INDEX

Summons.

(Filed October 23, 1928.)

THE STATE OF NEW JERSEY:

To: MATTHEW STANKEWICZ:

YOU ARE SUMMONED to answer the annexed complaint of Martin Rochford, in an action at law in the Hudson County Circuit Court. AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Hudson County Circuit Court, at Jersey City, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

L. S.

WITNESS, FRANK L. CLEARY, Esq., Judge of the Hudson County Circuit Court, at Jersey City, New Jersey, this 18th day of October, 1928.

JOHN J. McGOVERN,
Clerk.

GEORGE R. MILSTEIN,
Attorney for Plaintiff.

Complaint.

(Filed October 23, 1928.)

HUDSON COUNTY CIRCUIT COURT.

MARTIN ROCHFORD,
Plaintiff,

v.

MATTHEW STANKEWICZ,
Defendant.

Action at Law.

The Plaintiff, Martin Rochford, residing in Jersey City, Hudson County, New Jersey, says that:

1. That at all of the times hereinafter mentioned, the defendant was the owner of a certain automobile bearing New Jersey Registration License No. H-6327 for the year of 1928.

2. That on or about September 29th, 1928, said defendant, his servants, agents or employees operated and controlled the said automobile bearing license No. H-6327, along and upon Grand Street, a public highway in the City of Jersey City, Hudson County, New Jersey, at, about or near the intersection of Summit Avenue, therewith.

3. That at the time and place above mentioned the plaintiff, Martin Rochford, was lawfully proceeding at the crosswalk, across Grand Street.

4. That the said defendant, his servants, agents or employees negligently, carelessly and recklessly operated and controlled the said automobile along Grand Street aforesaid, at a high and excessive rate of speed, without regard for the motor vehicle laws of the State of New Jersey or the ordinances of the City of Jersey City, without sounding any

signal or warning of its approach and without regard for the safety of others lawfully upon the public highway, so that the said car struck and collided with the plaintiff.

5. That as a result of the negligence of the defendant, his servants, agents or employees, the plaintiff sustained severe and painful bruises, contusions, lacerations and abrasions about the arms, head and body, eight stitches in his forehead and his nervous system was severely shocked and injured; from which injuries, and as a result thereof, he was made sick, sore, maimed and disordered, and so continues; he has suffered, still suffers and will continue to suffer in the future great pain and distress and said injuries will become permanent.

6. As a result of the injuries sustained by the plaintiff, Martin Rochford, his earning capacity is, and will continue to be impaired; and he has and in the future will be compelled to spend divers sums of money for medicines and medical attendance.

Wherefore plaintiff demands judgment against the defendant in the sum of Twenty-five Thousand ($25,000.00) Dollars, and costs of this suit.

GEORGE R. MILSTEIN,
Attorney for Plaintiff.

Answer.

(Filed November 7, 1928.)

HUDSON COUNTY CIRCUIT COURT.

MARTIN ROCHFORD,
Plaintiff,

v.

MATTHEW STANKEWICZ,
Defendant.

Action at Law.

The defendant, Matthew Stankewicz, residing in the City of Bayonne, County of Hudson and State of New Jersey, in answer to the plaintiff's complaint, says that:

1. He admits paragraph one.

2. He admits paragraph two.

3. He has no knowledge or information sufficient to form a belief as to the contents of paragraph three.

4. He denies paragraph four.

5. He has no knowledge or information sufficient to form a belief as to the allegations in paragraph five.

6. He has no knowledge or information sufficient to form a belief as to the allegations in paragraph six.

FIRST SEPARATE DEFENSE.

1. As his first separate defense, defendant, Matthew Stankewicz, says and will offer to prove at the trial that the injuries received by the plaintiff were contributed to by his own negligence,

when he walked into the rear of defendant's automobile.

SECOND SEPARATE DEFENSE.

1. As his second separate defense, defendant, Matthew Stankewicz, says and will offer to prove at the trial that the injuries received by the plaintiff were caused by the said plaintiff's being intoxicated and under the influence of liquor.

THIRD SEPARATE DEFENSE.

1. As his third separate defense, defendant, Matthew Stankewicz, says and will offer to prove at the trial that he blew the horn of his automobile, as a warning to pedestrians and other persons or vehicles using the streets where the alleged accident happened, was driving very slowly at the intersections of all streets, had full control of his automobile, and was very careful in operating the same.

CASIMIR TOKARSKI,
Attorney of Defendant,
Matthew Stankewicz.

Reply.

(Filed November 16, 1928.)

HUDSON COUNTY CIRCUIT COURT.

MARTIN ROCHFORD, *Plaintiff*, v. MATTHEW STANKEWICZ, *Defendant*.	Action at Law.

The plaintiff replying to the answer filed by the defendant says that he denies each and every allegation contained in the First Separate Defense, Second Separate Defense and Third Separate Defense.

GEORGE R. MILSTEIN,
Attorney for Plaintiff.

HUDSON COUNTY CIRCUIT COURT.

MARTIN ROCHFORD

v.

MATTHEW STANKEWICZ.

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

Jersey City, N. J.
November 3, 1930.

APPEARANCES:

GEORGE R. MILSTEIN, Esq., for the Plaintiff.
CASIMIR TOKARSKI, Esq., for the Defendant,
SAMUEL E. KRESCH, Esq., of Counsel.

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

Counsel opened to the Jury.

MARTIN ROCHFORD, sworn for the plaintiff.

Direct examination by Mr. Milstein:

Q. When I ask you these questions, answer slowly and loudly enough so that the twelfth man over there in the Jury box can hear you. Do you understand? A. Yes, sir.

Q. What is your name? A. Martin Rochford.

Q. With whom do you live, Mr. Rochford? A. 351 Randolph Avenue.

Q. With whom do you live? A. With my daughter.

Q. Do you remember being in an accident on September 29th, 1928? A. I was at the corner.

Q. Do you remember being in an accident on September 29th, 1928? A. Yes, sir.

Q. Where were you at the time? A. At the corner.

Q. What corner? A. Summit Avenue and Grant.

Q. Were you about to cross the crossing there, at the crosswalk? A. The first track.

Q. Did you look up and down to see whether any machines were coming in either direction? A. I looked up and down and I seen nothing coming.

Q. Did you hear whether or not anyone was blowing a horn in either direction? A. No, sir.

Q. Did you hear any? A. No, sir.

Q. Did you cross, or did you start to cross? A. About three or four feet crossing and—

Q. And what happened? A. I got struck and I got knocked unconscious, I didn't know what happened.

Q. Where were you taken after you were hit by the automobile? A. I don't know who took me.

Q. What happened? A. I was knocked unconscious.

Q. When you came to, Mr. Rochford, what was the matter with you, as a result? A. I was up in the City Hospital, I guess.

Q. How long were you there? A. I don't know. I could not tell you.

Q. Were you there a day or more? A. They fixed me up and brought me home.

Q. You were there a couple of hours? A. I suppose.

Q. And they brought you home? A. They brought me home, yes, sir.

Q. What happened to you as a result of this accident? A. Put a couple of stitches in my eye, my head.

Q. Whereabouts on your eye? A. Right here (indicating).

Q. Where else did you get stitches? A. Right here (indicating).

Q. Where else were you hurt as a result of this? A. They took me home.

Q. Where else were you hurt, as a result of this accident? A. All over the body, bruised.

Q. Where else? A. Head, shoulder.

Q. Were you able to go to work after this accident? A. No, sir. I was seven weeks laid up.

Q. Where did you work? A. Whitlock Cordage.

Q. What was the nature of your work? A. Making rope.

Q. How much were you making? A. I was making $33 a week.

Q. How long were you away from work as a result of this accident? A. Seven weeks.

Q. You were not working for seven weeks, is that right? A. Yes, sir.

Q. And you were making $33 a week? A. $33 a week.

Q. While you were at home, were you being treated by a doctor? A. Well, every second day.

Q. You had a doctor come to see you? A. Yes, sir.

Q. Do you remember whether or not this machine that struck you was coming fast? A. I suppose it must have been coming fast because I didn't see it.

Q. You tell the Jury whether you know, if you know, whether the machine that hit you, was going fast?

The Court: I understand he didn't see it.

Q. You say you were out of work seven weeks;

after you returned to work, what was the nature of your work? A. Porter.

Q. Was that the same kind of work you were doing before? A. I was making rope before the accident. I could not work, my side and my head hurt me.

Q. You could not do the work? A. No.

Q. Are you getting the same salary? A. I am only getting $15 a week now.

Q. Seven weeks after the accident, you say you returned to work? A. I never go back to the same work.

Q. Is there anything that bothers you today? A. Yes, sir.

Q. Tell the Court and Jury what troubles you today? A. The side.

Q. What about your side? A. Bruised.

Q. Bruised there yet? A. Sore.

Q. What is it; your side hurts. Tell the Court and Jury just what is your trouble? A. My side and my head.

Q. What was the matter with your head? A. Sore.

Q. Is it sore now? A. Well, it is.

Q. Do you suffer any headaches? A. Yes, I have headaches.

Q. What else is the matter with you? A. My bones pain me. I always feel good till I get that.

Q. Were you ever sick, or suffered these injuries before you had this accident? A. Not that I know.

Cross examination by Mr. Kresch:

Q. How old are you? A. Sixty years old.

Q. Do you remember on the day of this accident,

September 29th, 1928; you remember the day you were hurt? A. Yes, sir.

Q. What time was that you were hurt? A. About seven o'clock.

Q. In the afternoon or evening? A. In the afternoon.

Q. Was it light or dark outside? A. Seven o'clock.

Q. Was it light or dark? A. Kind of dark.

Q. Where had you been before you came to the street; were you visiting anybody? A. I was just after leaving my daughter's, going to the store for a bottle of magnesia.

Q. Where does your daughter live? A. She lives on Randolph Avenue; 351 Randolph Avenue.

Q. Jersey City? A. Jersey City, yes, sir.

Q. Where do you live? A. The same place.

Q. You live with your daughter? A. I stayed with the daughter.

Q. Where were you going? A. I was going to the drug store for a bottle of magnesia.

Q. Then you intended to come back to the house? A. Yes, sir.

Q. Who else was at the house; was there a party or something? A. No, sir; only my daughter and her husband.

Q. You were not entertaining anybody that night? A. Not as I know.

Q. Where was the drug store with reference to the corner? A. Pretty near the corner; I could not tell you—

Q. Did you have to cross the street to go to the drug store? A. Certainly.

Q. Tell us just what you did as you got to the sidewalk, right near the curb? A. That is what I did, I crossed the first track.

The Court: No; counsel wants to know, Mr. Rochford, just what you did when you tried to walk over the street. What was your action; you stepped down from the curb, did you, or what did you do?

The Witness: I just crossed the first track. I got hit. I don't know; I didn't see nothing.

The Court: Counsel wants to know if you did anything before you walked over?

The Witness: No.

The Court: Do you understand the question? You didn't do anything at all. You just walked out in the street?

The Witness: Walked straight out.

The Court: When did you look?

The Witness: I looked up and down. I didn't see nothing.

The Court: When did you look?

The Witness: At the time I was passing.

The Court: I know, but where? Were you in the street when you looked?

The Witness: Just crossed the first track.

The Court: So you didn't look until you got to the first track?

The Witness: I looked up and down. I didn't see anything coming.

The Court: Is that right, that you didn't look until you were to the first track?

The Witness: Certainly. I looked to see the cars. If I didn't—

The Court: When did you look; when did you first look?

The Witness: At the first track, I looked up and down, like this (indicating). I seen nothing coming.

The Court: There are two tracks on the street?

The Witness: Yes, sir.

The Court: There are two rails to each track?

The Witness: Yes, sir.

The Court: How near were you to the nearest rail?

The Witness: About three or four feet, I guess.

The Court: Over it before you looked, is that right?

The Witness: That is right.

The Court: How many steps had you taken over the first rail before you looked?

The Witness: Two or three.

The Court: Had you crossed the entire track?

The Witness: The first track, yes, sir.

The Court: The first rail?

The Witness: First rail.

The Court: But not the second rail?

The Witness: Not the second rail.

The Court: Which way did you look then?

The Witness: I looked up and I looked down.

The Court: You didn't see anything?

The Witness: Could not see anything.

The Court: Then when you looked, what happened to you?

The Witness: I got struck, that's all.

The Court: How soon after you looked?

The Witness: I could not tell you.

The Court: Why can't you tell?

The Witness: Well, I was struck right

away. I don't know. I just looked up and down.

The Court: How many steps did you take after you looked?

The Witness: Three or four.

The Court: While you were taking three or four steps, you were struck; is that right?

The Witness: I was struck. I could not tell you nothing.

The Court: What track were you in when you were struck, the first or second?

The Witness: Across the first, I guess.

The Court: Where were you when you were struck, if you know?

The Witness: At Summit Avenue and Grand.

The Court: I know you were; where were you in relation to the tracks in the street; how far over had you gotten?

The Witness: Well, three or four feet.

The Court: Over what?

The Witness: Over the track, I guess.

The Court: Over the first track?

The Witness: Over the first track.

Q. Now, Mr. Rochford, had you been employed regularly before this accident? A. No, sir; I never had nothing before.

Q. No; had you been working before the accident? A. Was I working?

Q. Regularly? A. Was I walking?

Q. Working, not walking. Did you have a job before the accident, a regular job? A. I was home in the house.

Q. The day before the accident, were you working? A. Yes, certainly.

Q. Before that was your work steady? A. I got paid Saturday, 12 o'clock.

Q. Did you have a steady job? A. Twenty-seven years working there.

Q. For the same company? A. For the same company, Whitlock Cordage.

Q. While you were in bed or in the house for seven weeks, did you get your pay? A. No, they didn't pay me.

Q. And then you went out to look for another job? A. No, I got my own job back, but not the same money.

Q. I see; you got $15? A. $15 as porter.

Q. Were you pretty healthy before the accident? A. Yes, sir.

Q. You have been working since the accident steadily? A. Yes, sir; working steady.

Q. But you are getting less money although you are working steady?

The Court: Martin, did they reduce you? You say you were getting $33 before the accident?

The Witness: Yes, sir.

The Court: What were you doing before the accident?

The Witness: Making rope on a machine.

The Court: You had been doing that for twenty-seven years?

The Witness: Yes, sir.

The Court: After the accident, what did you do?

The Witness: They cut me down; I wasn't able to work on the machine.

The Court: Why?

The Witness: Because my arms were sore; I could not put up.

The Court: Your arm isn't sore now, is it?

The Witness: Sure it is. I cannot hardly pick my coat up and dress myself.

The Court: You got hit on this side of the head?

The Witness: I was hit all over.

The Court: Well, they reduced your salary to $15?

The Witness: Yes, sir.

Q. What doctor did you go to see, Mr. Rochford?

The Court: Have you a doctor?

The Witness: Yes, sure I have.

The Court: What is his name?

The Witness: Alpert; something like that.

Q. Did the doctor come to see you or did you go to see the doctor? A. No, he came to see me every second day.

Q. At your home? A. Yes, sir.

Q. How many times did he come to your home? A. Every second day.

Q. For how long? A. Three or four weeks, I guess.

Q. What did he do to you while you were home; what treatment did he give you? A. He gave me medicine, that's all.

Q. The same thing every time? A. Yes, sir.

Q. How long were you in bed? A. Three or four weeks in bed; I could not turn in bed.

Q. You say you were three or four weeks in bed? A. Yes, sir.

Q. Then you got out of bed and you were around the house? A. I was walking with a stick.

Q. Did the doctor come to see you while you were around the house? A. Yes, sir.

Q. How many times did the doctor come to see you after the three weeks, while you were in the house? A. Well, every second day he called in to see how I felt.

Q. For how long did that take place? A. Well, about three or four weeks after that.

Q. So for seven weeks, the doctor came in on an average of once every two or three days? A. Yes, sir; every second day.

Q. Every second day for seven weeks? A. Yes, sir.

Q. Did you ever have the doctor since the end of the seven weeks? A. No, I had a doctor in the Court House examine me.

Q. Outside of the Court examination? A. No; well, when I was right, I went to work.

Q. You were only at the hospital for the first day's treatment, were you? A. They took me to the hospital, I guess.

Q. When you went to the hospital did you go to bed at the hospital? A. I don't know.

The Court: Martin, when you were in the hospital, were you in bed or not?

The Witness: I don't know. They put a couple of stitches in my eye.

The Court: They sent you right home. Evidently he was there for the first day, left and went home. How much did you spend for doctor's bills?

The Witness: Well, I can't tell you. I didn't pay him yet.

Martin Rochford, redirect.

Q. Do you know about how wide Summit Avenue is, how many feet? A. How wide is it? I guess from this along to that door over there.

The Court: From here to the door that is 38 feet; is that about it?

The Witness: About thirty or forty.

The Court: How far do you say from where you are to where the officer is sitting down there?

The Witness: There by the door.

The Court: The Court will say that is 34 or 35 feet.

Redirect examination by Mr. Milstein:

Q. Mr. Rochford, when I asked you on direct examination whether you looked before you crossed the street, whether you looked up and down before you crossed the street, you said you did. Was that true? A. Certainly I looked up and down.

Q. I asked, before you started to cross, did you look up and down? A. Certainly I looked up and down before I crossed the street.

The Court: Martin, when was the first time you looked; where were you?

The Witness: Just across the first track. That is where I was. I looked up and down. I didn't see nothing coming.

John Gill, direct.

JOHN GILL, sworn for the planitiff.

Direct examination by Mr. Milstein:

Q. Where do you reside? A. 362 Randolph Avenue.

Q. Where were you on the evening of September 29th, 1928, with reference to this vicinity? A. I was on the opposite corner.

Q. Did you see this accident? A. I didn't see him get hit.

Q. What did you see about the accident that you can tell the Court and jury? A. I see him get dragged.

Q. You say he was dragged away; where was he dragged up? A. He was dragged about fifty feet.

Q. What did you do after the car came to a stop? A. Me and a couple of other fellows picked him up.

Q. Where did you take him? A. Laid him on the curb, on the sidewalk.

Q. What happened after that? A. I don't know, because I went away.

Cross examination by Mr. Kresch:

Q. Who were you with that day on the opposite corner? A. There was about five fellows.

Q. Did you see the direction that cars were going and this car in particular that you claim dragged this plaintiff, which direction was that going? A. He was going down Grand Street.

Q. What was the first thing you noticed about this accident that you say you saw him dragged? A. I saw him getting dragged. You could see the body going around under the wheels.

Q. That is the first thing, the very first thing you saw and then you ran over to help him. Do you

know what part of the car was dragging him? A. He was underneath the car.

Q. Which side, front, rear or side or what? A. The rear of the car.

Q. Where was his body; was his body between the wheels? A. No, he was between two wheels.

Q. Between the wheels and the side of the car? A. Yes, sir.

The Court: Was he on the left or right?

The Witness: He was right between the four wheels, right in the middle of it, right the middle of the car, underneath.

Q. Where was his head? A. That is a thing I could not tell you. I don't know where his head was.

The Court: Where was the car in relation to the tracks?

The Witness: He was on the right side of the street.

The Court: The car was?

The Witness: Yes, sir.

The Court: How near the curb was he?

The Witness: He was about five feet from the curb.

The Court: Do you know where the street railway track is?

The Witness: Yes, sir.

The Court: How was he in relation to the first track on his right?

The Witness: He was between the two rails.

The Court: And with his right wheels nearest the curb?

The Witness: No, his right wheel right near the first rail.

The Court: Inside the rail or outside?
The Witness: Outside.

Q. How far from the rail? A. About six inches.
Q. How far away was the opposite wheel from the curb? A. About seven feet.
Q. Do you know if those rails were practically, or proximately, in the center of the street? A. Well, they were about the center of the street.

The Court: There are two tracks, are there not?
The Witness: Yes, sir.

Q. I mean the four tracks occupying the center of the street; there is as much distance on one side of the end rail as the other side of the end rail? A. Yes, sir.

MRS. AGNES RUSSELL, sworn for the plaintiff.

Direct examination by Mr. Milstein:

Q. Where do you live? A. 351 Randolph Avenue.
Q. This plaintiff, Martin Rochford, is related to you? A. Yes, sir; my father.
Q. With whom does he live? A. He lives with me.
Q. Do you remember September 29th, 1928? A. Yes, sir.
Q. Will you tell the Court and jury when you saw your father after, that night? A. Well, I didn't see him getting hit. It was about seven o'clock and my husband was taken sick and the child was not in. I said to my father, "Will you go for a bottle of magnesia?" He said, "Yes," and he started out to get a bottle of magnesia, going over

the Avenue to the drug store at the corner of Summit Avenue and that was the last I seen him then, until he was brought in a cab, he had been hit with the automobile.

Q. Was the doctor treating him at the house? A. Well, he was treated while at the hospital and at the house he was treated by the doctor after that.

Q. Was he in the hospital? A. Of course he was just only treated there and brought home.

Q. How often did the doctor come to the house to see him? A. He came in every other day for three weeks.

Q. Did you spend anything for medicines? A. Yes, I spent about $10 for medicines.

Q. Did you notice what your father was suffering from, from your own observation?

Mr. Kresch: I think the doctor's testimony is the best proof.

The Court: What she could see?

The Witness: Well, in his eye he had about five stitches, and the doctor treated him.

The Court: You don't know how many stitches?

The Witness: That is what the doctor said, it was five stitches.

The Court: You tell what you saw?

The Witness: Well, I saw stitches in his eye. I saw stitches in his head and his shoulder was dislocated; his body was all bruised.

The Court: The shoulder was dislocated?

The Witness: It was discolored.

Q. How long was he home, roughly? A. About seven weeks; between five and seven weeks home.

Q. Was he working prior to the accident? A. He worked before the accident.

Mr. Kresch: No questions.

DR. EDWARD ALPERT, sworn for the plaintiff.

Direct examination by Mr. Milstein:

Q. Are you a licensed and practicing physician of the State of New Jersey? A. Yes, sir.

Q. As such, are you connected with any institutions?

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

Q. Did you have occasion to treat and examine Martin Rochford, the plaintiff in this case? A. I did.

Q. Will you tell the Court and jury what you did for this plaintiff and the nature of the injuries that you found as a result of your examination? A. I examined him on October first, 1928, the first time, at his home on Randolph Avenue. At that time, his injuries consisted essentially of a laceration over the left eyebrow, which was about 2½ inches long. I think there was four or five stitches. He had a laceration in the right templar region, about 1½ inches long. Three or four stitches in that. He had a bruise of the right shoulder and quite a marked bruise on the outer leg, the side of the left knee, about the size of a baseball. He had some other minor scratches and bruises of a nondescript nature.

Q. Did you return to treat the plaintiff after the first time you examined him? A. I saw him at his home, the date of the last visit was October 13th.

Between the first and the 13th I saw him about six times, each time at his home.

Q. Did you render a bill? A. Yes, the bill was $18.

Q. Was it ever paid? A. I don't think it was.

Q. Did you have occasion to examine the plaintiff recently? A. I did the other day.

Q. Did you find any of the injuries that he complained of to be of a permanent nature? A. The only thing was a scar on the left eyebrow; that is the only visible evidence today of the result of his injuries at that time.

The Court: There is no limitation in any part of his body?

The Witness: No, sir.

The Court: Did he complain about this arm; what is that, rheumatism?

The Witness: I don't know what it is he has. He has got no limitation of motion that is due to trauma.

The Court: Was that serious—

The Witness: It was mostly the left knee. He had a severe bruise of the right shoulder; nothing to indicate anything permanent.

The Court: How long would that injury last?

The Witness: The last time I saw him, I figured the disability would be from three to four weeks.

Cross examination by Mr. Kresch:

Q. Do you know what the amount of your bill is? A. $18 for six visits.

Q. You didn't go to him every second day for seven weeks? A. No, for about two weeks. The

date of the last visit, as I said before, was October 13th.

Q. Did he require any further treatment after two weeks? A. At the time of the last examination, he seemed to be pretty good.

Q. Well, after the removal of the sutures, that would all heal by itself? A. Yes, sir.

Q. And the black and blue marks would naturally disappear with time? A. Yes, sir.

Q. And the bruise to his shoulder would also disappear with rest of the patient. As a matter of fact, these injuries were not very severe, were they? A. Well, the one to his left knee was pretty severe. He had a marked bruise and discoloration about the size of a baseball on the outer side of his left knee.

Q. How long would it take for that to disappear? A. Anywheres from ten days to two weeks.

Q. There is nothing permanent that he still suffers from? A. Nothing that I can find, except scars.

Q. Which would leave a white mark, possibly? A. Just one scar over the left eyebrow.

Q. And the hair covered that scar? A. Slightly; not completely though.

The Court: Was there any injury such as affects the man from working, making rope, or sufficient to incapacitate him from pursuing his usual employment?

The Witness: You mean since the time of the injury?

The Court: Yes.

The Witness: Well, just that time I estimated, as I said, about three or four weeks subsequently to that time; I think then he

could have done the work he was accustomed to doing.

The Court: Three or four weeks he was disabled?

The Witness: Yes, sir.

The Court: After that he could return to his usual employment?

The Witness: Yes, your Honor.

Mr. Milstein: That is our case.

Mr. Kresch: I respectfully move for a nonsuit, on the ground that the plaintiff has not shown by even a scintilla of evidence, sufficient to cast any responsibility upon the defendant. There is nothing to prove that it is our automobile that struck this man.

Upon the further ground that the plaintiff has failed to establish a case of negligence which should go to the jury.

And upon the ground that the plaintiff was himself guilty of contributory negligence, by his own testimony, in not observing and looking in a manner to safeguard his own person.

The Court: It there any proof of ownership?

Mr. Milstein: No, except their admission in the answer.

Mr. Kresch: We do not admit ownership of the car that struck the plaintiff. We admit the ownership of an automobile which was registered under No. H6327,f or the year 1928.

The Court: You may reopen the case if you want to prove ownership.

George A. Mauer, direct.

Officer GEORGE A. MAUER, sworn for the plaintiff.

Direct examination by Mr. Milstein:

Q. Do you recall September 29th, 1928, officer? A. Yes, sir.

Q. Are you an officer of the Jersey City Police force? A. Yes, sir.

Q. Do you recall this accident down at Summit Avenue and Grand Street? A. Yes, sir.

Q. Will you tell the Court and jury what you know about this? A. At 7:15 at Summit and Grand Avenue, I happened to be making a pull at the box at the intersection of what they call the Junction, at that far corner where the cigar store is. I heard a holler and I dropped the cover on the box and runs down to see what it is. This man in a sedan was down by the restaurant which is owned by colored people, about 50 or 60 feet away from where the accident happened. Picking the man up, not knowing him until I came to the hospital, I got hold of him and put him in this car. I asked him, did you hit this man and he said he didn't know. I said, "All right; rush him to the City Hospital." We went there and Dr. Skelette attended to the injuries of the eye and forehead, and also the side and the shoulder and he was taken back to the station house.

The Court: Officer, did Matthew Stankewicz say that he struck this man, or deny it?

The Witness: No, he was in the position he didn't know what to do—

The Court: Did he admit he struck him?

The Witness: No, sir.

The Court: As far as your knowledge, you don't know who struck him?

The Witness: No. There was only one car at the present time.

The Court: Whose car was that?

The Witness: That was Matthew Stankewicz, which was by the colored restaurant down about 50 to 60 feet.

The Court: Stankewicz was the man that was in the car?

The Witness: Yes, sir.

Q. Did you look up Mr. Stankewicz's license? A. Yes, sir.

Q. To see if it jibed with the number on the car? A. Yes. I would have put him in for a violation for not having it.

The Court: What number was it?

The Witness: N. J. H6327.

The Court: The Court will reserve decision on the motion for nonsuit and put you to your proof now.

MATTHEW STANKEWICZ, sworn for the defendant.

(Recess to 2 p. m.)

MATTHEW STANKEWICZ, took the stand.

Direct examination by Mr. Kresch:

Q. Mr. Stankewicz, on September 29th, 1928, at around 7 o'clock in the evening, did you hit anybody in the vicinity of Grand Street and Summit Avenue, Jersey City? A. No, sir.

Matthew Stankewicz, cross.

Mr. Kresch: Cross examine.

Cross examination by Mr. Milstein:

Q. Mr. Stankewicz, on the evening of September 29th, 1928, in the vicinity, or around the vicinity of Summit Avenue and Grand Street, were you arrested at that time?

Mr. Kresch: I object to that question as improper.

The Court: I will permit it; he is a party. Were you arrested at that time?

The Witness: Yes, when I took the man to the hospital, and from the hospital to the police station.

Q. What were you arrested for at the time?

Mr. Kresch: That is objected to as improper cross examination.

The Court: That is enough. You have gone I think, as far as proper license will permit.

Q. Who did you take to the hospital, Mr. Stankewicz? A. The man—

Mr. Kresch: I object to that as improper cross examination.

The Court: That is all right. The man that was hurt?

The Witness: Yes, sir.

The Court: Who arrested you?

The Witness: In the police station, they said, "We have got to have somebody responsible for it."

Q. Did the officer ask you for your license, driver's license and owner's license? A. Yes, sir.

Q. Did you give your owner's license and driver's license to the officer? A. I did.

The Court: You say your car didn't run into anybody?

The Witness: No.

The Court: Did you see this man that was hurt?

The Witness: Yes, the man hollered after me, I should stop and take him up to the hospital and I did.

The Court: What car struck him, do you know?

The Witness: I could not tell you.

The Court: Where was he when you passed him?

The Witness: I didn't see him; when I backed up my car I see him lying on the street.

The Court: You didn't see him before that? A. No.

Q. For what reason did the officer ask you for your driver's and owner's licenses?

Mr. Kresch: I object to that as improper. He handed them up when he was asked.

The Court: It doesn't matter what the reason was. He exhibited his licenses. Your license number was 6327?

The Witness: Yes, sir.

The Court: Did you blow your horn?

The Witness: I did not.

The Court: Did you see this man at all?

The Witness: No, I didn't see him.

Q. What kind of car have you got, Mr. Stankewicz? A. I haven't got any car.

Q. What kind was it? A. Moon.

Q. Was it a sedan? A. Sedan.

John Gill, direct.

Q. Do you remember seeing this gentleman down there? A. No.

Mr. Milstein: No further questions.

(Defendant Rests.)

JOHN GILL, recalled in rebuttal.

Direct examination by Mr. Milstein:

Q. Did you see this plaintiff being dragged by the automobile, Mr. Gill?

Mr. Kresch: I object as being improper rebuttal.

The Court: It is improper. He did so testify on direct examination.

Q. What kind of car was it, if you recall, that you saw dragging him? A. Sedan car.

The Court: Did you see this man, the defendant, there?

The Witness: I didn't see nobody. I didn't see nobody get out of the car at all.

The Court: Well, the car that you saw this man dragged by, what became of it?

The Witness: It pulled to the curb and came up, because I didn't wait there. The party came out of the car and he pulled to the curb.

The Court: Well, did you see where it went to afterwards?

The Witness: I didn't wait around for long. I went away.

Q. Was there any other car in that vicinity at that particular time?

Mr. Kresch: I object as improper rebuttal.

The Court: Well, I will permit it because of the present position of the case. Were there any other cars there?

The Witness: It was the only car coming down till after the accident.

The Court: How long after the accident?

The Witness: About five minutes.

Q. Did you see this car coming down Grand Street? A. I didn't see him coming down, only I see him getting dragged, that's all.

Cross examination by Mr. Kresch:

Q. Didn't you say on direct examination you didn't see anything until this man was dragged? A. I didn't say nothing like that.

Q. Didn't you say, when you first took the stand that you didn't see anything until this man was dragged, and then you saw it? A. I didn't say nothing of the kind like that.

Q. What did you see? A. I just said, I saw the man getting dragged.

Q. And before that, you didn't see the car, you say? A. Yes, sir; you didn't ask me that question.

Q. Your lawyer asked you that question? A. No, he didn't.

The Court: Well, did you see the car?

The Witness: It was a sedan car.

Q. Before the accident? A. No; till after the accident.

Q. You didn't see anything on the road till after the accident? A. It was the car that hit him pulled to the curb; it was a dark color of a car.

The Court: What color was your car, Mr. Defendant?

The Defendant: Black.

(Both Sides Rest.)

Motion for Direction of Verdict.

Mr. Kresch: I respectfully move for a direction of verdict on the grounds mentioned in my motion for a nonsuit;

First, that there has not been any evidence of the defendant being the person and the owner of the car that struck the plaintiff.

Second; that in the event that our car was designated as the car that struck the plaintiff, that the plaintiff was guilty of contributory negligence in not observing and looking at the cross-walk to safeguard his own person. That he should have looked as he was about to leave the curb, so that he could pass in safety. Not having looked until he approached the middle of the street, or in the vicinity of the rail in the middle of the street, that he therefore is guilty of contributory negligence in not using the proper care that a prudent person would use under the same circumstances.

That in view of the cases cited, and of the testimony, there should be a direction of verdict in favor of the defendant.

The Court (after argument): The Court will deny the motion for a direction and allow you an exception, and the denial is on these grounds.

I would like to state the grounds, as the Court sees them now.

In regard to the ownership, it is admitted in the pleadings that the defendant himself was the owner of the car bearing license No. 6327. There is no doubt about the ownership, it seems to the Court.

There might be something said, however, about the lack of proof as to whether or not the defendant actually struck this man with his car, in view of the fact that he denies absolutely that he did.

The plaintiff does not testify that the defendant struck him with his automobile. In fact, he does not know the defendant.

There is testimony, however, that just as soon as this man was struck, he was seen being dragged or below that automobile. It appears also that this automobile was the only automobile in the immediate vicinity. It appears further that when the officer came there, a license was exhibited that was of this No. 6327. It appears, too, that the style and color of the car has been identified.

I think there is sufficient proof on that score for the jury to determine whether or not it was this identical car, from all the facts in the case. Surely this man was struck by an automobile. Surely the defendant's car was in that vicinity, and there is no proof of any other car having caused the accident. In fact, almost every other agency of injury in the way of an automobile has been excluded, so that the thing is carried almost positively to the door of the defendant.

The Court feels therefore, that it is a question for the jury to determine, and that question is going to be left to the jury.

As to the second, the question of this man's negligence. It is true he did first testify and that by a leading question from counsel, as follows. This is a fair example of the viciousness of leading questions. Counsel asked the plaintiff:

> "Did you look when you first started to walk across the street?"

He answered "yes." Well, of course, that was indicated to the witness, the answer to make. When the Court asked the witness where he was when he first looked, he said "Beyond the first rail."

After some argument about it, he again repeated that statement.

So that you have two views of it; his first answer that he looked as he stepped down. Then, eliminating that part of the testimony, it appears that he did look and there was no car in sight. He said there was no horn blown, and he proceeded to cross.

Now, the plaintiff has as much right in the street as the defendant had. It was the duty of the defendant to blow his horn; to exercise the same degree of caution. Whether the plaintiff exercised reasonable care in going across, I think is a jury question.

All that the defendant does is to state absolutely that he did not collide with this man and he leaves it rest there.

I think under the circumstances that the question of the plaintiff's contributory negligence, as well as the defendant's negligence is one for the jury, and I shall leave that question to the Jury.

Mr. Kresch: I pray an exception on both grounds.

The Court: Yes.

(Counsel summed up to the jury:)

The Court's Charge.

The Court then charged the jury, as follows:

The Court: Gentlemen of the jury:

This action is brought by Martin Rochford against Matthew Stankewicz. The plaintiff charges that on the 29th day of September, 1928, while he was crossing a public highway in this city, he was struck by the automobile of the defendant.

The burden of sustaining that charge is upon the plaintiff. He has got to satisfy you by a preponderance of the evidence. In this case, particularly, your duty is to pay attention to the rule of law as to the burden of proof, and at the outset, it seems to me, that should give you some concern. Has this plaintiff borne the burden of proof by a preponderance of the evidence, that he was struck on the day in question by an automobile; that the automobile that struck him was the defendant's automobile; and that he was struck through the negligence of the defendant and not through any negligence of his own? All of those factors, in order for the plaintiff to recover, have got to be carried by the burden of proof, by a preponderance of the evidence; except the item of contributory negligence of the plaintiff, that burden of proof being on the defendant.

Was he struck by an automobile? I think you will not have any trouble about that.

Was it the defendant's automobile? You may have some difficulty about that. But even if it were the defendant's automobile, there is still another consideration that you must lend your minds to, and that is whether he was struck, if you find it was the automobile of the defendant, through the negligence of the defendant alone, solely, and not through any negligence of the plaintiff himself. If the plaintiff contributed in any degree to his injuries, by failing to look, by failing to make proper observation, and you conclude that that failure contributed to his injuries, he cannot recover, because the law is that a man cannot recover in a case of this character unless he prove to you by a preponderance of the evidence that it was the defendant's negligence alone that caused his injury.

The Court's Charge.

You have heard the testimony in this case just as well as the Court has. While there is no direct testimony as I remember it, although it is for you to determine, that the defendant's automobile struck this man, nevertheless there are circumstances that you must consider; but those circumstances must not be speculative in order to bring conviction to your minds. They must be circumstances that will support an inference that will be a relevant inference in this case to support a fact. I mean by that a fact that, being stated from the mouth of a witness, might bring conviction to your minds, if truthfully stated, that the thing testified to, that is, that this man's car struck the plaintiff; that in the absence of direct proof, then you are to take the surrounding circumstances.

What are some of the circumstances? There is an admission that this defendant was on the highway at the time. There is an admission that he was called upon, after he had gone some distance to retrieve his steps or to stop. You will recall the testimony in that regard. Did his stop, or the calling of him to stop, have any relation to the man that was injured? The officer came there as soon as he heard this squeaking, or whatever the noise was—I have forgotten—something that attracted his attention. You will recall the testimony. It might not have been the screeching of brakes. I don't remember; you will remember something attracted the officer's attention. He went there and had this man exhibit his license, after the man had taken the injured one to the hospital.

You will remember the testimony of the young man who said that he actually saw the body of this man being dragged under the automobile. He

did not see the automobile strike him, but he saw the automobile dragging him.

Now, Gentlemen, it is for you to determine in this case, whether or not the defendant's automobile was the automobile that struck this plaintiff. There is no testimony in the case as to any other automobile that I know of, but that is for you to determine. The automobile that this young man saw dragging the plaintiff, was it the automobile of the defendant? That is for you to determine under all the circumstances and the testimony you have heard. You have heard the admission that it was a sedan car, dark in color, and also, I believe the young man testified that it was a sedan car, dark in color.

The plaintiff testifies that there was no horn blown. I believe the testimony was that he was crossing at the cross-walk, or near the intersecting street; that he had passed quite some distance from the walk before he looked. I don't know what it was, but evidently, taking the measurement of the street as being thirty feet, and the trolley tracks equally distant from each side of the street, he had crossed possibly, before he reached the first rail, a distance of seven or eight feet at least. That is for you to determine and I am just indicating a computation I made, but he evidently did not look while he was going that distance. He stepped over the other rail and then he looked, that is the first rail, and had taken, as I remember his testimony, three or four steps before he was struck.

A person crossing a street, particularly a cross-walk, is not bound to keep constantly observing right and left; but automobiles in this case had an equal right on the street to this pedestrian, no matter what the law is in regard to who has the right of way at an intersection.

The Court's Charge.

It comes down to this: that where a person is operating an automobile in the street, and another person is crossing the street, that both of those parties must exercise reasonable care, the care of an ordinary person, under the circumstances, to avoid colliding with each other. A person crossing the middle of a block, of course, must of necessity exercise, it seems to me and I so charge you, a degree of care that is commensurate with the danger of the place that he is going to cross. A person crossing at a cross-walk must exercise the degree of care commensurate with that position.

A person operating an automobile is obliged to exercise a degree of care when approaching a cross-walk that is commensurate with the possibility of persons crossing back and forth.

If this automobilist was exercising reasonable care, would he have seen this man out in the street? Could he have gone to the rear of the man, or around him, or could he have blown his horn or stopped his car, or done anything to avoid the collision?

Those are all questions for you to determine.

As I said before, this pedestrian evidently was approaching the center of the street before he was struck. There is no gainsaying that fact, so far as I can remember. I am not saying he was in the center of the street, but giving you the testimony as I remember it. That is for you to determine. He was approaching, had passed beyond the first rail and had taken three or four steps. Evidently, if he had taken three or four steps, if you so find, that must have taken him beyond the rails.

The testimony of the young man was that the automobile was coming down the street, as I re-

member it; when he saw it, at least, with the wheels on the right-hand side just over the rail, and the wheels on the left-hand side well inside the rail. There is no testimony that the course of the car was changed from left to right, nor that the speed was diminished, nor that it was increased, except that the car that was dragging this man stopped.

You heard the statement of the defendant that he did not strike this man. He swears to that on the stand, and if that is true, why, of course, he cannot be held liable. If you believe that, Gentlemen, why this plaintiff has got to go out of this Court with a judgment against him, and you must find, if you believe the defendant, in favor of the defendant.

If you believe that the plaintiff did not exercise the care that he should, and you must understand that while I say a person does not have to keep a constant observation right and left, he certainly has to use reasonable care in crossing the street. He can't go out in the street just before an accident happens, look up, and get struck, when, if he exercised observation beforehand, he could have avoided it; then, he cannot recover.

And so, this case is peculiarly one for the Jury, and the Court has left the questions, both of the operation of the automobile, as well as to whether or not this defendant's car came in collision with the plaintiff, and the question of contributory negligence, to you for your determination. You are twelve good men, who have listened to the facts and testimony in the case, and you ought to be able to arrive at a just verdict, and after all, that is what you are to arrive at.

Now, if you find that this plaintiff was not neg-

ligent, that is, he was not negligent in such a way as to contribute to his own injury, and if you find by a preponderance of the evidence that the plaintiff's injuries were sustained because of the negligent operation of the defendant's automobile, then you come to the question of damages, and not until then.

You have heard the doctor in this case testify that he gave this man three weeks disability. As I remember it, he was the plaintiff's own physician and he was rather frank about it. He said that three weeks was enough, as I remember it, although it is for you to determine; that this man was all right after that and that his injuries were not such as would incapacitate him from work longer. I believe he saw him at a later date and he confirmed his opinion on that. So that you have the doctor's unqualified testimony that the most that this man would be incapacitated, according to his view, was three weeks. You have heard the plaintiff testify that his arm was injured, he can't raise it any more; that he could not work as he did theretofore, and that his wages were cut from $33 to $15 a week, and it does not appear how long that is going to last. The doctor says that there are no permanent injuries, except a scar, and evidently that did not incapacitate this man at all. There was no fracture, except that on the side complained of there was a bruise. All of these items are for you to determine.

It is for you to weigh the testimony. You must understand, Gentlemen, that it is quite natural that persons who come into Court, as a rule put their best foot forward, so that the Jury have always to be on guard. I don't mean to say by that, everyone does, even in this case, but I do say that

it is a very natural thing to do, and if you come to the question of damages in this case, and I am not saying that you should, that you should be reasonable in your determination; be just, rather. The damages claimed, as I remember; the plaintiff claims he lost wages of $231 thus far sustained; $18 for doctor's bills, $10 for medicines or thereabouts. You have heard the testimony in connection with expenditures and loss of wages; if you come to the question of damages, of course, you consider that testimony.

Gentlemen, before you come to the question of damages, determine conscientiously whether this plaintiff is entitled to a judgment, or whether he is not, and then, if you come to the point that you think that he is, under the evidence, then approach the question of damages; and with that question, likewise, be careful and cautious. I mean by that, be just, because after all, that is what we are here for, to do and to give justice to our fellow men, and when that is not done, there is great dissatisfaction. I don't suppose there is such a thing as bias or prejudice in your minds in this case. There is no necessity for it one way or another. I suppose you don't know either of the parties, so that you are sure in every way to determine this case impartially.

Are there any objections or exceptions to the Court's charge?

Mr. Milstein: I just want to call your Honor's attention: If the Jury should reach the stage that they think the plaintiff should be entitled to judgment, to consider the question of pain and suffering.

The Court: Yes; I said nothing about that. That necessarily follows. Counsel has called my atten-

tion to the fact that I failed to charge on the question of pain and suffering.

If the plaintiff is entitled to judgment, of course, he is entitled to judgment for the pain and suffering that he has thus far endured, and will endure in the future.

In regard to the prospects of future pain and suffering, bear in mind that the doctor said he didn't see there was any, as I remember it; but that is for you to determine.

(The Jury Retired.)

Rule for Judgment.

(Filed November 12, 1930.)

HUDSON COUNTY CIRCUIT COURT.

MARTIN ROCHFORD,
Plaintiff,

v.

MATTHEW STANKEWICZ,
Defendant.

Action at Law.

This action was tried before Honorable Thomas Brown, Judge of the Hudson County Circuit Court, with a Jury at the Hudson Circuit, in the Court House in Jersey City, New Jersey, on November 3rd, 1930.

The cause having been heard and submitted to the Jury, they returned their verdict as follows: Judgment in favor of the plaintiff Martin Rochford in the sum of Five Hundred and Nine ($509.00) Dollars against the defendant Matthew Stankewicz.

Whereupon it is adjudged that the plaintiff Martin Rochford recover of the defendant, Matthew Stankewicz the sum of Five Hundred and Nine ($509.00) Dollars and his costs to be taxed.

THOMAS BROWN,
Judge.

Judgment entered November 12, 1930, on Motion of George R. Milstein, Attorney of Plaintiff.

Notice of Appeal and Grounds.

(Filed December 30th, 1930.)

HUDSON COUNTY CIRCUIT COURT.

MARTIN ROCHFORD, *Plaintiff,* v. MATTHEW STANKEWICZ, *Defendant.*	Action at Law. Appeal from the Hudson County Circuit Court.

To George Milstein, Esq., Attorney of Plaintiff.

SIR:

PLEASE TAKE NOTICE that the defendant Matthew Stankewicz 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 cause on the following grounds:

1. Because the Hudson County Circuit Court erroneously refused to grant defendant Matthew Stankewicz's motion for a nonsuit.

2. Because the Hudson County Circuit Court erroneously refused to grant defendant Matthew Stankewicz's motion for a direction of a verdict in favor of said Matthew Stankewicz and against plaintiff Martin Rochford.

Dated December 24th, 1930.

Respectfully yours,

CASIMIR TOKARSKI,
Attorney for Defendant.

SAMUEL E. KRESCH,
Of Counsel.

New Jersey Court of Errors and Appeals

MARTIN ROCHFORD, *Plaintiff-Respondent,* *v.* MATTHEW STANKEWICZ, *Defendant-Appellant.*	On Appeal from Hudson County Circuit Court.

BRIEF OF DEFENDANT-APPELLANT.

Statement of Facts.

Plaintiff, Martin Rochford, while crossing Grand Street at Summit Avenue, Jersey City, was struck by an automobile alleged to be owned and operated by the defendant. As the plaintiff reached the first trolley track in the street, he looked up and down Grand Street for the first time, for moving vehicles, and not seeing any coming, he continued to cross. He took a few steps and was struck and run down by an automobile (Case, p. 12, lines 20-40, inclusive).

At the trial the defendant denied that his automobile was physically involved in the accident, although it was operated by him in the vicinity of Grand Street and Summit Avenue at that time.

At the trial the defendant moved for a nonsuit and a direction of verdict in his favor upon the ground that his automobile was not involved in this suit, and upon the further ground that the

plaintiff was guilty of contributory negligence. The Court denied these motions, which denial forms the basis of this appeal.

Argument.

The trial judge erred in denying the defendant's motion for a nonsuit at the end of the plaintiff's case, and also was in error in denying defendant's motion for a direction of verdict in his favor at the finish of the case after the defendant rested.

The defendant urged on his motion for nonsuit and on his motion for a direction of verdict:

1. That his automobile was not physically involved in the accident.

2. That the plaintiff, by his own testimony admitted that he was guilty of negligence as a matter of law.

POINT I.

Defendant's automobile was not physically involved in the accident.

The only evidence tending to involve the defendant's automobile in the accident was stated by the witness, John Gill, which was as follows:

> "The Court: Well, did you see the car?
> "The Witness: It was a sedan car.
> "Q. Before the accident? A. No; till after the accident.
> "Q. You didn't see anything on the road till after the accident? A. It was the car that hit him pulled to the curb; it was a dark color of a car" (Case, p. 32, lines 31-37).

The witness at a former stage of the case testified as follows:

> "Q. Did you see this accident? A. I didn't see him get hit.

"Q. What did you see about the accident that you can tell the Court and jury? A. I see him get dragged" (Case, p. 19, lines 13-17).

* * * * * *

"Q. What happened after that? A. I don't know, because I went away" (Case, p. 19, lines 25 and 26).

This evidence was brought out by a direct examination by the plaintiff's attorney.

The testimony of Officer George A. Mauer, a witness for the plaintiff, was as follows:

"The Court: Officer, did Matthew Stankewicz say that he struck this man, or deny it?

"The Witness: No, he was in the position he didn't know what to do.

"The Court: Did he admit he struck him?

The Witness: No, sir" (Case, p. 27, lines 34-40).

This testimony clearly leaves the fact that the defendant struck the plaintiff with his automobile, to conjecture. The true rule upon this subject, as to the quantity and quality of evidence to establish an accident by the plaintiff is laid down in a celebrated case in this State by the Court of Errors and Appeals in *Suburban Electric Company* v. *Nugent,* 58 N. J. L., at pages 661 and 662, where the Court said:

"It was incumbent upon him (plaintiff), in the absence of direct evidence of that fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant and would exclude the idea that it was due to a cause with which the defendant was unconnected." * * *

Maher v. *Magnus Company,* 123 Atl. 868;
McCombe v. *Public Service Ry. Co.,* 95 N. J. L. 187.

In the case of *Adriance* v. *Schenck Bros.*, 95 N. J. L. 185, the plaintiff was riding on a certain device called a racer. Toward the end of the second ride, something happened. The plaintiff ceased to remember anything. He was bleeding. The Court in commenting upon the testimony affirmed a nonsuit and stated the rule to be:

> "If there is no proof of any fact by which the conduct of the defendant can be ascertained, there is nothing for a jury to pass upon" (Baher *v.* Lombard, etc., 53 N. J. L. 233).

The testimony in this case is insufficient to indicate that the defendant's automobile was physically involved in the accident. The witness stated that the car that dragged him was a black sedan and that it was the only automobile coming down the street. He did not testify that there were no other automobiles parked in the vicinity, nor was there any evidence that the defendant's automobile was a black one.

A case can hardly be imagined where a witness sees a man being dragged by an automobile, and who with the assistance of friends places the victim on the sidewalk, and then disappeared without noticing the license number of the automobile involved, nor recognizing the driver who drove the car. With the injuries complained of, surely some evidence of blood marks or stains about the car could have been diligently identified by the arresting officer. Yet there was no evidence to that effect.

John Gill, the plaintiff's witness, testified on direct examination as follows:

> "Q. You say he was dragged away; where was he dragged up? A. He was dragged about fifty feet" (Case, p. 19, lines 18-20).

In spite of this testimony, not even skid marks leading to the defendant's car were introduced into

evidence, which would have been reasonable to infer the participation of the defendant's car in the accident.

John Gill testified that he was standing on the corner in the presence of four other companions (Case, p. 19, line 30) who assisted him in placing the victim on the sidewalk. Yet, not one of the companions was present in corroborating John Gill's meagre and self-contradictory testimony in this case.

Defendant was the owner of an automobile bearing license #H 6327, but there is no evidence or inference to be drawn therefrom, that this automobile struck the plaintiff.

POINT II.

The testimony conclusively shows that the plaintiff was guilty of contributory negligence.

The plaintiff testified that he was struck by an automobile, but there is no identification as heretofore stated that the defendant's automobile did the striking. At best, the plaintiff proved the happening of an accident, and that, standing alone, is not sufficient testimony for the Court to permit the case to go to the jury.

As stated in the case of *Alvino* v. *P. S. Ry. Co.*, in 117 Atl. 709, where the plaintiff merely proved the happening of an accident, the Court said:

> "Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence. McCombe *v.* Public Service Ry. Co., 95 N. J. L. 189, 112 Atl. 255."

Throughout the entire testimony of the plaintiff and his witnesses, there is no evidence or any in-

ference to be drawn therefrom that the defendant was guilty of negligence, which would make him responsible for the damages sustained by the plaintiff. The elementary rule of law being, that there must be a preponderance of evidence on the part of the plaintiff to justify a recovery against the defendant. Yet, in this case, there is no evidence of any negligent conduct on the defendant's part.

In the plaintiff's complaint, he charges that the defendant drove at a high and excessive rate of speed without regard for the motor vehicle law of the State of New Jersey or the ordinances of the City of Jersey City (Case, p. 2, lines 38-41, inclusive).

There is no proof that the defendant drove at a high and reckless rate of speed. As a matter of fact, there is no proof that the defendant drove at any speed. There is no proof that the defendant violated the Motor Vehicle Act of the State of New Jersey or the Ordinances of the City of Jersey City. At best, the plaintiff proved that he was struck by an automobile.

That the plaintiff failed to exercise reasonable care or prudence in his endeavor to cross the street, may be seen by a perusal of the testimony, especially when the Court took the witness in hand and asked him:

"The Court: When did you look?

"The Witness: I looked up and down. I didn't see nothing.

"The Court: When did you look?

"The Witness: At the time I was passing.

"The Court: I know, but where? Were you in the street when you looked?

"The Witness: Just crossed the first track.

"The Court: So you didn't look until you got to the first track?

"The Witness: I looked up and down. I didn't see anything coming.

"The Court: Is that right, that you didn't look until you were to the first track?

"The Witness: Certainly. I looked to see the cars. If I didn't—

"The Court : When did you look; when did you first look?

"The Witness: At the first track, I looked up and down, like this (indicating). I seen nothing coming" (Case, p. 12, lines 20-40).

And again, when the witness was asked by the Court:

"How many steps had you taken over the first rail before you looked?" (Case, p. 13, lines 18, 19.)

The witness answered:

"Two or three" (Case, p. 13, line 20).

This was the first time that the plaintiff made any observation while crossing the street to the first rail without even looking. When he reached a point, about the first rail, he takes three steps, looks up and down the street and is immediately struck by an automobile.

It is peculiarly interesting to note, however, that the plaintiff when making his observation up and down the street, testifies that he saw nothing, as indicated by the Court's questioning along that score:

"The Court: Which way did you look then?

"The Witness: I looked up and I looked down.

"The Court: You didn't see anything?

"The Witness: Could not see anything.

"The Court: Then when you looked, what happened to you?

"The Witness: I got struck, that's all" (Case, p. 13, lines 29-37).

In the case of *Sheets* v. *Connolly Ry. Co.*, 54 N. J. L. 518, a similar state of facts was determined

by the Court. In that case, an intelligent child of ten years of age, was crossing a public street at a cross-walk. There were no obstructions to view and no passing vehicles. The plaintiff testified that she did look and did not see any vehicles, but immediately thereafter was struck by a horse car. The Court said:

> "Under such circumstances plaintiff, if she had looked in the direction in which she was going, must have seen the approaching horse car. It was impossible not to have seen it."

Thus, in the case *sub judice,* if the plaintiff had looked, he would have seen the defendant's car approaching in the absence of any other evidence that the defendant's car was speeding. Therefore, the only inference from such circumstances to be drawn is that he did not look, as the Court said in the case of *Sheets* v. *Connolly Ry. Co., supra,* which was followed by the Court of Errors and Appeals in the case of *Clerici* v. *Gennari,* 102 N. J. L. 377.

In the case of *Cady* v. *Trenton and Mercer Corp.,* 104 N. J. L. 572, the facts were that the plaintiff was crossing with an umbrella. She looked before she started to cross. Not seeing any vehicles, she proceeded to cross without looking again. She was struck by defendant's trolley. The Court in affirming a nonsuit, said:

> * * * "that if the appellant had paid due regard to her own safety and had not walked blindly across the street, she would have observed the oncoming car, before she reached and crossed the first track, and thus have avoided being injured through the negligence of the respondent's servant. See Hubbard *v.* Atlantic Coast Electric Railway Co., 91 N. J. L. 299."

In the case of *Jewett* v. *Paterson Ry. Co.,* 62 N. J. L. 424, the Court held that there is a duty

upon a pedestrian to continually keep a lookout for a coming vehicle and stated that it was contributory negligence for a pedestrian to breach this duty.

Counsel for the plaintiff may seek to distinguish the cases cited, because they affect particular accidents where trolley cars are involved. The answer is stated in *McGrath* v. *North Jersey Street Ry. Co.*, 66 N. J. L. 312, where the Court said:

> "Trolley cars have characteristics of their own, but are not therefore set apart, for the legal treatment, in a class by themselves. Their peculiarities are circumstances that have sometimes to be taken into account in applying the general rule to a particular case."

In *Petras* v. *P. S. Transportation Co.*, 136 Atl. 189, the facts were that a pedestrian before crossing the street noticed a bus 200 feet away. He continued to cross the street reading a newspaper, without keeping a further lookout for said bus. He was struck and the Court held that he was guilty of contributory negligence as a matter of law, and therefore was deprived of a recovery.

In the case of *Newark Passenger Ry. Co.* v. *Block*, 55 N. J. L. 605, the established rule of reasonable care was defined as follows:

> "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."

Measured by the rules as stated in the cited decisions, plaintiff has failed to exercise the duty of reasonable care. Plaintiff's own testimony shows that there was no other vehicle approaching at the time of the alleged accident and that there was no obstruction to prevent a clear view of Grand Street, and in the absence of evidence of reckless driving by the defendant, it can be logically argued and inferred that the plaintiff had not made any observation. If the plaintiff had observed, he did so at an inopportune time, when it was impossible for him to exercise his duty of reasonable care to avoid an impending danger.

Upon the grounds stated, it is urged that the Court erred in denying the defendant's motion for a nonsuit and the defendant's motion for a direction of verdict in his favor.

Respectfully submitted,

CASIMIR TOKARSKI,
Attorney of Defendant-Appellant.

SAMUEL E. KRESCH,
Of Counsel.

New Jersey Court of Errors and Appeals

MARTIN ROCHFORD, Plaintiff-Respondent, *vs.* MATTHEW STANKEWICZ, Defendant-Appellant.	Action at Law. On Appeal from Hudson County Circuit Court.

BRIEF IN FAVOR OF PLAINTIFF-RESPONDENT.

Statement of Facts.

The plaintiff-respondent, Martin Rochford, while crossing Grand Street at its intersection with Summit Avenue, in the City of Jersey City, County of Hudson and State of New Jersey, was struck by the automobile owned, operated and controlled by the defendant-appellant, Matthew Stankewicz. Before the plaintiff-respondent started crossing at the crosswalk at Grand Street and Summit Avenue, he looked up and down Grand Street to see whether there were any automobiles coming in either direction. The plaintiff-respondent seeing no machines coming in either direction and hearing no warnings of the approach of any machines, stepped off the curb and started crossing Grand Street (Case, p. 8, lines 11-17, inclusive). The plaintiff-respondent had crossed beyond the first car track near the center of Grand Street and after looking up and down again and seeing and hearing no warning of approaching vehicles, continued beyond the center line of Grand

Street when he was struck and dragged by the defendant-appellant's automobile for a distance of fifty feet in the roadway (Case, p. 19, lines 10-20, inclusive). The defendant-appellant's automobile was the only car in the vicinity at the time of accident (Case, p. 28, lines 5-15, inclusive and Case, p. 32, lines 5-11, inclusive). The plaintiff-respondent was taken to the hospital for treatment in the automobile of the defendant-appellant (Case, p. 29, lines 28-34, inclusive).

At the trial, the Trial Judge denied a motion for a non-suit and refused to direct a verdict in favor of the defendant-appellant which motions form the basis of this appeal.

Argument.

The Trial Judge was correct in law in denying the defendant-appellant's motion for a non-suit and was also without error in denying the defendant-appellant's motion for a direction of verdict in favor of the defendant-appellant after the defendant-appellant had rested.

POINT I.

Defendant-appellant's automobile was physically involved in the accident.

The evidence clearly involving the defendant-appellant's automobile in this accident was developed in the cross-examination of John Gill, witness for the plaintiff-respondent as follows:

> *"Cross-examination by Mr. Kresch:*
>
> Q. Did you see the direction that cars were going and THIS CAR IN PARTICULAR that you claim dragged this plaintiff, which direction

was that going? A. He was going down Grand Street.

Q. What was the first thing you noticed about this accident that you say you saw him dragged? A. I saw him getting dragged. You could see the body going around under the wheels'' (Case, p. 19, lines 31-38).

The defendant-appellant's participation in this accident is further clearly established by the testimony of Officer George A. Mauer as follows:

''The Court: Officer, did Matthew Stankewicz say that he struck this man, or deny it?

The Witness: No, he was in the position he didn't know what to do——

The Court: Did he admit he struck him?

The Witness: No, sir.

The Court: As far as your knowledge, you don't know who struck him?

The Witness: No. There was only one car at the present time.

The Court: Whose car was that?

The Witness: That was Matthew Stankewicz, which was by the colored restaurant down about 50 to 60 feet.

The Court: Stankewicz was the man that was in the car?

The Witness: Yes, sir.

Q. Did you look up Mr. Stankewicz's license? A. Yes, sir.

Q. To see if it jibed with the number on the car? A. Yes. I would have put him in for a violation for not having it.

The Court: What number was it?

The Witness: N. J. H6327'' (Case, p. 27, lines 33-40, and Case, p. 28, lines 5-23).

The defendant-appellant's automobile is positively identified by the testimony of the witness, John Gill, in Rebuttal on cross-examination, as follows:

''The Court: Well, did you see the car?

The Witness: It was a sedan car.

Q. Before the accident? A. No; till after the accident.

Q. You didn't see anything on the road till after the accident? A. It was the car that HIT HIM pulled to the curb; it was a dark color of a car.

The Court: What color was your car, Mr. Defendant?

The Defendant: Black'' (Case, p. 32, lines 31-41).

This testimony, adduced both in direct and cross-examination, clearly establishes the facts that the defendant-appellant was driving the automobile which struck and dragged the plaintiff-respondent and therefore established a case for the consideration of the jury, justifying the Trial Judge's refusal to grant the motion of the defendant-appellant for a non-suit.

The rule of law laid down as to the quantity and quality of evidence to establish an accident by plaintiff by the Court of Errors and Appeals of New Jersey in the case of *Suburban Electric Company* vs. *Nugent,* 58 N. J. L., at pages 661 and 662, is fully met by the above testimony.

This testimony also presents facts and circumstances from which the negligence causing the happening could be adduced, thus presenting a jury question and thereby meeting the rule of the Supreme Court of New Jersey in the case of *Fitzgerald* vs. *Gore,* reported in 7 N. J. Miscellaneous Reports, at page 910, wherein the *per curiam* decision sets up the rule as follows:

> ''The proofs present facts and circumstances from which their negligence causing the happening could be found, thus presenting a jury question. There was therefore no error in refusing to non-suit as to them.''

POINT II.

The testimony shows that the plaintiff-respondent was not guilty of contributory negligence.

The plaintiff-respondent testified that he was struck by an automobile and was corroborated by further testimony that he was dragged by an automobile, the only automobile at the scene of the accident, driven by the defendant-appellant. The plaintiff-respondent testified that he looked up and down before crossing and while crossing, and saw no vehicles, thereby exercising reasonable care or prudence imposed upon him by law in crossing a street. The plaintiff-respondent testified as follows:

> "Q. Did you look up and down to see whether any machines were coming in either direction? A. I looked up and down and I seen nothing coming.
>
> Q. Did you hear whether or not anyone was blowing a horn in either direction? A. No, sir" (Case, p. 8, lines 11-16).

This was the first observation made by plaintiff-respondent before crossing and then when plaintiff-respondent had almost reached the center line of the street at the car tracks, while upon the first set of tracks, plaintiff-respondent again looked up and down in the exercise of reasonable care, as shown by his testimony in being examined by the Court as follows:

> "The Court: When did you look?
>
> The Witness: At the time I was passing.
>
> The Court: I know, but where? Were you in the street when you looked?
>
> The Witness: Just crossed the first track.
>
> The Court: So you didn't look until you got to the first track?

The Witness: I looked up and down. I didn't see anything coming'' (Case, p. 12, lines 23-32 inclusive).

Although there is no direct testimony of the speed with which the automobile of the defendant-appellant was traveling, that speed can be clearly assumed from the uncontradicted testimony of witnesses that the plaintiff-respondent was dragged fifty feet and that the automobile of the defendant-appellant was found fifty or sixty feet from the intersection. Mr. Gill, a witness for the plaintiff-respondent, testified on direct examination as follows:

''Q. What did you see about the accident that you can tell the Court and jury? A. I see him get dragged.

Q. You say he was dragged away; where was he dragged up? A. He was dragged about fifty feet'' (Case, p. 19, lines 15-20 inclusive).

The same witness on cross-examination testified as follows:

''Q. Did you see the direction that cars were going and this car in particular that you claim dragged this plaintiff, which direction was that going? A. He was going down Grand Street.

Q. What was the first thing you noticed about this accident that you say you saw him dragged? A. I saw him getting dragged. You could see the body going around under the wheels.'' (Case, p. 19, lines 31-38 inclusive).

Police officer Mauer testified as follows on direct examination:

''Q. Do you recall this accident down at Summit Avenue and Grand Street? A. Yes, sir.

Q. Will you tell the Court and jury what you know about this? A. At 7:15 at Summit and Grand Avenue, I happened to be making a pull at the box at the intersection of what they call the Junction, at that far corner where the cigar store is. I heard a holler and I dropped the cover on the box and runs down to see what it is. This man in a sedan was down by the restaurant which is owned by colored people, about 50 or 60 feet away from where the accident happened. Picking the man up, not knowing him until I came to the hospital, I got hold of him and put him in this car. I asked him, did you hit this man and he said he didn't know. I said, 'All right; rush him to the City Hospital.' We went there and Dr. Skelette attended to the injuries of the eye and forehead, and also the side and the shoulder and he was taken back to the station house'' (Case, p. 27, lines 13-32 inclusive).

Throughout the entire testimony of the plaintiff-respondent there is the evidence of the plaintiff-respondent that he was injured by being struck by an automobile, by another witness that he was dragged beneath an automobile for fifty feet and by a third witness that the defendant-appellant's automobile driven by the defendant-appellant was the only car in the vicinity of the accident from which evidence, inference can plainly be drawn that the defendant-appellant was guilty of negligence which would make him responsible for the damages sustained by the plaintiff-respondent and such testimony coupled with the denial by the defendant-appellant that he saw no one in the road, that he blew no horn approaching the intersection and defendant-appellant's further statement according to the testimony of the police officer that he did not know whether or not he struck the plaintiff-respondent, raised a question of fact which the Court properly said was one for the jury to decide.

As stated in the case of *Nightengale* vs. *Public Service Coordinated Transport,* in 8 N. J. Miscellaneous Reports, at page 238, the Supreme Court says:

> "1. It is settled law that the Court will not grant a nonsuit if there is any testimony tending to show there was negligence on part of the defendant. (2) That unless it clearly appears on part of the plaintiff's case that his negligence was proximately contributory to the defendant's negligent act, a nonsuit cannot be legally granted. The burden of establishing contributory negligence is upon the defendant. (3) A trial judge cannot legally direct a verdict for the defendant, unless it appears from the testimony offered, on behalf of defendant, or from all the evidence in the case, that there is a legal bar to the plaintiff's right of recovery. Where the defendant's testimony merely raises a question of fact, the case MUST GO TO THE JURY."

In the Court's charge to the jury, in the case *sub judice,* the Trial Judge said:

> "And so, this case is peculiarly one for the jury, and the Court has left the questions, both of the operation of the automobile, as well as to whether or not this defendant's car came in collision with the plaintiff, and the question of contributory negligence, to you for your determination" (Case, p. 40, lines 29-34, inclusive).

This reiteration of the Trial Court's justifying the submission of the questions of fact to the jury is completely supported in the case of *Steinberg* vs. *Bogatin Dyers and Cleaners,* reported in 105 N. J. L., at page 294, wherein Justice Minturn, speaking for the Supreme Court of New Jersey, says that:

> "(2) It has been uniformly held in this country and in England that in an action for

> negligence, as in other actions, it is for the judge to say whether there is any evidence of negligence at all to go to the jury, and as it has been tersely remarked in one of the cases: 'It is for the judge to say whether negligence can be legitimately inferred from the facts in evidence, and it is for the jury to say whether it ought to be inferred under the circumstances.' "

From the conflict of testimony adduced at the trial it was impossible for the Trial Judge to infer clearly that there was contributory negligence on the part of the plaintiff-respondent and in the absence of clear and unequivocal proof of contributory negligence in the case as submitted by the defendant-appellant the Trial Judge was without error in his refusal to grant a nonsuit on the ground of contributory negligence.

In the case of *Walton* vs. *Ackerman,* reported in 49 N. J. L., at page 234, the Court of Errors and Appeals said that:

> "Where at the close of the plaintiff's case, there is evidence upon which the jury might find for the plaintiff, the court should not direct a nonsuit; nor should it, at the close of the defendant's case, direct a verdict for the defendant, on the ground of plaintiff's contributory negligence; both questions arising upon the facts, and being solely for the jury to determine."

Thus in the case of *Shelly* vs. *Brunswick Traction Co.,* reported in 65 N. J. L., at page 639, the Court of Errors and Appeals said that:

> "It is not error to refuse to direct a verdict for the defendant when there is evidence upon the question of the defendant's negligence and of the plaintiff's contributory negligence in addition to that of the happening of the accident from which the defendant's liability may be fairly inferred."

And in the case of *Baker, et al.,* vs. *Fogg & Hires Co.,* reported in 95 N. J. L., at page 230, the Court of Errors and Appeals said that:

> "Contributory negligence is a matter of defense under our present practice, and not a ground for taking the case away from the jury upon the plaintiff's proofs."

It is respectfully submitted that there was no error committed by the Trial Judge in refusing defendant-appellant's motion for a nonsuit or in refusing defendant-appellant's motion for a direction of a verdict and therefore the judgment below should be affirmed.

Respectfully submitted,

GEORGE R. MILSTEIN,
Attorney for and of Counsel with
Plaintiff-Respondent.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.