you remember about what time it was that you looked out of the window and saw Mr. McClellan gathering the leaves? A. No, I can't just remember the time.

Q. Was that before you saw Willie in flames? A. Yes, sir.

Q. Now, describe, if you please, what happened when you heard the scream—from that point on. A. Mrs. Davenport says, "That sounds like William!" I said, "No, I am sure"——

Mr. Lum: I object.

Witness (Continuing): I ran to the window and saw him in flames. I ran back into the kitchen and yelled to Mrs. Davenport and she ran down to the street. I ran and got a blanket. By the time I got down there the colored woman across the street got a rug and put over him. When I ran downstairs Mrs. Davenport was pulling William's clothes from him.

Q. Were the clothes on fire? A. Yes, the colored woman across the street ran over with a rug. But by that time Mrs. Davenport had most of the flames out.

Q. Do you remember how the comfortable came in? A. I ran down with the comfortable. They wrapped him in that and carried him upstairs again.

Q. Have you any knowledge—have you ever been warned in making fires?

Mr. Lum: I object.

The Court: Objection sustained.

Q. Did you see a police officer? A. Yes, sir.

Q. Warn——

Mr. Lum: I object.

The Court: Objection sustained.

Q. Miss Tosta, while you were at Mrs. Davenport's house part of your duties were to take care of Willie, weren't they? A. Yes, sir.

Q. Is he a bright boy? A. Yes, sir.

Q. How long were you there? A. Twenty months.

Q. Does he learn easily? A. Yes, sir.

Q. Have you had occasion to observe his conduct from time to time or for a considerable period at one time?

Mr. Lum: I object. I do not see the relevancy of it.

The Court: What do you say is the relevancy of that?

Mr. Parker: A basis for the measure of damages.

The Court: You asked about his conduct.

Mr. Parker: On the question of contributory negligence.

The Court: You are anticipating the defense. Beside, I understand the child was then only five years and eight months of age at the time.

Q. Now, Miss Tosta, will you let me know whether you saw Mr. McClellan light a fire? A. No, I did not.

Q. Did you see it burn? A. After William was burned it was smoking.

Q. After you saw Willie you saw this fire? A. Yes, sir; when I ran downstairs.

Q. Well, where on that spot? Will you locate the position as near as you can? Where was the fire? Tell us just where it was? A. It was right opposite the front porch of Mr. McClellan's home. Right in front of the porch there is a slab of sidewalk goes down into the gutter. It was right in front of that.

Q. There is a telephone pole there? A. I don't remember.

By the Court:

Q. This fire that you saw, this substance that you saw smoking was in the gutter? A. Yes, sir.

By Mr. Parker.

Q. Will you describe, now, as well as you can, the objects on the street near the curb on Mr. McClellan's side of the street? A. There were two trees there.

Q. How far was either tree from Mr. McClellan's house and in what direction? A. One of them is right opposite.

Q. In front of the house or a little to the side? A. A little to the side.

Q. At the telephone pole? A. I don't remember that.

Q. After the accident did you telephone to Mr. Davenport? A. I didn't telephone; a friend did.

Q. Have you any way that you could fix the time when you saw William in flames, or about the time? A. It was a quarter to twelve.

CROSS-EXAMINATION by Mr. Lum.

Q. By whom are you employed at this time? A. Westinghouse.

Q. When did you leave Mr. Davenport? A. I can't just remember how long ago it was.

Q. About? A. About two years and a half, I should think.

Q. How long after this accident? A. It was the following May.

Q. The following May? A. Yes, sir.

Q. Your duties were among others, nurse? A. Yes, sir.

Q. On the morning in question Willie went out about what time? A. I don't remember just what time.

Q. You didn't go out with him? A. No, sir; I did not.

Q. Fires had a fascination for Willie? A. (No response.)

Q. Didn't they? A. A little bit, not very much.

Q. Only a little? A. Yes, sir.

Q. Do you think Willie was a normal child? A. What do you mean by that?

Q. An ordinary usual child? A. Yes, sir.

Q. A bright boy? A. Yes, sir.

Q. And you say fires only had a little fascination for him? A. Yes, sir.

Mr. Parker. I object to that testimony on the ground that I have been criticised repeatedly for you are putting the answers into the witness's mouth on cross examination.

The Court: Objection overruled.

Q. Being out with Willie you had occasion to know that fires did have a little fascination for him, didn't you? A. He never bothered with them when I was with him.

Q. You simply spoke to him about playing with fires? A. Yes, sir.

Q. And warned him? A. Yes, sir.

Q. And admonished him? A. Yes, sir.

Q. He was a bright boy? A. Yes, sir.

Q. He understood you? A. Yes, sir.

Q. He was in the habit, at times, of jumping across fires, wasn't he? A. I never saw him.

Q. You never saw him jump across a fire? A. No, sir.

Q. I don't suppose you ever saw him play with a fire, did you? A. Not that I remember.

Q. How do you know, then, that fires had a little fascination for him? A. Because he used to talk about them.

Q. Did you ever see him play with a fire in your life? A. No, sir.

Q. Never in your life? A. No, sir.

Q. You never saw any other child in that neighborhood play with a fire? A. No, sir.

Q. Never saw any child anywhere play with a fire, did you? A. Yes, sir.

Q. In other neighborhoods you have seen them play with fires? A. Yes, sir.

Q. But not the children in that neighborhood? A. I never had occasion to see them.

Q. How long were you nurse there? A. Twenty months.

Q. You say you went to the window to look out to see how Willie was getting along? A. Yes.

Q. He was on your mind? A. Yes.

Q. Part of your care was to see to his welfare that day? A. Yes, sir.

Q. It was a cold blustery day? A. It was a clammy day.

Q. And cold? A. Yes, sir.

Q. You stayed in the house? A. I had to do my work in the house.

Q. What time was it when you looked out? A. I can't just say the time; I don't remember.

Q. You don't remember what time at all you looked out? A. No, sir.

Q. When you looked out where was Mr. McClellan? A. He was just coming out of the yard with a bag full of leaves.

By the Court.

Q. Where? A. Out his alley from the back.

By Mr. Lum.

Q. Putting them in the fire? A. He had no fire there yet. He was just putting the leaves in the gutter.

Q. That is the only time you looked out? A. Yes.

Q. Do your remember testifying in your direct examination, five minutes ago, that you looked out and saw a fire in front of Mr. McClellan's place? A. After Willie was burned.

Q. It was burning? A. I didn't see the fire.

Q. You did not so testify? A. No, sir.

Q. So when you saw Mr. McClellan putting leaves in the gutter you don't know what time it was? A. No; I can't remember at all.

Q. It was a considerable time before Willie was burned, wasn't it? A. Yes, sir.

Q. What time do you think it was when Willie was burned? A. A quarter to twelve.

Q. Did you look at the time? A. I went to the parlor and looked at the clock and it was just a quarter to twelve.

Q. Now, when you heard these screams you rushed forward? A. I ran to the window.

Q. And where was Willie then? A. He was running from the alley to the door. He wanted to get to the door and he turned around and went out quick. By the time I could get in to push the button.

Q. He was running from the alley to the door? A. Yes, sir.

Q. Going toward your house? A. Yes.

Q. While you were looking at him he turned and ran the other way? A. Ran out in the street, when I screamed to Mrs. Davenport.

Q. But he didn't get up to the door? A. No, sir.

Q. Are you sure that he was there when you saw him? A. Yes, sir.

Q. Quite positive? A. Yes, sir; I am.

Q. You have talked quite a great deal about this case recently, haven't you? A. Yes, sir.

Q. Discussed it with Mr. Parker? A. Yes, sir—no, sir; not with Mr. Parker.

Q. With Mr. Davenport? A. Yes, sir.

Q. And Mrs. Davenport? A. Yes, sir.

Q. You have been reminded quite a little about this case, haven't you? A. No, sir.

Q. You retain a very clear recollection of all details through these three years? A. Yes, sir; I have had it on my mind ever since it happened.

Q. When you came back after having seen Willie, Mrs. Davenport came downstairs, did she? A. After I ran into the kitchen she ran down into the street.

Q. Then you brought down a comforter? A. Yes, sir.

Q. Where was Willie when you brought the comforter down? A. In Mrs. Davenport's possession.

Q. Who was there at the time when you brought the comforter down. A. Mr. Fenner. I don't know who else. The colored woman from across the street. That is all I can remember.

Q. Some other people came up, then, didn't they? A. I don't remember who they were.

Q. How many people? A. I can't remember.

Q. Half a dozen collected there? A. About that,

Q. A crowd collected right around there? A. Yes. sir.

Q. And you had the comforter? A. Yes, sir.

Q. All the crowd was there? A. Yes, sir.

Q. And where did you go then? A. I went upstairs with Mrs. Davenport and William.

Q. You went upstairs with him? A. Yes, sir.

Q. I want you to tell us exactly what you did when you came down with this comforter? A. I just brought the comforter down and gave it to somebody; I don't know who it was; I can't just remember.

After they got the flames off Mrs. Davenport and William they rolled him in it and went upstairs.

Q. Did you go up with him? A. Yes, sir.

Q. You didn't stay there? A. No, sir.

Q. When did you go out again? A. About half an hour later.

Q. Did you look at the fire then? A. No, sir; I didn't.

Q. Didn't look out then? A. No.

Q. When did you first look at the fire? A. When I ran down, when William was burning in his mother's arms.

Q. Where was the fire then? A. It was in front of Mr. McClellan's house.

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

Q. How big was that fire then? A. It was very nearly burned out.

Q. How big? A. I can't just remember how big it was.

Q. I want you to remember. Now, you said you remember the details after these three years. How big was that fire? A. It was quite small when I saw it.

Q. Well, how big? A. About that much there (indicating).

The Court. Indicating about 18 inches.

Q. How high? A. About that high (indicating).

The Court. Indicating about 6 inches.

Q. Blazing up? A. No, sir.

Q. Wasn't blazing? A. No; it was just a low fire.

Q. What was it six inches high? A. The blaze was six inches high.

Q. What was six inches high? A. Leaves; and the fire was coming out from under them around the side and the back.

Q. Don't you remember very well a conversation taking place between the people there and the question being asked, "Where was the fire?" A. No, sir.

Q. You don't remember that? A. No, sir.

Q. Nor the question as to where he caught fire at the time? A. No, sir.

Q. Nothing at all about it? A. No, sir.

Q. You are sure of that? A. I am.

Q. Did you call attention to the fact that you saw the blaze over in those leaves to anybody else at the time? A. No, sir.

Q. You knew that a long time afterwards neither Mr. nor Mrs. Davenport knew where he caught fire, didn't you?

A. Yes; I knew they didn't know.

Q. You didn't remember to tell him where you saw the fire, did you? A. Well, I didn't think.

Mr. Lum: You didn't think of it. That is all.

Mr. Parker: If your Honor please, I would like to call the doctor out of order in this case. I want to let him go.

DR. WILLIAM A. WERNER, sworn in behalf of the plaintiff.

It is stipulated that the doctor is properly qualified as an expert and testified that plaintiff was seriously and permanently injured.

ADJOURNED to January 12, 1914.

ZENA SPEER, sworn for the plaintiff.

DIRECT EXAMINATION by Mr. Parker.

Q. Mr. Speer, where do you live? A. It now is in Carnegie avenue, 17.

Q. In the city of—— A. East Orange.

Q. New Jersey. Mr. Speer, you are acquainted with the little boy that is suing in this accident? A. Yes, sir.

Q. And his father and mother? A. Father and mother.

Q. Do you know the defendant? A. Well, only by hearsay. I am not personally acquainted with him.

Q. You have seen him, have you? A. I have seen him.

Q. Where were you living on the 4th day of November, 1911? A. I lived in Mr. Davenport's house, 197 South Clinton street, East Orange.

Q. You are not engaged in business at the present time, are you, Mr. Speer? A. Oh, no.

Q. Mr. Speer, how old are you? What is your age? A. I am past eighty-six.

Q. On the 4th day of November, 1911, do you remember what occurred? Do you remember of going out on that morning? A. Why, yes, sir, I remember quite distinctly.

Q. Will you relate just what happened on the morning of November 4, 1911, as well as you can remember it? Just tell the Court as you remember it what happened. A. Why, I left the house about ten o'clock to take a morning walk for exercise, and I was gone, probably, until half-past eleven or nearly twelve o'clock before I returned. When I left the house Mr.—the defendant's name, I don't remember it.

By the Court.

Q. Mr. McClellan? A. Mr. McClellan, had the leaves raked off his lawn into the gutter, except a few

between the flagging and the curb, he was there cleaning up when I went away. When I came back the leaves had been burned; I saw the ashes lying there in the street and the little boy had been burned also, but I didn't know it until I got into the house; the doctor was, I think, there at that time.

By Mr. Parker.

Q. Mr. Speer, can you fix about the time when you returned to the house? A. About the time when I returned to the house I think the doctor was there, I am not sure of that.

Q. Can you tell what time of the day that was? A. It was nearly twelve o'clock, I should judge; I know lunch was prepared, ready, but there was quite a good deal of excitement.

Q. Mr. Speer, was it, about this time, your habit to go out in the morning at a particular time of the day? A regular custom? A. Well, only by habit I am in the habit of going out when it is fair weather.

Q. What time do you usually go out? A. I usually go about ten o'clock, or close to it.

CROSS-EXAMINATION by Mr. Lum.

Q. Mr. Speer, you did not look at your watch or clock on this morning, did you? A. No, sir; I did not.

Q. It might have been nearer half-past nine than ten o'clock when you went out? A. Well, it might have been, certainly. I did not look at the time.

Mr. Parker: I want to call the plaintiff, this little boy, as a witness, and I will present him.

Mr. Lum: Three years ago. I was wondering whether he had not better testify without being sworn.

The Court: Suppose you question him, and qualify him to be sworn.

WILLIAM A. DAVENPORT called on behalf of the plaintiff.

By Mr. Parker.

Q. Willie, how old are you now? A. I am eight years old.

Q. Do you go to Sunday School, Willie? A. Yes, sir.

Q. Where do you go to school in the daytime? A. The Lady Help of Christians.

Q. Well, do you understand that when you tell the Judge anything it must be absolutely true? A. Yes, sir.

Q. You know that, don't you? A. Yes, sir.

Q. It would not make any difference——

The Court: Do not lead him; it is very important under these circumstances.

Q. Willie, do you remember—what do you remember about the time you were burned? Can you remember that time? A. Yes, sir.

Mr. Parker: Will your Honor permit me to go ahead and examine him as a witness?

The Court: Oh, no, I would not permit him to be sworn now; his entire recollection may be the result of discussions in the family. I mean the discussions which naturally take place in the family at table, or around the sitting-room at night, may be the basis of his present recollection. It ought to be shown that he has an independent recollection; that he knows the nature of the oath; knows the penalties of untruthfulness.

Q. Willie, do you know what happens to little boys that tell things that are not true? A. Yes, sir.

Q. What do they tell you at the Sunday School is the result of that? A. They say that bad boys go to hell, and good boys go to heaven.

Q. And that is a pretty serious matter, isn't it, Willie? A. Yes, sir.

Q. Now, do you know what it means when you swear on the Bible that you will tell the truth? Do you understand that you must be very careful that——

The Court: Oh, no, no; not your understanding; what his understanding is.

Q. Do you understand what it means when you see these gentlemen come up here and swear on the Bible? Do you understand why they do that? A. No, sir.

Q. Do you understand it means that they are to tell——

The Court: Oh, no.

Q. Well, do you understand what it means to take an oath? A. Yes, sir.

Q. What is that? Tell the Judge. A. That good boys go to heaven and bad boys go to hell.

By the Court.

Q. Have you heard the oath that the different people have taken up here? A. No, sir.

Q. Haven't heard that? A. No, sir.

Q. Now, the oath is the oath which the clerk of the court administers to these people. He aks them if the evidence they shall give—evidence, that is what they shall say—"shall be the truth, the whole truth and nothing but the truth, so help you God;" do you know what that means? A. Yes, sir.

Q. What does it mean? A. It means an oath.

Q. And what is that an oath to do? A. I don't know.

Mr. Parker: I think, if your Honor please, it is a matter of understanding the language, more than anything else. I have confidence, of course, that he knows.

Q. Have you been talked to about what you must say here? A. Yes, sir.

Q. Have you been told what you must say? A. Yes, sir.

Q. What have you been told that you must say? A. I was told by mother and father I must tell the truth, and nothing but.

Q. And did they tell you anything else you must say? A. No, sir.

Q. Well, do you know what may happen to people who, in court, take an oath to tell the truth, and who do not tell the truth? A. Yes, sir.

Q. What? A. The one that don't tell the truth go to jail.

Q. How old were you when this accident happened? A. I was five years old.

Q. How old are you now? A. Eight.

Q. When were you eight? A. I was eight the 18th of March.

Q. Last year? A. Yes, sir.

Q. So you will be nine now, in about two months, will you? A. Yes, sir.

Q. Be nine years old in about two months? A. Yes, sir.

Q. And it has been over three years since the accident happened, has it? A. Yes, sir.

Q. You were a pretty small boy then, weren't you? A. Yes, sir.

Q. And how much do you remember of what happened to you? A. I just remember taking leaves and putting them on the fire and catching on my Indian suit, and I tried to get it out, but it was burning the leg, and I ran around in the yard.

Q. Isn't it a fact someone has told you that is what happened? Hasn't someone since told you that that is what happened? A. No, sir.

Q. You remember that yourself, do you? A. Yes, sir.

The Court: I think he may be sworn.

Mr. Lum: I am willing that his testimony shall have the same effect as if he had been sworn, without being sworn.

(The witness is examined on the part of the plaintiff without being sworn.)

DIRECT EXAMINATION by Mr. Parker.

Q. Now, then, just tell us what happened on the morning when the fire caught your trousers; just tell how it happened. A. I went out with an Indian suit on, and I was playing around with two little girls.

Q. What were their names? A. Helen Bonafield and Margaret Horton. Then they went in the house, and I came out in the alley, and I saw the fire there, I saw it just smoldering, and I went over and put the leaves on.

Q. Where was the fire you put the leaves on? A. It was right in front of McClellan's door.

Q. That is, in front of their house? A. Yes, sir.

Q. Was Mr. McClellan there when you went over to put the leaves on? A. No, sir.

Q. Had you seen Mr. McClellan that morning at all? A. I don't remember it.

Q. Before you got on fire? A. I don't remember seeing him.

Q. Where were you playing with Margaret and the other little girl? A. We were playing in the back yard, playing tea party.

Q. That is back of the house on the other side of the street, was it? A. Yes, sir.

Q. Then when they went in the house what happened? A. I came out of the alley, and crossed the street.

Q. Where did you find the leaves? A. I found them next to the tree near to the alley.

Q. Where is the tree? A. The tree is right next to that alley.

Q. What do you mean by the alley? A. Where it comes out into the gutter.

Q. That is between the two houses? A. Yes, sir.

Q. And you picked the leaves up right by the tree; where did you go with the leaves then? A. I went over to the fire and threw them on.

Q. Where was the fire? A. The fire was in front of their door.

Q. How far away was it from the place where you picked up the leaves, Willie? A. It was from one part of their house to the other.

By the Court.

Q. The leaves that you put on the fire, did they burn? A. Yes, sir.

Q. They burned, did they? A. Yes, sir.

Q. And was it from those leaves that you caught fire, or did you walk through the fire to put the leaves on? A. It was from them leaves I got on fire.

CROSS-EXAMINATION by Mr. Lum.

Q. You had a little stick in your hand? A. No, sir.

Q. Do you remember that you did not have a little stick? A. Yes, sir.

Q. Willie, you were, of course, badly hurt, weren't you? A. Yes, sir.

Q. And do you remember how long you were in bed? A. I was in bed seven months.

Q. Were you in bed all that time, or up part of the time? A. I was up part of the time in a little chair and carriage.

Q. And do you remember, as soon as you were a little better, that your parents asked you where you were burnt? A. Yes, sir.

Q. And do you remember you told them you didn't know? A. No, sir.

Q. What is that? A. No, sir.

Q. Are you sure you didn't tell them you didn't know where you were burnt? A. No, sir.

Q. When did you first tell them where you were burnt? A. I can't remember.

Q. It was quite a long time afterwards, wasn't it? A. Yes, sir.

Q. Now, be sure you understand me, don't answer anything unless you thoroughly understand my question, because I can ask it another way. Now, do you think it was two weeks or two months after you were burned before you told your father and mother where you were burnt? A. I don't remember that.

Q. Do you remember it was quite a long while after? A. Yes, sir.

Q. And do you remember playing with Helen Bonafield that day? A. Yes, sir.

Q. She sometimes played with fire, didn't she? A. No, sir.

Q. Did you ever see her play with fire? A. No, sir.

Q. Never saw any of the little children there play with fire, did you? A. No, sir.

Q. And you never played with fire before? A. No, sir.

Q. And don't you remember you and Helen Bonafield playing with fire in a back yard that morning? A. No, sir.

Q. Do you remember seeing Mrs. Bonafield have a fire that morning? A. No, sir.

Q. You didn't see any other fire around there at all that morning, did you? A. No, sir.

Q. Were you around there all that morning? A. Yes, sir.

Q. And you are very sure you didn't see any other fire? A. No, sir.

Q. Either on the street or any of the back yards? A. No, sir.

Q. What had you been doing all that morning, Willie? A. I was playing in the back yard that morning.

Q. In whose back yard? A. Their back yard.

Q. The Bonafield's back yard? A. Yes, sir.

Q. Do you remember a lot of little children playing in a back yard—A. Yes, sir.

Q. On up the street from your house, do you remember that? A. No, sir.

Q. Do you know where Mr. Manheim's house is, that double house over by the hedge? A. I don't remember that.

Q. You know where it is now? A. No, sir.

Q. You know Mr. Fenner? A. Yes, sir.

Q. Do you remember saying to Mr. Fenner in your father's presence that the little Manheim girl lit the fire? A. No, sir.

Q. You don't remember that at all? A. No, sir.

Q. Do you remember, Willie, at different times, telling different stories of how you got burnt? A. Yes, sir.

Q. And how did you come to tell different stories? Did you get confused, or didn't you want to tell the truth?

Mr. Parker: I want the questions to be reasonable for the witness.

The Court: When you think the question is objectionable just tell the Court.

Mr. Parker: I object on the ground that saying to this boy he told different stories, without saying where they differed, is misleading to the boy.

Q. (Question read as follows: "Do you remember, Willie, at different times, telling different stories of how you got burned?")

The Court: I will overrule the objection.

(The last question read as follows: "And how did you come to tell different stories? Did you get confused, or didn't you want to tell the truth?")

The Court: Do you know what "confused" means?

Witness: Yes, sir.

The Court: Then you may answer the question. A. I don't remember telling anybody else but my mother and father.

Q. Have you told your father and mother different stories of how you got burnt? A. Yes, sir.

Q. What different stories did you tell? Willie, I tell you again, if you don't understand any of my questions ask me to put them to you in a different way, or if you don't understand any better that way, you tell me and I will put it to you again.

Mr. Parker: May I cross-examine on the word "different stories?"

By Mr. Parker.

Q. Do you understand the word "different," Willie? A. Yes, sir.

Q. What does it mean? A. It means different kind of stories.

Mr. Parker: All right; now you may go ahead.

By the Court.

Q. Well, did you tell your mother and father different kinds of stories about it? A. I just told them

I went over and put the leaves on the fire, and that then I saw my coat was on fire, and both legs, I ran around the house, and through a hole in the fence, and I came running home and calling for my mother, and I remember seeing Raymond Fenner's father in the yard raking up leaves, and I ran over to see if he would put it out with his rake, and just as I was running out in the street my mother called to me, and I turned back and ran to her.

By Mr. Lum.

Q. Now, Willie, you say you know what "different" means? A. Yes, sir.

Q. And you say that you told your father and mother different stories. Now, that was one story; now, what different story did you tell them? A. That is all I told my father and mother.

Q. Don't you remember telling them you were burned by one of the fires that one of the little girls started? A. No, sir.

Q. You don't remember that. Do you remember telling them you didn't know where you were burned? A. No, sir.

Q. Well, didn't you ever tell your father or mother, either one, that you didn't know where you were burned? A. No, sir.

Q. Well, this case, this suit, has been talked about at your home a good deal lately, hasn't it? A. Yes, sir.

Q. And you were told that you would be wanted to tell something on the stand, weren't you? A. Yes, sir.

Q. And what you were going to testify to was talked over at home, wasn't it?

The Court: "Testify" might not be understood.

Q. What you were going to say here was talked over at home, was it not? A. I don't remember.

Q. Well, do you mean you don't remember whether it was talked about? A. Yes, sir.

Q. Well, how is it you don't remember that, and yet you can remember back three years and eight months—three years and two months—if you cannot remember what was talked about within the last two or three weeks. A. I just remember my father and mother asking me if I remembered that I was burned there, and I said yes.

Q. Your father and mother did ask you if you remembered you were burnt in front of Mr. McClellan's house, didn't they? A. Yes, sir.

Q. And that was a little while ago? A. Yes, sir.

Q. And where did you get your leaves that you put on the fire? A. I got them next to McClellan's alley, in the gutter.

Q. And did you stir up the ashes to make the fire burn? A. No, sir.

Q. You never were jumping through any fire? A. No, sir.

Q. Or running through it? A. No, sir.

Q. You knew at that time that fire would burn you, didn't you? A. Yes, sir.

Q. You knew that a fire would burn you, and you knew that you must be careful with fire, didn't you? A. Yes, sir.

Q. And you knew that there was a fire there where you put the leaves, didn't you? A. Yes, sir.

LINCOLN E. ROWLEY, sworn for the plaintiff.

DIRECT EXAMINATION by Mr. Parker

Q. Mr. Rowley, where do you reside, please? A. East Orange, New Jersey.

Q. You are the City Clerk of the City of East Orange, are you not? A. Yes.

Q. Mr. Rowley, have you been the City Clerk of East Orange for the last ten years? A. No, sir.

Q. How long have you been the City Clerk of East Orange? A. Since May, 1907.

Q. You were asked to bring with you to Court the ordinances of the city, were you not? A. Yes, sir.

Q. Have you them here? A. Some of them.

Q. May I ask you to turn to——

Mr. Lum: I object to this. We may as well raise it now. The declaration in this case contains no reference to any statute, or ordinance of any kind whatsoever; merely common law declaration.

Mr. Parker: I think it is well enough to wait until we hear what the testimony is going to be before we raise an objection.

The Court: I presume your purpose is to prove an ordinance.

Mr. Parker: It is, for a certain purpose, but not to predicate an action on an ordinance. It is to prove negligence.

(A certified copy of the ordinance is handed to the Court.)

The Court: I have read these over twice, and I cannot see the relevancy of either of these ordinances to this case; still I am perfectly willing that you should ask such questions, or make such offer, as will raise the objection.

Mr. Lum: I will admit that these are the ordinances of the City of East Orange with full force and effect, but I object to them as absolutely immaterial and irrelevant.

The Court: They may be marked for identification, and I will overrule the offer of these ordinances, and an objection to that ruling will be noted as ground of appeal.

An objection to this ruling is noted by the plaintiff as ground of appeal.

Said ordinances are marked P1 and P2 for identification. (See page 58)

CORNELIUS MINNIHAN, sworn for the plaintiff.

DIRECT EXAMINATION by Mr. Parker.

Q. Mr. Minnihan, where do you live? A. East Orange.

Q. And you are on the police force of the City of East Orange? A. Yes, sir.

Q. Mr. Minihan, did you bring with you your time cards for the months of October and November, 1911? A. No, sir; I did not.

Q. Have you since you were subpoenaed in this case examined those time cards? A. Why, they could not be found; couldn't find them.

Q. Mr. Minnihan, do you remember in November, October and November, 1911, where you were stationed or where your duties took you? A. Why, yes, I remember; the circumstance of the fire brought me back to memory that I was on that territory doing duty.

Q. You remember the accident to the boy? A. Yes, sir.

Q. Mr. Minnihan, do you remember of having instructions in regard to fires at that time?

Mr. Lum: I object.

The Court: I sustain the objection.

An objection to this ruling is noted by the plaintiff as ground of appeal.

Q. As a matter of fact, Mr. Minnihan, in your rounds in the neighborhood of South Clinton street did you warn everyone that you saw in regard to building fires?

Mr. Lum: I object.

The Court: I sustain the objection.

An objection to this ruling is noted by the plaintiff as ground of appeal.

Q. Mr. Minnihan, will you kindly describe to the jury the neighborhood south of Central avenue, on South Clinton street; just describe the way the houses are built, the neighborhood generally, what class of people occupy them, and so forth?

Mr. Lum: They are residences, aren't they? Put your statement of it on the record.

Mr. Parker: It is stipulated that south of Central avenue on South Clinton Street, the neighborhood of the residences of the plaintiff and defendant, that the neighborhood consists of two-family houses on one side of the street, set back about 25 feet from the street.

The Court: What do you mean by that? From the curb or from the sidewalk?

Mr. Parker: From the curb, we will say; and on the other side of the street there are one-family houses set back 35 feet from the curb approximately; that the neighborhood is one occupied by families; that there are no fences on the front of the property lines, but the street is open up to the front doors of the houses.

Q. Mr. Minnihan, in your rounds in the neighborhood of South Clinton street in East Orange did you observe whether children played there or not?

Mr. Lum: I object.

The Court: On what grounds?

Mr. Lum: The time is not fixed at all.

It is stipulated that on or about the 4th of November, children played about the streets and the yards, and were accustomed to playing there.

NOT CROSS EXAMINED.

Mr. Parker: Now, if your Honor please, I want to have the plaintiff shown to the jury, if it is possible. I suggest that he be disrobed, and put into his bathrobe, and brought back for that purpose, and meanwhile I will put on other witnesses, so the Court will not be in any way delayed. It seems to me it will be advisable, if this motion on my part is granted, that at the time he is here a doctor shall be testifying. I am going to call another doctor who has been treating the plaintiff.

The Court: There can be no objection to showing the boy to the jury.

ANNA SMITH, sworn for the plaintiff.

DIRECT EXAMINATION by Mr. Parker.

Q. Mrs. Smith, where do you reside? A. 17 Bradford street, Orange.

Q. Where did you reside on November 4, 1911? A. The same address.

Q. On the 4th day of November, 1911, did you happen to be in the neighborhood of South Clinton street in East Orange? A. Well, not in the morning, but I received a telephone message that William had been badly burned, and I went up to the house in the afternoon.

By the Court:

Q. What time? A. Well, as nearly as I can recollect it was about between two and three o'clock.

By Mr. Parker.

Q. Mrs. Smith, just tell now, in a concise way, what you saw and what happened.

A. Well, when I reached the house, of course, everything was in excitement, and the boy and Mrs. Davenport were both in a pitiable condition; the boy laid in bed unconscious, and Mrs. Davenport's hands were both bandaged; she had been bandaged by the doctor. Of course, I would not venture in the room to annoy William much, but I stayed with Mrs. Davenport the entire afternoon and night, and William, I can't recollect him gaining consciousness at any time during the time I was there; he did not; and about four o'clock Dr. Warner had called, and watched him closely, and warned Mrs. Davenport and I particularly we should watch him closely, because he was in very great danger; and, of course, we administered the stimulant the doctor ordered—and around four o'clock in the morning he turned like death, his lips got blue, and we called Mr. Davenport into the room, we thought the child was dying. So we stayed with him until it must have been around seven or after when he seemed to show some little change; of course, the doctor came—I stayed until around nine, I guess, that morning, the doctor had been there, I forget whether he called once or twice, before I left, but he said the boy was——

The Court: Not what he said.

Witness: Well, I know when I left there yet William was unconscious, he had not gained consciousness, but he had come out of that very death-like condition that he had shown around four, I thought surely he was dying. Then I went home for awhile, and my husband called in the afternoon; but I was indeed very much worked up, I was nervous over the boy, because I had loved him from a baby, and I was very much afraid he would not pull through. Mr. Smith came down in the afternoon and found his condition was not much better. I went daily from that time on, but I would not venture to talk to William, he was in no condition to talk to, and the

doctor said he should not be talked to, he should be kept strictly quiet.

Q. How long did that condition continue? A. Well, that continued for a long, long time, but I can't recollect just how long.

Q. Perhaps two weeks or a month? A. Oh, yes, fully that time.

NOT CROSS EXAMINED.

The Court: Mr. Parker, the officer reports that the boy is ready.

The boy is brought into the court, and the location of the burns is exhibited to the jury by Mrs. Davenport.

Mrs. Davenport: These are the wounds, all up here. The deep wound is under the bandage; has not healed; and here is where the child was burned, and in here on this side. This leg healed up much better. Here was the deep spot. The wound is not exposed. I am still dressing the wound night and morning.

WILLIAM E. DAVENPORT sworn for the plaintiff.

DIRECT EXAMINATION by Mr. Parker

Q. Mr. Davenpot, where do you reside? A. 197 South Clinton street, East Orange, New Jersey.

Q. How long have you lived there, Mr. Davenport? A. I think it is eight years this coming December.

Q. You are the father of the plaintiff in this case, are you not? A. I am.

Q. Do you know the defendant in this case? A. Yes, sir.

Q. Do you know where the defendant resided on November 4, 1911? A. 196 South Clinton street.

Q. Had the defendant at one time lived in your house? A. Yes, sir.

The Court: He said he had.

Q. Now, Mr. Davenport, going back to November 4, 1911, will you relate to the Court just what occurred on that date that you remember? A. Well, about twelve to twelve-fifteen on the morning of November 4, 1911, I was then in New York, 196, I believe, Broadway, and I received a telephone message from a man named Fenner saying to "come home at once, your wife and boy are in bad shape." I inquired as to what the trouble was, and he said "Well, you had better come home." I arrived home, I should say, about 1.30 in the afternoon, and I found my wife and boy, the boy in bed, and the wife bandaged from the wrists to the fingers, perhaps one thumb and one finger exposed. That is all I know as to that; but the boy, at the time, was unable to talk to me.

Q. How long did the illness continue, Mr. Davenport? A. He was in bed from November until the following May, with the exception of having him out in the little cart from one room to another. I remember distinctly the first time he was taken out was between Christmas and New Year's, we tried to make it as pleasant as we could, we had a Christmas tree, and that was between Christmas and New Year's; and on the 5th of January was when the grafting took place. We cleared the tree away at that time, but even then we didn't question the boy, and was told by the doctor not to.

Q. You knew Mr. McClellan prior to the time of the fire, didn't you? A. I did.

Q. After the fire did Mr. McClellan come to you and say anything to you about the fire?

Mr. Lum: I object to this.

The Court: I overrule the objection.

A. He did not.

Q. Has he ever approached you in regard to the subject since that time?

Mr. Lum: I object to the question.

The Court: I sustain the objection. He has just said he never talked to him about it. It seems to me that is substantially the same question.

Q. Have you talked yourself voluntarily to Mr. McClellan about it?

Mr. Lum: I object to that. I do not see the materiality.

The Court: I will permit that, whether or not he has.

A. I have not.

Q. Have you seen Mr. McClellan since the accident a number of times? A. On many occasions.

Q. And no mention was made on any of those occasions of the fire?

Mr. Lum: I object to the question.

The Court: I sustain the objection. He has said so.

CROSS EXAMINATION by Mr. Lum.

Q. Mr. Davenport, do you remember a conversation in the room where Willie was lying about half-past two in the afternoon of November 4th? A. No, I don't know as I do.

Q. You remember Mr. Fenner came in that after-

noon? A. Not after I arrived at home; he was not in the house to my knowledge.

Q. Are you quite sure of that? A. I know it.

Q. How about the next day? A. No, not the next day.

Q. Do you recall very shortly after the fire Willie speaking to you about it in the presence of Mr. Fenner? A. No, no, he wasn't there.

Q. Will you swear that in the presence of Mr. Fenner Willie did not say the fire which burnt him was started by Helen Bonafield? A. I swear.

A Juror: Is it proper to ask whether the boy was perfectly well before the accident?

Witness: The boy was physically well, and mentally also before the fire, and was not anaemic either, previous to the burning.

MARGARET DAVENPORT recalled for the plaintiff.

DIRECT EXAMINATION by Mr. Parker.

Q. Mrs. Davenport, after the accident had occurred when did you first hear of the McClellan family in connection with it?

Mr. Lum: I object to that as immaterial.

Mr. Parker: I am simply laying the foundation.

The Court: Does not that logically lead to the next question, as to what she heard? I do not see that any harm can come from answering this question. You may answer the question. Just give the date, that is all you are required to do.

A. I could not give the date, but the very day the child was born Mr. McClellan——

Q. No, not born; we are speaking of this matter. I asked you when you first heard of McClellan in connection with the fire? A. Why, when William was well enough to tell me where he got burnt he mentioned the McClellan family, named Mr. McClellan.

Mr. Lum: I object to what he said, and ask it to be stricken out.

The Court: That part may be stricken out, what Willie said.

Q. Did you thereafter call upon the McClellans, or did they call upon you?

Mr. Lum: I object.

The Court: The "McClellans," yes; if you mean Mr. McClellan——

Q. Did Mr. McClellan, the defendant, call on you? A. No, sir; he never inquired personally about the child.

Mr. Lum: That is objected to.

The Court: That will be stricken out. The fact that he did not call may stand.

Q. Did you see Mr. McClellan afterwards? A. Yes. On the day——

Mr. Lum: I object. You have answered the question.

Q. Did he say anything about it? A. No, sir.
Q. Has he ever said anything about it to you?

The Court: She said "No."

A. No, sir.
Q. Not since the time of the fire? A. Never.

CROSS EXAMINATION by Mr. Lum.

Q. You had warned Willie against fire? A. Naturally; mothers do.

Q. And given him instructions about burning? A. Always.

Q. And keeping away from them? A. Yes.

PLAINTIFF RESTS.

Mr. Lum: I move for nonsuit, and suggest that the jury retire during the argument.

The Court: The jury may retire to the jury-room for a few minutes.

(The jury withdrew.)

Mr. Lum: I move for nonsuit on the ground that there is no proof to support the declaration.

Second, on the ground that the proof varies from the declaration.

Third, on the ground that there is no proof of negligence in this case.

Fourth, on the ground that, in this case, despite the very young age of the child, he must be found guilty of contributory negligence, taking into consideration his own statements, and the instructions of his parents.

Fifth, on the ground that there is no evidence in this case that the defendant ought reasonably to have anticipated the injury which resulted here.

(Argued.)

The Court: This boy was terribly burned, and the sympathies of every one who has heard this case up to this point must have gone out to

this little boy, who has suffered so terribly, and to the father and mother, particularly the mother, who went through the anguish of seeing the boy in fiames, and who did what, perhaps, very few mothers would have done although, as she herself expressed it, "it is what any natural mother ought to have done," perhaps, at the risk of great personal injury, succeeded in extinguishing this fire. I say "at the risk of great personal injury;" she was badly injured; and as the testimony was being given upon the stand I do not see how any one could have failed to be affected by the evidence given. As the father of young children, that was my feeling while this testimony was being given. But the Court is constantly saying to jurors that they are not to be swayed by their prejudices, or by their sympathies. Courts and juries are dealing with cold, hard facts. It would not do for us to decide cases according to our prejudices. If the Court did that its usefulness would soon be at an end. If juries did that their usefulness would soon be at an end. Nor can courts and juries decide cases in line with their sympathies. That would defeat justice, as we understand justice. They are obliged to deal with cases according to the law as the Court understands the law.

In this case it is beyond question that there was a fire that morning in front of Mr. McClellan's property. He admits that. Whether or not the fire was at 8.30, or 9.30, or 11.30, makes very little difference, if there was sufficient fire there at any time to set fire to this boy, and do the damage. And I am not deciding in this case that it is not negligence for a person to build a fire in a street where children are accustomed to play, and then to go away and leave it without any protection. I am inclined to think it is

negligence for a person to do that. But, in order to recover in a case of this kind, which is a case founded upon negligence, not only must the injury have been the natural and probable consequence of the negligent act, but, in addition to that requirement, the consequence should be one which, in the light of attending circumstances, an ordinarily prudent man ought reasonably to have foreseen might probably occur as the result of his negligence. The testimony of the plaintiff, the little boy—which is really the only testimony we have in the case which places him near the fire in front of Mr. McClellan's house—would lead to grave doubt whether or not this is a case in which Mr. McClellan should have anticipated, not only that the probable consequence of lighting that fire there, and going away and leaving it unprotected, might result in injury to this, or some other, little boy, but whether or not he should have foreseen that this little boy would place other leaves upon that fire, which would ignite, and which would burn him. Because that is what Willie says he did. He says he saw the smouldering fire, that he picked up leaves at another place, put them on the fire, and it was from these leaves that he caught fire. But, going a step further than that—it may be that this would present a slight jury question, although I have considerable doubt about that—but, going a step further, it is a well known principle in cases of this kind that where there is an intervening cause between the act of negligence and the injury, the person committing the negligent act is not responsible for it. As is stated in the books, where a fire is started by one person which destroys one building, and from that building, by the action of the elements, or in any other natural

way, the fire communicates to another building, the owner of that building may hold liable in damages the person guilty of the negligent act. But where a brand is plucked by another person from the burning building, and thrown against, or into, another building, and by reason of that the second building burns, that is an intervening cause which, notwithstanding the fact that the original fire was started by a negligent act, prevents the owner of the second building from recovering. In this case the intervening cause, it seems to me beyond question, was not the fact that the fire was there; it was not the fire which Mr. McClellan left there that burned this boy, according to his testimony—which is all the testimony we have in the case—it was the fire which was caused by the act of this boy in getting these leaves and placing them upon that fire, from which his clothing became ignited. That is the intervening cause. The Court is not obliged to find that that was contributory negligence on the part of the boy. That is undoubtedly a question for the jury, although argued by the defendant in this case. The question of contributory negligence is undoubtedly one for the jury; whether a boy of that age, and under the existing circumstances, could be guilty of contributory negligence. But it seems to me the decisive thing in this case is that there was an intervening cause between the negligent act, assuming it to have been negligent, and the injury to this boy. That view results in the granting of the motion for nonsuit, and an exception to that ruling as ground of appeal will be noted.

An objection to this ruling is noted by the plaintiff as ground of appeal.

Exhibits

The following is a copy of an ordinance passed by the City Counsel of the City of East Orange, State of New Jersey on the day of 1905.

Plaintiff's Exhibit 1 for identification:

"That no person or persons shall kindle any bonfire or other fire, nor permit or suffer such fire to be made, or continued within forty feet of any building located wholly or partly within the fire limits of the City of East Orange, unless such person shall have first obtained permission therefor in writing, from the Chief Engineer of the Fire Department."

The following is a copy of an ordinance passed by the City Counsel of the City of East Orange and approved by the Mayor on the day of 1904, and is known as Section 103 Title 20 Revised Code of General Ordinances adopted 1904.

Plaintiff's Exhibit 2 for identification.

"That it shall be unlawful to place, cast or throw into any street, any paper, rags, straw, wood, boxes, leaves, cut grass, or glass, metal, loose stones, earthenware or any substance of a nature likely to cause injury to travelers or pedestrians, or to carriages, bicycles or other vehicles traveling or moving on said street, or which might wound, disable or injure any horse or other animal, or injure, cut or puncture any pneumatic tire."

GROUNDS OF APPEAL, FILED FEBRUARY 24, 1915

New Jersey Supreme Court

ESSEX COUNTY

Between
WILLIAM A. DAVENPORT, an infant, suing, etc.
Plaintiff-Appellant.
and
DOUGLAS Y. MCCLELLAN,
Defendant-Respondent.

Grounds of Appeal.

The following are the grounds of appeal upon which plaintiff relies in asking for a reversal of the judgment of the Circuit Court and a new trial of the above cause:

First. The judgment of the Court below was contrary to the weight of the evidence.

Second. The judgment of the court below was contrary to the law.

Third. The Court erred in not denying the defendants motion to dismiss when the plaintiff rested.

Fourth. The Court erred in not submitting the case of the plaintiff to the Jury.

Fifth. The Court below erred in excluding evidence offered by the plaintiff.

Sixth. The Court below erred in admitting evidence offered by defendant over the objection of the plaintiff.

Seventh. The Court below erred in overruling the objections of the plaintiffs to the form of questions put by defendant to plaintiff's witnesses and to the scope of defendant's cross-examination of plaintiff's witnesses.

Dated, East Orange, N. J.

February 20, 1915.

TERRY PARKER,

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