Index.

Notice of Appeal and Grounds.

NEW JERSEY SUPREME COURT

PASSAIC COUNTY. 10

AMETRIA LANDRA, Plaintiff, vs. SALVATORE MARONE, trading as Marone & Co., and NICHOLAS ALTIERI, Defendants.	20

To William B. Stites, Attorney for Defendants:

Sir:

Please take notice that the plaintiff in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this case upon the following ground, to wit: 30

1. Because the Court erred in entering a judgment of a nonsuit in favor of the defendants and against the plaintiff.

HELLER & BOSS,
Attorneys for Plaintiff. 40

Summons.

New Jersey Supreme Court to Salvatore Marone trading as Marone & Co., and Nicholas Altieri—

(L. S.) You are summoned to answer the annexed complaint of Ametria Landra, in an action at law in the New Jersey Supreme Court.

And take notice that unless you file your answer to the said complaint with the Clerk of New Jersey Supreme Court at Trenton, within twenty days after the serving upon you of this writ and the annexed complaint, the plaintiff may proceed in said suit and judgment may be instituted against you.

Witness, William S. Gummere, Esq., Chief Justice of our Supreme Court, at Trenton, this 10th day of November, 1927.

EDWARD J. KELLEHER,
Clerk.

Heller & Boss,
Attorneys for Plaintiff.

Complaint.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

AMETRIA LANDRA, Plaintiff, vs. SALVATORE MARONE, trading as Marone & Co., and NICHOLAS ALTIERI, Defendants.	Action at Law.

Plaintiff residing in the City of Clifton, County of Passaic, State of New Jersey, says that:

1. On or about the twenty-eighth day of October, 1927, the defendant, Salvatore Marone, trading as Marone & Co., was the owner of a certain automobile truck which he caused to be operated by his agent and servant Nicholas Altieri in and along Main Avenue, in the City of Passaic, County of Passaic, and State of New Jersey, in a general northerly direction.

2. On the aforesaid date it became and was the duty of the said defendant, Salvatore Marone trading as Marone & Co., and his agent and servant Nicholas Altieri, to operate said automobile at a lawful and reasonable rate of speed, on the right side of said road, to give a signal and warning of approach, and to operate said automobile truck in divers other respects in accordance with the motor vehicle laws of the State of New Jersey.

3. Yet the said defendant operated said automobile in a careless and negligent manner, going at a rapid and unreasonable rate of speed, without giving a signal and warning of approach, and divers other respects so carelessly and negligently operated said automobile, and failed to equip said automobile with proper brakes so as to keep the same at all times under proper control, and in divers other respects operated said truck contrary to motor vehicle laws of the State of New Jersey, that as a result thereof, the said defendant ran into and struck the said plaintiff who was lawfully crossing Main Avenue at the intersection of Summer Street in the City of Passaic, County of Passaic, and State of New Jersey.

4. As a result of the negligence of the said defendant, said plaintiff was severely injured, receiving a fracture of the left ankle and left calf of the leg; bruises about the head, face, arms, legs, contusions and abrasions and in divers other injuries both external and internal, some of which are permanent in character.

5. As a result of said injuries, said plaintiff was obliged to remain in the hospital for a long time and will be obliged to remain in the hospital and then at his home for a long time in the future.

6. Said plaintiff was obliged to expend divers sums of moneys for medicines and medical aid and attention, in an effort to cure and heal injuries which he received and will be obliged to expend divers sums of moneys for medicine

and medical aid and attention for a long time in the future.

7. Plaintiff was obliged to undergo great pains and sufferings and will be obliged to undergo great pain and suffering for a long time in the future.

8. Plaintiff was prevented from attending to his ordinary tasks and duties and will be prevented for a long time in the future. Plaintiff will be obliged to expend divers sums of moneys for hospital, nurses and other treatment for a long time in the future to his great damage.

9. Plaintiff's clothes were torn by said accident to his great damage.

Wherefore, judgment will be demanded in the sum of Twenty-five ($25,000) thousand dollars.

HELLER & BOSS,
Attorneys for Plaintiff.

Answer.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

AMETRIA LANDRA, Plaintiff, vs. SALVATORE MARONE, trading as Marone & Co., and NICHOLAS ALTIERI, Defendants.	Action at Law.

The defendants residing in the City of Paterson, County of Passaic, and State of New Jersey, jointly answering the complaint herein allege:

1. ~~Admit~~ Deny paragraph 1.

2. Deny paragraphs 2, 3, 4, 5, 6, 7, 8, and 9.

FIRST SEPARATE DEFENSE.

1. Defendants allege that any injuries or damages sustained by the plaintiff herein at the time or on the occasion in the complaint referred to were caused in whole or in part by the negligence and want of care of the said plaintiff and not by any negligence or default or want of care on the part of these defendants.

2. The contributory negligence of the plaintiff consisted in that he failed and neglected

Reply

to make proper observations at the time and place mentioned in the complaint and did not listen and carelessly and negligently walked and controlled his movements and placed himself in a position of known danger and crossed the said highway at a place other than the regular crosswalk thereof.

WM. B. STITES,
Attorney for Defendants.

Reply.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

AMETRIA LANDRA, Plaintiff, vs. SALVATORE MARONE, trading as Marone & Company, and NICHOLAS ALTIERI, Defendants.	Action at Law.

Plaintiff replying to the answer filed by the defendants in the above matter, says as to:

SEPARATE DEFENSE.

Plaintiff denies each and every allegation contained therein.

HELLER & BOSS,
Attorneys for Plaintiff.

Postea.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

AMETRIA LANDRA, Plaintiff, vs. SALVATORE MAROND (or Marone), trading as Marond (or Marone) & Co., and NICHOLAS ALTIERI, Defendants.	Action at Law.

This action was tried before Judge Newton H. Porter, with a jury at the Passaic Circuit on May 22, 1928.

The plaintiff having submitted his evidence and rested his case, and the Court being of the opinion that the plaintiff was guilty of contributory negligence, ordered, upon motion of defendant's counsel that the plaintiff be nonsuited.

NEWTON H. PORTER,
Circuit Court Judge.

A true copy.

FRED L. BLOODGOOD,
Clerk.

Testimony.

NEW JERSEY SUPREME COURT,

PASSAIC CIRCUIT.

AMETRIA LANDRA, Plaintiff, vs. SALVATORE MARONE, trading as Marone & Company, and NICHOLAS ALTIERI, Defendants.	Action at Law.

Paterson, N. J., May 22, 1928.

Before: Hon. Newton H. Porter, Judge, and a jury.

Appearances:

Messrs. Heller & Boss (by Mr. Heller), for the Plaintiff.

Wm. B. Stites, Esq., for the Defendants.

A jury of twelve was duly empanelled and sworn.

Counsel for the respective parties opened the case to the jury.

Plaintiff's Case.

ABRAHAM KOVIN, M. D., sworn.

Direct-examination by Mr. Heller:

Q. Doctor, are you a practicing physician, practicing medicine in the City of Passaic? A. Yes, sir.

Q. Have been for how long? A. Oh, about five years.

Q. Prior to that time, where were you located, doctor? A. Oh, for a very short while in Brooklyn.

Q. You are a graduate of what medical college? A. Flower Hospital, New York.

Q. Were you associated with the hospital during that time, or after that time? A. Yes, sir.

Q. What hospital? A. Why, the General Hospital, Passaic; St. Mary's, Passaic; Beth Israel, Passaic.

Q. Do you know Ametria Landra, the plaintiff, in this case? A. Yes, sir.

Q. Had you occasion to treat him for an injury which he sustained last October? A. Yes.

Q. When did you first treat this man? A. Why, the beginning of November.

Q. What injury did you find him to have? A. I found he had a fracture of the left ankle.

Q. Which one? A. The left.

Q. Did you take care of this man during his illness? A. I did.

Q. For how long a time was he under your care? A. Approximately four months.

Q. During that time, was he able to work? A. He was not able to work.

Q. What was the condition of his leg, Doctor, describing it from the beginning to the end? A. Why, there was a break at the two bones of the left ankle—the tibia and fibula; it was swollen, very painful, unable to walk

at the beginning. After a certain length of time, the ankle and foot and part of the leg was in a cast, they were taken off, and the ankle was stiff.

Q. You say that there were two bones broken in the leg? A. Yes.

Q. Now, as a result of that, was it necessary to have a cast on the leg? A. Cast or splints.

Q. How long was the cast and splints on this man's leg? A. For about two months.

Q. After the two months, then the cast and splints were removed? A. They were removed.

Q. Then what treatment was necessary? A. Well—

The Court: You didn't keep the cast on two months, Doctor, did you?

The Witness: No, I didn't keep the cast on two months; I put a splint on after about a month.

The Court: You say he had the cast on for about a month, then you substituted splints?

The Witness: Yes.

Q. Then, after that, what happened? A. Then we took off the splints, and we used various therapeutic measures to bring that joint in motion, such as passive motion, we would call that, and active motion heat applied to it and massage.

Q. Now, was that injury that you found there a painful one? A. It was painful, yes.

Q. During the time that the cast was on, and the splints were on, did it cause a considerable amount of pain? A. Fair amount of pain.

Q. Now, you say that he was under your care for about four months? A. Yes.

Q. Do you know how many months after the accident he was able to resume his work? A. That I do not know.

Q. During the first month or so that you treated this man, was he in bed, or not? A. Yes, he was in bed the first month.

Q. Then after that, was he able to walk around? A. To limp around with the aid of a cane and a stick.

Q. When was the last time you saw this man, Doctor? A. Oh, several months ago.

Q. What was his condition when you last saw him? A. Why, he was able to walk, but he still complained of pain, and slight stiffness of the joint.

Q. Is that a probable result of a fracture of this kind, where two bones are broken? A. Yes, sir.

Q. Do you know what his condition was when you last saw him, with respect to whether or not there was any permanent injury there? A. Whether there was any permanent injury? No, there wasn't.

Q. No shortening of the leg? A. No.

Q. Did you render a bill for your services, Doctor? A. I did.

Q. How much was your bill? A. $100.

Q. And is that a reasonable amount for the services that you rendered? A. I believe so.

Mr. Heller: That is all.

By the Court:

Q. I suppose you answered this question

when I was not listening, Doctor. How near the joint was the break? A. It was right at the joint in fact, one of the cracks went right through the joint. I have the X-ray here.

The Court: All right.

By Mr. Heller:

Q. Just one moment. Have you X-ray pictures of this leg? A. Yes.

Q. How many have you there? A. (Indicating; no audible response.)

The Court: Is there any objection to these X-rays?

Mr. Stites: I do not know anything about them, your Honor.

By the Court:

Q. Who took them, Doctor? A. Dr. Terhune, of Passaic.

Q. Dr. Terhune took them at your request? A. Why, yes.

Q. And then turned them over to you? A. Yes.

Q. Let counsel see them? A. (Handing to Mr. Stites.)

CROSS-EXAMINATION by Mr. Stites:

Q. Where did you get them from, Doctor? A. I got them from the hospital.

Q. When? A. In the beginning of November.

Q. Do you know when they were delivered

to the hospital? A. Why, they were taken when he was in the hospital.

Q. They were taken at the hospital? A. They were taken at the hospital, yes.

Q. In whose custody were they while they were at the hospital? A. Why, in the technician's there, the X-ray man.

Q. How do you know, Doctor, that these are the X-rays of Mr. Landra's ankle? A. I went to the technician, and asked for the X-ray of Mr. Ametria Landra, and the technician, the name is Miss Loosey, gave them to me I know she takes care of them, I see her several times a week there; she is the assistant to Dr. Terhune.

Q. They have a great many patients there with broken bones, haven't they? A. Oh, yes, but they have a regular catalog, and they know where each patient's records are.

Mr. Stites: Your Honor, if I was sure that these were the X-rays of Mr. Landra's ankle, I wouldn't have any objection; but I think we ought to be certain that they are.

Mr. Heller: May I ask him a few questions; maybe he can tell.

The Court: Let me ask him one.

By the Court:

Q. Do you recognize these plates as the ones that you examined at that time? A. I do.

Q. What is there about them that causes you to recognize them? A. Why, there is a distinct break there, there are two breaks, rather.

Q. And you recognize these as the ones that you saw? A. Yes, and they are put away—

Q. I know, but aside from the envelope, if you saw these, you couldn't identify that as the fracture that you treated, could you? A. At all times, I would use these plates with the case, in the treatment.

By Mr. Stites:

Q. You have many fractures, haven't you, Doctor, that you treat? A. Yes, not many, but several.

Q. You have had several fractures of the ankle, during your medical experience, haven't you? A. Yes.

Q. Well, without the aid of any memoranda or hospital records, if these plates were shown to you, could you identify them as the X-rays of Mr. Landra's ankle? A. Why, yes—I couldn't definitely state just where the breaks took place; but there are two definite breaks in the picture here.

Q. How many times did you examine them, Doctor, at the time you was treating him? A. Why, every time when I came to see him, I examined him.

Q. I mean the plates? A. Why, at the beginning, I had to examine it several times, many times, in order to see what I was going to have to do in taking care of the patient.

Mr. Heller: Is there any objection, Mr. Stites?

Mr. Stites: Yes, I wish to object to them, your Honor, for this reason, that

I am not certain that these are the plates.

The Court: Objection sustained.

By Mr. Heller:

10 Q. As far as you are concerned, Doctor, these are the X-rays that show the picture of Mr. Landra's ankle?

Mr. Stites: I—

A. Yes, sir.

Mr. Stites: —object to that.

The Court: Oh, I will allow him to say that, but there is no markings on these pictures that identifies them, and, of course, they are not properly proven, and the doctor cannot be positive. He, of course, is highly certain that these are the plates, but I think he is guided largely by the fact where he got them from.

20

Mr. Heller: I just wanted to know whether he, himself, is concerned—as far as he himself is concerned, they show that.

30

The Court: He is as certain as he can be.

Q. Yes; you are certain about that, aren't you? A. Yes.

Mr. Heller: That is all.

40

CROSS-EXAMINATION by Mr. Stites (cont'd):

Q. Doctor, can you tell us the first day that you saw Mr. Landra, after this accident? A. Yes; I believe it was November 10th.

10

Q. That is the first examination you made of him? A. First examination I made of him.

Q. Well, at that time, Doctor, the bones of the ankle had been set, hadn't they? A. There wasn't any need of setting these bones.

Q. Oh, I see. Was there any cast on the ankle on November 10, 1927? A. Yes.

Q. The accident happened October 28, 1927, didn't it, Doctor? A. I was told that, yes.

20

Q. Was you connected with the General Hospital in Passaic during October? A. I was connected with it, yes; I have been connected for several years.

Q. Seven years? A. Several years.

Q. Was Mr. Landra your private patient? A. He was not.

Q. How long was he in the hospital? A. He was in the hospital from October 28th, according to my records until—well, somewheres around November 10th.

30

Q. Did you first see him in the hospital or at his home? A. I didn't; I saw him at his home.

Q. He had left the hospital when you first saw him? A. He had left the hospital, yes.

Q. Did you remove the cast on his ankle at any time before you removed it permanently? A. I don't quite get you.

40

Q. There was a cast on the ankle when you saw him November 10th? A. Yes.

Q. How long after that was it that you removed the cast? A. Why, I kept it on for about a month.

Q. Can't you hear, Doctor? A. I kept it on for about a month.

10 Q. About a month? A. Yes.

Q. That is the first opportunity that you had of examining the ankle, after you removed the cast? A. Yes.

Q. Doctor, just for the information of the jury, the tibia and fibula are the two bones below the knee, are they not? A. Yes, they run from the knee to the ankle.

Q. Small bones? A. Well, they are long bones

20 —two bones.

Q. Smallest bones in the leg, aren't they? A. Yes.

Q. Smaller than the femur? Is that right? A. Yes.

Q. Did the bones heal with a good union, Doctor? A. They did.

Q. You were satisfied with your treatment? A. Yes.

30 Q. How many times, doctor, did you treat Mr. Landra for this injury to his ankle? A. At the beginning, I would see him about two or three times a week, and then towards the end, I would see him about once a week.

Q. About how many visits altogether do you suppose you attended him, doctor? A. Oh, I should judge about forty visits.

Q. Some of those at your office, I suppose?

40 A. None at my office; all at his home.

Q. All at his home. Can you state what month it was that you last treated Mr. Landra for the

injury to his ankle? A. Sometime in March, beginning of March.

Q. Of what year? A. Of this year, 1928.

Q. That is the last time you saw him, to treat him? A. Yes.

10

Q. You considered that he had recovered at that time? A. Yes.

Q. While the ankle, doctor, was in the case, was Mr. Landra in bed? A. He always complained of pain.

Q. No; while the ankle was in the cast, what did your treatment consist of, doctor? A. Inspecting the rest of the leg to see that there was no pressure symptoms, and that is about all.

20

Q. Mostly a matter of observation to prevent infection— A. Any complications arising, and to give him treatment when the cast came off.

Q. It didn't require any medicine, did it, doctor? A. No.

Q. Do you think he would have been able to go back to work about two months after the accident? A. Two months? No.

Q. About how long would you say, doctor?

30

A. Well, when I left him, he was about ready to go to work—in about four months.

Q. About four months after the accident he was then able to return to his usual work? A. About that, yes.

Mr. Stites: That is all.

RE-DIRECT EXAMINATION by Mr. Heller:

40

Q. You say about four months? A. About four.

Mr. Heller: That is all.

AMETRIA LANDRA, sworn.

Direct-examination by Mr. Heller:

Q. Mr. Landra, you are the plaintiff in this case? You are suing here? A. Yes.

Q. Just talk up loud so that we can all hear you. Where do you live, Mr. Landra? A. I am living Clifton, 80 Silleck Street.

Q. 80 Silleck Street, Clifton? A. Yes.

Q. How long have you lived there? A. Three years.

Q. Do you remember having an accident last October? A. Yes.

Q. Just before the accident, where had you been working? What mill? A. I am work in Botany Mills.

Q. In the Botany Mills, Passaic?

Mr. Stites: Botany?

A. Botany.

Q. What time did you have to be at work? A. On a trolley car—

Q. What time did you go to work in the morning? A. I go to work, leaving home quarter after four.

Q. I say, what time did you have to be in the factory? A. Six o'clock in the starting.

Q. You have got to be in the factory at six o'clock? A. Six o'clock in the starting.

Q. On the morning of the accident, what time did you leave your home? A. Quarter after four.

Q. Where did you get off? A. I walk to Main Avenue, take a trolley car, and on Main and Summer Street, and I was there—got there at half-past five.

Q. All right, now, at half-past five, you came to the corner of Main Avenue and Summer Street? A. Yes.

Q. Now, did you get off the trolley car? A. I got off the trolley car.

Q. What happened after you got off the trolley car? A. The trolley car went, and I am looking both sides, and I cannot see nothing, and I walking across.

Q. As you walked across the street, did anything happen to you? A. No, I cannot see nothing, look on both sides, can see nothing.

Q. As you walked across the street, did anything happen to you? A. No.

Q. Did you understand my question?

The Court: Did an automobile hit you?

A. I walking, look both sides, you could see nothing, but it was about five more feet from curbstone I got hit, a "knife" at that time knocked me down.

Q. Did an automobile strike you? A. Yes.

Q. It struck you while you were crossing the street? A. Yes.

Q. Where did the auto strike you? What foot was struck? A. Left foot.

Q. The left foot. When the auto struck you, do you know what happened to yourself? A. Well—

Q. Well, what part of the roadway were you struck on? Do you know? A. I was a little—

By the Court:

Q. How nearly had you gotten across the

street? How near were you to the other side? A. I was about five feet from the curbstone.

Q. About five feet from the gutter? A. Yes.

Q. What street was that—Main Avenue and what is the street? A. Main Avenue and Summer Street.

Q. Summer Street. After you were struck, where were you lying after the accident with respect to the roadway? Where did you pick yourself up? Where were you when you got up? A. Well, the fellow knocked me down, I was lying down on the ground—gutter.

Q. On the what? A. Lying down on the gutter.

By Mr. Heller:

Q. You were down on the gutter? A. Yes.

Q. But after the accident, you were lying in the gutter; then, did somebody pick you up? A. Yes.

Q. Did you know at that time who picked you up? A. I don't know.

Q. While you were going across the street, did you hear any horn blown by any automobile? A. No.

Q. Did you see any lights on the truck? A. I don't see the lights, no.

Q. Now, after that, were you taken to the hospital? A. Yes.

Q. Do you know by whom? A. I don't know whom.

Q. You don't know; what hospital were you taken to? A. In the General Hospital, Passaic.

Q. How long were you in the General Hospital, Passaic? A. Two weeks.

Q. After your stay of two weeks at the hospital, where did you then go? A. I go take me home.

Q. Did you get a bill from the hospital for those two weeks? A. Yes.

Q. How much was the bill?

Mr. Stites: I object to that.

The Court: Objection sustained.

Q. You were in the hospital for two weeks? A. Two weeks.

Q. Where is the bill that you got from the hospital? A. I think I leave it home.

Q. What is that?

The Court: Left it home.

A. Left it home.

Q. Do you know what doctor treated you while you were in the hospital? A. Yes.

Q. Who was it? A. Dr. Kovin.

Q. Dr. Kovin? A. Yes.

Q. He treated you after the hospital? A. Yes.

Q. During the time that you were in the hospital, was it the interne?

The Court: What is the name of the doctor in the hospital?

The Witness: I don't know.

The Court: Doesn't know.

Q. Now, just before the accident, you say you were working in the Botany Mills in Passaic? A. Yes.

Q. How much money were you making a week? A. I making $33.60.

Q. $33.60; now, for how long were you out of work? A. Three months, three days.

Q. How many months? A. Three months, three days.

Q. Three months, three days; during that time, did you collect any salary? A. No.

By the Court:

Q. Did you get any pay? A. No.

The Court: They don't get salaries in mills.

By Mr. Heller:

Q. Now, after the expiration of the three months and three days, you then went back to work? A. Yes.

Q. Did you get your same job back again? A. Same job.

Q. Now, how did your leg feel after you started to work? A. Not so good; I cannot walk so fast; I work in the mill, I must take rest about two or three times in the day, can't stand on my feet.

Q. Your work in the mill requires you to stand on your feet? A. Yes.

Q. Does it affect you to stand on your feet today? A. Yes.

Q. Did it trouble you before the accident? A. No.

CROSS-EXAMINATION by Mr. Stites:

Q. Mr. Landra, how long have you been in this country? A. I am in this country twenty years.

Q. Twenty years; what kind of work do you

do in the Botany Mills? A. Cleaning carding machine, spinning—well, spinning machine.

Q. Spinning machine? A. Yes.

Q. Did that consist of just attending to one machine? A. It is just cleaning of them carding machines.

The Court: Just cleaning them?

The Witness: Yes.

Q. Oh, cleaning the machines? A. Yes.

Q. How often did you have to clean them? A. What you say?

Q. How often did you clean the machines? Once a day, twice a day or how often? A. Every day I got to clean them.

Q. How many machines did you have to clean every day? A. I clean six machines.

Q. Six; you was cleaning six machines a day at the time you was hurt? A. Yes.

Q. After you went back, returned to your job, you cleaned the same number, six, each day? A. Yes.

Q. Now, what street was it that you took this trolley car on? A. Why, across St. Joseph's Hospital.

Q. At the hospital? A. Yes.

Q. How far away from that Summer Street was that? A. About four miles.

Q. Eh? A. I don't know how many blocks.

Q. How many blocks? A. Paterson to Passaic.

Q. Well, was it a mile? A. I should think more than a mile.

Q. More than a mile; was this one of those long trolley cars? A. Yes.

Q. That runs between Passaic and Paterson? A. Yes.

Q. Now, when that trolley car stopped, did it stop north of Summer Street or south of Summer Street? A. It goes in Passaic, and stopped on the right side—right hand side.

By the Court:

Q. Did it pass Summer Street? A. No, it stopped on Summer Street and Main.

Q. First corner? A. First corner, Summer Street.

The Court: North corner.

By Mr. Stites:

Q. You got off before the trolley car passed over Summer Street? Right? A. Yes.

Q. Now— A. I got off not past Summer Street—I got off before Summer Street—it stopped Summer Street and Main—and I got off at Main and Summer Street.

Q. You got off the rear platform of the trolley car? A. Yes.

Q. About how far was the rear of the trolley car from the north side of Summer Street, when you got off? Can you tell us?

By the Court:

Q. How far was the back of the car from Summer Street? A. Oh, about, I don't know how long that car was, but about ten feet.

Q. Ten feet; did you get out the back of the car or the front? A. Front of the car.

Q. You told him the back. A. No, the front.

The Court: He doesn't know "rear."

Mr. Heller: I don't think he knows what "rear" means.

By Mr. Stites:

Q. Do you know which is the front and which is the rear of a trolley car?

The Court: He doesn't know "rear."

A. In the front, that is where the conductor is.

Mr. Heller: But, do you know which the back of the trolley car is?

The Witness: Yes, sir; I got off the front.

Q. You didn't get off the back? A. No.

Q. When you got off the front of the trolley car, it was about ten feet from the north crosswalk of Summer Street? A. I did, I got off of the trolley car, the trolley car pass, and I just walked on the side.

By the Court:

Q. How far was the point where you got off from Summer Street, how many feet? A. I don't know how wide is the street.

Q. Well, was it right on the corner? A. Yes.

Q. Right on the corner? A. Right on the corner.

By Mr. Stites:

Q. Now, when you got off of the trolley car, did you wait for the trolley car to pass, or did you pass in front of it? A. I waited until the trolley car pass.

Q. As soon as the trolley car passed, did you walk out in back of the trolley car, across the street? A. Trolley car pass already, I am looking both sides, I can't see nothing, and I went to walk.

10 Q. You couldn't see anything on account of the fog, could you? A. Well, you can see about twenty or twenty-five feet.

Q. You could see twenty to twenty-five feet that morning? A. Yes.

Q. You could? A. Well, I could about, maybe twenty or some more feet I saw.

Q. Wasn't it very foggy, heavy fog, that morning? A. Not so quite.

20 Q. What?

The Court: Not so much.

A. Not so much.

Q. Not so much fog? A. I can see about twenty feet.

Q. Before you crossed the street, you looked both up and down Main Street, did you? A. Yes.

30 Q. How far away from you was the trolley car when you looked up and down Main Street? A. Well, I see about couple of blocks, looked both sides.

Q. How far away from you was the trolley car when you looked up and down Main Street? How far had the trolley car gone when you looked? A. Trolley car pass already.

Q. How far? A. About twenty to twenty-five

40 feet already.

Q. It had crossed over Summer Street, had it, when you looked? A. Yes.

Q. Then you looked both directions on Main Avenue, did you? A. Yes.

Q. Did you see anything coming? A. No.

Q. You could see for twenty feet, you say? A. I could see. 10

Q. Could you see all of the way across Summer Street? A. Yes.

Q. You didn't see anything coming? A. No.

Q. How wide is Summer Street at that point? A. I don't know how wide is that street.

Q. Well, can you show us in the court room here about how wide it is? A. It is as wide as the court room.

The Court: It is as wide as the court room? 20

The Witness: Looked as wide as the court room.

The Court: As wide as the court room; forty feet.

Q. You could see all of the way across Summer Street before you started over? Right? A. I looked all over, both sides; I can't see nothing.

Q. You could see all of the way across Summer 30 Street? A. Yes.

Q. You didn't see anything coming? A. No.

Q. Well, did you walk or run across the street when you started to cross? A. I walked regular walking across the street.

Q. Well, after you looked up and down the street and started to cross, did you look again? A. Yes.

Q. How many times did you look after you started to cross the street? A. I looked four 40 or five times, and I saw nothing, looked both sides.

Q. You looked four or five times while you were crossing the street, both up and down Main Avenue?

The Court: The answer is, "Yes." Don't shake your head, please.

10

Q. On any of those times when you looked, did you see this automobile truck? A. No.

Q. Didn't see it? A. (No audible response.)

Q. In reply to your lawyer's question, you said that when you were struck, you was about five feet from the gutter? A. Yes.

Q. Is that right? A. (No answer.)

Q. Do you know what part of the automobile

20 struck you? A. No.

Q. It didn't run over you, did it? A. Why, I can't see, I got knocked down, I can't see nothing.

Q. Well, you can feel, can't you? A. (No answer.)

Q. Do you know whether the automobile ran over you, or not? A. No.

Q. You do not know? A. No.

30 Q. Do you know what part of the automobile struck your ankle? A. I seen, after somebody pick me up on stone, I see that big truck, big heavy truck, loaded truck.

Q. The first time you saw the automobile was after you were struck; is that right? A. Somebody pick me up, put me on a—I see truck.

The Court: That is the first you saw it; you didn't see it before that?

40 The Witness: No.

Q. The driver of the truck picked you up and

put you up on the seat, until you went to the hospital? A. Some of the other fellows pick me up.

Q. Didn't you get up on the seat of this automobile truck to wait for the hospital ambulance? A. The other guys look all over for cop, or some fellows from the hospital; I am wait down 10 there about half an hour.

Q. The driver of the truck tried to get the ambulance for you, didn't he? A. After no can find cops, that driver called me, and he go to his wagon, to the truck.

Q. You got tired of waiting for the ambulance, and he put you on the truck, and started for the hospital? Right? A. Yes.

Q. While you was on the way to the hospital, 20 the ambulance came along and you got in the ambulance? A. Yes.

Q. Right? A. (No audible response.)

Q. Doctor Kovin did not treat you while you was in the hospital, did he? A. No.

Q. He didn't see you in the hospital at all, Doctor Kovin? A. I don't remember.

Q. Eh? A. I don't remember.

Mr. Stites: That is all. 30

RE-DIRECT EXAMINATION by Mr. Heller:

Q. You said before you were struck you did not see the truck. Did you have any warning that the truck was coming there? A. When I went to cross, on the street, I heard noise.

Q. What? A. I heard noise.

Q. Did you look? A. I looked; I couldn't see 40 nothing, just heavy noise, that is all.

Q. I think you said before you did not see any lights. A. No, I don't see the lights.

Q. Now, was the truck going towards Passaic or towards Paterson? A. From Passaic to Paterson.

10 Q. It was going from Passaic towards Paterson? A. Yes.

Q. You were crossing the street—

Mr. Heller: I do not know how I can explain it to him.

Q. (Continuing.) You do not know where north, east, south and west is, do you? A. No.

Q. When you got off the trolley car, the 20 trolley car was going from Paterson toward Passaic? A. Yes.

Q. The side that you got off the trolley car is the west side. Do you understand? I am telling you now. The side you got off is the west side. Now, did you start to cross the street from the west to east or from east to west? A. From west—

Q. What? A. I got off—

30 Q. Well, when you got off the trolley car, when you started to go across the street, did you want to go straight across the tracks? A. I wanted on Summer Street across the street.

Q. That would be straight across the tracks? A. Yes.

Mr. Heller: I think we will agree on that.

The Court: That is what he said before.

40 Mr. Heller: I did not get it. All right, that is all.

RE-CROSS EXAMINATION by Mr. Stites:

Q. Mr. Landra, just one more question. You say you heard noise. A. I heard noise; yes, sir. 10

Q. What kind of a noise did you hear? A. Oh, engine like automobile.

Q. Like a truck coming? A. Yes.

Q. But you couldn't see it? A. Couldn't see it that day, heard the noise.

Q. Did you hear a whistle? A. No.

Q. Didn't hear any whistle? A. They no blow horn.

Q. Was there a headlight on the trolley car? A. On the trolley car? Yes. 20

Q. The light was lit on the trolley car, wasn't it?

The Court: Was it lighted?

The Witness: Sure.

Q. And the lights in this trolley car was lighted? A. Yes.

Q. Was the street lights lighted there on the street? Big light up over the street, was that lighted? A. Yes. 30

Mr. Stites: That is all.

CORNELIUS VANDERWENDE, sworn:

Direct-examination by Mr. Heller:

Q. Mr. Vanderwende, where do you live? A. 429 ..... Street. 40

Q. What city? A. Clifton.

Q. How long have you lived in Clifton? A. Eighteen or twenty years.

Q. Past twenty years? A. Yes.

Q. Do you know the plaintiff in this case, Mr. Landra, or the defendant in this case, Mr. Marone or Altieri? A. Neither one.

Q. Do you know counsel in this case? Or have you known at any time prior to this matter?

Mr. Stites: I object to that.

The Court: Objection sustained.

Q. Do you remember seeing an accident on October 28, 1927? A. Yes, sir.

Q. About what time did that accident happen, if you know? A. Around five-thirty in the morning.

Q. Where did it happen? A. Corner of Main and Summer Streets.

Q. Now, where were you at the time of the accident? A. Standing on the corner.

Q. Now, can you tell us what corner, keeping in mind the directions of the compass? Towards Paterson is north, towards Passaic is south; and then standing in the way—standing towards Paterson, to your right would be east, to your left would be west. Now, on what corner were you standing? A. West corner.

Q. On the west corner? A. Yes, sir.

Q. Is that the corner that Mr. Landra— A. Yes.

Q. —started across the street from? A. Well, I was standing on the opposite corner.

Q. On the opposite; then you were standing on the easterly side of Main Avenue? A. Yes.

Q. You were on the opposite corner from which he was crossing the street? A. Yes, sir.

Q. Whom were you with? A. Four or five other fellows.

Q. What were you doing on that corner so early in the morning? A. Waiting to go to work.

Q. Where were you working at that time? A. Ringwood.

Q. For the Ringwood Company? A. For the Union Building.

Q. Oh, to Ringwood, for the Union Building Company? Did you see the accident that morning? A. Yes, sir.

Q. Will you tell us what you know about it?

The Court: What you saw.

The Witness: What I saw?

Q. What you saw. A. I saw a man crossing the street. As soon as he got on the Paterson bound track the truck came along and hit him on the left foot.

Q. Now, did you hear a horn blown, or any signal given by the truck? A. No, sir.

Q. After the truck—by the way, did you see the speed with which the truck was coming? A. Yes, sir.

Q. Was it going fast or slow? A. About twenty to twenty-five miles an hour.

Q. Would you say that was fast or slow?

Mr. Stites: I object to that.

A. (Interrupting.) I would say fast.

Mr. Stites: I object to that.

The Court: Objection sustained; strike it out.

Q. Now, after the truck struck the boy, how far did the truck go—or this man? How far did the truck go before it stopped? A. Seventy-five or a hundred feet.

10 Q. You say about seventy-five to a hundred feet? A. Yes, sir.

Q. After the accident, did you do anything to assist this man? A. Yes, sir; I picked him up.

Q. What did you do? A. Helped to pick him up, and put him in the doorway.

Q. Helped to pick him up and put him in the doorway? A. Yes, sir.

Q. Then, what did you do? A. Then I went to

20 look if I can get a cop around there.

Q. I beg pardon? A. I went to see if I can get a cop.

Q. Did you see any lights on the truck while proceeding along Main Avenue? A. I didn't notice.

Q. Didn't notice any at all? A. No.

Q. Did you notice this man walking across the street? Or did you just see him when the ac-

30 cident happened? A. I seen when he was about the center of the track.

Q. On the center of the tracks? A. Yes, sir.

Mr. Heller: Take the witness.

CROSS-EXAMINATION by Mr. Stites:

Q. As I understand you to say, that you was standing on the west corner—

40

Mr. Heller: He said eastern.

Mr. Stites: Wait a minute; you have examined him.

Q. Didn't you say, first, that you was standing on the west corner? A. I think I did.

Q. Well, you was mistaken about that, wasn't you? A. Well, the west should be the west cor- 10 ner if you were coming from Passaic.

The Court: No, it is west there from Passaic, or Paterson—

Q. Coming from Passaic— A. East corner I was standing on then.

The Court: Facing Paterson on the right-hand side?

The Witness: On the right-hand side. 20

The Court: That is east.

Q. How long did you say you had lived in Passaic? A. Eighteen or twenty years.

Q. Do you know which direction Main Avenue runs? A. Yes, sir.

Q. What direction? A. East and west.

Q. What direction does Summer Street run? A. North and south. 30

Q. Pretty sure of that, are you? A. I am pretty sure.

Q. You went to school, didn't you? A. I guess so.

Q. Eh? A. I guess so.

Q. Studied geography? A. Yes.

Q. Well, now, the intersection there of Summer Street and Main Avenue has four corners, hasn't it? A. Yes, sir.

Q. Which one was you on? A. On the east 40 corner.

Q. Well, the northeast or the southeast?

Mr. Heller: I might say this, if your

Honor please, since the witness has the points of the compass confused—

The Court: Oh, he has lived here twenty years; he has been to school, and knows north, east, south and west, he says.

Mr. Heller: I think, in order to simplify matters, if we showed him the picture, he may be able to show us more accurately.

The Court: You can ask him on redirect, if you want.

Mr. Stites: I am trying to simplify it all I can.

Mr. Heller: No, you are not.

Mr. Stites: I am, too.

By the Court:

Q. Which corner were you on? A. On the east corner.

Q. Well, northeast or southeast, or what?

Mr. Heller: If you do not know, just tell him you do not know.

Mr. Stites: I object to that.

The Court: You mustn't do that.

Mr. Stites: That is not proper.

The Court: He knows enough without prompting or not to answer, I hope.

Mr. Heller: No, if he knows, I want him to answer.

The Court: Of course, you do; but if he doesn't know, he knows enough not to answer, I hope.

Mr. Heller: I hope so, too.

Q. All right. What corner were you on? A. On the northeast corner.

By Mr. Stites:

Q. Northeast corner? A. Yes, sir.

Q. Which corner was it that Mr. Landra started from to cross the street? A. From the opposite corner.

Q. Well, which corner was that? A. That is, the opposite corner.

Q. Northwest or southwest? A. Northwest corner.

Q. Was there any fog that morning? A. Yes, sir.

Q. Much of a fog? A. You could see for between twenty and forty feet.

Q. You could see all of the way across Summer Street, couldn't you? A. Yes, sir.

Q. How long had you been standing on the corner? A. About fifteen minutes.

Q. And there was four or five fellows with you? A. Yes, sir.

Q. Friends of yours? A. No, sir; they were workingmen.

Q. Workingmen? A. Men; yes, sir.

Q. Did you know them? A. Yes, sir; but not by name.

Q. Lived in the neighborhood there, I suppose? A. Well, they come from Clifton, Passaic, all around the neighborhood there.

Q. They worked with you, did they? A. Yes, sir.

Q. Are they in court? A. No, sir.

Q. Did you give your name to Mr. Landra? A. I did not, not that day.

Q. Did you see the truck driver there? A. I seen him, but I didn't talk to him.

Q. Do you see him in court A. I couldn't say, to recognize him.

10 Q. You would not recognize him? A. No, sir.

Q. Didn't the driver of the truck help to put Mr. Landra on the seat of the truck? A. I don't know; I didn't see him go away.

Q. How long did you stay there after the accident? A. I stood there about twenty minutes after.

Q. In what part of the street was Mr. Landra when you picked him up? A. He was laying in 20 the gutter.

Q. On what side of the street? A. Where I was standing.

Q. On the east side or the west side? A. On the east side.

Q. You saw him struck, did you? A. Yes, sir.

Q. Of course, you saw the automobile coming, didn't you? A. I seen it; yes, sir.

Q. You could see all of the way across Sum- 30 mer Street? A. Yes, sir.

Q. You saw it coming? A. Yes, sir.

Q. Making considerable noise, was it, rattling? A. Oh, rattling; yes, sir.

Q. Now, when you picked him up, Mr. Landra, how far north of the corner where you was standing was he lying in the gutter, that is, toward Paterson? A. He was laying about five foot from the corner.

40 Q. From where you was standing? A. Yes, in the gutter.

Q. In the gutter. Did you see Mr. Landra

when he first started to cross the street? A. No, I seen him about the middle of the road.

Q. First you saw him, he was in the middle of the road? A. Yes, sir. 10

Q. Where was the automobile truck at that time? A. He was about five or ten feet from the intersection.

Q. That is, the truck was about five or ten feet from—south of Summer Street, you mean? A. Yes.

Q. At that time, Mr. Landra was about in the middle of Main Avenue? A. Yes, sir.

Q. Truck coming all of the time? A. Yes, sir. 20

Q. And the truck passed over Summer Street? A. Yes, sir.

Q. And then struck Mr. Landra? A. Yes, sir.

Q. About how far from the east curb was Mr. Landra when he was struck? A. He was right in the Paterson bound trolley track when he was struck.

Q. That is, the north bound track? A. Pater- 30 son bound.

Q. Paterson bound, that is, from Passaic to Paterson? A. Yes, sir.

Q. Between the rails? A. No, right on the—right on the outside rail.

Q. How was he moving? A. Who? Mr. Landra?

Q. Yes? A. Walking.

Q. Wasn't he running? A. No, sir.

Q. Did you see Mr. Landra look up and down 40 Main Avenue? A. I didn't notice that.

Q. Were the streets wet or dry that morning? A. Damp.

Q. What kind of a truck was this? A. Baby Mack.

Q. How many tons? Do you know? A. I do not know; no, sir.

Q. Loaded? A. Yes, sir.

Q. Did you notice with what? A. No, sir.

Q. You did not see what it was loaded with? A. Loaded with produce on it.

Q. How many men was on it? A. I didn't notice.

Q. Did you notice the trolley car there at all that morning? A. No, I didn't.

Q. Didn't notice that? A. No, sir.

Q. Was there anyone else crossing the street at the time that you noticed? A. No, sir.

Q. There wasn't anyone? A. No, sir.

Q. Mr. Landra was alone? A. Yes, sir.

Q. Were the street lights lighted there that morning? A. Yes, sir.

Mr. Stites: I think that is all.

RE-DIRECT EXAMINATION by Mr. Heller:

Q. Before the accident, did you see a trolley car there at all? A. I didn't notice it.

Q. Before the accident? A. No, I didn't notice it.

By the Court:

Q. You said that the truck struck him in the ankle; is that correct? A. Yes, sir.

Q. What part of the truck struck him in the ankle? A. The rear right wheel—front right wheel.

Q. Front right wheel? A. Yes, sir.

Q. Could you see that? A. Yes, sir.

Q. Then he was hurled to the side, was he? A. Hurled to the gutter; yes, sir.

Q. Truck did not pass over him? A. No, sir.

Mr. Heller: That is all, Mr. Vanderwende.

Mr. Heller: That is our case, your Honor.

PLAINTIFF RESTS.

Defendants' motion for non-suit.

Mr. Stites: Your Honor, I move for a non-suit, first, upon the ground that there is no proof of ownership or operation; secondly, that it appears from the testimony of the plaintiff himself that he was guilty of contributory negligence.

The Court: I will hear you, Mr. Heller.

Mr. Heller: If your Honor please, on the question of ownership, I did not think Mr. Stites was going to raise that.

The Court: Let's forget that, talk about the other point.

Mr. Heller: About the point whether the plaintiff was guilty of contributory negligence?

The Court: Yes, sir.

(Mr. Heller then argued the question of contributory negligence.)

The Court: The motion is granted. There is nothing for the jury at all in this case. It is a

clear case of contributory negligence, under your own proof—a man crossing the street has no right to assume that because he has the right of way he need not look, and where a man, if he looked, could have seen, and did not see, the courts have said he did not look.

Mr. Heller: May I say this, your Honor please, on the question of ownership, will your Honor allow me to prove ownership?

The Court: I did not pass on that question at all; that is not necessary—assuming that ownership is admitted.

Mr. Heller: Yes.

The Court: And I assume, perhaps, it is by the pleadings.

Mr. Stites: He is a partner, this one defendant; he is a part owner.

The Court: I do not have to pass on that, on that phase of it; therefore,there can be no question about that.

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

The Court: You may have an exception, certainly. I will hear the next case. The jury is excused.

NEW JERSEY COURT OF ERRORS AND APPEALS.

AMETRIA LANDRA, Plaintiff, vs. SALVATORE MARONE, trading as Marone & Company, and NICHOLAS ALTIERI, Defendants.	Action at Law on Appeal from Passaic Circuit.

BRIEF OF PLAINTIFF.

This is an appeal from a judgment of nonsuit entered after the closing and resting of the plaintiff's direct case. The facts in this case briefly are these:

On the twenty-eighth day of October, 1927, the plaintiff, Ametria Landra, was injured in an automobile accident at the corner and intersection of Main Avenue and Summer Street in the City of Passaic, New Jersey. He got off a trolley car at the corner of Main Avenue and Summer Street at half past five in the morning on October 28, 1927. He waited until the trolley had proceeded on its course and then made observations to his left and right and seeing no approaching vehicles, started to cross Main Avenue at the intersection of Summer Street. It was a foggy morning and one could only see a distance of between twenty and forty feet. Main Avenue is a main thoroughfare upon

which there are two sets of trolley tracks. The plaintiff had already gone across the first set of tracks, and had passed the second set of tracks when he was struck by the automobile owned by the defendant, Salvatore Marone, trading as Marone & Company, and driven by the defendant, Nicholas Altieri.

The uncontradicted testimony was also to the effect that while the plaintiff was crossing the street, he had made observations about four or five times both to his left and right, but had seen nothing. No signal or warning of approach was given. There were no lights on the truck. The defendant's truck was operated at an excessive rate of speed and did not come to a stop until about seventy-five to one hundred feet from the point of contact.

The plaintiff himself was corroborated by a disinterested person, to wit: Cornelius Vandewende, whose testimony was to the effect that the truck was going at a fast rate of speed and had travelled about seventy-five to one hundred feet after striking the plaintiff; had no lights and gave no signal of approach.

The plaintiff received a fracture on the left ankle as a result of which he was incapacitated for a long period of time.

With these facts being brought out at the plaintiff's case, the defendant moved for a nonsuit upon the ground that the plaintiff was guilty of contributory negligence. The court granted this motion and it is because of this decision that the plaintiff appeals.

POINT ONE.

We contend that the court erred in entering a judgment of nonsuit in favor of the defendants and against the plaintiff.

We desire first to urge that in a situation such as the case at bar, it is fundamentally the rule that the plaintiff's evidence must be and should be taken as admitted for the purpose of a motion for a nonsuit. In support of this contention we cite the case of *Kerner vs. Zerr* (135 Atl. 866); decided by our Court of Errors and Appeals, speaking through Justice Black:

> "A motion for a nonsuit admits the truth of the plaintiff's evidence, and of every inference of fact that can be legitimately drawn therefrom, but denies its sufficiency in law. The trial judge is to say whether any facts have been established by evidence from which negligence may be reasonably inferred. It is for the jury to say whether from those facts negligence ought to be inferred."

We therefore come to the question as to whether or not the testimony adduced on the part of the plaintiff is the inference most favorable to the plaintiff and sufficient to raise a jury question.

The court, in granting the motion, said (Case, page 43 and 44):

> "There is nothing for the jury at all in this case. It is a clear case of contributory negligence, under your own proof—a man crossing the street has no right to assume that because he has the right of way he need not look, and where a man, if he looked, could have seen, and did not see, the courts have said he did not look."

With this conclusion on the part of the court, we respectfully refer to the actual testimony, and submit upon a careful reading, the trial court erred in both stating of the facts and in finding a fact which was necessarily within the sole province of the jury.

Referring to the plaintiff's testimony (Case, page 21, lines 10 to 43, page 22, lines 1 to 10):

> "Q. What happened after you got off the trolley car? A. The trolley car went, and I am looking both sides, and I cannot see nothing, and I walking across.
> "Q. As you walked across the street, did anything happen to you? A. No, I cannot see nothing, look on both sides, can see nothing.
> "Q. As you walked across the street, did anything happen to you? A. No.
> "Q. Did you understand my question?
>
> "The Court: Did an automobile hit you?
>
> "A. I walking, look both sides, you could see nothing, but it was about five more feet from curbstone I got hit, a "Knife" at that time knocked me down.
> "Q. Did an automobile strike you? A. Yes.
> "Q. It struck you while you were crossing the street? A. Yes.
> "Q. Where did the auto strike you? What foot was struck? A. Left foot.
> "Q. The left foot. When the auto struck you, do you know what happened to yourself? A. Well—
> "Q. Well, what part of the roadway were you struck on? Do you know? A. I was a little—
>
> "By the Court:
>
> "Q. How nearly had you gotten across the street? How near were you to the other side? A. I was about five feet from the curbstone.
> "Q. About five feet from the gutter? A. Yes.
> "Q. What street was that—Main Avenue and what is the street? A. Main Avenue and Summer Street."

Continuing (Case, page 22, lines 29 to 33):

> "Q. While you were going across the street, did you hear any horn blown by any automobile? A. No.
> "Q. Did you see any lights on the truck? A. I don't see the lights, no."

It will be observed that the plaintiff cannot speak the English language too well, but nevertheless states very clearly that he made proper observation both before and during the time he was crossing the street at the intersection; that he was struck, as he estimates, at about five feet opposite the curb.

Upon cross-examination, this witness reiterates his story and explains that it was a foggy morning and in his estimation, one could not see more than a distance of twenty or twenty-five feet (Case, page 28, lines 10 to 29):

> "Q. You couldn't see anything on account of the fog, could you? A. Well, you can see about twenty or twenty-five feet.
> "Q. You could see twenty to twenty-five feet that morning? A. Yes.
> "Q. You could? A. Well, I could about, maybe twenty or some more feet I saw.
> "Q. Wasn't it very foggy, heavy fog, that morning? A. Not so quite.
> "Q. What?
>
> "The Court: Not so much.
>
> "A. Not so much.

"Q. Not so much fog? A. I can see about twenty feet.

"Q. Before you crossed the street, you looked both up and down Main Street, did you? A. Yes."

He also testified that the trolley car had already passed him before he attempted to cross the road (Case, page 28, lines 34 to 43):

"Q. How far away from you was the trolley car when you looked up and down Main Street? How far had the trolley car gone when you looked? A. Trolley car pass already.

"Q. How far? A. About twenty to twenty-five feet already.

"Q. It had crossed over Summer Street, had it, when you looked? A. Yes."

He also reiterated that after he started to cross the street, he looked four or five times and saw nothing (Case, page 29, lines 38 to 42):

"Q. How many times did you look after you started to cross the street? A. I looked four or five times, and I saw nothing, looked both sides."

This in effect completes the testimony of the plaintiff. We desire at this time to urge that according to this testimony which of course must be accepted upon the argument for a nonsuit, that the plaintiff acted as any reasonable person would act under the similar circumstances and used every precaution that any reasonable man would.

He is corroborated by a disinterested witness, Cornelius Vanderwende, who testified as follows (Case, page 34, lines 9 to 11):

"Q. Do you know the plaintiff in this case, Mr. Landra, or the defendant in this case, Mr. Marone or Altieri? A. Neither one (Case, page 34, lines 17 to 25).

"Q. Do you remember seeing an accident on October 28, 1927? A. Yes, sir.

"Q. About what time did that accident happen, if you know? A. Around five-thirty in the morning.

"Q. Where did it happen? A. Corner of Main and Summer Streets.

"Q. Now, where were you at the time of the accident. A. Standing on the corner."

This witness was standing on the opposite corner (Case, page 35) from where the accident happened, and actually saw the accident (Case, page 35, lines 23 to 42):

"Q. What you saw. A. I saw a man crossing the street. As soon as he got on the Paterson bound track the truck came along and hit him on the left foot.

"Q. Now, did you hear a horn blown, or any signal given by the truck? A. No, sir.

"Q. After the truck—by the way, did you see the speed with which the truck was coming? A. Yes, sir.

"Q. Was it going fast or slow? A. About twenty to twenty-five miles an hour.

"Q. Would you say that was fast or slow?

"Mr. Stites: I object to that.

"A. (Interrupting.) I would say fast.

"Mr. Stites: I object to that.

"The Court: Objection sustained; strike it out (Case, page 36, lines 1 to 10).

"Q. Now, after the truck struck the

boy, how far did the truck go—or this man? How far did the truck go before it stopped? A. Seventy-five or a hundred feet (Case, page 36, lines 23 to 33).

"Q. Did you see any lights on the truck while proceeding along Main Avenue? A. I didn't notice.

"Q. Didn't notice any at all? A. No.

"Q. Did you notice this man walking across the street? Or did you just see him when the accident happened? A. I seen when he was about the center of the track.

"Q. On the center of the tracks? A. Yes, sir.

"Mr. Heller: Take the witness."

Upon cross-examination of this witness, he substantiated the story testified to on direct-examination and also gave his version of the distance that he could see in the fog of that morning (Case, page 39, lines 19 to 22).

> "Q. Was there any fog that morning? A. Yes, sir.
>
> "Q. Much of a fog? A. You could see for between twenty and forty feet.
>
> "Q. You could see all of the way across Summer Street, couldn't you? A. Yes, sir."

Plaintiff also produced the medical testimony and then rested his case. With these facts the court took it upon himself to conclude that the plaintiff was guilty of contributory negligence and granted a motion for a nonsuit.

We sincerely urge that we have carefully inspected the records for the purpose of finding any fact which might lend favor to a conclusion that the plaintiff was guilty of contributory negligence and that such contributory negligence

was the approximate cause of the injury, especially in the light the court's finding, to wit (Case, page 44, lines 1 to 9):

> "A man crossing the street has no right to assume that because he has the right of way he need not look."

With this first finding as just set forth, it is our contention that there is no evidence which would indicate that the plaintiff did not make proper precautions. Obviously, the contrary is conclusively proven, to wit: That the plaintiff did as a matter of fact make four or five observations to see an approaching vehicle. The court also found as a fact (Case, page 44, lines 1 to 9)

> "and where a man, if he looked, could have seen, and did not see, the courts have said he did not look."

The court was not justified in finding these facts in view of the testimony since the plaintiff testified that he could only see at a distance of approximately twenty feet. This was directly contrary to the admitted evidence in the case, since the testimony clearly shows that it was a foggy morning and that it was impossible to see any great distance.

We liken the case at bar to the case of *Quinn vs. West Jersey & S. R. Co.,* 74 Atl. 456; 78 N. J. L. 539, in which case the court said:

> "The plaintiff, having driven to within three feet of defendant's track and there stopped, looked and listened for an approaching train, and, it appearing that at that point his range of vision extended about two hundred feet up the track, and hearing and seeing no train, he attempted

to cross, when an electric train coming at high speed suddenly emerged and caused the damage complained of. There was evidence from which a jury might infer that the audible signals required by statute were not given. Held that, under these circumstances, a jury question was presented, and a motion to nonsuit was properly refused."

We feel that the case at bar presents a situation almost parallel at every angle to the *Quinn* case and the court therefore was in error in granting the nonsuit.

We therefore urge that the court in giving its reasons for the granting of a nonsuit was in error and that there exists no grounds upon the records which would entitle the court to grant the motion.

Citing the case of *Donus vs. Public Service Ry. Co.*, 133 Atl. 196:

> "To preclude the plaintiff from maintaining the action on the ground of contributory negligence, his conduct must have been negligent, and his negligence must have been contributed to the injury in such a way that, if he had not been negligent, he would have received no injury from the act of the defendant."

Also citing *Jackson vs. Geiger, et al.*, 126 Atl. 438; 100 New Jersey Law, 330:

> "To disentitle a plaintiff to recover, it must not only appear that he was negligent but that his negligence proximately contributed to defendant's negligence that caused his injury."

It is fundamentally the rule that where the entire evidence presents a debatable question of

fact as to the existence of contributory negligence, the issue is one for the jury. Citing *Doney vs. Morris County Traction Co.*, 99 Atl. 118, at page 119 (89 New Jersey Law 416):

> "We find nothing of a character so clearly culpable in the plaintiff's conduct in this case as to charge him as a court question with contributory negligence. The books are replete with road crossing cases, wherein this court has determined the rule to be that, where the case upon the entire evidence presents a debatable question of fact as to the existence of contributory negligence, the issue is one for the jury. *Zindler vs. Public Service Ry. Co.*, 78 N. J. Law 536; 74 Atl. 478; *Quinn vs. West Jersey Ry. Co.*, 78 N. J. Law 539, 74 Atl. 456; *Bradley vs. C. R. R. of N. J.*, 84 N. J. Law 357; 86 Atl. 378; *Peterpolo vs. Public Service Ry. Co.*, 81 N. J. Law 390, 79 Atl. 307; *Napodensky vs. W. J. R. R. Co.*, 88 Atl. 1032; *Schnackenberg vs. D., L. & W. R. R.*, 98 Atl. 266; *Rabinowitz vs. Hawthorne*, 98 Atl. 315.
>
> "*A fortiori* must this well-settled rule be applied where, as in the case *sub judice*, the facts upon the *ex parte* proof of the plaintiff stand uncontroverted, and any deduction to be drawn therefrom must necessarily present a question of fact resolvable only by the jury."

Taking therefore the entire case, we respectfully urge that the judgment of the trial court in granting a nonsuit be reversed and a trial *de novo* be granted.

Respectfully submitted,

HELLER & BOSS,
Attorneys for Plaintiff.

AARON HELLER,
Of Counsel.

New Jersey Court of Errors and Appeals

AMETRIA LANDRA, Plaintiff, v. SALVATORE MARONE, trading as MARONE & COMPANY and NICHOLAS ALTIERI, Defendants.	Action at Law On Appeal from Passaic Circuit.

BRIEF FOR THE DEFENDANTS-APPELLEES.

Statement.

On the 28th day of October, 1927, at 5:30 o'clock A. M. (Case, 20, l. 40; Case, 34, l. 20), plaintiff alighted from a south bound trolley car on Main Avenue in the City of Passaic, State of New Jersey, and while in the act of crossing Main Avenue, at its intersection with Summer Street, from the northwest corner to the northeast corner going in an easterly direction, plaintiff was struck by an automobile truck proceeding in a northerly direction on Main Avenue, north of the intersection of Summer Street.

POINT I.

The non-suit was properly granted.

Plaintiff was guilty of contributory negligence in crossing the highway in the manner in which he proceeded in not making careful and proper observations, both before and while in the act of crossing. He testified that he looked on both sides and did not see anything (Case, 21, l. 10; Case, 28, l. 1), and the first time that he saw the automobile which struck him was after he was struck (Case, 30, l. 35), although he could see up and down Main Avenue in both directions for a distance of about two blocks (Case, 28, l. 30).

Plaintiff further testified that he waited for the trolley car from which he had alighted on the northwest corner of Main Avenue and Summer Street (Case, 39, l. 18; Case, 26, l. 15), to continue before he started to cross the highway in an easterly direction to the northeast corner (Case, 28, l. 1), and that when he first looked before crossing, the trolley car had proceeded entirely across Summer Street, going south (Case, 28, l. 41).

> "Q. Then you looked both directions on Main Avenue, did you? A. Yes.
>
> Q. Did you see anything coming? A. No.
>
> Q. You could see for twenty feet, you say? A. I could see.
>
> Q. Could you see all the way across Summer Street? A. Yes.
>
> Q. You didn't see anything coming? A. No.
>
> Q. How wide is Summer Street at that point? A. I don't know how wide is that street.

> Q. Well, can you show us in the court room here about how wide it is? A. It is as wide as the court room.
>
> The Court: It is as wide as the court room?
>
> The Witness: Looked as wide as the court room.
>
> The Court: As wide as the court room; forty feet.
>
> Q. You could see all of the way across Summer Street before you started over? Right? A. I looked all over, both sides; I can't see nothing.
>
> Q. You would see all of the way across Summer Street? A. Yes.
>
> Q. You didn't see anything coming? A. No."

When the plaintiff was crossing Main Avenue, he heard a noise like an automobile truck coming, but did not see anything (Case, 33, l. 10). From this testimony, it conclusively appears that the plaintiff heard the automobile truck approaching, but paid no attention to it and did not even look to see what was making the noise, because if he had looked he could have seen the truck as it was approaching at the time.

There was plenty of light at the intersection where the accident occurred as the headlights and other lights on the trolley car were lighted which was going in a southerly direction and the automobile truck was proceeding north and the large street light at the intersection was also lighted (Case, 33, l. 20).

Plaintiff's witness, Vanderwende, who was standing on the northeast corner of Main Avenue and Summer Street (Case, 39, l. 1), could see south beyond Summer Street (Case, 39, l. 22), the direction from which the truck was approaching and

he saw the automobile truck approaching when it was south of Summer Street and making considerable noise and rattling (Case, 40, l. 30), and saw the truck pass all the way over Summer Street before the accident (Case, 41, l. 20), and the plaintiff was struck north of Summer Street on Main Avenue in the middle of the street (Case 41, 1. 18).

This witness, on the morning of the accident, could see a distance of at least 75 or 100 feet as he testified that the truck proceeded about that distance after the accident (Case, 36, l. 1), as the witness would necessarily have to see the truck that distance in order to testify to that effect, which indicates that the truck could have been seen that morning a considerable distance if the plaintiff had been looking.

The witness also testified that at the time of the accident, the street lights at the intersection were lighted (Case, 42, l. 28), and that when he first saw the plaintiff, he was in the middle of the road and at that time, the truck was approaching, going north, 5 or 10 feet south of Summer Street (Case, 41, l. 5), and that the truck had to cross Summer Street, a distance of 40 feet (Case, 29, l. 20), before reaching the plaintiff, who was crossing Main Avenue, north of Summer Street.

This witness did not testify that there was no lights on the truck as stated in plaintiff's brief, but said that he did not notice whether there was any lights on truck (Case, 36, l. 24).

It is respectfully contended that if plaintiff's witness could see the automobile truck approaching, it is only reasonable to assume that the plaintiff could have seen it also if he had been looking.

This witness saw the plaintiff crossing the street (Case, 35, l. 25), but did not see the plaintiff look up and down Main Avenue as testified to by the

plaintiff (Case, 41, l. 40), which is a strong indication that the plaintiff did not look while crossing the street.

It is apparent from the testimony of the plaintiff that if he did look up and down Main Avenue, he certainly looked carelessly as the automobile truck was certainly within the range of his vision before he started to cross the street as he could see for about two blocks as he expressed it and there was plenty of light and the large street light on the corner was lighted and the defendants contend that the plaintiff was guilty of contributory negligence in not making reasonable and careful observations at the time of crossing the street and that he should have seen the automobile truck approaching as it was certainly in the street coming toward him at the time and there does not seem to be any reason for his not seeing the truck if he had either looked or made careful observations.

The rule requiring one exercising his lawful rights in a place where the exercise of lawful rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances, is the measure of duty for one who crosses a public highway on foot. He must use his powers of observation to discover approaching vehicles, and his judgment how and when to cross without collision, but his observation need not extend beyond the distance within which vehicles moving at lawful speed would endanger him. If obstacles temporarily intervene to prevent observation, he should wait until the required observation can be made.

Newark Passenger Ry. Co. v. Block, Errors and Appeals, 55 N. J. Law, page 605.

In the above case, the court at page 612 states as follows:

> "The duty devolving on one using a highway for passage on foot varies with circumstances, which are indefinitely various. It may be of one degree when the highway is a quite country road, and of another degree when it is the crowded street of a great city. It may differ at different hours of the day, with respect to different vehicles and the differing rates of speed at which they are moving, and by reason of different opportunities of observation.
>
> It is impossible, in my judgment, to classify these variant circumstances, and to lay down a precise rule as to the degree of care required in each class. In dealing with cases of this sort we must recur to the general rule, which requires one, in exercising his lawful rights in a place where the exercise of like rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances.
>
> From this rule it may be said in general that one who passes on foot along a sidewalk or footpath of a highway must use his powers of observation in respect to other passers thereon, and a reasonable judgment to avoid collision. In crossing the roadway a foot passenger must likewise use his powers of observation to discover approaching vehicles, and a like judgment when and how to cross without collision. In the latter case, doubtless the degree of care required exceeds that required in the former case, not because the right of the foot passenger and the right of the driver of a vehicle differ, but because of the circumstances. The vehicle usually travels at a greater speed—it cannot be so quickly stopped or diverted from its course; a street car cannot deviate from its track; while the passer on foot may quickly stop, turn aside or even retrace his steps. So it may also be generally said that if obstacles temporarily intervene to prevent observation, reasonable prudence would dictate delay until such observation as is requisite has been made."

One who passes on foot along a crosswalk over a highway is bound to use his powers of observation to discover approaching vehicles, and should exercise a reasonable judgment as to when and how to cross without collision. McGrath v. North Jersey Street Ry. Co., 66 N. J. Law, page 312, Errors and Appeals.

The court in this case stated as follows at page 317: Two conclusions seem inevitable. One is that if the plaintiff, just before the accident, had not been inattentive to his surroundings he must have seen this eastbound car, within a few feet of him, either in motion or at rest, on the track upon which he was about to step. The car was a large object. Its lights made it conspicuous. There was no impediment to vision. Unfortunately the plaintiff was looking away from the car, and so did not see it.

The other conclusion that results from the testimony is that the plaintiff, when he looked to the west, before stepping off the curb, and saw no eastbound car, must have looked carelessly, etc. At page 318, near the top of the page, the court further commented as follows: The time that elapsed between his leaving the curb and the accident was brief; only what a man would occupy in walking twelve or fifteen feet at a "nice, ordinary walk."