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Notice of Appeal.

(Filed June 29, 1927.)

First District Court of Jersey City

10

Between:

LEO MARMORSTEIN,
Plaintiff,

v.

STATE THEATRES CORPORATION, a
corporation of the State of New
Jersey,

Defendant.

20

To

LEO MARMORSTEIN,

OR

CHARLES C. COLGAN,
Attorney of Plaintiff,
15 Exchange Place,
Jersey City, N. J.

PLEASE TAKE NOTICE that the defendant, State
Theatres Corporation hereby appeals to the New
Jersey Supreme Court from the judgment and ver-
dict of the First District Court rendered in the
above stated action on Thursday, the 16th day of
June, 1927.

30

Dated June 21st, 1927.

ATWOOD C. WOLF,
Attorney for Defendant.

40

Specification of Determinations.

(Endorsed)

Service of a true copy of the within notice hereby acknowledged this 21st day of June, 1927.

10

CHARLES C. COLGAN,
Attorney for Plaintiff.

(Filed June 29, 1927.)

Appeal Bond in Usual Form.

(Filed June 29, 1927.)

Specification of Determinations.

(Filed July 27, 1927.)

20

NEW JERSEY SUPREME COURT.

LEO MARMORSTEIN,
Plaintiff-Appellee,

v.

STATE THEATRES CORPORATION,
Defendant-Appellant.

On Appeal from
First District
Court of Jersey
City.

30

The defendant-appellant herein does hereby set down the following specification of determinations of the Trial Court with which it is dissatisfied in point of law:

1. The Trial Court erroneously refused to non-suit the plaintiff upon motion to do so by the defendant.

40

2. The Trial Court erroneously refused to direct a verdict in favor of the defendant upon motion to do so by the defendant.

Specification of Determinations.

3. The Trial Court erroneously permitted the case to go to the jury, since no legal evidence had been adduced by the plaintiff which in any way involved or connected the defendant corporation with the plaintiff's claim for damages.

10

4. The Trial Court erroneously held that it was a question for the jury to determine whether the arrest and imprisonment of the plaintiff was the act of the corporation when there was no evidence in the case to sustain such a ruling.

5. The Trial Court erroneously held it was a question for the jury to determine whether the arrest and imprisonment of the plaintiff at the instigation of a subordinate employee, was the act of the corporation.

20

6. The Trial Court erroneously held the defendant corporation was legally responsible for damages because one of its subordinate employees made and pressed a criminal complaint against the plaintiff for an alleged assault and battery committed on such individual employee by the plaintiff.

7. The Trial Court erroneously held that the making and pressing of such criminal complaint by such subordinate employee for an individual wrong personally committed against him by the plaintiff, was the act of the corporation.

30

8. The Trial Court erroneously held that it was a question for the jury to determine whether the manager of the defendant's theatre acted within the scope of his authority and had power to authorize on behalf of the defendant corporation, the arrest of the plaintiff when there was no evidence in the case to sustain such a ruling.

40

Specification of Determinations.

9. The Trial Court erroneously held that it was a question for the jury to determine whether the arrest of the plaintiff was caused by the defendant's employees acting within the scope of their employment and with authority from the defendant corporation when there was no legal evidence in the case to sustain such a ruling.

10. The Trial Court erroneously held that it was a question for the jury to determine whether the defendant corporation committed the wrongs which were charged against it by the plaintiff.

11. The Trial Court erroneously held that it was a question for the jury to determine whether plaintiff's arrest was brought about by the servants and employees of the defendant corporation or whether the same was brought about at the sole request and solicitation of the plaintiff.

12. The Trial Court erroneously held that it was a question for the jury to determine whether the defendant corporation was responsible for the individual acts of its employees since there was no legal evidence to sustain such a ruling.

13. The Trial Court erroneously held that it was a question for the jury to determine whether the acts complained of by the plaintiff were done at the instance of, or for the benefit of, and with the sanction of the defendant corporation, when there was no legal evidence in the case to sustain such a ruling.

14. The Trial Court erroneously held it was a question for the jury to determine whether the defendant corporation was responsible for an alleged assault committed upon the plaintiff, when as a matter of fact, there was not only no evi-

Specification of Determinations.

dence to sustain such a ruling, but there was evidence, as shown by the records of the criminal court, that the plaintiff had filed and pressed a criminal complaint for assault and battery against the individual employees of the defendant corporation and such complaints and charges were dismissed in such criminal court. 10

15. The Trial Court erroneously held it was a question for the jury to determine whether the usher, James Tuohy, acted with authority from the corporation and within the scope of his employment, and at the instance of and for the benefit of and with the sanction of the defendant corporation when he personally made and pressed a criminal complaint against the plaintiff for an assault alleged to have been committed by the said Tuohy personally and individually upon the plaintiff. 20

16. The Trial Court erroneously held it was a question for the jury to determine whether Manager Keale acted with authority from the defendant corporation and within the scope of his employment and for the benefit of, at the instance of and with the sanction of the defendant corporation, since the only testimony upon this point was brought out by the plaintiff himself who testified that said Manager Keale advised the usher Tuohy to make a criminal charge against the plaintiff for an alleged assault committed upon the said Tuohy by the said plaintiff. 30

17. The Trial Court erroneously held it was a question for the jury to determine whether the defendant corporation was responsible for the individual acts of its employees. 40

Specification of Determinations.

18. The Trial Court erroneously left it to the jury to determine whether there was probable cause for the arrest of the plaintiff.

19. The Trial Court erroneously charged and instructed the jury as follows:

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“If you come to the question of damages, it is largely a question for you under all of the circumstances of the case, having in mind what damage if any has been sustained by the plaintiff, in order to determine what damages you should assess against the defendant and in favor of the plaintiff to compensate him for the wrong that has been done,”

20

since such charge presupposes that a wrong has been committed against the plaintiff.

20. The Trial Court erroneously charged and instructed the jury as follows:

“The complaint is that the State Theatre, a corporation acting thru its agent, committed an assault and battery upon this plaintiff on the 14th day of February * * * etc., etc.”

30

when, as a matter of fact, there was no allegation in the plaintiff's pleadings, nor was there any evidence or proof of any kind, that an assault and battery had been committed upon the plaintiff.

21. The Trial Court erroneously charged and instructed the jury as follows:

“The defendant, the State Theatre Corporation, comes into court and says it had absolutely nothing to do with the assault, if

40

Specification of Determinations.

there was an assault * * * and, of course, if you find that to be so, if you find that the assault, if there was an assault * * * etc., etc.”

22. The Trial Court erroneously omitted to charge the jury that the burden of proof rests upon the plaintiff to prove the allegations of his complaint or state of demand. 10

23. The Trial Court erroneously, and over the objection of the defendant, permitted the following question to be answered by the plaintiff:

“Q. Do you belong to any organizations?

A. Yes, sir.

“Q. What organization?

“(Objection overruled and exception taken.) 20

“A. The Benevolent & Protective Order of Elks, and the Albert L. Quinn Post of the American Legion, of which I am treasurer.”

24. The Trial Court erroneously refused to permit an answer to the following question asked by the defendant of the witness Newall Hogan:

“Were you performing your duties as an assistant manager when you went along in the patrol wagon to the police station?” 30

ATWOOD C. WOLF,
Attorney of Defendant-Appellant.

(Filed July 27, 1927.)

Transcript of Judgment.

Endorsement:

No. 163522

FIRST DISTRICT COURT
OF JERSEY CITY

SUMMONS IN TORT

10

LEO MARMORSTEIN,
Plaintiff,

v.

STATE THEATRES CORPORATION,
2852 Boulevard,
Jersey City, N. J.,

Defendant.

Demand	\$500.00	20
Costs	2.10	
Mileage20	

Returnable May 3rd, A. D. 1927, 10
o'clock A. M.

(A true copy.)

30

40

State of Demand.

FIRST DISTRICT COURT OF JERSEY CITY.

10

LEO MARMORSTEIN, Plaintiff,	}	In Tort.
<i>v.</i>		
STATE THEATRES CORPORATION, a corporation of the State of New Jersey, Defendant.		

The plaintiff demands from the defendant the sum of \$500.00, for the following:

20

COUNT ONE.

1. On or about February 15th, 1927, at 2852 Boulevard in the City of Jersey City, County of Hudson and State of New Jersey, the defendant State Theatres Corporation, through its agents and servants was engaged in the conducting of a theatre known as the State Theatre.

30

2. At the time and place aforesaid, the said agents and servants of the defendant, to wit, the manager and usher while actually engaged in the performance of their duties and acting within the scope of their authority, then and there and during the time the plaintiff was lawfully seated in the audience of said theatre, having purchased a ticket for a reserved seat therein, with force and arms assaulted the plaintiff and with great force and violence pulled and dragged him about, and also then imprisoned the plaintiff and kept and detained him in prison for a long time, to wit, two

40

State of Demand.

hours or thereabouts, and forced and compelled the plaintiff to go to court, and forcibly conveyed him in custody in and along divers public streets and highways to a certain police station and there imprisoned the plaintiff and kept and detained him in prison without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of two hours or thereabouts; contrary to law and under a false and unreasonable assertion, color and charge that the plaintiff had committed an offense punishable by law, to wit, that he had committed an assault and battery. 10

3. Whereby the plaintiff was greatly hurt and suffered great anguish and pain of mind and body and was prevented from attending to his lawful affairs and was also thereby then greatly exposed and injured to his credit, reputation and circumstances and was subjected and put to divers expenses, in order to obtain and in obtaining his liberation from said imprisonment and thereby, also sustained other wrongs. 20

Judgment will be claimed for the sum of two hundred and fifty (\$250.00) dollars, on Count One.

COUNT TWO.

1. The plaintiff Leo Marmorstein, repeats Paragraphs One and Two of Count One. 30

2. The plaintiff further says, that he was forced to defend himself against a charge of assault and battery which was made in the First Criminal Court of Jersey City, before Magistrate Leo Sullivan, Esq., on February 15th, 1927; said charge of assault and battery having been made wilfully and maliciously and without any probable cause by the said agents and servants of said defend- 40

State of Demand.

10 ant while actually engaged in the performance of their duties and acting within the scope of their authority and said charge was tried before said Magistrate Leo Sullivan, Esq., in the First Criminal Court of Jersey City, on February 15th, 1927, and was dismissed.

20 3. Whereby the plaintiff was greatly hurt and suffered great anguish and pain of mind and body and was prevented from attending to his lawful affairs by having to appear in court and was thereby exposed and injured in his credit and reputation and circumstances and was subjected and put to divers expenses in obtaining his release from said charge of assault and battery and forced to expend various sums in the obtaining of bail and in the hiring of an attorney to defend himself from said malicious prosecution and also suffered other wrongs.

Judgment will be claimed for two hundred and fifty (\$250.00) dollars on Count Two.

Judgment will be claimed on Counts One and Two in the sum of five hundred (\$500.00) dollars.

Dated April 26th, 1927.

30

CHARLES C. COLGAN,
Attorney of Plaintiff.

40

Clerk's Certification

THE FIRST DISTRICT COURT OF JERSEY CITY.

Before—CHARLES L. CARRICK, Esq., Judge.

State of New Jersey, }
 Hudson County, } ss.:
 City of Jersey City, }

10

<p>LEO MARMORSTEIN, Plaintiff,</p> <p style="text-align: center;"><i>v.</i></p> <p>STATE THEATRES CORPORATION, a corporation of the State of New Jersey, Defendant.</p>	}	<p>No. 163522</p> <p>In Tort Demand \$500.</p> <p>CHARLES C. COL- GAN, Pltff's Atty.</p> <p>C. ATWOOD WOLF, Deft's Atty.</p>
---	---	---

20

COSTS	City Al.	A summons was issued	
Summons, Copy	1.50	tested APRIL 26, A. D.	
Service, return	.60	1927 at 10 o'clock in the	
Mileage	.20	forenoon at the Court	
Venire	1.25	Room of said Court in	
Summoning Jury	1.50	the City of Jersey City.	
Service of Sub.		The Constable returned	
Witness Fees	2.50	the Summons as follows	
Jury Fee	9.00	viz: I served the within	
Trial Fee	1.50	summons APRIL 27, A. D.	30
Bond	1.00	1927 on JAMES McNALLY,	
		of the Defendant Com-	
		pany, by reading the	
		same to him and deliver-	
		ing to him a copy	
		thereof.	

ROBERT J. LIVINGSTON,
 Constable.

Plaintiff Demand was
 filed APRIL 26, A. D.

40

Clerk's Certification.

10

1927. Demand for Trial by jury filed April 27, 1927 JUNE 16, A. D. 1927 the Plaintiff appearing and the Defendant appearing and the trial of the cause was proceeded with as follows: The constable returned Venire with the following named persons summoned: — James T. Leonard, David Katz, Morris Lyvin, Emanuel Restivo, Fred Lohman, Joseph H. Crane, John Polito, Samuel Ludwin, Samuel Boxes, George C. Reese, Louis Margolis and Andrew Fregara, who were jointly and severally sworn as Jurors. Upon application of Plaintiff, Edward W. Cooper was appointed and sworn as stenographer.

20

30

On the part of the Plaintiff, James Lepis, Leo Marmorstein, James Toohey, William R. Heath, were sworn and testified. One Ticket offered and received in evidence.

40

On the part of the Defendant, Harry W. Walsh, James Toohey, Newall Hogan, and John G. Keale, were sworn and testified. The Court

Clerk's Certification.

addressed the Jury who retired and after due deliberation returned into Court and say they find a verdict for One Hundred Fifty Dollars, (\$150.00). 10

Whereupon it is on this SIXTEENTH day of JUNE, A. D. 1927 by this Court considered and adjudged that said LEO MARMORSTEIN, Plaintiff, recover against said State Theatres Corporation, a corporation of the State of New Jersey, defendants, the One Hundred Fifty Dollars, Damages and Twenty-Five Dollars, fifty-five cents, cost of Suit. 20

June 29, 1927, Notice of Appeal filed by defendant.

June 29, 1927 Appeal bond filed by defendant.

I. B. FRANCES MARRON, Clerk of the First District Court of Jersey City, Charles L. Carrick, Esquire, Judge, do hereby certify that the foregoing is a true copy of the Summons, State of Demand, Notice of Appeal and transcript of a judgment of the said Court. 30

IN WITNESS WHEREOF, I do hereby set my hand as Clerk of the Said Court and affix the seal of the said Court this sixth day of July, nineteen hundred and twenty-seven. 40

B. FRANCES MARRON,
Clerk.

Case.

FIRST DISTRICT COURT OF JERSEY CITY,

STATE OF NEW JERSEY.

Before—CHARLES L. CARRICK, Judge, and a Jury.

10

LEO MARMORSTEIN,
Plaintiff-Appellee,

against

STATE THEATRES CORPORATION, a
corporation of the State of New
Jersey,

Defendant-Appellant.

20

Jersey City, New Jersey,
Thursday, June 16th, 1927.

APPEARANCES:

CHARLES C. COLGAN, Esq., Attorney for the
Plaintiff.

ATWOOD C. WOLF, Esq., Attorney for the
Defendant.

30

(Edward W. Cooper, a certified shorthand re-
porter, was sworn as stenographer by the Clerk.)

(A jury was duly empanelled and sworn at 12:52
o'clock P. M.)

Mr. Colgan: If the Court please, I ask to have
my statement of complaint amended to read: "On
or about February 14," instead of "February 15" on
both counts.

Mr. Wolf: I have no objection to the amend-
ments.

40

The Court: That will be done.

James Lepis, direct.

(Mr. Colgan opened to the jury on behalf of the plaintiff.)

(Mr. Wolf opened to the jury on behalf of the defendant.)

(A recess was taken until 2 P. M.) 10

Jersey City, N. J., at 2 P. M.

AFTERNOON SESSION.

(By 2:15 o'clock P. M. only eleven of the panel of jurors had appeared.)

The Court: Are you willing to stipulate that this case go on with eleven?

Mr. Colgan: Yes, we are willing to go ahead. 20

The Court: Are you, Mr. Wolf?

Mr. Wolf: Yes.

The Court: By stipulation of counsel we will proceed with the trial with a jury of eleven men.

JAMES LEPIE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Colgan:

Q. Mr. Lepis, are you connected with the First Criminal Court? A. Yes, sir. 30

Q. Will you turn to your docket? A. I have it here.

The Court: He is Clerk of the First District Court: You are the Clerk, are you not, Mr. Lepis?

The Witness: I am an attendant, your Honor.

40

*James Lepis, cross.**By Mr. Colgan:*

10 Q. Will you turn to the docket of the charge made against Leo Marmorstein? A. Yes, sir, it is here. Read what you have in the docket there, please. A. Leo Marmorstein, 79 Crescent Avenue; age, thirty years old; color, white; born, United States; charge, assault and battery, February 15th, 1927.

Q. What does that mean? What is that the date of? A. February 15th, 1927?

Q. Is that when the case came up? A. That is when the case came up, yes, sir.

Q. By whom was the charge made? A. James Tuohy.

20 The Court: First, please tell us what your docket shows.

The Witness: Yes; he pleaded not guilty. The State's witness was James Tuohy, 191 Summitt Avenue; case tried February 15th, 1927, and he was discharged.

By Mr. Colgan:

Q. He was what? A. Discharged.

30 Mr. Colgan: That is all. I offer the book in evidence.

Cross examination by Mr. Wolf:

Q. Does this record on the docket show by whom the complaint was made? A. Yes, sir.

Q. Can you tell, from referring to your record, who made the complaint in this case? A. James Tuohy; I have the complaint here also.

40 Q. You have the complaint? A. Yes (producing paper).

James Lepis, cross.

Q. Is this the complaint that was made in this case? A. Yes, sir.

Q. This shows that it was made by James Tuohy. A. Yes, sir.

Q. Can you turn to the record of this docket of complaint made on the same date by Leo Marmorstein against James Tuohy? 10

Mr. Colgan: I object to that, if the Court please, as not proper cross examination.

The Court: I will permit it. The witness has appeared for this purpose, and he might as well testify to it. You may proceed.

By Mr. Wolf:

Q. By the way, you have been subpoenaed by the defense in this case, have you not? A. Not I; the Assistant Clerk of the Court has been. 20

Q. And you were sent to take his place, were you? A. Yes, sir.

Q. Will you read that record, please? A. February 15th, Austin Tuohy, 191 Summitt Avenue, 23; color, white; born, United States; charge, assault and battery. He pleaded not guilty. The complaint was made by Leo Marmorstein. The case was tried February 15th, 1927, and was discharged. 30

Mr. Colgan: If the Court please, I move that that be stricken out, in view of the fact that the complaint is against Austin Tuohy, and therefore there is no relevancy between the two.

The Court: Is Austin Tuohy a different man?

The Witness: Well, I don't know.

Mr. Wolf: If the Court please, we will show you in our case that this Austin Tuohy 40

James Lepis, cross.

is the same person as James Tuohy, and there was some mistake made in the complaint. Will counsel consent to have this complaint go into evidence? I refer to the complaint of Tuohy against Marmorstein.

10

Mr. Colgan: Yes.

The Court: Very well; mark it as an exhibit in evidence.

(The paper referred to was marked Plaintiff's Exhibit 1.)

By Mr. Wolf:

Q. You have here under your docket 255 on page 26 another record against Austin Tuohy at 191 Summitt Avenue, have you not?

20

Mr. Colgan: I want to object to that, if your Honor please.

The Court: Let us hear his question first. This is preliminary, I take it.

By Mr. Wolf:

Q. If the book is in evidence, there is no need of my examining the witness. Is that right—that you have two records here against Austin Tuohy, the complaints being made, apparently, by the same person? A. That is what the book shows.

30

Q. And that was also the complaint of Leo Marmorstein against Austin Tuohy? A. According to this book, yes, sir.

Q. So you have here two different records of complaints made by Leo Marmorstein against what the docket shows as Austin Tuohy; is that correct? A. Yes, sir.

Q. One is 255 and the other is 256? A. Yes, sir.

40

Q. You don't have anything to do with the writing in this book, do you? A. No, sir.

Leo Marmorstein, direct.

Q. You were just sent here by the Clerk of the Court with these papers and books that you have brought? A. Yes, sir.

By Mr. Colgan:

Q. Have you the complaints that were filed in these cases with you? A. No, sir, not with me. 10

Mr. Colgan: That is all.

Mr. Wolf: That is all.

LEO MARMORSTEIN, the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Colgan:

Q. Mr. Marmorstein, on February 14th, 1927, were you in the State Theatre? A. Yes, sir. 20

Q. Did you pay your way in? A. Yes, sir.

Q. Did you receive a ticket? A. Yes, sir.

Q. Have you it with you? A. It is there (indicating a ticket stub).

Mr. Colgan: Have you any objection, Mr. Wolf?

Mr. Colgan: I offer it in evidence.

(The stub referred to was marked Plaintiff's Exhibit 2.) 30

By Mr. Colgan:

Q. This receipt that you received was GG-101, Center? A. Yes.

Q. Where was that seat located? A. On the aisle.

Q. And on this particular afternoon, at what time did you go into the theatre? A. About a few minutes before two.

Q. And were you escorted down to your seat by the usher? A. Yes, sir. 40

Leo Marmorstein, direct.

Q. Which usher? Do you know the usher who escorted you to your seat? A. No.

Q. Was it Mr. Tuohy? Do you know? A. I don't know whether he escorted me to my seat or not.

10 Q. While you were in your seat, did you leave it? A. Yes, sir.

Q. For what purpose did you leave it? A. To go to the men's room.

Q. Tell us what happened when you came back. A. I came back from the men's room, and I wanted to go back to my seat, so I went to go back down the aisle, in the passageway down over there, and they said, "You can't go down."

I said, "Why?"

20 And they said it was the manager's order,—to wait until the end of the number. That particular act had about six or seven numbers in it, see? I waited until the end of the number and then I walked down the aisle. I got about a few feet past these two ushers, one standing on each side of me, and I felt somebody grab me on the back. I didn't see who it was. And I heard this usher say: "You can't go down." I pulled away from them and continued on down to my seat and sat down.

30 Q. Were the lights up at that time? A. No, the house was dark.

Q. When you proceeded to your seat, did you have to cross anyone? A. No, sir.

Q. Your seat was right on the end? A. Yes, sir.

Q. What took place after that? A. I had been seated there a few minutes on another part of these scenes,—not on this particular act,—and another young man came down to me and said, "You think you are a privileged character."

40 Q. Do you know who that was? A. I saw him here this morning; yes,—that is him, right there.

Leo Marmorstein, direct.

Q. You mean standing up over here? Is that the man? A. Yes, that is the young fellow.

Q. What else was said? A. I said, "No."

He says, "Well, I will see you at the end of this act." That was the last act; the next thing was the feature picture.

10

Q. Yes. A. Well, he had warned me that he would see me, and so, when the act was over, I happened to look up the aisle to see whether anybody was coming, and sure enough the usher was a—coming down with a policeman. The cop came down through the aisle there and says, "Come on," so I got my rubbers there and I went up to talk with him there, and Mr. Keale was there, and—

Q. (Interrupting.) Who is Mr. Keale? Is he here in court? A. That is the gentleman right there, with the glasses.

20

Q. This gentleman here? A. Yes.

Q. Yes. A. I said to Mr. Keale—I said, "I haven't done anything." I talked a few minutes, but that was the effect,—and Mr. Keale says, "You are going out."

So when the officer brought me out I said, "Where are we going to." He said, "You are going out."

"Out where?"

30

"Out in the street."

So he went over and he talked to Mr. Keale. Mr. Keale said, "Take him out."

I said to the officer, "I am not going out in the street. I don't know what you can do in this matter, but if you will arrest me, I will go with you peacefully. That is, if you want to arrest me, I will go with you peacefully."

The officer then went back to Mr. Keale and Mr. Keale said, "All right, bring him inside,—into

40

Leo Marmorstein, direct.

the office." In the meantime, this was all in the back of the orchestra. We went into the office—

Q. (Interrupting.) Went into whose office? A. Went into Mr. Keale's office. Then he told the officer to use the 'phone and to call for the wagon.

10 Q. Who told him? Mr. Keale? A. No; the officer asked what 'phone to use, and Keale pointed to the 'phone.

Q. I see. A. And then, while the officer was 'phoning for the wagon, I asked the question to be allowed to remain. When the officer finished, he said, "You want to remain here after I have called for the patrol wagon?" He thought it was a joke. So we waited there a while and Mr. Keale said to this young lad here—

20 Q. (Interrupting.) Which young lad? Is he in Court? A. Yes,—this young lad, sitting next to Mr. Keale here.

Q. This man there? A. Yes.

Q. What did Mr. Keale say to him? A. He said to him, "You will go down and make a charge of assault and battery against this man, see?"

30 Q. Mr. Keale said that? A. Yes, he told this usher to make a charge of assault and battery, while the patrol wagon was coming. I got in the patrol wagon, and this young fellow got in also, and we were taken over to the Seventh Precinct.

Q. That is, you were taken? A. Yes, the patrol wagon pulled up in front of the theatre on the Plaza, and—

Q. Go right ahead. A. We went over to the Seventh Precinct. They were just going out on duty, the new round, I guess,—a new shift was coming in, and we had to wait a while, and then we went in there and this young lad—

40 Q. (Interrupting.) When you say "young lad,"

Leo Marmorstein, direct.

do you mean— A. (Interrupting.) This Mr. Tuohy.

Q. What is your name, sir?

A Voice: James Tuohy.

Q. Mr. James Tuohy? 10

A Voice: Yes, sir.

The Witness: Yes, that is the man. And this young man over here—I don't know his name. He calls himself assistant manager, I think.

A Voice: Hogan.

By Mr. Colgan:

Q. Mr. Hogan, this man here? A. Yes, sir, Mr. Hogan. 20

Q. And they both went over in the patrol wagon with you? A. Yes, sir; and then we came before the desk, after the officers went out on duty, you know, on a new round, and this young lad told that I had gone on—

Q. (Interrupting.) Which do you mean by the "young lad"? Do you mean Mr. Tuohy? A. Mr. Tuohy. Mr. Tuohy told the officer at the desk that he told me I couldn't go down the aisle, and when he told me I couldn't go down the aisle I turned around and hit him twice in the stomach. Well, they were very friendly over there with all these people over there, you know, and I— 30

Mr. Wolf (interrupting): I object to that, and move that it be stricken out.

By Mr. Colgan:

Q. Never mind; just tell us what took place. A. Well, the officer spoke to me and asked me what I had to say. 40

Leo Marmorstein, direct.

Q. What officer was that? A. The officer at the desk there.

Q. Do you know who he was? A. I found out later that it was Captain Walsh.

10 Q. Captain Walsh? A. Yes, that is what I found out later. He told me—he asked me, rather, what I had to say, and I told him nothing, and then, of course, the captain asked me—

20 Q. (Interrupting.) What did the captain say to you? A. The captain said to me—"Well," he says, "now—" he said, "You fellows go over there and spend fifteen or twenty cents and you think you own the place." After he said that to me, I said, "Well, that is all. I went down the aisle and these two lads grabbed hold of me—this Tuohy and his brother, another Tuohy, and I shook them off and went down to my seat, and they got the officer."

He said, "All right,—one hundred dollars bail, tomorrow morning, Oakland Avenue"—or something to that effect. Anyway, he said something about a hundred dollars bail.

30 Q. How long did you remain in the police station? A. Well, I asked for a 'phone, you know, to get somebody to bail me out, and they took me next door where there was a pay booth. My brother came over and bailed me out with a two hundred dollar real estate bail.

Q. So you were in the police station for about half an hour, or longer? A. I should judge—well, we left there a little after four. We were there about from half an hour to three-quarters of an hour.

Q. And the next morning you went over to the police court, did you? A. Yes.

40 Q. And you were discharged over there in the police court, were you? A. Yes, sir.

Leo Marmorstein, direct.

Q. What business are you in, Mr. Marmorstein?

A. Industrial loans.

Q. What position do you hold there? A. Manager.

Q. What other position do you hold in the City?

A. The business is Leo Marmorstein, trading as. 10

Q. Do you belong to any organizations? A. Yes, sir.

Q. What organizations?

Mr. Wolf: I object to that, if the Court please.

The Court: What difference does it make what organizations he belongs to?

Mr. Colgan: The question of damage to his reputation, if your Honor please, in being taken to the police station in a patrol wagon. 20

The Court: Very well, I will allow it.

Mr. Wolf: Exception.

By Mr. Colgan:

Q. To what organizations do you belong? A. The Benevolent & Protective Order of Elks, and the Albert L. Quinn Post of the American Legion, of which I am treasurer. 30

Q. You are treasurer of the Albert Quinn Post, are you? A. Yes, sir, of the American Legion.

Q. Where do you live now? A. 79 Crescent Avenue.

Q. How long have you lived there? A. On Crescent Avenue, a little over a year, I think.

Q. Have you ever been arrested before? A. No, sir.

Q. Have you ever been convicted of any crime? A. No, sir. 40

Leo Marmorstein, cross.

Q. When you were over in the police court, were you represented by an attorney? A. Yes, sir.

Q. Who represented you? A. Mr. Nolan.

Q. What is his first name? A. Ezra.

Q. Did you pay him his fee? A. Yes, sir.

10 Q. How much did you pay him? A. Fifty dollars.

Q. Did you have to pay for the bond? A. No, sir.

Q. How long were you over in the police court? How many hours were you there? A. Well, we were told to get there the first thing in the morning.

Q. What time did you get there, and what time did you leave? A. Eight o'clock.

20 Q. What time did you leave? A. Oh, pretty near twelve.

Mr. Colgan: You may cross examine.

Cross examination by Mr. Wolf:

Q. How long had the performance been going on, Mr. Marmorstein, before you left your seat? A. The exact time I cannot tell you, but I can tell you it was the last act on the bill.

30 Q. And the show starts at about two o'clock, doesn't it? A. Yes, sir.

Q. And you left your seat, then, around four? A. No, sir, before four.

Q. How long before? A. Well, I don't know the length of time of the act. It was one of those spectacular acts, you know, and it had six or seven parts in it.

Q. That act was a feature act, was it not? A. Yes; well, it was the last act on the bill.

40 Q. Do you know the name of it? A. Ned Wayburn's act.

Leo Marmorstein, cross.

Q. Ned Wayburn's Revue, wasn't it? A. Yes, sir.

Q. That was the feature act of this particular performance, wasn't it? A. Yes.

Q. And a very important one? A. Well, I don't know whether it was important or not. 10

Q. You don't think it was important? A. It was an act.

Q. It was just the same as any other act to you? A. That is it.

Q. As you personally felt about this matter, you didn't care about this act, did you? A. Certainly.

Mr. Colgan: I object to that, if your Honor please, as immaterial.

The Court: I do not see the materiality of that. Did he remain or not? 20

By Mr. Wolf:

Q. Well, you left shortly after this act started; is that correct? A. Yes, sir.

Q. And you went to the men's room? A. Yes, sir.

Q. How long were you gone from your seat? A. Well, you mean in the men's room?

Q. Yes. A. I would judge about five minutes. 30

Q. And when you got back to the aisle again, the aisle was open, was it not? A. The aisle was open, sure.

Q. And there were no people standing in front of the aisle blocking it up in any way, were there? A. No, sir.

Q. And there were a lot of people standing in back of the theatre on both sides of that aisle? A. There were people standing in the back.

Q. Is that right? A. The whole back was filled. 40

Leo Marmorstein, cross.

Q. And there were ushers standing in the aisle, were there not? Did you see them? A. Yes, sir.

Q. And one of them was Mr. Tuohy? A. Yes, sir.

Q. Do you know who the other one was? A. His brother,—another Mr. Tuohy.

10 Q. That is Mr. Austin Tuohy? A. I don't know his first name.

Q. Did you attempt to go back to your seat when you went back there? A. Yes, sir.

Q. Who was it that spoke to you and said you couldn't go down? A. Well, I don't know which one it was, but they said, "You can't go down."

Q. Yes; what did you say? A. I asked him why. He said, "Manager's orders, until the end of this number."

20 Q. Did he say "the end of the number" or "the end of the act"? A. "The end of the number."

Q. You are sure about that, are you? A. Yes, sir.

Q. What did you say? A. I waited; I didn't say anything more.

Q. Are you sure you waited there? A. Positive.

Q. How long did you wait? A. Oh, it was a matter of a couple—maybe about five minutes, at the most, or less.

30 Q. Less than five minutes? A. Yes, sir.

Q. Then what happened? A. Then the end of the number came, and I started to walk down the aisle.

Q. Did the usher tell you that it was all right for you to go down? A. The usher didn't say anything.

Q. You just took it upon yourself to walk down, did you? A. Yes, sir.

40 Q. Did anybody stop you? A. After I got past the ushers, they grabbed hold of me.

Leo Marmorstein, cross.

Q. Who were "they"? A. The two Tuohy brothers; one from each side, at the back.

Q. Did they say anything to you? A. They grabbed hold of me. The two of them grabbed hold, and I jerked away, and I heard them say, "You can't go down. I told you that a while ago." Those two lads were holding on my back. 10

Q. Where did they grab you? Did they grab you or just tap you? A. No, sir; they grabbed hold of me.

Q. Isn't it a fact that they just tapped you to attract your attention? A. No, sir.

Q. They both grabbed hold of you? A. Yes.

Q. Up to that time there had been no trouble at all, had there? A. No, sir.

Q. Everything was nice and peaceful; is that right? A. Sure. 20

Q. And when you said, "Let go," it was not quite loud, was it? A. Well, I don't know how loud it was at that time, but I felt somebody on my back pulling on me.

Q. You got excited and grew quite loud, didn't you? A. Well, I don't think I grew loud.

Q. Did they let go of you? A. I beg your pardon?

Q. Did they let go of you? A. Did they let go of me? 30

Q. Yes. A. I pulled away from them and sat down in my seat.

Q. What did you do in pulling away from them? A. I pulled away and walked straight down.

Q. You walked straight down? A. Yes, sir.

Q. Did you say anything to them when you were going down? A. No, sir.

Q. Did they say anything to you? A. No, sir. 40

Leo Marmorstein, cross.

Q. When they saw you do that, did they attack you and grab you all over again? A. No, sir.

Q. They just let you go, did they? A. Yes, sir.

10 Q. How long did it take from the time that they first grabbed hold of you, as you say, to the time you started to walk down the aisle? A. Well, I suppose it takes about a minute to walk down that aisle.

Q. I mean, from the time you started to go down there, how long were you arrested in your motion of going to your seat? A. Yes, sir,—that means the whole thing?

Q. Yes. A. Well, it was over as fast as I am telling it to you.

20 Q. There were several people standing there waiting to go down the aisle, when you went down, were there not? A. No, sir.

Q. There were some people standing there, weren't there? A. They were standing there when I went up, too.

Q. They were standing there waiting to go down, were they not? A. No, sir.

Q. You don't know that they were standing there waiting to go down? A. Standing room.

30 Q. You don't know that they were standing there waiting? A. I go to the theatre quite a few times, and I see there always standing room there.

Q. Do you know of anyone else there in the back who was standing waiting for the act to be over so that they could take their seats? A. I saw people standing there. What they were waiting for, I don't know.

Q. You didn't know? A. No.

40 Q. After you were sitting there, how long was it before anybody came to you? A. That was a semi-dark number prior to the time I started down

Leo Marmorstein, cross.

when the change came, and the house went dark. I was sitting about eight rows from the back seats. Then this young man, Mr. Hogan, came to me, and said—

Q. (Interrupting) Yes; how long after you had taken your seat did Mr. Hogan come down and speak to you? A. As soon as the lights went on full he came down. 10

Q. How long did that take? A. Well, I suppose two or three minutes at the most.

Q. At the most. It might have been shorter, though? A. I would not be sure.

Q. What did he say to you? A. He came down there and he said, "You think you are a privileged character." I told him no.

Q. Isn't it a fact that he said to you, "You will report at the manager's office as soon as the act is over"? A. No, sir. 20

Q. Didn't he say that? A. No, sir; he told me—he said I supposed that I was a privileged character.

Q. Are you sure that he didn't say something about reporting to the manager's office? A. No, sir.

Q. You are quite certain about that? A. Absolutely. 30

Q. What happened then? A. The rest of the acts continued, and then, that being the last act, the house went dark for the picture. The moment the house went dark—naturally he had told me he would see me—and I looked up to see if he was coming to see me. When I looked up the officer with Mr. Tuohy was there.

Q. Did you see Hogan? A. No.

Q. Hogan hadn't come down as he promised 40

Leo Marmorstein, cross.

you he would? A. The house was dark and I didn't see any Hogan.

Q. You didn't see Hogan? A. No, sir.

Q. When you looked around up the aisle you didn't see Hogan? A. No, sir.

10 Q. When you got back up the aisle you didn't see Hogan? A. No, sir.

Q. When the cop came down the aisle, did he take you out or did he ask you to go out? A. He asked me.

Q. Had he already reached you when he asked you? A. Huh? I was in the position of ready for anything on account of what he said, you know, to me.

Q. The house was dark? A. Yes, sir.

20 Q. And you saw him coming down the aisle? A. Yes.

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

Q. Are you sure about that? A. Yes, sir.

Q. Who asked you to go out? A. I don't know if the young lad there, Tuohy, said it, or whether the officer said to come out. I got up and took my coat and my rubbers—

Q. (Interrupting.) Don't you know whose voice it was that you heard? A. No, sir.

30 Q. You don't know? A. No, sir, but I could see them both.

Q. Don't you know who it was that said that to you? A. No, sir.

Q. Do you mean that you don't know or that you don't remember? A. I don't remember.

Q. You don't recall who spoke to you? A. No; I know I was told to "come on."

Q. Did you get up? A. Yes, sir; sure.

40 Q. Where did you go? A. I walked up the aisle. The officer was alongside of me, and I said to him,

Leo Marmorstein, cross.

“Where am I going?” and he said, “Out.” I said, “Out where?” And he said, “Outside.”

Q. And then what happened? A. We came to the top of the aisle and Mr. Keale was there, and, I think—

Q. (Interrupting.) Pardon me just a moment. 10
After you walked up the aisle, and after you asked him where you were going and he told you, “Outside,” didn’t you then and there raise a rumpus and say that you would not go outside? A. No, sir.

Q. Didn’t you loudly say that you were going to remain where you were because you had paid for your seat? A. No, sir.

Q. When did you say that? A. I didn’t say that at all. 20

Q. Oh, that never took place, did it? A. No, sir.

Q. When Mr. Keale met you at the head of the aisle, did he escort you into his office? A. No, sir.

Q. What happened then? A. I saw Mr. Keale—I knew Mr. Keale by sight, and I said to Mr. Keale, “I didn’t do anything wrong. I want to remain to see the balance of the show—the picture.” Mr. Keale said, “You are going out.”

Q. Didn’t he say, “On the way out, go and get your money at the box office”? A. No, sir—no mention was made about that at all. 30

Q. Are you sure of that? A. Absolutely.

Q. How long after that was it before you went out? A. Well, after we went on up there, we were about four feet away from Mr. Keale, and then the officer says, “Come on.” I said, “Where are we going?” He says, “Outside.” I said, “No, I am not going out. I don’t know what you can do about this matter, but if you want to arrest me, I will go with you peacefully.” With that— 40

Leo Marmorstein, cross.

Q. (Interrupting.) Just a minute, please. A. Yes.

Q. When you were going up the aisle, you said, "Where am I going?" and he said, "Outside"? A. Yes.

10 Q. Why did you ask him that over and over again? A. Because I was not going outside.

Q. You refused to go? A. Outside? Yes, sir.

Q. And did you tell that to the officer? A. Yes, sir.

Q. Did you use quite a loud tone of voice? A. No, sir, I was just talking like—

Q. (Interrupting.) You resisted him, too, didn't you? A. Resisted the officer?

Q. Yes. A. No, sir.

20 Q. Didn't you say very loudly that you were not going at all? A. No, sir.

Q. You did actually resist him, though, when he said that you were going out and you asked him where you were going and you said that you wouldn't go? A. There are two questions that you just asked me there. I didn't finish answering one before the other one came.

30 Q. All right; I will give you an opportunity to answer. A. The first of the questions, if you want me to answer, I will do my best.

Q. I want to know whether, when, as you just said a moment ago, you spoke to the officer and said, "Where are we going?" and the officer said, "We are going out," you did not resist the officer and say, "No, we are not going outside. I don't know what you can do about it, but I am going to remain right here,—"? A. That is the second time I asked him?

40 Q. Yes. A. No; the officer said, "Come on." I said, "Where?"

Leo Marmorstein, cross.

He said, "Outside."

I said, "I am not going outside." I said, "I don't know what you can do about it, but if you want to arrest me, I will go with you peacefully."

Q. You said, "I will go with you peacefully"?

A. With that the officer left me and went back to Mr. Keale. 10

Q. Up to this time you had done nothing for which you could be arrested, had you? A. No, sir.

Q. You are sure about that, are you? A. Yes, sir.

Q. When you wouldn't go out, the officer then went back to Mr. Keale? A. Yes, sir.

Q. After he came back from talking with Mr. Keale, you went into Mr. Keale's office, didn't you? 20

A. With the officer. We were right near Keale at that time, because the officer brought me back to Keale and left me standing about by the drinking water, and Mr. Keale says, "All right,—bring him in here."

Q. Into the office? A. Yes, sir, into the office.

Q. Who went into the office with you? A. The officer, Mr. Tuohy, Mr. Keale, and I think there was another gentleman in there at that time.

Q. Was Hogan there? A. I don't remember. 30

Q. Was Tuohy's brother there? A. No, sir,—only this Tuohy who is in court now.

Q. James Tuohy? A. Yes, sir.

Q. As soon as you got into the manager's office, what happened then? A. The officer said that he wanted to call up, you know, or, rather—or Mr. Keale told the officer, "All right, take him in,"—see?

Q. Mr. Keale said that? A. Yes, sir,—"Take him in." 40

Leo Marmorstein, cross.

Q. Before anything was said by anybody, when you got in the office, Mr. Keale said to the officer, "All right; take him in"? A. Yes, sir.

Q. Are you sure about that? A. Yes, sir.

10 Q. If he said that, do you know why it was that he asked you to go in the office? A. I don't know what the officer said to Mr. Keale when I told the officer about not wanting to go out in the street.

Q. Yes, but you heard Mr. Keale say, "Bring him in the office"? A. Yes, sir.

Q. You don't know why, when you got into the office, Mr. Keale said, "All right,—take him in"? A. No, sir.

20 Q. What happened after you got into the office? A. After we got into the office, the officer telephoned—after Mr. Keale said, "Take him in," he telephoned for the patrol wagon.

Q. How long was it before the patrol wagon came? A. About ten minutes.

Q. During those ten minutes, did you say anything? A. Yes, sir, I asked to be allowed to remain.

Q. To remain in the theatre? A. Yes, sir.

30 Q. And he said no? A. The officer said, "Well, after we called the wagon—do you want to remain after I had the wagon called?" and he laughed.

Q. The officer was quite nice, wasn't he, at the time? A. Oh, yes, we got along all right.

Q. And you were very nice to him, too, were you not? A. Sure.

Q. All he wanted to do was to put you out of the theatre and you refused to go? A. Yes, sir.

40 Q. What did he say about arresting you before? A. The second time I asked the officer where we were going, and he said, "We are going outside."

Leo Marmorstein, cross.

I said, "We are not going outside. I don't know what you can do about the matter, but if you want to arrest me I will go with you peacefully."

Q. You said that to the officer? A. Yes, sir.

Q. That if the officer wanted to arrest you, you would go with him peacefully? A. Yes, sir. 10

Q. Now, to come back to the manager's office, Mr. Marmorstein, while you were waiting for the patrol wagon you said you asked Mr. Keale to let you remain in the theatre? A. Yes, sir.

Q. And then the officer interrupted, after he called up the wagon, and said that you could not very well remain? A. Yes, sir.

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

Q. And then you went to the police station? A. Yes, sir. 20

Q. And then young Mr. James Tuohy went along with you, did he? A. Yes, sir.

Q. And Mr. Hogan, too? A. Yes, sir, Hogan.

Q. When you got to the police station you met Captain Walsh? A. I didn't know who it was at that time, but I found out later that it was Captain Walsh.

Q. You know now that it was Captain Walsh? A. Yes, sir.

Q. Then it was that you started in all over again, wasn't it? A. Yes, sir, but the trouble was— 30

Q. (Interrupting.) And you— A. (Interrupting.) No,—he asked that question.

Q. Who asked? Captain Walsh? A. Yes.

Q. What did he ask? A. The officer said to Captain Walsh that this young fellow wanted to make a complaint.

Q. That was correct, was it not? This young fellow did want to make a complaint, didn't he? Did he ask James Tuohy—young Tuohy, whether 40

Leo Marmorstein, cross.

that was so? A. He asked him what had happened.

Q. Whom did he ask? A. Young Tuohy.

10 Q. What did he say? A. He said that he told me I couldn't go down the aisle and then I went down the aisle, and when he told me I couldn't the second time, that I turned around and hit him twice in the stomach.

Q. That is what Tuohy told the police captain, is it? A. Yes, sir.

Q. And you were held in a hundred dollars bail, were you not? A. Yes, sir.

Q. Wasn't there some noise,—some loud talking by you in the police station while Captain Walsh was there? A. No, sir.

20 Q. And were you not even then resisting arrest?

Mr. Colgan: I object to that, if the Court please, even conceding that that took place, although it is denied; that is not material.

The Court: I will allow it. It is cross examination.

Mr. Wolf: Read the question, Mr. Stenographer, please.

(The reporter read the last question.)

30 A. I did not resist arrest at any time.

By Mr. Wolf:

Q. Didn't Captain Walsh have to scold you a little bit there in the police station and tell you that you were "too fresh"? A. Only to give me an illustration; he said, "When you fellows go over and spend fifteen or twenty cents, you think you own the place."

40 Q. Didn't he say you were "too fresh," even there in the police station? A. No, sir.

Leo Marmorstein, redirect.

Q. Are you sure about that? A. Certainly.

Q. Next morning, when you got in the police court, you made a countercharge against James Tuohy, didn't you? A. Against both Tuohys.

Q. Against both Tuohys? A. Yes, sir.

Q. One of them was James and one was Austin? A. Yes, sir. 10

Q. And they were both for assault and battery? A. Yes, sir.

Q. But there was only one complaint made against you, wasn't there? A. Yes, sir.

Q. That is to say, by James Tuohy? A. Yes, sir.

Q. All the complaints were dismissed, were they not? A. Yes, sir.

Q. You were scolded even by Judge Sullivan, were you not? A. No, sir. 20

Mr. Colgan: I object to that as incompetent, irrelevant and immaterial.

By Mr. Wolf:

Q. Weren't you told by the Judge that even when you go into Court you should have some regard for the other affairs of the Court? A. Was I told that?

Q. Yes, by Judge Sullivan, on the morning that all the complaints were discharged? A. No, sir. 30

Mr. Wolf: That is all.

Redirect examination by Mr. Colgan:

Q. What did Judge Sullivan say on that morning, Mr. Marmorstein, to James Tuohy, who made the complaint against you? A. This James Tuohy took the stand and we were ranged before the rail there in front of Magistrate Sullivan, and Mr. Tuohy told his story about how he told me that 40

Leo Marmorstein, redirect.

I couldn't go down the aisle, and that then I struck him twice in the stomach. And Judge Sullivan said to him, "Do you mean to tell me that this man, without any provocation, just because you told him that he couldn't go down the aisle, struck you twice in the stomach?" and Mr. Tuohy answer, "Yes."

10 And Judge Sullivan said, "That doesn't sound reasonable to me."

Q. What else did he say? Did he say anything else? A. He said, after the other young man, Mr. Hogan, took the stand, and after Mr. Tuohy's brother, Austin Tuohy took the stand, Judge Sullivan said, "What must have taken place was that this man went down and these two young fellows grabbed him, and he pulled away from them and went down to his seat."

20 He questioned Mr. Hogan as to whether I made a disturbance after I went down to my seat. The Judge says, "Why didn't you leave him there?"

Q. What did Mr. Hogan say? A. He asked Mr. Hogan that; after Mr. Hogan had come down and told me about "a privileged character," he asked Mr. Hogan whether I had created any disturbance after I was in my seat.

30 Q. Yes. A. And Mr. Hogan said, "No." So the Judge said, "Why didn't you leave him down there?"

Q. Did Mr. Hogan answer the Judge about that? A. He didn't say.

Q. He didn't answer him? A. Or, if he made an answer, I don't know what it was.

Q. The Judge then dismissed the charge against you, did he? A. Well, up to that time I don't think we had made this countercharge.

40 Q. No,—I mean the charge against you was dismissed? A. Yes, sir.

Leo Marmorstein, recross.

Q. You go into the State Theatre quite often, don't you? A. Yes, sir.

Q. What days do you usually go in there? A. On any previous day; but I was in there on the Saturday previous to this Monday.

Q. Do you know of any such rules and regulations as they tried to tell you about this time? A. No, sir. 10

Q. Did you see any rules and regulations up around the State Theatre? A. No, sir.

Q. For how long a time have you been going to the State Theatre? A. I have been going there ever since it was built.

Q. For how many years? A. Well, I think the first time I was there there was a party in charge by the name of Mr. Hall, and at that time I saw him. I can't exactly remember what years it was. 20

Q. Was it a crowded house on this day? A. Yes, sir, Monday matinée.

Q. Do you know whether the people there were people waiting to go down to their seats or whether it was just standing room? A. Well, I don't know whether they were waiting for a seat, but that many couldn't have been seated. It was standing room, for most of them. 30

Mr. Colgan: That is all.

Recross examination by Mr. Wolf:

Q. Just a moment. I understood you to say that up to this time that you have just narrated, of the conversation with Judge Sullivan, your two other complaints had not yet been heard? A. We had not then made any.

Q. You had not made any complaint? A. No. It was not until after this trial was under way that 40

James Tuohy, direct.

Mr. Nolan asked us to make a countercharge in the police court.

Q. And you opened it up again by making the two complaints? A. We never had it up again.

10 Q. You signed those complaints yourself, didn't you? A. I signed about half a dozen papers about it, I guess.

Q. And two of them were complaints? A. Yes, sir.

Q. And those complaints were also dismissed, were they not? A. Yes, sir.

Mr. Wolf: That is all.

20 JAMES TUOHY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Colgan:

Q. Mr. Tuohy, on February 14th were you employed by the State Theatre? A. I was.

Q. In what capacity? A. Usher.

Q. What? A. Usher.

30 Q. What were your duties as usher? A. Why, I had several duties; escorting people to their seats—

Q. (Interposing.) Yes. A. And keeping order; things like that.

Q. And keeping order? A. Yes.

Q. And what else? A. Well, I guess whatever were the duties of an usher.

Q. And you had received instructions as to what your duties were? A. I had.

Q. From whom? A. From the manager.

Q. Who was the manager? A. Mr. Keale.

40 Q. What were those instructions? A. For that certain day?

James Tuohy, direct.

Q. Yes. A. Well, they were the same as usual.

Q. There were no different instructions on that day from any other day? A. No, sir,—only the rules of the house, that is all.

Q. Did you have a copy of any of the rules of the house? Or have you a copy of them? A. I haven't a copy, no, sir. 10

Q. Where did you get the list of those rules and regulations? Were they oral? A. Mr. Keale informed me of them the day I was employed.

Q. When were you employed? A. Oh, I cannot recall the date. About two years ago, I think it was,—the month of January.

Q. What were those rules and regulations? A. Well, there were various rules.

Q. What were they? 20

Mr. Wolf: Speak up louder, please, James, so that this last juryman here can hear you.

Q. What were they? A. Well, they were relative to people leaving their seats during the last act; they were not permitted to go back to their seats until the act was over. So all the people in the theatre,—all the patrons literally consented to that— 30

Q. (Interrupting.) What was that? A. That rule has been in effect since I have been employed there.

Q. Is that rule in any way brought to the attention of people coming into the State Theatre? A. Why, no,—they all know it.

Q. How were they informed? A. They were informed once, and I guess they always remembered it. 40

William Robert Heath, direct.

Q. How were they informed? A. Oh, if they want to go down—

Q. (Interrupting.) That is, it was just by reason of their being informed of the breach of one of those rules? A. Yes, and they would all consent.

Mr. Colgan: All right,—that is all.

Mr. Wolf: That is all.

WILLIAM ROBERT HEATH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Colgan:

Q. Officer, you made the arrest on February 15th in the State Theatre? A. Yes, that is right.

Q. Are you assigned to the State Theatre? A. Occasionally.

Q. On that day were you in the theatre, or were you outside? A. I was outside.

Q. At whose request did you make this arrest? A. Oh, I didn't make it on anybody's request. I just came to the conclusion that I had to bring the two of them in.

Q. To bring what two in? A. Why, the complainant and the defendant.

Q. Who was the complainant? A. Why, James Tuohy.

Q. Then he was the one who made the complaint? A. Yes, he was the one who made the complaint at the station.

Q. And on his complaint you arrested the defendant Marmorstein, did you? A. That is right.

Mr. Colgan: That is all.

William Robert Heath, cross.

Cross examination by Mr. Wolf:

Q. How did you come to arrest him? A. Well, I was called in there by one of the ushers, and I walked down—I walked inside and he said that there was a person down there who had hit him.

Q. Had hit him? A. Had hit him; so—

10

Q. (interrupting.) That is young James Tuohy?
A. That is Tuohy.

Q. Did he tell you how he had been hit? A. Well, he did not explain that to me. He said he was hit. That is about all I know.

Q. And did he point out the man who had hit him?

Mr. Colgan: I object to that,—whether he pointed out the man who had hit him.

20

Mr. Wolf: This is cross examination, your Honor.

The Court: Yes, this is cross examination. Go ahead.

By Mr. Wolf:

Q. Did he point out the man who had hit him?
A. Yes, he did.

Q. Did you go down toward him? A. I went down part of the way.

30

Q. You went down part of the way? A. Yes, sir.

Q. What happened after you went down part of the way? A. Why, the usher pointed him out, and then he told him to come up.

Q. Who told Marmorstein to come up? A. The usher did.

Q. Did you tell Marmorstein to get up out of his chair? A. Not that I remember.

Q. Had you reached the seat when—

40

William Robert Heath, cross.

Mr. Colgan: (Interrupting.) I object to that as not proper cross examination. I only brought out the fact of the arrest.

The Court: Yes; and of course that opens the whole matter. It is all open to inquiry now. Proceed.

10

By Mr. Wolf:

Q. Mr. Marmorstein had got up out of his seat before you reached there, had he? A. Well, I was almost there—that is to say, I was within a few seats of the back of his seat—

Q. (Interrupting.) But you had not then spoken to him yet, had you, when he got up? A. No, sir.

Q. When you got there he was out of his chair?
A. Yes, sir.

20

Q. You did not tell him to get out of his chair, did you? A. No, sir, I did not tell him to get up.

Q. Then he got up and walked back? A. Yes, sir.

Q. Did he say anything to you? A. Why, yes; he asked what was the matter.

Q. He asked you what was the matter? A. Yes, sir.

Q. What did you tell him? A. I told him, "You are acting in a disorderly way, and you are going out."
30

Q. You told him that he was acting in a disorderly way and that you and he were going out?
A. That is right.

Q. What did he say? A. He said that he was not going out.

Q. Did he say it in a loud voice, or in an ordinary conversational tone? A. Oh, just ordinary conversation, going up the aisle.

40

William Robert Heath, cross.

Q. Did you get hold of him in any way? A. I did not touch him.

Q. When you got to the back of the theatre—
A. (Interrupting.) At the back of the theatre—

Q. (Interrupting.) What happened there, Mr. Heath? A. Why, we got to the back, and he came to the conclusion that he was not going out, so he requested that he be arrested. 10

Q. When you say that "he came to the conclusion that he was not going out," just give me an idea of approximately what took place. A. Well, he said he was not going out, so I said, "Well, if you are not going out, we will go over the situation," so we got into the manager's office.

Q. Did you go back to Mr. Keale and talk it over with him? A. No, sir. 20

Q. You did not talk to Keale at all? A. No, sir, no words with him.

Q. When he said that he was not going out, while he was in the back of the theatre, was he then using loud words? A. Regular conversation.

Q. Was he excited at all? A. Well, he appeared to be, a little.

Q. He was mad, wasn't he? A. Sure.

Q. And he did not want to go out? A. Sure.

Q. You were there on the complaint of James Tuohy, were you not? A. Yes, sir. 30

Q. He had called you in and said— A. (Interrupting.) Called me in and said that he was hit.

Q. Did Mr. Keale come up to you while you were arguing? A. Not that I can remember.

Q. How did you happen to get into Mr. Keale's office? A. That was the nearest telephone, so I walked in there and used his telephone.

Q. That is directly in back of the theatre, is it? A. Directly in back of the theatre, yes. 40

William Robert Heath, cross.

Q. Right in the rear of the center aisle? A. Yes, that is it.

Q. Did Mr. Keale go in there with you? A. Yes, we all went in the office together.

10 Q. Whom do you mean by "all"? A. Well, I think there were three or four.

Q. Was young Tuohy with you? A. Young Tuohy was with us; yes, I think that is right.

Q. Did Mr. Keale tell you to arrest Mr. Marmorstein? A. Not that I remember.

Q. If he had, wouldn't you remember it? A. Well, I don't take orders from Mr. Keale in regard to arresting people. If I came to that conclusion, why, I was supposed to do that myself.

20 Q. I didn't ask you what you were supposed to do, but what you did do in this particular case. A. I found that was the only way out. He wasn't going out of the theatre, and I said that was the only way to do it.

Q. Did young Tuohy say anything about having him arrested? A. No, sir.

Q. He didn't say anything about having him arrested there? A. No.

30 Q. Why, then, did you send for a patrol wagon? A. Well, I couldn't settle the case there myself, and that was the only way. I brought the two of them over to let them have it out at the station house.

Q. Did the State Theatre, up to that particular point, have anything to do with this arrest? A. Not that I recall.

Q. At any time after that did the State Theatre have anything to do with this particular arrest? A. No, sir.

40 Q. The only reason why you took him into custody was because he requested it? A. Because he requested it and I was called in there.

William Robert Heath, cross.

Q. You were called in there by James Tuohy?
A. James Tuohy.

Q. Was there any conversation in there in the manager's office while you were calling for the patrol wagon, as to who was making the complaint against this man Marmorstein? A. I was calling up. I wasn't paying any attention at that time. 10

Q. Did you know who the complainant was going to be? A. Well, I knew that it was James Tuohy, because he was the one who was assaulted.

Q. No—I say, did you know who the complainant was going to be? A. He claimed that he had been assaulted.

Q. Mr. Keale said nothing about the arrest, did he? A. No, sir.

Q. And when you went down to the police station who went along? A. Why, there were Tuohy, Hogan and myself. 20

Q. And what happened in the police station, officer? A. Oh, I just said to the desk lieutenant that here was a man who wanted to make a complaint. So that is where I ended; that is where I left the case.

Q. Was Captain Walsh there at the time? A. Yes.

Q. Did you hear any conversation between the defendant and Captain Walsh? A. Yes, sir. 30

Q. What was that? A. I didn't pay much attention to it. I couldn't very well repeat what that was.

Q. Captain Walsh is here, is he not? A. Yes, sir.

Q. Can you tell me what Mr. Marmorstein's demeanor was in the police station at that time? Was he noisy, or boisterous in any way? 40

William Robert Heath, cross.

Mr. Colgan: I object to that as immaterial. I think counsel has gone a little further than he should.

The Court: I will allow it.

Mr. Colgan: Exception.

10

A. Well, I wouldn't say it was a regular conversation. I guess it was a little out of the ordinary.

By Mr. Wolf:

Q. A little louder than the ordinary? A. Oh, yes, sir.

Q. In what tone was the conversation in Mr. Keale's office in back of the theatre? A. All about the same.

20

Q. About the same? A. Yes, sir, sure.

Q. Mr. Marmorstein refused to go out unless he was arrested, did he? A. Yes, sir.

Q. How many times in your recollection did Mr. Marmorstein say, "I won't go out unless I am arrested"? A. I don't remember.

Q. Did he say that more than once? A. Oh, yes, sure he did.

Q. Did you appear in court the next morning? A. Yes, sir.

30

Q. Were you up there at Judge Sullivan's desk when the case was called? A. No, sir.

Q. Did you hear any part of the conversation between Judge Sullivan and this defendant? A. No, sir.

Q. You don't know what took place between these parties, do you? A. I was not called.

Q. You were not called? A. No, sir.

40

Q. I want to ask you once more if the State Theatre had anything to do with Mr. Marmorstein's arrest. A. No, sir.

Mr. Wolf: That is all.

*William Robert Heath, redirect.**Redirect examination by Mr. Colgan:*

Q. Officer, you say that you were going to take him outside, and he refused to go? A. Yes, sir, that is correct.

Q. You would not have taken him out without some charge being made, would you? A. Why, I would not have gone in there if I had not thought that he was acting in a disorderly manner.

10

Q. Would you have taken him out on your own initiative if no charge had been made? A. Well, I would have to ask the manager about that.

Q. Would you have taken him out? A. No, no.

Q. When you first were brought into the theatre, it was at the call of one of the ushers, was it not? A. One of the ushers, yes, sir.

20

Q. Which one? A. Oh, I think it was Austin.

Q. Austin Tuohy? A. Yes.

Q. What did he tell you? A. He said, "My brother has been assaulted inside. Won't you come in?" Then I walked in.

Q. Whom did you see? A. I walked right over to the aisle where James Tuohy was standing.

Q. Was he standing there when you went in there? A. Yes.

Q. And you talked to James Tuohy? A. He said that he was sitting down in the seat.

30

Q. You talked to him? A. Sure I talked to him.

Q. Where was James Tuohy? A. In the aisle.

Q. Was he assaulted, in any way that you saw? A. I didn't see any assault.

Q. Did you talk to James Tuohy and ask him what had happened? A. I asked him what had happened, and he explained it to me.

Q. What did he explain to you? A. He said that someone came and he was standing in the aisle and he pushed him and brushed by him.

40

William Robert Heath, redirect.

Q. Did he point out to you where the man was?

A. Yes.

Q. Did he take you right down to his seat? A. Took me right down to his seat.

10 Q. What did he say to you? Did he tell you to take him out of his seat? A. Well, I don't know of—

Q. (Interrupting.) No,—I am asking what he said to you. Did he tell you to take him out of the seat? A. No.

Q. Who went down with you? A. He went down with me,—young Tuohy.

Q. What did you do? A. I just stood there, and Mr. Marmorstein got up and walked back.

20 Q. He raised no discussion as to asking you what you wanted him for? A. That is right.

Q. It was not in a loud voice, was it? A. Well, it was not normal. It was not the way you would talk in a theatre.

Q. Was it disturbing anyone in the theatre, that you could tell? A. No.

Q. Was it any louder than the way he talked to you here on the stand? A. Well, it was just about the same.

30 Q. That would be a normal conversation while you were coming up the aisle, which any two people might have in walking out, then, wasn't it? A. Well, I don't know.

Q. You could not tell? A. I couldn't say.

Q. He came up with you? A. Sure he did.

Q. Up the aisle? A. Yes.

Q. And when you got up to the head of the aisle, was James Tuohy there? A. Young Tuohy was there.

40 Q. Was Mr. Keale there? A. Not that I remember. He was over in his office, probably.

William Robert Heath, redirect.

Q. How far was his office away from this aisle that you took up? A. Well, I don't know about that.

Q. So that when you brought him to the head of the stairway, Mr. Marmorstein and the two Tuohys— A. (Interrupting.) That is right. 10

Q. You stood there talking? A. Yes, sir.

Q. What were you doing? A. Walked right up by—

Q. (Interrupting.) By whom? A. By the end of the aisle over to the back of the theatre.

Q. What did you do then? A. Why, then they stood there for a while and I asked him if he would not go outside.

Q. You asked him that? A. Yes.

Q. Why did you ask him that? A. Why, I was called in there. I thought that he was acting in a disorderly manner. 20

Q. Well, Officer, did you see him act in a disorderly manner? A. Well, I had to take the usher's word for that.

Q. Is that within your province,—when you see a person acting in a disorderly manner, to tell them to get out of the place? A. When there is a complaint there.

Q. Is that your instructions? A. If there is a complaint there. 30

Q. But you had not received any complaint up to this time, had you? A. Only from the ushers,—that he had assaulted the usher,—that he had assaulted him. That was the only complaint.

Q. Up to the time that you told him he had to get out of the theatre, there was no complaint filed by the usher, was there? A. Sure there was.

Mr. Wolf: I object to that, if the Court please. Does he mean a written complaint, 40

William Robert Heath, redirect.

or does he mean an oral complaint made to the officer?

The Court: He may answer.

Mr. Wolf: Exception.

(The reporter read the last question and answer.)

10

By Mr. Colgan:

Q. There was a complaint? A. Yes.

Q. Made by whom? A. A complaint made by James Tuohy.

20

Q. So when you asked him to get out of the theatre, it was because James Tuohy had made a complaint? A. He didn't make any formal complaint. He said that he hit him—that he had hit him.

Q. Officer, would you have insisted on putting Marmorstein out unless Tuohy had come with you and made the complaint? A. No, sir, I don't think so.

Q. That is what I want to get at. So that it was at Tuohy's own request—not his request, but his demand on you to have Marmorstein taken out of the house that you insisted on having Marmorstein go out? A. I insisted upon his going out.

30

Q. That is right. Now, you were up at the top of the stairs, were you not? A. At the end of the aisle.

Q. The aisle,—you were up at the end of the aisle at this time that Marmorstein told you that he was not going out? A. That he was not going out.

Q. And what did Tuohy say to you then? A. What did he say to me?

40

Q. Yes. He did not say anything.

Q. After he told you that he was not going out,

William Robert Heath, redirect.

did you say, "You will have to go out" or something? A. I walked over to the office, then.

Q. Over to what office? A. Over to the manager's office.

Q. What did you walk over there for? A. To get a telephone. 10

Q. For what purpose? A. To call the wagon.

Q. Who told you to call the wagon? A. I told myself. I called up myself.

Q. Did Mr. Tuohy tell you that he was going to make this complaint? A. Well, he said that he was not going out, and I saw only one conclusion. I had to do something. He said that he was not going out of the theatre, and I wasn't going to leave him there.

Q. Who told you not to leave him there? A. Well, of course, that is the manager's orders. 20

Q. What manager? A. The manager of the State Theatre.

Q. Mr. Keale's orders? A. Sure.

Q. How did you know that was Mr. Keale's orders? A. Well, I pretty near knew—

Q. (Interrupting.) Who told you? That is what I want to get at. A. What?

Q. Who told you? A. Who told me? 30

Q. Yes. A. Nobody told me. I took it upon myself. If he was not going out, why then, the only thing to do was over to the station.

Q. Officer, you did not see this assault, did you? A. No, I did not.

Q. And you didn't know whether what young Tuohy said was true or not, did you? A. I have to take their word for granted. I am not going to work and call him a liar.

Q. So that you would not have arrested Marmorstein unless you had Tuohy to back you up in mak- 40

William Robert Heath, redirect.

ing this complaint, would you? A. Well, he had to make this complaint.

Q. What? Yes or no? Would you have arrested Marmorstein unless you had Tuohy to back you up in making this complaint? A. No.

10 Q. So you rang for the wagon because Tuohy insisted on making this complaint. Isn't that so? A. That is right,—that is quite right.

Q. When you went to the office, was Mr. Keale there? A. He was there.

Q. Did you ask him whether you could use the telephone? A. I did.

Q. And he knew what was taking place in reference to Marmorstein, didn't he?

20 Mr. Wolf: I object, if the Court please, to what Mr. Keale knew.

The Court: What happened in his presence, he may tell, of course; what did not, of course, he cannot.

By Mr. Colgan:

Q. Mr. Keale was there when you used the telephone, wasn't he? A. He was, sure.

30 Q. And he overheard you? A. He overheard the conversation, I guess, of my calling to the lieutenant at the desk.

Q. Did he hear the previous conversation between you and Mr. Marmorstein? A. I don't know that.

Q. Was he standing near there? A. He was standing around there.

Q. Wasn't Marmorstein brought into the manager's office at that time? A: At what time?

40 Q. At the— (A. (Interrupting.) Sure, he went in there at the same time.

William Robert Heath, redirect.

Q. Who was there? A. I didn't pay any attention to that.

Q. Mr. Keale was in there, wasn't he? A. There were three or four there,—maybe more than that.

Q. Mr. Keale was in there, was he not? A. I could not say. 10

Q. When you were telephoning, wasn't Keale there in the manager's office? A. He might have been there.

Q. But you stated before that he was there. A. He might have been.

Q. You telephoned? A. Yes, I telephoned.

Q. And you stayed in the manager's office while you were waiting for the patrol wagon to come? A. Yes, for a while, and then I went outside. 20

Q. Didn't Mr. Marmorstein say to Mr. Keale or to Mr. Tuohy that he wanted to see the show? A. I didn't pay any attention to what he was saying.

Q. You held him by the arm, did you not? A. Yes, sir.

Q. During all this time that you were arresting him, he was not acting in any rowdy fashion there in any way, was he? A. Well, I wouldn't say that he was, no, sir. 30

Q. He did say that he would go peacefully with you, didn't he? A. Yes, sir; after he said—he refused to leave the theatre. I said, "Well, you can go over with me, then," and he did go.

Q. Did Mr. Marmorstein request to be arrested? A. He requested to be arrested.

Q. Didn't he say that he did not know what you could do, but he would not go outside, and if you arrested him, he would go peacefully? Did he use those terms? A. That is right; he did. 40

William Robert Heath, redirect.

Q. He said that if he could not stay in the theatre, he would be arrested? A. Arrested, yes.

Q. But he would go peacefully? A. Yes, sir.

Q. You were in the police court the next morning? A. Yes, sir.

10 Q. You were ready to be called? A. Yes, sir.

Q. They did not call you as a witness, did they?

A. No, sir.

Q. Prior to coming down here today, were you subpoenaed? A. Yes, sir.

Q. To whom did you talk about this case? A. I didn't have any conversation with anyone.

Q. You didn't talk to anybody? A. Other than some man who I think came from your office.

Q. Oh, when you were subpoenaed? A. Yes, sir.

20 Q. Did you talk to anybody else? A. Not anyone else, that I remember.

Q. Didn't you talk to anybody today? A. Here? Today?

Q. Yes. A. Oh, I might have had some conversations.

Q. To whom were you talking? A. Oh, I spoke to the Captain; that is all.

Q. Who else? A. Might have been talking to you.

30 Q. To whom else were you talking? A. I don't know; it might have been Tuohy or it might have been Hogan.

Q. So you came down here today and Mr. Tuohy and Mr. Hogan didn't know what you were going to testify to?

Mr. Wolf: I object to that, if your Honor please.

The Court: I will allow it.

40 Mr. Wolf: Exception.

A. I would say that they did not.

William Robert Heath, redirect.

By Mr. Colgan:

Q. Well, you must have told them. A. Told them what?

Q. What you were going to testify to. A. I don't have anything to do with any of those people.

Q. I know that, Officer; but I am just asking you whether or not you were talking to them. A. No, sir, I didn't have any conversation with anybody.

10

Q. Did you ever talk to Mr. Wolf about the case? A. Mr. Wolf?

Q. Yes. A. No.

Q. Did you ever talk to him about it? A. No, sir.

Q. And he didn't know what you were going to testify, did he? A. Oh, he might have asked me a few questions.

20

Q. That is what I am getting at. When did he ask you those? A. Well, outside in the ante-room.

Q. Is that the only time? A. That is the only time, that I recollect.

Q. You haven't anything against this Marmorstein, have you? A. No, sir, I haven't got anything against him at all.

Q. All this was done in a friendly manner, wasn't it? A. Absolutely.

30

Q. You know of certain rules up there, don't you? A. Well, I know—

Q. (Interrupting.) Did Mr. Keale or Mr. Tuohy tell you about them? A. Did they tell me about what?

Q. About those rules that they have up there. A. Well, I can pretty near judge.

Q. I am asking you who told you about them. A. No, they did not.

40

William Robert Heath, recross.

Q. So you don't know what rules they have?

A. No, I don't know. I haven't any idea.

Mr. Colgan: That is all.

Cross examination by Mr. Wolf:

10

Q. When you went down the aisle and Mr. Marmorstein saw you coming and got up from his chair, was there an act on at the time? A. Yes; well, it was dark. I think it was just turning into the picture at the time.

Q. And it was then that Mr. Marmorstein engaged you in this conversation about not going out? A. Going up the aisle.

20

Q. Was there anybody there having a conversation, or was he the only one who was doing any talking in the entire theatre? A. Well, that I don't know. That I can't say.

Q. Did you hear any other voice in there but his? A. No, sir.

Q. And you could hear his voice very distinctly, could you not? A. Oh, yes.

Q. And the same thing occurred in back of the theatre? A. In back of the theatre, too.

30

Q. You would not have arrested Mr. Marmorstein if he had not asked for it, would you? A. No, sir.

Q. In fact, you hadn't any idea of putting him under arrest at all? A. No, sir.

Q. Didn't you tell Mr. Tuohy that if he wanted to make a complaint against Mr. Marmorstein that he would have to go to the police station the next morning and do so? A. Well, sir, I usually tell them that.

40

Q. You usually do so. But you did so this time, didn't you? Didn't you tell Mr. Tuohy that if he

William Robert Heath, redirect.

wanted Marmorstein arrested on a charge of assault and battery he could go down to the police station the next morning and file his complaint? Isn't that right? A. I think I told him that over at the station.

Q. Yes; at the station, or in the theatre? A. 10
Well, I just don't remember now where it was.

Q. But you might have said that to him? A. I might have said that.

Q. And it was only when Mr. Marmorstein insisted upon being arrested that you took him in? A. That is all.

Q. And you took him in at that time instead of waiting until the next morning? A. That is right.

Mr. Wolf: That is all.

20

Redirect examination by Mr. Colgan:

Q. Officer, you stated that you arrested him only at his request? A. That is it.

Q. And you mean by that that he requested—
A. (Interrupting.) That he requested to be taken out over to the station.

Q. Is that the reason why you arrested him? A. Why, I arrested him with the other one, too, because he said that he had assaulted him. I wasn't going to arrest him; it was the complainant. 30

Q. Because he asked you to arrest him? A. Well, only that he requested to be arrested.

Q. I know; but if Mr. Tuohy had not made the complaint or would not make a complaint, would you have arrested M. Marmorstein because he requested you to arrest him? A. I think I would.

Q. On what charge? A. On the charge of being a disorderly person.

Q. But you didn't see it? A. I know I didn't, 40

William Robert Heath, recross.

but why should he come up and request to be arrested?

10 Q. Would you arrest anybody who just came up to you on the street and asked to be arrested? A. Well I would take them in and have their heads tested, or something like that.

Q. Officer, in this case here, he asked—he requested to be arrested because you insisted upon his going outside? A. That is right.

Q. If you had let him stay inside he would not have wanted to be arrested, would he? A. Sure he would.

Q. Even though you had let him stay inside? A. Well, I have nothing to do with that.

20 Q. Wait a minute. Didn't he say to you that he was not going outside? A. Yes.

Q. And you said to him, "You are going outside," didn't you? A. I don't remember saying that.

Q. That is what brought up the question, wasn't it? A. Oh, sure, I said that he was going out.

Q. And he said that he was not going out? A. He said he wasn't going out.

30 Q. Then he said, "If you want to arrest me—" or words to that effect, "I will go with you peacefully." Isn't that what he said? A. He might have said that.

Q. So it was not because he requested you to arrest him. It was because he objected to your putting him out of the theatre that he requested you to arrest him. Is that not right? A. That might have been.

Mr. Colgan: All right; that is all.

Recross examination by Mr. Wolf:

40 Q. Mr. Heath, in the office of the manager, Mr. Keale, didn't you hear Mr. Keale say to Mr. Mar-

William Robert Heath, redirect.

morstein, "Go out quietly and stop up at the box office and get your money"—did you hear that?

A. Well, I wasn't paying so much attention to that.

Q. Did you hear anything like that said in the office there at all? A. I don't just recollect.

Q. You don't recollect. But wasn't it in that office that Mr. Keale said to Mr. Marmorstein, "Stop at the box office and get your money back," and he said, "I want to be arrested"? A. Well, he said he wanted to be arrested. I don't know about his money.

10

Q. You were not interested in that? A. No.

Q. All you were interested in was this charge being made by Touhy? A. Yes, sir.

Q. That was for assault and battery made on Tuohy, and not for disorderly conduct? A. No, sir.

20

Q. Are you sure about that? A. Yes, sir—absolutely.

Q. No disorderly conduct? A. No.

Q. As a matter of fact, he was not guilty of any disorderly conduct, was he?

Mr. Colgan: If the Court please, I object to that. The record speaks for itself.

By Mr. Wolf:

30

Q. Your intention was not to arrest him for any disorderly conduct charge, was it? A. No, sir.

Q. Your first intent was to have him arrested on Mr. Tuohy's complaint? A. That is all.

Mr. Wolf: That is all.

Re-redirect examination by Mr. Colgan:

Q. Did Mr. Keale say anything to Mr. Marmorstein about stopping at the box office? A. I don't know.

40

Motion for Nonsuit.

Q. What was said while this was going on? A. I do not recall.

10 Q. Didn't you hear him say anything at all before they did anything? A. All I know is that I was in the office there and was directed to the telephone.

Q. Who directed you? A. Mr. Keale; I suppose it was Mr. Keale.

Q. Just stand up, Mr. Keale, please. Is that the gentleman that directed you in the office to the telephone? A. That must have been the one.

Q. Did you tell him that you wanted to use the telephone? A. That is the one.

Q. And he told you to go into the office? A. Yes, sir.

20 Q. He directed you into the office? A. Yes, sir.

Q. He didn't ask you what it was for? A. Well, I don't remember.

Q. You would have remembered, wouldn't you, if he had said something about that? A. Sure.

Q. Then you will say that he did not say anything to you? A. That is right.

30 Q. You won't say that he didn't say anything, however, will you? A. I don't remember him saying anything that I can recollect.

Mr. Colgan: That is all.

Mr. Wolf: That is all.

Mr. Colgan: That is our case, if the Court please.

40 Mr. Wolf: If your Honor please, I move for a non-suit at the present time, on the ground that there has been nothing shown to establish that the State Theatre had anything to do with this man's arrest. The testimony clearly shows an assault and battery

Harry W. Walsh, direct.

was committed on the person of James Tuohy,—a personal crime committed against him individually. He himself goes down to the police court and files this complaint against him for assault and battery. No crime was committed against the State Theatre. As is shown conclusively by this last witness, the State Theatre had nothing whatever to do with this complaint and had nothing whatsoever to do with the arrest of the plaintiff. 10

The Court: It is not a question of considering the testimony of the witnesses on a motion for non-suit. The statement that the plaintiff himself has made would justify the holding of the State Theatre. I will deny your motion and allow you an exception. 20

Mr. Wolf: Exception.

CAPTAIN HARRY W. WALSH, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Wolf:

Q. Captain, you are the commanding officer of the Seventh Precinct of Jersey City? A. Yes, sir. 30

Q. Do you recall this date of February 14th, 1927? A. Yes, sir.

Q. Do you recall the time that this young man Marmorstein was brought into the station house? A. Yes, sir.

Q. By Officer Heath? A. Yes, sir.

Q. Who preceded you on the witness stand? A. Yes, sir.

Q. Will you tell us just what took place in the police station at that time? A. Well, Officer Heath 40

Harry W. Walsh, direct.

brought Mr. Marmorstein in in company with Mr. Hogan and Mr. Tuohy to the station house in the patrol wagon, and arraigned them in front of the desk. I was behind the desk at the time, and I inquired from the officer on what complaint he
10 had brought them there, and what the trouble was. He informed me that Mr. Tuohy was making a complaint of assault and battery against Mr. Marmorstein. I asked him who Mr. Tuohy was, and he told me that he was an usher for the State Theatre. Then I inquired from Mr. Tuohy what the circumstances were that led to the assault, and also the extent of the assault, for the purpose of ascertaining what it amounted to. There was no visible evidence of an assault. And
20 during this time, Mr. Marmorstein, who was brought in there, supposedly as a prisoner, started to roam around the station house with his two hands in his back pockets, and I reprimanded the officer for his conduct and told him to arraign his prisoner back in front of the desk, which he did. After Mr. Tuohy had finished what he had to say with reference to the assault and what took place in the State Theatre, I inquired from Mr. Marmorstein what he had to say, and I was in-
30 formed by Mr. Marmorstein that he had paid his fare to the State Theatre,—that he was entitled to his seat and entitled to see the show; that he was not going to be dictated to by the usher or by anybody else in there. I then inquired from Marmorstein as to where he lived and in what business he was engaged,—what his occupation was, and so forth. I was then informed by him that he was in the loan business,—had a loan office up around Journal Square. In face of the
40 fact that he was a reputable citizen, and that there

Harry W. Walsh, direct.

were no visible evidences of assault, I told Mr. Tuohy that he could apply to the First Criminal Court the following morning and make a complaint, and obtain a warrant for assault and battery.

Q. On the following morning? A. Yes; and Mr. Marmorstein insisted on being arrested. I accommodated Mr. Marmorstein by booking him and holding him in one hundred dollars bail. 10

Q. If Mr. Marmorstein had not insisted on being arrested at that time, would you have booked him?

Mr. Colgan: I object to that, if the Court please.

The Court: I will allow it.

Mr. Colgan: Exception. 20

A. No, sir, I would not. I would have instructed the complainant to go to the court room of the Criminal Court and make a complaint the next morning in the Criminal Court.

Q. Let me ask you this, now, Mr. Walsh. Just what was Mr. Marmorstein's demeanor in the police station at that time? Was it boisterous, or just politely conversational? A. I would say it was surly. 30

Q. Surly? A. Yes, surly and sarcastic.

Q. Sarcastic and surly? A. Boisterous, yes.

Q. Was he acting the part of a gentleman at that time?

Mr. Colgan: I object to that, if the Court please.

The Court: The objection is sustained.

Mr. Wolf: I will withdraw it. That is all. Take the witness. 40

Harry W. Walsh, cross.

Cross examination by Mr. Colgan:

Q. Captain, I understood you to say that you would not have arrested Mr. Marmorstein unless he had insisted on being arrested. Is that correct?

A. Yes, sir, that is right.

10

Q. What did Mr. Tuohy say when he came into the police station? A. Mr. Tuohy told me that this man was going down the aisle to get a seat in the midst of an act, and that he had stopped him and told him that he would have to wait until the end of the act to go to his seat, and Mr. Marmorstein pushed him with both hands in the stomach.

20

Q. Wasn't he there at the station for the purpose of pressing this complaint of assault and battery? A. Both of them were brought in there in the police station, and that was the purpose of the trip.

Q. Did Mr. Tuohy say that he didn't wish to press the complaint? A. No, sir. He insisted on making a complaint.

Q. Captain, would you have the right to let Mr. Marmorstein go, even though Tuohy insisted on making a complaint? A. Yes, sir.

30

Q. You would have that right? A. Yes, sir.

Q. That is, you would have the right not to book him and hold him in bail, but he would have to appear the next morning in the Police Court, would he not? A. No, sir.

Q. Would you have decided the case right there? A. When we book a prisoner in our records he must abide by the law. He must either furnish bail, or, if it is a minor case, be paroled in the custody of some reliable person.

40

Q. I suppose that you don't quite understand me, Officer. You said in this case that you wanted

Harry W. Walsh, cross.

to let Marmorstein go, but he insisted up his being arrested. You don't understand that. A. Well, it was because of the fact that he was a business man with a residence in Jersey City, and because I was satisfied that I would have no trouble in getting Marmorstein later if I wanted him. 10

Q. That is, if Tuohy still wanted to press his complaint? A. I instructed Tuohy that he could go to the Court the following morning.

Q. Yes. A. And make his complaint in court and have a warrant issued for Mr. Marmorstein's arrest. That is a courtesy that is granted to all reliable citizens of Jersey City.

Q. Yes; but wasn't the reason why Mr. Marmorstein asked to be arrested that he was put to disgrace by being brought through the streets in a police patrol? A. There was no explanation that accompanied his insistence on it. 20

Q. He didn't say anything about it? A. No, sir; as a matter of fact I think Marmorstein might have thought that I was a little sore on him when I reprimanded him for walking around the station.

Q. You investigated him, didn't you? A. I made no investigation at all. The case warranted none.

Q. But you say that you knew he was a reputable business man? A. Well, so far as I know, yes. 30

Q. So far as you knew? A. I couldn't say that through any investigation I had made, because I never conducted one for the purpose of investigating Marmorstein.

Q. When you held him for a hundred dollars bail and you booked him, you instructed Tuohy there that he would have to go to the police court, didn't you? A. I told him that he would have to 40

James Tuohy, direct.

go to the police court the following morning to make the complaint.

Q. When Tuohy first came in they began telling you about the case and Tuohy said that he was an usher in the State Theatre? A. Yes.

10 Q. Did he say anything about this man Marmorstein's breaking any rules of the theatre? A. I told you what he said, Counsellor. He told me that he was assigned to an aisle there where Marmorstein had come down in the middle of an act, and that he had stopped Marmorstein and told him that he could not go to his seat until after the completion of the act. He said that Marmorstein had stuck his two hands into his stomach and shoved him out of the way.

20

Mr. Colgan: That is all.

Mr. Wolf: That is all.

JAMES TUOHY, recalled:

Direct examination by Mr. Wolf (continued):

Q. James, you have been employed by the State Theatre now for two years or more, have you not?

A. Yes, sir.

30

Mr. Colgan: Suppose you let the witness answer the questions.

The Court: He has been on the stand before. We have to finish this case some time.

Q. On this day of February 14th, 1927, do you remember this episode that occurred between you and Mr. Marmorstein? A. I do, sir.

40 Q. Just state it, please, Mr. Tuohy, as quickly as possible. A. Why, it was "Ned Wayburn's Buds" of 1927,—that was the last act. It was a feature act on the bill. So about twenty-five or thirty

James Tuohy, direct.

young fellows came up out of their seats, and when they returned from the gentlemen's room they all stood in the back of the theatre. I said to them, "You will have to wait until this act is over." They consented and stood there to view the remainder of the act from the back of the theatre when this young fellow, Marmorstein, came along, and I told him the same thing. Right away he got noisy and boisterous and embarrassed me in front of the other fellows, because they readily consented to stand there. It didn't hurt them to stand there and wait until the act was over. 10

Q. When you say that "he got noisy and boisterous",—what did he say? A. Well, I asked him—I told him what my orders were, and he said that when he went into a theatre he expected a seat and he was going to take it. I remember that. 20

Q. He said that he expected a seat and was going to take it? A. Yes, sir.

Q. What kind of tone did he use? A. About the average. You could not hear the act on the stage, hardly.

Q. You could not hear the act on the stage? A. Not from where I was standing.

Q. And what happened after that? A. Well, they were all standing around, and then immediately he brushed past me again and turned around and punched me twice in the stomach, and then continued on down to his seat. He said nobody could stop him— 30

Q. (Interrupting.) Did he say that nobody could stop him? A. Yes, sir. And then he continued on down to his seat.

Q. What did you do? A. I came back to the head of the aisle, because that can easily cause a panic. 40

James Tuohy, direct.

Q. What? A. I say that could easily cause a panic.

Q. He ran down the aisle, did he? A. Well, he didn't run down. He walked down very fast, though.

10 Q. Were there any of the others who turned and started to run down? A. No, sir.

Q. They all remained there? A. Yes, they all remained there. They knew the rules of the house.

Q. You were struck in the stomach, were you? A. Yes, sir, twice.

Q. What did you do after he started down to his seat? A. Came back to the head of the aisle.

Q. How far down the aisle had you gone then? A. Well, a few rows from the rear.

20 Q. Did you grab hold of him at all? A. I did not, no, sir.

Q. Did you attract his attention in any way when he started down the aisle the second time? A. No, sir.

Q. Did you put your hands on his shoulders? A. No, sir.

Q. Did you grab hold of him in any way at all? A. No, sir.

30 Q. Where were you? A. I was a few feet from the top of the aisle.

Q. How did you get down those few feet from the top of the aisle? A. Well, I walked down,—see? I walked after him, and he turned around and punched me twice in the stomach.

Q. So, in the few feet that you had walked after him, you had not yet got hold of him? A. No, sir.

Q. You then spoke to him and he turned around and struck you, did he? A. That is it. And Mr. Hogan, the assistant manager, went down.

40

James Tuohy, direct.

Q. Did you tell Mr. Hogan what happened to you? A. I told Mr. Hogan what happened to me.

Q. Mr. Hogan then went down, did he? A. Yes, sir.

Q. And then what happened after that? A. The act continued.

10

Q. Did you go out and call Officer Heath? A. No, sir; my brother went out.

Q. Your brother went out and called him? A. Yes, sir.

Q. Did you tell Officer Heath when he came in what had occurred? A. I think he spoke to me.

Q. What did Officer Heath say? A. He said, "Well, the best thing to do is to go down next morning and have a warrant sworn out for him."

Q. What did you say? A. I wanted to have him arrested then.

20

Q. You wanted him to be arrested then? A. Yes, sir, for assault and battery.

Q. At any time did anybody in the State Theatre ask you to have him arrested?

Mr. Colgan: I object to that question as leading.

The Court: He is your witness. I think it is leading.

30

By Mr. Wolf:

Q. Did anybody tell you? A. No, sir.

Q. Were you in anybody's office when you had him arrested?

Mr. Colgan: I object to that, if your Honor please.

The Court: I will allow it.

40

James Tuohy, direct.

By Mr. Wolf:

Q. Were you acting under anybody's orders when you had him arrested? A. No, sir.

10 Q. Did anybody tell you to make out a complaint against Mr. Marmorstein? A. No, sir.

Q. Why did you, then, have him arrested? A. Well, they have a picture—

Q. (Interrupting.) Why did you have him arrested? A. Well, of course—

Mr. Colgan: I object to that, if it please the Court.

The Court: Never mind his reason. Let him tell what happened.

20 A. (Continued.) Because of the assault—that he had hit me.

Q. Because of the assault, that he had hit you? A. Yes, sir.

Q. In Mr. Keale's office? A. Well, the picture started, and I started down the aisle. The officer was marching down about five or ten feet behind me. We got about five feet from Marmorstein, and he catches sight of the two of us coming down and he turns around then and hollers, "What are you coming down for—to have me locked up?"

30 Q. What is that? A. He hollers, "What are you going to do,—have me locked up?" he hollers; and all the women turning around to see what was the matter. Then he jumped around and followed me, and the officer was ahead. And all the way he kept hollering, "I want to be arrested. I want to be arrested."

By Mr. Colgan:

40 Q. Just one second, please. Did you tell the officer where this man was seated? A. Yes, sir.

James Tuohy, direct.

Q. Did you walk down the aisle for the purpose of showing him where he was seated? A. For the purpose of showing him where he was seated, but it was not necessary, because he jumped up when we got to him.

Q. Did anybody in the State Theatre tell you to go down to where he was seated? A. No, sir. 10

Mr. Wolf: I object to that, if your Honor please.

Mr. Colgan: It is for the purpose of showing probable cause, if your Honor please.

The Court: No; you may show what was done. This was for the purpose of anticipating a defense that has not been made as yet. 20

By Mr. Wolf:

Q. Did you go into Mr. Keale's office after Mr. Marmorstein came back? A. When Marmorstein came back?

Q. Yes. A. I went in there with Officer Heath.

Q. What was said to you in there? A. Well, I just can't recall. I know that coming up the aisle I told the officer I wanted to press the point to have him arrested for assault. Marmorstein just kept on saying, "I want to be arrested. I want to be arrested." Officer Heath says, "Where is the telephone?" I said, "In the manager's office." 30

Q. You told the officer that the telephone was in Mr. Keale's—in the manager's office? A. Yes, sir.

Q. Did you go in there? A. We went in.

Q. Where was Mr. Keale at that time? A. Well, that I can't just recall. I know coming out of the office Mr. Keale was outside. 40

Q. What happened in Mr. Keale's office? A.

James Tuohy, direct.

Well, I remember Officer Heath and Marmorstein and I were in there, and then the officer called for the wagon and he all the while kept on insisting about his arrest.

10 Q. Yes. A. Well, I told the cop that I didn't want to have him arrested for assault, and he got pretty noisy in the office. You could hear him from outside the office.

Q. He got noisy in the office, did he? A. He got noisy in the office. You could hear it outside, so we had to take him out in the lobby.

Q. You took him out in the lobby? A. Yes.

Q. What happened there? A. He was offered his money and he would not take it.

20 Q. What is that? A. He was offered his half dollar and he would not take it.

Q. Who offered it to him? A. He showed his ticket around and he said, "This is all I want. I don't want the half dollar."

Q. He said, "This is all I want. I don't want the half dollar?" A. Yes, sir; he showed a yellow stub and then put it back in his pocket.

30 Q. When you appeared in the Police Court the next morning, was there a charge made against you and your brother? A. Why, yes, he made a countercharge.

Q. And that was dismissed? A. That was dismissed.

Q. For assault and battery? A. Yes, sir.

Mr. Wolf: That is all. Oh, just one more question while he is here, Mr. Colgan, if you please.

Mr. Colgan: Very well; go right ahead.

Mr. Wolf: No—that is all.

*James Tuohy, cross.**Cross examination by Mr. Colgan:*

Q. Who told him to get his fifty cents back?

A. Well, I just can't recall that.

Q. How did the conversation come around? A. Well, I know—I couldn't just recall, but I know it was somebody. Maybe it was the manager that offered him the fifty cents.

10

Q. Mr. Keale? A. Well, I just can't recall who it was.

Q. Mr. Keale or Mr. Hogan? A. Well, I can't just recall.

Q. When was it offered to him? Was it offered to him in Mr. Keale's office? A. Well, maybe it was before he went in the office or when he was in,—either one.

Q. Was it Mr. Keale or Mr. Hogan? A. Well, if he wanted to be boisterous, he didn't want to see the show.

20

Q. Then Mr. Keale or Mr. Hogan knew what he was being brought up for, didn't he?

Mr. Wolf: I object to that. The witness cannot speculate.

The Court: I will overrule the question.

By Mr. Colgan:

Q. Was Mr. Keale or Mr. Hogan in the office the time the officer called for the patrol wagon? A. Well, I can't just remember which one was there.

30

Q. Was one of them in there? A. Well, I believe there was one, but I just can't remember who was there.

Q. And you heard the officer testify, Mr. Tuohy? A. I did.

Q. You heard him testify that it was not such

40

James Tuohy, cross.

a loud conversation that he had coming up the aisle? A. I heard him say that was so.

Q. You say it was loud? A. Well, the officer is not used to conversations in a theatre.

10 Q. Then the officer is mistaken? A. Well, if he hears conversations in a theatre—

Q. (Interrupting.) You also heard him testify that there wasn't any loud talking in the office, didn't you? A. Well, not that he could hear. The officer was 'phoning.

Q. You were enforcing the rules of the State Theatre, were you not, when you told him he could not go back to his seat? Is that right? A. Yes, sir.

20 Q. And after he punched you in the stomach, did anybody see that? A. Why, they must all have seen it, because there were thirty people not ten feet away.

Q. Were you hurt? Were you hurt? A. Well, it just doubled me up for the minute.

Q. Did you sit down? A. Well, I can't recollect whether I sat down then or not.

Q. What did you do then? Did you go back up to the end of this— A. (Interrupting.) I went back up the aisle.

30 Q. Did you go back down to Marmorstein's seat? A. No, sir.

Q. Whom did you tell then? Did you tell your brother about it? A. I think I did tell my brother.

Q. What did you tell him? A. Well, he saw it, anyway, I guess.

Q. Did he see it? A. Yes, sir.

Q. He was the one who went down to the seat, too? A. No, sir, my brother didn't go near him; no, it wasn't he. It was Hogan.

40

James Tuohy, cross.

Q. Did you tell Hogan? A. Mr. Hogan saw the rumpus. I guess he knew it.

Q. He was the one that went down and said that he would see him? A. That is right.

Q. Who was the one that went out after the officer? Was it you or Hogan? A. I can't remember. I know I didn't go out. 10

Q. You say that this loud and boisterous talk embarrassed you. How did it embarrass you? A. Well, now, I informed all these other fellows to wait until the act was over, and they all consented. And when this one fellow brushed past, it made me look like a fool or something.

Q. Yes, you were a little sore, weren't you? A. Well, I wouldn't say that I was sore, until he had hit me. 20

Q. It embarrassed you? A. Well, I guess it did.

Q. You guess it did? A. I guess it did embarrass me, yes. If they all ran down the aisle, it would cause a panic.

Q. Yes. A. Sure, that is right.

Q. That made you pretty sore on Marmorstein? A. No, I wouldn't say that.

Q. Why didn't you let him sit in the seat? Why did you take him out? A. Because he assaulted me. 30

Q. Why didn't you let him sit in his seat until the show was over? A. Because I thought that I was assaulted then and not after all the show was over.

Q. Oh, you wanted to get him while he was in the house? A. That is right.

Q. Did you know him? A. No, sir, I didn't know him until the first time he hit me, and that is when the show was on. 40

James Tuohy, cross.

Q. Where was Mr. Keale all this time? A. Mr. Keale? I couldn't tell you.

Q. Mr. Keale gave you instructions that they were not to go down. Is that right? A. No, sir.

10 Q. Who gave you those instructions? A. Mr. Keale said they were not to go down on the last act.

Q. On the last act? A. That is right.

Q. Was there a rope up there on the aisle? A. Why, no, sir, we don't need any.

Q. You don't need any? A. No; there were crowds of people that had come up out of their seats.

20 Q. Did you have any conversation at all with Mr. Keale before the officer called the wagon? A. I did not see Mr. Keale.

Mr. Wolf: What was that last answer?
(The reporter read the last answer.)

By Mr. Colgan:

Q. Wasn't Mr. Keale in the office at the time that the officer was telephoning? A. Well, I wouldn't say whether it was he or Mr. Hogan who was there.

30 Q. Did you have any conversation with Mr. Hogan? A. Well, I know why—when the officer came in, I told him what happened. I told the officer I wanted him arrested for assault.

Q. Yes. A. And he said, "Point him out to me." He said, "You had better go down in the morning and have a warrant sworn out."

Q. Who said that? A. The officer,—“In the First Criminal Court.” Well, then, I thought it was best to have him arrested while Marmorstein insisted upon it.

40 Mr. Colgan: I think that is all.

Mr. Wolf: That is all.

Newall Hogan, direct.

Mr. Colgan: Just one more question, if your Honor please—no—never mind.

NEWALL HOGAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

10

Direct examination by Mr. Wolf:

Q. Mr. Hogan, you are employed by the State Theatre in January or February of this year, were you not? A. Yes, sir.

Q. In what capacity? A. As assistant to Mr. Keale.

Q. As assistant to Mr. Keale? A. Yes, sir.

Q. You remember the 14th day of February of this year, do you? A. Yes, sir.

20

Q. Did you see Mr. Marmorstein, the plaintiff in this case, on that day? A. Why, I didn't see him until I went down to his seat.

Q. Just before you went down to his seat, what had occurred to attract your attention? A. Why, I was standing there over in the right section where there were more young men waiting around to go down than in the center section. Then I heard all this rumpus.

Q. What did you hear? A. "Leave go; I am going down to my seat."

30

Q. You heard that? A. I heard that.

Q. How many seats away were you standing? How many aisles were you over? A. Why, about half an aisle over.

Q. You were half an aisle over when you heard that? A. Yes, half an aisle over, and I snapped and went down the aisle where Mr. Marmorstein was.

Q. You say you "snapped." You mean you

40

Newall Hogan, direct.

snapped for this boy to go back into his place? A. Yes,—that was the signal back to all the ushers, just for attention. They saw me and went back to retain their positions.

Q. Did you see James Tuohy struck in any way?

10 A. No, sir, I couldn't witness that, because of the fact that my view was obstructed by so many people standing in front of the aisle.

Q. Were you later informed that he had been struck?

Mr. Colgan: I object to that.

The Court: I overrule the question.

Q. Did you see Mr. Tuohy and Mr. Heath go down later? A. Mr. Tuohy said, "This fellow hit me." He wanted to see where he was sitting.

20

Q. What did you say to him when you went down? A. I don't remember the words, but I think I said something like this: "You think you are privileged to come down. You come back to the office."

He said, "I am paying for this seat, and I am going to sit here."

I said, "After the act." That is all I said. I said, "After the end of the act."

30

Q. Did he say that to you in a loud tone? A. No, I knelt down alongside of his seat. The seat was an aisle seat, and I knelt down and said, "You think you are privileged. I think you had better come back to the office."

He said, "I am going to sit here"—or something like that.

I said, "Wait until the end of the act." Then I turned around and walked up the aisle, and Mr. Tuohy—

40

Q. (Interrupting.) What did you do then? A.

Newall Hogan, direct.

Why, then I had to go over on relief on the side aisle. Tuohy then instructed his brother—

Q. (Interrupting.) You don't know anything about that. When did you next see Mr. Marmorstein? A. Why, when he came back behind the cop, up the aisle.

10

Q. Did you send the cop down there? A. No, sir.

Q. Did you have anything to do with sending the cop down there? A. No; I was over on the side aisle.

Q. Did you know that a cop had been sent down there? A. No, not at that time, sir.

Q. Did they go into Mr. Keale's office then? A. I saw them coming up, and Mr. Keale was then on the left side of the orchestra, and I, being the nearest, walked over midway where they were conversing in back of the center of the orchestra.

20

Q. Who were conversing? A. Tuohy, the cop, and Mr. Marmorstein.

Q. Was there quite loud talking then? A. Well, quite loud.

Q. What did you hear them say? A. Well, all I could hear was, "Take me in. You have got to take me in."

Q. What happened then? A. Well, then the cop said, "Can I use the 'phone?" I said, "Absolutely."

30

Q. He ask you whether he might use the telephone? A. He asked me whether he could use the 'phone.

Q. And you said, "Absolutely"? A. I said sure it was all right.

Q. And then the officer did call up for the patrol wagon? A. Then the officer, Tuohy and Marmorstein, went into the office. It was then that Mr. Keale came over.

40

Newall Hogan, direct.

Q. Mr. Keale came over at that time? A. Mr. Keale came over at that time.

Q. Before the policeman had requested the use of the 'phone?

10 Mr. Colgan: I want to object, if the Court please.

The Court: Of course it is improper. He is your witness and you should not lead him.

By Mr. Wolf:

Q. Mr. Keale came over. Had Mr. Heath, the officer, requested the use of the 'phone before that? A. Well, no. Mr. Heath was 'phoning when Mr. Keale came over to him. It was then that Tuohy told him.

20 Q. You went along in the patrol wagon, did you?

A. I went along as a witness in Tuohy's behalf.

Q. As a witness for Tuohy? A. Yes, sir.

Q. Were you performing your duty as an assistant manager when you went along in the patrol wagon to the police station?

Mr. Colgan: I object to that.

The Court: The question is overruled.

30 Mr. Wolf: And your Honor will allow me an exception?

The Court: Yes.

By Mr. Wolf:

Q. Did the State Theatre have anything to do with your going to the police station?

Mr. Colgan: I make the same objection.

The Court: The question is overruled.

Mr. Wolf: Exception.

40 Q. What was your idea in going to the police station?

Newall Hogan, cross.

Mr. Colgan: I object.

The Court: He has already said that he went along as a witness for Touhy. Why don't you let it stop at that?

Mr. Wolf: All right; that is all.

Cross examination by Mr. Colgan:

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Q. Why did you go as a witness for Tuohy? You did not see him struck, did you? A. No, sir, but I went as a witness for Tuohy.

Q. You couldn't testify to anything, could you? A. I could only testify to the disorderly conduct.

Q. What disorderly conduct? A. The loud talking.

Q. Did you see any disorderly conduct in addition to that? A. Well, I went as a witness.

20

Q. Of the assault and battery? A. I told them afterwards that I didn't—no, sir, I did not see it at all.

Q. When you got to the police station, did you tell the captain anything? A. There was a roll call of the officers coming in. We had to go to the side door because the roll call was on. We waited—

Q. (Interrupting.) What did you mean when you went down and said to Marmorstein, "You are not privileged, and I will see you after the act"? A. I didn't repeat all that statement. I just got as far as saying, "You are not privileged,"—and "I would like to see you after the act."

30

Q. What did you mean by that? A. I meant by that that he might not be acquainted with the rules, and it might be advisable for him to see the manager and get the matter settled.

Q. Did you explain the rules to him? A. I didn't explain then, because the act was continuing, and

40

Newall Hogan, cross.

it would be more advisable for him just to come up to the end of the aisle and have a talk there, which has been done in many cases.

10 Q. Well, then you went into Mr. Keale's office, and it was explained to Mr. Keale why you went into his office, was it? A. I didn't explain that.

Q. Were you there? A. I was there.

Q. At what stage of the proceedings? Was the cop 'phoning there at that time? A. The cop was 'phoning.

Q. The cop was 'phoning for the police wagon? A. Yes.

20 Q. Did Mr. Keale know that he was going to be arrested and taken down to the police station? A. Mr. Keale didn't know that until after he had called for the wagon.

Q. Yes. After he had called for the police patrol wagon, Mr. Keale knew— A. (Interrupting.) Mr. Keale knew that Mr. Tuohy was going to book him on a charge of assault.

30 Q. You went down there originally for the purpose of being a witness to the disorderly conduct, didn't you? A. No, I didn't, no, sir. I went down there for the purpose of being a witness for Tuohy. I figured I was the nearest one there, overlooking his brother. That is all.

Q. Wasn't Mr. Keale present? Did Mr. Keale— did Mr. Marmorstein, rather, talk with Mr. Keale? Didn't he talk to him and say that he wanted to see the show? A. When he was going out in the lobby.

40 Q. What did Keale say to him? A. That he would refund his money. He said, "No, I don't want my money. I have got my ticket; that is all."

Newall Hogan, redirect.

Q. What did Mr. Marmorstein say to Mr. Keale?

A. That is what he repeated.

Q. What did Mr. Marmorstein say to Mr. Keale?

A. He said, "I don't want my money back. I have my ticket—my stub; that is all."

Q. Didn't he say that he wanted to see the show? 10

A. I don't recollect.

Q. And Mr. Keale said that he would refund his money? A. Refund his money.

Q. So that you knew Tuohy was making a charge of assault and battery, didn't you? A. Yes, sir, I did.

Q. And you were in the police court the next day, were you not? A. I was, yes, sir.

Q. And you testified as— A. (Interrupting.) As a witness for Mr. Tuohy. 20

Q. As to the assault and battery? A. As to the assault and battery.

Q. And you testified that you saw the assault and battery? A. I did not, sir, because my testimony was thrown out.

Q. Your testimony was thrown out? A. Yes, sir.

Q. Now, the primary reason why this man was arrested was because he broke these rules, wasn't it?

Mr. Wolf: I object to that, if the Court please. The facts speak for themselves. 30

The Court: The question is overruled.

Mr. Colgan: I think that is all, Mr. Hogan.

By Mr. Wolf:

Q. One question more, Mr. Hogan: while you were in Mr. Keale's office, was anything said by Marmorstein about requesting to be arrested? That is, in Mr. Keale's office? 40

Mr. Colgan: Now, I—all right—go ahead.

John G. Keale, direct.

A. I don't recollect that.

Mr. Wolf: That is all.

By Mr. Colgan:

10 Q. You would recollect it if he had said it, wouldn't you? A. I wouldn't say yes to that, no, sir.

Q. Then you don't know whether Mr. Keale requested the arrest, do you? A. Mr. Keale didn't request the arrest, because he was talking to Tuohy.

Q. Well, he had Mr. Tuohy do it, didn't he? A. I beg your pardon?

20 Q. He had Mr. Tuohy make it, didn't he? Mr. Keale? A. No one had Tuohy make it. Tuohy had it in his mind to make it before he came into the office.

Mr. Colgan: That is all.

Mr. Wolf: That is all.

JOHN G. KEALE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Wolf:

30 Q. Mr. Keale, you are the manager of the State Theatres Corporation in Jersey City? A. I am.

Q. Is the State Theatre on the Boulevard, Jersey City? A. Yes.

Q. At Journal Square? A. Yes.

Q. Do you recall the events that occurred inside the theatre with Mr. Marmorstein on February 14th? A. Only so far as I saw.

40 Q. What first attracted your attention to this episode? A. Well, there seemed to be a little com-

John G. Keale, direct.

motion on the aisle. I usually watch my show. I saw a little commotion there and I saw them come into the office. Naturally we are interested, because we can't afford to have a commotion. It is likely to start a panic. I saw them going over to the office and going inside. The officer started to 'phone. Naturally I inquired from Tuohy what had happened. 10

Q. After the officer had started to 'phone, did you have a conversation with anyone in that group? A. Why, no. The officer seemed to have his mind made up as to what he was going to do. I didn't have any interest in what the officer was doing. I was simply there to protect the State Theatre and to protect my patrons.

Q. Did you ask Tuohy, then? A. I asked Tuohy what the trouble was. 20

Q. Was Marmorstein there then? A. Yes.

Q. What did Tuohy say to you? A. He told me he had been hit out on the aisle. I asked him why, and he told me that a lot of these boys had come up during the act. You see, if the boys don't like an act, they get up and walk towards the rear, disturbing everybody. That is what happened during this act. So, in order to protect the patrons—see—and not have them annoyed, I ask the boys to please be courteous, and ninety per cent. of them will, but once in a while we will get somebody who is a little bit over-bearing or very anxious, and they will force their way down. Naturally, I was a little concerned about the boy's being hit, but it was a matter between Tuohy and the other man; nothing that the State Theatre had anything to do with. 30

Q. Did you know at that time that Marmorstein 40

John G. Keale, direct.

had anything to do with it? A. I didn't know anything about it until he came into the office.

Q. Until he came into the office? A. Yes.

Q. What took place in the office, Mr. Keale? A. Well, Marmorstein was very boisterous and nasty.

10 Q. What did he say? A. Well, he was talking—saying that he had paid for his seat and was going to have it and he was going to do what he liked, and all that sort of thing. I tried to reason with him, because, naturally, we don't want to lose patrons, and I told him that,—I said, "If you don't want to be quiet, I will give you your money back. If you behave yourself, you can stay in the theatre and see the show, but if you don't behave yourself,—"
20 —there was so much noise there, and the office door was closed,—so I told him that he would simply have to take his money back and go out quietly.

Q. What did he say to that? A. He said he didn't want to take his money back; he seemed anxious to be locked up.

Q. Did he say anything about that? A. Yes, he said, "I want to be locked up."

30 Q. What did the officer say about that? A. Why, he said that he would be glad to accommodate him.

Q. He did? A. Yes, he did.

Q. Did you have anything to do with the charge that was made against Marmorstein?

Mr. Colgan: I object to that, if the Court please. I think counsel is putting the answers in the witness's mouth.

The Court: I will allow it. I think it is proper.

40 Mr. Colgan: Exception.

John G. Keale, cross.

By Mr. Wolf:

Q. Did you have anything to do with the charge that was made against Marmorstein? A. Why, no, I had absolutely nothing whatsoever to do with that. It seemed that the boys had made up their minds as to what they were going to do. Nobody had any authority to make such charges on behalf of the State Theatre.

10

Q. You are the only one that had? A. Absolutely.

Q. You didn't make any charge, did you? A. No, sir.

Q. There wasn't any assault and battery committed on you, was there? A. I didn't see anything.

20

Q. Did Tuohy say that he insisted on making a charge at that time?

Mr. Colgan: I object.

Mr. Wolf: Oh, I withdraw that. That is all.

Cross examination by Mr. Colgan:

Q. Mr. Keale, you told Mr. Tuohy to make such a charge, didn't you? A. Why, no.

Q. Did you tell him to make a charge, in the office? A. Why, no.

30

Q. Did you tell him that if he didn't keep quiet—that he would have to be quiet or go out? A. Well, I told him that while he remained in the theatre he would have to be quiet, because we have to protect our patrons.

Q. Or he would have to go outside? A. Well, naturally he would.

Q. That is what the officer meant when he said, "You will go outside," wasn't it?

40

John G. Keale, cross.

Mr. Wolf: I object to what the officer meant.

The Court: I overrule the question.

By Mr. Colgan:

10 Q. You were in the office—your office, with the officer and Marmorstein, before the officer started telephoning, weren't you? A. As I said before,—

Q. (Interrupting.) Just answer that yes or no. A. Just as I said before.

Q. Were you in your office or were you not? Were you in your office? A. I was in my office, watching the show. I was in my own private office.

Q. Were the officer and Marmorstein in there at that time? A. No, I was watching the show, and
20 in my own private office.

Q. That is, you were in the office into which they were brought, were you not? A. Yes.

Q. You were? A. I was in my office when they were brought in.

Q. What was the first conversation you had with the officer? A. Why, I waited until he got through with the 'phoning.

Q. I know; but you were in there when he came there, were you not? A. Yes.

30 Q. What did he say to you? A. Why, he walked over to use the telephone.

Q. He didn't say a word to you? A. It looked like a private fight, to my notion.

Q. Without a word to you, he went over to the private telephone and used it. Is that right? A. Yes, sir.

Q. Yes or no. A. Yes.

40 Q. You knew nothing about what had taken place then, did you? A. I had had no opportunity to investigate, no, sir.

John G. Keale, cross.

Q. You were in the office, and you saw the officer come in with Marmorstein? A. Yes, sir.

Q. Was Tuohy in there? A. Tuohy came in there.

Q. And Hogan? A. The party came in, you know. 10

Q. Hogan came in too, didn't he? A. Yes, the whole party was there.

Q. Marmorstein was quite boisterous about coming in there, wasn't he? A. Yes.

Q. Making a lot of noise and saying he wanted to be arrested? A. Well, he wasn't saying that at first. He was making a lot of noise, though.

Q. He was making a lot of noise, and the officer walked over to the telephone and called up the police station? A. Yes. 20

Q. You stood there all the while? A. No, I didn't stand there all the while. I went over to the telephone. I went over and asked my boy what the trouble was.

Q. Whom did you ask? A. I asked Tuohy.

Q. What did you say? A. The boys told me that he had been hit.

Q. What did he say? A. That he was struck twice.

Q. What happened then? A. Why, then he told me that Hogan had gone down and talked to the boy. I asked him what else had happened and who got the officer. He said that his brother had gotten out, I believe, and called an officer and taken him out of the audience. I wanted to know why— 30

Q. (Interrupting.) You say you talked to Tuohy? A. Yes, to James Tuohy; and he was crying—

Q. (Interrupting.) Yes. A. And he told me that 40

John G. Keale, cross.

10 the boy had created a disturbance, and that when Buddy went down and talked to him—that is, Hogan—he got nasty there, then, and he got the officer to bring him back to my office so that he could straighten the matter out. That is our usual habit when we get any disorderly people. I usually direct them to bring the person back to my office. Their intention apparently—their minds seemed to be made up to go to the police station. That is all I know.

Q. Why didn't they bring them in the office, if that is what they usually do? A. Well, the officer's intention, I think, was to telephone for the patrol wagon.

20 Q. Did you have a conversation with Marmorstein then? A. When Marmorstein was a little loud and boisterous, I asked him to be quiet.

30 Q. What did you say to him? A. He was arguing very loudly that he hadn't hit him. I told him that there were people out there who wanted to be entertained and I didn't want any disturbance. But he would not be quiet. I kept Tuohy quiet all right, so I told him that if he didn't want to keep quiet he would get his money back, but if he wanted to be a gentleman, he could stay in the theatre.

Q. Tuohy would agree to that, wouldn't he? A. Well, the officer had called the wagon, then, and Tuohy had been piqued at being struck, you know. Of course, I didn't know—that is what was in their minds. I didn't know about that.

40 Q. You had a right over Tuohy to prevent his having this man taken up, didn't you? He was under your jurisdiction, wasn't he? A. Why, if somebody hits one of my employees and they want

John G. Keale, cross.

to have him arrested, it is not within my province to interfere. I am there simply to maintain order.

Q. Did you see him hit? A. No, I was in my office. I knew nothing about it.

Q. You heard Marmorstein deny that he hit him, did you not? A. Yes, I did. 10

Q. You heard Marmorstein say that he didn't hit him? A. Oh, I heard that before.

Q. Well, did you hear it? A. Well, you said "you heard." You are trying to tell me what was said.

Q. No,—I am asking you whether you heard Marmorstein deny that he hit him. Did you hear it? A. No, I didn't hear it.

Q. Didn't you testify before that Marmorstein asked you to be permitted to stay in the theatre? A. No, I didn't testify that. I said that I told Marmorstein, as long as he was quiet and abided by the rules of the theatre, he could stay in the theatre. But I asked him to keep quiet, as he was disturbing everybody. Apparently he did not feel like doing that, and I told him that he could have his money back. But the officer and Tuohy—it seemed the wagon was on the way and I assumed they were arresting the man. So when they were taking him out, I knew he was trying to prepare a case and I said, "Here is your money." 20 30

Q. You knew that he was going to sue the State Theatre? A. He wanted to get some "easy money."

Q. And you wanted— A. (Interrupting.) I wanted to keep right out of it. We had nothing to do with the assault. We were simply operating the theatre. I had nothing to do with that.

Q. You were in the Police Court, too, were you not? A. Me?

Q. Yes. A. Yes, I was in the Police Court. 40

John G. Keale, cross.

Q. You had nothing to do with it, did you? It was just a personal fight between one of your employees and this man, wasn't it? A. Yes, that is all.

Q. Why did you go into the police court, then?

10 A. Well, I have to have some recreation.

Q. You wanted to hear the testimony of the cases in court? A. Yes, I enjoy those things.

Q. You weren't interested in this case, were you?

A. Not very much.

Q. Who represented Tuohy in the police court?

A. I don't really know.

Q. Mr. Flaherty did, didn't he? A. It might have been.

20 Q. And Mr. Flaherty represents the State Theatre, doesn't he? A. Absolutely not. Mr. Wolf represents the State Theatre.

Q. Didn't Mr. Flaherty represent the State Theatre before Mr. Wolf did? A. He never did, to my knowledge.

Q. He never did? A. No.

Q. Mr. Hogan was there in the police court, too, was he not? A. Yes.

Q. You were back in the rear? A. I was in the rear of the court, yes, sir.

30 Q. Why did you go to the police court, Mr. Keale? A. I just went there to find out what would happen.

Q. You did not have to go, did you? A. No.

Q. You were not under subpoena, were you? A. No.

Q. You didn't testify, did you? A. No, sir.

Q. Hogan testified? A. Yes.

Q. Both Tuohys testified, did they not? A. Yes, sir.

40 Q. And Judge Sullivan discharged Marmorstein.

John G. Keale, cross.

You heard the Judge's decision on that, didn't you?

A. I heard his decision very clearly.

Q. And you heard him say to Mr. Tuohy the impossibility of being struck in the aisle, didn't you?

Q. He said quite a few things. Do you want me to tell you what he said? 10

Q. No. I am asking you the question; did you hear him say that he doubted the probability of Tuohy's being struck in the aisle? A. Why, he said that he didn't really believe that an assault had been committed.

Q. When you told him that if he didn't behave himself he could get his money back, that was the only offer you made to return the money,—to get him his fifty cents back, wasn't it? A. Why, I explained while he was talking in there that if he didn't keep quiet he could go out. I asked him to be quiet. 20

Q. And that is the only time you offered it, isn't it? A. Well, I may have offered it to him twice.

Q. Do you recollect whether you did or not? A. I wouldn't say for sure. I know I offered him his money.

Q. Did you offer him his money while he was being taken out by the police officer? A. I told him he could have his money back. 30

Q. And it was then he was being taken out? A. While he was on the way out he could stop at the box office and get his money.

Q. While he was in the custody of the police officer? A. I knew nothing about that.

Q. You knew nothing about what? You knew that he was being taken out in the custody of a policeman, to the police station, didn't you? A. Well, the probabilities were that he was. 40

John G. Keale, cross.

Q. You testified before that Mr. Tuohy seemed to be bent on having him arrested. A. Yes.

Q. So when the officer took him out, you knew that he was going to be arrested, didn't you? A. The probabilities were that he was.

10 Q. And you told him to stop at the box office and get his fifty cents back? A. On the way out, yes.

Q. Why did you tell him to get his money back? The State Theatre was in no way responsible for his being arrested, was it? A. The only thing is we don't want people's money when they don't enjoy themselves there.

20 Q. But the State Theatre was not responsible for his getting arrested, was it? A. But if he got his money back. You know, we like to keep the good will of everybody, and—

Q. (Interrupting.) This was a rule just put in force on that day, wasn't it? A. Oh, no.

30 Q. Was that a standing rule of the State Theatre? A. There is a standing rule in the State Theatre that after the second act the ushers are not to take people down to their seats unless—between the acts, unless the act is over. If the patrons leave their seats during the performance, the ushers are instructed to ask them to please wait until the act is over so as not to disturb people.

Q. That is, after the second act? A. Then, when we get many people in the theatre, we stop them there until after the first act is over. When they leave their seats for any reason whatever, we ask them to please stay there so as not to disturb everyone.

40 Q. That is not a regular rule? A. It obtains during any act after they are seated.

Leo Marmorstein, direct.

Q. But there is no rule — A. It is just an act of courtesy; that is all.

Q. You haven't any cards on the wall or anywhere with those rules on them, have you? A. It is not necessary. Most of the people usually do it. We have nice people up there.

10

Q. The only occasions on which you call their attention to those rules is whenever they break them; but you don't get them arrested right away, do you? A. Oh, we don't arrest people up there.

Q. No. A. We entertain them.

Q. This was an exceptional case, then? A. It apparently was an exceptional case.

Mr. Colgan: That is all.

Mr. Wolf: That is all. That is our case.

20

LEO MARMORSTEIN, the plaintiff, recalled as a witness in rebuttal, testified as follows:

Direct examination by Mr. Colgan:

Q. Mr. Marmorstein, you heard Mr. Keale say that he had nothing at all to do with your arrest; is that so? A. He told Tuohy to make a charge when we were in the inner office. He told the officer to take me out.

30

Q. That is, Mr. Keale, the man who was just on the stand here? A. Yes, sir.

Q. Did he say anything to you about your having to behave yourself or you could get your money back? A. No mention was made about money at all. No offer was ever made about money. The main idea was to put me out in the street. That was the main idea.

Q. Did you assault this Tuohy boy? A. No, sir. If there was any assault committed it was an as-

40

Leo Marmorstein, direct.

sult upon me, by those two brothers grabbing me as I walked down that aisle.

10 Q. The policeman testified, Mr. Marmorstein, that you asked him to arrest you several times. Did you do that? A. No, sir. What I said to the policeman is, where we were going, and he said outside, and I told him—I said, “I don’t know what else you can do in this matter, but if you are going to arrest me I will go with you peacefully.” That is all I told the policeman. Then he left me and went and spoke to Mr. Keale.

Q. When you were at the police station Captain Walsh testified that he told you that you could go home, or something like that. But you insisted on being arrested? A. No, sir, absolutely not.

20 Q. Did you insist upon being arrested? A. No, sir.

Q. There was testimony to the effect that you were showing your ticket and saying that you didn’t want to be arrested? A. No, sir, they didn’t see that ticket at all. That ticket was put in my pocket—and when you go in the door, show it there—and put back in my pocket.

30 Q. Mr. Marmorstein, will you tell me when it was after you were brought up from your seat that you saw Mr. Keale? A. In back of the aisle.

Q. Did he speak to you, or did you speak to him? A. I spoke to him.

Q. What did you say? A. I spoke to him and I said, “Mr. Keale, I haven’t been doing anything. I wasn’t doing anything, and I want to see the rest of the show.”

Q. What did he say to you? A. He said, “You are going out.”

40 Q. Then you went into the office? A. No, I walked a couple of feet with the officer towards going out.

Leo Marmorstein, cross.

The Court: Yes. Never mind that. We have gone all over that.

Mr. Colgan: That is all.

Cross examination by Mr. Wolf:

Q. Will you please describe now exactly what took place when you say that these two boys took hold of you as you started to go down the aisle? 10

A. The end of the number came—

Q. No. No. After they took hold of you, how did you free yourself of their grasp? A. I pulled away from them.

Q. You said that while pulling away from them you turned around? A. At an angle, yes.

Q. And did you swing your arms as you turned around? A. No, sir. 20

Q. You didn't swing around? A. They had hold of my arms.

Q. They had hold of your arms? A. Yes, sir.

Q. Both of them? A. Yes, sir, one on each side.

Q. Up to that time there had been no trouble? A. No, sir.

Q. And no loud talking? A. No, sir.

Q. No disorder or anything there? A. No, sir.

Q. So you want this jury to believe that these two ushers grabbed hold of you? A. Yes, sir. 30

Q. And you say that if there was any assault they committed it upon you? A. Yes, sir.

Q. That is true? A. It is.

Q. You acted the part of a gentleman all through this trouble? A. Exactly.

Q. And you didn't do a thing? A. No, sir.

Q. That would make them aggrieved? A. No, sir. At the end of the number I could go down.

Q. And you waited? A. And I waited. 40

Leo Marmorstein, cross.

Q. Until the end of the act? A. No, sir, until the end of that number.

10 Q. What do you mean by the number? A. That particular act had maybe four or five scenes. When one scene is done that is the end of the number.

Q. But had you been told when you started to go down that you couldn't go down until the end of the act? A. As I came up?

Q. Yes. A. No, sir.

Q. No, no, I mean as you went down for your seat? A. As I came up to go down?

Q. Yes. A. As I came up to go down they stopped me, and said "You can't go down."

20 Q. Yes. A. I asked why, and they said, "Manager's orders to wait until the number is over."

The Court: This has all been gone over.

Mr. Wolf: No. This is all rebuttal for probable cause, if your Honor please.

30 Q. Why did you insist on going down? Why didn't you come back when they took hold of you and told you not to go down? A. Why, I got part of the way down and I felt somebody grab me from the back. I didn't know who it was at that particular moment.

Q. Why did you insist on going down? A. Why, I pulled away—

Q. You were told then, a second time, weren't you? A. They were yelling "You can't go down." I am telling them to let go of me.

Q. Why did you simply go down when they told you you couldn't go down? A. Why, I was facing that way, so I just went right ahead.

40 Q. Oh, you just disregarded them and went right ahead anyhow? A. Yes, sir; that is it.

Case.

Q. You didn't pay any attention to these instructions by the ushers, then? A. No, sir.

Mr. Wolf: That is all.

If your Honor please, I move for the direction of a verdict in favor of the defendant, on the ground that there is nothing in the testimony which would connect the defendant, the State Theatres Company, in any way with the plaintiff's arrest. The testimony shows very clearly that the State Theatre had nothing whatever to do with the arrest. The machinery which was set in motion for the plaintiff's arrest was motivated by an individual who was not acting for the defendant corporation and who was not, at that time, acting within the scope of his employment, but who made and pressed his criminal charge against the plaintiff for a personal assault or crime committed upon him, individually.

There has been no proof that the corporation in any way authorized the arrest or in any way acquiesced in it or approved of it. The evidence, uncontroverted by the plaintiff, now clearly shows that no one had any authority to authorize the arrest, particularly since the crime with which the plaintiff was charged was not one committed against the corporation but against an individual employee, in his individual capacity. The plaintiff has failed in his burden of proof on this point.

I urge the further ground that, from the testimony of the manager, and even from the evidence given by the plaintiff and the evidence on behalf of the complainant in the criminal proceedings, it is perfectly plain that we have in this case not a scintilla of proof of want of probable cause for the plaintiff's arrest. This is one of the elements which the plaintiff must prove in sustaining his

Case.

10 burden of proof. The preponderance of the evidence shows that there was probable cause for his arrest at the instance of the usher, in that there was a crime, an assault and battery, committed against him, for which the plaintiff was charged in the criminal court. The fact that it terminated in his discharge does not, of itself, mean that the plaintiff can come in here and ask for damages on the ground of malicious prosecution.

As a further ground I urge that it has not been here shown that there was any malice whatsoever on the part of the defendant corporation, malice being likewise one of the elements necessary in the recovery of damages for malicious prosecution.

20 The last ground I wish to urge, if your Honor please, is that it has now been definitely established that even the manager of the State Theatre had no authority to authorize the arrest of the plaintiff. Even if he did say to the usher "make a charge against this man"—which he denies—yet it cannot be said that he was acting on behalf of the defendant corporation, at the time, or within the scope of his employment. The plaintiff has failed utterly in the proof of every element of his case.

30 The Court: The motion is denied, and I will allow you an exception.

Mr. Wolf: Exception.

(Mr. Wolf summed up to the jury on behalf of the defendant.)

(Mr. Colgan summed up to the jury on behalf of the plaintiff.)

Charge to the Jury.

The Court: This is an action, gentlemen, which is brought by Mr. Marmorstein, the complainant, against the State Theatre. There is no other defendant. The only case that is alleged here is a claim against the State Theatre. The complaint is that the State Theatre, a corporation, acting through its agent, committed assault upon this plaintiff on the 14th day of February, that they imprisoned or took into custody this plaintiff, and that they thereafter—all, of course, acting through their agents—prosecuted a claim against him, falsely, as it is said, which resulted in a dismissal of the criminal complaint, which they say, and, of course, are bound to show, was made without probable cause. Alleging those facts they ask a thousand dollars at your hands.

Now, the damages, of course, in a case of this kind, are very difficult to assess if the plaintiff is entitled to damages. The only method which the law has for giving damages in most legal cases is by giving money. In many cases it is possible to admeasure with some accuracy what money loss has been sustained by the plaintiff who comes seeking money damages at your hands. In a case like this, however, it is impossible to figure with any accuracy how much loss has been sustained. If the defendant committed the wrongs which are charged against it, then, of course, the plaintiff is entitled to such damages as you in your judgment think are justified by all the circumstances in the case as they have been testified to before you this afternoon, as a recompense for the humiliation and the obloquy to which the plaintiff claims to have been subjected by being arrested, carried to

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Charge to the Jury.

10 the police station in a patrol wagon, arraigned, and there being subsequently compelled to appear in the police court and make his defense. You will not, however, have to take up the question of damages and you will not have to go into that until you have determined the preliminary facts which are before you.

20 The defendant, the State Theatre Corporation, comes into court and says that it had absolutely nothing to do with the assault, if there was an assault, with the arrest of the plaintiff, with the prosecution of the plaintiff, or with the transactions subsequently; and, of course, if you find that to be so, if you find that the assault, if there was an assault, committed by James Tuohy, this
30 usher, upon Mr. Marmorstein, the plaintiff, was not done by him in the pursuit of his occupation as an usher for the State Theatre but was an act of individual wrong, and if you find that he, James Tuohy, prosecuted his complaint and caused the arrest of Mr. Marmorstein because of that individual wrong which he thought he had suffered from Mr. Marmorstein, and that he carried on the subsequent complaint in the Police Court which resulted in the subsequent dismissal of that complaint, then, of course, the State Theatre is not
40 liable at all, and you do not have to go any further than that. If the stories that have been told by the witnesses for the defendant convince you that whatever wrong that was done to the plaintiff—if there was any such wrong done—was done by James Tuohy individually, then, of course, that ends his case, and you do not need to go any further.

40 In order to hold the State Theatre you will have to find that the acts complained of by the

Charge to the Jury.

plaintiff were done at the instance of, for the benefit of, and with the sanction of the State Theatre. If you do find that to be so, then the next inquiry before you is whether there existed probable cause for the making of the complaint which was the basis of the arrest and of the subsequent proceedings in the Police Court, because the law is that, although one may cause another one to be arrested and it may turn out that when an investigation is had in a court of law he may be acquitted, that does not in itself justify the assessment of damages against the person who made the complaint. It must further appear that the complaint which resulted in the acquittal of the plaintiff in the civil suit was made without probable cause. That question of probable cause is peculiarly a question for you to deal with. Of course, gentlemen, this question of probable cause only becomes at all important if you find that the arrest was made at the instance of the State Theatre. 10 20

Now, the questions which are submitted to you here are very largely questions of fact with which you deal as jurors, being the final arbiters of the disputed questions of fact. Your first inquiry is: Was this assault, was this arrest, was this prosecution of which the plaintiff complains prosecuted or done by the State Theatre corporation through its agents? If it was not, that ends the case. If it was done by the State Theatre corporation your next inquiry is: Was it done without probable cause? If it appears to you that it was done by the State Theatre corporation, but that they had probable cause to take the proceedings which are complained of by the plaintiff, there can be no recovery. It is only in case you find that this prose- 30 40

Charge to the Jury.

cution was carried on and conducted by the State Theatre corporation and without probable cause that you will take up the question of damages.

10 If you come to the question of damages it is largely a question for you under all of the circumstances of the case, having in mind what damage if any has been sustained by the plaintiff, in order to determine what damages you should assess against the defendant and in favor of the plaintiff to compensate him for the wrong that has been done. You will of course not take up the question of damages unless you have decided the other questions against the defendant here. You may retire and consider your verdict.

(An officer was sworn and the jury retired.)

20 Mr. Wolf: I wish to take exception to your Honor's charge on the ground that there has been nothing said in the Court's charge regarding the burden of proof, which the plaintiff must sustain in this as in all other cases.

Secondly, I except to your Honor's charge, in that the Court has entirely omitted from its charge to the jury any reference to the element of malice, which is essential in all cases of malicious prosecution.

30 I also desire to except to so much of your Honor's charge as refers to an assault and battery committed against the plaintiff by the corporation through its agents, servants and employees, since there is no proof in this case or any allegations in the pleadings of any assault and battery committed on the plaintiff. On the contrary, the plaintiff's own testimony, as well as the police-court records, shows that the plaintiff's charge of assault and battery against the usher and his brother was

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Certificate of Trial Judge.

dismissed. The state of demand contains no such count or allegation.

I further take exception to so much of your Honor's charge as deals with the question of damages, wherein your Honor says that the plaintiff is entitled to such damages as the jury finds from the whole circumstances of the case, as a recompense for humiliation, obloquy, and so forth. No damages of such nature have been proved by the plaintiff, and, since, in a case such as this, a corporation cannot be held responsible for punitive damages or for smart money but can only be held responsible for compensatory damages, the verdict cannot be for more than six cents, if the jury finds that the plaintiff is entitled to any recovery.

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Certificate of Trial Judge.

To the Chief Justice of the Supreme Court of New Jersey:

I do certify the foregoing transcript, made by the stenographer designated by me and sworn, as the minutes and proceedings of the trial of the case of Leo Marmorstein, plaintiff, against State Theatres Corporation, defendants, at the First District Court of Jersey City, to be used on the appeal herein.

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CHARLES L. CARRICK,
Judge.

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Exhibit P-1.

RECORD OF DOCKET.

FIRST CRIMINAL COURT OF JERSEY CITY.

- Case #208.
 Date—Feb. 15, 1927.
 Precinct—7.
 10 Defendant—Leo Marmorstein 79 Crescent Ave.
 Age—30.
 Color—White.
 Nativity—U. S.
 Charge—A&B.
 Arraignment and Plea—Feb. 15, 1927. Not
 Guilty.
 State Witnesses—James Tuohy, 191 Summit Ave.
 Witnesses Defence—Defendant.
 20 Date of Trial—Feb. 15, 1927. Jury Waived.
 Disposition—Discharged.
 Magistrate—Sullivan.
 By Whom Bailed—
- Case #255.
 Date—Feb. 15, 1927.
 Precinct—4.
 Defendant—Austin Tuohy 191 Summit Ave.
 Age—23.
 30 Color—White.
 Nativity—U. S.
 Charge—A & B.
 Arraignment & Plea—Feb. 15, 1927. Not guilty.
 State Witnesses—Leo Marmorstein 79 Crescent
 Ave.
 Witnesses Defence—Defendant.
 Date of Trial—Feb. 15, 1927. Jury Waived.
 Disposition—Discharged.
 By Whom Bailed—
 40 Magistrate—Sullivan.

Exhibit P-1.

Case #256.
 Date—Feb. 15, 1927.
 Precinct—4.
 Defendant—Austin Tuohy 191 Summit Ave.
 Age—23.
 Color—White. 10
 Nativity—U. S.
 Charge—A&B.
 Arraignment & Plea—Feb. 15, 1927. Not guilty.
 State Witnesses—Leo Marmorstein 79 Crescent
 Ave.
 Witnesses Defence—Defendant.
 Date of Trial—Feb. 15, 1927. Not guilty.
 Disposition—Discharged.
 By Whom Bailed—
 Magistrate—Sullivan. 20

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Notice of Appeal.

(Filed July 21, 1928.)

NEW JERSEY SUPREME COURT.

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LEO MARMORSTEIN,
*Plaintiff-Respondent,**v.*STATE THEATRES CORPORATION, a
corporation, etc.,
Defendant-Appellant.

} On Appeal, etc.

To the above named Defendant, or Charles C.
Colgan, his attorney:

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PLEASE TAKE NOTICE that the defendant-appellant
hereby appeals to the Court of Errors and Appeals
from the whole of the judgment entered in this
cause.

Dated July 19, 1928.

Respectfully yours,

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ATWOOD C. WOLF,
Attorney and of Counsel for the
Defendant-Appellant.Due, timely and legal service of the above notice
on appeal acknowledged this 20th day of July,
1928.CHARLES C. COLGAN,
Attorney and of Counsel for the
Plaintiff-Respondent.

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Grounds of Appeal.

(Filed July 21, 1928.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

LEO MARMORSTEIN, <i>Plaintiff-Respondent,</i> <i>v.</i> STATE THEATRES CORPORATION, a corporation, etc., <i>Defendant-Appellant.</i>	}	On Appeal, etc.	10
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Defendant-appellant, State Theatres Corporation, states the following grounds of appeal: 20

1. That the Supreme Court erred in affirming the judgment of the First District Court of Jersey City.

Dated July 19, 1928.

ATWOOD C. WOLF,
Attorney for Defendant-Appellant.

Due, timely and legal service of the above notice on appeal acknowledged this 20th day of July, 1928. 30

CHARLES C. COLGAN,
Attorney for Plaintiff-Respondent.

Opinion of Supreme Court.
NEW JERSEY SUPREME COURT.
 No. 408, OCTOBER TERM, 1927.

Between

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LEO MARMORSTEIN,
Plaintiff-Respondent,

and

STATE THEATRES CORPORATION, a
 corporation of the State of
 New Jersey,
Defendant-Appellant.

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Argued October 5, 1927; decided January ,
 1928.

Defendant's appeal from district court.

Before—Justices PARKER, MINTURN and CAMPBELL.

For the defendant-appellant, ATWOOD C.
 WOLF.

For the plaintiff-respondent, CHARLES C.
 COLGAN.

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Per Curiam. The suit was for assault and bat-
 tery and false imprisonment and malicious prose-
 cution arising out of a dispute which took place
 during a moving picture or vaudeville show in the
 theatre of the defendant company. There was a
 verdict for the plaintiff, and defendant appeals.

The case was argued very much as if it were
 a rule to show cause but, of course, it is not. The
 principal ground of appeal urged is that the court

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Opinion of Supreme Court.

erred in refusing to nonsuit; but after an examination of the testimony in the case, we are clearly of opinion that it would have been error to nonsuit. The facts, as the jury was entitled to find them from the testimony, are that the plaintiff attended the performance as the holder of a reserved seat, and during the performance left his seat for the purpose of visiting the toilet; when he started back to his seat he was told he could not go then but to wait until the end of the number. Appellant's brief claims that he was told to wait until the end of the act, and there is a sharp contradiction in the testimony on this point, the plaintiff saying in his testimony that it was the end of the number, and that the act had six or seven numbers in it. He says he waited until the end of the number, and then went down to his seat, that shortly afterwards a young man—no doubt an usher—came down to him and said, "You think you are a privileged character." The plaintiff said, "No," and that the young man said, "Well, I will see you at the end of this act." And that at the end of the act he came down with a policeman who took him to the manager of the theatre, a Mr. Keale; that they talked a few minutes, and then Keale said to the officer, "Take him out." The officer called up the police station on the telephone, the patrol wagon came, and Mr. Keale told the usher to go to the station and make a charge of assault and battery against the plaintiff. All went to the station together, the charge was made, and afterwards dismissed. On cross examination the plaintiff testified that when he started back for his seat at the end of the number and got past the ushers, they grabbed hold

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Opinion of Supreme Court.

of him, and that he pulled away and walked down to his seat.

10 There are twenty-four separate specifications of alleged error in the case, but they can all be considered under three or four heads. The first is that the court erred in refusing to nonsuit and in refusing to direct a verdict. These refusals were proper; the testimony of the plaintiff, as the trial judge properly said, would prevent that. It shows, if believed (and the jury had a right to believe it), that the defendant's employes laid hands on the plaintiff, that he was substantially taken into custody in the theatre, turned over to an officer by the direction of Keale and taken down to a police station where a formal complaint was made against him by Keale's express instructions. Keale's authority in the premises as the executive of the theatre was shown by his own testimony; so that, as to the responsibility of the corporation, the case is within the rule laid down in *Wendelken v. The New York, Susquehanna & Western Railroad Co.*, 88 N. J. L. 270, 86 Atl. 377.

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What has been said seems to cover the first four points made in the brief.

30 Point five is based on specification 18, the language of which is, "The trial court erroneously left it to the jury to determine whether there was probable cause for the arrest of the plaintiff." This specification is insufficient to bring up the alleged error complained of in that it fails to give the language of the trial court; but we have examined the portion of the charge set out in the brief, and are clearly of opinion that the instructions there quoted are quite as favorable to the defendant as it had any right to expect.

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Point six brings up the admission of a question

Opinion of Supreme Court.

to the plaintiff as to his membership in certain fraternal organizations, and it is alleged that this was error; but in an action for malicious prosecution, evidence as to the character and standing of the plaintiff is relevant upon the question of damages.

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The seventh and last point is that the court erred in charging the jury that "The complaint is that the defendant, acting through its agent, committed an assault and battery upon the plaintiff," and it is alleged that this was error because the state of demand does not so allege. In answer to this it is sufficient to quote from the state of demand that the servants and agents of the defendant within the scope of their authority and in the performance of their duties "with force and arms assaulted the plaintiff and with great force and violence pulled and dragged him about," etc.

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We find no error in the case, and the judgment is, accordingly, affirmed.

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Rule of Affirmance and Remittitur.

NEW JERSEY SUPREME COURT.

No. 408, OCTOBER TERM, 1927.

Between

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LEO MARMORSTEIN,
Plaintiff-Respondent,

and

STATE THEATRES CORPORATION, a
corporation of the State of
New Jersey,
Defendant-Appellant.

} On Appeal.

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This cause having been duly argued at the October Term, 1927, of this Court by Atwood C. Wolf, Esq., of counsel for the defendant-appellant, and Charles C. Colgan, Esq., of counsel for the plaintiff-respondent, and the court having considered the same, and finding no error in the record or proceedings in the First District Court of Jersey City;

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It is thereupon ordered and adjudged, that the judgment of the First District Court of Jersey City, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the First District Court of Jersey City, to be proceeded with in accordance with this judgment and the practice of said court.

Entered June 19th, 1928.

On Motion of

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CHARLES C. COLGAN,
Attorney for Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

Between:

LEO MARMORSTEIN,
Plaintiff-Respondent,

and

STATE THEATRES CORPORATION, a
corporation of the State of
New Jersey,
Defendant-Appellant.

On Appeal
from
Supreme
Court.

BRIEF OF DEFENDANT-APPELLANT.

The Case.

This case was originally tried before the First District Court of Jersey City. The state of demand contained two counts—the first count being for false imprisonment and the second count for malicious prosecution. The learned Trial Court erroneously charged the jury that the action was also brought for assault and battery, although no direct testimony was adduced to prove any such unlawful act. The jury returned a verdict of \$150 in favor of the plaintiff. The defendant appealed to the Supreme Court, assigning 24 Specifications of Errors which were argued under seven different points in the brief. The Supreme Court affirmed the judgment of the District Court and this appeal was thereupon filed to the Court of Errors and Appeals.

Statement of Facts.

On February 15th, 1927, plaintiff-respondent, Leo Marmorstein, purchased a ticket for a matinee performance at the State Theatre, Jersey City, and took his seat. During the feature act of the vaudeville performance, Marmorstein left his seat to go back to the smoking room in the rear of the orchestra. He returned in a short time and was about to proceed down the aisle to take his seat when he was stopped by one of the ushers and told that he could not take his seat until the act was over, as it would disturb the other patrons in their seats. There were a number of other patrons standing behind the orchestra rail, likewise waiting to take their seats when the act would finish.

It appears from plaintiff's own testimony, that he refused to wait until the act was over, but began to go down the aisle after one or two minutes standing in the rear. He was again stopped by the usher and told that he could not go down the aisle to his seat until the act was over. He refused to wait, however, and in order to clear his way down to the seat, *punched James Tuohy, an usher, twice in the stomach, whereupon he walked down the aisle and took his seat.* The head usher then came down to his seat and asked Marmorstein to report to the manager's office, which he refused to do. In the meanwhile, James Tuohy, the usher who was struck in the stomach by Marmorstein, cryingly told his brother, Austin Tuohy, who was also an usher, of the episode, whereupon the brother, without any instructions or advice from anyone, ran out into the street and called in a police officer named Robert Heath, who was then on duty on the Boulevard and in uniform. *At the request of the brother, Officer Heath came into the theatre and proceeded down the aisle with James Tuohy, the*

usher who was struck, where Tuohy pointed out Marmorstein, the plaintiff-respondent, as his assailant. Marmorstein turned around in his seat and saw the officer coming down the aisle for him. He got up before the officer had actually reached the row in which he sat and walked up the aisle toward the officer. On the way up the aisle Marmorstein asked the officer, "Where are we going"? And the officer replied, "You are going out." "Out where?" "Out in the street" (p. 23, Case, line 27). When they reached the back of the orchestra and were on their way out, Marmorstein, according to his own testimony, again asked where they were going and the officer replied, "You are going outside," and Marmorstein replied that he was not going outside, *but insisted upon being arrested* (p. 49, Case, line 11). The officer then said that he would accommodate him and walked over to the manager's office to use the phone. The officer then brought Marmorstein into the office, followed by Tuohy, Hogan and Mr. Keale, the manager, whereupon the manager asked what the trouble was and they told him in Marmorstein's presence that Marmorstein had assaulted usher James Tuohy by punching him in the stomach. In the meanwhile, the police officer was already telephoning for a patrol wagon. In the manager's office, Marmorstein had become very "boisterous and nasty," insisting that he had paid for his seat and that he was going to do as he pleased and insisted upon remaining in the theatre. He was told by the manager to be quiet and finally was told to leave the theatre premises, stop at the box office on his way out, and get his money back. Marmorstein refused to do so, stating, "I want to be locked up." "I want to be arrested" (p. 49, Case, line 12).

In the meanwhile, Tuohy insisted upon pressing his personal complaint of assault and battery

against Marmorstein, and finally the patrol wagon arrived and took Marmorstein, Tuohy and a witness named Hogan to the station house, where *Marmorstein, the plaintiff, was booked on a charge of assault and battery preferred by James Tuohy in his personal and individual capacity.* The Police Captain, who was present at the time this charge was made, then advised James Tuohy not to arrest the plaintiff, but to come back to the Police Court the next morning and make his complaint at that time. Tuohy, however, refused to wait until the next morning, but insisted upon having Marmorstein booked then and there. The next morning when the matter came up to be heard in the Police Court, *the plaintiff swore out a counter complaint of assault and battery against James Tuohy and his brother, Austin Tuohy,* whereupon the Court, after hearing all three complaints, decided to dismiss them all and discharged all three boys from custody.

It will be observed throughout this recital of facts that the State Theatres Corporation was in nowise even remotely connected with the arrest, or with the cause of arrest. The only testimony in this case which could possibly be connected with the State Theatres Corporation is that of the plaintiff-respondent, wherein he testified (p. 24, Appellant's Brief, line 25) :

“Q. What did Mr. Keale say to him (Tuohy)? A. He said to him, you will go down and make a charge of assault and battery against this man.

“Q. Mr. Keale said that? A. Yes, he told this usher to make a charge of assault and battery, *while the patrol wagon was coming.* I got in the patrol wagon, and this young fellow got in also, and we were taken over to the Seventh Precinct.”

Mr. Keale was the theatre manager, a paid employee of the defendant State Theatres Corporation, a company duly incorporated under the laws of the State of New Jersey, as is conceded by the State of Demand, and it is important to note that the above conversation took place *after* the patrol was called for.

The plaintiff utterly failed to connect the corporation in any other way with the charge of assault and battery which was made against him and for which he was arrested. He also failed to prove that the manager, Mr. Keale, even if he did advise the usher to make the complaint of assault and battery against him, after the arrest had already taken place, had any authority, express or implied from the corporation, to order or suggest the arrest or that such order or advice or suggestion was for the benefit and protection of the corporation's property.

At no time during the trial of the entire case was it shown that the State Theatres Corporation gave any authority to any person whatsoever to order the plaintiff's arrest, or that the State Theatres Corporation in any way consented to or acquiesced in or even knew of the plaintiff's arrest.

On the contrary, the facts clearly disclosed, both at the end of the plaintiff's case and at the close of the entire case, that *the arrest of the plaintiff was occasioned by his own conduct in that he insisted upon being arrested*, or at best, because he had a complaint made against him by an usher, a subordinate employee, charging the plaintiff with committing an assault and battery upon this usher individually, and that *the usher in his individual capacity, not within the scope of his employment nor with any authority from the corporation, caused the plaintiff to be arrested*. So far as the State Theatres Corporation is concerned,

the attention of the Court is respectfully called to the testimony of Officer Heath, the plaintiff's witness (p. 50, Case, line 33, etc.), and of Mr. Keale, the manager of the theatre (p. 95, Case, line 10).

A perusal of Mr. Keale's testimony together with that of the police officer (called as a witness for the plaintiff), also the plaintiff's own testimony, will clearly show that the arrest was the individual act of the usher, because of a personal assault and battery committed upon him, and that the State Theatres Corporation had nothing whatsoever to do with the making of the complaint or with causing the arrest.

Conceding (for the purpose of argument only) that the defendant, State Theatres Corporation, did have something officially to do with the plaintiff's arrest; yet, the defendant respectfully makes the point that in view of the circumstances above recited it acted without malice and with probable cause. The plaintiff having failed to prove either the element of malice or the element of want of probable cause, the question became one that the Trial Judge should have decided on the motion to direct a verdict and the learned Trial Judge should not have permitted the case to go to the jury.

Then again the Supreme Court seemed to indicate in its opinion that some basis for a verdict lay in the fact that an "assault" may have been committed upon the plaintiff by the defendant corporation's usher. The learned Justices of the Supreme Court, however, seemed to overlook entirely that the counter-complaint of the plaintiff against the usher in the Police Magistrate's Court was dismissed, and it seems clear that this dismissal disposed of any future claim being raised in the resultant civil action, particularly as against

the defendant corporation. The Trial Judge likewise seemed to overlook this fact of dismissal of the plaintiff's criminal complaint.

The present action is unquestionably framed in false imprisonment and malicious prosecution. These are the only two counts in the State of Demand.

Nowhere in the testimony is there any direct reference to any "assault" committed on the plaintiff. None has been proven nor even specifically alleged, except that on (p. 101, State of Case, line 39) plaintiff denied that he assaulted the usher, and adds "*if* there was any assault committed, it was an assault upon me by those two boys grabbing me as I walked down the aisle."

It is respectfully submitted that a verdict for assault and battery must be based upon more positive evidence than this.

ARGUMENT.

The Supreme Court erred in affirming the judgment of the First District Court of Jersey City because:

(a) The plaintiff should have been nonsuited on the appellant's motion because of the plaintiff's failure to show any authority, or consent, or acquiescence by the appellant corporation resulting in the plaintiff's arrest.

(b) The plaintiff should have been nonsuited, and the defendant's motion for a direction of a verdict should have been granted because actions for malicious prosecutions and false imprisonment will not lie where the plaintiff was arrested at his own request.

(c) The learned Trial Judge erroneously held that it was a question for the jury to determine

whether the manager of the defendant, State Theatres Corporation, acted within the scope of his authority, and had the power to authorize on behalf of the corporation, the arrest of the plaintiff.

(d) The learned Trial Judge erroneously held that it was a question for the jury to determine whether the arrest of the plaintiff was caused by the defendant's employees acting within the scope of their employment, and with authority from the defendant corporation, when there was no legal evidence produced by the plaintiff to sustain such a ruling.

(e) The learned Trial Judge erroneously left it to the jury to determine whether there was probable cause for the arrest of the plaintiff.

(f) The learned Trial Judge erroneously and over the objection of the defendant, permitted the plaintiff to testify as to his membership in certain fraternal organizations for the purpose of proving in that manner, good moral character and damages to the plaintiff's reputation.

(g) The learned Trial Judge erroneously charged the jury upon the issues involved in this cause.

THE LAW.

POINT I.

The Supreme Court erred in affirming the judgment of the First District Court because the plaintiff should have been nonsuited on the appellant's motion since the plaintiff failed to show any authority or consent or acquiescence by the appellant corporation in plaintiff's arrest.

It will be observed from the plaintiff's own testimony throughout his direct case, that the State Theatres Corporation did not authorize or direct

the making of the complaint in the criminal court against the plaintiff.

It will be further observed that the plaintiff failed to connect his arrest with the defendant corporation or any person on its behalf who was duly authorized to order the plaintiff's arrest.

Throughout the plaintiff's own story, and particularly the testimony of Police Officer Heath, who was the plaintiff's own witness, and whose testimony binds the plaintiff, it must be noted that the arrest was caused by an usher, a minor employee, because of an alleged personal wrong committed upon this usher by the plaintiff.

The State Theatres Corporation had nothing whatever to do with either the alleged assault or with the plaintiff's arrest. Police Officer Heath testified that he was brought into the theatre by the usher's brother, and that upon his arrival into the theatre, he was informed by these boys as to what had taken place. No proper member of the defendant corporation had been consulted regarding this action, nor had it been shown at any time throughout this case, that the usher had any authority to take this step, or that it was within the scope of his employment.

It is obvious that the usher, James Tuohy, was acting upon his own initiative, apparently for the purpose of seeking some redress or satisfaction for the wrong which had been committed against him *individually*.

The uncorroborated testimony of the plaintiff, even assuming that to be true, discloses that the manager of the theatre, Mr. John Keale, advised the usher to go to the police station for the purpose of presenting "a charge of assault and battery against this man" (the plaintiff) and that this was done.

This evidence, however, standing alone, fails to

disclose any facts or circumstances which would create any sort of a legal presumption that the manager of the theatre at the time he gave this advice was acting on behalf of the defendant corporation or in its interest, or that the making of this statement was in pursuance of his duties as manager of the theatre, or that he was acting with any authority from the defendant corporation or that he was vested with any authority to "order" the plaintiff's arrest.

On the contrary, the only inference which can be raised from this testimony is that he was merely giving some friendly advice to the usher, as one employee would to another, viz., if it was true that an assault had been committed against the usher, then this usher should, in view of the conduct of the plaintiff, go to the police station and there make his personal complaint of assault and battery.

That the affray between the plaintiff and the usher was strictly a personal one with which the defendant corporation had nothing whatever to do, is clearly evidenced by the fact that the plaintiff himself, on the very next morning when the case came up in the Police Court, made a counter-charge of assault and battery against the usher and which complaint was likewise dismissed at the same time that the usher's complaint against the plaintiff was dismissed.

Perhaps the most important decision upon this point is that of *President, etc., of Baltimore and Y. Turnpike Road v. Green*, 86 Md. 161—37 Atl. 642, wherein the Court of Appeals of Maryland holds (syllabus):

"A Turnpike Company is not liable for false arrest and malicious prosecution of an individual on a charge of defrauding such Company of tolls preferred by a gate keeper where

it appears that such gate keeper was not expressly authorized to cause the arrest and that the Company had not adopted or ratified such an act.

“In an action against a Company for damages for false arrest and malicious prosecution it was error to refuse to direct a verdict in favor of the defendant, where there was no evidence legally sufficient to prove that any officer or agent was authorized to cause such arrest, or that defendant had subsequently adopted or ratified such act.”

Mr. Justice BRISCOE, speaking for the Court of Appeals of Maryland in this case, says:

“To hold a Company liable for a tortious act committed by its agent, the act must be done by the express precedent authority or ratified and adopted by the corporation or the act must be done *bona fide* in pursuance of a general authority in relation to the subject of it. * * * It should be made to appear that the agent was expressly authorized to act as he did by the corporation. The doing of such an act could not in the nature of things, be in the exercise of ordinary duties of the agent or servant entrusted with the custody of the Company's money or goods. And before the corporation could be made liable for such an act it must be shown that either there was an express precedent authority for doing the act or that the act had been ratified and adopted by the corporation. * * * Now, there is no evidence in this case that Bowen, the toll gatherer, was authorized by the corporation to make the arrest nor that he was acting within the scope of his employment.”

It will be noted that in the above quoted case the arrest of the plaintiff was brought about by the toll keeper who charged the plaintiff with defrauding the company of tolls. There is a very great distinction between this case and the case *sub judice*.

In the case *sub judice*, the plaintiff was arrested not because of any alleged wrong committed against the company, but from his own admissions and from the testimony of the police officer who actually made the arrest, it is very apparent that *the plaintiff's incarceration was due to an assault committed by him upon the usher, the corporation's employee.*

Certainly if, in the *Turnpike* case, the Court of Appeals of Maryland holds that the corporation could not be responsible for the acts of the gate keeper in charging the plaintiff with defrauding the Turnpike Company out of tolls, then certainly, by no stretch of the imagination, could it be held that the Turnpike Company would be responsible if the plaintiff in the *Turnpike Company* case had punched the gatekeeper in the stomach during an argument and thereupon the gatekeeper personally caused the plaintiff's arrest for such assault and battery. Yet, that is identically what is attempted to be done in the case *sub judice*.

The learned Trial Judge seemed to lay stress upon the plaintiff's statement that the manager (Keale) of the State Theatre told the usher to go to the Police Court and make the charge of assault and battery and that this bare statement was sufficient to hold the defendant corporation.

The courts, however, are not in accord with this view of the learned Trial Judge.

See:

Central Railroad Co. v. Brewer, 78 My. 394, 28 Atl. 615.

In this case the plaintiff boarded a street car and dropped into the fare box a coin resembling a 5c. piece which the driver immediately discovered was a counterfeit. Plaintiff's attention was called to it and he was asked to redeem the coin

which he said he would do if it was returned to him. The driver told the plaintiff that he could not open the box, but that the coin could be obtained by calling at the company's office. The plaintiff continued in the car which passed the company's office, without redeeming the bad coin and soon after the president and superintendent of the railroad company and other employees had him arrested for passing counterfeit money. He was brought before a United States Commissioner who discharged him. The passenger brought suit, but the Court of Appeals, however, held:

"A street Railway Company is not liable for a malicious prosecution and false arrest of an individual by its *President* and *Superintendent* on a charge of having passed counterfeit money by dropping a 'lead nickel' in the fare box, unless such officers have express authority for such action or is ratified by the company."

The Court goes on to say:

"When the plaintiff was arrested and held to bail, in the manner already stated, the affidavit was made by the Superintendent of the defendant. It is asserted in the brief of the appellee that the President of the Defendant was also present at that time. We fail, however, to discover the fact in the record. But, in our view of the case, it is immaterial whether he was or was not. *The President was but the agent of the defendant as were the other officers and employees.*

"There is nothing in the record which directly or indirectly tends to show that the Superintendent was acting in pursuance of express precedent authority from the defendant (*Carter v. Machine Co.*, 51 Md. 298), in causing the arrest of the plaintiff, nor had he any implied authority for so doing, arising out of the scope of his employment, so far, at least, as the testimony in the record discloses. The

fact that he had general authority to look after and manage the affairs of the defendant, in running its cars on the streets of Baltimore City for the carriage of passengers, in no manner suggests that he had, unless expressly authorized so to do by his principal, any authority to arrest a passenger for placing in the fare box a leaden nickel in payment of his fare. He may have a general authority to look after and protect the property of the defendant, and he may possess all the powers properly pertaining to such employment; and yet he would not be empowered to invoke the aid of the criminal law on behalf of his company unless he had express precedent authority. And, if this be true of the Superintendent, it is equally true of the other agents and employees of the defendant. As to the subsequent ratification or adoption by the defendant, the testimony is very meager and inconclusive. At the hearing of the charge, the President, the Superintendent, and the driver testified, and the impression made upon the mind of the commissioner is described by him in his testimony, when he says there was nothing in the conduct or manner of the officers or employees of the railway company before him to indicate that they wanted to do anything more than tell the facts which were within their knowledge. And which appertain to their examination. The fact that the President, Superintendent and driver testified before the Commissioner affords no legally sufficient evidence of ratification or adoption, for, if they were without authority in causing the arrest, the subsequent testimony given for the Government by them, or the manner in which they demeaned themselves in delivering their testimony, in no way supports the theory of adoption or ratification. (*Improvement Co. v. Steinmeier*, 72 Md. 320, 20 Atl. 188.) There was not we think any legally sufficient evidence given at the trial below from which the jury could have properly inferred either express precedent authority to justify

the agents of the defendant in causing the arrest of the plaintiff, nor was there any legal evidence which establishes the adoption or ratification by the defendant of the acts of its agents. It was certainly not within any of the usual objects or powers of the defendant company to prosecute offenders against the criminal laws of the United States, and it had not been intended that any such powers ever were specially conferred upon the defendant. While courts of some of the States have held corporations to strict liability in actions of like character with the one now under consideration, we are following the doctrine which we think this court has correctly announced in the case of *Carter v. Machine Co.*, 51 Md. 290. To hold differently would, we think, be opening wide the door to a class of cases which courts do not look upon with favor. Public justice has its claims, as well as the individual citizen and it is no part of the privileges of the latter that he can with impunity ignore the reasonable demands of the former."

The Court also adds:

"When all the facts which the plaintiff's evidence conduces to prove do not show a want of probable cause, it becomes a mere question of law, which the court must decide, and it will be useless and improper to take the opinion of the jury upon it."

The Court thereupon reversed the judgment in favor of the plaintiff without granting a new trial.

In the case above quoted the attention of the Court is again respectfully called to the fact that the arrest of the plaintiff was brought about by a charge arising out of the prosecution of the company's business, and not because of any personal attack upon the conductor, for which the conductor alone sought personal redress or satisfaction.

In the case of *Beiswanger v. American Bonding*

& *Trust Company*, 98 Md. 287—57 Atl. 202, the Court of Appeals in Maryland again lays down the rule:

“Where a corporation is sought to be held liable for the wrongful and malicious act of its agent or servant in putting the criminal law in operation against a party upon a charge of having fraudulently embezzled the money and goods of the company in order to sustain the right to recover (by the plaintiff) it should be made to appear that the agent was expressly authorized to act as he did by the corporation. The doing of such an act could not in the nature of things, be in the exercise of the ordinary duties of the agent or servant entrusted with the custody of the company’s goods or money; and, before the corporation could be made liable for such an act it must be shown either that there was express precedent authority for the doing of the act or that the act had been ratified and adopted by the corporation. * * *”

Once again the attention of this Court is respectfully called to the fact that the act of the usher, in causing the plaintiff’s arrest, was not for the purpose of protecting the defendant, State Theatres Corporation or its property, but because of the usher’s and the manager’s personal desires to vindicate justice on account of the alleged assault and battery committed personally upon the usher by the plaintiff.

A case directly in point is that of *Concoff v. Hippodrome Theatre Co.*, 180 Cal. 626—182 Pac. 273, where the Court holds:

“An usher in a theatre has no implied authority to arrest or cause the arrest of a patron whose conduct is disorderly.

“The evidence merely shows that he was employed as an usher in the theatre *which* was the scene of the arrest, and that as such usher, his duty was to attend to the seating of

the patrons after they had entered the room. It may be true that one of the implied duties of an usher is to prevent disorderly conduct in the theatre and perhaps to eject persons guilty thereof, but there is no evidence on the subject respecting his duties in that particular, or that he had any such authority. But in any event there was no implied authority to him from the defendant to arrest or imprison persons who might commit criminal offenses while in the theatre. Such authority is not to be implied from the mere fact that he was an usher with the duty of attending to the seating of the patrons and keeping order. The authorities are practically unanimous to this effect."

In the present case, however, the plaintiff himself called the usher, James Tuohy, to the stand, for the purpose of having him define his duties (p. 44, State of Case), and it was then definitely established that the only duties of the ushers were to escort patrons to their seats and keeping order. It was *not* shown that the ushers had any authority to order patrons arrested. The plaintiff is bound by this testimony.

In New Jersey, the law is well settled that a corporation cannot be held for the torts of its servants or agents unless such tortious acts are committed by the agents and servants in performance of their duties and with express authority from the corporation.

Brokaw v. N. J. Railroad & Construction Co. and Campbell, 3 Vroom 328;
Vance v. Erie Railroad, 3 Vroom 334;
 See 25 *Corpus Juris*, 500;
Daniel v. Atlantic Coast Line R. R. Co.,
 136 N. C. 517—67 L. R. A. 455;
Bernheimer v. Becker, 62 Atl. (Mo.) 526—
 3 L. R. A. (N. S. 221.

In the case *sub judice*, the tort of assault and battery was committed by the plaintiff on the usher while the usher was engaged in the performance of his duties.

It is respectfully submitted that the Supreme Court obviously overlooked the most important feature of the appellant's case and entirely omits any reference thereto in its recital of facts, *i. e.*, that the plaintiff expressly invited his own arrest by requesting the Police Officer to arrest him; that the defendant corporation had nothing whatever to do with the arrest is borne out by the Supreme Court's own recital of facts since the Court recognizes the fact that the Manager, Keale, after talking to the Police Officer, stated to him "take him out." Marmorstein refused to go out but told the officer to arrest him and that he, Marmorstein, would then go with the Police Officer "peacefully."

It is respectfully submitted that the citation relied upon by the Supreme Court in affirming the judgment of the First District Court—*Wendelken v. N. Y., Susquehanna & Western Railroad*, 88 N. J. Law 270, 86 Atl. 377, is based upon a state of facts totally different from those *sub justice*.

In the *Wendelken* case the false imprisonment was occasioned by the direct act of the defendant corporation's servants and agents as the acts complained of were brought about in order to further the interests and protect the property of the railroad company.

In that case the officials of the railroad had to tear up some railroad tracks and in order to avoid interference by the plaintiffs, locked them all up in a box car, and held them at bay with drawn guns until the tracks were torn up, after which the men were released.

In the case at bar, however, I cannot too emphatically point out that the imprisonment and

prosecution were *not* caused by the defendant corporation or in the course of its business or in the protection of the State Theatres property. It was caused entirely by the plaintiff punching the usher in the stomach. This assertion is entirely substantiated by the subject-matter of the criminal complaint which was filed by the usher in his individual capacity and alleged an assault and battery.

Besides, the testimony clearly shows that even this assault and battery committed upon the usher would not have led to the arrest and making of the criminal charge had it not been for the plaintiff's own insistence to be arrested.

In the *Wendelken* case, Mr. Justice PARKER himself points out that under the circumstances of that case the acts of the company justified a verdict for punitive damages against it. The appellant in this case respectfully contends that under the facts *sub judice* the verdict is not justified.

Apparently every case must be decided upon its own merits and it is respectfully submitted that the plaintiff-respondent has shown no facts or circumstances which justifies his verdict.

The plaintiff-respondent and the Court seem to lay some stress upon the point that the verdict of the jury may have been based upon an alleged assault and battery committed upon the plaintiff-respondent by the usher and his brother.

It is difficult to conceive any justification for this view. Plaintiff points to the stereotyped phraseology of Paragraph 2 of the first count of the State of Demand which alleges "with force and arms assaulted the plaintiff and with great force and violence pulled and dragged him about," etc., etc., but nowhere in the testimony is there any evidence of any assault committed upon the plaintiff by the ushers except that which is quoted

on page 101, line 39, of the State of Case, and the language used by the plaintiff on this point is too hazy and indifferent to justify the verdict. The first count of the plaintiff's State of Demand is framed in false imprisonment and the "force and arms" allegation is the usual stereotyped language employed to describe the manner in which the plaintiff was taken into custody in order that he may be falsely imprisoned. The testimony, however, distinctly shows that no force and arms were used since the arrest was occasioned by the plaintiff's own request and invitation.

But the Supreme Court, in its opinion, says (p. 118, State of Case, line 13):

"It shows, if believed, and the jury had a right to believe it, that the defendant's employees laid hands on the plaintiff, that he was substantially taken into custody in the theatre, turned over to a police officer by the direction of Keale and taken down to a police station where a formal complaint was made against him by Keale's express instructions."

The evidence, however, does not bear this out. It seems to me that what the Court must take into consideration is, the question as to whether the defendant's employees under the circumstances indicated by the evidence, *unlawfully* laid hands on the plaintiff. The language employed by the Supreme Court to the effect that the plaintiff was "substantially taken into custody in the theatre, etc.," must be disregarded since the plaintiff himself, as indicated in the excerpts of testimony hereinabove quoted, invited and requested his own arrest.

Surely he cannot now be heard to complain because his request was granted—granted by a police officer who was *not* at the time acting for the defendant corporation.

The verdict in this case must stand or fall upon one of two theories: (A) The verdict is either compensation for an alleged assault and battery, or, (B) it is to compensate the plaintiff for his alleged false arrest and malicious prosecution.

The latter ground must fail completely because plaintiff admits that he was arrested upon his own request and the making of the complaint was the personal act of the usher for the punches in the stomach which the usher received at the hands of the plaintiff.

If the verdict is sought to be predicated upon the assault and battery alleged to have been committed by the defendant's employees, then here too, the plaintiff fails since nowhere in the testimony is there a single fact which in any way connects the defendant corporation with the assault. Neither is the evidence of the plaintiff in support of this alleged assault specifically convincing. He says he was "grabbed" by the usher when he attempted to take his seat. Was this grabbing unlawful? Certainly the usher had a right to prevent him from taking his seat while the act was in progress and, furthermore, it has not been shown anywhere in the testimony that this act on the part of the ushers was unlawful or in any way prejudicial to the rights of the plaintiff-respondent.

If the plaintiff was the quiet, respectable, law-abiding and peaceful citizen he claims to be, why was he so belligerent in insisting upon taking his seat after he was told to wait until the act or the number was over. Why did he not take into consideration the rights of thousands of other people who were in the theatre at the time and who would be annoyed by his passing up and down the aisle while the act was in progress?

It does not seem to me that under the facts of this case and the conduct of the plaintiff-respondent while in the theatre, this verdict should stand and that the defendant corporation should be penalized for the act of its usher who *lawfully* attempted to stop the plaintiff from taking his seat.

Mr. Keale, the manager of the theatre, testified (p. 91, State of Case, line 22) :

“Q. What did Tuohy say to you? A. He told me he had been hit out on the aisle. I asked him why, and he told me that a lot of these boys had come up during the act. You see, if the boys don't like an act, they get up and walk towards the rear, disturbing everybody. That is what happened during this act. So, in order to protect the patrons—and not have them annoyed, I ask the boys to please be courteous, and ninety per cent. of them will, but once in a while we will get somebody who is a little bit overbearing or very anxious, and they will force their way down. Naturally, I was a little concerned about the boy's (the usher) being hit, but it was a matter between Tuohy and the other man; nothing that the State Theatre had anything to do with.”

The Supreme Court likewise seemed to emphasize stress upon the fact that the manager (Keale) “instructed” Tuohy to go down to make the charge to the Police Station, but the testimony on this point is very clear that this “instruction” or “advice” was given after the plaintiff had been taken into custody on the complaint of the usher and *after the patrol wagon was called up for*. See also page 93, Case, line 1:

“Q. Did you have anything to do with the charge that was made against Marmorstein? A. ‘Why, no, I had absolutely nothing whatsoever to do with that. It seemed that the boys

had made up their minds as to what they were going to do. Nobody had any authority to make such charges on behalf of the State Theatre.'

"Q. You are the only one that had? A. Absolutely.

"Q. You didn't make any charge, did you? A. No, sir.

"Q. There wasn't any assault and battery committed on you, was there? A. I didn't see anything."

The testimony also shows that throughout this affair Marmorstein was very loud and boisterous in the theatre. The defendant corporation has a right to protect its patrons and it is under a duty to see that peace and quiet are maintained at all times during the performance.

As pointed out by Mr. Keale in his testimony, panics and other serious results are very likely to follow commotions of any sort. For doing this can the State Theatres Corporation be made to pay damages to a young man who acts as Marmorstein did, and who assaulted an usher of the theatre simply because the usher was trying to do his duty? Or, under the facts of this case, as will be disclosed upon a careful reading of the State of Case, can it be said that the State Theatres Corporation, as a corporation, had anything to do with the plaintiff's arrest or that the alleged assault he claims was committed upon him and which he describes as a mere "grabbing"?

POINT II.

The motion for a nonsuit and the direction of a verdict should have been granted because the plaintiff requested his own arrest.

A cursory examination of the plaintiff's testimony, as corroborated by the police officer who made the arrest, establishes the fact that *the officer was first called into the theatre by the assaulted usher for the purpose of ejecting the plaintiff*. The plaintiff refused to go out and demanded that he be arrested, whereupon the police officer accommodated him. The testimony of the plaintiff on this point is as follows (p. 23, State of Case, line 22) on direct examination:

"A. I said to Mr. Keale—I said, 'I haven't done anything.' I talked a few minutes, but that was the effect, and Mr. Keale says, 'You are going out.' So when the officer brought me out I said, 'Where are we going to.' He said, 'You are going out.' 'Out where.' 'Out in the street.' So he went over and he talked to Mr. Keale. Mr. Keale said, 'Take him out.' I said to the Officer, 'I am not going out in the street. I don't know what you can do in this matter, but if you will arrest me, I will go with you peacefully. This is, if you want to arrest me, I will go with you peacefully.' The Officer then went back to Mr. Keale and Mr. Keale said, 'All right bring him inside—into the office.'"

On cross examination the plaintiff testified as follows (p. 34, State of Case, line 13):

"Q. When the cop came down the aisle, did he take you out or did he ask you to go out?
A. *He asked me.*"

And again on page 34, State of Case, line 34:

“Q. How long after that was it before you went out? A. Well, after we went on up there, we were about four feet away from Mr. Keale, and then the Officer says, ‘Come on.’ I said, ‘Where are we going?’ He says, ‘Outside.’ I said, ‘No, I am not going out. I don’t know what you can do about this matter, but if you want to arrest me, I will go with you peacefully.’”

And again on page 38, State of Case, line 37:

“Q. All he (Police Officer) wanted to do was to put you out of the theatre and you refused to go. A. Yes, sir.”

Police Officer Heath testifying for the plaintiff on cross examination says (p. 49, State of Case, line 4):

“Q. When you got to the back of the theatre—what happened there? A. Why, we got to the back, and he came to the conclusion that he was not going out, so he requested that he be arrested.”

Again on page 50, State of Case, line 14:

“Q. Did Mr. Keale (the manager) tell you to arrest Mr. Marmorstein? A. Not that I remember.”

“Q. If he had, wouldn’t you remember it? A. Well, I don’t take orders from Mr. Keale in regard to arresting people. If I came to that conclusion, why, I was supposed to do that myself.”

Then again on recross examination (p. 62, State of Case, line 29), the police officer testifies:

“Q. You would not have arrested Mr. Marmorstein if he had not asked for it, would you? A. No, sir.”

"Q. In fact, you hadn't any idea of putting him under arrest at all? A. No, sir.

"Q. Didn't you tell Mr. Tuohy that if he wanted to make a complaint against Mr. Marmorstein that he would have to go to the police station the next morning and do so? A. Well, sir, I usually tell them that.

"Q. You usually do so. But you did so this time, didn't you? Didn't you tell Mr. Tuohy that if he wanted Marmorstein arrested on a charge of assault and battery he could go down to the police station the next morning and file his complaint? Isn't that right? A. I think I told him that over at the station.

"Q. Yes, at the station or in the theatre? A. Well, I just don't remember now where it was.

"Q. But you might have said that to him? A. I might have said that.

"Q. And it was only when Mr. Marmorstein insisted upon being arrested that you took him in? A. That is all.

"Q. And you took him in at that time instead of waiting until the next morning? A. That is right."

Thus it will be observed that the case *sub judice* binds the defendant corporation even less than the Maryland cases above cited, for in addition to the facts hereinabove argued, we have the additional circumstances here, which unquestionably, and by the plaintiff's own admission, prove that the plaintiff was arrested at his own request or suggestion rather than at the direction of the corporation or any of its employees, and certainly not in furtherance of the company's business. This strikes at the very heart of any element of probable cause, or charge that the *defendant* caused plaintiff's arrest.

The law is well settled that the arrest of a person by a policeman called by a corporation employee for the purpose of *ejecting* a person from

premises of the corporation, cannot be construed, when the ejection leads to an arrest invited by the individual as binding upon the corporation.

See *Little Rock Traction & Electric Co. v. Walker*, 40 L. R. A. 473, where the Arkansas Supreme Court holds:

“The arrest of a street car passenger by a Policeman called by the conductor of the car to arrest and take him off on the charge of riding without paying the fare does not render the carrier liable for false imprisonment, when the conductor had been authorized only to put delinquent passengers off the car.”

See, also, *Decker v. Lackawanna R. R. Co.*, 39 Pa. Super. 225, where the Court holds:

“Where a discharged employee after being removed from the car by the Peace Officer, ran back into the car and was thereupon followed, brought out and arrested by the Peace Officer for disorderly conduct, the Railroad Company, having only authorized his removal from the car, could not be liable for the false imprisonment.”

Then again, in the case at bar, Marmorstein testified on direct examination by Mr. Colgan, in rebuttal (p. 101, State of Case, line 25):

“Q. Mr. Marmorstein, you heard Mr. Keale say that he had nothing at all to do with your arrest; is that so? A. He told Tuohy to make a charge when we were in the inner office. He told the officer to take me out.

“Q. That is, Mr. Keale, the man who was just on the stand here? A. Yes, sir.

“Q. Did he say anything to you about your having to behave yourself or you could get your money back? A. No mention was made about money at all. No offer was ever made about money. *The main idea was to put me out in the street. That was the main idea.*”

From this testimony it is quite clear that at the close of the plaintiff's direct case and at the close of the entire case, the plaintiff failed in the burden of proof which is required in cases of false arrest and malicious prosecution.

He failed to prove:

FIRST.—Want of probable cause on the part of the corporation.

SECOND.—That his arrest was brought about by the corporation or anyone acting on behalf of the corporation with authority, and within the scope of their employment.

THIRD.—His own evidence establishes definitely and convincingly that he was arrested at his own request rather than upon any charge made by the corporation. He was the first and only person to suggest it.

FOURTH.—The evidence showed quite clearly that the plaintiff's request to be arrested wiped out completely the presumption of malice or want of probable cause on the part of the corporation.

All of the above points are essential elements to spell out a case of malicious prosecution and of false imprisonment.

It is respectfully submitted that this case should never have been permitted to go to the jury since no legal evidence had been adduced by the plaintiff which in any way involved or connected the defendant corporation with the plaintiff's suit.

POINT III.

The Trial Judge erroneously held that it was a question for the jury to determine whether the manager of the defendant corporation acted within the scope of his authority and had power to authorize on behalf of the defendant corporation the arrest of the plaintiff.

Mr. Keale testified with regard to this as follows (p. 93, State of Case, line 5) :

“Q. Did you have anything to do with the charge that was made against Marmorstein?
A. Why, no, I had absolutely nothing whatsoever to do with that. It seemed that the boys had made up their minds as to what they were going to do. *Nobody had any authority to make such charges on behalf of the State Theatre.*”

This evidence remained uncontradicted, and the issues thereupon became a matter of law for the Court to decide. *Magowan v. Rickey, infra.*

POINT IV.

The Trial Court erroneously held that it was a question for the jury to determine whether the arrest of the plaintiff was caused by the defendant's employees acting within the scope of their employment and with authority from the defendant corporation when there was no legal evidence adduced by the plaintiff to sustain such a ruling.

Under this point will be argued Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the Specification of Determinations (pp. 3 and 4, State of Case).

A cursory examination of the testimony in this case absolutely fails to disclose any evidence whatsoever offered by the plaintiff which in any way fixes or attempts to fix the liability of the defendant corporation through the acts of its employees.

Not a line of testimony has been offered by the plaintiff which in any way connects the duties of such employees with the arrest. It was not even attempted to be proved by the plaintiff that the agents and employees of the State Theatres Corporation acted within the scope of their authority or employment.

Certainly these things cannot be left to inference, and the jury must have some positive proof of these essential elements upon which they can rest a verdict.

Corporations can only act through their servants, agents, and employees, and in order for a corporation to be held for the tortious acts of its servants, agents, or employees, the burden rests upon the plaintiff in each of these cases to prove that such tortious acts were committed by or with the authority of the corporation and within the scope of the employment of such agents, servants and employees. These elements cannot be inferred but positive proof may be offered to establish them, even where the officers of the corporation are concerned.

This principle of law is so well settled that I respectfully submit no additional citations are necessary to be quoted in support.

For further argument under this point the attention of the Court is respectfully directed to the argument of Point I of this brief.

POINT V.

The Trial Court erroneously left it to the jury to determine whether there was probable cause for the arrest of the plaintiff (Par. 18 of the Specification of Determinations).

At the close of the entire case the defendant moved for a direction of a verdict (p. 105, State of Case, line 34) upon the ground that the plaintiff failed to prove want of probable cause and any degree of malice.

The Court, however, overruled these motions and left it for the jury to determine whether or not there was probable cause for or malice in the plaintiff's arrest and the learned Trial Judge charged the jury as follows (p. 109, State of Case, line 26):

"Now, the questions which are submitted to you here are very largely questions of fact with which you deal as jurors being the final arbiters of the disputed questions of fact. Your first inquiry is: Was this assault; was this arrest; was this prosecution of which the plaintiff complains prosecuted or done by the State Theatres Corporation through its agents. If it was not, that ends the case. If it was done by the State Theatres Corporation, your next inquiry is: Was it done without probable cause? If it appears to you that it was done by the State Theatres Corporation, but that they had probable cause to take the proceedings which are complained of by the plaintiff, there can be no recovery. It is only in case you find that this prosecution was carried on and conducted by the State Theatres Corporation and without probable cause, then you will take up the question of damages."

It will be noted that the Court omitted to define

“probable cause” and *the question was left to the jury to determine whether or not the plaintiff was guilty as charged in the criminal complaint.*

This, we respectfully submit, was harmful error since the question was not whether the plaintiff had committed the things with which he was charged in the Police Court. The sole question was whether or not the State Theatres Corporation had probable cause to believe that an assault had taken place, or, more properly speaking, the issue was whether or not the usher, James Tuohy (if his action *did* bind defendant), had probable cause for making and pressing an assault and charge of assault and battery, and whether there was any malice.

The guilt or innoence of the plaintiff in the criminal proceedings was not an issue.

See *Magowan v. Rickey*, 64 N. J. 402; 45 Atl. 804, where Mr. Justice VAN SYCKLE speaking for the Supreme Court said:

“The question of the existence of a reasonable and probable cause for the prosecution of the persons of malice should have been decided by the court and not have been left as it was to the jury.”

See *Bell v. Railroad Co.*, 58 Law. 227; 33 Atl. 211.

See, also, *Stricker v. Railroad Co.*, 16 Law. 230; 30 Atl. 776.

The testimony of the defense at the trial was uncontradicted and uncontroverted in so far as the source of its information was concerned regarding the occurrences which led up to the making of the criminal complaint.

The plaintiff in no wise contradicted the evidence of the defense in any particular, especially, with respect to the testimony of the Manager, Mr. Keale, or of his assistant, Mr. Hogan.

Both these men testified, and their testimony is supported by Police Officer Heath, a witness for the plaintiff, that an assault and battery had taken place and that the usher, James Tuohy, who claimed to have been assaulted, was standing there crying (p. 95, State of Case, line 39); that Hogan heard a voice cry out in the darkness and stillness of the theatre, "Leave go, I am going to my seat!" (p. 83, State of Case, line 30).

The plaintiff himself in rebuttal testified (p. 103, line 15):

"Q. After they took hold of you how did you free yourself of their grasp? A. *I pulled away from them.*"

Whether the plaintiff, in "pulling away" actually struck the usher in the stomach as was charged and related by the usher to the manager, goes to the very essence of probable cause. The question is not whether the plaintiff struck the usher, but whether there was reasonable and probable cause for an arrest on this charge—that is, if the corporation is to be held responsible for the arrest at all.

Mr. Keale, the manager of the theatre, testified that he knew nothing whatever of the arrest or of the policeman's intention to arrest the plaintiff until the officer was actually telephoning for the patrol wagon. This story is elaborately corroborated by the plaintiff, who himself testified that up to that point the only thing that he heard the manager say was that the plaintiff was to go out of the theatre.

Not one word have we in the testimony throughout this case, either in the plaintiff's direct proof, or in rebuttal, which bears any relation to the issue of want of probable cause or presence of malice.

In the case of *Isso v. Viscount*, 74 Law. 65, 64 Atl. 953, Mr. Justice FORT says:

“An accusation of larceny is *justified* if the party accused be guilty. It is *excused* if probable cause be found for the making of the accusation although the prosecution resulted in acquittal. * * * At the trial in this case the court charged the jury: ‘was the affidavits true or false? From the falsity of the affidavit upon which an arrest is procured malice and want of probable cause may be inferred.’

“We do not think that this statement of the law is accurate under our decisions. It left the jury to find the defendant guilty if the facts stated in the complaint were not true, whether he had or had not reasonable and probable cause for stating them; and if he did or did not believe them to be true.”

In the *Rickey* case, *supra*, the Court held that it was immaterial whether or not there was malice; if there was a reasonable and probable cause for making the complaint, and if the defendant acts cautiously after due investigation then, if there is a reasonable or probable cause, the defendant cannot be held responsible in a civil case for damages.

The testimony of the defendant in the case *sub judice* is replete with evidence of the fact that the corporation took no steps whatever to cause the plaintiff's arrest.

And even if we tie up the remark alleged to have been made by Mr. Keale, the manager, to the usher, wherein the manager advised the usher to make the complaint of assault and battery in the Police Court, yet it cannot be charged to have been done without reasonable or probable cause or with malice, because the usher who claimed to have been assaulted was standing there crying, and pointed out the plaintiff as the person who had committed the offense.

The mere fact that the plaintiff was discharged in the Police Court does not of itself, standing alone, justify a verdict in his favor.

Aside from all this, the defense wishes to emphasize the fact that Tuohy, the usher, acted upon his own behalf, and not for the defendant corporation, when he pressed the criminal charge against the plaintiff.

POINT VI.

The Trial Court erroneously and over the objection of the defendant permitted the plaintiff to testify as to his membership in certain fraternal organizations (Par. 23, Specification of Determinations).

In response to a question put to the plaintiff on direct examination the plaintiff was allowed to testify over objection that he was a member of the Benevolent and Protective Order of Elks, and the Albert L. Quinn Post of the American Legion.

It is respectfully submitted that this ruling was prejudicial and harmful error, since it was argued at the time that its sole purpose was to prove good character and damages to plaintiff's reputation.

It is respectfully submitted that, in the first place, the good moral character of the plaintiff was not an issue; and even if it were, the mere fact of membership in these two fraternal organizations would not legally establish it. Even scoundrels belong to the most respectable fraternal and social orders.

It is quite probable that the plaintiff was of good character, but it certainly was not attacked by the defense.

The members of the jury may have been Elks or members of the American Legion, or members

of their family may have been affiliated with either or both these organizations, and it is clear that the sole purpose of this question and its answer was to appeal to the sympathies of the jury through these fraternal affiliations.

The question should not have been allowed and it is respectfully submitted that the Court erred in permitting it to be answered.

POINT VII.

● **The Trial Court erroneously charged the jury as follows:**

“THE COMPLAINT IS THAT THE STATE THEATRES CORPORATION ACTING THRU ITS AGENT COMMITTED AN ASSAULT AND BATTERY UPON THIS PLAINTIFF ON THE 14th DAY OF FEBRUARY, 1927,” etc.

(Under this point will be argued paragraphs 20 and 21 of the Specification of Determinations.)

It is obvious from a reading of the pleadings and of the evidence in this case, that the learned Trial Court committed a serious and most harmful error in thus instructing the jury, since it is apparent from the State of Demand as it is also from the evidence, that this case is based solely upon two grounds:

First: For malicious prosecution;

Second: For false imprisonment.

No charge is made by the plaintiff that the defendant corporation committed an assault and battery against him, nor was any mention made at the trial to amend the pleadings so as to include a count for assault and battery. The learned Trial Judge must have confused some of the issues of the case and undoubtedly the learned Trial Judge's

injection of this element of assault and battery was due to a misunderstanding on his part.

However, the appellant respectfully submits that the statement of the Trial Court to the jury on the question of assault and battery was a serious and harmful error, prejudicial to the defendant, and for this reason also the judgment ought to be reversed.

RESUME.

A reading of the testimony contained in the record of this case will disclose at least one outstanding feature which definitely disposes of the plaintiff's contention that the State Theatres Corporation should be made to respond in damages for his arrest.

This feature is the fact that the plaintiff was arrested upon his own request, and the complaint was later pressed by James Tuohy, the usher, because an assault and battery was alleged to have been committed upon him, individually, by the plaintiff.

I can readily understand that there *might* be some ground upon which the corporation can be held had the plaintiff been arrested on a charge preferred by the State Theatres Corporation through its officers, agents, servants and employees arising out of some *act of misconduct* on the part of the plaintiff *as against the State Theatres Corporation or its property*. As for instance, a disturbance had arisen in the theatre and the corporation then arrested the plaintiff charging him with causing the disturbance and the plaintiff later being discharged. But this is not the case; the plaintiff was arrested because he was alleged to have punched an usher, and this usher turns around and prefers a charge of assault and bat-

tery against the plaintiff. That the assault took place on the corporation's premises, is immaterial. It might have happened anywhere.

Certainly it cannot be charged that the corporation had anything to do with either the assault and battery or with the plaintiff's subsequent arrest. Neither it, nor its property, had any connection with this affray.

But even granting, for the purpose of argument, that such was the case, then the appellant respectfully submits, in view of the line of cases hereinabove cited, that the judgment against the State Theatres Corporation cannot be sustained and the judgment of the Supreme Court should be reversed.

The plaintiff at the trial seemed to lay great stress upon the rules of the State Theatre which were being enforced at the time of the trouble. Aside from the fact that the rule being enforced was a reasonable one, and invoked for the protection of the thousands of people—men, women and children—who patronize the theatre, such an argument is beside the point.

For example: If in the *Turnpike* case, a passenger boards a street car and refuses to pay his fare. *An argument ensues, and the passenger assaults the conductor.* The conductor stops the car and calls over some nearby police officer, who, on the conductor's personal complaint, arrests the passenger. Both the passenger and the street car conductor make charges of assault and battery against each other and at the police court hearing, both complaints are dismissed.

Under the above facts, can it be held that the Street Railway Company can be held responsible or liable in damages? I am unable to lend myself to an affirmative view, and I respectfully contend that it would make no difference even if the gen-

eral manager of the Railway Company was present and advised the conductor to press his personal complaint.

The example above quoted is exactly on all fours with the facts in the case *sub judice*, except that in our case, the plaintiff insisted upon being arrested.

Respectfully submitted,

ATWOOD C. WOLF,
Attorney for Defendant-Appellant.

APPEAL PRINTING CO., 22 THAMES ST., NEW YORK CITY

[9542]

New Jersey Court of Errors and Appeals

Between:

LEO MARMORSTEIN,
Plaintiff-Respondent,

and

STATE THEATRES CORPORATION, a
corporation of the State of
New Jersey,
Defendant-Appellant.

On Appeal from
Supreme Court.

BRIEF OF PLAINTIFF-RESPONDENT.

Statement.

The facts in the statement set forth in the defendant-appellant's brief do not contain the true facts as shown by written testimony in the State of Case, and which facts we say are the following:

On or about February 14, 1927, plaintiff-respondent Leo Marmorstein purchased a ticket for a matinee performance in the State Theatre in Jersey City, and took his seat. During the feature act of the vaudeville performance Marmorstein left his seat to go to the men's room in the rear of the orchestra. He returned in about five minutes and was about to proceed down the aisle to take his seat, when he was stopped by one of the ushers and told that he could not go down and take his seat as it was the manager's orders to wait until the end of the number. The

particular act on at the time had about six or seven numbers in it and plaintiff waited until the end of the number that was being acted at that time and then walked down the aisle. Plaintiff had only proceeded a few feet past the usher when he grabbed him, and said again, "you can't go down." Plaintiff pulled away from him and continued down to his seat, which was the end seat and numbered GG 101 center. Plaintiff-respondent was seated only a few minutes when another usher came down and said to plaintiff, "You think you are a privileged character," and told him that he would see him at the end of the act. At the end of the act a policeman came down with the usher and told the plaintiff-respondent to come with him and when the plaintiff-respondent reached the head of the aisle, Mr. Keale, the manager of the State Theatre was there. Plaintiff-respondent appealed to the manager, Mr. Keale, that he had done no wrong and did not see why he was arrested, and Mr. Keale said to him, "You are going out." Plaintiff-respondent then asked the officer where he was bringing him and the officer said he was going out in the street. Plaintiff-respondent replied that he was not going out in the street as he had paid his way into the show, had done no wrong and that if the officer wished to arrest him he would go with him peacefully. The officer went back to Mr. Keale, the manager, and Mr. Keale said, "All right, bring him inside into the office," where they proceeded, and Mr. Keale then told the officer to use the 'phone and call for the wagon and pointed out to the officer where the 'phone was located. Plaintiff-respondent appealed again to Mr. Keale to be allowed to remain, but Mr. Keale, the manager, turned to the usher and said to him, "You go down and make a charge of assault and battery against this man," and then plaintiff-re-

spondent was taken from the theatre to the patrol wagon, which was outside of the theatre, and brought to the Seventh Precinct in Jersey City, and detained in the police station for an hour or so, while bail of \$100 was arranged for his appearance in the police court the next morning. The case was heard in the police court the next morning and the plaintiff was discharged. The plaintiff-respondent Mr. Leo Marmorstein also testified that he was in business in Jersey City as treasurer of an industrial loan society, and also treasurer of the Albert Quinn Post, and a member of the Benevolent Protective Order of Elks, and at the time that he was brought from the theatre to the police wagon, which was standing outside on the Boulevard, the street was crowded with people.

ARGUMENT.

POINT ONE.

The plaintiff-respondent should not have been nonsuited on the appellant's motion because the plaintiff did show that the arrest was made by the authority of the defendant, for by the testimony of the plaintiff-respondent it showed that Mr. Keale, the manager of the State Theatre, was the one who ordered the arrest, by reason of a breach of the State Theatre's rules, which rules, by the way, were not displayed in any part of the theatre, and were only known to the plaintiff-respondent by reason of the usher telling him so; and further, that the manager, Mr. Keale, was acting within the scope of his authority, and this matter was properly submitted to the jury as a question of fact.

This is further borne out by the testimony of John G. Keale, manager of the State Theatre, on direct examination by the attorney of the appel-

lant, Mr. Wolfe, on page 93 in the State of Case, line 14, in which Mr. Keale testified that he was the only one who had authority to make any charges.

In the case of *Brokaw v. The New Jersey Railroad and Transportation Co. and Campbell*, 3 Vroom 328, 32 N. J. L. 328, it was held:

“The question whether a corporation is liable for the tortious acts of its agents or servants, is to be determined by the same principles, as determine the question of the liability of a master for the torts of his servant.”

On page 331, *ibid.*, Justice DEPUE, held, if the act of the agent was authorized by the rules and regulations of the company *or was necessary to accomplish the purposes of his employment* the company is answerable even for the unnecessary violence of the agent.

The appellant contends that the plaintiff-respondent should have been nonsuited because no *express* authorization was shown by the plaintiff to the agents of the theatre to cause the arrest and prosecution of the plaintiff-respondent, and the appellant cites the following cases:

President, etc., of Baltimore and Y. Turnpike Road v. Green, 86 Md. 161; 37 Atl. 642;

Central R. R. Co. v. Brewer, 78 Md. 394; 28 Atl. 615;

Carter v. Machine Co., 51 Md. 298;

Beiswanger v. American Bonding & Trust Co., 98 Md. 287; 57 Atl. 202, in support of this doctrine.

The above cases cited by the appellant have been passed upon by the Court of Appeals of Maryland in *McCrorry Stores Corp. v. Satchell*, 129 Atl. 348, in which case it was held that the master is liable for servants' acts done within the scope of

employment and limits of implied authority, however erroneous, mistaken or malicious, but not for acts beyond such limits unless expressly authorized and subsequently ratified. The Court of Appeals of Maryland in this case refutes and distinguishes the mistaken idea that the cases cited above for the proposition that there must be an express authority and says, that this is erroneous. This same proposition was distinguished in an earlier case in Maryland, *Baltimore C. & A. Ry. Co. v. Ennalis*, 69 Atl. 638, when the same doctrine was repudiated. The Court in this case held that it was not necessary to prove an express authorization *if the act done is within the scope of the agents' employment.*

I therefore submit that the manager was acting within the scope of his authority and rendered the corporation liable when he directed the usher to make a charge of assault and battery against this plaintiff-respondent. This is borne out by the testimony of Mr. Keale, the manager, in the State of Case on page 93, line 14, where he testified that he is the only one who had authority to make any charge on behalf of the State Theatre, the defendant-appellant.

From the cases cited by the plaintiff-respondent in Maryland and also the cases in the State of New Jersey, it is not necessary to prove any express authorization on behalf of the defendant company, as we submit that this act which the manager, Mr. Keale, did was within the scope of his authority and during the course of his employment.

See also 12 *Cyc.*, pages 1216-1217, and cases there cited.

The appellant further cites the case of *Concoff v. Hippodrome Theatre Co.*, 180 Cal. 626; 182 Pac. 273, for the proposition that the usher in a theatre had no implied authority to arrest or cause the

arrest of a patron whose conduct is disorderly. In that case, however, the facts are entirely different from the case at bar. In the case cited the Court held that the usher had no implied authority, but further stated that the duties of an usher were to attend to the seating of the patrons after they had entered the room, and that it may be true that one of the implied duties of an usher is to prevent disorderly conduct in the theatre and perhaps to eject persons guilty thereof, but there is no *evidence* on the subject respecting his duties in that particular or that he had any such authority.

In the case at bar there is evidence that the manager had the authority by his own testimony to prefer charges, and from the evidence of the plaintiff-respondent it shows that the manager was present, and that he was the one who instructed the usher to make the charge of assault and battery, and that he further informed the plaintiff-respondent that he was going out of the theatre, and further that he showed the officer where to telephone for the police wagon.

It is further submitted that in the case at bar, I do not contend that the usher had the authority to cause the arrest, but I do contend that the manager had the authority and that he did cause the arrest and prosecution, as he was present at the hearing in the Police Court, when the plaintiff-respondent was tried and discharged.

In affirming this judgment when the case was before the Supreme Court, it relied on the case of *Wendelhen v. N. Y. Susquehana and Western*, 88 N. J. L. 270, 86 Atl. 377, and counsel for the appellant in his brief attempts to distinguish that case from the case at bar, and I respectfully submit that the opinion cited and followed by the Supreme Court settled the question raised under this point in the case at bar. In the cited case at page 271,

Justice PARKER points out that the general superintendent issued the orders and his acts were binding on the company. In the case at bar according to the plaintiff's testimony the manager Mr. Keale, whose authority was conceded by his own testimony, was the one who instructed the usher to make the charge, which facts I submit were sufficient to justify the verdict against the defendant-appellant.

Counsel for the appellant argues other facts under this point which I respectfully submit were all controverted and which were properly submitted to the jury.

POINT TWO.

Plaintiff should not have been non-suited and the direction of a verdict should not have been granted because the plaintiff requested his arrest. As the learned Trial Judge said in disposing of this motion for a nonsuit (see p. 67, State of the Case):

"The Court: It is not a question of considering the testimony of the witnesses on a motion for nonsuit. The statement that the plaintiff himself has made would justify the holding of the State Theatre. I will deny your motion and allow you an exception."

The law is definitely settled in this State by the case of *Kaufman v. Bush*, Court of Errors and Appeals, 69 N. J. Law, page 645 (syllabus).

1. Discrepancies between the testimony of the witnesses called by a plaintiff cannot avail the defendant upon a motion to nonsuit.

Also in the opinion of the Court delivered by Judge GARRISON, on page 646, *ibid*:

"The trial judge could not ignore the testimony of one of the plaintiff's witnesses in

favor of that given by another, or pass upon their conflicting claims as to credibility. The motion has the effect of a demurrer to so much of the testimony as is favorable to the plaintiff, admitting its verity in point of fact for the purpose of denying its sufficiency in point of law. The motion to direct a verdict in the present instance presented the plaintiff's case in precisely the same aspect."

POINT THREE.

The Trial Court properly held that it was a question for the jury to determine whether the manager of the defendant corporation acted within the scope of his authority and had the power to authorize on behalf of the defendant corporation the arrest of the plaintiff-respondent. Mr. Keale, the manager, testified on page 93, State of Case, line 5, as follows:

"Q. Did you have anything to do with the charge that was made against Marmorstein?
A. Why, no. I had absolutely nothing whatsoever, to do with that. It seemed that the boys had made up their minds as to what they were going to do. Nobody had any authority to make such charges on behalf of the State Theatre.

"Q. *You are the only one that had?* A. *Absolutely.*"

This showed conclusively that manager Keale had the authority to cause the arrest of the plaintiff-respondent in this case. Of course, he denied that he did so cause the arrest, but the plaintiff-respondent's testimony contradicted this and a disputed question of fact was presented for the jury to determine. See page 24, State of the Case, line 25:

"Q. What did Mr. Keale say to him? A. He said to him, 'You will go down and make a charge of assault and battery against this man, see?'"

“Q. Mr. Keale said that? A. Yes, he told the usher to make a charge of assault and battery, while the patrol wagon was coming. I got in the patrol wagon, and this young fellow got in also, and we were taken over to the Seventh Precinct.”

Again, on cross examination of John Keale, the manager of the State Theatre, the testimony showed that Mr. Keale, was in the Police Court the next day, he testified that he only went there for recreation to hear some cases, and that he was not very much interested in the outcome of the case in the Police Court, but his testimony in this respect was very unsatisfactory and was for the jury to say, whether or not he was telling the truth. See pages 97 and 98, State of Case, for testimony on this point.

Again, I submit that under this testimony the Court properly submitted this question to the jury to determine, as this question was disputed, and I do not think it necessary to cite any cases in support of the doctrine that disputed questions of fact are not to be decided by the Court, but are to be left to the jury to determine under the proper instructions.

POINT FOUR.

The Trial Court properly held that it was a question of fact for the jury to determine whether the arrest of the plaintiff-respondent was caused by the defendant's employees acting within the scope of their employment and with authority from the defendant corporation. I do not think it necessary to argue this point as I think it is covered under Points One and Three of plaintiff-respondent's brief and I respectfully refer the Court to our argument under these points.

POINT FIVE.

The Trial Court properly left it to the jury to determine whether there was probable cause for the arrest of the plaintiff. At the close of the entire case the learned Trial Judge refused to direct a verdict for the defendant corporation upon the ground that the plaintiff-respondent failed to prove want of probable cause and any degree of malice. Whether or not there was probable cause for the arrest of the plaintiff was in dispute because the plaintiff's testimony shows that he was arrested on a charge of assault and battery which was false, he having committed no assault and battery. On the other hand the usher testified that he had been assaulted by the plaintiff-respondent and for this reason the arrest was caused. The plaintiff's testimony shows that the main idea was to eject the plaintiff-respondent from the theatre. If that is so, then he was arrested on a false charge which was maliciously made, and it clearly shows want of probable cause, but as this is disputed it was properly held to be a question of fact to be determined by the jury.

In the case of *Weisner v. Hansen*, 81 N. J. L. 601; 52 Vroom 601 (syllabus), the Court of Errors and Appeals, held, in an action for malicious prosecution, uncontroverted evidence that the charge upon which the plaintiff-respondent was prosecuted was false, so far as the plaintiff's responsibility for the malice alleged against him was concerned is sufficient to justify an inference against the defendant of malice and want of probable cause.

2. "When the question of the existence or non-existence of probable cause for instituting a criminal prosecution depends partly upon undisputed facts, and partly upon facts which are in dispute, and which must be determined

from the evidence in the cause such question is not one of law to be resolved by the court but one of fact to be settled by the jury under the proper instructions."

Appellant has cited the case of *McGowen v. Rickey*, 64 N. J. L., page 402, for the proposition that the question of the existence of a reasonable and probable cause for the prosecution of the person of malice should have been decided by the Court and not have been left to the jury, but in that case, the facts, showing probable cause were undisputed and the Court should have properly directed a verdict, but in the present case the facts are disputed and under the authority of *Weisner v. Hansen, supra*, were properly submitted to the jury.

POINT SIX.

There was no error by the Trial Court in allowing the plaintiff-respondent to testify as to his memberships in certain fraternal organizations. It is respectfully submitted that this went to the element of damage which the plaintiff may have sustained in being taken from the public theatre out in the public highway, which happened in this case to be the Hudson County Boulevard, a thoroughfare used by several thousand people during the course of the day, and may have been seen by hundreds of people being escorted to the police wagon, and could have easily affected his standing as a member of the organizations to which he belonged.

It is further submitted that the jury was not swayed by this question as the damages which were awarded were not in any way excessive, amounting to only the sum of \$150.00

It is further submitted that allowing this ques-

tion to be answered was not a prejudicial error requiring reversal and the Practice Act of 1912, Section 27, provides, no judgment shall be reversed on the ground of admission or exclusion of evidence unless after examination of the whole case it shall appear that the error injuriously affected the substantial rights of the parties.

POINT SEVEN.

The Trial Court did not erroneously charge the jury as the appellant claims. The appellants state that there is nothing in the case or in the demand showing any assault and that the Trial Court erroneously charged the jury when he used the term assault in the charge. The State of Demand on page 10 of the State of the Case reads as follows:

“At the time and place aforesaid, the said agents and servants of the defendant, to wit: the manager and usher, while actually engaged in the performance of their duties and acting within the scope of their authority, then and there and during the time the plaintiff was lawfully seated in the audience, having purchased a ticket for a reserved seat therein, *with force and arms assaulted the plaintiff and with great force and violence pulled and dragged him about, etc.*”

The above clearly shows an allegation in the pleadings for assault and battery. Also in the State of the Case, on page 101, line 40:

“Q. Did you assault this Tuohy boy? A. No, sir, if there was any assault committed it was an assault upon me by these two brothers grabbing me as I walked down the aisle.”

Also, on page 22, the plaintiff-respondent testified that he was assaulted. See lines 20 to 30, State of the Case.

If the entire charge is read, it will be clear to the Court that the charge was correct. See State of the Case, page 107, line 10:

“The complaint is that the State Theatre, a corporation, acting through its agent, committed assault upon this plaintiff on the 14th day of February, that they imprisoned or took into custody this plaintiff and that they thereafter—all, of course, acting through their agents—prosecuted a claim against him falsely, as it is said, which resulted in the dismissal of the criminal complaint, which they say, and of course, are bound to show, was made without probable cause.”

In the case of *Schoeffler v. Phillipsburg Horse Car R. R. Co.*, 90 N. J. L. 235. The rule is stated (syllabus).

An excerpt from instructions to a jury upon which error is assigned must be read in connection with the context and if, when taken together, no error appears the excerpt standing alone will not support the assignment.

In the case of *Brown v. Spence*, 79 N. J. L. 453 (syllabus):

“In construing the effect of certain language contained in a charge of the Trial Court upon the minds of the jury, this court will consider the charge *in toto* and not the isolated phrase or sentence complained of and give effect to the charge as an entirety.”

It is submitted that an entire reading of the charge and the evidence that this excerpt complained of was not error.

CONCLUSION.

The outstanding feature of this case discloses the fact that the State Theatre, the defendant-appellant, has been trying to hide behind the fact that the usher made the complaint, and if this was the only fact in the case the State Theatre would not be liable, but from reading the evidence in the State of the Case, it conclusively shows the following:

That the charge made by the usher was made by reason of the instructions and orders given him by the manager of the State Theatre, Mr. Keale.

That the manager from the evidence in the case had authority to order the arrest as shown by his own testimony which was uncontradicted.

There is no denial of the evidence that Mr. Keale, the manager, was present at the time the plaintiff-respondent was arrested by the police officer, nor is there any denial that he was present at the trial in the Police Court.

It is therefore respectfully submitted that the judgment against the State Theatre Corporation should be affirmed.

CHARLES C. COLGAN,
Attorney for Plaintiff-Respondent.

