INDEX.

(Filed April 11, 1934.)

New Jersey Supreme Court

HUDSON COUNTY.

JOSEPH CELLA, by his next friend, ADELINA CELLA, and ADELINA CELLA, individually, *Plaintiffs,* *v.* GEORGE ROTH and VINCENZO MATASSA, *Defendants.*	Action at Law. NOTICE OF APPEAL.

To: PAUL F. CULLUM, Esq.,
Attorney for Plaintiffs,
147 Summit Ave.,
Union City, N. J.

Sir:

TAKE NOTICE that the defendant, George Roth, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause.

Respectfully yours,

COX AND WALBURG.

Dated: April 9, 1934.

(Filed April 16, 1934.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH CELLA, by his next friend, ADELINA CELLA, and ADELINA CELLA, individually, Plaintiffs-Appellees, *v.* GEORGE ROTH, Defendant-Appellant.	Action at Law. GROUNDS OF APPEAL.

The defendant-appellant sets down the following grounds of appeal in the above entitled case:

The Trial Judge committed legal error in charging the jury:

1. "There are two separate defenses, as the court has mentioned, and in order for the defendant to be served with a verdict or receive a verdict according to those defenses, he is obliged to prove them by the greater weight of the evidence.
* * *
"If you come to the conclusion by the greater weight of the evidence that it was the negligence of this third party referred to by the court as Matassa, that is, the operator of the automobile on the Boulevard, going south, and you come to that conclusion, that it was his negligence that caused the boy's injury, you should not hold Roth."

2. "You will understand, gentlemen of the jury, as the court has heretofore explained to you, that

if you find from the testimony in this case that the defendant in this case has proved to your satisfaction by the greater weight of the evidence any of the affirmative defenses alleged, that is to say the one of contributory negligence on the part of the boy, or the one that it was the fault of someone else, you may return a verdict in favor of the defendant.''

Respectfully,

COX AND WALBURG,
Attorneys for Defendant-Appellant.

Summons.

THE STATE OF NEW JERSEY—TO—GEORGE ROTH and VINCENZO MATASSA:

YOU ARE SUMMONED to answer the annexed complaint of JOSEPH CELLA, by his next friend, ADELINA CELLA, and ADELINA CELLA, individually, in an action-at-law in the New Jersey Supreme Court.

(L. S.)

AND TAKE NOTICE, that unless you file your answer to the said complaint with the Clerk of the Supreme Court at Trenton within TWENTY DAYS after the service upon you of this writ and the annexed complaint, the plaintiffs may proceed in said action and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, ESQ., Chief Justice of our Supreme Court at Trenton, this 16th day of September, 1932.

FRED L. BLOODGOOD,
Clerk.

PAUL F. CULLUM,
Attorney.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

JOSEPH CELLA, by his next friend, ADELINA CELLA, and ADELINA CELLA, individually, Plaintiffs, *vs.* GEORGE ROTH and VINCENZO MATASSA, Defendants.	Action at Law. COMPLAINT.

FIRST COUNT.

Plaintiff, Joseph Cella, residing in the Township of North Bergen, County of Hudson and State of New Jersey, who has been permitted by Order of this Court to prosecute this action by Adelina Cella, as his next friend, says:

1. On or about July 27th, 1932 at or about 3:15 P. M., the defendant George Roth was the owner and operator of a certain automobile bearing registration—H 71191 N. J.

2. On or about July 27th, 1932 at or about 3:15 P. M., the defendant Vincenzo Matassa was the owner and operator of a certain automobile bearing registration—P 36305 N. J.

3. At or about the time aforementioned, the defendant George Roth was driving his said automobile in an easterly direction on Hoboken Street, at or near the intersection of the Hudson Boulevard, both public highways in the Township of North Bergen, County of Hudson and State of New Jersey.

4. At or about the time aforementioned, the defendant Vincenzo Matassa was driving his said automobile in a southerly direction on the Hudson Boulevard, at or near the intersection of Hoboken Street, both public highways aforesaid.

5. When the automobile owned and operated by the defendant Vincenzo Matassa had reached the intersection of Hoboken Street, the automobile which was owned and being operated by the defendant George Roth in an easterly direction on Hoboken Street, failed to come to a stop when it reached the intersection of the Hudson Boulevard in compliance with traffic signals which were stationed on said Hudson Boulevard, but continued out into the said Hudson Boulevard, causing the automobile owned and operated by the defendant Vincenzo Matassa to swerve to the left toward the center line of the said Hudson Boulevard and strike the plaintiff Joseph Cella who was lawfully upon the southerly crosswalk on the westerly side of the Hudson Boulevard at the said intersection of Hoboken Street at a point at or near the center line of the said Hudson Boulevard.

6. Said collision was caused by the negligence of the defendant George Roth and the negligence of the defendant Vincenzo Matassa.

The negligence of the defendant George Roth consisted of the following:

(a) He drove his said automobile at a fast, excessive and unlawful rate of speed.

(b) He failed to bring his car to a stop in compliance with traffic signals which were stationed on the highway.

(c) He failed to have his car under control and he failed to observe the presence of lawful users of the highway.

(d) He operated his said automobile contrary to the provisions of the Traffic Act and Motor Vehicle Laws of the State of New Jersey.

The negligence of the defendant, Vincenzo Matassa, consisted of the following:

(a) He drove his said automobile at a fast, excessive and unlawful rate of speed.

(b) He failed to have his automobile equipped with proper brakes and he failed to apply the brakes in time to avoid striking the plaintiff.

(c) He failed to use that degree of care which an ordinary, prudent and cautious man would and should have used under the circumstances.

(d) He operated said automobile contrary to the provisions of the Traffic Act and Motor Vehicle Laws of the State of New York.

7. As a result of the accident caused by the negligence of the defendants, the plaintiff, Joseph Cella, received serious, painful and permanent injuries, to wit the left side of the plaintiff's face was ripped from the mouth and extending back to the car, which injury required twenty stitches to close and which injury became abscessed and swollen. He also suffered a severe shock to his nervous system and his health and well-being has been greatly undermined.

8. By reason of the injuries received by the plaintiff, he was immediately after said accident removed to the Jersey City hospital where he was confined until the 6th day of September, 1932, and upon his discharge from said hospital he was obliged to return to said hospital daily for treatment and he will continue to receive treatment at said hospital for a long period of time in the future.

9. As a result of the aforementioned injuries, the plaintiff underwent great pain and suffering and will continue to undergo great pain and suffering in the future. His face will be permanently swollen and his facial appearance has been disfigured and scarred for life.

WHEREFORE, plaintiff, Joseph Cella, by his next friend, Adelina Cella, will demand as damages on this Count the sum of Twenty Thousand Dollars ($20,000.00).

SECOND COUNT.

Plaintiff, Adelina Cella, says that:

1. All the allegations contained in the First Count are hereby incorporated in and made a part of this count.

2. She is the mother and the sole support of the infant plaintiff, Joseph Cella.

3. By reason of the injuries which the infant plaintiff, Joseph Cella, sustained, the said plaintiff Adelina Cella was obliged to expend and lay out divers sums of money for hospital care, medical attention, doctor's bills, x-rays and other expert treatment all in an effort to cure her said son of his said injuries and will be obliged to expend further sums in the future.

WHEREFORE, plaintiff, Adelina Cella, demands as damages on this count the sum of Five Thousand Dollars ($5,000.).

PAUL F. CULLUM,
Attorney of Plaintiffs.

(Filed October 8, 1932.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

JOSEPH CELLA, etc., et al.,
Plaintiffs,
v.
GEORGE ROTH, et al.,
Defendants.

Action at Law.

ANSWER.

The defendant, George Roth, answering the plaintiffs' complaint, says that:

FIRST COUNT.

1. He admits the allegations contained in paragraphs 1, 2, 3 and 4.

2. He denies the allegations contained in paragraph 5 and so much of paragraph 6 as relates to him, paragraphs 7, 8 and 9.

SECOND COUNT.

1. He repeats his answers to the allegations contained in the First Count and makes them a part hereof.

2. He has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 2, and, therefore, leaves the plaintiffs to their proof.

3. He denies the allegations contained in paragraph 3.

Answer.

First Separate and Distinct Defense.

The infant, Joseph Cella, was guilty of negligence, which was a proximate cause of the alleged accident, in that he entered upon and attempted to cross the public highway without making proper observations for his own safety; without giving any warning or indication of his intention to do so; in that he failed to cross at a place set apart for pedestrians, and in that he crossed against a traffic signal.

Second Separate and Distinct Defense.

The alleged accident was due to the negligence of a third party, over whom this defendant had no control and for whose acts he is not responsible.

Cox and Walburg,
Attorneys for Defendant,
George Roth.

(Filed October 17, 1932.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

JOSEPH CELLA, by his next friend, ADELINA CELLA, and ADELINA CELLA, individually, Plaintiffs, *vs.* GEORGE ROTH and VINCENZO MATASSA, Defendants.	Action at Law. REPLY.

The plaintiffs, replying to the answer filed by the defendant, George Roth, in the above entitled action, say that:

1. They deny the allegations contained in the First and Second Separate and Distinct Defenses.

PAUL F. CULLUM,
Attorney of Plaintiffs.

Testimony.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

JOSEPH CELLA, by his next friend, ADELINA CELLA and ADELINA CELLA, individually,

vs.

GEORGE ROTH and VINCENZO MATASSA.

Before Hon. THOMAS BROWN, J., and a Jury.

JERSEY CITY, N. J., FEBRUARY 16, 1934.

APPEARANCES:

PAUL F. CULLUM, Esq., for the Plaintiffs, by EDGAR C. LARSEN, Esq.

COX & WARBURG, Esqs., for the Defendant, George Roth, by Mr. Cox.

A jury was duly empanelled; being found satisfactory, they were sworn.

Counsel opened to the Jury.

Mr. Larsen: I want to amend the complaint to allege that the boy was crossing Hoboken Street, instead of the Hudson County Boulevard, at the time of the accident in this case.

Mr. Cox: I object to that. They have had two years since the action was started

to find out where he was going. It is our understanding from our witnesses, that he was crossing the Boulevard, and this is a complete switch around at the last minute.

The Court: That may be so; but, are you taken by surprise.

Mr. Cox: Yes, and no. I would say this: May I read sections of the complaint to the Jury to show that in 1932, immediately after the accident, and before they found out they could not find the other defendant—

Mr. Larsen: I object to that.

Mr. Cox: I feel that it is an admission on the part of the plaintiffs and binding upon them, and inasmuch as it corroborates the only version of this accident we have ever had right from the beginning, I feel it is evidential in this case.

The Court: The Court feels that is not a matter of discretion. I think you have a right to show any inconsistency with the pleadings already or originally filed, and as compared with those that are later filed in the nature of an amendment. I think the Court has no discretion about it.

Your adversary may refer to the pleadings or he may offer them in evidence, and then argue such inferences as he thinks should be drawn from them.

Mr. Larsen: I think that would react against me. May I ask at this time for a mistrial, and to amend my pleadings.

The Court: That would not change your position, if you had a mistrial and a formal amendment of the pleadings. The Court feels that your adversary would have the

same right to call the jury's attention to the pleadings wherein you pleaded one set of facts.

Mr. Larsen: I don't want your Honor to think that we are changing our story.

Your Honor, then, allows the amendment to the effect that the boy was crossing Hoboken Street from a southerly to a northerly direction.

The Court: There being no further objection the amendment will be allowed.

Louis Klein, sworn for the Plaintiffs:

Direct Examination by Mr. Larsen:

Mr. Larsen: The Boulevard is 60 feet wide, more or less. Hoboken Street is about 25 feet wide. There is a traffic light at the Patterson Plank Road and the Boulevard. Ownership and operation are admitted.

Q. Mr. Klein, what is your full name? A. Louis Klein.

Q. Where do you live? A. 927 Hoboken Street.

Q. What City or Town? A. North Bergen.

Q. On July 27th, 1932, where did you live? A. 927 Hoboken Street.

Q. With reference to the intersection of Hoboken Street and the Hudson County Boulevard, where is that located; how far away from the Boulevard did you live? A. The middle of the block.

Q. Half a block away from the Boulevard? A. Half a block away.

Q. Now, on July 27th, 1932, at or about 3:15 in the afternoon, did you have occasion to be at the Hudson Boulevard and Hoboken Street? A. I was waiting for the light to change to go across.

Q. Where were you standing? A. On the south corner of the Boulevard.

Q. South, east or west? A. Going towards Journal Square.

Q. The southwest corner of the Hudson County Boulevard? A. Yes, sir.

Q. Is there any store located at that corner? A. Delicatessen.

Q. You were standing on the southwest corner? R. Where the delicatessen store is.

Q. And you say there is a delicatessen store at that corner? A. Yes, sir.

Q. Can you tell us what is on the north east corner of Hoboken Street? A. A motorcycle store.

Q. Are you very familiar with the neighborhood? A. Been there pretty near all my life.

Q. On that afternoon, did you see an accident occur at that intersection? A. Well, while I was waiting for the light to change.

Q. You were standing, waiting? A. On the corner.

Q. Waiting for the light to change? A. The Boulevard light to change to go across.

Q. Where did you intend to go on that day? A. For lunch.

Q. Where were you going, what direction? A. Towards Summit Avenue.

Q. In other words, you intended to cross the Boulevard? A. Yes, sir.

Q. You were waiting for traffic lights? A. The light to change.

Q. At that time, could you tell us whether or not traffic was proceeding on the Boulevard? A. Traffic was kept going.

The Court: That is, the light on the Boulevard was green?

The Witness: And at Hoboken Street was red.

The Court: On the Boulevard, it was green.

Q. And on the other street, Hoboken Street, the light was red? A. Red.

Q. Did you see Joseph Cella at the intersection? A. I seen the little fellow walk.

Q. When you first saw Joseph Cella, where was he; was he on the sidewalk when you first saw him? A. He was off the sidewalk, walking across.

Q. In which direction was Joseph walking? A. He was walking towards the Plank Road.

Q. Could you come down here and indicate on the diagram. This is the Hudson Boulevard and this north, and this south; this is Hoboken Street, east and west. Now, this cross indicates the delicatessen, and the corner on which you were standing. Now, will you tell us first, what direction the boy was walking? A. Right across.

Q. Was he walking across this way?

The Court: That is from the southwest.

Q. From the south to north?

Mr. Cox: The southwest corner to the northwest corner.

Q. Southwest corner to the northwest corner? Will you just tell us, then, what happened? A.

When I looked around, I see a car. I hollered to the boy, "Look out".

Q. What car? A. Coming up Hoboken Street.

Q. Can you tell us what sort of street Hoboken Street is with reference to the grade? A. It is a steep grade.

The Court: Which way?

The Witness: Towards the Boulevard.

Q. You say that you saw this car come on top of Joe? A. I yelled, "Look out".

Q. How far had Joseph Cella proceeded from this curb when you saw this car on top of him? A. He was no more than about ten feet away from it.

Q. At that time, when Joseph Cella was walking across this intersection, could you tell us the condition of the traffic signals? A. The traffic signal at Hoboken Street was red and the Boulevard was green.

Q. Can you tell us whether this car owned by the defendant George Roth, was coming fast or slow? A. He was coming up pretty fast.

Q. You say he was about to crash into Joe? A. When I hollered.

Mr. Cox: Will you please not to lead.

Mr. Larsen: That is the testimony .

Q. What happened when you hollered? A. I hollered "Look out". Joe looked around twice and walked back into the other car.

Q. Joe turned twice? A. On his own way.

Q. To avoid being struck? A. Yes, sir.

Q. How far out in the Boulevard did he get? A. (No answer.)

Q. You say Joseph Cella turned away to avoid being struck by this car. How far out in the

Boulevard did he get before he was struck by the other car? A. I would say about twelve feet away.

Q. How far out in the Boulevard with reference to the curbline; how far from the curb was he, from the westerly curb of the Hudson Boulevard? A. About eight or ten feet.

The Court: You say that he was crossing from south to north.

Mr. Larsen: South to north.

The Court: And the car was coming from west to east.

Mr. Larsen: West to east, up a steep grade into the Hudson County Boulevard.

The Court: And he attempted to get out of the way of the car.

Mr. Larsen: When the boy got about eight feet from the curb line, the car was about to crash into him and he attempted to get away and back out and was struck by a car which was proceeding in a southerly direction.

The Court: That is, he backed into the Boulevard.

Mr. Larsen: Yes; and was struck by a car which was proceeding in a southerly direction.

The Court: He was not struck by the car he was trying to avoid, but by another car?

Mr. Larsen: By another car.

Q. Where was this car which was proceeding in a southerly direction on Hudson County Boulevard?

The Court: It is only a suggestion: why not go through with the car on Hoboken Street. What happened to that car; did it keep going on across.

Q. What happened to the car owned by the defendant, George Roth; will you describe what happened to that car? A. He turned left and went up the Boulevard.

Q. He made a left turn? A. Went up the Boulevard.

Q. When he made this left turn and went up the Boulevard; what was the traffic light on Hoboken Street? A. It was green then.

Q. When? A. When he turned to the Boulevard.

Q. As the car owned by the defendant, George Roth, came up this hill at Hoboken Street, will you tell us what happened to the car afterwards? A. He turned left and went up the Boulevard.

The Court: That would be north?

The Witness: North.

Q. And when he made that left turn, was the light still green on the Boulevard? A. No, it was red.

Q. Had it changed just then? A. Yes, sir.

Q. And he came to a stop at the next corner? A. Yes, sir.

The Court: Can't you tell this Jury again about the course of this Roth automobile?

Mr. Larsen: The Roth automobile is that of the defendant here today.

The Court: Then it is the Roth automobile that went over the Boulevard from Hoboken Street?

The Witness: Yes, sir.

The Court: You say it came out of that street to the Boulevard?

The Witness: Yes, sir.

The Court: When it was coming the boy backed out of its way?

The Witness: Out of its way.

The Court: At the time it came on the Boulevard, the lights for traffic on Hoboken Street were what?

The Witness: Red.

The Court: So that he turned on a red light; is that right?

The Witness: Yes, sir.

The Court: Now, he made a left hand turn?

The Witness: A left hand turn.

The Court: Where was this other automobile, did you see it?

The Witness: Coming down the Boulevard.

The Court: How far was it away from the intersection?

The Witness: It was up about the next block; just about, coming down.

The Court: You say it was a block away?

The Witness: Yes, sir.

The Court: When this Roth car turned from Hoboken Street into the Boulevard?

The Witness: Yes, sir.

The Court: The other car was a block away then; is that right?

The Witness: No, it was not a block away.

The Court: State how far he was; the Court wants to know, just as the Roth car turned from Hoboken Street into the Boulevard, how far the other automobile was away?

The Witness: Just going to pass him, going down the Boulevard.

Louis Klein—For Plaintiffs—Cross.

The Court: How far was it from the north side of Hoboken Street?

The Witness: It was on the other side.

Mr. Larsen: Maybe I could indicate that.

Mr. Cox: I would like to hear this man tell his story, without being led.

The Court: What is it?

The Witness: I didn't figure how far away the other car was, whether it was right on top when he passed; both cars almost came together; one was going up and the other down.

Q. Now, Mr. Klein, when the Roth car had reached the Hudson County Boulevard, and you say the Cella boy was forced back out in the Boulevard, where was this car which was coming south on the Boulevard then? A. Right on top of him.

Q. Right on top of the boy? A. Yes, sir.

The Court: Which car passed first; which car passed the boy, the Roth car or the other automobile?

The Witness: The boy was away, a step away from the one from Hoboken and walked into the other.

Q. Walked into the Matassa car coming down the Boulevard? A. Yes, sir.

Cross examination by Mr. Cox:

Q. Mr. Klein, how fast was Mr. Roth's car coming? A. He has got to go at least——

Q. How fast was he going? A. About thirty, when it came up that hill.

Q. How far was he away from this boy when you first saw him? A. When I took note of the boy.

Q. How far was this Roth car away from the boy when you yelled? A. A few feet away from him.

Q. How many? A. Probably eight feet.

Q. About as far as I am away from you; is that right? A. That is all.

Q. The Roth car never slowed up? A. He could not slow up until he got on top of the hill.

Q. He didn't slow up until the time you yelled at the boy? A. Yelled at the boy.

Q. He kept on going and almost hit this car going south on the Boulevard? A. Yes, sir.

Q. When you yelled, the boy was about as close to the front of that car as I am to you now? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. The boy was looking north across the street? A. Yes, sir.

Q. He wasn't looking at the Roth car, was he? A. I don't know if he was looking at the car.

Q. Which way was he looking? A. He was going up to the Plank Road.

Q. Wasn't he looking either way? A. Was he looking either way?

Q. Yet when you yelled, the boy had time, standing on front of this car going thirty miles an hour to stop, take three or four steps, and the car never caught him? A. The car on the Boulevard caught him.

Q. The Roth car never struck him, although it was going thirty miles an hour, and never slowed up? A. Didn't strike him.

Q. I didn't hear what you say? A. The car didn't touch him.

Q. It never slowed up and went on out and almost hit this other car? A. Yes, sir.

Q. Isn't it true that this boy after this accident was lying about fifteen feet out from the curb on which he was standing, on the cross walk, going across the Boulevard; isn't that where he was lying after this accident? A. When I hollered?

Q. After the accident? A. After the accident, had his hand up against the car; he was—the gentleman came out of the candy store and picked him up.

Q. Wasn't he on the cross walk? A. Right on the cross walk.

Q. Isn't that where he was struck, when he was on the cross walk, about fifteen feet out from the curb? A. From the curb.

Q. You say that he was ten feet out from the curb, going across this street, when the car was only eight feet away from him; is that right? A. Yes, sir.

Q. And yet he ran from a place ten feet out from this curb, out to a place fifteen feet out from this curb on the cross walk going across the Boulevard before he was struck? A. Right; he walked into that.

Q. You are sure you saw this accident? A. I was standing on the corner, waiting to go across.

Q. Did you know the Cella boy before the accident? A. I knew the child a little.

Q. Did you go down to tell his people that you saw the accident? A. No, sir.

Q. Did you tell anybody? A. Only the cop asked me, questioned me. I was standing, I was the only one standing on the corner when it happened.

Q. Did you tell anybody you saw it? A. No.

Q. Never told anyone you saw it? A. No.

Q. I suppose you were subpoenaed, though you never told anyone that you saw it?

The Court: Are we concerned with that?

Mr. Larsen: We went over the facts yesterday the same as you went over the case with your witnesses. He said he spoke to the cop.

The Court: When did you speak to the cop?

The Witness: The cop asked me who the boy was; I told the officer the name and he asked where he lived and I told him 914 Paterson Avenue.

The Court: Since that talk have you spoken to anyone about it?

The Witness: No, sir.

Q. Never talked to anybody representing the Cellas about the case? A. No, sir.

Q. Never spoke to the lawyers? A. No; I was down here three or four times to Court but nobody showed up.

Q. You were to Court three or four times? A. I was here three times; this is the fourth time down here.

Q. You are sure that this Roth car didn't stop here until the light on the Boulevard changed? A. The light was red on Hoboken Street; when he got to the next block, it changed.

Q. When he got where? A. It changed when he turned left.

Q. You mean the light just happened to turn just as he got there? A. Yes, sir.

Q. How is it that you had time to watch this light change up here a whole block away, or two blocks away, when all this was happening right

down in front of your eyes? A. Well, I got to watch the light one block away or two blocks away to cross the Boulevard.

Q. Were you interested to see if this boy was going to be struck or what was going to happen to this boy? A. No, sir.

Re-direct examination by Mr. Larsen:

Q. Mr. Klein, you said that after the Cella boy was struck by the Matassa car, he was down near this cross walk as indicated by X?

Mr. Cox: On the cross walk.

Q. That is where he was when the Matassa car came to a stop; is that correct? A. That is right.

Q. Could you tell us whether or not the Matassa car dragged this boy along the ground after he struck the boy?

Mr. Cox: I object as leading.

The Witness: The boy was holding on with his one hand against the car.

The Court: Do you want to have that stricken?

Mr. Cox: I don't think the answer is responsive.

Q. He had his one hand against the car? A. Yes, sir.

Re-cross examination by Mr. Cox:

Q. So that there will be no confusion before this Jury; you told me on cross examination that the boy was at this position marked "X" when he came in contact with the Matassa car?

Mr. Larsen: That is not his testimony.

Mr. Cox: It was his testimony.

Mr. Larsen: When the car came to a stop his testimony was.

Mr. Cox: He didn't say that; if there is any question, I will ask Mr. Turner to read it back.

Q. Isn't that right? A. When I knew the boy was hooked up to the car, see, to the side of the car, and he was holding on with his one hand.

Q. Isn't that where he was, right where I made this "X" when he was struck by the Matassa car? A. I don't know whose car it was.

Q. The car into which he walked; isn't that where he was when he came in contact with that car? A. The car on the Bulevard, yes sir.

JOSEPH CELLA sworn for Plaintiffs:

Direct examination by Mr. Larsen:

Q. Speak up good and loudly so that His Honor and the Gentlemen of the Jury can hear you; how old are you? A. Fourteen.

Q. Where do you live? A. 50 Tonnele Avenue, Jersey City.

Q. On July 27th, 1932, where did you live? A. 914 Paterson Avenue.

Q. North Bergen? A. Yes, sir.

Q. At that time, you were 12 years old? A. Yes, sir.

Q. You were going to school at that time? A. Yes, sir.

Q. What school were you going to? A. No. 7.

Q. Number 7 school, North Bergen? A. Yes, sir.

Q. What school are you going to now? A. St. John's.

Q. Jersey City? A. Yes, sir.

Q. What grade are you in? A. Four-A.

Q. Do you remember the day of your accident, July 27th, 1932? A. Yes, sir.

Q. On that date, you lived on Paterson Avenue? A. Yes, sir.

Q. Can you tell us how far from Hoboken Street Paterson Avenue is? A. About one block.

Q. In other words, you lived one block from the scene of this accident? A. Yes, sir.

Q. The day of this accident was during the summer time and you didn't go to school then? A. No.

Q. Where were you on that afternoon, Joseph, immediately prior to this accident? A. That day I was on the corner. I was coming up on the corner of Hoboken Street.

Q. You were coming up Hoboken Street? A. Yes, sir.

Q. Can you tell us what sort of street Hoboken Avenue is? A. It is a hill.

Q. You mean that it is a hilly road? A. Up to the Boulevard.

Q. Over towards the meadows? A. Yes, sir.

Q. Can you tell us if it is a steep hill? A. It is a steep hill.

Q. Very steep hill? A. Yes, sir.

Q. You were walking up that hill? A. Yes, sir.

Q. You reached the corner of Hoboken and the Hudson County Boulevard? A. Yes, sir.

Q. Which we will call the southwest corner? A. Yes, sir.

Q. Can you tell us what sort of store is on the southwest corner? A. Delicatessen.

Q. Can you tell us whether or not there is a traffic light on that corner? A. There is a traffic light on the Boulevard, green.

Q. Can you tell us whether there is a traffic light on that particular corner? A. No.

Q. Can you tell us on what streets there are traffic lights? A. Paterson Avenue and the transfer station.

Q. And you said before that Paterson Avenue was one block south of Hoboken Street? A. Yes, sir.

Q. The transfer station is how many blocks north of Hoboken Street? A. Two.

Q. When you reached that southwest corner of Hoboken Street and the Boulevard, in which direction did you intend to proceed? A. North.

Q. North on the Boulevard? A. Yes, sir.

Q. Where did you intend to go? A. To the candy store.

Q. Can you tell us just where that candy store is situated? A. On the north; Demott. It is on Demott Street.

Q. And Demott Street? A. Is the next block.

Q. Demott is the next block north of Hoboken Street? A. Yes, sir.

Q. As you started to cross the intersection of Hoboken Street, can you tell us whether the traffic light on Hoboken Street was green or red? A. On Hoboken Street was red; the Boulevard was green.

Q. And as you started to cross Hoboken Street was traffic proceeding up and down the Boulevard? A. Yes, sir.

Q. And as you were walking across Hoboken Street, and in a northerly direction, can you tell us what happened? A. I was four feet off the curb.

Q. Just go very slowly? A. I was four feet off the curb. All of a sudden, this one car came up the street and Louis hollered "Look out".

Q. Go slowly so that the Gentlemen of the Jury and his Honor can hear you; you were walking across Hoboken Street? A. Yes, sir.

Q. How far out in Hoboken Street had you gotten? A. Four feet.

Q. And then what happened? A. All of a sudden, this car that was on top of me——

Q. This car that you are talking about, which direction did it come from? A. Up Hoboken Street.

The Court: That is from your left?
The Witness: Yes, sir.

Q. From your left up the hill? A. Yes, sir.

Q. And then what happened, how far away was it from you? A. About three feet.

Q. Can you tell us whether he was coming fast or slowly? A. He was coming fast.

Q. Can you then tell us what you did; did you try to avoid this car? A. This car was almost on top of me, and then I——

The Court: Counsel should refrain from repeating the answers.

Mr. Larsen: It is just a boy and I thought I could probably lead him.

The Court: You may have it repeated; the Court has been very tolerant with you. It is not a good habit to contract. Of course, it cannot be avoided at times.

Q. You say that the car was about three feet away from you? A. Yes, sir.

Q. Then what did you do? A. Then, when it was nearly on top of me, Louis hollered. I turned myself to avoid being killed and I went the opposite way and all of a sudden, I was hit.

Q. Meaning what way you turned? A. Around to the left.

Q. With reference to the Boulevard, where did you go? A. Across the Boulevard.

Q. You went out into the Boulevard? A. No.

The Court: What is your name?

The Witness: Joseph Cella.

The Court: Joseph, suppose you go down to the blackboard. Do you think you can show just what way you turned. Get a chair so that you can stand on it?

The Witness: I can reach it.

Q. Now, Joseph, this is the boulevard and this is north up to the transfer station, and this is south? A. To Journal Square?

Q. Yes. This is Hoboken Street, and this is the delicatessen store on the corner? A. Yes, sir.

Q. Now, can you tell us just what happened as you left that corner? A. From there, I went out; then the other car came up and I went round this way.

Mr. Cox: Indicating that he went from a point out in Hoboken Street to the north of the southerly curb line, out to a point in the

Boulevard on the southerly crosswalk; is that right?

The Court: Is that all right?

The Witness: Yes, sir.

The Court: Did you run to the crosswalk on the Boulevard?

The Witness: No.

The Court: How near the corner were you when you were struck?

The Witness: About two feet out.

The Court: In the Boulevard?

The Witness: Yes, sir.

The Court: You didn't get to the crosswalk?

The Witness: No.

Q. Immediately after the accident you were taken to the Jersey City Hospital? A. Yes, sir.

The Court: You were struck by the automobile?

The Witness: Yes, sir.

The Court: Which automobile?

The Witness: I think it was the Boulevard.

The Court: The car coming south on the Boulevard?

The Witness: Yes, sir.

The Court: What happened to you when you were struck?

The Witness: From when I was struck, I know somebody put me in a car. I was unconscious. I found myself in the hospital.

Q. Can you tell what part of your body this automobile came in contact with? A. I could not really tell you.

Q. With reference to your face? A. I think, well, on this side.

Mr. Cox: His right side.

Q. What part of your body? A. This.

Q. Your face? A. Yes, sir.

Q. You were then taken to Jersey City Hospital? A. I was unconscious then.

Q. How long were you in the hospital? A. A month and a half.

Q. When you were first brought into the hospital, Joseph, what did they do to you? A. They operated on me.

Q. They operated on you? A. Right away.

Q. Were you in bed the month and a half you were in the hospital? A. Yes, sir.

Q. On what part of your body did they operate? A. This here.

Q. Your face? A. Yes, sir.

Q. What did they do to your face? A. Sewed it up, stitches.

Q. Can you tell us how many stitches they put in your face? A. Twenty.

Q. After you were discharged from the hospital after the month and a half, what did you do? A. Went to the clinic.

Q. What clinic? A. To the Medical Center.

Q. How often did you go to the clinic? A. Three weeks.

Q. How often during that three weeks? A. Every day.

Q. Thereafter, were you again brought back to the hospital? A. Yes, sir.

Q. How long were you confined to the hospital the second time? A. Three weeks.

Q. What did they do to you when they brought you back to the hospital the second time? A. I was there for a few weeks and from there the doctor came back, my own doctor, and then he operated on me.

Q. Operated on you again? A. Yes, sir.

Q. And after you were there three weeks the second time, were you brought home? A. Yes, sir.

Q. When you got home, were you confined to bed thereafter? A. Yes, sir.

Q. Would you step down so that the Gentlemen of the Jury can examine these scars.

The Court: Let the Jury see the scar.

Q. How long did you remain away from school as a result of this accident? A. A year.

Q. One year? A. Yes, sir.

Q. Can you tell us whether this injury which you had to your face, causes you any pain to date? A. Yes, sir.

Q. Can you tell us whether it interferes with your speech? A. It interferes with my speech, and when I chew and when I lie down.

Q. Can you describe the sensation which you have when you lie down? A. Yes, sir.

Q. What is it; what happens to you? A. Shocks and pains; some pains and shocks.

Cross Examination by Mr. Cox:

Q. How do you know you were only four feet out from the curb when you heard Louis yell? A. I seen how far I was out when Louis yelled.

Q. Did you see how far you were out? A. I know I was four feet out.

Q. How do you know? A. By walking; I walked four feet out.

Q. How do you know you were only four feet out when you heard Louis yell? A. I can tell by the curb how far I was out.

Q. You were not looking at the curb, were you? How could you tell if you were not looking at the curb, you were only four feet out in the street? A. I know I was out four feet.

Q. How is it you know you were out only four feet; how close do you think this automobile was when you first saw it? A. The one that came up Hoboken Street?

Q. Yes? A. From here to there.

Q. You are indicating from where you are standing to this spot right here? A. Yes, sir.

Q. That was when you first turned your head? A. Yes, sir.

Q. Indicating about three feet? A. As I walked out, this car was coming towards me. I had twisted this way, Louis said "Look".

Q. It was only three feet away from you when you first saw it; that was before you twisted? A. Yes, sir.

Q. When you saw it, that is the way you twisted? A. Louis said "Look out", and I turned and that is all I know.

Q. Didn't you run? A. No, just turned around.

Q. You were at the crosswalk, weren't you, over here, if I understand you correctly, on Hoboken Street? A. I was there when the car came out; then I twisted this way.

Q. That is you just turned around and were struck; you were struck on Hoboken Street? A. I twisted this here way.

Q. Suppose you just stand up here. You illustrate to the Jury the way you were, and where that car was. About here? A. Yes, sir.

Q. Will you show the Jury just what you did before you were struck? A. The car was there, and then I went this here way.

Q. The car nearly struck you? A. No.

Q. He was coming all the time? A. Yes, sir.

Q. You don't know where you were when you were struck, do you? A. I know I was struck, that's all; then I was unconscious.

Q. Where had you been just before you came up Hoboken Street? A. Where had I been. I had been up to Miss Sullivan's. I was coming to the store for her.

Q. Going to the candy store for her? A. Yes, I had to go get a book for her.

Q. I thought you said you were going to the candy store? A. In the candy store, they had books there.

Q. What book? A. Love Story Magazine.

Q. A Love Story Magazine? A. Yes, sir.

Q. When did you first talk to your lawyers about this case? A. I could not tell you, but after I was hit.

Mr. Larsen: I object to that.

The Court: How is that material?

Mr. Cox: I am not asking what he said. Just when he saw them.

Q. (Question repeated) A. After I came out of the hospital. I was in the hospital a month and a half. After a while I was down at Miss Sullivan's and I think Mr. Cullum came down.

Q. He came down to talk to you when you came home from the hospital? A. Yes, sir.

Q. That was about the second time you came out of the hospital, was it? A. Yes, sir.

Q. You told him then just what happened? A. Yes, sir.

Q. How long did he talk to you? A. About fifteen minutes.

Q. Asked you all the questions about how this happened? A. Yes, sir.

Dr. William J. Arlitz sworn for plaintiffs:

Direct examination by Mr. Larsen:

Q. You are a licensed and practicing physician and surgeon of the State of New Jersey? A. I am.

Q. You have been for how long? A. About forty odd years.

Mr. Cox: I will admit the doctor's qualifications.

Q. Did you have occasion to examine the plaintiff, Joseph Cella, in this case? A. I did.

Q. When was that examination made? A. The 27th of last month.

Q. Where was this examination made? A. At my office.

Q. Will you describe to the Court and Jury just what you found this boy suffering from? A. I found a boy whose general resistance was considerably below the average, a boy who had heart disease that was of long standing, and was not due to this accident. I found that he had a scar on the side of his face, which was approximately three and a quarter inches long. This scar was

crescent shaped and it extended down into the angle of the mouth on the left side. As a result of that scar, which is a noticeable cosmetic defect, he has some difficulty in enunciating, some difficulty in puckering his mouth, especially when he smiles the contraction of that side of the mouth is quite evident. The same thing occurs to a lesser extent when he attempts to whistle. In other words, he had a very bad scar, which has resulted in the symptoms that I have mentioned and which is the result of an extensive lacerated wound.

Q. In your opinion, is that scar permanent? A. Yes, sir, it is.

Q. Is that scar disfiguring? A. It is quite evident. It does not require expert opinion to see that, or speak about it.

The Court: Doctor, what is the color of that scar?

The Witness: The scar is still quite red and quite livid when I saw it. It is a scar which is crescent shaped, which commences on the left side.

The Court: Just show the jury, doctor?

The Witness: It commences here and extends down for a distance of approximately 3¼ inches; then there is another scar which is about 1¼ inches long which extends into the angle of the mouth. Now, the defect that this produced is especially noticeable when he smiles. Go ahead and smile; laugh. It draws up that side of his face. Now, whistle.

The Court: About the color, doctor; will that color remain?

The Witness: Like all scars in young

people, that scar will gradually grow whiter in color.

The Court: It won't be as noticeable?

The Witness: No, but the contraction will always remain.

The Court: The contraction would produce what in the way of facial presentment, you might say, or appearance?

The Witness: Distortion when he attempts to smile.

The Court: And when in repose?

The Witness: I think that that is quite noticeable when he is in repose. It is drawn up, and pushes that side of the face, and the fullness of the cheek is not now in evidence; that normally is in evidence. In other words, there is no material physical disability as a result of this injury. It is rather a scarring, a cosmetic defect.

The Court: Then it is a disfigurement?

The Witness: He has difficulty in enunciating, the change in the facial expression and the hollowness of the cheek.

The Court: Is that a keloid scar?

The Witness: It is not, sir.

The Court: Would this injury have anything to do with his heart condition?

The Witness: I think not. I think his heart condition has been in existence for a long while, and his heart condition may be a factor that is responsible for his poor resistance. In other words, he is a sick boy, and like all children of that type, when they are traumatized, they do not respond to treatment as readily and as quickly as a normal child.

Mr. Cox: No questions.

MRS. ADELINA CELLA sworn for the Plaintiff:

Direct examination by Mr. Larsen:

Q. Are you the mother of Joseph? A. Yes, sir.

Q. Is your husband living? A. No, sir.

Q. You are a widow? A. I am a widow five years.

Q. You didn't see this accident, did you? A. No, sir.

Q. What is the first thing that you knew with reference to this accident? A. I was waiting for the return of my oldest daughter from her honeymoon. I was sitting in the front room, waiting for her to come down the street when the officer came down and suddenly I heard my bell ring. I went down. It was the officer to give me the news.

The Court: What she was told by the police officer will be stricken.

The Witness: The officer gave me the notification that he was struck and brought to the hospital. He took me down; when I got down, he had the last rites of the Church. Then a stranger came in and they took——

Mr. Cox: I object.

The Court: That is not material.

Q. You saw Joseph at the hospital? A. Yes, sir.

Q. Was he in bed? A. Yes, he was in bed, getting ready to go up to the operating room.

Q. Did you go to see Joseph at the hospital thereafter? A. Every visiting day.

The Court: Is that material?

Q. How long was he in the hospital the first time? A. A month and a half.

Q. He was then brought home? A. Brought home.

Q. How long was he home then? A. About three weeks.

Q. Were you treating him? A. No, I had to go down to the clinic every day.

Q. For how long? A. About three weeks.

Q. Thereafter was he brought back again? A. He had to remain in the hospital for another period of time.

Q. How long was Joseph obliged to remain away from school? A. A whole year.

Q. Is this the hospital bill that you received? A. Yes, sir.

The Court: Does your adversary agree that it is reasonable?

Mr. Cox: Yes.

Mr. Larsen: $350.50.

Mr. Cox: No questions.

Testimony for Defendant.

(Plaintiff Rests)

Mr. Cox: I want to read into evidence the fifth paragraph of the complaint. The summons was issued on the 16th of September 1932; according to the bill of particulars the boy returned from the hospital on September 6th 1932.

Mr. Larsen: I object to the reading unless there is also read into the record the amendment to the fifth paragraph.

The Court: He can't read both at the same time. What your adversary does not supply, you may supply.

Mr. Cox: (Reading) When the automobile owned and operated by the defendant Vincenzo Matassa had reached the intersection of Hoboken Street, the automobile which was owned and being operated by the defendant George Roth in an easterly direction on Hoboken Street failed to come to a stop when it reached the intersection of the Hudson Boulevard in compliance with the traffic signals which were stationed on the Hudson Boulevard, but continued out in the said Hudson Boulevard, causing the automobile owned and operated by the defendant Vincenzo Matassa to swerve to the left towards the center line of said Hudson Boulevard and strike the plaintiff Joseph Cella, who was lawfully upon the cross walk on the westerly side of Hudson Boulevard, at the said intersection of Hoboken Street at a point at or near the center line of the said Hudson Boulevard.

GEORGE ROTH sworn for the defendant.

Direct examination by Mr. Cox:

Q. Mr. Roth, where do you live? A. 528 37th Street, Woodcliff.

Q. Where did you live in July 1932? A. Same place, same address.

Q. On July 27th 1932, were you driving a car east on Hoboken Street or Hoboken Avenue? A. On Hoboken Street.

Q. What kind of a car were you driving? A. Ford coupe.

Q. Can you tell us the condition of Hoboken Street, to the west of the Boulevard as to whether it is level or up hill or down hill? A. It is up hill to come up to the Boulevard.

Q. As you came up to the Boulevard, did you see anyone crossing on the crosswalk going from this corner to the southwest corner of the Boulevard? A. The crossing was absolutely clear.

Q. What did you do when you came to the Boulevard? A. Made a stop, dead stop.

Q. What color were the lights for traffic on the Boulevard as you got to it? A. Green.

Q. What color were the lights for traffic on Hoboken Street? A. Red.

Q. How long did you remain standing there? A. Possibly standing there for two minutes.

Q. During the time that you were standing there, did you see the accident happen? A. I did not.

Q. Did you see a car stop? A. No, sir; a car was coming, going south, a Ford, going south, and the car stopped.

Q. On which street? A. On Hudson Boulevard.

Q. How far out in the street? A. Right in the middle of the Boulevard.

Q. You mean out towards the center of the street? A. Out to the center of the Boulevard.

Q. Did you see that car at any time stop? A. I saw him stop after he passed the curb about 25 feet.

Q. What did you see the people in the car do? A. One fellow jumped right out and picked up the child who was lying between the sidewalk and the middle of the Boulevard.

George Roth—For Defendant—Cross.

Q. Whereabouts was he lying, between the sidewalk and the Boulevard? A. Right in the walk, right across the walk.

Q. By the crosswalk, which one of the crosswalks do you mean? A. I mean where the delicatessen is on the southwest.

Q. That is which corner? A. That corner.

Q. This corner (indicating)? A. No.

Q. Which corner, this one? A. The other.

Q. Indicating the southerly crosswalk? A. Ask me that question once more, where the child was picked up, the crosswalk from the delicatessen store the right side of Hoboken Street coming up, crossing east from west.

Q. How far out from the westerly curb, out in the street, was the boy lying when he was picked up? A. About 12 to 15 feet, I should judge.

Q. After the lights changed, where did you then go? A. I turned to my left and went up.

Q. Went up in this direction? A. Yes, sir.

Q. Was this boy at any time in front of your car? A. No, sir.

Cross examination by Mr. Larsen:

Q. What business are you in? A. Butcher business.

Q. Where were you coming from on this day? A. From Grand Avenue, North Bergen.

Q. Where had you been prior to this accident? A. On Grand Avenue, to one of my customers.

Q. Where were you going? A. Going towards the Boulevard, to another customer.

Q. On the Boulevard? A. Turning north.

Q. Did you have a lot of deliveries? A. No other delivery.

Q. You say that your car was stopped at this red light for two minutes; is that correct? A. Approximately two minutes. I could not tell you; I stayed there until everything was over.

Q. Hoboken Street is a very steep hill, leading in to the Boulevard, isn't it? A. Right.

Q. And it is necessary to come up that hill at a high speed, isn't it? A. Not necessarily.

Q. What speed did you come up the hill? A. Approximately 15 to 20 miles speed.

Q. Were you in high or second gear? A. Second gear.

Q. How far from the westerly curbline of the Boulevard were you when you came to a stop? A. The westerly curb?

Q. From the curbline, how far? A. I was in the middle of the street, the middle of Hoboken Street; right in the middle of Hoboken Street.

Q. How far from the Boulevard? A. Right on the corner of the Boulevard, even with the sidewalk.

Q. Even with the Boulevard? A. The sidewalk.

Q. You are sure you didn't come out into it? A. Yes, sir.

Q. You came to a stop and waited there for two minutes? A. Yes, sir.

Q. When was the first time you saw this Cella boy? A. The first time I saw him falling on the curb, on the pavement.

Q. The first time was when he was falling? A. On the pavement.

Q. Did you see him before he fell? A. No, sir, didn't see him before.

Q. Even though you were there two minutes, you didn't see him before? A. No, sir.

Q. Where was he, was he walking? A. I haven't seen the boy walking; I only saw the boy fall.

Q. You didn't see him walking; you just saw him fall? A. Fall, yes, sir.

Q. After he fell, the light changed? A. Yes, sir.

Q. You didn't make any attempt to come to his assistance; as soon as the light changed, you proceeded north on the Boulevard? A. There was nobody to assist, because the other car hit the child, and they jumped right out of the car, within a second and picked up the child and went right off. There was nobody to assist.

Q. You didn't stop? A. I did stop, for two minutes. This happened in less than a minute; the car went away with the child. There was nobody there to ask, nobody to tell, nothing; and then, when everything was off, I drove away.

Q. You are positive that you didn't come up Hoboken Street and attempt to make a left turn into the Boulevard; you are positive of that? A. As to what?

Q. You are positive that you didn't come up Hoboken Street and make a left turn into the Boulevard without stopping? A. I did come up Hoboken Street. When I saw the light, the light was red and I stopped.

Q. Before you said you came to a dead stop? A. Yes, sir.

Q. What do you mean by that? A. Just a dead stop. I didn't move; just a standstill.

Q. You were coming up this steep hill at 12 to 15 miles an hour? A. As I said before, about that, about 15 or 20 miles, if I am not mistaken, in second gear.

Q. You are positive of that? A. Yes, sir.

Q. Did you see Mr. Klein standing on the sidewalk? A. No.

Q. Nobody around that vicinity at all? A. After that, when the child was picked up, I saw some people there, maybe one or two, but I don't recall who they were or what they were.

Mr. Cox: That is the defendant's case.

The Court: Is there any appearance for Matassa, the other defendant.

Mr. Larsen: The other defendant was not served.

(Both sides rest.)

(Counsel summed up to the jury.)

CHARGE.

The court then charged the jury as follows:

Gentlemen of the jury: Joseph Cella, the infant plaintiff, brings this suit by his next friend, Adelina Cella, and Adelina Cella sues individually. You have two plaintiffs and they are both suing one defendant, George Roth.

The other defendant, Matassa, that is mentioned on the papers was not served. Evidently Matassa was the man that was operating the automobile on the Boulevard that is alleged to have struck Joseph Cella. Matassa has not been served and he is not before you. Your concern then, is between the claims of these two plaintiffs, mother and son, against one defendant, George Roth.

It is charged in the pleadings that on the 27th day of July, 1932, that Roth was operating his automobile in an easterly direction on Hoboken Street in the township of North Bergen, and that about that time the infant plaintiff was, according to the amended pleading, in the act of crossing,

or was about to cross the street known as Hoboken Street from the south to the north side thereof, and that while in the act of doing so, it is alleged that Roth operated his automobile in a careless and negligent way so that the infant Cella in attempting to avoid the oncoming car that is alleged to have been operated negligently by Roth, that Cella was injured by going into the way of another car.

Joseph Cella, the boy, seeks to recover for pain and suffering he has endured and injuries that he has sustained. His mother seeks to recover for the expenses that she incurred or moneys expended in endeavoring to cure her son.

The defendant denies the allegations of negligence and charges that Joseph Cella, the infant plaintiff, contributed to his own injury. It is further claimed by way of separate defense that if Cella was injured it was due to the act of someone else over which the defendant Roth had no control.

Those are the issues that are presented for your determination. Now, there is left for you an application of the testimony adduced here to those issues, and in applying that evidence, bear in mind the rule that you have heard charged to you time and again in cases of this kind that the burden of proof is upon the plaintiff to prove his case by the greater weight of the evidence; that means that he must not only prove the charges as in this case in order to recover under the rule, proving that Roth was negligent, but he must prove that item or factor by the greater weight of the evidence.

In this case it seems to the court, though you may find otherwise, that you may have more difficulty in finding out what the proximate cause of

the injury was. This case as the court sees, requires a careful application of the rule. Here is a case where a man is charged with being negligent, and the fact is conceded that his automobile did not strike this plaintiff. Nevertheless he is charged with being responsible for the injuries.

Now, in order for you to find that Roth should be held liable in damages, you should first find that he was negligent. Then your duty does not conclude or end there. The plaintiff is obliged under the law to prove that the defendant's negligence was the proximate and natural cause of the injury sustained. So that you see, under that rule, what was the natural and proximate cause should be well considered in this case. If it was through the negligence of Matassa, or whoever the other defendant or driver was, and not through the negligence of Roth that this boy was injured, of course Roth should not be held for someone else's negligence. Nor is Roth to be held if you find by the greater weight of the evidence that this boy's injury was caused proximately and naturally by his own negligence or carelessness, or that he contributed in some way to his own injury.

There are two separate defenses as the court has mentioned, and in order for the defendant to be served with a verdict or receive a verdict according to those defenses, he is obliged to prove them by the greater weight of the evidence. Now, what are those defenses:—generally stated they are that this boy contributed to his own injury. In order for the defendant to be sustained on that defense, he must prove that defense by the greater weight of the evidence. Now, that brings into consideration what conduct was required of

this boy in crossing that street. The law required that this boy, who evidently was about twelve years of age, to use the degree of care and caution that a child of his age, mentality and understanding would use. He is not held to the same accountability and conduct as an adult would be, but rather to that conduct that a child of his mentality and understanding would exercise. What would be the reasonable conduct of a child of his standing and his mental capacity in crossing the street? Did he do the thing that a child of that degree of intelligence would have done, or did he omit to do the thing that a child of that degree of intelligence would have done? If he omitted to do something that he should have done under that degree of care, and thereby contributed to his own injury, and you believe that by the greater weight of the evidence, the boy cannot recover; or, if he failed to do anything that he should have done, as a child would in the exercise of reasonable care as expected from a boy of his age and understanding, and he thereby contributed in some way to his own injury, and you believe that by the greater weight of the evidence, he cannot recover.

If you come to the conclusion by the greater weight of the evidence that it was the negligence of this third party referred to by the court as Matassa, that is, the operator of the automobile on the Boulevard, going south, and you come to that conclusion, that it was his negligence that caused the boy's injury, you should not hold Roth.

If you come to the conclusion that this was an accident, something against which the exercise of reasonable foresight and care could not have prevented, why Roth could not be held.

Charge.

The law required Roth, as the operator of an automobile, to use that degree of care and caution that a reasonably prudent man would exercise under the time, place and circumstances. What would a reasonably prudent man do in coming from the side street or intersecting street known as Hoboken Street; what would he do under the circumstances? Would he have seen this boy, and if he would, what would his conduct then be? What were the signals and the traffic lights that obtained or were in operation on that day. What would a man do who was coming into the Boulevard under all these circumstances? Did Roth do those things that a reasonably prudent man would have done? If he did, you cannot hold him liable. On the other hand, if you find that he did not and you believe that by the greater weight of the evidence and that his act of commission or omission, if you find it was one of negligence, and that it was the proximate and natural cause of this boy's injury, and you believe that by the greater weight of the evidence, you may find a verdict against Roth, provided you do not find that this boy contributed to his own injury or that the negligence of someone else was the cause of the injury alleged to have been sustained.

If you come to the conclusion, therefore, that the verdict should go in favor of the defendant, your verdict should be "no cause for action."

If you find a verdict in favor of the infant plaintiff, to be consistent, you should bring one in for the mother. The mother's recovery in this case is limited, as the court sees it, to the hospital bill. It may be that you would find the hospital is too large. The court does not know; it is for

your determination. However, that seems to be the limit of the recovery.

Now, the boy's recovery, if he is to receive one at your hands, in the nature of a verdict, a money verdict, should represent what would compensate him or award him, rather, for the injuries sustained by the boy, as well as the pain and suffering endured and the injuries sustained including the disfigurement that evidently had resulted in this case. The court is not saying that this disfigurement resulted from Roth's negligence; that is for you to find.

But if you find that Roth is liable, you may include in your verdict an item for the disfigurement. A person is entitled, if they are entitled to recover, and this boy is that sort of a person, just compensation for all of the injuries sustained and that includes cosmetic defects, the humiliation of having a disfigurement and scars on the face as distinguished from an unscarred or natural countenance as the Lord gave it to him. The amount that you find in any event should not be unreasonable. It should be one that is founded and grounded and based and supported by the testimony adduced and by the greater weight of the evidence.

You are not obliged to speculate on anything in this case. The burden is upon the plaintiff to prove all of his charges as well as the amount of damages that he seeks to recover, by the greater weight of the evidence.

I know of nothing else to charge you men with except to say this: the mere fact that this woman is a widow and that the boy is the boy that he is, is not to excite your sympathy, nor on the other hand are you to have any sympathy, passion or

prejudice for Roth or anyone else in the case. Decide the case according to the oath that you have taken; decide it impartially; decide it justly and honestly upon the evidence that has been adduced and not upon matters of emotion.

REQUESTS AND EXCEPTIONS TO CHARGE.

Are there any exceptions to the court's charge?

Mr. Cox: I would like your Honor to charge as to the defendant proving both defenses set up by the greater weight of the evidence, the one defense that the accident was due to the negligence of a third party over whom this defendant had no control, that that is in the nature of explanation rather than as a defense.

The Court: Then you withdraw it? It is a separate defense that you charge that it was the negligence of someone else.

Mr. Cox: It is explanatory and I withdraw it.

The Court: If you withdraw it, that defense is out of the case.

Mr. Cox: May I withdraw it with the stipulation that we still contend it was the fault of the other man?

The Court: You can't have the benefit of the defense and then withdraw it.

Mr. Cox: Then I will have to let it stand.

The Court: You will understand, gentlemen of the jury, as the court has heretofore explained to you that if you find from the testimony in this case that the defendant in this case has proved to your satisfaction by the greater weight of the evidence any of the affirmative defenses alleged, that is to say the one of contributory negligence on the part of the boy, or the one that it was the fault of some-

one else, you may return a verdict in favor of the defendant.

Mr. Cox: May I have an exception to that part of your Honor's charge in which your Honor charges that the defendant must prove by the greater weight of the evidence that the accident was due to the negligence of a third party over whom the defendant had no control on the ground that it is throwing upon the defendant the burden of proving himself free from negligence by the greater weight of the evidence.

The Court: That may be the effect of it. If you are going to blame someone else for it, you have certainly to prove it. You may have your exception.

JOSEPH CELLA, by his next friend, ADELINA CELLA, and Adelina Cella, individually,
Plaintiffs,
vs.
GEORGE ROTH,
Defendant.

Action at Law.
POSTEA.

This case was tried before Judge Thos. Brown and a jury at the Hudson Circuit on Feb. 16, 1934. The jury rendered a verdict in favor of plaintiff Joseph Cella by his next friend Adelina Cella and against defendant George Roth in the sum of $2400.00 and a verdict in favor of Adelina Cella individually and against the defendant George Roth in the sum of $350 plus costs.

THOS. BROWN,
Circuit Court Judge.

JUDGMENT.

NEW JERSEY SUPREME COURT.

JOSEPH CELLA, by his next friend, ADELINA CELLA, and Adelina Cella, individually,
Plaintiffs,
vs.
GEORGE ROTH,
Defendant.

Action at Law.
ON POSTEA.
PAUL F. CULLUM, Attorney.

$2400.00	Jos. C.
350.00	A. C.
2750.00	
70.83	
$2820.83	

Judgment entered this twenty-sixth day of February, A. D. nineteen hundred and thirty-four. Against the defendant and in favor of Joseph Cella, by his next friend Adelina Cella, plaintiffs, for the sum of two thousand four hundred dollars damages, and in favor of Adelina Cella, individually, plaintiff, for the sum of three hundred and fifty dollars damages and seventy dollars and eighty-three cents costs.

THOMAS J. BROGAN,
Chief Justice.

CLERK'S CERTIFICATE.

I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the Judgment entered in the above-stated cause, which said Judgment is recorded in this office in Vol. 49 of Judgments, page 543.

In testimony whereof I have set my hand and the seal of said Court at Trenton this nineteenth day of April A. D. nineteen hundred and thirty-four.

Fred L. Bloodgood,
Clerk.

(seal)

New Jersey Court of Errors and Appeals

JOSEPH CELLA, by his next friend, ADELINA CELLA, and ADELINA CELLA, individually, *Plaintiffs-Appellees,* *v.* GEORGE ROTH, *Defendant-Appellant.*	Action at Law. On Appeal from the New Jersey Supreme Court.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT.

Statement of Facts.

This is an appeal to the New Jersey Court of Errors and Appeals from a judgment entered in the New Jersey Supreme Court on a verdict returned in the Hudson County Circuit in favor of Joseph Cella, by his next friend, Adelina Cella, for $2400. and in favor of Adelina Cella, individually, for $350., plus costs of $70.83.

There was a substantial conflict between the version of this accident offered on behalf of the plaintiff at the time of trial and the version of this accident offered on behalf of the defendant, and we are, therefore, setting forth in the Statement of Facts the claims of both the plaintiffs-appellees and the defendant-appellant.

It was agreed by both the plaintiffs and the defendant at the time of the trial of the case that on July 27, 1932, the infant plaintiff, Joseph Cella,

was struck by an automobile owned and operated by Vincenzo Matassa, which at the time of the accident was proceeding in a southerly direction on the Hudson Boulevard in Jersey City, having just crossed the intersection of Hoboken Street.

The original complaint filed on behalf of the plaintiffs-appellees on September 16, 1932, alleged that the infant, Joseph Cella, at the time of the accident was crossing the Hudson Boulevard from west to east on the southerly crosswalk of Hoboken Street, and that he was struck in the center of the Hudson Boulevard by the automobile of Matassa while it was being operated in a southerly direction. (See paragraph 5 of the First Count of the summons and complaint, S. C. page 6; see also S. C. page 41, line 4.)

It was also the contention of the appellant in this case that the injured boy was crossing from the west to the east side of the Hudson Boulevard on the southerly crosswalk at the time that he was struck by Matassa's car, and the defendant-appellant's version of the accident is that at the time that the accident occurred the defendant-appellant's automobile was at a standstill on Hoboken Street on the westerly side of the Hudson Boulevard, facing east. It was the defendant-appellant's contention that the accident was caused by the negligence of the driver, Matassa, and that he in no way contributed to the happening of the accident.

At the time of the trial it appeared that Matassa had not been served with a summons and complaint according to the statement of the plaintiffs' attorney. The plaintiffs' attorney thereupon moved to amend the summons and complaint to allege that the boy was crossing Hoboken Street from south to north, rather than crossing the Hudson Boulevard from west to east, and to further

allege that the defendant came toward the boy at a fast rate of speed, causing the boy to run out into the highway and be struck by the automobile of Matassa. (See S. C. page 12, bottom of page, page 13, and page 14.)

At the time of trial the boy testified to the facts of the amended complaint as to how the accident happened, and was supported in whole or in part by a witness called by the plaintiffs.

The defendant-appellant, in order to clarify the answer filed by him and prevent any surprise to the plaintiff at the time of trial as to what his defense to the action was, included in his answer a Second Separate and Distinct Defense, which read as follows:

> "The alleged accident was due to the negligence of a third party, over whom this defendant had no control and for whose acts he is not responsible."

It is the defendant-appellant's contention that the Judge's charge in connection with the matter set forth in the Second Separate and Distinct Defense was in error and that that error was prejudicial to the defendant's case.

POINT I.

The charge of the Trial Court was erroneous for the reason that it was prejudicial to the Defendant-Appellant.

Under this point it is the appellant's intention to argue the First and Second Grounds of Appeal together inasmuch as both grounds of appeal set forth the same legal error committed by the Trial Judge in his charge to the jury.

As has already been pointed out in the Statement of Facts, the answer filed on behalf of the defendant, George Roth, contained the Second Defense which we set forth:

> "The alleged accident was due to the negligence of a third party, over whom this defendant had no control and for whose acts he is not responsible."

In commenting upon the Second Separate and Distinct Defense in his charge the Trial Judge charged the jury as follows (S. C. page 2, line 25, et seq.; S. C. page 48, line 30 et seq.; S. C. page 52, line 32 et seq.):

> "There are two separate defenses, as the court has mentioned, and in order for the defendant to be served with a verdict or receive a verdict according to those defenses, he is obliged to prove them by the greater weight of the evidence. * * *
>
> "If you come to the conclusion by the greater weight of the evidence that it was the negligence of this third party referred to by the court as Matassa, that is, the operator of the automobile on the Boulevard, going south, and you come to that conclusion, that it was his negligence that caused the boy's injury, you should not hold Roth.
>
> "You will understand, gentlemen of the jury, as the court has heretofore explained to you, that if you find from the testimony in this case that the defendant in this case has proved to your satisfaction by the greater weight of the evidence any of the affirmative defenses alleged, that is to say the one of contributory negligence on the part of the boy, or the one that it was the fault of someone else, you may return a verdict in favor of the defendant."

We submit on behalf of the defendant-appellant that the Trial Judge was in error in this portion

of his charge inasmuch as the legal effect of his charge was to place upon the appellant the duty of proving that the accident was due to the negligence of a third party, over whom he had no control and for whose acts he was not responsible by the greater weight of the evidence. The law casts no such duty upon the defendant-appellant, for the plaintiff at all times had the burden of proving by the greater weight of the evidence that the infant plaintiff was injured as a proximate result of the negligence of the defendant-appellant, and he did not have to show by the greater weight of the evidence that it was due to the negligence of someone else.

The charge, as given, imposed a duty upon the defendant-appellant greater than that required by law, and, therefore, was, in this respect, prejudicial to the defendant-appellant's side of the case.

Hughes v. *Atlantic City, etc. Railway,* 85 N. J. L. 212 (E. & A. 1914); *Migliaccio* v. *Public Service Railway Company,* 101 N. J. L. 496 (Sup. 1925), affirmed 102 N. J. L. 442 (E. & A. 1926); *Kresse* v. *Metropolitan Life Insurance Company,* 111 N. J. L. 474 (E. & A. 1933).

It is true that in another portion of the charge, the trial judge correctly stated the rule which requires that the plaintiff prove his case by the greater weight of the evidence (S. C. page 47), but this statement of the law does not cure the error in the portion of the charge which the defendant-appellant challenges in this appeal, for the reason that it is impossible to tell whether the verdict of the jury might not have been the result of the erroneous portion of the charge. *McLaughlin* v. *Damboldt,* 1 Misc. 510 (Sup. 1923), (not officially reported).

In *Nemecz* v. *Morrison and Sherman, Inc.,* 109 N. J. L. 517, the judgment of the New Jersey

Supreme Court was reversed because the trial judge erroneously charged that the burden of proof in that case shifted from the plaintiff to the defendants, and because the trial judge failed to correct the error in his charge when it was pointed out to him by counsel. In attempting to correct his charge, the trial court further charged.

> "What the court intended to say was that the burden of proof ordinarily is upon the plaintiff to prove his case by a preponderance of the evidence, but in this case if the defendants set up certain facts in justification of their position, the burden of proof is upon them to prove the truth of those facts which they would set up in their defense. Of course, the burden of proof never does shift in those cases from the plaintiff which is always incumbent upon him in the proving of his case."

In passing upon this, Judge Kays, speaking for the Court of Errors and Appeals, said,

> "We think this charge was erroneous and that the court after the original charge to the jury did not correct the previous error which it had made in the charge."

We submit, on behalf of the defendant-appellant that the error in the charge of the trial court in this case was not cured by another correct statement in the charge, that it was prejudicial and, therefore, that there is ground for reversal of the judgment below.

POINT II.

The charge of the Trial Court was erroneous for the reason that it imposed upon the Defendant the burden of proving the second separate defense of his answer.

Under this point the appellant will again argue the first and second grounds of appeal, inasmuch as both grounds of appeal set forth the same legal error complained of under this point.

The portion of the charge urged by the appellant as erroneous necessarily implies, that because the defendant set up by way of separate defense, that a third party was responsible for the accident, the defense was affirmative, and that, therefore, the defendant had the burden of proving it. The charge is, in effect, a statement that every separate defense is affirmative. In his own words, the trial judge charged,

> "There are two separate defenses, as the court has mentioned, and in order for the defendant to be served with a verdict or receive a verdict according to those defenses, he is obliged to prove them by the greater weight of the evidence."

Such a generalization is clearly too broad. Furthermore, it is not in accord with well-settled precedent.

In *Dewees* v. *Manhattan Insurance Company,* 34 N. J. L. 244, at page 253, Mr. Justice Depue, speaking for the court stated that,

> "A special plea alleging facts which will maintain the defense under the general issue, does not necessarily amount to the general issue."

In so holding, the court must necessarily have assumed that the converse was also true, namely, that matter of defense which is pleaded by way of special plea, may be a defense of which the defendant could avail himself under the general issue.

In *Kresse* v. *Metropolitan Life Insurance Company,* 111 N. J. L. 474, (E. & A. 1933), which was an action brought by the beneficiary on a life insurance policy, the defendant set up death by suicide by way of separate defense, and it was held error to charge that the defendant had the duty to prove it. Nevertheless, it was held that the trial court committed reversible error in charging that the burden of proof, that the deceased came to his death by suicide, rested upon the defendant.

Thus, it is clear that the trial judge did not follow the law of this State when he charged that the defendant had the burden of proving that a third party was responsible for the injuries which the plaintiff in this case received.

In other jurisdictions the precise question raised by this appeal has been passed upon and decided in favor of the position of the appellant in this case.

In *Mt. Ida School for Girls* v. *Kerr,* 154 Atl. 565 (R. I. 1931), the plaintiff brought an action on a contract. The defendant pleaded the general issue and by way of special plea, false representations inducing the defendant to enter into the contract. The Supreme Court of Rhode Island recognized that the special plea was merely a special plea of matter in defense which amounted, in effect, to the general issue. Therefore, it held that the filing of this special plea did not change the burden of proof on the main issue, namely, of the right of the plaintiff to recover on its contract.

To the same effect are the following decisions: *City of Key West* v. *Baldwin,* 69 Fla. 136, 67 So. 808 (1915); *Bay Shore Development Company* v. *Bonfoey,* 75 Fla. 455, 78 So. 507 L. R. A. (1918) D 889; *Schmitz* v. *Matthews,* 133 Wash. 335, 233 Pac. 660 (1925), and see *Rice* v. *Patterson,* 92 Miss. 666, 46 So. 255 (1908).

We further submit, on behalf of the defendant-appellant, that the matter set forth in the second separate defense does not constitute an affirmative defense. Under the practice in this State, as we understand it, the defendant is required to set up, by way of affirmative defense, only such defense as is consistent with the truth of the material allegations of the complaint and any defense which, if not stated, would be likely to cause surprise or would raise issues not arising out of the complaint.

It is submitted that the plaintiff in this case had the burden of proving the defendant's negligence, and that the defendant's negligence was the proximate cause of the injuries which the plaintiff received. Therefore, the defense that a third party was responsible for the accident, coupled with a denial that the defendant was responsible for the accident, constituted matter which was put in issue by the allegations of the complaint and the denials in the defendant's answer.

The Supreme Court of Connecticut, in the case of *Miller* v. *Pierpont,* 87 Conn. 406, 87 Atl. 785, has laid down a practical test of what constitutes new matter. There, it is held that anything which may be proved under a general denial is not new matter and as to this, the defendant does not have the burden of proof.

In the case of *Peacock, et al.* v. *Detroit, etc. Railway Company,* 208 Mich. 403, 175 N. W. 580

(1919), the Supreme Court of Michigan had presented before it a defense analogous to the second separate defense of the defendant in this case. In the Michigan case the plaintiff owned land adjacent to the defendant's railroad tracks. Sparks from locomotives passing by the plaintiff's property set fire to the plaintiff's fruit trees and the plaintiff brought an action for damages against the railroad company. However, the railroad, at that time, was being operated by the Director General of Railroads and his agents. The defense of the railroad was that the damages sustained by the plaintiff were caused by the acts of a third party. Speaking of that defense, the court said at page 582, in 175 N. W.,

> "The defense of the railroad company, that it had committed no negligent acts resulting in damage to the plaintiff, that any negligent acts proven were the negligent acts of the agents of the Director General of Railroads, was not an affirmative defense under Section Two of the Circuit Court Rule 23, nor would such defense be likely to take the plaintiff by surprise."

It is submitted that the same rule should be applied in this case and that this rule is in accord with the recognized practice of the courts in this State.

Finally, we wish to point out, on behalf of the defendant-appellant, that the purpose in setting up the second separate defense in the answer was not to raise a new issue, for the matter therein alleged was already in issue by the denials in the answer, but the purpose was solely to fully apprise the plaintiff of the manner in which the defendant intended to present his case at the time of trial.

In conclusion, therefore, we submit that the trial judge was in error when he charged that the defense that a third party was responsible for the accident was an affirmative defense, and that he was in error in charging, in effect, that because the defendant set this up by way of separate defense, that, therefore, it constituted an affirmative defense.

For the reasons hereinbefore mentioned in this brief, it is respectfully submitted that judgment of the Supreme Court should be reversed.

COX AND WALBURG,
Attorneys for Defendant-Appellant.

WILLIAM H. D. COX,
Of Counsel.

New Jersey Court of Errors and Appeals

JOSEPH CELLA, by his next friend, ADELINA CELLA, and ADELINA CELLA, individually, *Plaintiffs-Appellees,* *v.* GEORGE ROTH, *Defendant-Appellant.*	Action at Law. On Appeal from the New Jersey Supreme Court.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLEES.

Statement of Facts.

The plaintiffs instituted an action in the New Jersey Supreme Court, Hudson County Circuit, against George Roth and Vincenzo Matassa to recover damages for injuries sustained by the infant plaintiff, Joseph Cella on July 27, 1932. The mother of Joseph Cella, the plaintiff, Adelina Cella, sued to recover expenditures necessarily incurred as the result of her son's injuries.

The defendant Vincenzo Matassa was not served with the summons and complaint, and the case came on for trial against the defendant, George Roth, and a verdict was returned against him for the sum of $2400.00 in favor of Joseph Cella, by his next friend, Adelina Cella and the sum of $300.00 in favor of Adelina Cella, individually.

The facts, as alleged in the amended complaint and supported by testimony introduced at the trial,

are that the defendant George Roth was operating his automobile in an easterly direction on Hoboken Street, in the Township of North Bergen and that the infant plaintiff was crossing Hoboken Street from the south to the north side thereof, at the westerly side of the Hudson Boulevard. That the defendant Roth negligently drove his automobile toward the infant plaintiff at a fast rate of speed. causing the boy to run out into the Hudson Boulevard to avoid being struck by him, and that as a result of this negligence, the infant plaintiff was struck by the automobile of Matassa, which was proceeding in a southerly direction on the Hudson Boulevard.

The defendant Roth filed an answer in which he set up two Separate and Distinct Defenses, as follows:

> First Separate and Distinct Defense.
>
> The infant, Joseph Cella, was guilty of negligence, which was a proximate cause of the alleged accident, in that he entered upon and attempted to cross the public highway without making proper observations for his own safety; without giving any warning or indication of his intention to do so; in that he failed to cross at a place set apart for pedestrians, and in that he crossed against a traffic signal.
>
> Second Separate and Distinct Defense.
>
> The alleged accident was due to the negligence of a third party, over whom this defendant had no control and for whose acts he is not responsible.

The defendant-appellant contends that the Judge's charge with reference to the above separate defense was erroneous and prejudicial to the defendant's case and submits that as the ground of its appeal. It is the plaintiff's appellee's first

contention that the Court's charge in this respect was not erroneous and its second contention that, if there was error in the charge, the error was invited, was harmless and was cured by other portions of the charge.

POINT I.

The charge of the Trial Court was not erroneous.

In answer to the complaint filed by the plaintiff in this action, the defendant set up a general denial and then by way of Second Separate and Distinct Defense, the following:

> "The alleged accident was due to the negligence of the third party over whom this defendant had no control and for whose acts he is not responsible."

The plaintiff filed a reply, denying the above defense and the issues were submitted to the jury on this theory. At the conclusion of the defendant's case, the trial judge charged the jury that the defendant had the burden of proving this Second Separate and Distinct Defense by the greater weight of the evidence.

It is submitted on behalf of the plaintiffs-appellees, that this action of the trial court was proper in view of the law in this and other jurisdictions.

In *Schomer* vs. *Hoffman,* 102 N. J. L., 347 (E. & A. 1925), it is stated as a general proposition that

> "The burden of proof is generally if not always in logic and law upon him who advances the claim, or holds the affirmative of the issue, so that the learned trial court in that respect simply stated an axiomatic proposition."

In *Collins Realty Co.* vs. *Sale*, 104 N. J. E., 143 (E. & A., 1928), this court in discussing the above question said as follows:

> "Whenever the existence of any fact is necessary in order that a party may make out his case or establish a defense, the burden is on such party to show the existence of such facts and if he desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, he must prove that those facts do or do not exist in order to be entitled to relief." Citing Willett vs. Rich (142 Mass., 356).

At the trial of this action below, plaintiff's attorney in his opening explained to the court and jury that the defendant, Vincenzo Matazza, had never been served with a summons and complaint and that under these circumstances he was not before the court and the only question, to be considered by them, was the negligence of the defendant. Roth. The trial court in the opening of its charge to the jury said with reference to this, as follows (S. C. page 46, line 26):

> "The other defendant, Matassa, that is mentioned on the papers, was not served. Evidently Matassa was the man who was operating the automobile on the Boulevard that is alleged to have struck Joseph Cella. Matassa has not been served and he is not before you. Your concern then, is between the claims of these two plaintiffs, mother and son, against one defendant, George Roth."

Thus it will be seen that on the trial of this action the only issue which was material to the plaintiffs' case was whether or not this particular defendant, George Roth, was negligent. Defendant by setting up the negligence of the third party as a

separate defense, has presented a new issue for the jury's consideration and it is respectfully submitted that under the rules of the above cases, defendant had the burden of proving the same by the greater weight of the evidence.

Wigmore in his treatise on evidence, Section 2486, at page 441, expounds the following theory:

> "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations. Thus, in most actions of tort there are many possible justifying circumstances,—self-defense, leave and license, volenti non fit injuria, and the like; but it would be both unfair and contrary to experience to assume that one of them was probably present, and to require the plaintiff to disprove the existence of each one of them; so that the plaintiff is put to prove merely the nature of his harm, and the defendant's share in causing it; and the other circumstances, which would if they existed leave him without a claim, are put upon the defendant to prove."

Considering the question from this view point, it is plaintiffs-appellees' contention that the duty of the plaintiff as regards the burden of proof was fulfilled when he showed the nature of his harm and this particular defendant's share in causing it.

The precise question does not seem to have been passed upon in this jurisdiction, but in many cases separate defenses of an analogous nature have been interposed and in these instances our courts have placed the burden of proving them upon the defendant.

Thus in *Giardini* vs. *McAdoo,* 93 N. J. L. 138 (E. & A. 1919), a tort action, defendant pleaded the defense of assumption of risk and the court held that defendant had the burden of proving this defense by the greater weight of the evidence. So,

too, where in a suit on a negotiable instrument, defendant pleaded no consideration and non-delivery (*First National Bank of Philadelphia* v. *Stonely,* 111 N. J. L., 519 at page 523 (E. & A. 1933), and where defendant pleaded estoppel, *Muhlenbeck* v. *West Hoboken,* 99 N. J. L. 198, at page 199 (E. & A. 1923).

In the present situation, defendant seeks to place the blame for this accident upon the shoulders of a third person, and it is respectfully submitted that he should be obliged to prove that fact. For, as was said in the case of *Schlitz Brewing Co.* vs. *Shiel,* 88 N. E. 957, 45 Ind. App. 623:

> "Everyone is presumed to obey the law and to do his duty, so that he who alleges against another an evil act or intent has the burden of proving it."

It is respectfully submitted that defendant by its Second Separate and Distinct Defense has affirmatively alleged new matter and, therefore, the trial judge properly placed upon him the burden of proving the same.

POINT II.

If there was any error in the Court's Charge, the error was invited by the Defendant-Appellant, therefore, the judgment of the Trial Court should be affirmed.

Section 3 of the Practice Act of 1912 provides that the "Process and pleadings in all actions shall be according to the rules of the court". Under Rule 22 of the Practice Act of 1912 it is stated that "The denial of any material allegation shall constitute

UNDER POINT I.

The exact question at issue on this appeal was passed upon by the Supreme Court of Oregon in the case of Ross vs. Willamette Valley Transfer Company, 248 Pacific, 1088 (1926). In that case plaintiff was an infant, who had been injured as the result of a collision between a car driven by her father, E. E. Ross, and a truck owned by the defendant company. The defendant alleged that the proximate cause of the accident was the negligence of the father, E. E. Ross, and the trial court charged the jury that the burden of proof was on the defendant to establish that fact. On appeal from this charge, the upper court said as follows:-

> "There was no error as claimed by the defendant in the instruction of the Court to the jury that the burden of proof was on the defendant to establish that the proximate cause of the accident was the negligence of E. E. Ross, the driver of the car. The defendant had alleged just that thing - that the proximate cause of the accident was the father's negligence - and so it was incumbent upon it to prove it by the preponderance of the testimony".

an issue; no other joinder of issue is necessary". Rule 40 of the Practice Act of 1912 further provides with reference to separate defenses, that the answer "Must specifically state any defense which is consistent with the truth of the material allegations of the complaint and any defense which if not stated would be likely to cause surprise or would raise issues not arising out of the complaint".

Defendant-appellant in this cause filed a general denial and then set up by way of separate and distinct defenses, contributory negligence, and as its Second Separate and Distinct Defense, the following:

> "The alleged accident was due to the negligence of a third party, over whom this defendant had no control and for whose acts he is not responsible."

It is submitted that under the practice of this State as laid down by Rule 40, this Second Separate Defense must have stated matter "which is consistent with the truth of the material allegations of the complaint", or "would be likely to cause surprise", or "would raise issues not arising out of the complaint".

If, as defendant-appellant contends, the defense in question states none of these, but is merely by way of explanation, then under Rule 22 of the Practice Act of 1912, and in view of the general denial also filed by the defendant-appellant, this defense was unnecessary, and under Rule 25 of the Practice Act of 1912 was objectionable as being repetitious. If this is so then by electing to set up the alleged matter as a distinct and separate defense, defendant-appellant has invited the error of which it now complains.

In *Katz* vs. *Inglis,* 110 N. J. L. 358 (E. & A. 1932), plaintiff sued for rent due for certain prem-

ises, vacated by the tenant before the expiration of the term. Defendant set up by way of separate defense that plaintiff had not exercised ordinary diligence to rerent the premises in diminution of damages. To this answer plaintiff filed a reply, denying the defense. The case was tried on this theory and a verdict was rendered in favor of the defendant. Plaintiff appealed from the judgment because the Court charged the Jury that, if they found from the weight of the evidence that the plaintiff failed to use reasonable diligence to rerent the premises, then the verdict should be for the defendant. As a ground of appeal, plaintiff contended that it was not incumbent upon him to make any effort to rerent the premises. This Court in rendering its decision said on page 360, as follows:

> "We are of the opinion that this charge of the Court was proper under the circumstances and theory upon which this case was tried. The rule is that where parties to an action try and submit the question at issue upon a theory satisfactory to themselves and by the pleading admit its legality, neither party can afterward complain because the Court accepted the issues thus adopted by them. In this case the defendants set up as a separate defense that the plaintiff had not used reasonable diligence to rerent the premises and allege this in diminution of damages. The plaintiff, by his reply, accepted this defense, but denied that he had not used sufficient diligence. It is too late, after the trial upon such a theory to object."

In the State of Washington, the question raised by this appeal was expressly passed upon in the case of *Davidson Fruit Company* vs. *Produce Distributors Company,* 134 Pacific, 510 (Washington, 1913). In that case, plaintiff sued defendant upon a contract and defendant in its answer alleged

affirmatively, as a separate defense, matters, which it might have relied upon in its general denial. The case was tried upon this theory, the court placing the burden of proving the separate defense upon the defendant. Upon appeal by the defendant from this charge, the upper court held that this constituted harmless error, for as the Court said:

> "It has been frequently held that one will not be heard to object to an alleged error when invited by him, or to an erroneous instruction when given at his request. Appellant treated its denial as an affirmative defense, it so denominated it in the pleadings and tried its case upon that theory.
>
> "To hold upon appeal that the trial court should have detected appellant's error or oversight and instructed the jury upon the theory of denial, would be to relieve counsel of that duty which is forthcoming in every trial and put a burden of precise, even technical appreciation of the worth of the pleadings upon the court at the time the jury is instructed, whereas, it is his right to assume that the pleading offered by either party is drawn in conformity with established rules of practice and procedure."

In view of the above cases, it is respectfully submitted by plaintiffs-appellees, that the defendant-appellant by its conduct has invited the alleged error and, therefore, should be estopped from setting it up as a ground for reversal.

Furthermore, at the trial of the action, defendant-appellant was given the privilege of withdrawing this defense from the pleadings. Instead of doing so, however, it elected to let it stand. If, then as defendant-appellant contends, this defense did not constitute an affirmative defense and could have been set up under the general denial, then the withdrawal of it from the pleadings could not have affected the defendant-appellant's case in any way.

It is respectfully submitted, therefore, that the action of the defendant-appellant in refusing to withdraw this defense when given permission, and in electing to let it stand labeled as it was, a "Separate and Distinct Defense", constituted an invitation to err and defendant-appellant should be estopped from asserting it.

POINT III.

If there was any error in the Court's charge, the error was not prejudicial and therefore the judgment of the Trial Court should be affirmed.

Under this point, it is the plaintiffs-appellees' contention that the question of whether or not a third party was at fault was of no importance in this case, and any error in the charge was cured by other portions thereof. At the time of the trial of this action, plaintiff's attorney explained to the court and jury that service had not been made on the other defendant, Vincenzo Matassa (S. C. page 46, line 26-27), and that plaintiff would therefore proceed only as against the defendant-appellant, George Roth.

As plaintiffs-appellees understand the law of this state then, the only duty cast upon the plaintiff was to show that the defendant, George Roth, was guilty of negligence and that this negligence was one of the proximate causes of the accident. Whether or not a third party was negligent did not concern the plaintiff at this trial, and a perusal of the court's charge shows that the trial judge had this in mind when he charged the jury as to the burden borne by the plaintiff.

Thus we find that the court charged the jury as follows (S. C. page 47, line 25, et seq.; S. C. page 48, line 11, et seq.; S. C. page 50, line 20, et seq.; S. C. page 51, line 32, et seq.) :

> "Those are the issues that are presented for your determination. Now, there is left for you an application of the testimony adduced here to those issues, and in applying that evidence, bear in mind the rule that you have heard charged to you time and again in cases of this kind that the burden of proof is upon the plaintiff to prove his case by the greater weight of the evidence; that means that he must not only prove the charges as in this case in order to recover under the rule, proving that Roth was negligent, but he must prove that item or factor by the greater weight of the evidence."

> "Now, in order for you to find that Roth should be held liable in damages, you should first find that he was negligent. Then your duty does not conclude or end there. The plaintiff is obliged under the law to prove that the defendant's negligence was the proximate and natural cause of the injury sustained. So that you see, under that rule, what was the natural and proximate cause should be well considered in this case."

> "On the other hand, if you find that he did not and you believe that by the greater weight of the evidence, and that his act of commission or omission, if you find it was one of negligence, and that it was the proximate and natural cause of this boy's injury, and you believe that by the greater weight of the evidence, you may find a verdict against Roth, provided you do not find that this boy contributed to his own injury or that the negligence of someone else was the cause of the injury alleged to have been sustained."

> "The burden is upon the plaintiff to prove all of his charges as well as the amount of damages that he seeks to recover, by the greater weight of the evidence."

It is submitted that in the above excerpts from the court's charge, the trial judge has correctly informed the Jury as to the burden which must be borne by the plaintiff in order for him to recover The question of whether or not a third party was negligent was not the concern of this plaintiff, as long as he sustained the burden of showing that this particular defendant George Roth, was negligent. Furthermore, an examination of the testimony will disclose that there is not even a scintilla of evidence offered by either side to show any negligence on the part of the defendant, Vincenzo Matassa. In view of this fact, it would have been impossible for the jury to have found that this injury was due to the negligence of a third party.

Thus, in the case of *Jordan* vs. *Teaneck,* 5 Misc. 556, at 558 (Sup. 1927), in deciding a situation of this kind the Court said as follows:

> "This being true, we think the question presented in the Court below became one of law and not of fact and that under the law, as we find it, it was the duty of the trial judge to have directed a verdict for the defendant. If, instead of doing so, he submitted the case to the Jury for its determination and the jury found as the judge would have been obliged to do, the error becomes harmless and of the result the plaintiff has no right to complain."

So too, in the case of *Pavlika* vs. *Giglio,* 5 Misc., 590 (Sup. 1927), the Court charged the jury that "under the law a child under the age of seven cannot be charged with contributory negligence." On appeal by the defendant from this statement of the law, the Supreme Court said as follows:

> "The instruction, however, was harmless. Contributory negligence is a defense under Rule 58 of the Supreme Court and it was not pleaded as a defense, but even if it had been the legal situation would have been the same so far as this defendant was concerned; for there was no evidence produced at the trial which rebutted such presumption or from which contributory negligence could have been charged to this infant in the circumstances of the case. This being so, the error was harmless and did not justify a reversal."

The portion of the charge complained of referred to the actions of a third party and in view of the evidence adduced at the trial, had no bearing on the main issue and therefore, the error, if any, was harmless. *Kneip* vs. *New York and Long Branch Railroad Company,* 102 N. J. L., 374 at page 376 (E. & A. 1925) ; *Journey* vs. *Zawish* (11 Misc. 482, Sup. 1931) ; *Altieri* v. *Public Service,* 101 N. J. Law 240, at page 244 (Sup. 1925).

It is respectfully submitted, on behalf of the plaintiffs-appellees, that the instruction complained of did not constitute harmful error and in no way affected the substantial rights of the parties and, therefore, under Rule 27 of the Practice Act of 1912, the judgment of the trial court should be affirmed.

For the reasons hereinbefore mentioned in this brief, it is respectfully submitted that judgment of the Supreme Court should be affirmed.

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